

Ofcom consultation on the Draft Initial Obligations Code

Response from the Mobile Broadband Group

30th July 2010



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Introduction

The Mobile Broadband Group (“MBG”, whose members are O2, Three, Vodafone and Everything Everywhere - who operate under the brands of T-Mobile and Orange in the UK) welcomes the opportunity to respond to Ofcom’s consultation on the Initial Obligations Code (The Code).

While the focus of MBG comments here is on the proposed obligations to which its members may become subject under the draft code, we would like to emphasise that the copyright owners (CROs) must at the same time continue to take further action to develop and promote legitimate content services and also to be prepared to use this new process to identify and, ultimately, execute legal action against the most serious infringers.

Summary of main points

- The MBG very strongly supports Ofcom’s proposal that mobile platforms be excluded from the initial phase, on the grounds that this would be disproportionate due to the low level of unlawful file sharing and the costs of compliance.
- The MBG is very concerned with the timescales being proposed for the launch of the Code and notification process. While we recognise the great pressure on Ofcom to put something in place, there are many complex issues to resolve and we feel that if a little more time were taken, there would be a much greater prospect of getting it ‘right first time’ and thus saving considerable time and money in the end.
- The Code needs to be clear on the details of the threshold of CIRs that would bring further ISPs into scope. The threshold needs to be expressed as a percentage of infringements that are attributable to an ISP, based on the total number of all infringements recorded by all qualifying copyright owners to all ISPs in a qualifying period. This percentage should not be insignificant given the costs of compliance. The threshold should be based on the actual level of infringement and not forecast.
- There should continue to be a de minimis threshold based on subscriber numbers as this would ensure that smaller ISPs are not disproportionately impacted by the obligations in the Act given that the definition of an ISP is so wide and could capture corporates offering employees internet access, wi-fi hotspot providers such as cafes, libraries and educational institutions.

- No ISP should have to commit to incurring costs on re-engineering processes and building systems until a commitment (and payment) has been received from the CROs that such costs will be recoverable in accordance with the cost sharing Order.
- Qualifying copyright owners should commit to being signatories to the Code in order to bind them to the obligations in the Code. Having a definitive list of copyright owners is essential for ISPs to process notifications effectively.
- There is no justification to require registration of prepay customers. This runs contrary to Government policy and is not practical.
- Ofcom, with the approval of the Appeals Body, should ensure that ISPs and CROs' processes are appropriately accredited as being capable of providing evidence to a standard that will stand up to the scrutiny of the Appeals body. Otherwise there is a material risk of systemic problems that undermine the public's trust and drastically inflate the cost of compliance for ISPs.
- The data retention requirements ought to be set following consultation with the Home Office, who are charged with setting IP data retention requirements more generally. We cannot allow a situation to develop where the standards proposed by the Home Office and Ofcom differ.

Detailed responses to the questions in the consultation document

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.

Yes. It is crucial that a Copyright Owner (CRO) should only be able to take advantage of the Code once it has met its obligations under the Statutory Instrument for cost allocation and, in particular, only when it has made the relevant forecast and payment for the CIRs that it intends to issue. In addition the MBG considers that the CRO should also be a confirmed signatory to Ofcom's code.

Qualifying Internet Service Providers should not be put in a position whereby they are obliged to commit to costs (e.g. employing staff, initiating projects for process development and capital expenditure) before there is adequate commitment and payment from each Qualifying CROs, to ensure that costs will be recovered in the manner set down by the Order and Ofcom. A significant proportion of the costs will be up front capital expenditure on building in capabilities which currently do not exist or have any commercial use and so it is entirely justifiable that robust assurances should be given in advance to ensure these significant costs will be recovered.

The MBG's principal supporting argument for CROs having to actively sign the Code is that there is an asymmetry whereby Ofcom will determine which Qualifying ISPs will participate whereas CROs can choose. Thus, in order for them to get benefit and to bind them into the obligations of the Code and the statutory instrument on cost allocation, they must agree to abide by the Code and for a time period that allows for ISPs to fully recover their capital expenditure.

