



## Online infringement of copyright and the Digital Economy Act 2010 - draft initial obligations code

## Response from Citizens Advice to Ofcom

July 2010

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## Introduction

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The Citizens Advice service provides free, independent, confidential and impartial advice to everyone, about their rights and responsibilities. It values diversity, promotes equality and challenges discrimination. The service aims:

- to provide the advice people need for the problems they face; and
- to improve the policies and practices that affect people's lives.

The Citizens Advice service is the largest independent network of free advice centres in Europe, providing advice from over 3,000 outlets, including GPs' surgeries, hospitals, community centres, county courts and magistrates' courts, throughout Wales, England and Northern Ireland. Citizens Advice Bureaux in England and Wales assisted two million clients with over seven million problems in 2009/10, including 4,352 on internet and broadband issues, 139,107 on consumer goods and services and 298,226 on legal issue.

Together with the Communications Consumer Panel, Consumer Focus, the Open Rights group and Which?, Citizens Advice is party to principles for consumer protection in a code of practice under the Digital Economy Act 2010.

In May we responded to the BIS consultation on cost sharing. We emphasised the need for access to the tribunal system to be free for consumers to challenge allegations of wrongdoing from those claiming copyright infringement. We detailed the arguments against charging even a small fee and the shortcomings of means tested fee remission systems. We are pleased to have the opportunity to comment on the draft OFCOM code for initial obligations and requirements for online copyright infringement claims and hope it will deliver a fairer balance between the rights of consumers and copyright holders.

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## General comments

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Citizens Advice welcomes OFCOM's desire to make the interests of citizens and consumers central to its approach to those areas of the code where the Digital Economy Act allows some discretion.

The aim of the code is to help stop copyright infringement. We hope, therefore, that copyright holders will abide by the code as the best way to follow up their claims, but are concerned that it will not be compulsory, and so copyright owners remain able to continue to use their current methods for pursuing a claim. This involves a compensation demand for over £200 sent with papers that include a High Court Order for release of subscriber identity. If copyright owners do not abide by the code, we suggest that OFCOM should use its powers under the Consumer Protection from Unfair Trading Regulations (CPRs), as failure to use the code procedures could constitute a failure to demonstrate the professional diligences required under the general prohibition of unfair commercial practices.

Citizens Advice Bureaux continue to report cases where clients have received demands for payment from solicitors acting for copyright owners. The consultation refers to subscribers as the person, or organisation, contracting for provision of an Internet connection. CAB clients in this response are private consumers who are also subscribers. These clients are seeking advice because they believe they are innocent of the alleged infringement and have been wrongly identified or because they

cannot be certain as to whether another person has used their Internet connection and downloaded the game, film or music in question, without realising the implications for the subscriber. CAB clients are shocked and worried at having received a demand for payment and want to know how to refute the claim. They are currently receiving information on the copyrighted product and when the claimed illegal download happened and are threatened with court action unless they pay the claimed sum and to sign an undertaking for the future., No information is provided about and opportunities to defend themselves.

In general we believe the code is well drafted and that the objective for a consumer focus has been met. We do, however, have some suggestions for improvement. The OFCOM requirements for robust processes for qualifying copyright owners claiming cases of illegal downloading and for Internet service providers (ISPs) checking their clients' Internet protocol references are very welcome. The appeals process should provide the means for challenging accusations of illegal downloading, **provided it is free to consumers**. But it is not yet clear from the code, and from the draft letters and notices that will inform subscribers about alleged copyright contraventions, what evidence consumers can submit to prove their appeal. Paragraph 7.12 of the draft code lists what ground can be included but how will consumer subscribers who lack technical computer skills prove they did not commit the claimed infringement? We believe the code can be improved through the inclusion of further information about what evidence the appeals tribunal will accept in order to uphold the appeal.

In addition to the code, we believe that if copyright owners want to succeed in protecting their rights, they must ensure that clear warnings are communicated to internet users about when payment is required. In addition, they need to concentrate resources on tackling the sites that act as a conduit to illegal downloading and file sharing. CAB clients and their family and friends, who might access their Internet service, are confused about what constitutes an illegal download and which products can legitimately be downloaded freely, as can many radio and TV programmes, including TV broadcast films and music.

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## Response to specific issues raised in the consultation

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Our responses are limited to those questions specifically affecting our clients as consumer subscribers. However, where we have not given a specific response, we can say that the proposals overall seem to us to be sensible and proportionate.

***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?***

Yes.

