

# OFCOM CONSULTATION RESPONSE

## Online Infringement of Copyright and the Digital Economy Act 2010

### Section 3 Application of the Code

*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 application of the code and requirements for information and analysis would appear may only be satisfied by copyright holders and ISPs of a certain business size and financial capacity.
- For copyright owners to have sufficient historical and statistical data to estimate the number of CIRs for a given notification period, suggests that the institutions involved will be large organisations that already have processes and management information systems in place to capture and report this data and/or have done so historically as part of their organisation's reporting cycles.
- Where larger groups which own smaller subsidiaries that fall under the "independent" umbrella either by genre or artist portfolio, may still have access to these facilities, so there is an underlying assumption that copyright owners will have access to similar data.
- For copyright owners which also own personal or "micro-labels" to self-copyright, self-produce and self-distribute their material, will face a potentially significant

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overhead burden. Under the Act, individuals will have to either personally devise and monitor their own marketing and copyright infringement analytics and CIRs, or outsource to an agent, as well as pay ISP fees for and extended notification period which may be beyond their ability to finance. This will then negate the value of the Act to individuals and SMEs.

**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.*

- Two months is an appropriate lead time for copyright owners who have processes and finance already in place. However, where the notification period is 1 year and during that year there are fluctuations and peaks in the activity of the copyright owners, ISPs may not be able to facilitate the demand for copyright infringement lists within the turnaround period specified in the Act.
- For example, a number of copyright owners may release new albums in time for the busy retail Christmas period. On the assumption that the activity of copyright owners has a direct relationship to new incidents of copyright infringement (no statistical data is provided here to support this) qualifying ISPs may require copyright holders to estimate the timing or distribution of CIRs and therefore ascribe different costs to those peak periods.

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- As noted in the response to question 3.1, this may be prohibitive for copyright owners who are individuals or SMEs.

**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?*

- ISPs should be treated in the same manner as other providers of services and utilities, such as post or electricity. Although ISPs are the conduits for online activity, they should not be expected to Act as wardens of the internet and be obliged to monitor the usage and habits of their customers for illegal activity to the benefit of any specific industry or industries.
- Furthermore, as Ofcom has already opened another discussion on bandwidth throttling, it is aware that there is the risk that subscribers (regardless of whether identified as infringing on copyright or not) may not receive the service they are expecting or have paid for. This may now be exacerbated if ISPs try to reduce their costs and exposure to monitoring CIRs and copyright infringement lists.

**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?*

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- The principle of ISPs acting as internet wardens needs to be re-assessed.
- The implications of subscribers migrating to smaller internet service providers even BEFORE the enforcement details of the Act are finalised, should be assessed and quantified.

**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 inclusion of providers of public Wi-Fi networks as qualifying ISPs could be potentially damaging to other industries, and the solution proposed to solve one issue has been transferred and compounded to be a problem of another.
- Should the Act be confirmed to include these other Wi-Fi providers, such as schools, libraries, and café's etc., this will have a marked increase in the costs of enforcing the Act and the implications to the BIS cost-sharing consultation may need to be re-assessed.

**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?*

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- No. Some Wi-Fi access and protected networks may be still hacked and used by cybercriminals or persistent copyright infringers.
- In a small survey of 68 respondents conducted in the past week and a half, one of the questions posed asked for their own self-assessment of their security awareness. Encryption and security settings on devices, websites, applications etc., are complex in nature and in the very limited survey conducted, 75% of respondents were rated their knowledge of security settings as average to poor. Also, of the population surveyed, 78% shared internet access with another person in their household. While this survey is a micro-sample of the population, it provides an illustration of the exposure that subscribers may face and their increased chances of being associated with a CIR.
- Furthermore, the advice to subscribers on how to protect their networks as part of a notification letter from an ISP, comes far too late in the process to be of benefit. This process of education should be addressed as a matter of urgency.

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### **Section 4 Copyright Infringement Reports**

**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 content of the CIR is reasonable, however for copyright owners that are individuals and their home address is the registered place of copyright, this could pose a serious privacy threat to them.

**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 proposals for quality assurance are reasonable, however the quality assurance process should be consistent across all copyright owners and ISPs and should be accredited by an independent body. Industry-wide standards should be tested and established before any notifications are sent to copyright infringers (as distinct from subscriber).

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**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?*

- See responses to question 3.1. This may only be feasible for certain copyright holders.

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### **Section 5 Identifying subscribers and making notifications**

**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 identification of a subscriber by IP address, should not be sufficient evidence of an infringement.
- A specific individual should be formally identified as the infringer. The Act should also first and foremost protect the public and include rights for the subscriber to protection and recourse where their account has been used inappropriately without their knowledge.

**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.*

- See question 5.1.



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- Furthermore ISPs may not have adequate or consistent systems to identify subscribers by IP address at a particular time and for a particular infringement as noted on a CIR. Until such time as there is a universally agreed industry standard for this among ISPs, identification by subscriber address should be scrapped.

**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.*

- See response to questions 5.1 and 5.2.
- In the survey conducted, respondents were asked their views on receiving notification of a copyright infringement notification. Of 57 respondents, 37 (65%) of those would be likely or extremely likely to contact their ISP. Where ISPs have respond to larger number of subscriber queries as a result of the Act, where those additional costs are not borne or shared directly by copyright owners, they may be passed on to the consumer.
- Of 56 respondents, 32 (57%) of those would be likely or extremely likely to stop P2P file-sharing. However, out of 55 respondents only 22 (40%) would be likely or extremely likely to stop posting videos online and only 17 (31%) would buy more CDs. Therefore while in this small sample a letter would discourage respondents from P2P file-sharing (as intended), it would not necessarily stop other areas of potential copyright infringement, or stimulate further revenue for the copyright owners.

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**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?*

- See response to questions 5.1 and 5.2

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### **Section 6 Copyright Infringement Lists**

**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.*

- See response to questions 5.1 and 5.2.

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### **Section 7 Subscriber appeals**

**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.*

- No. The notification of a subscriber not an specific infringer and the potential for disconnection after 3 notifications, even if remotely implied, is unfair and disproportionate first response to online copyright infringement.
- Ofcom should also consider the wider impact of the number of identified subscribers being referred to an appeals body and whether this body has the capacity to deal with these numbers.
- Ofcom should also consider, whether referrals to such a body may, for example, be included on an individual's credit report or any other public record that would consider an online copyright infringement as a public offence to be disclosed.

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### **Section 8 Administration, enforcement, disputes and information gathering**

**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.*

- Guidelines for enforcement and dispute resolution will be paramount to the Act being effective, however Ofcom should consider whether it has anticipated the levels of CIRs, copyright infringement lists, subscriber appeals and resolutions it may have to administer and publish those levels and associate costs to all stakeholders and to the public.