It will also be much easier to validate incoming CIRs if they can only be sent by 'white listed' Qualifying CRO code signatories who have fulfilled their payment obligations to the ISPs. We suggest Ofcom approves, publishes and regularly reviews the list of signatories. Where Qualifying CROs have under forecast the amount of infringement reports to be sent to an ISP, the ISP can choose to process these report on commercial terms set by the ISP.

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.

The first point that MBG would like to raise is in relation to timelines is that we are very concerned with the timescales being proposed for the launch of the Code and notification process. While we recognise the great pressure that is being put on Ofcom to put something

in place, there are many complex issues to resolve and we feel that if a little more time were taken, there is a much greater prospect of getting it 'right first time' and thus saving considerable time and money in the end.

In addition to finalising the Code there are several other activities which lie on the critical path that will render it virtually impossible for Ofcom to meet the Government timetable and still put in place a system of sufficient robustness to stand up to public scrutiny and, of course, any potential appeals. Such activities include: calculating the cost of processing CIRs, obtaining forecasts from CROs (and there is a certain amount of circularity in these two activities), building systems to the scale to match the forecasts and appointing the appeals body. As we state elsewhere, we strongly believe that the appeals body needs to be assured of the robustness of the evidence collecting and subscriber matching process before CIRs are processed in any scale.

With respect to question 3.2, there are two issues to consider. First, is two months enough notice to give to ISPs that, for the first time, are going to be qualifying ISPs and thus subject to the Code? Second, is two months sufficient notice to give ISPs that are already subject to the Code time to prepare for a new notification cycle?

If Ofcom were proposing mobile platforms to be part of the initial phase (which they are not), mobile ISPs would need to build infrastructure in order to execute the matching of the public IP addresses observed by CROs to individual subscribers. Due to the complexity of the systems required, this would take considerably longer than two months. The period required will depend on the circumstances at the time and so would have to be considered at the appropriate time, but only if required.

Once an ISP is in scope, for subsequent periods, a two month notice of the forecast prior to the start of the notification period is inadequate particularly if CROs were intending to make significant changes to the number of notifications. More time (around 6 Months) is needed to make adjustments to systems. We therefore propose that paragraph 2.2 of the draft Code be amended to: "As estimate under paragraph 2.1.1 must be provided in writing to the qualifying ISP. Where an ISP is already obliged to comply with the Code, such estimate shall be sent at least 6 months in advance of the start of the notification period to which it relates. Where an ISP is not already obliged to comply with the Code, the time for sending an estimate shall be agreed between the ISP and Ofcom."

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?

Ofcom is proposing that mobile platforms be excluded from the Code, at least for the initial phase.

The MBG strongly supports Ofcom's proposal for such an exclusion in the first phase for the following reasons:

- We have seen no proof of significant volumes of infringing content on mobile networks, such that would justify the scope of the new obligations being extended to mobile ISPs.
- Unlimited data packages on mobile may not be commonplace in the future. They do not exist on prepay tariffs (a major part of the market) and O2, for example, has recently announced an end to unlimited data offerings on contract. The propensity of a subscriber to download music unlawfully for free on a mobile when they have to pay for the data they are using is low.
- Operators are actively negotiating with CROs and there has been considerable growth in legitimate content such as music, games and video clips which compete successfully against piracy based alternatives. Ofcom's Communications Market Report 2009 states that the mobile platform continues to play an important role in stimulating digital music sales with a **third** of all digital music purchases being made over a mobile devices due to mobile operators' own portal services, some of which offer over one million tracks, third party services such as Nokia Comes with Music and applications on the G1 and iPhone which link to legitimate content.
- Measures are being taken to optimise network performance for all customers including enforcement of fair use policies by some MNOs.
- Disproportionate network costs would be incurred if mobile operators had to implement the proposed obligations and match individuals to public IP addresses. Recording, retaining and mapping this amount of information is complex and would give rise to privacy and data protection implications that go beyond current data protection requirements.
- Technical challenges associated with IP allocation could threaten the legitimacy of the obligations in relation to mobile. A customer may use more than one public IP address when downloading one file and this would therefore give rise to more than one 'logged' CIR per copyright work. This would have the effect of Copyright owners requiring us to send customers duplicate notifications relating to the same alleged infringement.

