Title:

Mr

Forename:

Andrew

Surname:

Norton

Representing:

Organisation

Organisation (if applicable):

Norton P2P Research

What do you want Ofcom to keep confidential?:

Keep nothing 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:

All my research on the topic has found that the Digital Economy Act itself is not needed. In fact it would act contrary to it's intended purposes, as IPRED in Sweden, and HADOPI in France have proved.

To quote a famous film, "The more you tighten your grip, Tarkin, the more star systems will slip through your fingers"

It does not help that the majority of the (incredibly short) debate prior to the bill consisted mainly of heavily twisted facts, or outright lies. I am a strong believer in fact-based government, which means I can find little to support in this bill, and no evidence for the claims or assertions made in support of it.

Speaking specifically to the consultation, I've noticed that it was prematurely closed, and that the method of participation, while online responses are helpful, that you only accept files in one specific proprietary format (Microsoft word) is not helpful, even allowing the worldwide standard of PDFs would have been a bonus. Every other government department I have submitted consultation responses for, around the world, has not required a MS Word document only.

Additionally, despite an expressed desire for evidence, the consultation, and indeed the act itself has deliberately ignored all actual evidence presented which negates the claims and stated goals of the act. As a counterpoint, nothing that can charitably called Evidence has been submitted to support the point, only conjecture, speculation and cherry-picked data which does not stand up to rigorous examination. This is, however, considered as evidence of the highest quality (such as in section 3.11)

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.:

Broadly, yes.
There are issues,however where this can exclude small copyright owners (over 99% of copyrights are owned by individuals, or organisations of less than 5 people) in favour of large corporations who control a small fraction of copyrights, and unfairly pervert copyright law to their benefit, at the expense of the whole.

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.:

I am not an ISP and so do not know the intricacies of their business. However, I am considered an expert in peer-to-peer systems, and copyright enforcement procedures, and can easily set up systems that can render thousands, or tens of thousands of infringement notices per hour. I can therefore expect the planned number to be in the hundreds of thousands, which can then be 'bartered down'.

again, the method fails the practicalities and discriminates small holders. It works fine for large companies, that can afford to contract out (the typical rates in 2008 were starting at $50,000/week for a monitoring company, based on the leaked MediaDefender emails) but not for small copyright holders that can not, and who are too busy undertaking their actual work to plan ahead.

If, however, the requirement is removed, then random 'bucketloads' of notifications can be dumped on ISPs, swamping them and making them unable to do any core business.

As with all aspects of the DEAct, it places a higher concern on an unproven claim of loss by the copyright-holding industries, against a clearly provable and observable loss by companies essential for the UK's basic infrastructure, and technological growth.

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?:

Negative. It is predicated on 'evidence' from copyright industries (as 3.15.3 states, for instance) As noted in the initial comments, such evidence is usually anything but, being conjecture, estimations or supposition, or using assumptions that have little basis to reality. As such any approach based on these will be invalid, and instead a new approach should be formulated, based on verifiable, INDEPENDENT data.

My alternative suggestion would be one that increases the revenues of both the ISP industry, and those of the copyright holders, which uses as it's basis historical parallels, and raw data from the industries themselves.
The suggestion is to DO NOTHING. Despite claims that industries are suffering, the figures from the industries themselves show that as online copyright infringement has become more pervasive over the last 11 years, sales have significantly increased. The UK Music industry sold more digital singles in 2008, that it sold in 1998 (by about 15%) and there were still significant physical singles sales in 2008 on top of it. There was a similar story in album sales. Were the claims about copyright infringement and the damages caused true, this situation would be reversed; especially since we're in a recession, and disposable spending is greatly reduced amongst the populace.

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?:

I do not agree.

An additional criteria should be added, in that first an independently verifiable loss or economic harm should be proven first. All the evidence suggests this would be impossible, however, since no study that has looked at economic impact (except those commissioned by the industries themselves, 'strangely') has found any loss, but instead found either no change, or a net positive gain for copyright holders, as a result of P2P copyright infringement.

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?:

I do not.
Specifically, I take issue with 3.22.
Wifi is not inherently secureable. As with all password-based systems, it's only secure until it is not. Many of the wifi security standards, especially the older ones which may be required to support old equipment, provide little or no actual security, and can be broken in minutes. Without either an intentional search, or some other indication that this has happened, there is no way to tell if a nominally secured wifi location has no actual security. This section typifies policy made about technology, by those with little or no understanding of it.

It again seeks to materially disadvantage huge swathes of the populace, most of whom are copyright holders themselves, in order to benefit a tiny group of copyright holders whose peril has never been proven.

