

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title: Online Infringement of Copyright and the Digital Economy Act 2010

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Representing (self or organisation/s): Motion Picture Association

Address (if not received by email):

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Name Chris Marcich

Signed (if hard copy)



MOTION PICTURE ASSOCIATION (MPA)
Response to Consultation on Online Infringement of Copyright
and the Digital Economy Act 2010
Draft Initial Obligations Code
July 2010

MPA comments on the draft initial obligations Code

Background

1. The Motion Picture Association (MPA) welcomes the opportunity to respond to OFCOM's consultation on a draft Code of Practice ("Code") concerning the initial obligations arising from the Digital Economy Act 2010. The MPA is an international trade association that serves the interests of the six major companies that invest in, produce, distribute and market audio-visual content on a global scale: Walt Disney Studios, Twentieth Century Fox Film Corporation, NBC Universal, Sony Pictures, Paramount Pictures and Warner Bros Entertainment.
2. You will know that both the MPA and some of its members are actively engaged in the negotiations towards the satisfactory Code of Practice that the DEA envisages. They will remain so, negotiating in good faith throughout so as to ensure that the policy objective that this process supports can be delivered as quickly and smoothly as possible. That objective is a significant reduction in the volume of online copyright infringement - illegal peer-to-peer file-sharing, streaming and so on.
3. In this submission, we offer a number of detailed responses informed by a general sense of support for the approach OFCOM is taking. We believe the Code being consulted upon to be broadly heading in the right direction and consistent with the spirit of positive cooperation that has characterised our participation in this process for the last five years. We will only raise objections to items in the draft Code where we believe they may jeopardise the efficient delivery of the Government's policy goal.

Guiding principles

4. There are six general principles that underpin our approach to the draft Code, which we believe strike the right balance between the needs of consumers and locking effectiveness into the system.
 - a. **Simplicity** - the Code needs to be as simple as possible and consistent, delivering a workable system that can support the sending out of large volumes of notices by multiple ISPs which are based on Copyright Infringement Reports (CIRs) generated by multiple Copyright Owners for multiple types of content. Simplicity should be reflected at all stages of the process, including in the form and delivery mechanism of CIRs to ISPs. The MPA believes the Advanced Copyright Notice System (currently version 2.0) provides a solution to this issue as well as to a number of other challenges posed by this initiative.
 - b. **Fairness** – the Code needs to be fair for all participants. First, there must be adequate provision made for those who receive notices to appeal - before they are placed on a repeat infringer list and rendered more likely to be the subject of litigation. And second, since an important purpose of notice sending under the DEA is to raise awareness and drive behavioural change among consumers, they must be given time to change their behaviour when in receipt of a notice. At the same time, free passes for those who ignore notices after a reasonable period must not be allowed, as that will risk undermining the entire programme and will quickly become a focus of opponents' comments.
 - c. **Flexibility** – the Code needs to be workable for the broadest range of rights holders and ISPs in a constantly evolving digital and online environment. It needs to provide clarity to all involved now, but also needs to be adaptable to change in broadband and Internet usage. There should, for example, be a straightforward mechanism for ISPs that start outside of the scope of the initial obligations (for example the mobile ISPs) to be brought into that scope.



- d. **Comprehensiveness** – the Code should apply to all of the organisations to which it relates in an even handed way. Since the initial obligations – to forward on notices to consumers and to maintain a repeat infringer database – are placed on ISPs, we argue they should apply to all (or effectively all) ISPs. The exclusion of small ISPs (collectively representing only 5% of broadband customers) is not of itself problematic, but to the extent that they become safe havens for infringers leaving other ISPs, it may become so. This risks distorting the marketplace among ISPs and putting larger, compliant ISPs at a competitive disadvantage.
 - e. **Rigour** – the Code should take account of the thoroughness of Copyright Owners’ (also referred to as rights holders) attempts to establish the accuracy and legitimacy of each Copyright Infringement Report. Detected infringements that cannot verify both the infringing IP address or the unauthorised digital file are discarded by our technology vendors. The evidence we gather of infringement, which may subsequently be used as the basis of a Copyright Owner’s case against a notification appeal, is of the highest standard and carefully developed so as to be of the type required to succeed with a copyright infringement claim in an appeals process or in court. We think that it is important that all participating Copyright Owners are held to a similarly high standard of evidence verification.
 - f. **Clarity** - The tone of notices received by infringing consumers is important, and should clearly convey, in addition to all of the necessary technical information required, the nature of the infringement, the impact of copyright infringement on the creative industries more broadly, the increasing availability of legitimate sources of creative content online, and the potential consequences of ignoring repeated notices. These are complex messages, but the goal of educating consumers into behavioural change requires that they be clearly delivered – and that it is made clear that **all** forms of online infringement are harmful.
5. We believe our detailed answers to the relevant questions in the OFCOM consultation document reflect these principles. We look forward to remaining engaged with the OFCOM process and to discussing directly with you and other stakeholders our detailed thinking on these matters.