Nevertheless, Ofcom has made it clear that such exclusion may only be temporary and so it is essential that the detail of the ISP threshold used to determine when further ISPs are brought within scope is included in the initial obligations code.

Paragraph 2.4 of the draft Code defines “qualifying ISP” with reference to customer numbers. The MBG recognises that this measure is all that is currently available in the absence of robust data on the volumes of unlawful file sharing taking place on each ISP’s network. The MBG understands from Ofcom that the number of fixed subscribers is therefore being used as a proxy for levels of infringement (in the absence of other information).

It is the MBG’s view that subscriber numbers should not be used as the benchmark in future for bringing more ISPs within scope. There is no comparable linkage between the number of customers on a mobile network, which is measured in the millions, and the level of infringement. Only a percentage of subscribers use the Internet at all (12% in Ofcom’s most recent market report)¹ and, thanks to the increasing use of mobile SIM cards in machine to machine situations, it is not even safe to assume that every “customer” is an individual capable of accessing copyright material.

The MBG proposes a different measure, calculating each platform (such as fixed and mobile) separately. The MBG believes that the threshold should be based on the percentage of infringements that is attributable to an ISP, as a percentage of the total number of all infringements recorded by all qualifying copyright owners on all ISPs in a qualifying period. This percentage should not be insignificant and should reflect the predicted costs of complying with the obligations. Furthermore the threshold should be based on actual infringements not forecast.

We also believe that there needs to be a de minimis threshold based on subscriber numbers in order to ensure smaller ISPs are not disproportionately impacted by the obligations in the Act. This is important given that the definition of an ISP is so wide and could capture corporates offering employees internet access, wi-fi hotspot providers such as cafes, libraries and educational institutions.

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 response to Question 3.3 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?

¹ Fig 4.12 http://stakeholders.ofcom.org.uk/binaries/research/cmr/CMRMain_4.pdf (although this figure is likely to rise when 2010 report is published)

The MBG has considered the definitions explained at paragraph 3.19 of the consultation document. It is not necessarily clear whether Mobile Virtual Networks, which may (but not always) use some of the network of a Mobile Network Operator, to offer Internet services to its own base of customers would be an ISP as defined in the Act. It is the MBG's view that the Virtual Network (who, in any event would hold the relevant customer contact information) should be treated as the ISP for the purposes of processing CIRs and would have the responsibility for communicating with its subscriber.

As the wholesale arrangements for mobile operators are often very complex with multiple parties in the value chain the MBG would invite Ofcom, at the appropriate time, to consult and provide guidance as to which party is responsible for complying with the requirements in the Act and who is the ISP (particularly where the value chain extends outside of the UK).

Prepaid Register

The MBG has serious concerns about the statement, in paragraph 3.28 that: *"Certain providers such as pay-as-you-go mobile broadband operators or libraries, which might fall to be considered as ISPs and are therefore potentially subject to the Code, may not hold such information about their subscribers. In those circumstances, if such operators fall within a future definition of Qualifying ISP (initially they would not), they would need to ensure that they do collect this data so as to be able to comply with the obligations in the DEA and the Code."*

This statement should not appear in the Code or any guidance accompanying the Code, as it is not consistent with government policy and would impose an unwarranted burden on subscribers and mobile operators.

Over a number of years the Government has repeatedly considered whether it would be appropriate in the UK to require customers to verify their name and address before acquiring a mobile device. It has consistently rejected the idea on the grounds that it would not be proportionate to ask for roughly 50 million UK prepay devices to be so verified; it is not at all clear how it would be practical to do this in any case. The security services do not require it, because the evidence is that it would not enhance our security in any way. The Government acknowledges that the prepay market has been extremely successful in providing telephony to those that were previously excluded either because of a lack of a permanent base, official forms of ID or a poor credit history.. The MBG therefore strongly opposes the imposition of such an onerous obligation without a consideration of these issues.

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?

In the context of this question, it is worth noting that, should the discussion ever move on to 'technical measures', it will be much more problematic to apply enforcement action against a whole corporate account (a subscriber, in the Act), when only one rogue employee may have been involved in the infringement.

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 with some additions.

