**OFCOM CONSULTATION**

# Online Infringement of Copyrights and the Digital Economy Act 2010

# Draft Initial Obligations Code

**TALKTALK GROUP RESPONSE**

July 2010

## 1. INTRODUCTION AND SUMMARY

This is TalkTalk Group's (TTG) response to Ofcom's Consultation ('Consultation') regarding the Draft Initial Obligations Code. TalkTalk Group is the largest provider of broadband services to UK homes. We serve over 4 million residential and business broadband customers under the TalkTalk, AOL, Tiscali, Opal and Pipex brands. We are the UK's biggest local loop unbundler and operate the UK's largest next generation network (NGN).

The response addresses both the particular issues raised by Ofcom in the consultation as well as a number of broader concerns regarding Ofcom's apparent misunderstanding of subscriber responsibility, costs / fees and the implementation process. The response is structured as follows:

- General issues (section 2) covers Ofcom's apparent misunderstanding of subscriber responsibility, costs / fees and the implementation process
- Threshold for participating ISP (3) discusses Ofcom incorrect and poorly though through approach to which ISPs qualify
- CIR, letter and CIL process (4) addresses a number of concerns we have regarding the overall process envisaged in the initial obligations
- Appeals (5) covers the appeal process
- Open wifi networks (6) discusses Ofcom proposed treatment of these networks which we think will cause serious harm
- Disputes (7) addresses two smaller issues

*If there are any questions regarding this submission please contact Andrew Heaney (andrew.heaney@talktalkgroup.com or 07979 657965).*

## 2. GENERAL ISSUES

In this section we discuss a number of general issues relating to the consultation and the process required to implement the code of practice.

### *APPARENT MISCONCEPTION OF SUBSCRIBER RESPONSIBILITY FOR INFRINGEMENT*

Ofcom in various places in its consultation seem incorrectly to imply that a subscriber is in some way legally or otherwise responsible of infringement if that infringement is carried out by another person on their connection. This misconception is worryingly also reflected in the draft notification letters and factsheet. For instance:

- Nowhere in the three draft letters does it highlight that the subscriber is not responsible for infringement by third parties using their connection yet there is lots of discussion of, for instance, the threat of legal action. This is clearly misleading
- Question 3 in the factsheet is titled "*Who has alleged that I* [the subscriber] *have infringed their copyright*?" [suggesting that the subscriber is alleged to have infringed copyright]
- Question 7 in the information sheet "*Copyright owners can go to court and require us to identify suspected offenders*" [suggesting the subscriber is the 'suspected offender']
- Of its general approach Ofcom says: "*we propose … to notify subscribers alleged to have infringed copyright*" (§1.14) [suggesting that the subscriber is alleged to have infringed copyright]
- Regarding the letter sending approach, Ofcom says: "*it is consistent with the objective of the legislation, in that it allows time for subscriber to come into compliance*" [implying that the subscriber was acting unlawfully or not complying if infringement occurred on their connection]
- Ofcom says that the notification letter should provide: "*advice or information enabling the subscriber to obtain advice about how to obtain lawful access to copyright works*" (§5.15) [implying that the subscriber themselves has unlawfully accessed content]
- Of the process, Ofcom say that it should "*make subscribers aware of reported infringements and to allow escalation if they continue to be identified engaging in online copyright infringement.*" (§5.21) [suggesting that the subscriber themselves has engaged in infringed copyright]
- Of the CIL Ofcom say: "*The information in the copyright infringement list is intended to help Copyright Owners to target any litigation against those subscribers that appear to have infringed against them to the greatest degree.*" (§6.6) [implying that infringement on the connection has been carried out by the subscriber]
- Section 6 in the draft Code about the CIL is titled: "*Identification of repeated infringers and provision of copyright infringement lists*" [implying that a subscriber equates to an infringer]

We presume that these errors were unintentional.

This is a common mistake made by others (accidentally in some cases and intentionally in others). The likes of ACS Law, for instance, have intentionally and maliciously implied that subscribers whose connection has been used for infringement are responsible and has used this tactic to bully and threaten subscribers. It goes without saying that Ofcom should not take such a approach and must base its approach and the Code on the correct legal basis.

