UK Film Council Response to the Ofcom Consultation:

Online Infringement of Copyright and the Digital Economy Act 2010

July 2010

Executive Summary

The UK Film Council is the Government-backed lead agency for film in the UK ensuring that the economic, cultural and educational aspects of film are effectively represented at home and abroad.

We strongly support the provisions in the Digital Economy Act aimed at significantly reducing online copyright infringement. A reduction in such infringements will benefit the UK's creative economy by safeguarding existing jobs, creating new jobs through the development of legal services, and incentivising investment across the digital content businesses, including film. We also strongly support the provisions in the Act which are designed to encourage changes in consumer behaviour.

With regard to the initial obligations code which is the subject of the current consultation we wish to make the following key points:

- We broadly support Ofcom's proposed approach to the introduction of the Initial Obligations Code.

- However, we underline the need to ensure that the qualifying threshold for Internet Service Providers (ISPs) is capable of being reviewed and changed with sufficient flexibility and speed to prevent mass circumvention of the Code – e.g. through a migration to smaller ISPs or, in time, mobile ISPs.

- As a public body, we are concerned that some other public bodies and educational institutions may be classed as "subscribers" rather than "communications providers" and that this may have a detrimental impact on the educational and cultural potential of the Internet. We urge Ofcom to address and clarify this issue.

- We retain serious concerns about the inequitable impact of the current proposals on cost-sharing, particularly with regard to smaller British companies which are rightsholders.[1] Although these proposals are not part of the current consultation, they are inextricably tied to the operation of the Code. We urge Ofcom to engage fully with the issues raised by the proposals on cost-sharing since, as drafted, those

[1] The UK Film Council would be happy to supply supporting data.

proposals significantly reduce the effectiveness of the draft Code as set out here.

Responses to specific questions

Question 3.1: Do you agree that Copyright Owners should only be able to take advantage of the online copyright infringement procedures set out in the DEA and the Code where they have met their obligations under the Secretary of State's Order under section 124 of the 2003 Act? Please provide supporting arguments.

The UK Film Council accepts that it is normal procedure for impact assessments to form part of the development and implementation of public policy. It is also compliant with business planning processes. It therefore seems reasonable that a copyright owner should provide an estimate of the number of copyright infringement reports that it intends to provide an ISP in a notification period. However, given the fact that the Act is breaking entirely new ground with regard to reducing online copyright infringement, it would also be practical for all sides to accept that for the initial notification period such estimates will, by their nature, need to be treated with considerable caution, most particularly in the absence of an agreed baseline regarding the volume of infringements.

If rights holders are required to make a contribution to costs in advance, then we believe that money should be paid to Ofcom only and not to ISPs. A mechanism needs to be established for reimbursement of any interest on money paid. However, as we have made clear in our submission to the Department for Business, Innovation and Skills Consultation on Cost-Sharing we do not agree with the current proposed allocation of costs which we believe is inequitable, most especially with reference to smaller rights holders.[2] The current proposed split of costs may make it impractical for smaller rights holders,[2] for example those distributing independent British films to participate in the

[2] http://www.ukfilmcouncil.org.uk/media/pdf/3/l/BISCostsConsultationFinal.pdf

process covered by the Initial Obligations Code. This remains a fundamental issue for the UK Film Council. It is very important that ISP costs are not unduly inflated creating greater burdens for rightsholders, especially smaller ones.

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 seems an appropriate lead time, at least in the initial phase. There is an urgent need to implement the Code in the face of significant and continuing levels of online infringement. We believe that the notification period of one year is too long – smaller, independent rightsholders may have to sign-up for a whole period, despite the fact that, given the flexibility of release dates, a particular release may be moved outside of the notification period. A notification period of a year could therefore result in them incurring unnecessary costs.

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 question 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 recognise that, as the Explanatory Notes to the Act make clear, the Government's intention is to set "qualifying threshold criteria" for ISPs.[3] Therefore the UK Film Council recognises that the principle of a cut-off point, so that the Code only applies to ISPs with more than a certain number of subscribers, is consistent with the intentions behind the Act. In the current market, the proposal for a floor of 400,000 subscribers seems to us a practical level, since this will enable the Code to contain within its scope the vast majority of the relevant market in the UK, and thereby the vast majority of potential infringements. However, we are concerned about the issue of migration by infringers from qualifying ISPs to those below the

[3] Explanatory Note 5 at http://www.opsi.gov.uk/acts/acts2010/ukpga_20100024_en_1

threshold and believe that this could mean that Ofcom is put in the position where it is always playing "catch-up" with regard to ISPs which are carrying large numbers of subscribers who have migrated there in order to avoid being covered by the Code. We welcome the proposal that Ofcom has the power to review the qualifying criteria but we would urge the regulator to also consider ways to ensure that it is not placed in the position of always playing catch-up.

