

Forename:

Name

Surname:

Withheld 8

Representing:

Self

Organisation (if applicable):

What do you want Ofcom to keep confidential?:

Keep name confidential

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

Ofcom may publish a response summary:

Yes

I confirm that I have read the declaration:

Yes

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

You may publish my response on receipt

Additional comments:

Question 3.1: Do you agree that Copyright Owners should only be able to take advantage of the online copyright infringement procedures set out in the DEA and the Code where they have met their obligations under the Secretary of State's Order under section 124 of the 2003 Act? Please provide supporting arguments.:

Yes.

However there is no method in place to stop mass raising of CRI's by individuals (falsely and maliciously) to result in copyright infringement notices being sent to a victim. This could be utilised for uses such as public protests and furthering of personal conflicts.

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.:

No.

It is reasonable to expect that ISP's will be receiving a substantial quantity of CIR estimates from a wide range of copyright holders once the legislation comes into force, and will need to arrange for appropriate staff provisions based on the number of CIR estimates received, to allow them to cope with the CIR's once received. Without advance knowledge of the number of CIR's to process only a crude estimate of numbers will be possible, therefore the CIR lead time is essential for allowing good ISP preparation. A two month period will result in a very short period for ISP's to begin recruiting or retraining potentially significant numbers of personnel to deal with the required volume of correspondence. Therefore the lead time should be extended by at least a further month.

It is unclear what the intention is for copyright holders who have not sent an estimate notice before the start of the financial year period; can they add a new estimate then start raising CIR's two months later, or must they await the next financial year before raising CIR's?

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?:

No.

The proposal does not cover the potential for an ISP to divide itself into separate legal entities with less than 400,000 subscribers each, or with less than a certain number of CIR's per legal entity.

The point at which an ISP ceases to be covered or obliged to maintain staffing for CIR response and management is not stated, implying that it will not be possible for an ISP to remove this obligation even when meeting the legislative duties fully once it has previously fallen under the legislative scope.

In regards to the statement made in 3.15.3, the use of such data by Ofcom in setting legislation without open publication, peer review and acceptance of its accuracy and truthfulness is highly questionable.

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

No.

Paragraph 1.6 and 3.6 indicates that the scope can be expanded to smaller ISP's where Ofcom consider "infringement...a significant issue". The criteria of "significant issue" is impractical and allows arbitrary expansion of scope by Ofcom. The current suggested criteria of number of CRI's received in a period (3.6) misses the fact that smaller and new ISP's will not be covered by the obligations set here, therefore should not be receiving CRI's in this period to measure the volume of. The suggestion in 3.17 that "potential CRI" volumes as indicated by copyright holders is unenforceable as stated; it relies on private unverified data from the copyright holders on how many such infringements they have identified, assumes that all or most copyright holders will hold records of "potential" CRI's, and that all or most copyright holders will take the effort to communicate such information to Ofcom as the basis for such an assessment.

There appears to be no basis for ISP appeal or response to inclusion.

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 current approach is reasonable.

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?:

No specific objection to the content, however it should be stated what criteria Ofcom consider as indicative of a wireless network to be "unprotected" for clarity.

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?:

No.

The means by which the copyright holder has come to belief that an infringement has occurred should be included.

Where the copyright holders means of detecting infringement involves a third parties evidence then this third party should also be identified.

Where a technological means has been used to identify an infringement then this method should be stated, including any software used, its version identifier and the operator of this software (if not the copyright holder itself).

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 current proposal is subject to error, as it assumes that a copyright holder will not change their practices, devices and software on a faster than annual basis. Unlike the billing and TV transmission issues referred to as examples in 4.6, the issue being legislated on here is subject to rapid technological change by both infringers and copyright holders in a "cat and mouse" type situation.

A superior approach would be to require a live document approach by which any change in the methodology used would be advised at the time of the change along with the basis for this change. This could then be combined with a more detailed CRI (as suggested in my response to question 4.1) to better identify if a copyright holders methodology is continuing to meet quality standards.

Further to this, Ofcom should set a quality standard for any method to be used for the creation of CRI's, requiring an identifiable repeatability and accuracy in a controlled environment test. This should then be used as the basis of the certification, by audit by independent, Ofcom-assessed third parties.

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?:

Yes.

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, however I note that the legislation makes no provision for the use of dynamic IP address allocation by ISPs should such a system begin to be implemented (giving each subscriber a different IP address on each connection). This would permit an easy bypass of the legislation as virtually all subscribers would be covered under paragraph 5.3, "an IP address has been reallocated from one subscriber to another at or too near the time identified to enable robust matching".

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.:

Yes, except for one comment.

Paragraph 5.7 "We are also proposing that ISPs must act on an Ofcom direction to take specified steps in relation to the maintenance or enhancement of the evidence gathering procedures." would provide Ofcom with a somewhat excessively broad scope of oversight. This could be improved by the addition of a clause at the end of this sentence: "where the ISP evidence gathering procedures do not currently adequately meet their obligations under the Act" or similar.

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. :

No.

There is no protection against nuisance CRI's can be raised against an individual using just their IP address (which is publicly available on the internet and so easily acquired by another) by a accuser acting as a copyright holder. They could choose to harass by making a single CRI falsely resulting in an immediate letter from the ISP to an unsuspecting subscriber, unlikely to be questioned by the ISP or Ofcom.

This could be protected by requiring at least two separate copyright holders separate CIRs before the first notification.

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. All proposed information under paragraphs 5.16 to 5.19 should also be mandatory for inclusion as it is essential for understanding the scope of the CIR and the potential legal implications for a subscriber who receives it.

In addition the methodology by which the infringement was identified, including a detailed identification of technological means used (software, version identifier, and software vendor) and any third parties involved in its gathering.

Question 6.1: Do you agree with the threshold we are proposing? Do you agree with the frequency with which Copyright Owners may make requests? If not, please provide reasons. If you favour an alternative approach, please provide supporting evidence for that approach. :

No.

The same issued raised for question 5.3 of nuisance accusations also exists for the threshold for addition to an infringement list and the potential disclosure of personal

details. If an individual or group wishes to locate a person via their IP address then the current legislation allows this via making of false copyright violation accusations to allow a court order to be obtained subsequently. This could be abused in a number of ways, i.e. physically locating vulnerable individuals such as children or refugees. Although not likely to occur with any great frequency this should be protected against.

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.:

Yes.

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.:

Yes.