In addition to the information suggested, it is essential that the following information is sent to help with the matching and notification process (and which would help the subscriber to investigate at their end):

- the file format of the alleged copied work;
- the file sharing application or protocol used to allegedly share the work;
- Both the IP addresses and port numbers in the communication of the apparent infringement that is the apparent infringing IP address/port number and the CRO's agent IP address/port number ie both the source and destination IP address and port number;
- the file size, as this helps, as a memory jogger, when the customer checks his/her files for the infringement identified in the Notification Letter.

The CRO should also confirm that it has followed the accredited process for obtaining the evidence to the required standard, which aligns with the warranty that the MBG considers should be required of CROs in order to participate in the process.

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.

The MBG considers that Ofcom's proposal includes the correct elements but is not entirely clear what exactly Ofcom is proposing when it states "*be subject to audit by an independent third party.*" It is not clear what sort of body would be able to act in this way – are there to be a multitude of independent third parties employed by CROs and ISPs for this purpose? Who will verify that their opinion is valid? Moreover, it would appear that ISPs could be

required to set up CIR processes with no assurance that they will be acceptable to the appeals body. The MBG's strong view is that this uncertainty is not workable.

The MBG favours a system by which the CROs' and ISPs' processes are independently accredited either by Ofcom or a single suitably qualified third party before the CIR process even begins. This means that the processes are audited *ex ante*. It will give all stakeholders and crucially, subscribers, confidence that proper procedures are being followed and will make the appeals process simpler. An independent check should be carried out annually to ensure that CROs and ISPs are working to their accredited processes.

The appeals aspect of the notification process is absolutely critical. At present ISPs, CROs, consumer groups and regulators have little experience of how customers will respond to the new legislation in general and the notification process in particular. So there is no way of knowing how many appeals will be made and which of the available bases of appeal they will use.

The best case scenario is that subscribers will accept the notification process, accept their responsibilities and convert to accessing content lawfully. Worse case, there could be mass resistance to the legislation, co-ordinated through social networking sites and other Internet facilities. In the latter (not unrealistic) case, the appeals body could be handling many thousands of appeals per month.

There appear to be two main instances in which an appeal might occur:

1. A mistake, whether a one off or a systemic issue, has arisen leading to the incorrect processing of one or more CIRs. For example, an administrative error in processing a particular CIR where a notification letter gets sent to the wrong postal address, or where there is an unexpected error in the system; or
2. The accredited system is working as it is supposed to but is later challenged as not being sufficiently robust.

The MBG accepts that an ISP shall be accountable for its mistakes such as those in scenario 1. The MBG's view is that it's likely that mistakes will happen and that there should be a step in the appeals process to weed out such obvious issues before the appeals body is required to adjudicate.

The MBG takes a very different view when it comes to challenges to the robustness of the process as a whole, set out in scenario 2 above. In the event that the appeals body does not believe that a process, even though it is working as it was designed, is not sufficiently robust, the effect would be that not only would the appeal in hand be thrown out, but all CIRs that that ISP has processed could be held to be unsound. This would entail the

destruction of the infringer list for that ISP at least and much money and effort will have been wasted along the way.

Clearly this outcome undermines the certainty and confidence that is needed for the new obligations to work successfully. Given these very real risks, it is therefore absolutely essential that the processes of all qualifying ISPs and CROs are certified as robust from an evidential perspective before 'go-live' and that the appeals body is comfortable with the process being followed by each participating CRO and ISP.

In addition, the MBG considers that the costs of making "changes to...systems and process" as directed by Ofcom at paragraph 4.6 of the draft code should be at the cost of the CRO. The MBG urges Ofcom to ensure that these costs are factored into the parallel discussions taking place on cost sharing.

The MBG therefore urges Ofcom to ensure that participating CROs and ISPs are required to submit to an independently validated accreditation process, acceptable to the regulator and the appeals body, prior to the processing of any CIRs.

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?

The CRO should be required to send CIRs to ISPs as soon as possible but, in any event, within ten days. Given the huge volumes of automatic records that will be generated, and the fact that qualifying CROs will be creating automatic systems to harvest the CIRs, there seems to be no reason why such CIRs should not ordinarily be sent to ISPs in less than 10 working days.

