

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): The Premier League

Address (if not received by email):

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Name OLIVER WEINGARTEN

Signed (if hard copy)



Premier League Response to Ofcom Consultation on the Draft Initial Obligations Code

1. Introduction

- 1.1 The Premier League is the top level of English Club football. It is a not-for-profit body from which all revenues are redistributed to its shareholders (being the 20 Clubs at any one time in the Premier League) or in solidarity payments.
- 1.2 At the heart of the Premier League's sporting and business model is an investment virtuous circle - the quality of the matches leading to popularity, leading to high income, leading to further investment and thus further improvement in the quality of the football, of the stadia, and of talent development.
- 1.3 Income from the exploitation of intellectual property rights is a vital part of this cycle. Sporting excellence contributes to strong audio-visual markets, generating significant revenues to be re-invested in not only football, but sport generally. This benefits sport participants, stadium spectators, viewers and listeners, the communications and other industries, and the economy at city, regional and national level successful sporting cities, regions and nations. Income from the exploitation of media rights has been re-invested in playing talent, youth development, training and other facilities, new and refurbished stadia, and in a wide range of sport-based solidarity and community programmes (funding for lower level professional sport, for community sport and for wider community engagement).
- 1.4 The Premier League's main revenue source is the sale of audiovisual rights to football matches played between our member clubs, as part of the Premier League competition. Our licensees around the world, including the UK, place the greatest value on the ability to exploit matches live - and the Premier League licenses its live audiovisual rights on a platform neutral basis. This means that our licensees are able to offer consumers the opportunity to watch matches via traditional broadcast television and via new media such as the Internet.
- 1.5 As such, the Premier League's business model relies on our ability effectively to enforce our intellectual property rights in order to protect the investment made by our licensees. The primary and most pertinent threat to that investment, given the enhanced value of live coverage, is to the piracy of our licensees' transmissions of live Premier League matches.
- 1.6 Piracy directly threatens the ability of the Premier League and other sports to re-invest revenues. Furthermore, the growth of piracy undermines confidence



in future revenues thus reducing incentives to invest for the long-term. There are of course other impacts of piracy, in particular on the wider economy. Pirates are not paying taxes, and pirate websites are making substantial revenues from advertising on their sites. Legitimate broadcasters and media and technology companies who generate revenue from the utilisation of their authorised rights know they can innovate and invest with the chance of getting a return, subject to enforcement taking place. Consequently good effective enforcement is good for investment, innovation, and ultimately jobs and taxes¹. A successful enforcement regime also benefits advertisers, marketeers, sponsors, content creators and innovators who can reasonably expect to achieve a proper return on their investment. And of course the consumers paying a legitimate subscription or viewing legally are not undermined.

2. Online infringement of Premier League audiovisual material

- 2.1 On the internet, piracy of Premier League audiovisual material is widespread, and in the context of live transmissions, takes the form of the unauthorised retransmission of the legitimate broadcasts of our licensees in the UK or elsewhere. These transmissions commonly (but not exclusively) take place over peer-to-peer networks where each individual viewer is involved in the transmission of the content around the network at the same time that the content is watched.
- 2.2 The damage to our licensees is obvious. Unfortunately, when enforcement options are weak some consumers are tempted to choose an unlawful alternative rather than pay a fair price for our content, with a consequent loss of potential revenue to our licensees. As bandwidth and the technology of the pirates improves, so does the quality of transmission meaning the impact of live streaming piracy for our licensees is undoubtedly going to increase, jeopardising the ability of the Premier League to reinvest its revenues in accordance with the virtuous circle.
- 2.3 The Premier League supports the objectives of the Digital Economy Act particularly that of significantly reducing the scale of digital piracy, in an environment where good quality and diverse legitimate offerings are widely available and should be allowed to flourish. The Premier League is pleased that the Digital Economy Act contains provisions which improve the ability of the Premier League and our licensees to enforce their intellectual property rights, including the insertion of Clauses 124A to 124N into the Communications Act 2003.

¹ The Premier League is a member of the Creative Coalition Campaign which campaigns to demonstrate the impact of copyright infringement on jobs and ensure successful business models can flourish within a fair market place (<http://www.creativecoalitioncampaign.org.uk>).



