M i k e H o l d e r n e s s

Response to OFCOM consultation:

'Online infringement of copyright & the Digital Economy Act 2010'

30 July 2010

This response is in a personal capacity, as one of the tens of thousands[1] of freelances journalists, writers and photographers, who, under UK law, are first owners of copyright in their texts and images. I am Chair of the Creators' Rights Alliance, www.creatorsrights.org.uk – and in that capacity am alert to the concerns of authors and performers in general.

Journalists are naturally deeply and concerned – and more directly concerned than others – with freedom of expression and their organisations will therefore be making a detailed submission in response to any proposals that may be put forward to implement Section 17 of the Digital Economy Act.

The immediate concern in the current consultation is that the perceived legitimacy of the entire system of copyright is undermined by the perception that it is a right used by large corporations against individual citizens – a perception that is at the root of the so-called "file-sharing" phenomenon that the relevant sections of the Act seek to address.

Copyright is, of course, fundamentally a right of the individuals who independently create works.

The Code of Practice in its current draft reinforces that perception, particularly in the way it defines a "Qualifying copyright owner" and their/its duties, which is clearly based on the assumption that a "copyright owner" is a large corporation with an extensive legal department.

The draft Code places a number of obstacles in the path of an individual copyright owner seeking to issue warning letters against a corporation, or of a body (such as the National Union of Journalists) seeking to issue such letters on their behalf.

OFCOM may not be aware that there is a serious problem with the current combination of UK law and court practice effectively denying individual copyright holders access to justice. Freelance journalists, for example, typically produce hundreds of copyright works in the course of a year, each

1 Any attempt to produce an exact number runs rapidly into definitional questions: of the 38,000 members of the National Union of Journalists around 9000 declare themselves to be freelance.

with a value of a few hundred pounds and many smaller.

Small Claims Courts in England and Wales currently do not contemplate hearing cases concerning copyright: and taking a claim in the full-fat County Court exposes the individual creator to the risk of costs many times the quantum of the suit, or rejection of the suit on that very ground. See the NUJ's submission to the Gowers review at www.londonfreelance.org/ar/gowers.html for detail and an example. Lord Justice Jackson has since made recommendations[2] to remedy this but in the nature of things these will take some time to implement.

For the Code to be implemented in its current form would, therefore, be to miss an important opportunity both to improve the functioning of copyright law and to further the perception that it can be used for its public policy purpose – to ensure that individual creators are rewarded sufficiently to be able to produce further high-quality works.

As requested, I present my concerns below in response to the consultation questions, but it will be helpful to summarise them here:

- It is clearly difficult for an individual creator or their representative to comply with the requirement in section 2.1 of the draft Code to estimate the number of Copyright Infringement Reports in advance.
- The current proposed definition of a qualifying ISP in S 2.4 makes it difficult for an individual creator to seek to issue notices. How is it to be determined which, if any, of the ISPs that qualify is responsible for the internet connection of any body corporate infringing an individual creator's copyright[3]?
- The requirement in S 3.5 to produce annual reports of audit procedures is incongruous when the typical individual creator's case would be "I found a copyright work at internet address www.moloch-media.com/index.php?page=my_work666 and do affirm and attest that it is my work and that I have issued no licence for this use."
- The reference in the model letters to "peer-to-peer file sharing" is unnecessarily restrictive when the majority of infringements of individual creators' works currently takes place through the hypertext transfer protocol (HTTP).

In addition, I am extremely disappointed that the draft Code takes no account of the concerns – expressed in the House of Lords debates on the Act and elsewhere – about the effects of the code on public bodies, such as public libraries, that offer internet connections to citizens. In a small survey of freelance journalists which I carried out last year respondents were unanimously in favour of the principle of public libraries as places for quiet private study – which, these days, must include quiet access to the internet.

A fundamental re-think of the definitions of "service provider" is required to deal with this serious omission.

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2 http://www.judiciary.gov.uk/publications-and-reports/reports/review-of-civil-litigation-costs/

3 Considering two bodies corporate that have been known to make relevant infringements, whether by accident or by design:
www.guardian.co.uk is served from 77.91.248.30 which resolves to Guardian News and Media Ltd itself;
www.thetimes.co.uk is served from IP 92.123.154.17 which resolves to Akamai Technologies Ltd.
Neither would , apparently, be a qualifying ISP under the Code – unless we could establish that a qualifying ISP had a contract to supply connectivity to either.

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.

I do not agree. I propose, for the public policy reasons set out above, that the obligations should apply only to bodies seeking to submit CIRs to ISPs in bulk – say a threshold of 1000 applications in a quarter.

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.

It is clearly difficult for an individual creator or their representative to comply with this requirement to estimate the number of Copyright Infringement Reports in advance. As with Question 3.1, a threshold approach would be more equitable.

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?

It is reasonable to restrict the procedure, initially, to the largest ISPs; but it would make more sense and remove a clear loophole to define these as those that *either* have more than 400,000 fixed-line subscribers *or* are providers of connections at 100Mb/s or above.

There is a further issue: How is it to be determined which, if any, of the ISPs that qualify is responsible for the internet connection of any body corporate infringing an individual creator's copyright?

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?

See above.

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?

See below.

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?

The current proposal appears entirely to fail to recognise the situation of bodies such as public libraries, though it does deal with coffee shops.
This is a show-stopper. In the unlikely case that no other body produces a draft alternative approach and supporting evidence, the consultation should be paused and resumed when creators' organisations have had an opportunity to work with other interested parties on this.

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?

The requirement to give the address of the copyright owner should be waived in the case where this is an individual's home address, on the obvious grounds that to do otherwise invites harassment. Otherwise, I currently detect no problems.

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.

No problem.

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?

No problem.

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.

No problem detected.

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.
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Agreed.

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. 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?

The reference in the model letters to “peer-to-peer file sharing” is unnecessarily restrictive when the majority of infringements of individual creators’ works currently takes place through the hypertext transfer protocol (HTTP).

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.

No problem.

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.

No comment.

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 comment.