Coadec
The Coalition For A Digital Economy

Ofcom Consultation

Online Infringement of Copyright and the Digital Economy Act 2010

Responses of The Coalition for A Digital Economy (Coadec)

30 July 2010

Introduction

The Coalition for a Digital Economy (Coadec) welcomes this opportunity to respond to Ofcom's consultation document, "Online Infringement of Copyright and the Digital Economy Act 2010" (the "consultation document").

Coadec is an all-volunteer organisation that works to support legislation and other government policies that foster a lasting, sustainable and innovative digital economy for Britain. We are made up of a wide range of members of the UK innovation community, including entrepreneurs, leaders of tech-driven startups and SMEs, inventors and developers, writers and journalists, and many others who believe that the future of Britain lies in the success of its digital economy. Additional information about us is available on our blog, http://www.coadec.com.

Coadec recognises the legitimate need of content owners to protect their intellectual property rights. However, we feel that the Digital Economy Act 2010 (the "Act") will have substantial and disproportionate negative consequences for businesses and entrepreneurs that work in or with digital media to create the innovations that will drive Britain's economy in the years to come. While some of these consequences are inherent to the legislation—and we are pushing for a legislative solution to them—we believe that others can be mitigated through careful and sensible implementation of the Act.

We are broadly encouraged by the consultation document and draft Initial Obligations Code (the "Code"), and given the legislative restrictions with which it had to work we appreciate the clear efforts Ofcom has made to find approaches that balance the needs of content owners with the imperative of promoting a digital economy. In many cases, we think Ofcom has gotten that balance right, and in our responses we note where we believe the Code should be implemented as proposed or with relatively minor amendments or additions. However, we have identified several significant problems with the proposed Code, and we point those out in our responses as well. We have chosen not to respond to questions where we believe the outcome is unlikely to affect our constituencies one way or the other. We do not request confidential treatment for any of our responses.

We would be happy to provide amplifications or clarifications of our answers at any time or to work with Ofcom in any capacity to help make the Code as effective and balanced a set of measures as possible. We can be contacted by e-mail at committee@coadec.com or by telephone on 07980 490331.

Responses

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?

We broadly agree with this approach and believe that it is consistent with the Act. However, as we set forth in more detail in our response to question 3.5, we are concerned that there is scope for substantial confusion as to who or what constitutes an ISP versus a subscriber, in particular with respect to downstream Internet access providers such as libraries, cafes and community centres. These downstream providers play a key role in the digital economy, and a reduction in their number or scope of services would be a detriment to entrepreneurship and technological innovation. We would therefore urge Ofcom to monitor very closely the extent to which confusion about the definition of an ISP exists as a practical matter and is causing unintended impacts on the way in which downstream providers act.

Question 3.4. Do you agree with the proposed qualification criteria for the first notification period under the Code, and the consequence for coverage of the ISP market, appropriate? If not, what alternative approaches would you propose? Can you provide evidence in support of any alternative you propose?

We strongly agree with these qualification criteria and believe they are vital to maintaining the health and vibrancy of the digital economy. We urge Ofcom to adopt these criteria as proposed, for the following reasons.

- We believe the limitation of the Code to fixed-line providers is absolutely essential to ensure continued and expanded provision of mobile Internet access throughout the country. Increasing numbers of workers in the digital economy rely on 3G access through their phones, laptops and tablet PCs to conduct their innovative activities while travelling around the country or working in other locations that do not have fixed-line service; as mobile speeds become faster, this type of access to will become even more important to businesses. As a result of the way in which mobile providers assign IP addresses (which Ofcom notes in section 3.12 of the consultation document) and related practical considerations, we are concerned that, were the Code to apply to mobile providers, it would be impossible or exceptionally burdensome for them to comply with it, and the result would be a significant decrease in or elimination of mobile Internet access in this country. Therefore, we feel that limiting the qualification criteria to fixed-line providers—and thereby preserving Britain's mobile Internet access—is a very important measure to protect the digital economy.
- With respect to limiting the application of the Code to providers with more than 400,000 subscribers, we believe this too is an essential qualification criterion, for two reasons.
    - First, complying with the Code's obligations is likely to be disproportionately burdensome for small ISPs that lack the infrastructure and manpower of the larger ISPs, so we believe that applying the Code to them would result in many going out of business. This would mean a reduction in competition in the ISP market and a move toward an oligopolistic structure in which only those ISPs that have achieved sufficient size to bear the burdens of the Code can function. This would be a detrimental outcome both for consumers and for innovation in the ISP market.