Contact details

If you require clarification or further information on anything contained in this submission, please contact:

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Consultation document questions

In this section, we respond to specific questions in the consultation using OFCOM's numeration. Where the answers are short, they should be read in conjunction with the submissions of the Alliance Against IP Theft and the Creative Coalition Campaign, both organisations of which the MPA is a member.

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.

The MPA has a number of concerns regarding the obligations for Copyright Owners as set out in Section 124 of the 2003 Act.

We have serious concerns regarding the draft order in relation to the nature and apportionment of costs which we consider not to be efficient or equitable. This includes the proposal regarding financing of subscriber appeals, particularly when joined-up with the open-ended scope for appeals proposed by OFCOM.

We have submitted detailed comments on the issue of costs to the recent BIS consultation on this issue. The MPA remains engaged in the debate about costs with Ministers and officials at DCMS and BIS, and looks forward to final decisions being made once OFCOM's current attempts to accurately gauge real ISP expenditure (as well as OFCOM's own costs) have been completed.

With regard to the estimate of CIRs, as we have explained in our conversations with OFCOM officials previously, we are unable to provide a precise assessment of these numbers until we have a clearer sense of the costs involved in the system and therefore the likely flat fee per notice (should the Government remain committed to that policy model).

That said, you will know that, for the purposes of assisting NERA with their report on likely ISP costs in 2009, a ballpark figure of 200,000 notices per week for all of the MPA's members was given. This reflects only a portion of current levels of infringing activity online detected by our technology vendors against a specific set of major content items. Of course the actual number of CIRs sent to ISPs under the emerging system will depend on the fee per notice (if that is the model system adopted). However we want to emphasise that, if that fee is too high, it could result in a more limited number of CIRs being sent, and as such, threaten to undermine the efficiency of the system as a whole and make achievement of the Government's policy objective less likely. This is true for MPA members and also for other (especially smaller) rights holders.

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 MPA understands why OFCOM has floated a two month lead time for the notification period. However, although a two month period may be appropriate for *initial* inclusion in the system, we believe this could be reduced to just one month after this point as the system will be up and running and we would assume therefore that it would become easier for ISPs to prepare for additional numbers of CIRs. Also we think that it is important that ISPs are incentivised to implement robust systems infrastructure at the inception of the programme - which ensures that it is not overly sensitive to increases and (eventually) decreases in notice volumes.

It may prove more difficult for some, particularly smaller, Copyright Owners to participate in the process from the start due to the level of cost involved. They may, however, wish to enter the system during the first year of the notification period. We therefore propose that new Copyright Owners should be allowed to enter the system every quarter at an agreed time and date and would need to provide one month's notice to ISPs of the estimated number of CIRs they expect to generate. Allowing for greater flexibility in this regard would better reflect the business model of smaller rights holders and will help ensure that the Code is workable for the broadest range of Copyright Owners.

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?

The MPA broadly agrees with OFCOM's approach to the application of the Code to ISPs. We understand that including all ISPs within the scope of the process from the start would not be practical and therefore understand OFCOM's suggestion that mobile providers and fixed line with fewer than 400,000 subscribers should not be included in the first instance. Moving forward, an approach that considers the prevalence of infringement rather than simply on customer numbers means that ISPs serving relatively small groups of serious infringers would not remain out of scope for long.

We are concerned that, if some ISPs sit outside the scope of the Code, some subscribers engaged in online copyright infringement will simply switch providers for their broadband and move to a smaller ISP or other "out of scope" ISPs in order to avoid being caught. Indeed, Talk Talk's head of regulatory affairs, Andrew Heaney, reflected this concern in recent public statements on the Code, stating, 'It means we could have huge swathes of customers moving to smaller ISPs to avoid detection'.