Given the very high degree of sharing of network connections the chances that any infringement on a connection is carried out by the actual subscriber is probably less than 50%. For instance:

- there may be five or more different people sharing a connection as well as other unauthorised individuals
- illegal filesharers tend to be younger and younger people are more likely to live with their parents (and so not be the subscriber) or live in shared accommodation (and so not be the subscriber)

Further, as the Copyright, Designs and Patents Act 1988 ('CDPA (88)') makes clear an individual is only guilty of infringement if they committed the act themselves or *authorised* the infringement by another[1]. By virtue of being the subscriber of a connection that has been used for infringement does not mean that the subscriber has authorised infringement.

Furthermore, there is no responsibility in law for a subscriber to protect their connection or dissuade others in the house from infringing and they cannot be found guilty of infringement as a result of not protecting their connection.

This position was confirmed recently by a QC's opinion that was prepared by Roger Wyand QC for Which? which said:

> *"'The subscriber could be liable if they knew that a third party intended to infringe copyright and consented to a third party using their equipment to carry out that intention. However, mere negligence in failing to take precautions to prevent such use is not actionable.'*[2]

If Ofcom believe that contrary is true it is important that Ofcom's makes its position clear and explains its reasoning.

It is important that Ofcom makes this situation crystal clear in the consultation and this misconception is very clearly corrected. Further, it is essential that this fact about responsibility is made clear to subscribers both in notification letters and other communications.

Another common misconception is that if a subscriber is told three times that infringement is occurring on their network connection then they become responsible for any further infringement. For example: from Ed Vaizey's blog (the now Minister responsible for the DEA) in May this year:

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[1] See CDPA(88) s16(2)

[2] http://www.which.co.uk/news/2010/07/qcs-view-raises-doubt-on-online-piracy-cases-221050

*"We're looking to introduce the new measures* [e.g. disconnection] *next year, but no one will be cut off (and then only temporarily) without plenty of warning and a chance to change their behaviour"*

To state the obvious – telling an innocent person three times that they are responsible for infringement by another person does not make them responsible for that infringement. They are only responsible if the law imposes the obligation on them. There is nothing in the CDPA (88) (that we are aware of) that does that.

***COSTS / FEES***

We recognise that this consultation is not specifically about the fee paid by Copyright Owners to cover ISPs' costs. Notwithstanding, there are a number of issues important regarding ISP's costs and fees that are linked to the issues discussed in the consultation document. These are outlined below.

First, it is essential to include in the costs that ISPs can recover from rightsholders the cost of churn resulting from meeting these obligations on behalf of rightsholders. The cost of churn[3] should be included for the same reasons and in the same way that system development and operation costs are. There is no cogent reason to treat these differently. Exclusion of churn costs will result in inefficiency[4]. We have provided Ofcom with estimates of these costs.

Second, the fee structure must address risk of under-recovery and ensure that ISPs are able to fully recover their costs[5]. There are three options that could address this problem:

- Participating rightsholders could (in aggregate) cover the fixed CAPEX (and fixed ongoing cost) with a separate fee (per CIR) to cover incremental costs
- The forecasts provided by rightsholders that are used to derive the fee per CIR should be used as a firm commitment and if rightsholders do not deliver the volume they forecast they will be required pay for the unused portion
- Any under-recovery by ISPs could be carried forward and recovered through a higher fee in future

Third, Ofcom should consider whether there should be different fees / tariffs to recognise differing circumstances (e.g. for smaller / larger operators, for post or

[3] Churn will result both from innocent customers wishing to avoid unfounded threats and litigation proceedings as well as infringers wishing to avoid detection. Notably the cost of churn will be higher if there are ISPs that are not required to participate in the scheme. However, even in the case of inclusion of all ISPs the obligations will still result in churn since people will move to 'wipe their slate clean' and start afresh with no CIRs against their name

[4] If the rightsholders do not experience the full cost of their actions they are likely to make inefficient choices

[5] Or fully recover the proportion of the costs that are recoverable from rightsholders as determined under the cost-sharing approach

email delivery) or alternatively bespoke fees for each ISP based on the cost that they incur.

Fourth, there are some key cost assumptions that are not known (e.g. propensity to call, churn, level of appeals) that need to be determined prior to the fee being set. This can probably only be done through actually testing the service to gather the necessary evidence.

Lastly, the model that is used to calculate the fee must be disclosed. Ofcom recently committed in future to (in all but exceptional circumstances) disclose models used to develop charge controls since it aids transparency and ensures more effective consultation. We see no reason in this case as to why the model used to set the fee should also not be disclosed.