- Second, given that many small businesses and public institutions that offer wi-fi access will be treated as ISPs, it is essential that they be excluded from the Code in order to ensure that such access continues to be provided. As we note in our response to question 3.3, these downstream providers play a key role in the digital economy: the access they provide is relied on by many entrepreneurs and small businesses on a regular basis, and it also facilitates the movement of economic activity both around Britain and from abroad into Britain by giving workers the means to maintain their Internet access while away from office and home. These providers are also the ones who, generally, are in the least strong position to be able to comply with the burdens of the Code, and if they were not excluded therefrom, we are certain that a large number would cease providing Internet access and that the availability of wi-fi around the country would decrease substantially.

- Meanwhile, we feel that the qualification criteria Ofcom has proposed are more than adequate to address concerns about copyright infringement. As noted in section 3.15 of the consultation document, the seven ISPs that would qualify under these criteria provide all but a fraction of the Internet access in this country, and it is widely accepted that levels of copyright infringement correlate directly with the number of subscribers an ISP has. We are therefore confident that, to the extent that copyright infringement can be reduced at all by the measures set out in the Act, that reduction will occur if the Code is applied solely to these seven ISPs.

We note that, assuming Ofcom does adopt these qualification criteria as proposed, Ofcom states in section 3.17 of the consultation document that it intends to keep them under review and may change them at a later date. We recognise the importance of continued review, but we would urge Ofcom not to make any changes to the qualification criteria without first (1) considering the issues we have set out above with respect to mobile ISPs and small fixed-line ISPs and (2) engaging in a substantive consultation process with stakeholders in order to develop a clear understanding of the impacts such a change could have on the digital economy.

We would also clarify that, throughout the remainder of our responses, we operate under the assumption that the qualification criteria are adopted as proposed. There are a number of provisions in the consultation document that we feel able to support to the extent that the proposed qualification criteria apply but that we would oppose if smaller or mobile ISPs were to become Qualifying ISPs.

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 for that approach?

We broadly agree with this approach, as we feel that it is important to ensure that small ISPs, including small businesses that provide wi-fi access, do not face the burdens of complying with the Code's obligations on Qualifying ISPs (for the reasons discussed in our response to question 3.4) while at the same time not being held directly responsible for the activities of their subscribers over which they have no control. Nevertheless, we would ask Ofcom to consider several issues and measures to ensure that this approach is implemented in the most effective way possible:

- Notwithstanding the clarification Ofcom provides under sections 3.19 to 3.28 of the consultation document, it has become evident to us that there remains a substantial amount of confusion among many affected constituencies as to the proposed treatment of non-qualifying ISPs. We have received a number of representations indicating that many people believe that small providers of wi-fi access will either be required to process CIRs, be treated as subscribers and held

responsible for the actions of their end-users, or both. We recognise that part of this confusion stems from the fact that there is a bit of a grey area at law surrounding what constitutes a pure open wi-fi provider (and therefore a subscriber) versus a wi-fi provider that offers access as a service (and therefore is an ISP), but our perception is that that is not the main area of confusion. Instead, we think there have not yet been enough clear public statements saying that non-qualifying ISPs will neither be required to comply with the obligations of Qualifying ISPs nor be treated as subscribers. We are concerned that the mere fact of this confusion, even where the law is settled, may lead a significant number of downstream providers to cease their activities, and as discussed above we believe any such reduction in wi-fi access would be detrimental to the digital economy. We would therefore urge Ofcom to make as clear a set of statements as possible with respect to (1) who constitutes a non-qualifying ISP and (2) how such non-qualifying ISPs will be treated under the Code, and to communicate those statements in the manner or manners likely to have the widest possible reach. This could perhaps be resolved as an issue with a register of Qualifying ISPs that is made publicly available.

