UK MUSIC

Response to:

Ofcom: Online Infringement of Copyright and the Digital Economy Act 2010
Draft Initial Obligations Code

July 2010

About UK Music

UK Music is the umbrella organisation which represents the collective interests of the UK's commercial music industry - from artists, musicians, record producers, songwriters and composers, to record labels, music managers, music publishers, and collecting societies.

UK Music consists of: the Association of Independent Music representing 850 small and medium sized independent music companies; the British Academy of Songwriters, Composers and Authors with over 2,200 songwriter and composer members; the BPI representing over 440 record company members; the Music Managers Forum representing 425 managers throughout the music industry; the Music Producers Guild representing and promoting the interests of all those involved in the production of recorded music – including producers, engineers, mixers, re-mixers, programmers and mastering engineers; the Music Publishers Association, with more than 250 major and independent music publishers representing close to 4,000 catalogues; the Musicians Union representing 32,000 musicians; PPL representing 42,000 performer members and 5,000 record company members; and PRS for Music representing 70,000 songwriters and composers and music publishers.

Executive Summary

UK Music supports the measures in the Digital Economy Act which we believe will lay foundations for a more sustainable and incentivised digital marketplace, where copyrighted goods carry a value that can be realised by their creators and investors.

However, we feel it is important to contextualise our support for this legislation – the purpose of which is to look forward, not back.

For the membership of UK Music, the Digital Economy Act is a catalyst for change. It is not a means to an end.

Furthermore, the legislation must not be viewed in isolation.

In conjunction with other measures - such as the continued licensing of new online music services and consumer education campaigns - we believe a process whereby ISPs send notifications to those customers who are infringing copyright online has the potential to make a significant impact in driving forward the UK's digital market.

It is UK Music's aim that these customers – who are also music fans - will be encouraged to enjoy one of the diverse range of existing licensed music services: ensuring that those who create and invest in music can be paid, and leading to further investment in future services.

Over the next decade, it is crucial that the UK's "knowledge economy" - encompassing creative, technological and telecommunication sectors - can prosper.

Earlier this year, UK Music articulated and published our shared vision for the future of the UK's commercial music industry. Titled *Liberating Creativity*, this set out an ambition that "the UK music industry would lead the world in realising the full potential of digital music and achieve the highest share of income from music in the digital marketplace" by 2020, and that "UK Music fans would have the greatest array of shops, services and forums where music is available, experienced, recommended, shared and enjoyed, fully in the knowledge that it is all legal and that the creators are being paid."[1]

[1] *Liberating Creativity* executive summary, published by UK Music April 2010

Our sights are set firmly on pursuing opportunities, growth and innovation in the digital marketplace. In 2010, we have a firm foundation on which to build, with more than 50 licensed digital music services in the UK (excluding the hundreds of direct-to-fan artist or label run stores, smartphone applications and other digital innovations). Digital income now accounts for 20.3% of overall recorded music revenues. In 2009, digital recorded revenues totalled £188.9m - an increase of 47.8% on 2008[2]. It is our ambition to accelerate and diversify this growth.

In context, it is also clear that economic conditions in the present decade will be vastly different to the last. It is imperative that commercial partnerships between creative, technological and telecommunication sectors are built on a sustainable and mutually beneficial footing.

Certainly, there is evidence of such partnerships developing.

Emerging digital services such as mflow, Spotify and We7 have taken a longer-term approach to business, offering fans more choice and - crucially - comprehensively licensing all appropriate right holders, including independent music companies and music publishers. With the contraction of venture capital, it is imperative that such services can conceive of their "business model" from launch.

We anticipate more innovative licensing in the future, and particularly in partnership with Internet Service Providers where there remain significant commercial opportunities.

In 2010, UK Music established a Future Business Research Group to research music consumption on a household level and anticipate opportunities for the licensing of music subscription services.

UK Music's members would encourage an increased emphasis and resources being placed on education and marketing initiatives – for instance, the Music Matters campaign[3] - highlighting the range of licensed services available and the value of music. And, ultimately, on delivering to music fans an even more diverse range of services.

Collectively, it is our aim to innovate and to find licensing-based solutions.

