## Title:

Mr

## Forename:

Mark

## Surname:

Gracey

## Representing:

Organisation

## Organisation (if applicable):

THUS Ltd

## What do you want Ofcom to keep confidential?:

Keep nothing confidential

## If you want part of your response kept confidential, which parts?:

## Ofcom may publish a response summary:

Yes

## I confirm that I have read the declaration:

Yes

## Ofcom should only publish this response after the consultation has ended:

Yes

## Additional comments:

THUS welcomes the opportunity to comment on Ofcom’s draft initial obligations Code for the Digital Economy Act 2010.

THUS is part of Cable&Wireless Worldwide and operates the Demon Internet service to consumers as well as small and medium size enterprises. The debate about online infringement and how to deal with it, is something that we have participated in over the last 10 years (at least), through both the Demon Internet and THUS brands.

Whilst, according to the consultation document THUS, Demon or indeed Cable&Wireless Worldwide are not within scope we feel strongly that consideration for out-of-scope ISPs is needed not least of all if any of those ISPs becomes in scope. This document therefore forms THUS’s response to the consultation.

In terms of current engagement with rights holders we would like to make clear that in the last month (mid-May to mid-June) we have received 530 “CIRs” which equates to about 18 per day (including weekends) (in that period the maximum we received was 35 in a day, the minimum was 6; the mode was 18). Most of these relate to movies and have been sent from Rights Holder agencies operating from the US.

## 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.:

Yes we agree with this approach. Cost recovery is a fundamental prerequisite for this process and without a clear defined path that ensures each party is clear what is expected the Code will fail just like every effort thus far has. ISPs need to understand what level of CIRs to expect from rights holders to be able to decide how they would best deal with them.

## 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.:

There is no way that with a two month lead time any ISP business could prepare itself for the number of notifications it is to receive in the following year, especially when it is not clear what number of notices to expect. It would also mean that if an “in scope” ISP built a system and then the rights holders decided not to send as many notices, they would have wasted time and money on building a system to process CIRs that isn’t covered by the cost per CIR.

As already indicated THUS is currently receiving about 18 notices a day – would this increase if we were part of the scheme or would it stay the same? As we have indicated in our paper supplied to Ofcom researchers, BWCS, on cost recovery, the number of notices received would determine whether we needed a specific employee part time or full time, or whether economically we would be better off automating. Two months before each period does not give enough time to determine what options are available for the processing of CIRs and then to set about implementing – we would estimate that if we opted for a technical solution, we would need about a year to implement.

It should be noted by Ofcom that whilst there may be a need to have a Code in place by January 2011, this does not mean that the process has to be up and running by then as well. There are still lots of areas of the process that need to be resolved: how many notices ISPs will get; cost per CIR; general cost recovery, etc. These are all reasons that Ofcom should pursue either an implementation extension from government or at least set a sensible timeframe within which the Code is implemented.

## 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?:

see answer to 3.4

## 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 support the idea of setting a threshold and are happy with the 400k subscriber limit that is currently set. THUS do not believe that it would be proportionate to include smaller ISPs with fewer subscribers, particularly given that the “top 7” account for 96% of the UK market. It would be disproportionate for smaller ISPs to have to implement systems to manage a smaller number of notices.

Whilst we are not convinced that users will migrate away from these “big 7” ISPs as they are (a) tied into contracts and other services (e.g. triple or quadruple play) and (b) we are not convinced that the average subscriber is aware of how their services are being used by others in their premises, we are concerned that were the threshold extended to include THUS that, as with our answer to Q3.2 there is adequate lead time to build systems and set up processes as required to deal with the CIRs.

## 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?:

Whilst the 400k subscriber threshold is in place (if it remains at that – we understand there is pressure to lower it already before the Code is “live”!) then the definition of an ISP seems to work. However, when considering a wider scope, the definitional point becomes more relevant. We agree that an ISP should be the entity providing the Internet connection to the end user and that clearly this will apply throughout the value chain.

However, we’re not happy that there is no clarity about how the threshold will be changed, at what frequency and just how these definitions will change to address

issues like shops offering wi-fi, etc. particularly whilst it is implied that such “new” providers to the scheme will be expected to carry out certain duties to comply (such as making sure they have the data available to them to handle CIRs correctly).

Furthermore, we are not convinced that Ofcom has considered the scenario where a significant upstream provider is using a pool of IP addresses shared amongst its downstream providers. The wholesale provider could easily become in scope if the threshold was to fall in line with the governments original intention of based on number of infringements. But the wholesale provider would not have the relationship with the end user – so how would such a scenario work? Rights holders sending CIRs to the wholesale provider would be a waste of time, but without consulting the wholesale provider as to which of their downstream providers the IP address belongs, but they wouldn’t do this as the wholesale provider would not be covered by the Code…

Similarly, if for example all Demon Internet IP addresses were to be registered to C&W rather than still with THUS Ltd (as they are now) again the rights holder would think that C&W are the ISP when in terms of the Code they’re not. I’m sure C&W would not want to be in scope when they don’t have the customer relationship. So how would such a situation be managed by the Code?