***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 supporting evidence.***  
***and***

***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.***

Yes. The proposals appear to demand accuracy and robustness and to allow OFCOM to carry out its regulatory functions. Many of the copyright infringement claims cases that bureaux report are fiercely denied by our clients, for example:

A Derbyshire CAB client was one of many reported by this bureau who thought a demand received for £295 for a claimed music download was a scam. The client explained that he never downloaded music and did not even listen to the type of music detailed in the letter. He was the only person able to access his computer. He was worried about the threat of court action and the stress this was causing his partner who had recently suffered a stroke.

A CAB client in Buckinghamshire received a letter claiming £495 for downloading material protected by copyright. He was certain this had not happened in his home. At the time the download had allegedly occurred, he was getting married.

A Suffolk CAB client sought advice about the alleged copyright theft of a piece of music. He had no idea what they were talking about, but was worried about the allegation and the threat of court action.

We suggest that to help to identify where evidence gathering is failing, OFCOM could check CAB evidence regularly, together with cases that have been successful appeals under the code... Access to appeals information could fall within the provision proposed at paragraph 7.2 of the consultation; ie that OFCOM is able require information from the appeals body to assist OFCOM functions.

***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?***

We agree that CIRs need to be sent promptly, otherwise the subscriber and their household may find it difficult to recall whether the claimed infringement could have taken place.

***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.***

Yes, by requiring that at least a month elapses between each letter, the Code gives adequate time for the subscriber to act to stop the problem or appeal the claim. Notifying subscribers of accumulated Copyright Infringement Reports (CIRs) on a three monthly basis again allows for relevant appeals and ensures the subscriber is alerted to any continuing problem.

***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) in Annex 6?***

CAB clients have sometimes found the letters they are receiving currently on claimed copyright breached both complex and confusing. They contain a lot of information and are formally written. In particular, the copies of the High Court order has made some clients believe that the infringement they are accused of has already been to court. This then implies that the compensation demand is a fine or other award of the court.

A CAB in Greater Manchester called for clear guidance for clients in how to deal with copyright infringement claims and a fair appeals process. Their client denied the copyright owner's claim and explained he would have no idea how to download music or anything else. He was very distressed by the papers he had received, which included a copy of a High Court order that he thought related to the sum being claimed. His Internet Service Provider had provided his name and address as being exclusively connected to the IP address used for the claimed download. and he needed help to claim his innocence.

A CAB client in Buckinghamshire was worried about the consequences of not paying a £295 demand for copyright breach despite being certain that no breach had occurred in her household. At the time of the claimed download the client was at work, her eldest child was away at university and the two younger children were at school. She checked the download history of all the computers and found no evidence to substantiate the claim.

A CAB client from Kent told the bureau that she felt the law offered her no protection from being held to ransom by the 'Letter of Claim' she received. It claimed an illegal download had happened on a day when she had not been at home. She also thought that the disclosure of her identity had been an invasion of her privacy.

The paperwork CAB clients are receiving raises several concerns and we would like to see a requirement in the code for clarity about the purpose of the various papers and how they will be stored and used, rather than an enclosures list as is common currently. Some letters from copyright owners' solicitors have undertakings about future contraventions with no information about how this will be stored and used, for example:

A bureau in Devon reported a client who was distraught with worry about the threat of court action which could stop her continuing to be a foster carer. She had received a £295 claim for an alleged copyright infringement she knew nothing about. The raft of papers she had received included an undertaking as an alternative to further action. She was asked to sign an admission of guilt and a promise not to allow other people to download, upload or share the product. There was no assurance about whether such undertakings could be made publicly available or used against her if her internet connection was used without her permission. The client was concerned about whether her internet connection had been used by a someone making use of the connection from outside her home and wrote to her Internet Service Provider for advice about how to prevent this.

.. Other papers are not accessible. For example, we have seen 'frequently asked questions' sheets in a minute font size that would be a challenge for many people to read who might find the information useful. We are happy to provide OFCOM with examples of letters received by CAB clients about alleged copyright contravention.

We appreciate the need for the content OFCOM lists but suggest that a short front sheet could be designed to alert the subscriber to the most important details or key facts and to reference further details and accompanying papers. Further we suggest that the following matters should attract a prominence rule:

- the evidence, to show the common title for the product that is the subject of the claim, the IP address, time and date etc from the CIP;
- the availability of an appeals process and reference to details on how to use that process, its scope and what evidence is required; and

- the level of notification reached and what that means.

This may not be necessary if the letters and information sheet at annex 6 are adopted but at present they only represent guidance.

