

**IDRS Response to the Ofcom Consultation on
Online Infringement of Copyright and the Digital Economy Act 2010**

Introduction

IDRS Ltd is a provider of independent redress and appeals services in the telecommunications industry and other business sectors. We respond to this consultation from that perspective and our comments are set out against each section and question, using the same reference numbering as the Ofcom consultation document.

Section 3

Question 3.1

IDRS Response: No comment

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.*

IDRS Response:

Whatever the time limit applied following the consultation, we suggest that it would be helpful to any operator of an appeal service if Ofcom was also a recipient of this information and was able to confidentially share the total number of possible CIRs for the coming year, to enable any appeals body to forecast and plan possible activity. In the context of responding to significant variations in such activity, a 3 month period would be better than 2 months.

Questions 3.3 and 3.4

IDRS Response: No comment

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?*

IDRS Response: Yes, we agree.

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?*

IDRS Response: Yes, we agree.

Section 4

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?*

IDRS Response: Yes, we agree.

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.*

IDRS Response:

Yes, we agree. However, we suggest that the Quality Assurance Report or some suitable extract or revised form of it should be made available in the public domain.

We consider that this will be important for two reasons; firstly, as the purpose of using a quality assurance approach is about ensuring robust and accurate evidence behind the creation of CIRs, it becomes a critical portfolio of information for the proposed appeals body. Knowledge of the quality assurance approach adopted by Copyright Owners and ISPs would allow an appeals adjudicator to give appropriate weight to the evidence and how it was gathered. If this information is not available at the outset, then the appeals adjudicator will be obliged to ask for this at every instance. To ensure a fair hearing, the appellant also needs to understand the quality of evidence and how the evidence is gathered. This is a matter of ensuring the correct balance of rights between the

parties. It may even be argued that this information, in a suitable form, should be in the public domain so that appellants, the public and wider stakeholders may have confidence in the process.

This is not to suggest an alternative approach but rather to request that consideration be given to the context in which an appeal body needs to be convinced that the evidence for a CIR and the method by which it was gathered is reliable.

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?*

IDRS Response:

We are not in a position to make a judgement regarding the appropriateness of a period of 10 days. We would comment that in the interest of justice, the more timely the process, the better.

Section 5

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.*

IDRS Response: Yes, we agree.

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.*

IDRS Response: Yes, we agree (see also our response to Question 4.2)

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.*

IDRS Response:

The timing of the escalation process as described in 5.11 may lead to a situation where an individual could be placed on a CIL before the appeal on the first notification had been completed

by an appeals body. There is therefore a significant challenge created for an appeals body to act in a timely manner to ensure that any appeal against the first notification can be considered and decided upon before the minimum time for the addition of an appellant subscriber to the CIL.

Any appeals process taking more than 8 weeks to determine an outcome of the first notification appeal could be overtaken by the inclusion of the appellant on a CIL. The result of this could be that the person considering the appeal and deciding to uphold the appeal may be unable to order the correct remedy which, in such circumstances should be the removal of the appellant from the CIL.

The absence of any public knowledge about the quality assurance process for evidence gathering would place further pressure on the time scales by virtue of requiring comment from the Rights Holder as to how the evidence for the CIR had been gathered and then having to share that with the appellant for comment. (see also our response to Question 4.2)

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?*

IDRS Response:

We do not believe that any additional requirements are needed. However, we would comment that the warning regarding the protection of the subscriber's identity as per paragraph 12 of the Information Sheet on Online Copyright Infringement and Notifications, is in our view neither sufficiently prominent nor strong enough in its language.

Section 6

IDRS Response: No comment

Section 7

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.*

IDRS Response:

Yes, we agree with the general approach as set out in the Code.

The provisions of the Digital Economy Act 2010, generate a number of conflicts in rights among relevant stakeholders; the intellectual property rights of the copyright owner compete with the right of privacy and protection of identity for the subscriber, the rights of the ISP to act purely as a conduit and the overall rights of all parties to a fair hearing. The Act and the Code properly place the responsibility on any appeals body to consider these competing rights within a tight time frame (see also our response to Question 5.3 above). The complexity of Intellectual Property law at the European and UK level, together with the public law context and the time frames for determining an appeal suggest that those involved in determining appeals should be legally qualified, suitably trained in the role of an appeal adjudicator and operating a structured environment.

The absence of predictive information about the possible level of appeal activity sets a significant challenge for any appeals body to match public expectations for the delivery of a fair hearing in a timely manner.

Paragraph 7.13 of the Code refers to a period of 5 days for the appeals body to send a copy of the appeal to the ISP and/or any relevant Copyright Owner. We consider that this should be 5 *working* days, in concert with the other time periods defined with the code?

Section 8

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.*

IDRS Response: Yes, we agree.