Online Infringement of Copyright
Draft Initial Obligations Code

July 2010
BSkyB

Introduction

1. BSkyB ("Sky") welcomes this opportunity to respond to Ofcom's consultation on the *Draft Initial Obligations Code* ("Code") published under the 2010 Digital Economy Act ("Act"). Sky is in a unique position to address the issues raised in this consultation in as much as the Act and the Code imposes obligations on us as both an ISP and a content owner. Sky is the UK's fourth largest ISP, covering 70% of UK homes and with 2.5 million broadband customers gained since launch in 2006. In a highly competitive market Sky Broadband has become the UK's fastest growing ISP, offering customers a fast, reliable and attractively priced service.

2. However, at the heart of our business is our investment in high quality audio-visual content to the benefit of our customers. Sky is one of the largest acquirers and producers of content rights in the UK, amounting to £1.75 billion last year - more than any other commercial broadcaster. As a result we fully support the need to protect and enhance incentives to invest in creative content. We recognise that Illegal file sharing has the potential to erode the value of content, undermine investment and innovation in the creative industries and with it ours and others' ability to continue to provide our customers with the content that they value.

3. It is on this basis that Sky fully supports the measures in the Digital Economy Act. We accept that ISPs, in conjunction with content owners, have an important role to play in tackling online piracy. Given that piracy is so widespread across all ISP networks, the only practical way of communicating with illegal downloaders is via the ISPs that hold the customer relationship.

4. The notification process set out in the Act is a practical means of doing this and we accept that, in the absence of an agreement by all ISPs to deliver notifications, a legal obligation was required in order to create a level playing field so that no ISP could opt out and undermine the effectiveness of the solution. It is imperative that the notifications process, as envisaged by Parliament, is made to work by all parties as we are unlikely to be presented with such an opportunity to tackle this problem in the near future.

5. While we welcome much of the draft Code, some of which we recognise is based on the exercise undertaken by Sky and content owners before the Act was passed by Parliament, we have several significant principle concerns relating to the consultation questions put by Ofcom. We have prioritised these concerns as we believe that if they remain unresolved, they may undermine the basis of the Code and/or prevent ISPs from playing their full part.

6. We have also made several recommendations to improve or clarify the Code that will make the operation of the initial obligations more effective, especially from the point of view of ISPs who will be responsible for delivering the majority of the operational requirements. We have therefore addressed our comments in 2 parts – the first part deals with our principle concerns; the second part suggests improvements or requests for clarification.

Part 1 – Principle Concerns

1.1 Qualifying ISP threshold

Draft clause 2.4.2 sets a threshold of 400,000 customers for an ISP to be included in the initial obligations. Sky believes this is too high. The setting of the threshold at this level excludes over one hundred ISPs, some of which have a substantial customer base in the hundreds of thousands. It fails to reflect the fundamental principle enshrined in the Act that places an obligation on all ISPs to play a role in tackling copyright infringement.

Ofcom has justified its decision on the basis of the explanatory notes to the Act which says that the government anticipates most small and medium sized ISPs would fall under the threshold. However, the threshold that Ofcom has chosen captures just 7 ISPs which we do not believe was the intention of Parliament or that of the Government. As it stands, the threshold is discriminatory and runs the risk of creating a substantial loophole that will enable determined illegal file sharers to avoid receiving notifications.

Sky believes that by excluding so many ISPs from the obligations, Ofcom is providing an incentive for customers to switch from those ISPs that are required to send notifications. Already we are aware that the additional publicity generated by the draft Code has resulted in websites and online forums discussing how to avoid notifications by switching to non-qualifying ISPs: http://www.trustedreviews.com/networking/news/2010/05/28/Ofcom-Reveals-New-ISP-Rules-Following-the-Digital-Economy-Act/comments

We also believe that Ofcom has underestimated the time it will take to assess the extent of evasion and any consequent increase in illegal file sharing on non-qualifying ISPs. And it will take Ofcom a further period of time to review qualification criteria and then for newly qualified ISPs to make the system changes that would allow them to process CIRs. It seems unlikely that it will be possible to extend the obligations to cover new ISPs for at least a year after the notification process is fully up and running. In effect, the threshold that Ofcom sets from the outset will become the default threshold. If this is set too high it will make it much harder to tackle switching and will undermine the intention behind the Act.

