

Title:

Ms

Forename:

Gemma

Surname:

Hersh

Representing:

Organisation

Organisation (if applicable):

Elspa

What do you want Ofcom to keep confidential?:

Keep nothing confidential

If you want part of your response kept confidential, which parts?:

Ofcom may publish a response summary:

Yes

I confirm that I have read the declaration:

Yes

Ofcom should only publish this response after the consultation has ended:

Yes

Additional comments:

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.:

ELSPA agrees that copyright owners must meet their obligations under the proposed costs statutory instrument in order to take advantage of the on-line copyright infringement procedures. However, this is of course linked to the results of the recent costs consultation by BIS, and to the actual costs that will be incurred by Ofcom, the appeals procedure and ISP notification costs. In the light of this lack of information, copyright owners in the video games industry have no way of gauging the number of CIRs that they would wish to issue in the forthcoming notification period. Until such time as transparency is present, video games copyright owners can do no more than express an interest in taking part in the procedures.

ELSPA expressed concern in its BIS Costs Consultation about the proposed split of costs. This was based on a flawed presumption that only copyright owners would benefit from the Digital Economy Act Code. Clearly the eventual cost of the implementation of the Code to Industry will be a deciding factor in Industry's involvement.

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.:

ELSPA considers that the lead-in time of two months for the initial notification period may be necessary for this introductory phase in the operation of the procedures. Lead-in times for subsequent notification periods should be shorter given that ISP systems will be created and up and running. The shorter the initial lead-in time the better it will be for copyright owners to estimate the number of CIRs that will be issued by taking into account their upcoming release schedules.

ELSPA has concerns about the currently proposed notification period of one year. ELSPA's concerns are that it is too long for a number of reasons:

1. Not all copyright owners, especially smaller ones, will know up to fourteen months in advance which content they will likely have need to protect. Of course the proposed CIR fee will impact heavily on the level of CIRs to be issued. The more expensive it is the more selective they will be;
2. Smaller copyright owners may only have intermittent releases and short periods requiring protection.

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?:

ELSPA considers that Ofcom's approach to the application of the Code to ISPs is sensible given that this is the initial phase and there is no experience of the number of CIRs that will be generated.

However ELSPA's concern is that there should be sufficient monitoring by Ofcom of on-line piracy that will reveal whether, by way of migration to smaller ISPs or mobile ISPs, further ISPs need to be brought within the system to avoid wide scale avoidance of the initial obligations regime. This monitoring will of course be undertaken in response to Ofcom's duties under the Act but reviewing any migratory trends needs to be given a priority.

Ofcom must show how it would bring newly qualifying ISPs into scope expeditiously. If there is a significant migration to non-qualifying ISPs, ELSPA would want the initial obligations code to be applied quickly and for Industry not to suffer further copyright infringement during laborious consultations. Ofcom should also consider whether regional monopolies, such as exists in Hull, should be included irrespective of the number of subscribers they have.

Question 3.4: Do you agree with the proposed qualification criteria for the first notification period under the Code, and the consequences 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?:

No further points.

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?:

No further points.

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 with non-qualifying fixed line ISPs ELSPA considers that Ofcom's measurement and monitoring of piracy will be vital when taken with copyright owner evidence to establish whether the application of the Act to subscribers and communication providers is realistic and effective. This needs to be regularly reviewed by Ofcom.

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?:

ELSPA agrees with the proposed contents 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 supporting evidence.:

ELSPA believes the proposed Quality Assurance Reports are a sensible way of providing the necessary confidence in the accuracy of copyright owners' detection methods. There should be appropriate safeguards to protect commercial and proprietary information and Ofcom should confirm in the Final Code that s.393 Communications Act will protect these reports from public disclosure, for example under the Freedom of Information Act. This is because copyright owners' arrangements with evidence-gathering vendors are likely to be confidential, sensitive and may reveal details relating to proprietary software.

The content of Quality Assurance Reports should not be an area in which the proposed Appeals Body would have any competency to dictate further requirements.

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?:

Ten working days as proposed is acceptable to ELSPA.

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.:

ELSPA has concerns that ISPs may be able to avoid responsibilities under the Act by invalidating CIRs in large numbers by using the very wide reasons for doing so as proposed for the Code. However having discussed this with Ofcom in meetings ELSPA understands that as part of the Quality Assurance Reporting of ISPs the issue of, for example changing IP addresses will be a valid consideration. We trust that Ofcom will take a robust view so that ISPs are not able to avoid their responsibilities in this manner.

The Code should provide certainty; therefore the potentially broad grounds under the final bullet point at 4.3 of the Code should be removed.