***OVERALL PROCESS***

The implementation of the initial obligations of the DEA will be a hugely complex endeavour. For example:

- It will require the development, implementation and integration of complex and expensive systems and processes that traverse rightsholders, the network systems of ISPs and customer systems of ISPs and resellers
- It will involve possibly 100s of ISPs and rightsholders who will need to act in a consistent and coordinated manner
- It will require the sending of millions of letters
- It raises many legal issues that need to be addressed including privacy, data processing and retention, information disclosure and basic rights

The potential difficulties have been compounded by the lack of scrutiny by Parliament that resulted in an Act that was, by the admission of most, ill-thought through with many areas left unclear. This ragbag Act has been tossed across the river in a long range hospital pass to Ofcom to implement in a unrealistically short period.

Needless to say, if the Initial Obligations are to be implemented in an efficient and effective manner it will require strong leadership particularly given the differing positions of many of the players such as ISPs, rightsholders, consumer groups and bodies such as ICO. We believe that only Ofcom is in the position to provide that leadership.

However, we feel at the moment that there could usefully be more leadership by Ofcom. For instance:

- Ofcom has not address certain gaps and areas of uncertainty such as the position on threshold and the treatment of open wifi networks
- Ofcom needs to ensure measures are compatible with *inter alia* the e-Commerce Directive, Privacy Directive, Data Retention Directive and Data Protection Act as well as the DEA itself. It is unclear whether such assessment has been made (or is being made)

- there is a need for coordination through working groups (e.g. to ensure a consistent overall approach including quality assurance and set standards for quality levels, reject codes and formats). Ofcom seems to be addressing some of these issues through a traditional consultation process which is, we think, unlikely to be effective
- there is a need for an overall project plan with time lines and dependencies. For instance, there is not even an estimated start date
- Ironically given the lack of overall plan, Ofcom seem to have jumped to the smaller issues (e.g. CIR rejection reasons, quality assurance approach) without considering some of the bigger questions

A useful benchmark for this project is the project to implement a single database for number porting in 2008[6] - this was in many respects simpler than the current development. In that case there was a dedicated operational / implementation team (UK Porting) which ran a variety of workstreams and workgroups which involves 10s of operators to drive the implementation forward. A similar approach is probably needed in this case.

In respect of overall implementation timing, it is worth noting the following:

- that it will take considerable time for ISPs to design, implement, integrate and test the new systems and processes required to meet the obligations. We estimate that this will take around 12 months
- We cannot start the design and development in earnest until key factors are known such as the trigger mechanism, volumes, interfaces, quality requirements, cost sharing and fee structure.
- Once the systems are ready it will be necessary to conduct a market test phase to understand important impacts such as impact on churn, propensity to call, letters per CIR[7], level of appeals etc. This needs to be known for two reasons – first so that the approach can be modified (e.g. trigger mechanism, letter content, resourcing for customer service) and secondly to verify the costs and thus fee payable.

We note that there is no requirement under the DEA for ISPs to start receiving CIRs and sending notification letters in January 2011. The January 2011 deadline is merely to have the code of practice in place (see s124D DEA).

## 3. THRESHOLD FOR PARTICIPATING ISPS

Ofcom has proposed (§3.14 *et seq*) that only ISPs with more than 400,000 subscribes will initially qualify and as a result be required to meet the obligations. They have also said (in the draft Code §2.7) that they will 'keep this approach

[6] Albeit this got pulled late in the process due to a successful appeal of the original decision

[7] Assuming that the fee charged is per CIR then the number of letters sent (for any given trigger method) will depend on the level of repeat infringement on the connection. This is almost impossible to predict even in the case where no letters are being sent. When letters are sent there may be some reduction. This can only be determined by a market test.

under review'. Ofcom's approach is simply unacceptable and contrary to Ofcom's objectives. We think it is ill-conceived and requires more analysi. The main problems are:

- It will increase churn since subscribers (both those who have infringed and those who have not) will move to the excluded ISPs[8]. This will unequivocally increase costs
- The approach will be hugely detrimental to competition since it will distort competition and discriminate against larger ISPs who will
  - incur the development and operating cost of meeting the obligations
  - and bear the cost of lost customers who churn

  this distortion can only be addressed if rightsholders reimburse 100% of *all costs* incurred by qualifying ISPs (including churn cost) or if *all ISPs* are included
- It will make the whole scheme even less effective at reducing illegal filesharing since it will be easy to avoid detection by moving ISP. Of course, the overall process at deterring illegal filesharing will have little effect anyway since there are many other easy to use techniques to access content for free without being detected such as ripping radio streams, using anonymising proxy servers, using a cyberlocker, hacking into a neighbours wifi network or using an open wifi network