Provided that the Government accepts that content owners (COs) should pay the majority of ISPs capex and opex costs, Sky cannot see why the threshold should be set so high as to only include 7 ISPs. Ofcom should lower the threshold considerably on the basis that content owners should be prepared to bear the majority of the costs of a greater number of ISPs in order to ensure that the initial obligations are effective in tackling copyright infringement.

1.2 Exclusion of mobile ISPs

The arguments above also apply to the exclusion of mobile ISPs. Mobile broadband is increasingly substitutional for fixed line broadband and the number of mobile devices being used access digital content is growing rapidly. Mobile networks are likely to become increasingly important platforms for copyright infringement and the Code should reflect that. In the explanatory notes to the Act, only the possibility of mobile networks falling under the threshold was raised. Sky does not accept that Ofcom has been sufficiently rigorous in its analysis of the levels of copyright infringement on mobile networks or of the costs to make that possibility a certainty.

1.3 Notification of number of CIRs

Draft clause 2.2 requires copyright owners to provide an estimate of the number of Copyright Infringement Reports to ISPs at least 2 months in advance of each notification period. Sky considers that this is a reasonable timescale for ISPs to plan for once the obligations are up and running. However, for the initial notification periods, covering the soft launch and as the ISP systems are scaled up, a longer lead time is necessary in order for ISPs to implement the operational and systems requirements to process a given number of CIRs. Assuming a notification period is six months, copyright owners should provide an estimate of at least [4 months] ahead of the start of the first two periods. Estimates at the start of subsequent periods should revert to 2 months.

1.4 Content of notifications

Draft clauses 5.11-512 require that ISPs should send a single, standard notification letter for each of the first, second and third notifications. The requirement for a standard single letter undermines the important principle that these are ISP customers for whom the ISP remains responsible. While the Act sets out what should be communicated to customers, it does not dictate how this should be done. ISPs need to retain the freedom to communicate with their customers as they see fit, provided the information required by statute is included.

Sky wishes to send a cover letter with the formal notification. Such a cover letter may also include information required in the Act, such as how to obtain lawful access to copyright works, while the notification will contain the rest of the required information. The only thing the Code needs to stipulate is that no communication from the ISP should contradict or undermine what is in the statutory notification.

Part 2 – Improvements and Clarifications

2.1 Production of CIRs

Draft clause 3.2 states that the qualifying CO must send the CIR to the qualifying ISP within 10 working days of the day on which the evidence is gathered. Sky believes this should read "…within 10 days of the day the alleged offence *took place*…". The assumption is made that the alleged offence and the gathering of the evidence by the CO take place at the same time. The evidence may have been gathered later or earlier, especially additional evidence referred in draft clause 3.9.

2.2 Form of CIRs

Draft clause 3.4 states that a CIR must be in standard form. Sky agrees with this and has been working with content owners to understand their standardised approach. However, Ofcom risks undermining the benefits of standardisation by requiring compliance with, "any obligations as Ofcom may introduce from time to time." This is too wider a power and is unreasonable given all parties have an incentive to standardise in any event.

Sky has a concern that there is not adequate time (from the date the Code of Practice is published) for ISPs to be able to design, test and implement a robust system for the receipt / management of CIRs for the Act coming into force in January 2011. This is likely to mean that Copyright Owners and ISPs will have to establish a process without automated elements. If this is the case then this would significantly limit the number of CIRs that an ISP will be able to process each month (also see comment 1.3 above). Sky's current view is that it will take

approx 6 – 9 months to implement an automated solution for accepting CIRs from the date the system / message specification is agreed with Industry.

2.3 CO compliance with data protection laws

Draft clause 3.5.6 requires COs to include a statement of compliance with relevant data protection laws. Sky would like to know whether Ofcom have confirmed that data protection laws apply and whether the opinion of the Information Commissioner (ICO) has been sought. It is reasonable for COs and ISPs to require more direction/certainty from Ofcom and the ICO in this area.

2.4 ISP Quality Assurance Report

Draft clause 4.5 requires a list of detailed information that ISPs must provide in a Quality Assurance Report to Ofcom which Sky accepts. However, Ofcom should confirm under which conditions this report will be made public, either in the event of a subscriber appeal or if subject to an FOI request. Ofcom should also confirm that it will be obliged to consult the ISP before disclosure.

In addition, draft clause 4.5.6 provides for Ofcom to require ISPs to provide any other information in the Quality Assurance Report as it sees fit. This is too broad a power and should be deleted. ISPs need certainty as to what is in the reports and Ofcom should be clear from the outset what is required.