Considerations of *sustainability*, *inclusion* and *incentivisation* should also be key when it comes to implementing the initial obligations. To deliver our ambitions, it is crucial that the Code of Practice balances integrity with accessibility. It is imperative that the obligations are viable for the creators, self-employed and small businesses that constitute the vast majority of our business.

The measures proposed in the Digital Economy Act mark a welcome and progressive strategy. However, they are also untested. They are also likely to be more costly than anticipated, as Government has indicated its expectation that copyright owners should bear not only costs associated with their own obligations, but the costs associated with ISPs obligations as well.

We ask Ofcom to bear in mind that the music industry has already weathered some 10 years of significant disruption and structural change. The new wave of embryonic licensed music services is indicative of the green shoots of opportunity; but overall the industry is justifiably anxious of new costs, and small copyright owners are particularly anxious.

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[2] http://www.bpi.co.uk/press-area/news-amp3b-press-release/article/recorded-music-sales-revenue-stabilise-in-2009.aspx

[3] http://www.whymusicmatters.org

We make this point because such a significant proportion of the industry is comprised of small or micro businesses. 81% employ fewer than 5 people[4]. Of the 850 members of the Association of Independent Music, the average number of employees per company is 2. For the vast majority of these, there is limited infrastructure or budget in place for detecting online infringement or pursuing infringers in court. Margins are extremely tight, and irregular cash flows place additional pressures on liquidity.

Consequently, unreasonably high upfront costs associated with implementation of the Digital Economy Act could represent a disproportionate burden that the vast majority of music creators and music investors would be unable to shoulder.

In such circumstances, we would very strongly caution Ofcom and Government against surmising that the inability of some music businesses to meet the initial obligations set out in the Code could be taken as an indication of their interest or willingness to engage in the process.

We note the pragmatic approach that Ofcom has taken, particularly towards smaller ISPs.

We are therefore confident that Ofcom will apply similar pragmatism to the music sector, and particularly to creators and smaller copyright holders.

The integrity of the initial obligations depends on the feasibility of their inclusion.

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.

In principle, we agree that copyright owners should meet certain obligations before they qualify to take advantage of the copyright infringement procedures set out in the Digital Economy Act.

However, for the Code to function and to achieve our aims of growing the UK's digital music market, it is essential that these obligations are pragmatic and do not represent an excessive and unreasonable barrier to entry. We do not believe the suggested obligations are pragmatic.

At present, the suggested obligations are for copyright owners to contact each qualifying ISP two months ahead of a notification period and: (a) estimate upfront the number of CIRs that they are likely to send in the forthcoming notification period (currently 12 months); and (b) to pay the cost of these CIRs in advance.

By default, smaller copyright owners with fewer resources – particularly independent record labels and music publishers and individual artists and composers - are at greatest risk to the financial consequences of online copyright infringement. It is therefore imperative that they can take advantage of the procedures set out in the Digital Economy Act. Unfortunately, even if it were possible to predict the volume of CIRs they might need to send in a 12 month period, cash flow would dictate that paying for these CIRs in advance would be unfeasible.

Such obligations would be far beyond the resources of practically all UK music copyright owners. Collectively, these are some of the most significant investors in new talent and repertoire, and typical of the revenue-generating businesses we all wish to see thrive in the

[4] http://www.ccskills.org.uk/LinkClick.aspx?fileticket=bpzuRnIQSFE%3d&tabid=600

future. They are operating in a volatile, diverse and fast-paced digital market and on tight margins.

We believe these challenges must be addressed if the Digital Economy Act procedures are to reach their stated objectives of reducing online copyright infringement and encouraging growth in the online market.

In terms of the notification period, we believe this should be reduced from twelve months to three months.

Estimating the volume - two months upfront - of CIRs necessary to be sent over a 12 month period would be hugely challenging for any copyright owner. Quite simply, they would be unable to predict their release schedule so far in advance. This would be far more pronounced for smaller rights owners, reliant on revenues generated from a specific artist or release, and who need these revenues to invest in the careers of other creators.

By reducing the notification period to three months, qualifying copyright owners could provide qualifying ISPs with more realistic estimations of CIRs, and particularly so in the first year of notifications when there will be inherent uncertainty over costs. Reducing the period will, we believe, alleviate some of this uncertainty and provide greater accuracy.