Ofcom has suggested that it would be disproportionate for smaller ISPs to meet the obligations (§3.15) since (we presume) the unit cost per customer of meeting the obligation will he higher than for larger ISPs due to the fixed costs involved[9]. However, this argument holds little water since much of cost incurred is as a result of churn and churn is a variable cost (it varies with number of subscribers rather than being fixed). In any case, Ofcom apparently did no analysis of the costs. Further, differences in unit costs could be addressed by having a higher fee for smaller operators and 100% reimbursement of *all* incurred costs.

Ofcom have suggested a 'correction' mechanism to bring in other ISPs whereby if infringing users move to other ISPs the number of CIRs on these other ISPs would rise and so they may qualify (however, the exact mechanism for this is unclear).

This type of approach is woefully inadequate to address the problems identified above in particular since it will take too long to bring other ISPs into the mechanism if the churn happens. It may take more than a year before an ISP whose CIRs increase above the threshold will qualify (e.g. 3 months to do

[8] Those ISPs that are qualifying and those which are not is likely to be easily found out and known by subscribers

[9] In fact, Ofcom has not properly explained why it is disproportionate. Their reasons in §3.15.1 to §3.15.5 seem to be based on the fact that there is less infringement on smaller ISPs networks, that it provides certainty and it is in line with the Government's 'anticipation'. This reasoning is insufficient: provided that there is no disproportionate cost (e.g. higher unit or per subscriber cost) there is no reason to exclude the small ISPs, certainty can be provided by including everyone and regarding suggestion that this was the Government's anticipation (to the degree to which that this is relevant) we imagine that the Government's real anticipation or hope was that Ofcom would address this issue properly

measurement of CIRs, then notify / impose order, then 6-12 months to implement). Furthermore, this mechanism does not address churn by the many innocent customers who might churn as a result of being threatened or thinking they may be since they will not generate a large number of CIRs.

If a *few* ISPs were initially excluded and a correction mechanism used to bring them in later then it must be predefined and slick (not a 'to be determined later').

A further concern with Ofcom's approach is that they have based the threshold on number of subscribers rather than on level of infringement. We find this confusing since Ofcom imply in §1.6 that they have data on the level of infringement (though then in §3.8 claim don't have it).

Whatever Ofcom now propose on the question of which ISPs are included, they must properly consult on their preferred option with evidence and proper reasoning to support their proposal and the decision must be objectively justified, non-discriminatory, proportionate and transparent. Any consultation on this issue would need to be completed prior to the statement on the Code of Practice[10] given the interdependencies. If Ofcom do not adopt this approach there is a risk that their decision is appealed further delaying the implementation.

Regarding which ISPs are included we have the following additional comments:

- If any ISP is non-qualifying there must be an obligation that they do not advertise themselves as non-qualifying with the punishment if they do advertise themselves as non-qualifying that they become qualifying
- Ofcom must provide clarity over the treatment of subsidiaries of ISPs
- Ofcom must provide a properly justified reason for the inclusion or exclusion of mobile

[10] Obviously, Ofcom would need time to properly consider the responses to the consultation prior to publishing the Statement

## 4. CIR, LETTERS AND CIL PROCESS

In this section we discuss a number of aspects related to the process of receiving and processing copyright infringement reports (CIRs), sending notification letters and preparing and disclosing the copyright infringement list (CIL).

### *COPYRIGHT INFRINGEMENT REPORTS (CIR)*

In respect of receiving CIRs we have a number of issues / points:

- Under the current proposal (§3.52) CIRs must be forecast 2 months in advance of each notification period (which is 12 months long). Though this lead time may be broadly sensible it may be useful to be able to modify forecasts during the year (i.e. to allow reforecasting) and also to allow a mechanism for other Copyright Owners to enter the process during the year (with sufficient notification)
- Copyright Owners must be required to distribute CIRs proportionally to all (Qualifying) ISPs
- Question 4.3 asks how long the period between infringement event and CIR delivery should be. We agree with Ofcom's proposal of 10 days. If a rightsholder wishes to pursue an alleged infringement that is outside this window then they can use other routes e.g. Norwich Pharmacal disclosure order

Question 3.1 notes the basis on which rightsholders would qualify to take advantage of the procedures offered by the DEA. We broadly agree with the approach proposed.