In the interests of the comprehensiveness principle set out above, there needs to be far greater clarity on the following issues to help prevent this migration or to deal with the issue should it arise.

- We recommend including the criteria referred to in paras 3.17-3.18 of the consultation document in the Code itself. It should also include a specification that OFCOM should assess the prevalence of online copyright infringement among customers of out-of-scope ISPs and the rate at which that prevalence increases – as well as considering both initial and changing subscriber numbers. If excluded ISPs become piracy 'havens' and cannot swiftly be brought within scope of the initial

obligations, a serious regulatory failure will have occurred.

- In that respect, the MPA recommends that clarity is provided on how quickly OFCOM can bring excluded providers within the scope of the Code once they cross an agreed infringement prevalence threshold. We suggest that OFCOM should be able to extend the Code to these ISPs immediately to ensure that piracy 'havens' do not emerge.

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

See answer to Question 3.3

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?

The MPA believes that the definition of an ISP in the draft Code is currently too narrow and should state explicitly that "virtual" ISPs are covered by the obligations. Virtual ISPs ("virtual ISPs") are those, such as the Post Office, that provide an Internet service to subscribers, but which also rely on another ISP's ("infrastructure ISP") network infrastructure for this purpose.

We understand from our conversations with OFCOM that infrastructure ISPs already have arrangements in place that allow for the identification of customers of virtual ISPs and that these arrangements could be used for the purposes of providing notices to be sent by virtual ISPs to their infringing customers.

Since comprehensiveness is an important principle underpinning the Code - and the MPA believes that these arrangements and the obligations associated with them, should be set out clearly in the Code. Otherwise, there is a risk that CIRs sent to the infrastructure ISP in charge of the relevant IP address may end up not being processed and forwarded by the "downstream" retail ISP, that some infringers may end up not receiving the notice or notices they are due and/or that the repeat infringer list maintained by the retail/infrastructure ISP would be incomplete. Also, if it became known that it would be possible to avoid receiving notices by moving to a "whiteboard/virtual" ISP, this could be another cause of subscriber migration to "safe havens".

In addition, it should be noted at this point that despite using the short hand term 'infringer' at certain points in our submission, we do in fact recognise that the system is designed to identify internet accounts that are being used for infringing activity and for those who are responsible for those internet accounts to be notified. This point is relevant throughout our response but will be particularly relevant to the question of appeals and associated costs.



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 support the definition of Subscriber and Communications Providers - as entities covered by this definition prevent subscribers from avoiding the Code by offering their access service to others. This language should be retained.

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 MPA is happy with the proposed content of the Copyright Infringement Reports as set out in the draft Code. All of the required information is already gathered by our vendors during the scanning process.

It is the MPA's view (and we believe it is shared by other Copyright Owners) that it is imperative that CIRs forwarded to ISPs are based on verified infringements and that ISPs can automate and streamline their systems for accepting and processing those CIRs to as great an extent as possible. For this to happen, the MPA recommends that specific standards of verification of infringement are implemented and that a specific and consistent "format" is used to constitute and communicate those CIRs to (and response message from) the ISPs (and vendors).

Accordingly the MPA proposes that specific standards for the identification and verification of infringements of the MPA members' content and the resulting content and format of CIRs be adopted as part of the Code and that these standards are adopted by all rights holders and ISPs.

Standards of identification and verification of infringement:

The MPA advocates a consistent model of evidence gathering and verification as specified in the ACNS 2.0 and the associated evidence standards.

Standard format of communicating CIRs: ACNS 2.0

It is important that as few 'formats' as possible remain in place in communication between the relevant stakeholders. The ideal scenario would be for a single "gold standard" system to be adopted by other Copyright Owners (and ISPs), driving cost efficiency and simplicity.

As you will know from our recent discussions with OFCOM officials, a mechanism to achieve this already exists in the Advanced Copyright Notice System (ACNS) (currently version 2.0). The ACNS system has been in use since 2003 and is an open source, royalty free system that universities, ISPs, or any entity that handles large volumes of copyright notices can implement on their network to increase efficiency. The ACNS system has been successfully deployed throughout the world (including in the United States and Asia).

To ensure that the efforts of the MPA-contracted scanning vendors are consistent and that the resulting CIRs are presented to ISPs in the consistent format and manner that will facilitate automation and processing of large volumes of CIRs, the MPA proposes compliance with the current release (2.0) of the



ACNS standard (and also vendor compliance with the associated identification and verification standards as well as with required metadata requirements).