ELSPA also believes that CIRs referring to an account that is no longer active should not be a ground for processing. Clearly the subscriber, even though they have left the ISP, was a customer when the infringement occurred and therefore the ISP should be required to process a CIR and where appropriate issue a notification. This is to help avoid creating a situation where the churning of subscribers is high simply to avoid CIRs and notification.

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.:

ELSPA supports Quality Assurance Reports for ISPs as with copyright owners.

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. :

ELSPA are very supportive of the proposal that sees the issuing of subsequent notifications being linked to a time based process. ELSPA has the following specific comments:

1. Given the sheer level of illegal filesharing it may prove difficult to identify the same infringer twice in a 6 month period; this is not to say that the individual has not been infringing, just that this infringement has not been detected. If this was the case, the process would be logging people as first time infringers who are in reality repeat infringers. ELSPA recommends that the subscriber must, therefore, be sent a Second Notification if they have received a First Notification within the previous 12 months, not 6 months as proposed in 5.6.1 of the draft code;
2. The suggested 'grace period' in 5.6.2 of one month is too long. This gives infringers a whole month of continuing an illegal activity without any check on their behaviour. ELSPA considers that the delay between the sending of a first and second notification should be 21 days. This has clear comparisons across the legal and regulatory system. For example, an appeal to a Crown Court must be made 21 days after a conviction. 21 days is also the discount period for parking tickets and the time in which you have to appeal a penalty fare with most train companies;
3. The system must make some acknowledgement of the fact that the subscriber has already been given time to improve their security and/or to use legal services etc but has chosen not to. Therefore, the length of the 'grace period' between notifications should operate on a sliding scale. As stated above, the time delay under 5.6.2 should be 21 days with the time delay under 5.7.2 (the 'grace period' between the sending of the second and third notifications) should be 14 days.

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?:

ELSPA agrees with all the areas for inclusion listed in 5.11 of the draft code.

However, ELSPA do believe further provisions are required:

1. It must be made clear in the code that ISPs may only include information relating to

wi-fi and computer security and the availability of legal content services when they send the notification. It would be inappropriate to include general marketing material which may detract from the important message the notification is designed to communicate, and is not something Copyright Owners should be subsidising.

2. Given the flexibility the code provides for ISPs to formulate their own notifications (a desire which we understand), ELSPA believe that there should be a provision which states that nothing in the tone or content of the notification should undermine the initial obligations process.

3. As an additional safeguard, ISPs should be required to get approval from Ofcom of their notifications.

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. :

ELSPA agrees with the thresholds proposed and with the frequency with which copyright owners may make requests.

During our meeting the Ofcom representatives indicated that Ofcom has no objection in principle to the exchange of copyright infringer list data between industries and the core copyright owners. It is understood that the ICO will look at this, however this is ELSPA's current understanding of how matters will work and this is clearly an important issue if effective measures are to be taken against serious repeat infringers. The ability for copyright owners to act in concert in legal action will of course be a much more efficient way of dealing with these people.

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.:

ELSPA believes it is in the interest of all parties, subscribers, ISPs and Copyright Owners for the appeals system to be clear, open, robust and transparent. In order for it to meet these criteria, it needs have a high degree of certainty so all parties can have confidence in it. Therefore, the grounds of appeal should be tightly defined and the list in 7.12 in the draft code made exhaustive.

To this end, 7.12.5 which includes 'any other ground on which a Subscriber chooses to rely as to why the act or omission should not have occurred' should be dropped given that this is not a ground required by the Digital Economy Act (unlike the others listed). ELSPA does not consider that to do so in any way fetter the independence of the Appeal's Body since there are specified statutory criteria for its operation. To do so potentially opens the floodgates to unmerited appeals. In any event the Code should provide certainty on this matter and paragraph 7.12.5 is simply too broad.

ELSPA also do not believe that a decision on the length of time a Subscriber has to appeal should be left to the Appeals Body. For reasons of certainty, this should be set in the Code. ELSPA recommend a period of 21 days. As stated early, this is the length of time used in many other appeals system and as such is one with which consumers are very familiar.

ELSPA do not agree with the inclusion of 7.21 in the draft code which allows the Appeals Body to take into account the technical knowledge of the subscriber. Again, this is not in the Act and, ELSPA believe, ignores the central purpose of the notification process which is to educate consumers and provide them with exactly such technical information. Given this, there should be no circumstances where this should be a factor.

With regards to the awarding of costs and compensation under 7.29, given the subscriber is only appealing the fact they have been sent a letter there should be very little or no loss incurred on their part. Therefore, ELSPA believe Ofcom should stipulate a cap on the compensation the Appeals Body can award and tariff for costs.

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.:

No comments.