Questions 4.2 and 5.2 both discuss quality assurance (of the IP address gathering and the IP address to subscriber matching). In respect of quality assurance there seems little benefit in ensuring a high level of quality in gathering and matching when there is a gaping and inherent flaw in the process that means that in probably more than 50% of cases the letter is sent to an individual (the subscriber) who has not carried out any infringement.

It is worth noting that the process of matching IP addresses to subscribers is not infallible and there are potential weaknesses in IP address matching that can lead to some errors.

With regard to the process of receiving CIRs thought needs to be given to what would happen in the case of fixed ISPs who are considered an ISP for the purposes the DEA but do not manage their own IP address ranges. These ISPs use wholesale broadband services from larger operators ('main ISP'). According to the overall approach suggested these ISPs should receive CIRs. However, there is no way of this happening since Copyright Owners do not know the IP address range used (and indeed in some cases it might be dynamic and so changes). Theoretically the main ISP (the operator providing wholesale services and manages the IP address range) may be able identify the IP address range to the Copyright Holders (if static IP address range are used). However, they can only do this if static IP addresses are used and they are informed that their customer is an ISP with respect to the DEA. Clearly there will be cost involved.

***TRIGGER PROCESS FOR NOTIFICATION LETTERS***

A method needs to be set to determine the triggers for sending of notification letters. Ofcom has proposed (§5.11 and question 5.3) a 'time-based' trigger whereby:

- the first notification letter is sent on the first CIR
- the second if another CIR is received one month after the first (but no more than 12 months after the first)
- the third if another CIR is received one month after the second (but no more than 12 months after the first)
- at this point the details of the subscriber and associated CIRs and letters are transferred onto the CIL

We are broadly in agreement with the overall structure of the mechanism but disagree with the numbers used. First, only a single CIR is required to trigger each notification letter and we think it should be greater. Second, CIRs remain 'live' for 12 months – we think this too long. We explain our points below.

On the question of number of CIRs required to trigger a letter the current approach means that a letter must be sent if just one CIR received. Further, a subscriber could be put on the CIL if they received just three CIRs over a 12 month period. This is likely to result in an excessive and disproportionate number of notification letters and an excessive number of subscribers being put on the CIL (falsely in most cases) which will result in greater costs in sending letters, handling questions and appeals and excessive consumer distress and harm.

The other issue regarding Ofcom's suggestion of a 12 month period is that this requires ISPs to retain data for 12 months. As a general rule, data should only be stored for long periods if it is necessary – a shorter time period is preferable.

Therefore we believe the following approach would be preferable

- the first notification letter is sent after *five* CIRs are received in a one month period
- the second notification letter is sent if another *five* CIRs are received one month after the first notification letter is sent (but *no more than two months after* the first notification letter is sent)
- the third notification letter is sent if another *five* CIRs are received one month after the second notification letter is sent (but *no more than two months* after the second notification letter is sent)

This would require CIRs to be stored for no more than about six months[11] and CIR data could be deleted after that point or transferred to the CIL.

[11] The longest period would be:
month 1: get 5 CIRS, sent 1st letter end of month
month 2: any CIRs received do not 'count'
month 3: get 5 CIRS, sent 2nd letter end of month

It may be appropriate to run some analysis (based on some actual CIR data that rightsholders have) to confirm that this approach is reasonable. The market test phase could also help assess whether this approach is sensible.

A separate issue regarding this process that should be recognised is that the subscribers of a particular connection may change and thus CIRs must be associated to a subscriber and not to a connection.

***NOTIFICATION LETTER CONTENT***

The content of the letter (and other material like the factsheet) is critical if the initial obligations are to achieve their goal of education and deterrent but achieves it in a manner that is not misleading, bullying or threatening. In particular the letters must clearly recognise that in most cases the subscriber who receives the letter has probably not carried out any infringement themselves (and therefore has done nothing unlawful). Further, the letters must not falsely suggest that the subscriber is responsible (in law or otherwise) to dissuade or prevent other users from infringing using their connection.

Unfortunately, the draft letters (and linked factsheet) suggested by Ofcom do not meet these key principles. For example, nowhere in the three draft letters does it clearly highlight that the subscriber is not responsible for infringement by third parties using their connection yet there is lots of discussion of, for instance, the threat of legal action. Further, the letters suggest that subscribers have a responsibility to dissuade or prevent others from infringing. Again this is incorrect.