Additionally, a shorter period would provide greater flexibility to participate in terms of both targeting CIRs around specific releases/ repertoire and helping to alleviate the burden of payments by qualifying rights owners.

In terms of payment, and to ensure the process is open and feasible to more than the largest music right owners, we would be happy to work with Ofcom to explore other possibilities.

We would reiterate that UK Music members are in agreement with the principle of obligations. For the integrity of the process and to provide Internet Service Providers with greater certainty, it is correct that copyright owners should pay to qualify.

However, under the obligations suggested in the draft Code, the barrier to entry is simply too high.

We look forward to working with Ofcom and other stakeholders to find pragmatic and workable solutions to the above challenges.

CASE STUDY: Trevor McNamee, Jalapeno Records

I run an independent label called Jalapeno. We release and invest in album acts from the funk and soul side of dance music. Our albums sell upwards of 500 copies to around 30,000.

We have ambitions to crossover our artists into the mainstream and invest accordingly in recording, marketing and promotion. We also have a digital only ‘house music’ label called Floorplay, which sells single dance tracks predominantly to DJs and is digital only.

In my mind illegal downloaders can be split into two types:

1/ Those who now believe music should be free and would not pay for it.

2/ Those who would pay for music they like, but because there is no repercussion to taking it without paying, and because everybody else is doing it; put their normal morals to one side and hit the Pirate Bay or whichever their chosen method of access is.

It is the second type that I think the DEA has some chance to target.

Whenever I have a new release which seems to be popular, I employ a company which constantly monitors the internet for posted links to my releases. They issue 'takedown orders' which leads to the links being removed.

In the two weeks that the takedown service lasts I can expect to see around 50 – 100 takedown requests issued. It's a service that costs me money but I simply do not have the time to manage it myself with such limited resources (one employee and myself).

I have been a massive supporter of the DEA but I think there is a role for the government to enforce the Act and there's a definite need to help smaller labels participate in enforcing their copyrights without costly barriers to entry.

Release schedules are set three months in advance and only when a record is released do we know how popular it will be (and therefore how heavily infringed). So, the idea that I can predict and pay upfront for the amount of infringement letters 14 months in advance is totally unworkable. I'm not sure we can even afford the investment required to directly identify infringers and provide that info to the ISPs, but I am willing to do whatever I can.

More likely is that there would be some test cases by larger companies with bigger resources leading to national publicity and potentially the return to the 'buying public fold' of the second type of offender identified above. That would be my hope anyway.

I would like to see more onus on the ISPs to educate their users (via national TV adverts) of the implications of the Act. That aside, I feel there needs to be much lower requirements for participation in enforcement and as much education as possible for labels about how the process would work.

CASE STUDY: Paul Harris, Reverb Music (UK) LLP

Reverb Music is an independent music publishing company with approximately 8,000 copyrights in our catalogue. We are a fairly typical small music company - who have managed to grow a healthy business despite the increasing loss of income due to so-called file 'sharing'. Hence, we are very keen to join the initiative to dissuade these practices, encourage the perception that music has value, and encourage the use of legitimate services provided by legitimate businesses that pay royalties.

However, how Ofcom is proposing to implement the cost contributions from companies like ours – requesting that we forecast the amount of letters we may have to send out to copyright infringers over a fourteen month period, and then requiring us to pay a deposit to cover the as-yet-undecided cost of these letters – would almost certainly preclude us from participating in these efforts.

There are two reasons for this.

Firstly, it's impossible to accurately forecast the amount of times our copyrights may be infringed over a period of time. The figure will fluctuate due to a number of factors. As publishers, our copyrights are released on a large number of music labels, major and independent, and we have no idea how these releases will fare.

A more popular release will lead to more 'sharing'. We may sign something in the coming fourteen month period that proves especially popular amongst the file sharing community: we are aware that certain genres are more 'shared' than others. We may negotiate a synchronization license for a copyright that sparks a bout of file sharing, as we have witnessed in the past: hitherto unknown acts gain exposure on a popular TV show that leads to a slight increase in sales and a massive increase in 'sharing'.

Ironically, these are the acts that require the most support. Any significant exposure unfailingly leads to an increase in infringement – a TV appearance, a tour, a festival appearance. All these factors play a role in the amount our copyrights are infringed – but unfortunately are practically impossible to predict with any meaningful accuracy.