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.

Yes, in part.

The MBG agrees with the list of scenarios in paragraph 4.3 of the draft code, subject to the following comments:

- An ISP should not be obliged to process any CIRs where the CRO is not a "Qualifying CRO" that has complied with their forecast and payment obligations to that ISP; and
- The fifth point should be amended to "the subscriber cannot be identified because the Qualifying ISP does not hold an electronic or postal address for the subscriber." On this point, the deletion of "and it is not reasonably practicable..." is important as an MBG member will either have the contact details or they will not. An ISP should

not be required to undertake any research or investigation to see if the contact details can be established from any other source.

- the ISP needs to be able to refuse a CIR if there is some ambiguity with the subscriber traceability. For example if the time on the CIR is within an agreed period of the IP address being reallocated to a new subscriber then the ISP cannot be certain that the particular subscriber is the one identified by the CIR. These parameters must be agreed as part of the quality standard process.

It should be noted that because every CIR will automatically generate a search on an ISP systems, the administrative costs associated with processing a CIR which is found to be invalid are similar to those that are valid. In fact, bearing in mind the need to inform the CRO of invalid CIRs, the costs may be higher. Thus, both invalid and valid CIRs will count against the forecast and the flat fee will be payable by the CRO. A further point is that an ISP may have a substantive dispute with a CRO over the content of a CIR or CIRs or the manner in which they are being submitted. It would seem sensible that the Code provides for circumstances where it would be more sensible to halt the processing of CIRs while a dispute is resolved.

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.

No, see our response to 4.2 above.

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, in part. There are a few points of detail that need to be amended or clarified further:

a) Intermediate CIRs

The MBG supports the suggestion that Notification letters are sent out at intervals based on time rather than volume of CIRs, with the proviso that no less than 30 days elapses between letters. The balance of probability suggests that the higher frequency offenders will receive Notification letters in quicker succession.

This has led the MBG to consider how this fits with an appeal process. Every CIR will be recorded against the subscriber and potentially be produced as evidence in any court proceedings taken by the CRO. Therefore, the subscriber should have the opportunity to appeal each CIR being recorded against them, not just the ones that give rise to a notification letter. This can either be done at the time of any court case or at the time when Notification Letters are sent out.

The MBG therefore proposes that each Notification Letter contains details not just in relation to the CIR that triggered the Notification Letter, but also in relation to any CIR received in the time since any previous Notification Letter. The MBG considers that this is the most transparent methodology for subscribers and recommends that paragraph 5.11 of the draft code be amended accordingly.

b) Copyright Infringer Lists

The code specifies, under paragraph 6.2, that *“A Qualifying ISP must provide a Qualifying Copyright Owner with a Copyright Infringement List on the request of that Qualifying Copyright Owner and for a period of time as requested by the Qualifying Copyright Owner, up to a maximum of 12 months prior to the date of the request.”*

The implication of the 12 month limit is that Ofcom intends there to be some time bar on the subscriber’s infringing behaviour to be stored on either an ISP’s or a CRO’s database. In order for this to be effective, there should also be some time bar on the CRO’s ability to retain the CIL, so that there is some incentive on the CRO to ‘use it or lose it’ for the purposes of bringing proceedings against serial infringers. A further consequence would be that an ISP will be obliged to send update notifications indefinitely, which is surely not the objective of the entire new regime.

c) Notification letters after 12 months

The MBG is not clear about what Ofcom intends for subscribers whose infringer behaviour stretches beyond 12 months.

Say, for example, a CRO sends CIRs to an ISP in April and October and these CIRs lead to the first and second notifications being sent. And say the next CIR is not sent until the following April. The ISP will still have a record of second Notification letter having been sent in October. Even though the infringements of the previous April would, after 12 months be erased from the subscriber’s record, the second letter would still be on file and it would not really then make sense to completely start again with this subscriber. To do so would undermine the overall process. The MBG requests that Ofcom reconsiders this point.

d) Update notifications

The MBG strongly rejects the concept of ‘update notifications’. **The concept of sending three letters or emails to an infringing subscriber has formed the basis of the proposals on file sharing for some time. It was on this premise that Parliament debated the provisions on file sharing to ensure a fair and balanced approach would be adopted.** Once the third Notification Letter has been sent, then that should be the end of the ISPs’ obligations. The subscriber is on the CIL and there should be an expectation that the CRO proceeds with legal enforcement.