We think the letter should clearly lay out the following facts (in suitably consumer friendly language):

- the subscriber has only acted unlawfully and be found guilty of infringement in a Court if they themselves have infringed copyright (by sharing files) or if they have authorised another individual to do so
- therefore, the subscriber has not infringed copyright if, for instance, someone else in the household has shared files or someone else has hacked into the subscribers wifi network and shared files
- further, the subscriber will not infringe copyright if they choose not to protect their network connection or choose not to dissuade others from infringing (though the subscriber may choose to do so themselves)
- how open wifi networks will be treated

In respect of the letter more generally, ISPs should be able to include anything else in the letter they believe is appropriate. TalkTalk reserve right to include anything in letter they consider is appropriate.

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month 4: any CIRs received do not 'count'
month 5: get 5 CIRS, sent 3rd letter end of month
month 6: details transferred onto CIL

Regarding the letter content we also question whether it is appropriate to include in the letter the name / title of the content that was shared since this could result in the disclosure of sensitive personal information to a third party and cause distress. This can occur since subscribers will be informed of allegations of unlawful file-sharing by other users of the account and that the information provided to the subscriber may be personal (to another individual) and sensitive. It is quite possible, for instance, that a parent may be provided details of a pornographic film that one of their teenage children has downloaded. The following BBC story describes one such example[12]:

> *"Lawyer Michael Coyle has 200 clients, many of who claim to be wrongly accused of file-sharing and said he was receiving around 50 calls a day on the issue. Some of the calls raise issues about privacy, he said. 'One woman called me to say that having received a letter she found out her teenage son had downloaded gay porn. She was angry because she didn't know he was gay and would have preferred to have found out from him rather than from a solicitor,' he said."*

***COPYRIGHT INFRINGEMENT LIST (CIL)***

When considering the handling of the CIL it is important to recognise that the list (or 'offenders register') will include 100,000s of innocent subscribers who have not infringed copyright, have done absolutely nothing unlawful and as a result of being on the CIL will be exposed to unfounded litigation. Thankfully any litigation proceedings will be based on whether someone has actually infringed copyright and will also be based on the principle of innocent until proven guilty. However, it is highly undesirable that 100,000s of subscribers may be brought before the court where there is not a shred of sound evidence that they have done something illegal.

Notwithstanding this major failing, there are a number of other aspects of the CIL that need to be addressed / improved.

- the CIL should be prepared in line with the approach to the trigger mechanism that TalkTalk have proposed (see above). This will mean that CIR data is (when transferred to the CIL) a maximum of six months old
- there should only be disclosure of information (albeit anonymised) in a CIL to a Copyright Owner if necessary and that particular data is required to pursue an intended or planned court action[13]. This is effectively the same test that is required to grant a Norwich Pharmacal order. As a general principle, information regarding customers (even if anonymised) should not be shared unless absolutely necessary.
- disclosure of the CIL should be contingent on a 'good behaviour commitment' to not write inaccurate and threatening letters to customers (following a Norwich Pharmacal order) as has been done by the likes of ACS Law and

[12] http://news.bbc.co.uk/1/hi/technology/7763185.stm

[13] This may result (in the case where subscribers who receive a third notification letter are put on the CIL) that only a portion of the CIL is disclosed to rightsholders

Davenport Lyons. Additionally, there must be some mechanism to enforce this commitment. TalkTalk will not provide CILs if, as a result, TalkTalk is exposing its customers to bullying.

- A number of measures should be taken to avoid the unnecessary retention of data including
  - The Copyright Owner who receives CIL data should be required to delete data received within (say) three months of receiving it
  - An ISP should be able to delete the data after (say) three months or once it is passed to the Copyright Owner
  - In terms of the frequency that a CIL can be requested, once in a three month period (as suggested by Ofcom in §6.7) is OK. However, a shorter period may be appropriate to allow a reduction in the time over which data is retained

## 5. APPEAL PROCESS

Given that innocent subscribers who have not infringed copyright can have CIRs made against them, receive notification letters and be put on the CIL and be exposed to litigation proceedings, a sound and fair appeals process is critical. Unfortunately, the appeal process specified in the DEA starts in the wrong place since it:

