



**National Campaign for the Arts (NCA)**  
**Response to Ofcom consultation on Online Infringement of Copyright and the**  
**Digital Economy Act 2010 – Draft Initial Obligations Code**

**July 2010**

**1. INTRODUCTION**

- 1.1 The NCA is the UK's only independent lobbying organisation representing all the arts. It provides a voice for the arts world in all its diversity. It seeks to safeguard, promote and develop the arts and win public and political recognition for the importance of the arts as a key element in our national culture. This response has been informed by input from our members.
- 1.2 The NCA believes fundamentally in the right of artists to be recognised as creators and that artists have the right to dispose of their intellectual property as they see fit.
- 1.3 The NCA believes that it is of paramount importance that artists are, and continue to be, able to secure income from artistic output. We also believe that income derived from the sale of popular content has been critical in supporting emerging artists and the production of minority interest content and it is vital that this support continues.
- 1.4 The NCA believes that safeguards should exist to protect artists against copyright theft and that peer-to-peer (p2p) downloading, represents the latest in a long series of threats to copyright protection. The NCA therefore welcomes Ofcom's publication of the code inline with its duties under the Digital Economy Act 2010 (DEA).
- 1.5 The NCA, however, also believes that it is important to ensure maximum transparency in any actions to protect copyright. If transparency and fairness are not hard wired into the regulations, copyright owners face a potential backlash of negative public opinion against their legitimate action to protect their intellectual property. It is also important that public confidence in the use of the internet is not damaged as this would in turn damage the ability of artists and rights holders to exploit this technology for the legitimate distribution of their intellectual property.

**2. APPLICATION OF THE CODE**

- 2.1 In response to question 3.1, the NCA supports the ability of rights holders to request the details of rights violators from ISPs under the DEA and the Code, and we support the proposal that rights holders would trigger the ISP to notify customers who were violating intellectual property rules that their actions were unlawful. We do not believe that the ability to trigger ISP action should be extended to anyone other than rights holders or their designated agents.



- 2.2 In response to question 3.2, the NCA agrees that two months is an appropriate lead time for the purposes of planning ISP and Copyright Owner activity in a given notification process. The NCA has always held the view that there should be a time limit from the date that a specific infringement is made until a request for action can be made to the ISP. This should be no longer than six months and ideally would take place within one to three months of the infringement taking place; the current proposal for two months is therefore adequate in our opinion. This would ensure that the offence for which the violator is being warned took place within two months of the infringement taking place, thereby ensuring that the violator could link their illegal behaviour with the warning they were receiving. Any longer risks the violator not necessarily connecting the offence and the sanction and therefore the sanction would likely have less effect on modifying behaviour.
- 2.3 In response to questions 3.3, the NCA agrees with Ofcom's approach to the application of the Code to ISPs.
- 2.4 In response to questions 3.4 and 3.5, the NCA agrees with the proposed criteria for the first notification period under the Code. However, the NCA is concerned that only fixed-line ISPs with over 400,000 subscribers are covered by the code. The NCA believes that with mobile phones representing an increased share of internet connections, the Code, in its failure to address such internet users, already creates potential loopholes for serious copyright infringers. The NCA therefore hopes that proposals will be forthcoming to deal with copyright infringement conducted over non fixed line connections.
- 2.5 The NCA agrees with Ofcom's application of the Act to subscribers and communications providers as highlighted in question 3.6.

### **3. COPYRIGHT INFRINGEMENT REPORTS**

- 3.1 As raised in question 4.1, the NCA broadly agrees with the proposed content of a Copyright Infringement Report (CIR).
- 3.2 The NCA has no comments on the proposed details of a quality assurance approach to address the accuracy and robustness of evidence gathering, as raised in question 4.2, believing this to be a discussion for rights holders and ISPs, but agrees that safeguards and guidelines are necessary to ensure that information can be relied upon.
- 3.3 In response to question 4.3, although the NCA believes that Copyright Owners should be required to send CIRs within a set time limit from the date that a specific infringement is made, the NCA believes that the current proposal of 10 working days may not give Copyright Owners sufficient time to respond to each infringement made against them. The NCA therefore proposes that this period be extended to 20 working days.
- 3.4 Given the large amount of data required to produce a Copyright Infringement Report, the NCA also believes that assurances must be made by the regulator that such data will be handled in accordance with the Data Protection Act and further clarity is required as to how long such data will be retained by both ISPs and Copyright Owners.