- We are also concerned that, even though non-qualifying ISPs are not intended to be treated as subscribers under the Code, as a practical matter there is likely to be confusion among upstream Qualifying ISPs as to which of their customers are ISPs and which are subscribers. If, as a result of this confusion, a non-qualifying ISP winds up receiving notifications, there needs to be a clear and straightforward process for the non-qualifying ISP to notify the upstream Qualifying ISP that it is not a subscriber, should not receive further notifications and should not be included in any copyright infringement list. While we do not have a specific view on how such a process should be implemented, we would say at the outset that we believe requiring the non-qualifying ISP to do anything more burdensome than send some sort of basic notification to the upstream Qualifying ISP—such as requiring the non-qualifying ISP to participate in the formal appeals process—is likely to have a significant chilling effect on small wi-fi providers like pubs and cafes that do not have the capacity for significant administrative activity. We would therefore strongly urge Ofcom to include in the Code provisions that require Qualifying ISPs not to send notifications to any customer that has informed the Qualifying ISP that it is an ISP itself unless the Qualifying ISP has reason to believe that such notification was inaccurate.
- Finally, we would encourage Ofcom to monitor the commercial behaviour of Qualifying ISPs to ensure that they do not pass on the costs or burdens of compliance with the Code to their customers who are non-qualifying ISPs. To the extent that Qualifying ISPs are not satisfied with the qualification criteria Ofcom has proposed, we are concerned that they may attempt effectively to bypass the criteria by imposing price or other restrictions on wi-fi providers and other customers who are ISPs that fall beneath the qualification threshold. This would run counter to the purpose of the qualification criteria and could result in a similar decrease in small ISPs (including wi-fi providers) as would have been seen if the qualification criteria applied to them in the first place. We do not feel that any pre-emptive action is necessarily required to prevent this, but we hope Ofcom will keep the situation under review and, if it sees this type of behaviour by Qualifying ISPs, use its powers to remedy it.

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?

We broadly agree with this approach, for the same reasons—and subject to the same caveats—as set forth in our response to question 3.5.

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?

We broadly agree with the proposed content of CIRs. However, in order to prevent abuse of the system, we believe that in addition to the items of information proposed, copyright owners (or their agents) who file a CIR should be required to include in it evidence that they actually own the copyright they are claiming has been infringed, for the following reasons:

- As Ofcom is no doubt aware, a number of law firms and other agents, both here and abroad, have been sending letters to alleged (and often innocent) copyright infringers demanding payment under threat of litigation. We are concerned that these types of firms will similarly look to abuse the system set up under the Act, and while the proposed Code contains a number of protections against it, the lack of a requirement to provide evidence of copyright ownership is a loophole that we believe is likely to be exploited.
- We would note that evidence of copyright ownership would generally be required in any court proceeding relating to infringement (except where certain presumptions apply), and given this we see no reason why the standard should be any different for CIRs, or why imposing such a standard would be unduly burdensome for copyright owners seeking to make legitimate use of the system.

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.

We broadly agree with this proposal, but we are concerned that the proposal does not contain "requirements as to the means of obtaining evidence of infringement of copyright for inclusion in a report" as required under section 7(2)(a) of the Act and "the standard of evidence that must be included" as required under section 7(3)(a) of the Act. Given the variety of ways in which information is transmitted over the Internet and the technical complexities that result therefrom, we think it is essential that the Code comply with the Act by providing these specific requirements.