- presumes a subscriber guilty unless they can prove not themselves innocent (i.e. it violates the basic right to a fair judicial process that someone is assumed innocent unless proven guilty)
- and, the appeal will be unsuccessful even if it is known that the subscriber has committed no infringement (since to be successful a subscriber has to prove that they did not carry out the infringement themselves and they protected their connection neither of which is not necessary to defend an allegation of infringement in a Court)

In this context it is worrying that Ofcom seems to be under the misapprehension that appeal can address false allegations of infringement. Question 5 says: "*c) If you believe the allegation of copyright infringement is false, then you can appeal the copyright infringement report(s)*". This is incorrect – it is very possible to have not infringed copyright (and that to be known) but lose an appeal – since to be found guilty of copyright infringement requires proof that the subscriber themselves infringed copyright whereas to appeal successfully requires the subscriber to demonstrate that they did not infringe copyright themselves *and* also that they protected the connection.

The design of the appeals process must recognise this inherent and major flaw.

With regard to the appeal body and process itself we have the following comments in respect of the overall approach and Question 7.1:

- ideally the onus should be on the Copyright Owner to prove that the subscriber themselves infringed copyright

- it must be as user-friendly as possible and designed with the subscriber in mind (i.e. from the outside and from the perspective of the appellant, not the body itself). With this in mind Ofcom should conduct some research to understand, for instance, customers familiarity and technical knowledge. Making an appeal must be easy e.g. via online, email, telephone, letter
- There should be a range of support and advice to assist subscribers to lodge an appeal. This should include guidance on how to prove that the infringement was not them and on how to prove that they took 'reasonable steps to prevent other persons infringing copyright'
- Very clear guidance must be provided as to the treatment of open wifi networks (see §6 below)
- we agree that the subscriber should be able to lodge an appeal without disclosing their identity to the Copyright Owner(s)
- there should be a time limit to lodge an appeal but this should not be too short
- the relevant Copyright Owner(s) must provide their full evidence to the subscriber at the outset
- the process must be free to the subscriber (with appeal costs being paid by the Copyright Owner(s))
- any costs incurred by the ISP in the appeal must be met by the relevant Copyright Owner(s)[14]
- It is unclear why in §7.27.3 and §7.29 there is any provision for compensation to be paid to the subscriber by the Qualifying ISP. We cannot envisage any circumstances where that would be relevant

Ofcom should consult further once it has further deigned the appeal process (we heard a rumour that Ofcom was not planning to consult further). Given the importance of the appeal process, the complexity and Ofcom's inexperience in designing consumer appeal processes a consultation is all the more important.

## 6. OPEN WIFI NETWORKS

It appears from Ofcom's interpretation (§§3.19-3.31) that Ofcom considers that there are two treatments of wifi networks that are operated to provide service to other people e.g. in libraries, coffee shops, offices, airports, FON.

The first case (§3.32) is where there is an agreement (including oral or implicit) with the customer or users of the wifi service (either for the wifi service itself or a more general service e.g. a hotel room). In this scenario, the wifi operator would be considered an ISP and (if they qualify) then they would have to process CIRs and send notification letters. This raises a number of issues.

[14] In the case of an appeal against a notification letter or CIL there will be several relevant Copyright Owners

- The wifi operator will have no way (without additional cost or perhaps not at all) of knowing which device / customer carried out the infringement since they will only know the IP address used for the alleged infringement and that IP address will be shared by many customers / devices. Therefore it is unclear they could identify which of their customers carried out the infringement. It is unclear whether they could rely on the provision in the draft code (§4.3) that allows the CIR not to be processed "*if the Subscriber cannot be notified because the Qualifying ISP does not hold an electronic or postal address for the Subscriber and it is not reasonably practicable for the Qualifying ISP to obtain this information*"
- Even if they could identify the customer and even though there may be an agreement, the wifi operator may not collect sufficient details from the customer to be able to send a notification letter to them. For instance, if Starbucks is the wifi operator and it is considered an ISP (since there is an implicit agreement by virtue of the purchase of a cup of coffee) then Starbucks would need to collect the customers name and address details. Collecting the additional information will create hassle and be expensive for both the wifi operator and customer

Overall it seems unlikely that most wifi operators who are in this situation could reasonably comply with the requirements of being an ISP.

