

Channel Four Television Corporation Submission for the Ofcom consultation on online copyright infringement

Channel 4 welcomes the opportunity to respond to Ofcom's consultation "Online infringement of copyright and the Digital Economy Act 2010: Draft initial obligations code".

Channel 4 is a publicly-owned, commercially-funded public service broadcaster. Its core public service channel, Channel 4, is a free-to-air service funded predominantly by advertising. In recent years, Channel 4 has broadened its portfolio to offer a range of digital services, including the free-to-air, commercially-funded digital television channels Channel 4+1, E4, E4+1, Film4, More4 and 4Music, as well as HD services on a number of platforms. Channel 4 also offers a video on demand service—4oD—and recently became the first broadcaster anywhere in the world to make a catch-up service available on YouTube.

Channel 4 invests over £370 million per year in UK content creation, sharing the intellectual property rights to this content with our independent production partners. As a major investor in the creative economy, Channel 4 relies on a sound intellectual property regime to underpin its activities. Unlawful use of copyright material undermines investment in content, so Channel 4 welcomes the initial obligations set out in the Digital Economy Act to help address online copyright infringement. Channel 4, alongside others in the content industries, is also seeking to address this issue through the provision of compelling legal offers and by helping to educate consumers about the important role played by intellectual property in underpinning content creation.

This submission sets out Channel 4's views on the questions set out in the consultation document.

Application of the Code to Copyright Owners

Question 3.1: Do you agree that Copyright Owners should only be able to take advantage of the online copyright infringement procedures set out in the DEA and the Code where they have met their obligations under the Secretary of State's Order under section 124 of the 2003 Act? Please provide supporting arguments.

Channel 4 notes that Section 124 states that Copyright Owners cannot take advantage of the Act unless they have given notice of the number of copyright infringement reports (CIRs) they intend to make in the next year. Channel 4 further notes Ofcom's proposal that this notification must take place two months in advance of the relevant notification period. In addition, copyright owners must also have met their costs obligations to be able to take advantage of the Act.

Channel 4 agrees that Copyright Owners should only be able to take advantage of the online copyright infringement procedures set out in the DEA where they have met their obligations under Section 124. Channel 4 understands that it would be helpful for ISPs to have a firmer indication of the level of CIRs Copyright Owners are prepared to generate. However, Channel 4 believes it is very difficult to come to a meaningful estimate on the potential volume of CIRs in future for a range of reasons. For example, broadcasters constantly rearrange their programming and do not know with certainty their future schedules, and they generally do not know in advance the popularity of programmes, especially newer content. In addition, it will be difficult to estimate the number of CIRs in future without first knowing the costs associated with

issuing a CIR. That said, Channel 4 is working to establish parameters to try and assess the level of illegal activity affecting content broadcast by Channel 4.

Question 3.2: Is two months an appropriate lead time for the purposes of planning ISP and Copyright Owner activity in a given notification period? If a notification period is significantly more or less than a year, how should the lead time be varied? Please provide supporting evidence of the benefits of an alternative lead time.

As noted above, Channel 4 believes that it will be difficult for Copyright Owners to estimate future CIR levels in any case. However, Channel 4 believes that the reliability of any estimates is likely to decrease the greater the time period between the making of the estimate and the start of the notification period.

Application of the Code to ISPs

Question 3.3: Do you agree with Ofcom's approach to the application of the Code to ISPs? If not, what alternative approach would you propose? Can you provide evidence in support of any alternative you propose?

Channel 4 notes Ofcom's proposal that the code should initially apply only to fixed ISPs with more than 400,000 subscribers. This captures the seven largest ISPs with 96.5% of the broadband market. Channel 4 further notes that the proposal does not include mobile ISPs, and that Ofcom will keep the application criteria under review.

Channel 4 agrees with Ofcom's proposed approach as this will capture the vast majority of the broadband market. However, given the risk of subscribers migrating to ISPs that initially fall out of scope, Channel 4 agrees that the level of the subscriber threshold, and the role of mobile ISPs, should be kept under review. It would help this process if ISPs below the threshold maintained sufficient records of subscriber behaviour that would allow for easy access by Ofcom as part of a review of any threshold, and that Ofcom had the flexibility to rapidly bring any further ISPs into scope if deemed necessary.