Moreover, the MBG does not see how the 12 month time limit for storing data can be reconciled with an obligation to continue to send updates if it has to delete the information relating to the first, second and third Notification Letters.

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?

Yes. Copyright owners should set up online resources in order to comply with the information requirements in s. 124A(6) (f) to (i) and 124A (8) (a) to (d) of the Act, which provides the public and the recipients of notifications with further information on the online copyright infringement process, the appeals process, information on where to find independent legal advice. The service should be available to the public on an anonymous basis if required. This shall also include definitive guidance on what steps a subscriber can take in order to take “reasonable steps” to protect their internet connection from use by a third party.

Resources shall be referred to in all communications to apparent infringers. Copyright owners are best able to explain their concerns with breaching copyright law. ISP’s customer services employees are trained on how to respond to customer queries on their phone/mobile broadband accounts and are not able to explain about copyright beyond directing those subscribers to further information.

The MBG does not have any specific comments on the illustrative letters included in the consultation document, as it is still considering the benefits and drawbacks of standardising the content of the letters to Subscribers.

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 MBG is in favour of a threshold but is not certain that the proposed threshold works. The threshold provides that a Subscriber is added to the Copyright Infringement List if they have had the third letter in 12 months. The ISP would surely need to retain the CIRs relating to the first and second letters, as they are evidence that it was correct to send a third letter, leading to the Copyright Infringement List.

The MBG is therefore concerned that the true timescales for retaining CIRs, if they are needed to substantiate the CIL are in fact longer, if not much longer, than the 12 months stated in the consultation document. The MBG would welcome clarification on the precise way that this should work, as there is a significant cost associated with retaining CIR data.

The MBG agrees that it is appropriate to limit the frequency with which CROs can request copyright infringer lists, in order to keep down the costs of administration. An interval of three months is appropriate. ISPs should be given adequate time in order to process this request. We suggest 14 working days is appropriate. There is not the same urgency in processing these requests as with CIRS as Copyright owners will use the lists to decide which serious infringers to take to court.

The MBG understands that a Copyright Infringer List is to be an anonymous list.

It is worth noting, though, that the Information Commissioner, in its Guidelines on collection information on-line² states that: *“The DPA defines personal data as data which relates to a living individual who can be identified from those data or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller. The concept of identification is key here. In the Information Commissioner’s view an individual can be identified if his or her behaviour can be distinguished from that of a group of other individuals. This can take place even if no real world identifiers, such as names or addresses, are held.”*

The implication of this, then, is that it’s immaterial whether the list is anonymous or not. A list of IP addresses, code names which can be used to link to actual names might constitute personal data. The basis on which the ISP is passing the information to the CRO is because it has to by law (i.e. the Communications Act) not that the transaction is out of scope because no personal data is being passed.

The MBG believes that, between Ofcom and the Information Commissioner, there needs to be absolute clarity as to what ISPs are allowed to do in this context and on what basis.

Similarly, the MBG urges Ofcom to speak with the Home Office regarding the data retention requirements concerned with mobile ISPs being required to capture and store IP data which is attributable to individuals. Mobile operators do not currently store any “mapping”/“natting” data for any length of time, as it would involve the storage of massive amounts of data at a high cost. Recording, retaining and mapping this level of information is complex and would give rise to privacy and data protection implications. The Retention of Communications Data Order 2003, which approved a Code of Practice for voluntary retention of communications data by service providers, very specifically only extends to web activity logs of communications data and excludes the content of communications (such as file names). Any data retention obligations imposed on ISPs must comply with the provisions of the Data Retention (EC Directive) Regulations 2009, as records retained for the purposes of the Code will of course be made available to other public authorities in accordance with the provisions of the Regulation of Investigatory Powers Act 2000. The data

² <https://ico-consult.limehouse.co.uk/portal/cop/pio?pointId=1259683912607#section-1259683912607>

retention requirements ought to be set following consultation with the Home Office, who are charged with setting IP data retention requirements more generally. The MBG cannot allow a situation to develop where the standards proposed by the Home Office and Ofcom differ.