Secondly, to agree to a fourteen-month deposit – especially at this stage when the cost of the letters is undecided – does not make sound business sense. Who would agree to a cost that cannot be forecast, and at a point where the cost-per-unit is not established? The period would also cause a problem, especially for companies of our size. Fourteen months is a long time and the size of the deposit would certainly have an adverse effect on our cash-flow. This alone may prove to be as crippling to our business as the infringement that we are trying to fight.

Companies like ours are keen to contribute to this fight. We just need a more workable framework in which to help.

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.

As stated in our response to Question 3.1, we believe the notification period should be reduced from twelve to three months.

In this context, we believe a lead time of two months, for the purpose of planning ISP and Copyright Owner activity in a given notification period, is appropriate.

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?

We fully appreciate that, because no CIRs have been issued to date, Ofcom does not have the available information to set a CIR-based threshold for Qualifying ISPs.

We also acknowledge and appreciate Ofcom's pragmatic approach to enable swift implementation of the Digital Economy Act.

- that the Code should not initially apply to mobile ISPs
- that it should only apply to those fixed ISPs with more than 400,000 subscribers
- that, should copyright infringers migrate to ISPs outside of the Code, Ofcom will review the qualification criteria to address this

Online copyright infringement is a moving target. Unlicensed services are capable of gaining huge traction in a short time frame, and technological developments can have an instantaneous effect on consumer behaviour.

Therefore it is of upmost importance that the impact of technological developments can be carefully monitored and appropriate actions taken.

In line with Ofcom's pragmatic approach, we would consider all ISPs to fall within the boundaries of the Code. Initially the qualifying criteria would mean at least seven fixed providers would be actively obligated to take part in the Digital Economy Act processes. This would provide dispensation for non-qualifying ISPs, who currently do not fulfil Ofcom's criteria, to be brought into the process, at a future date, if circumstances demand.

We would seek assurance that Ofcom's quarterly reporting will uncover whether there is infringement taking place on non-qualifying networks; and, if there is infringement taking place, there will be a suitable trigger point to bring such networks into the Code.

We would reiterate that online copyright infringement is a moving target; it is crucial that any approach is future-proofed, enabling Ofcom to fine-tune the application of the Code on a quarterly basis.

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?

Again, we acknowledge and appreciate Ofcom's pragmatic approach, but with some caveats.

Fixed ISPs with less than 400,000 subscribers are currently excluded from the procedures. However, these criteria need to be regularly reassessed. If a significant percentage of subscribers to a specific ISP are found to be infringing copyright, then there must be provision to apply the Code.

Additionally, we would suggest that the rate of growth in regards the percentage of subscribers who are infringers should be monitored. Dramatic growth should trigger a response from the regulator. We would recommend that there is a threshold of growth above which Ofcom would consider taking that ISP into the Code.

Overall, and in line with its quarterly reviews of copyright infringement - and assuming quarterly notification periods - we would reiterate that Ofcom should monitor the wider ISP sector to scrutinise whether any non-qualifying ISPs are attracting a mass of infringers; whether the current 400,000 subscriber threshold is relevant; and developments in the mobile broadband market.

For the licensed market to develop, it is vital that no business achieves an anti-competitive advantage by exploiting potential loopholes under the Code.

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?

For the first year we agree with Ofcom's approach. We reiterate that it is pragmatic for the Code to cover 96.5% of the residential and SME business broadband market (as represented by 7 fixed ISPs) and for Ofcom to make accurate and evidence-based judgements in regards to other networks as part of its quarterly reviews.

We also agree with Ofcom's interpretation of the definitions in the Communications Act, in terms of what constitutes an Internet Service Provider. Specifically, that Wi-Fi networks fall under the definition of Internet Service Providers if provided in conjunction with other goods or services to a customer (such as a coffee shop or hotel).

In practice, we believe that the priority for the first year should be to establish procedures with the seven fixed providers. However, we expect Ofcom to closely monitor the wider ISP sector through quarterly reports and to scrutinise whether currently non-qualifying ISPs are attracting a mass of infringers (and should therefore qualify for the Code).

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?