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.

We strongly agree with these proposals, and we think that given the variety of ways in which IP addresses are assigned and the different types of relationships that can exist between ISPs and subscribers, giving ISPs the flexibility to reject CIRs where they cannot precisely identify or locate the relevant subscriber is essential. However, we would urge Ofcom to consider one additional proposal. As discussed in our response to question 4.1, we think it is important to the prevention of abuse that copyright owners and their agents be required to provide evidence that they own the copyright in question. In order to give full effect to that measure, it is important that an ISP be allowed to reject a CIR that either does not include such evidence or where such evidence does not, on its face, appear to be valid or legitimate.

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.

We broadly agree with this proposal, but we are concerned that the proposal does not contain "requirements as to the means by which the provider identifies the subscriber" as required under section 7(3)(a) of the Act. Given the variety of ways in which ISPs provide access to subscribers and the technical complexities that result therefrom, we think it is essential that the Code comply with the Act by providing these specific requirements.

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.

We strongly disagree with these proposals and urge Ofcom to consider adopting a volume-based approach like the one suggested by the Department for Business, Innovation & Skills (BIS). Our reasons are as follows:

- As a practical matter, there is a substantial distinction between "hardcore" file-sharing—such as creating an entire film or music collection out of illegally-downloaded media—and the inadvertent or occasional copyright violations that occur as a result of normal and well-intentioned use of the Internet. The reality of the Internet today is that a lot of content is shared innocently and in conjunction with important creative, professional and personal activities, and at times some of this sharing may infringe a copyright. This may include, for example, a multimedia artist creating a "mashup" of a popular video and posting it on YouTube; a consultant downloading an image that he mistakenly believes is not subject to copyright and using it in a presentation to clients; or a friend sending a copy of a paywalled news article to another friend, in much the way a previous generation might have photocopied an article from the newspaper and put it in the post.
- We realise there is little distinction under current copyright law between these types of activities and hardcore file-sharing. However, we feel the distinction is an important one for practical purposes, as unlike hardcore file-sharing, inadvertent or occasional copyright infringements pose minimal harm to content creation and instead reflect evolving societal norms about open communication of

information. Moreover, while the Act does not explicitly exempt inadvertent or occasionally copyright infringements, we believe the Act's core purpose and spirit—and indeed the basis on which its proponents argued for its passage in Parliament—is to tackle hardcore file-sharing. We therefore believe that it is sensible and proportionate to implement the Act in a way that primarily targets hardcore file-sharers and does not unnecessarily penalise or burden individuals who commit inadvertent or occasional copyright infringements.