2.5 Changes to subscriber identification procedures

Draft clause 4.6 provides for Ofcom to direct changes to ISP process and systems as it sees fit. This again is too broad a power and introduces critical uncertainty into ISP planning processes. Ofcom needs to determine what is required from the outset so that ISPs can make relevant planning decisions with clarity. If in future Ofcom determines that changes are required to ISP subscriber identification procedures, it should revisit the Code and consult accordingly.

2.6 Notification by recorded delivery

Draft clause 5.8 requires that the third notification is sent by recorded delivery. This will considerably increase the costs of notification and add complexity to the whole processes. Ofcom needs to justify more clearly why a recorded delivery is necessary since the third notification can in no way be used as a 'letter before action' by content owners as it will be sent before they have applied to a court for the customer address.

2.7 Retention of records

Draft clause 5.2 requires an ISP to retain records of CIRs and notification letters sent to subscribers for a period not longer than 12 months. Fulfilling this obligation would mean that an ISP will delete records that could be needed to support any related legal process instigated by a Copyright Owner. Ofcom should clarify that this is the intention.

2.8 Update Notifications

Draft clause 5.9 requires an ISP to send an Update Notification if the subscriber, having received a 3rd notification, continues to have CIRs raised against them. Sky is concerned that

this is an open-ended obligation. Sky's view is that it is reasonable that there should be a limit on the number of Update Notifications that an ISP is obliged to send to a subscriber who continues to have CIRs raised against them. It is conceivable that in certain circumstances the number of notifications required to be sent would be disproportionate.

2.9 Content of notifications

Draft clause 5.11 (h) and (i) require statements in the notification letters that subscribers have the right to access information held on them and that the information will be destroyed 12 months after the receipt. Both of these statements should be clear that the data referred is "personal" information.

2.10 Management of the Copyright Infringement List

Draft clause 6.1 requires ISPs to maintain a database of customers who have received a 3rd Notification Letter. Sky requires more clarification on how customers are placed on and remove from the Copyright Infringement List. For example, if a subscriber has not had any additional CIRs raised against them (after receiving the 3rd notification) and a period of 12 months has passed since they received their first notification, does the ISP take them off the CIL (on the basis that they only have 2 "live" infringements against them)? Ofcom should provide a flowchart showing how ISPs will be expected to manage subscribers in relation to the CIL.

2.11 Grounds of subscriber appeal

Draft clause 7.12.3 provides subscribers with grounds for appeal if they can show that they took "reasonable steps" to prevent other persons infringing copyright by means of the ISP service. However, it is unclear what constitutes "reasonable steps" and Ofcom should provide some clarity. For example Sky has the encryption key printed on the bottom of the router. If Sky subscribers follow our instructions i.e. encrypt the network, (a) would these be reasonable steps? And (b) is it an acceptable defence to argue that that another person in the household was able to use the pc connect "securely" to that router using that same encryption key?

2.12 Scope of subscriber appeals

Draft cause 7.12.4 provides the grounds of a subscriber appeal if "an act of omission by a Qualifying ISP or CO amounts to a contravention of the Code". However, a large proportion of the obligations in the Code refer to responsibilities that apply solely between ISPs and COs and do not affect subscribers in any way. As drafted the grounds are too broad and will lead subscribers to request information and make appeals relating to processes, even if they have not been affected by them – especially if those subscribers are motivated to undermine the process. Subscribers should only be able to appeal contraventions of the Code if they have been detrimentally affected by them.

2.13 Appeals Body remedies

Draft clause 7.27.2 allows the Appeals Body to award compensation to the subscriber. However, it is unclear what the compensation is for since at this stage no actual steps will have been taken against the subscriber other than sending notification letters. Ofcom should be clear about the likely amounts involved and whether there will be limits. In addition, there should be the right of a CO and ISP to appeal an adjudication by the Appeals Body.

Draft clause 9.11 also gives Ofcom the power to fine a CO or ISP for breaches of the Code and to award compensation payments. Ofcom should be clear that 'double jeopardy' will not apply and that COs and ISPs cannot be penalised twice for the same mistake or that subscribers can be compensated twice by the Appeals Body and by Ofcom.

2.14 Information collection

Draft clause 9.2 gives Ofcom a wide-ranging power to collect such information as it sees fit to administer and enforce the Code. As with other general powers in the Code, this is too wide and creates risks and uncertainties for ISPs that are not justified by the benefit. Ofcom needs to be much more specific in stating what information it might need to enforce the Code and it should consult again before making changes to its information requirements.