UK Music supports the growth and provision of public Wi-Fi, especially in libraries, educational establishments and in commercial businesses such as hotels and cafes.

However, with the majority of UK citizens banking, shopping and paying bills online, we would suggest that there needs to be increased efforts in educating consumers about Wi-Fi security. By default, this will be a welcome byproduct of notifications, which will contain this information.

In terms of public Wi-Fi or access within retail spaces, we reiterate that the priority for the first year should be to establish procedures with the qualifying communications providers, while ensuring Ofcom can monitor the wider ISP sector through quarterly reports and to scrutinise whether non-qualifying ISPs are attracting a mass of infringers.

Certainly, we would ask Ofcom to consider and assess the network activity of the larger business-to-business Wi-Fi providers.

For both 3.5 and 3.6 we would additionally ask that the subscriber base for qualifying ISPs is under constant review.

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?

We agree with the proposed content of CIRs, and feel this should be sufficient, also in the event of an appeal.

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 with Ofcom's proposals.

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?

We agree that copyright owners should be required to send CIRs within 10 working days of evidence being gathered.

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.

In principle, we would accept that there must be provisions to deal with the treatment of invalid CIRs.

However, we feel it is appropriate, in the spirit of partnership and cooperation, that ISPs would bear an equal share of responsibility in our shared objective of developing a more sustainable and incentivised digital marketplace.

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.

As with 4.2, we agree with Ofcom's proposals. It is vital that ISPs maintain accurate and robust systems, that these systems have integrity, and that they can provide Ofcom with Quality Assurance reports.

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.

Our members are unequivocal that the tone of the first notification should be marketing-led.

Our overriding objective is that users of unlicensed music services switch to licensed alternatives.

To achieve this, it is vital that – collectively – these communications are pitched appropriately.

We are aware that a small minority of copyright owners have chosen alternative means of notification, combined with demands for immediate financial settlements. However, we believe the notification process set out by the Digital Economy Act will be the more effective and proportionate way forward, and the most likely to encourage music fans to engage with licensed services.

We believe that notifications should be priced at a level that makes it feasible also for smaller right owners to use the Digital Economy Act process. This is certainly preferable to rights owners sending financial demands for settlements, with potential cost recovery mechanism of a settlement running into several hundred or thousand pounds.

Ultimately, it is our intention that a first notification will be the customer's last.

To ensure these objectives are met, we would strongly urge that a consumer or marketing psychologist is involved in the drafting process, and that a familiar, trusted and independent third party – such as Citizens Advice – is involved to disseminate further information.

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?

In terms of second and third notifications, messaging needs to be equally supportive and encouraging. Even on a third notification, we still aim to migrate account holders towards licensed services.

However, for the benefit of those account holders receiving second and third notifications, the potential ramifications of being added to a Copyright Infringement List should be plainly and explicitly explained.

Without this information, there is potential that they could misinterpret the seriousness of such notifications.

Given that ISPs will be sending the notifications, it is also important that any messaging does not run counter or undermines the spirit of the initial obligations.

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.

Ofcom has suggested that, to be included on a Copyright Infringement List, a subscriber must have received 3 notifications from their ISP within 12 months. To gain access to this anonymised list, the copyright owner must have sent at least one CIR relating to that subscriber within the previous 12 months. A list can only be requested once every three months.

In terms of the number of requests that Copyright Owners can make to each ISP to access a Copyright Infringement List, we acknowledge and agree with the principle of a threshold.

However, we consider Ofcom's proposal of a three-month limitation to request a Copyright Infringement List is unreasonable, especially in the Act's first year of implementation. We believe a one month limitation is more likely to be effective in achieving the objectives of the Act.

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 agree in principle to Ofcom's approach, but believe in some instances that the grounds for appeal are too wide and ill defined. Specifically the final recommendation: "[and] any other ground on which a Subscriber chooses to rely as to why the act or omission should not have occurred."

To ensure the integrity of the appeals process, at the very least, this should be specified as "relevant" or "reasonable" ground.

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.

It is imperative that there are provisions for the administration and enforcement of the code, including the ability to resolve disputes between Qualifying ISPs and Qualifying Copyright Owners. However, we would want this process periodically reviewed as part of Ofcom's overall assessment of the procedures.

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