- A key component of this sensible and proportionate implementation is ensuring that it is primarily hardcore file-sharers, and not inadvertent or occasional copyright infringers, who receive notifications. While many proponents of the Act have dismissed notifications as merely "a letter", in practice they have meaningful consequences: a person who believes he or she has received a notification erroneously must bear the time and administrative burdens of launching an appeal to clear his or her name; if that person receives enough notifications to be placed on a copyright infringement list, he or she faces a substantially increased likelihood of expensive and time-consuming litigation; and, in the event that technical measures are someday implemented (which, while not part of this consultation, must be recognised as a possible consequence of being placed on a copyright infringement list), that person is likely to find himself or herself subject to these measures, potentially losing Internet access that is vital to his or her business or livelihood.
- We believe the "three-strikes" rule Ofcom has proposed will result in substantial numbers of inadvertent or occasional file-sharers being put on copyright infringement lists while creating a wide loophole that will allow hardcore file-sharers to avoid the lists. With the proposed threshold of three CIRs filed over the course of year, each at least a month apart, copyright infringement lists are certain to include large numbers of people who, as part of their regular and ethical use of the Internet, occasionally share an article or video link. By contrast, hardcore file-sharers will effectively have an open license to engage in unlimited copyright infringement for two months out of each year, knowing that no matter how much sharing activity they engage in, they will not be placed on a copyright infringement list so long as they avoid file-sharing in a third month. This is clearly a perverse outcome, and while we are confident that it is not what Ofcom intended, we are deeply concerned that it will become a reality if the Code is adopted as proposed.
- By contrast, the system envisaged by BIS, in which the first notification is triggered by 10 CIRs, the second by 30 and the third by 50, would be much more effective at catching hardcore file-sharers instead of inadvertent or occasional copyright infringers. In anchoring the notification process to volume, this process—unlike the proposed behaviour-over-time approach—would reach someone who shares an entire music or film collection over the course of a short period of time. Meanwhile, by requiring a relatively substantial number of CIRs before a notification is sent, those who use the Internet for proper purposes but occasionally or inadvertently infringe a copyright are much less likely to face the consequences and burdens of receiving notifications and being placed on copyright infringement lists. (We do think, however, that in the interest of fairness some sort of time limitation would still need to be applied, as an Internet user should not find himself or herself punished for actions committed many years before.)
- We therefore believe that the volume-based approach would give better effect to the spirit and purpose—and would constitute a far more sensible and proportionate implementation—of the Act, and we would strongly urge Ofcom to adopt this approach in lieu of the behaviour-over-time approach.

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?

We broadly agree with this approach but would urge to add two additional requirements for the content of notifications:

- First, within the "information about copyright and its purpose", we think it is essential that information be included about the multiple statutory and common law defences to copyright infringement. While there is a common perception that UK law does not contain "fair use" provisions, in fact the situation is far more nuanced, and the law clearly establishes that activities that would otherwise constitute copyright infringement will not do so if, among other things, they are conducted as part of research and private study, they are purely incidental or they are used for news reporting. In order to treat recipients of notifications fairly and provide them full information, it is vital that these defences be spelled out and, as discussed further in response to question 7.1, that it be made clear that any of these defences constitute grounds for appeal. We would also emphasise that the text of this information should be drafted and approved by a neutral authority, such as the Information Commissioner or Ofcom, rather than by copyright owners.
- Second, further to the concerns we raise in response to questions 3.3 and 3.5 about the treatment of downstream ISPs, we believe it is essential that notifications contain a clear statement that if the recipient is an ISP rather than a subscriber, such recipient is not subject to receiving notifications and that it contain clear instructions on how the downstream ISP can notify its upstream Qualifying ISP that it is not a subscriber. Given the confusion that already exists around this issue, including this information will be key to ensuring that small businesses and public institutions that provide Internet access do not cease to do so due to the erroneous assumption that they are subject to the notification process.

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.

We broadly agree with this approach, but further to the concerns we raise in response to question 5.4 about defences to copyright infringement, we would encourage Ofcom to make clear in the Code that any of these defences constitutes a ground for appeal. We realise that this may already be addressed by the fact that one of the proposed grounds is that an apparent infringement of copyright was not in fact an infringement, but in the interest of clarity and certainty we think it would be helpful to list exhaustively, as explicit grounds for appeal, the various statutory and common law defences to copyright infringement.

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.

We strongly agree with this approach and urge Ofcom to use these powers actively and aggressively. As we set forth in response to a number of questions above, we are deeply concerned about the effect of the system implemented by the Code on the digital economy, and while we think that if our suggested amendments and actions are adopted some of the negative consequences will be mitigated, we are certain that there will still be foreseen and unforeseen problems. In order to protect and bolster Britain's digital economy for the years to come, we think it is essential that Ofcom keep a very close watch over how the system is working in practice and, in particular, the extent to which it is resulting in a reduction of Internet access, unnecessary penalisation of the people who contribute to the digital economy or unnecessary burdens on entrepreneurs and small businesses. We would also recommend that Ofcom engage in regular public consultations to receive input from stakeholders on how the Code them and their constituencies.