The ACNS and other associated standards are available for review at (www.movieclabs.com/ACNS) and, in addition to the standards themselves and the associated metadata specifications, example XML may be reviewed and adopted by rights holders, scanning vendors and ISPs. In addition the MPA is willing and able to provide ISPs with sample web services which are helpful in facilitating automation of the processes for accepting and processing CIRs (as well as processes for formulating and communicating the ACNS response messages).

Please note also that the current versions of these standards meet the requirements of the DEA with regard to format and processing of CIRs as well as for organising data required to generate and communicate the Copyright Infringement lists.

While, today, these standards and best practices are utilised by and required of MPA-contracted vendors, representatives of MPA have been meeting with ISPs which are likely to be required to participate in the first phase of implementation of the DEA and also with other Copyright Owners (including BPI and PACT as well as a number of smaller rights holders). Following these discussions, our strong recommendation is that OFCOM considers requiring that all Copyright Owners and ISPs adopt the ACNS 2.0 standard (and the applicable standards and best practices for identification and verification of infringements). By doing so:

- ISPs will be assured of consistent format and valid CIR data from all Copyright Owners and it would be easier for ISPs to automate their required responses.
- It will be possible to architect a technical solution which would limit the number of CIR feeds to ISPs (and resulting responses from ISPs) to one (or very few).
- CIRs received by ISPs would incorporate evidence summaries (which will be supplemented by full evidence packages to be produced if and when needed) which would give ISPs full confidence in the process that the applicable rights holder had used to confirm an infringement.
- It will be possible to communicate to the public at large (including recipients of notifications from ISPs following their receipt of CIRs) that these are supported by comprehensive evidence and have been generated using a robust and consistent infrastructure and process.
- It will be possible to audit efficiently the activities of scanning vendors, ISPs, rights holders and other relevant parties to ensure compliance and consistency.

In short, since the ACNS system is already designed and proven to work, adopting this approach would save Copyright Owners and ISPs time and money in developing new individual systems.

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.

The MPA supports OFCOM's proposal to use a quality assurance approach to ensure that the evidence gathering process is robust and stands up to scrutiny. The MPA is satisfied that its current evidence gathering process is "gold standard" and believes that ensuring other rights holders use the same



standard of process will ensure the whole system is robust. In our view, Quality Assurance Reports should have a role to play in providing evidential support for Copyright Owners' position at the appeals stage. We would like to see the Code state explicitly that Quality Assurance Reports ("QARs") will create a rebuttable presumption that the evidence from Copyright Owners is correct.

The note of caution we strike, however, is that these reports must not be required to solicit information that could be commercially confidential. This applies also to the application of quality assurance requirements to ISPs.

We understand from discussions with OFCOM that they believe Section 393 of the Communications Act would prevent the disclosure of commercially confidential information submitted as part of the process of producing Quality Assurance Reports.

However, the MPA has received independent legal advice that there remains a risk of such information being disclosed despite the provisions of Section 393. We would welcome clarification and a binding commitment from OFCOM that any information submitted by Copyright Owners or ISPs, including information in relation to Quality Assurance Reports, will not be disclosed to third parties.

The MPA believes that valid grounds for renewal of the Quality Assurance Report exist when significant changes are made to the process that the Report describes or validates. Therefore it is unnecessary to have an annual renewal process in place as proposed in the consultation document; rather, renewal should only take place when there are material changes to the individual entity's process.

Section 3.9 of the draft Code stipulates that Copyright Owners are obliged to keep evidence relating to each CIR, which could then be relied on in an appeal (which the MPA would of course expect to do via the process described above). However, the same section also makes provision for the subscriber to have access to that evidence on request within 10 working days. The MPA believes that this option should only be available to subscribers in the event of an appeal being filed to ensure that the system is not flooded with requests for evidence as a matter of course. We would like to see the language in 3.9 redrafted to reflect this.

In addition, under Section 4.4 of the draft Code OFCOM has used the word 'details' regarding the information to be submitted as part of the quality assurance report. Due to our concerns regarding the disclosure of commercially confidential information we suggest the word 'outline' is used in its place.

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 MPA agrees with the requirement to send CIRs within 10 working days of the evidence being gathered. In doing so, we do note however that the Act specifies that the requirement to send CIRs should stand at one month- and therefore observe that shortening this to 10 working days may, for some rights holders, risk excluding certain valid, but not timely, CIRs from the process.