The style, language, content and use of bold type in the draft illustrative letters and information sheet are very good and the non-judgmental tone ensures their content is not aggressive. They will also be valuable to advisers when subscribers consult them. We hope that this will be the form used by Internet Service Providers. The only improvements we suggest are:

- that the information sheet includes a note indicating examples of how a subscriber who is making an appeal might provide acceptable evidence, for example providing a signed statement from someone who can verify that nobody had access to the premises at that time; and
- that CIR and ISP are detailed in full as these initials may not be familiar to subscribers.

The issue of evidence that consumer subscribers will be able to produce will be vital to the success of the appeals process. Many will lack technical computer skills, for example:

CAB in the West Midlands were adamant that their household computer had not been used for an illegal download. They found the whole incident traumatic and wanted advice on how they could disprove the claim without significant expense as they lacked technical computer knowledge. The bureau commented on the concerns being raised in the press about innocent people being accused of copyright theft and how difficult it would be for clients to provide these claims were wrong..

***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.***

The thresholds and frequency of request seem fair. Copyright holders could, using these criteria, take a case against a persistent offender every three months and thus target this group and stop their activities, as envisaged in the Digital Economy Act.

We have one concern about the availability of the copyright infringement list to a person authorised to act on the copyright owner's behalf; ie where that person is authorised by a number of different copyright owners. As pointed out in paragraph 6.5, this would release a list containing all the CIRs. This may mean that it is in the interests of all copyright owners to use the same authorised person. This may make the detailed arrangements to ensure that copyright owners are not made aware of infringements reported by other copyright owners that OFCOM has proposed, invalid. We have no suggestion for an acceptable alternative, but do suggest that OFCOM take steps to monitor use of the infringement lists and checks whether any changes are needed in the future to ensure the safeguards built into the code are respected.

***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.***

Yes. We welcome the proposal that the Appeals Body can be required to provide information to help OFCOM carry out its functions. We believe that this could be a valuable source of information about



consumers' experiences and about where copyright owners and Internet Service Providers' evidence and processes are not working within the spirit of the code. We also support OFCOM's proposals for anonymity for subscribers who use the appeals process, the discretion for the appeals body to extend time limits and the powers of the Appeals Body in respect of hearings and information requests. In addition, we believe that the provision allowing payment of compensation to a subscriber who makes a successful appeal is very important. It recognises the costs in time, anxiety and money that those wrongly accused of copyright infringements suffer and offers an element of restorative justice.

***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.***

Citizens Advice is pleased to note that enforcement is proposed which reflects the provisions of the Regulation Enforcement and Sanctions Act. In particular we value the use of undertakings, fines and restorative justice as defined at paragraph 9.11. The wording of that paragraph indicated that these measures can be used in combination, which should allow OFCOM to use compensation as a tool to tackle infringements. In respect of penalties we note that the statutory maximum can be applied for any breach and imposed for each contravention. This, we believe, will act as a substantial deterrent.

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## Additional issues

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Citizens Advice has two further concerns at this stage of the consultations about the Initial Obligations Code.

Firstly, there is a need for action by copyright owners to warn subscribers about the potential for infringing copyright and to tackle sites that facilitate copyright infringement. This would, we believe, complement the code and stop many offences at source.

We welcome OFCOM's intention to monitor the consumer education, promotion of lawful alternative services and targeted legal action against serious copyright infringers as envisaged under the Digital Economy Act (DEA). Many CAB clients cite the lack of any warnings about copyright when they seek advice about copyright infringement claims.

A woman sought advice from a CAB in South-West Wales when she received a letter claiming £500 in compensation for the illegal downloading of music. The client had not done this herself but was worried in case her children had. The bureau cited the lack of information and controls on the Internet to alert people who might unintentionally breach copyright rules.

A Hungarian woman sought advice from a CAB client in Worcestershire after she had received a claim for £505 from solicitors acting for a music copyright holder. She was unaware that downloading was illegal and was shocked to receive documents that included three pages about a High Court order. There was no notification on the Internet site, no warning prior to the claim and the law on this is different in Hungary.

The son of an Essex CAB client downloaded a game that was offered free on a web site. The client received a solicitor's letter demanding £500. She did not have this money and was angry that the person whose web site offered the free download had not been held responsible.

Secondly, Citizens Advice is concerned that Internet Service Providers may find that their role in copyright infringements is sufficiently onerous as to effect whether they continue to offer their services to customers about whom they receive CIPs. This could restrict consumer choice and competition in this market.

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