There are additional complications in this scenario. If the wifi operator is the ISP in this respect then what is the status of the 'main ISP' (who provides the broadband connection to the wifi operator). Further, how would the interface between the main ISP and wifi operator work since if the wifi operator is acting as an ISP then CIRs in respect of the wifi operator would not be relevant to the main ISP[15] and the main ISP should not have to send notification letters to them?[16] How would the main ISP know not to send notification letters? If notification letters are sent (and the wifi operator placed on a CIL) can they appeal against this? Would a defence be that they are an ISP (either qualifying or non-qualifying)?

There is in fact an additional scenario in the case of these wifi operators who are classed as an ISP but do not qualify as an ISP (and so do not receive CIRs). If they purchase their broadband connection from a Qualifying ISP they will be treated as a subscriber and receive notification letters and potentially be put in the CIL. In this case what is supposed to happen to these wifi operators? Can they appeal? Will operating an open wifi network (with implicit agreements) be a defence?

Ofcom's second case is where there is no agreement with (and no payment from) the user or where there is mixed use (e.g. a business offering wifi in public areas or an individual offering 'community access') (§3.30). In this case, Ofcom have suggested that the wifi operator '*may*' be treated as a subscriber (§3.22). In this case if infringement occurs over their network then effectively the wifi operator (as a subscriber) will be sent notification letters and may be included on the CIL

[15] There would need to be a rejection code to cover this possibility

[16] Copyright Owners would only be able to send CIRs direct to the wifi operator if they knew the IP address range used. However, they may not know this since the wifi operator will not operate their own range but rather be assigned IP addresses (either static or dynamic) by the main ISP

and possibly be exposed to litigation proceedings. Clearly though any litigation proceedings under the CDPA(88) would be baseless since the wifi operator would not have infringed copyright.

The only approach that the wifi operator could use to halt this process would be to make an appeal. However, an appeal would fail unless[17] the wifi operator were able to:

- prove that it was not them that committed the alleged infringement (this might be possible if the appeal body accepted proof that they operated an open wifi network as sufficient demonstration)
- *and* prove that they took 'reasonable steps to prevent other persons infringing copyright'

Regarding this second point, it is unclear how a wifi operator might prove they took reasonable steps. Clearly blocking or controlling access could not be considered a necessary step since the whole purpose of this type of open wifi network (with no customer agreements) is that access is easy and no agreement is required. It is unclear what other reasonable steps would be required (Ofcom recognises this in §3.31). Would the wifi operator need to block P2P traffic (which would restrict legitimate traffic) or block certain sites? Both of these options would require expensive software and management. Would operating a open wifi network be an acceptable defence in an appeal?

In summary there are three options for the treatment of wifi operators:

- Either the wifi operator is considered an ISP (and qualifies) in which case they will receive CIRs, send notification letters and compile a CIL. However, it will be either be impossible or highly costly to meet these obligations given how they operate
- Or, the wifi operator is considered an ISP (but does not qualify) in which case they receive notification letters and be placed on a CIL yet it is unclear if or how they will be able to successfully appeal and quash the unfounded accusation
- Or, the wifi operator is considered a subscriber in which case they receive notification letters and be placed on a CIL yet it is unclear if or how they will be able to successfully appeal and quash the unfounded accusation

The impact of all this will be to deter open wifi networks from operating since it will add uncertainty, risk and cost. Further, since some wifi operators will be part of larger ISPs (such as BT Openzone) it is likely they will become qualifying ISPs whilst their wifi competitors will not. This will unequivocally distort competition. This situation is simply unacceptable and contrary to Ofcom's objectives.

[17] To successfully defend themselves the subscriber would need to demonstrate that

(a) the act constituting the apparent infringement to which the report relates was not done by the subscriber, and

(b) the subscriber took reasonable steps to prevent other persons infringing copyright by means of the internet access service.

It is incumbent on Ofcom to provide clarity. In particular, Ofcom should provide more clarity of the treatment of different wifi operators and make clear how wifi operators might be addressed in an appeal. Further, if there are particular flaws in the legislation for wifi operators (which it appears there are), it should raise with Government amendments to the legislation.

In respect of question 3.5 and 3.6 regarding Ofcom's interpretation we make no comment. However, we do believe that the impact of Ofcom interpretation of the DEA is likely to cause significant harm. This suggests that either Ofcom's interpretation is incorrect or the Act is flawed (and needs amending).

## 7. DISPUTES

Regarding dispute compliance procedure (section 8)

- What will be the approach to making public the existence and details of a dispute / compliance investigation?
- Regarding compensation, will there will be any limit on compensation (Draft Code §9.19)

**- END -**