That said, for the reasons set out below, we believe that a processing period of 10 working days is in the main achievable and in the interests of all parties. The notice-sending process as envisaged by the DEA has behavioural change as its goal. To achieve this, consumers must be given adequate time to change their behaviour after receiving a notice. Note that it is important that infringers receive notification of their offence as soon as possible after the infringement has taken place to maximise the impact of the notification by ensuring they remember and are informed of the consequences of what they were doing (and that this is a reason why the MPA's members would advocate electronic, and therefore closer to "real time" delivery of notices).

As the system will be automated, it is the intention of the MPA and its members to send CIRs much sooner than 10 working days after the infringement took place, within hours or less of the infringement taking place wherever possible. We understand, though, that other rights holders may operate different systems and may require more time to produce, verify and send their CIRs to ISPs. Hence our support for the 10 day time limit as striking an appropriate balance.

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.

The MPA is concerned that OFCOM's proposals for the treatment of invalid CIRs as currently drafted are too broad and could be used by ISPs to refuse CIRs for spurious reasons. We have the following specific concerns regarding some of the raisable objections in the draft Code:

- The MPA believes it should be incumbent on an ISP to notify a Copyright Owner as soon as possible, and certainly sooner than 10 working days, if there is an issue relating to the validity of a particular CIR. As currently drafted, Section 4.2 allows for up to 10 working days, which we believe could significantly hamper the effectiveness of the notice sending process. We would like to see this reduced to a shorter a time period and MPA members believe that all participating rights holders should be able to accelerate (for example to 2 business days) the CIR-generation and verification processes. The MPA would also like to seek clarity on when section 4.2.1 of the Code would apply above and beyond the grounds under 4.3.
- We are concerned that, in the case that CIRs may be rejected if the IP address was not used by one of the ISPs subscribers at the relevant time, it is important to ensure that notifications destined for virtual ISPs (such as the Post Office who use BT lines) are passed on by the infrastructure ISP rather than being disregarded as they were not a (probably commercial/business) subscriber of the infrastructure ISP at the time of the infringement.
- In addition, if a CIR refers to an account that is no longer active, appropriate structures must be put in place to prevent infringers simply moving between networks.
- The MPA believes that it would not be the case that a Qualifying ISP would not hold an electronic or postal address for its customer. Even virtual ISPs request this information in the sign up process and therefore we suggest this example (and potential exemption) is removed from the Code.



- To support this under the EU Data Retention Directive, ISPs are required to keep customer addresses for up to a year. This would ensure they have appropriate contact details with which to forward the notification (which under this Code would be at most ten days old).
- The MPA is particularly concerned with the 'catch-all' final bullet point under Section 4.3 of the draft Code, which would give an ISP an open-ended power to reject a CIR for 'some other reason in the reasonable opinion of the Qualifying ISP'. Such a power would significantly threaten the workability of the Code, opening the system up to spurious rejection on unjustified grounds. It is the MPA's view that the list of criteria for rejection of a CIR should be tightly defined to avoid spurious rejection and ensure greater certainty for Copyright Owners. This final bullet point should, accordingly, be removed from the Code. In fact a simple process would be, as suggested above, to mandate the use of the ACNS 2.0 response messages. This would provide an efficient way for ISPs to return response messages via an automated process and would also limit any messages related to invalid CIRs to a short list of prescribed, acceptable reasons.

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.

The MPA agrees with OFCOM's proposal to use a quality assurance approach to address accuracy and robustness of subscriber identification. In the same way that the quality assurance approach suggested addresses the evidence gathering process, it is appropriate to apply the same process to subscriber identification to ensure the entire regime is robust and stands up to scrutiny.

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.

The MPA agrees that a time-based approach to the notification process is sensible. However, we would like to see a shorter "grace period" before any applicable second and third notifications are forwarded to an ISP's subscriber.

We agree that the first notification should be sent following receipt of the first CIR for that Internet account. However, we believe that the second notification should be triggered by the first CIR received on or after a maximum of 21 calendar days from the date of the first notification (giving the subscriber a full 3 calendar weeks to take steps to avoid receiving further notifications). The third notification, (which, given our response to Q.6.1, will in effect be the first update notification), if necessary, should then be triggered by the first CIR received on or after a maximum of 14 calendar days from the date of the second notification. Also we believe that both the second and third notifications should include information about **all** of the infringements which were detected for the subscriber's account during the interim "grace period".