"Costs and feasibility of requiring these ISPs to comply with the obligations" should not be a relevant issue. The issue is the level of infringement – that should be determinant of whether an ISP is in scope. While we recognise that, for the first notification period, it may make sense to exclude mobile ISPs from the scope of the Code we would also urge Ofcom to keep this under review.

In particular we would note Ofcom's remarks in its recent discussion paper on net neutrality that:

"in the two years since Q4 2007 mobile internet volumes have increased by over 2300 per cent but revenues have not even doubled. In a recent report, Morgan Stanley argues that within five years more users will likely connect to the internet via mobile devices than via desktop PCs."[4]

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? Yes.

[4] http://stakeholders.ofcom.org.uk/binaries/consultations/net-neutrality/summary/netneutrality.pdf, p.13 5 http://www.ja.net/development/legal-and-regulatory/regulated-activities/related-regulatory-documents/Ofcom-DEA-Code-response.html

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?

As a public body, the UK Film Council recognises that some other public bodies and institutions which currently provide internet access have serious concerns that at present they are likely to be classed as "subscribers" rather than as "communications providers." For example, the submission to the consultation made by JANET, the UK's National Research and Education Network raises significant issues in relation to paragraph 3.30 of the consultation which it believes could result in the limitation of internet access to small numbers of trusted staff within some public and educational institutions such as universities.[5]

This problem also extends beyond public bodies to community libraries and other community spaces such as youth clubs etc. Unless this issue is resolved in a satisfactory way it could have a detrimental impact on social inclusion, depriving some communities of affordable access to the Internet. We therefore wish to see a solution which balances these considerations with the fundamental need to ensure that rightsholders interests are protected.

While we are not qualified to comment in detail on these concerns, we urge Ofcom to find a way to assuage the concerns of these public bodies and to ensure that the Act does not have a chilling effect on the power of the Internet to stimulate learning and education in all contexts.

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?

It is not appropriate for us to comment in detail on the content of the CIRs but we agree with the broad approach as set out in the consultation. However, the warning letter from the ISP to subscriber should cover such matters as the details of where

[5] http://www.ja.net/development/legal-and-regulatory/regulated-activities/related-regulatory-documents/Ofcom-DEA-Code-response.html

the film could be downloaded legally, the benefits of legal downloading etc.

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.*

Yes. We note that Ofcom has used a quality assurance approach before, for example in relation to price comparison calculators, and we believe that this is an equitable and sensible approach.[6]

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?*

Yes.

Question 5.1: *Do you agree with our proposals for the treatment of invalid CIRs? If you favour an alternative approach, please provide supporting arguments.*

We are not in a position to comment on this, but would direct Ofcom to the substantive issues which are being raised by rightsholders on with regard to this.

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.*

Yes. See answer to Question 4.2.

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.

[6] http://stakeholders.ofcom.org.uk/binaries/consultations/ocp/pricescheme.pdf, p.6

Yes. We support a time-based approach for the reasons set out at paragraph 5.13.

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 are broadly happy with the content of the notifications as they stand.

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.*

Yes, we broadly agree with the threshold. We particularly welcome the statement at paragraph 6.5 that "it should be noted that a Copyright Owner is defined as including a person authorised to act on behalf of another Copyright Owner." This is because we believe that, for some parts of the content industries, it may be more cost-effective and more efficient for there to be an entity which is capable of representing more than one Copyright Owner.

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.*

In general, we agree with the proposed approach. However, clause 7.12.5 ("any other ground on which a Subscriber chooses to reply as to why the act or omission should not have occurred") is far too general and should be deleted.

Question 8.1: *Do you agree with Ofcom's approach to administration, enforcement, dispute resolution and information gathering in the Code? If not, please provide reasons. If you favour an alternative approach, please provide supporting evidence on the benefits of that approach.*

We are not qualified to comment in detail on this. However, Ofcom's proposals to publish guidelines with regard to the enforcement and dispute resolution regime as proposed at paragraph 8.6. would seem desirable in the wake of the need to ensure transparency and clarity for all stakeholders.

Ends.