- 2.4 Whilst we fully support the intention behind these provisions and believe that they are a necessary part of the solution to the problem of online copyright infringement, we note that they are likely to be felt most by individual consumers. The Premier League has not to date targeted ISPs' customers, and has always preferred to target the commercial entities i.e. the P2P/streaming sites. The Premier League is, however, keen to disincentivise consumers from seeking out and viewing infringing content.
- 2.5 Ultimately, we would wish to see the activation by the Secretary of State of provisions relating to "blocking injunctions" under section 17 as these could well provide a more effective way of preventing copyright infringements. Blocking injunctions would target the instigators of consumer infringements rather than the consumers themselves. One online location could be facilitating infringements by several thousand consumers - a single blocking injunction could put a stop to infringements at source.
- 2.6 On the other hand, Copyright Infringement Reports (**CIRs**) would need to be sent to every participating consumer in a peer-to-peer network in order to cover every infringement, with the ultimate consequences being felt by the individual consumer. CIRs are a necessary deterrent but may not directly or immediately cause infringements to cease. Whilst the regime under Sections 124A to 124N is needed and will play an important role in discouraging infringements by consumers, for the preceding reasons we would strongly support any proposals by Ofcom or the Secretary of State to exercise the reserved powers under section 17.

3. Consultation - General Comments

- 3.1 As will be apparent from our comments above, the main threat to the Premier League and its licensees from unauthorised online services comes from the streaming of live matches.
- 3.2 As such, the Premier League's principal concern is that the draft Initial Obligations Code (the **Draft Code**) effectively prevents the use of CIRs to report infringements of copyright via live streams of matches distributed via peer-to-peer networks. This is because a CIR requires a "filename" for the infringing content to be stated. This concept is applicable to the sharing of, for example, mp3 music files, but has no relevance in the context of peer-to-peer streaming. This focus on "traditional" file sharing is an unjustified restriction on the application of sections 124A to 124N (which apply to any online infringement of copyright) and risks frustrating the purpose of those sections.
- 3.3 Please see our response to Question 4.1 for a fuller discussion on this issue.
- 3.4 The Premier League is a member of the Alliance Against Intellectual Property Theft (the **Alliance**) and we have had the benefit of contributing to its draft



submission in response to this Consultation. The Premier League's interests are aligned with the Alliance and as such, we broadly endorse the Alliance's response and we will not repeat points which have already been well made by the Alliance, although we have provided extra commentary on issues which are of particular significance to the Premier League.

4. Consultation - Response to Specific Questions

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 supply supporting arguments.

The effect of this provision is that Copyright Owners will only be able to make use of the section 124A to 124N regime if they have given an estimate of the number of CIRs it intends to make in the notification period, and has met its obligations as regards payment of costs under the Secretary of State's cost-sharing Order.

In principle, the Premier League does not believe that the issue of cost sharing and access to the notification regime necessarily needs to be interlinked. The overall regime could provide a mechanism for funding Ofcom's costs without requiring "pre-qualification" under the costs-sharing regime in every case.

However, in practical terms, limiting the regime to "qualifying copyright owners" in this way will only create a material limitation on the ability of copyright owners to participate in the regime if the qualification process presents unreasonable hurdles for copyright owners. In this regard, we would refer to the Premier League's response to the BIS Consultation on Online Infringement of Copyright (Initial Obligations) Cost-Sharing², in particular our answers to questions 9 and 10, where we expressed concerns with the difficulties of becoming a "qualifying copyright owner". As such, we would have concerns with the proposal unless the Premier League's concerns as stated in our response to the BIS consultation are allayed in the final version of the Order - such that any copyright owner of any size is not prevented, for practical reasons outside its control, from participating in the regime.

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 in time be varied? Please provide supporting evidence of the benefits of an alternative lead time.

² We are happy to provide Ofcom with a copy of this document.



We agree with the Alliance's response to this question.

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?

We agree with the Alliance's response to this question.

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?

We agree with the Alliance's response to this question.

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?

We agree with the Alliance's response to this question.

QUESTION 3.6

Do you agree with Ofcom's approach to the application of the Act to subscribers and communication providers? If you favour alternative approaches, can you provide detail and supporting evidence for these approaches?