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. The appeals aspect of the notification process is absolutely critical. The MBG has covered its concerns about the process of evidence collection in response to question 4.2 above. It is the MBG's view that paragraphs 7.1-7.6 of the draft code should be amended to include the certification of those ISP processes.

The MBG agrees that only in exceptional circumstances should it be necessary to hold an oral hearing and that in the vast majority of cases an appeal should be decided on the papers presented by the appellant to the appeals body and any other relevant evidence.

The MBG notes that Ofcom has the right to approve the Appeals body's procedures. We would therefore suggest that Ofcom is in a position to set some fairly important parameters for how that body will operate and that the draft code should go into more detail on some issues:

1. The MBG considers that Ofcom should specify that an appeal has to be lodged within 25 working days from receipt of the Notification Letter, by amending paragraph 7.10 of the draft code to this effect. This is an important limit to set, as it may have a substantial impact on the length of time that ISPs have to store evidence and thus could be a significant driver of costs. If the appeals body has the freedom to set this time limit, there could be unwelcome consequences for the flat CIR fee which Ofcom will have so carefully calculated;
2. The draft code should be amended at paragraph 7.27.3 to provide that only the subscriber's direct and reasonable costs in dealing with the Notification Letters and Appeals process should be the subject of any costs order;
3. The draft code should also be amended at paragraph 7.27.4 to provide that awards of compensation should be extremely limited in occurrence and, in any event, capped at a figure such as £5,000. It should not be able to award compensation for hard to quantify damage such as emotional distress. This limit is comparable to other awarding bodies such as Otelo.

4. The MBG also considers that Ofcom should mandate that appeals decisions are published publicly by adding a new paragraph to this effect to paragraph 7 of the draft code;
5. The MBG considers that the draft code should also include a statement about whether the receipt of an appeal effectively stays the further sending of Notification Letters to the same subscriber, again by adding to paragraph 7 of the draft code; and
6. The MBG considers that an ISP should have the opportunity to lodge written submissions with the appeals body if it wishes to, not just if invited to so do, and paragraph 7.14 of the draft code should be amended to reflect this.

The potential liability for ISPs on appeal to have to pay a subscriber costs and/or compensation is not sufficiently clear in the draft code provisions at paragraph 7.12.4 and 7.27-7.29. The MBG considers that the following points must be added to paragraph 7 of the code:

1. That the ISP is not liable to the subscriber or CRO provided that its processes work as they are accredited to (see scenario 2 under question 4.2 above);
2. That the ISP is not liable to the subscriber where its processes did not work because of an error (whether isolated or widespread) of which it was not aware at the time of sending a Notification Letter;
3. That the ISP is not be liable for issuing a Notification Letter and adding the subscriber to a Copyright Infringement List because of any mistake made by a CRO in issuing any CIR; and
4. That the ISP is not liable to the subscriber where a subscriber is able to prove that someone else was using their internet connection despite “reasonable steps” having been taken.

The MBG does of course accept that an ISP should be accountable where it is found to be negligent, whether that is discovered before or during an appeal.

As a last point, paragraph 7.9.3 should be amended to “any *reasonable* steps taken by the subscriber to prevent other persons from infringing copyright by means of the relevant internet access serve” to mirror the provisions of the Act.

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.

The arrangements proposed in the Code seem appropriate. There may be occasions when it is not practical to make representations within 5 days and Ofcom should build in some flexibility.

In some cases a perceived code breach may be of a nature whereby the best course of action would be for the ISP to suspend the processing of the CIRs that it receives from the CRO in question. In such instances Ofcom must be in a position to respond to an ISP's request, at short notice. Otherwise a situation could arise where an ISP complains about a systematic problem with the CIRs of a given CRO. The ISP is then faced with the bleak choice of either continuing to process CIRs which are strongly suspected of being faulty (thus upsetting customers) or halting the issuance of Notification letters and then being in breach of the Code. The code needs to cover how Ofcom would handle such a situation.