It is our belief that, in order for consumer education and behavioural change to be effective, the system must operate in as timely manner as possible so that consumers are able to easily identify the infringement and take necessary steps immediately.

We also do not agree with OFCOM's recommendation that subscribers on the Copyright infringement list should only receive further notifications once every 3 months. Given they have demonstrated that they are repeat infringers it is our belief that these subscribers should receive notifications more frequently – at a minimum every month – and that, again, these notifications should include information about **all** of the infringements detected for the subscriber account during the interim period.

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 MPA broadly agrees with the suggested requirements in the draft Code for the content of the notifications but takes issue with the word 'share' in the second paragraph. Rather we believe that 'make available' is preferable terminology for this purpose. On the issue of whether ISP to subscriber notifications should be in a standard format, we understand that the ISPs would like to have some flexibility to decide on how they communicate with their own customers as long as they contain the required information. However, it may be helpful for OFCOM to produce guideline notice forms to assist ISPs with this. Indeed, there is a risk that some ISPs that opposed the DEA during its parliamentary passage and are seeking to challenge it now may seek to 'disown' the notice, through the use of unhelpful language in the customer communication. This is not acceptable and should be prohibited in the Code.

It is important, however, that OFCOM ensures the notifications are not used by ISPs to send other general (ie. marketing) materials to their customers - as this would distract from the core message in the notification and undermine the initial obligations process.

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 MPA has concerns with the threshold OFCOM is proposing for the Copyright infringer list ("repeat infringer list"). It is our view that the anonymised details of the infringer account should be included on a list at the point that the second notification is triggered against them, not waiting until the third notification is forwarded as suggested in the draft Code. Indeed, it is on second notification that an infringer becomes a 'repeat infringer' not the third. Including subscribers on the list after their second notification will provide Copyright Owners with the necessary information to target effective educational information towards infringers in line with the goal of behavioural change identified in the DEA as the core purpose of notice sending.

We believe also that Copyright Owners should be able to request a copy of the repeat infringer list once every month and not every three months as proposed in the draft Code. At the beginning of the production implementation we do not know (and find it challenging to estimate) how many subscribers will appear on the infringement list or how quickly they will appear. So it would help Copyright Owners in fulfilling our own obligations under the Act to bring legal actions against the most egregious repeat infringers if we were able to analyse the list more regularly than once every three months. Given that the obligation to pursue legal action is one that Copyright Owners are only undertaking to fulfill our duties under the Act, we would welcome efforts to make this process as straightforward as possible. We also do not consider that providing more timely data would place any significant additional burden on ISPs particularly if consideration is given to using the standard response messages provided with the ACNS 2.0 message set since this would enable ISPs to automate the process of organising and producing the lists.

With regard to the information included on the repeat infringer list we also believe it is important that information about **all** of the applicable CIRs is detailed against the identifier of each subscriber account on the list. This information will help Copyright Owners to identify the most egregious infringers as we and other organisations consider legal actions. Also, it is possible that two or more Copyright Owners may consider coordinating legal action against repeat infringers - however this would only be possible if they were able to see from the repeat infringer list where CIRs from different Copyright Owners had been detailed against the same subscriber account (designated via its anonymised subscriber ID).

This process would also help subscribers because it should mean they are not sued separately by multiple Copyright Owners. It would also help to cut down on the administration and costs for ISPs as they would not have to filter the lists before providing them to Copyright Owners. Again, this process can be simplified if ISPs are required to adopt and use the ACNS 2.0 message set.

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 have a number of concerns relating to subscriber appeals in the draft Code. Firstly, the process as outlined could serve as an invitation to spurious and vexatious appeals. We also have serious concerns about the potential costs of an appeals mechanism. At a minimum, in accordance with S15 (2)(c) of the Act, the appeals body must be directed to establish a reasonable fee for subscribers filing appeals – and to consider the manner in which other costs are apportioned (for example considering the parties which prevailed in the appeal).

We understand from our discussions with OFCOM that the language relating to appeals here is based on language in the Act, specifically section 13 (5), relating to an appeal 'on any grounds'.

The MPA's view is that a reasonable interpretation of 'on any grounds' in this section of the Act is that it clearly relates to the two immediately preceding sub-clauses, 13 (3) and 13 (4) that is to say, any of the grounds that these two sub-clauses identify. Those grounds, to paraphrase the Act, are: if the apparent infringement was not an infringement of copyright; if the infringement report does not relate to the



subscriber's IP address at the time; and finally, if the copyright owner or the ISP has contravened a Code obligation in sending the notice.