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?:

As noted above, the majority of methods to secure are functionally inadequate, especially if any older equipment is to be used. Those that provide access as an intermediary are providers, not subscribers, in the same way that large ISPs are. In both cases they buy connections on larger networks and pass on data running through them. Functionally they are no different. To exclude one because of payment makes no sense, except that major ISPs can afford lawyers than can easily fight the outlandish copyright claims.

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 definition of hash code is inaccurate. In many forms of P2P, the commonly used hashcode is not for the work itself, but the sum totality of the offer. For instance, a torrent with a text file together has a 'hash'. If the text file is changed, the hash still changes. It is this lack of technical knowledge of the subject that underscores both the absurdity of the consultation, and of the Digital Economy Act in totality.

At no point in the CIR described in 4.3 is a requirement for any ACTUAL evidence. DMCA notices that would comply with section 4.3 were sent to the University of Washington in 2008 (http://dmca.cs.washington.edu/). It found that notices were sent with no actual evidence of infringement. In the study's case, over 800 notices in a 2 month period, were sent to network printers and routers incapable of performing the alleged infringement. Two of the four cases in the US focusing on online copyright infringement and have gone to court, have also been dismissed with prejudice; one of the other two is likely to head to retrial. The requirement that there be ACTUAL EVIDENCE is critical.

Additionally, there is no requirement, or penalty in the notice for false claims, that informs the accused that there may be consequences to accusations made without basis. The US DMCA by contrast, requires a statement made under penalty of perjury that the accuser is certain of the accuracy of the statements included. Such a clause will also ensure that baseless accusations are minimised, and that when they are made, those doing so are punished. The current proposal is best described as "shoot them all and let god decide their guilt."

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.:

Certainly a quality assurance approach must be undertaken. however, it should go further. It should be possible for independent verification of their claims, and that all such results are open to public view.

While some may claim Trade Secrets, these should not take priority over a fair and accurate knowledge of the system being used to make accusations.

In addition, I am more than happy for Norton P2P Consulting to provide independent, verifiable and accurate outside analysis of methods to assure this Quality Assurance. Further, we will do it entirely at cost.

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 ability of these systems to be automated (which I, as an expert in this field, am well aware of) means it is possible to send within 6 hours. At most it should be 48 hours - this allows for sufficient time to have a human verify the accusations.

the problem of a long timeframe is that downloads and files are transitory. including timelags to process and notify and pass on notices, it can take a week or two on top of those 10 working days (or 2 weeks+) meaning a month. The majority of computers may well have automatically purged any data that can be used to support a defence in that time.

Copyright infringement detection systems are automated, and thus do not distinguish between 'working days' and non 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.:

It is a good start. In addition, if it doesn't contain a legally enforcable statement of accuracy (as noted in the response to 4.1 above) it should be rejected - companies making valid claims should have no qualms about making it. Additionally, if the first two instances were the reason for invalidation, the notice should instead be passed back to OFCOM. There OFCOM can examine the system used to make the accusation (as in 4.2 above) and consider legal action or revokation of the certification of use for that system if multiple invalid CIRs are received in a time period (say 3 in 12 months)

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. Technological infrastructure systems are complex and constantly evolving. It must be kept in mind that at no point do the ISPs see the need, or have been provided any evidence why they are having to incur extensive costs on to stem the imaginary losses of industries that are actually in growth.

The entire basis of the Act is to boost revenues of industries resistant to technological progress. It seeks to do so by heavily penalising one of the industries that actually is embracing technological growth.

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 system is easily gamed.

It makes levels based on volume of accusations, irrespective of their being substantiated. It only requires an accusation made, not an actual infringement. As such is does not hold with the basis of 'innocent until proven guilty', replacing it with 'guilt by accusation'.

Accusations made at random, with little or no evidence will still trigger these thresholds.

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?:

There are concerns about the content of the 'information about copyright and it's purposes'. It has become readily apparent that this has become misunderstood in recent years, away from 'encouraging creativity and progress' to 'making money'

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. I don't believe there should be any such lists at all. If such lists are to exist, then there should be independently verifiable losses that can be attributed to online copyright infringement before they can access the lists.

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.:

It seems to be a extra-judicial method of achieving what is already provided for under UK law. As such, using the already understood UK legal process would make for better, more accurate and more accountable judgements. There is also the additional benefit that any false statements made in court are punishable, this would not be the case under this appeals process.

Additionally, there are no penalties or sanctions mentioned for those found to be making inaccurate notifications.

There should also be easy recourse to take the appeal into a judicial setting if desired.

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.:

I find it poorly researched, with little appreciation for facts, using as a basis research from a group of parties with a considerable bias.

I see nothing in this consultation that is based on facts, and the realities of the technologies involved.

It also leans excessively towards major copyright holders, who are a minority of total copyright holders by volume. There are no sanctions for false, or inaccurate statements, or for lies.

My favoured approach is to utilise the criminal and civil justice system, which was devised for the exact purpose.