Question 3.4: Do you agree with the proposed qualification criteria (400,000+ subs) for the first notification period under the Code, and the consequences for coverage of the ISP market? If not, what alternative approaches would you propose? Can you provide evidence in support of any alternative you propose?

As for Question 3.3.

Definitions of ISPs, subscribers and communications providers

Question 3.5: Do you agree with Ofcom's approach to the application of the 2003 Act to ISPs outside the initial definition of Qualifying ISP? If you favour an alternative approach, can you provide detail and supporting evidence?

Channel 4 notes the discussion about the application of the Act and the potential definition of Qualifying ISP, including whether operators of Wi-Fi networks would fall within the definition. Channel 4 has no comment to make in response to this question, other than to agree it would be useful to keep the definition of Qualifying ISPs to be kept under review in order to be able to respond to any changes in consumer behaviour.

Question 3.6: Do you agree with Ofcom's approach to the application of the Act to subscribers and communications providers? If you favour alternative approaches, can you provide detail and supporting evidence for those approaches?

As for Question 3.5.

Copyright infringement reports

Question 4.1: Do you agree with the proposed content of CIRs? If not, what do you think should be included or excluded, providing supporting evidence in each case?

Channel 4 notes Ofcom proposes that CIRs must include the following information:

- the name and registered address of the Qualifying Copyright Owner;
- where relevant, name and registered address of the person on whose behalf the Qualifying Copyright Owner is authorised to act and evidence of authorisation;
- identification of the work in which copyright in the UK is said by the Qualifying Copyright Owner claims to subsist (the "Relevant Work"), including the title of the Relevant Work and a description of the nature of the Relevant Work;
- a statement that there appears to have been an infringement of the owner's copyright in the Relevant Work;
- a description of the apparent infringement, including the filename, a description of the contents of the file, and (where appropriate) hash code of the infringing content;
- a statement that, to the best of the Qualifying Copyright Owner's knowledge, no consent has been given by the owner of the UK copyright in the Relevant Work for the acts described in the preceding paragraph to have occurred;
- the date and time using Universal Coordinated Time (UCT) on which the evidence was gathered, including both the start and end time of the relevant session;
- the IP address associated with the apparent infringement;
- port number used to conduct apparent infringement;
- the website, or protocol, via which apparent infringement occurred;
- a Unique infringement identifier (UII) allocated to CIR by the Qualifying Copyright Owner; and
- the date and time of issue of CIR.

Channel 4 agrees with the proposed content of CIRs.

Question 4.2: Do you agree with our proposal to use a quality assurance approach to address the accuracy and robustness of evidence gathering? If you believe that an alternative approach would be more appropriate please explain, providing evidence.

Channel 4 notes Ofcom's proposal that Copyright Owners submit a Quality Assurance Report, describing the processes they have used to ensure CIRs are accurate. Channel 4 agrees that a quality assurance approach will help to ensure that allegations of infringement are evidentially robust and accurate, and that the notification process is credible.

Question 4.3: Do you agree that it is appropriate for Copyright Owners to be required to send CIRs within 10 working days of evidence being gathered? If not, what time period do you believe to be appropriate and why?

Channel 4 agrees that it is important that CIRs are issued in a timely fashion, and that there are potentially benefits, in terms of eg. costs, if there was a standard format of CIRs that the industry could follow.

Identifying subscribers and making notifications

Question 5.1: Do you agree with our proposals for the treatment of invalid CIRs? If you favour an alternative approach, please provide supporting arguments.

Channel 4 notes that Ofcom envisages a number of situations where an ISP will not be able to identify a subscriber, and identifies other reasons why an ISP will not process a CIR (eg. it is incomplete, or the Copyright Owner has not paid).

Channel 4 agrees with Ofcom's proposal that ISPs notify the relevant Copyright Owner in these cases within ten working days.

Question 5.2: Do you agree with our proposal to use a quality assurance approach to address the accuracy and robustness of subscriber identification? If not, please give reasons. If you believe that an alternative approach would be more appropriate please explain, providing supporting evidence.