We agree with the Alliance's response to this question.

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?



As outlined above, our overarching concern with the Draft Code is that it is too prescriptive about the information which is required to be provided in CIRs. In particular, the Draft Code requires the Copyright Owner to specify the "filename" of the infringing content. If the Copyright Owner is unable to specify a filename, as the Draft Code is currently formulated, the Copyright Owner would be unable to complete a valid CIR, depriving the Copyright Owner of the benefit of the regime under sections 124A to 124N (see also our answer to Question 5.1).

File sharing has traditionally involved peer-to-peer sharing of "static" music and video files (e.g. mp3s and avi files). However, file sharing is just one form of online copyright infringement and not all current forms of online infringements will necessarily have a corresponding "filename". In particular, in an unauthorised retransmission of a television broadcast (an infringement of copyright in that broadcast and any copyright works comprised within the broadcast) over traditional or peer-to-peer networks, the technical mechanism does not involve all users in the network sharing a "file" which sits (in whole or in part) on their hard drives.

Moreover, there is no guarantee that future forms of copyright infringement will involve an identifiable filename.

As drafted, Copyright Owners are required to list a filename which means that the only infringements which can be validly reported will be those involving "traditional" file sharing. That is an unjustified limitation on the application of sections 124A to 124N, which apply to any infringement of copyright, since it effectively excludes the use of the regime to combat infringement of broadcast copyrights (and infringements of works within broadcasts) over peer-to-peer networks.

Whilst we recognise that CIRs need to include clear identification of how the infringement is occurring, it would frustrate the purpose of the legislation to require a filename (and the contents of the file) to be listed in every case. The requirements of the CIRs should be flexible enough to allow Copyright Owners to specify appropriate "identifiers" for infringing content other than filenames.

We believe that Copyright Owners should not be tied in to having to use any particular "identifier" since technologies will inevitably adapt and future infringements will not necessarily occur in the same ways that they do now. More general (and future-proofed) language is needed that will allow Copyright Owners to identify all types of infringement whilst recognising the need for an appropriate degree of precision in that identification. Department of Business Officials confirmed during the passing of the Digital Economy Act that the intention was for the provision of the Act to be applicable and utilised by copyright owners such as the Premier League who predominantly face live streaming issues.

As such, we suggest that the description of item (e) in a CIR should instead read as follows:

- (e) *a description of the apparent infringement, which may include (by way of example only) the filename, URL or other means of identifying the infringing*



content, a description of the infringing content and the contents of any associated data, and (where appropriate) the hash code of the infringing content;

A further technical point is that due to the nature of peer-to-peer streaming, there may be multiple port numbers used rather than just a single one. As such, we suggest that the description of item (i) in a CIR should instead read as follows:

- (i) relevant port numbers used to conduct apparent infringement;*

Further, we do not believe that online infringements will always take place via a "website" or "protocol" (if not now, then certainly in the future). As such, we suggest that the description of item (j) in a CIR should instead read as follows:

- (j) the website, protocol, application, online location or internet-based service or internet-based system via which the apparent infringement occurred;*

Future-proofing the contents of a CIR in this way will reduce the possibility that Ofcom will need to revisit the Initial Obligations Code as a result of new methods of infringement.

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.

We agree with the Alliance's response to this question.

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?

We agree with the Alliance's response to this question.

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.

We agree with the Alliance's response to this question but would additionally comment as follows.



As discussed in our response to Question 4.1, the Premier League believes that CIRs should be flexible enough so that their use is not constrained as a result of requiring specific technical information to identify infringements. The corollary of this is that the Premier League strongly believes that a CIR should not be invalid simply because it does not contain some specific technical "identifier".

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. Of you believe that an alternative approach would be more appropriate please explain, providing supporting evidence.

We agree with the Alliance's response to this question.

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.

We agree with the Alliance's response to this question.

QUESTION 5.4

Do you believe we should add any additional requirements into the draft code for the content of 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 notifications (cover letters and information sheet) in Annex 6?

We agree with the Alliance's response to this question.

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.

We agree with the Alliance's response to this question.



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 agree with the Alliance's response to this question.

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.

We agree with the Alliance's response to this question.

Premier League

30 July 2010