It is clear to THUS that further consultation on definitions of an ISP are needed and most probably consultation on significant changes to the Code at the point(s) it is amended in terms of who is in scope.

## 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?:

It makes sense to use the existing definitions in the Act.

## 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 list provided appears to be satisfactory. Rights holders already provide their notices in a pretty standardised form so it would be worth Ofcom confirming that this new list includes everything rights holders are already providing.

The standardised form should also include the infringement details in machine readable code that will enable automated processing of the CIR (e.g. XML code).

## 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 that a quality assurance approach should be used to demonstrate accuracy and robustness of evidence gathered that will form the basis for the CIR.

However we question whether what Ofcom proposes goes far enough to confirm that a Qualifying Copyright Owner is indeed collecting evidence which is satisfactory to identify the subscriber. We are mindful that rights holder’s current practices have not been tested in court and that until they are done so how can Ofcom be sure that suitable standards are satisfactory to meet the test in the Code? There has been much criticism of ACS:Law firm over their methods and certainly when we have had to deal with customers who have received correspondence from ACS:Law (as a result of THUS complying with a court order) there is a general perception online that this correspondence must either be a scam (i.e. they don’t believe the letter) or that their methods are questionable not least of all because the customer is not aware of their connection being used to infringe – we have even received correspondence from alleged infringers that they’ve had their systems checked and that there was no evidence of the peer to peer network let alone the alleged infringing material.

We urge Ofcom to consider very carefully what the expected standards are and that what ever audit is decided upon is strictly independent.

## 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?:

A 10 working day limit seems reasonable, although Ofcom should ensure that ISPs have the data they need to identify subscribers within that timeframe. We understand that in the mobile arena IP assignment data changes so often that they are limited by how much they can store – this will of course become relevant if mobile access came into scope.

## 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.:

Ofcom’s approach appears reasonable although we question whether there is a need to formally reject a CIR by notifying the rights holder. It’s not clear whether the cost recovery per CIR would include rejected CIRs; if it doesn’t then most certainly the ISP should not have to notify the rights holder that it rejects the notice.

## 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.:

Whilst we understand that from a consumer point of view, there is a need for some quality control, we do question Ofcom’s approach here.

THUS is happy that the accuracy of its logs identifying use of an IP at a particular time are accurate for its own purposes, however it offers no guarantees of that accuracy. We are mindful that in fact we offer no guarantee in the accuracy whilst providing information to law enforcement under RIPA or Court Orders – this means that potentially the police could be knocking on the door of the wrong person if our logs are wrong. It therefore seems odd that current practices are suitable for our and law enforcement needs (without complaint) however Ofcom is expecting ISPs to introduce a quality assurance process to satisfy requirements under the Code for rights holders. Ofcom should be mindful that the wider the scope of the Code at a later date the smaller the ISP included in the scheme, and that such assurances will come at a price to either the rights holder (via the per CIR cost) or the ISP’s customer if it’s not covered by the CIR cost recovery model.

Furthermore, there would be resource implications which would have to be factored into any implementation time scale if an ISP needed to make changes to its systems to comply with any quality assurance processes put in place by Ofcom.

## 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 timescales which dictate a “first”, “second” and “third” notification.

## 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?:

We have no particular views on the proposals for the content of the notifications as long as how they are presented to the ISP customer is in a way that works best for the ISP, i.e. that there are not so prescribed by the Code that the ISP can’t tailor them in a way that they believe is more appropriate for communicating to their customers.

## 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 have no particular view on the thresholds proposed.

We are concerned though that the expectation is that a third party acting on behalf of a

number of rights holders are entitled to request the infringement list for all their CIRs. Ofcom needs to be make it clear how that data should be managed by the rights holder third party – based on the rules set out in the consultation that third party should only share with its client data relating to it rather than all the data supplied to it by the ISP.

Furthermore we are concerned that our customer data could potentially be provided to organisations operating outside the EU where there is no control over what is done with that data. We raise this concern because almost exclusively all the notices we receive come from third party organisations in the US.

Finally, there should be something in the Code which requires the rights holders to use the data the ISPs are holding. It would seem that rights holders have generally been unwilling to make use of the court system to pursue alleged infringers, so if this position is maintained the ISPs will be storing infringement data unnecessarily which could be challenged by the Information Commissioner.

## 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 have no particular views on the appeals proposals, although we are surprised that there is no mention of publication of the outcomes of the appeals. We believe that the results of the appeals should be published publicly to indicate the effectiveness of the appeals process, ensure transparency and also consistency of the appeals body.

## 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.:

The only thing that we would add is that there should be some kind of review after say a year to determine whether the Code is actually practical and working for both rights holders and ISPs. We are aware that Ofcom has a role to report on effectiveness and we think that this could be tied in with a review of the workability of the Code also.