Channel 4 notes Ofcom's proposal that ISPs should provide Ofcom with a quality assurance report about its process for matching IP addresses to subscribers.

Channel 4 agrees it is important to ensure there is accuracy in matching IP addresses to subscribers, and that a quality assurance approach for ISPs would help achieve this objective.

Question 5.3: Do you agree with our proposals for the notification process? If not, please give reasons. If you favour an alternative approach, please provide supporting arguments.

Channel 4 notes Ofcom's proposal for a time-based notification process—ie. the process by which ISPs turn CIRs into letters to subscribers. Under Ofcom's proposals, the first letter is triggered by the first CIR; the second letter is triggered by the first CIR received on or after one month from the first letter; and the third and final letter is triggered by the first CIR received on or after one month from the second letter. At this point the subscriber would also be added to a copyright infringer list.

Channel 4 supports a time-based approach, over systems based on the volume of CIRs, or the value of the content to which the CIRs relate. A time-based approach has the advantage of simplicity and allows subscribers time to change their behaviour.

Question 5.4: Do you believe we should add any additional requirements into the draft code for the content of the notifications? If so, can you provide evidence as to the benefits of adding those proposed additional requirements? Do you have any comments on the draft illustrative notification (cover letters and information sheet)?

Channel 4 notes that the Act requires a range of information to be included in notification letters, and that Ofcom proposes to impose additional requirements on the content of these letters.

Channel 4 agrees that the tone of the letters should escalate over time. Beyond that, we have no comment on the draft letters included in the consultation.

Copyright infringement lists

Question 6.1: Do you agree with the threshold we are proposing? Do you agree with the frequency with which Copyright Owners may make requests? If not, please provide reasons. If you favour an alternative approach, please provide supporting evidence for that approach.

Channel 4 notes that ISPs have to keep a record of the CIRs linked to each subscriber and a record of which Copyright Owner sent the report. A Copyright Owner can request an anonymised form of relevant parts of these records: a copyright infringement list. Channel 4 notes Ofcom's proposal that a subscriber can be included on a copyright infringement list once he has been sent a third notification letter in 12 months. In addition, Ofcom proposes that Copyright Owners may not make more than one request for a copyright infringement list to each ISP within any period of three months.

Channel 4 agrees with the threshold for being included on a copyright infringement list. However, Channel 4 would also be grateful for clarity as to the number of requests a Copyright Owner can make of an ISP—as drafted it appears as if Copyright Owners can only request one infringement list from each ISP within any period of three months, which seems limiting, especially in the absence of reliable estimates of how many CIRs will be issued. It may be more flexible to not cap the number of requests.

Subscriber appeals

Question 7.1: Do you agree with Ofcom's approach to subscriber appeals in the Code? If not, please provide reasons. If you would like to propose an alternative approach, please provide supporting evidence on the benefits of that approach.

Channel 4 agrees it is important that subscribers have the right to appeal, and notes the appeals process set out in the draft Code. Channel 4 notes that grounds of appeal include that: the act is not an infringement of copyright; the act was not done by the subscriber; the ISP or Copyright Owner breached the code; or any other ground on which a subscriber chooses to rely. In relation to the final ground mentioned, while Channel 4 supports the right of subscribers to appeal, an unlimited ground of appeal is unlikely to be proportionate, especially given the quality assurance process, and may open the system to abuse.

Channel 4 notes that remedies can potentially include the payment of compensation and costs, and believes that there should be a cap on the amount of compensation that is payable—the

quality assurance process should limit the amount of inaccurate notifications, and therefore any compensation payable to subscribers should be limited to an appropriate amount.

Administration, enforcement, disputes and information gathering

Question 8.1: Do you agree with Ofcom's approach to administration, enforcement, dispute resolution and information gathering in the Code? If not, please provide reasons. If you favour an alternative approach, please provide supporting evidence on the benefits of that approach.

Channel 4 agrees with Ofcom's approach to administration, enforcement and dispute resolution. Channel 4 notes the draft dispute resolution process set out in the Code, and believes that guidelines could be useful in helping stakeholders understand the process, subject to costs.

2 August 2010