- 3.4 The NCA also believes that Ofcom must carefully devise, along with Internet Service Providers, an agreed set of standards of proof for internet users accused of breaching copyright regulation. This should be widely publicised and the NCA would recommend that the details of what constitutes illegal behaviour should be advised, prior to the code coming into force, to all customers who will be covered by the regulations.

#### **4. IDENTIFYING SUBSCRIBERS AND MAKING NOTIFICATIONS**

- 4.1 In response to question 5.1, the NCA agrees with Ofcom's proposals for the treatment of invalid CIRs.
- 4.2 The NCA however, also believes that in order to prevent invalid CIRs, the standard of evidence needed to trigger any enforcement procedure (including notifications from ISPs) should be widely publicised by the regulator. Copyright violation is illegal and it is important that the standard by which any sanctions (including notifications from ISPs) are understood well in advance of punitive measure being taken
- 4.3 The NCA has no additional comments to add to question 5.2 other than its comments on question 4.2. (See para 3.2 above)..
- 4.4 Although the NCA broadly agrees with Ofcom's proposals for the notification process, the NCA would also like to stress that it does not believe that the cost of sending these notifications should fall entirely to the Copyright Owners, who are, after all, the ones against whom the offence is being committed. However, we recognise that if a robust defence against piracy is to be mounted in the UK then rights holders will have to foot a proportion of the bill. The exact division of the cost should be agreed between representatives of rights holders, ISPs and the regulator.
- 4.5 In response to question 5.4, there are no additional requirements that we would like to see on the draft code for the content of the notifications.

#### **5. COPYRIGHT INFRINGEMENT LIST**

- 5.1 In response to question 6.1, the NCA agrees with the threshold proposed by Ofcom and the frequency with which Copyright Owners may make requests
- 5.2 The NCA supports the ability of rights holders to request the details of a Copyright Infringement List from ISPs. We do not believe that access to such information should be extended to anyone other than rights holders or their designated agents.
- 5.3 The NCA also believes that such data must be handled in line with the Data Protection Act with ISPs and Copyright Owners required to account for how long infringement lists are retained.

#### **6. SUBSCRIBER APPEALS**



- 6.1 In response to question 7.1, we believe the proposals put forward regarding subscriber appeals to be adequate and appropriate.
- 6.2 In order to avoid mistakenly notifying broadband consumers, the Government and rights holders will also need to launch an information campaign, alerting broadband users to the need for copyright protection and the penalties they can expect for infringement. Ofcom must also make provisions to advise internet users on how they can protect their network from being hijacked.

## **7. ADMINISTRATION, ENFORCEMENT, DISPUTES AND INFORMATION GATHERING**

- 7.1 In response to question 8.1, the NCA believes the proposals put forward regarding administration, enforcement, dispute resolution and information gathering to be adequate and appropriate.

## **8. CONCLUSION**

- 8.1 The NCA is broadly supportive of the contents of the code.
- 8.2 The NCA believes that rights holders should be allowed to enforce their copyright. We further believe in a proportionate response to filesharing, but we do think that there needs to be an ultimate sanction for serial uploaders and that this ultimate sanction should be disconnection from the internet. We would envisage that this ultimate sanction would be used only in a handful of cases and only after due process. Content should be paid for unless the artist(s) authorise the making available of their music to the public at no charge.
- 8.3 The NCA believes that there should be further clarity, guidance, and provisions of education around the law so that the public better understands the implications of the code.

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