Consistent with the principles of clarity and fairness that we set out above, the system needs to have a high degree of certainty. An exhaustive list is therefore required to comply with these principles. Accordingly, the MPA strongly rejects the suggestion that the catch-all will stand as part of the final Code.

More broadly the MPA believes that OFCOM should set a clear remit and rules of the Appeals Body rather than leaving the Appeals Body unguided. Copyright Owners and ISPs need a degree of certainty in relation to how the appeals system will operate and this position means that the grounds for appeal and the appeals process itself should be as defined as possible. Specifically:

- We suggest that more detail should be provided with regards to the make up of the Appeals Body and the experience/qualifications of those making decisions. These are important in terms of the functionality of the Appeals Body and the cost.
- It is also vital that, in the same way there are time limits for issuing CIRs and sending notifications, there is a maximum time limit for appeals to be filed and handled.
- There needs to be clarity on how Appeals Body decisions might be reviewed, whether this be that they are referred back to OFCOM or to a more formal Judicial Review process.

The MPA would like to offer the additional points below regarding the remit and powers afforded the Appeals Body in the draft Code are:

- Sections 7.14 and 7.15 appear to only provide Copyright Owners with the opportunity to submit evidence if **invited** to do so by the Appeals Body. The MPA believes that the Code should instead set out a definite opportunity for Copyright Owners to submit evidence - and in supplying that evidence, we should be entitled to rely on material gathered in our evidence gathering processes and on our Quality Assurance Reports.
- With regards to additional representations, if the Appeals Body decides that it will not take into account the evidence provided by a Copyright Owner, the reasons for that decision should be stated clearly so that Copyright Owners have the opportunity to challenge the decision.
- We agree that oral submissions and hearings would be held in determining a Subscriber Appeal only in exceptional circumstances.
- We believe that Section 7.21 results in a loophole through which subscribers who, for example, have not taken steps to secure their WiFi networks can ignore the notice sending regime. The purpose of notice sending is to educate consumers, including in relation to technical measures they can take to avoid their account being used for infringing activity. However a lack of knowledge on the very issues which the notifications are intended to educate on should not be a



reason for valid notifications (or contributing CIRs) to be overturned. We also note that this power for the Appeals Body does not appear to be required under Section 124K of the DEA.

- The Code should provide clarity on how decisions made by the Appeals Body might be reviewed, whether through reference back to OFCOM, judicial review, or some other mechanism.
- Section 7.24 purports to apply to all grounds for appeal listed under section 7.12. However, under the corresponding section of the DEA (Section 124K(6)) this provision should only apply to the grounds under Section 7.12.1 and Section 7.12.2.
- With regards to Section 7.29, the draft Code states that the Copyright Owner or ISP should pay a sum to the Subscriber if any of the grounds of appeal under 7.12 are upheld but the Act only makes provision for compensation in relation to 7.12.1 or 7.12.2. We believe that OFCOM should give consideration to a cap on compensation and a 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.

The MPA believes that the timeframes for any person subject to a Notice of Enforcement or a Draft Enforcement Notification to be too short as currently drafted, and believes that the enforcement process would be more manageable for all parties involved without jeopardising its effectiveness if these timings were extended to 10 and 15 working days respectively.

Additionally, with respect to the dispute resolution process, we feel that the timeframes are again too short, and should be extended to 10 working days for 9.15 of the Code, and 15 working days for 9.17 of the Code.

The MPA believes that the provisions regarding appropriate enforcement actions are too broad as currently drafted. Specifically, it is our view that granting OFCOM the power to impose "such conditions as OFCOM considers appropriate" does not reflect the provisions in the Act and could be used by OFCOM to go beyond its remit. This language is also reflected in the dispute resolution powers, which again the MPA rejects and would like to see removed from the draft Code.

In relation to the issuing of a direction to a Copyright Owner, to indemnify an ISP for any loss resulting from failure to comply with the Code we believe that the Code should set out that Copyright Owners are expected to indemnify only direct loss.

With regards to penalties, we would impress upon OFCOM the points set out under Sections 124L(2), (3)(b) and (3)(c) of the Act, which state that any financial penalty should be reasonable and proportionate.