



# Online Infringement of Copyright and the Digital Economy Act 2010

Notice of Ofcom's proposal to make by order a code  
for regulating the initial obligations

Interim statement and notice of a  
proposal to make an order

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# Contents

| <b>Section</b> |   | <b>Page</b> |
|----------------|---|-------------|
|                | Purpose of this document  | 1           |
| 1              | Executive summary   | 2           |
| 2              | Introduction  | 8           |
| 3              | Application of the Code   | 14          |
| 4              | Copyright infringement reports                                    | 37          |
| 5              | Identifying subscribers and making notifications                  | 48          |
| 6              | Copyright infringement lists                                      | 62          |
| 7              | Subscriber appeals  | 68          |
| 8              | Sharing of costs  | 78          |
| 9              | Administration, enforcement, disputes and information gathering   | 81          |
| 10             | Next steps  | 86          |
| <b>Annex</b>   |   | <b>Page</b> |
| 1              | Responding to this consultation                                   | 88          |
| 2              | Consultation response cover sheet                                 | 90          |
| 3              | The Initial Obligations Code                                      | 92          |
| 4              | The notification process  | 93          |
| 5              | Interpretation of key statutory definitions in the DEA provisions | 94          |
| 6              | List of selected abbreviations                                    | 103         |

## Purpose of this document

In this interim statement and notice under section 403 of the Communications Act 2003 (“CA03”),<sup>1</sup> Ofcom sets out its proposed conclusions in relation to its obligation to make by order a code for the purpose of regulating the initial obligations. These are measures introduced by the Digital Economy Act 2010 (“DEA”), aimed at reducing online copyright infringement. Specifically, we set out the general effect of the provisions of the draft Online Infringement of Copyright (Initial Obligations Code) Order (“the Code”), (which is included at Annex 3 of this statement) and explain our reasoning for them.

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<sup>1</sup> See section 1.11 below.

## Section 1

# Executive summary

## Background and introduction

- 1.1 The DEA received Royal Assent in April 2010. It followed a number of policy developments related to online copyright enforcement including the Gowers Review of the UK Intellectual Property Framework (2006), the industry-led Memorandum of Understanding process to trial subscriber notifications (2008), and the Government's Digital Britain reports (2009).
- 1.2 The provisions in the DEA impose new responsibilities on Ofcom to implement and administer measures aimed at significantly reducing online copyright infringement. These measures form part of a multi-pronged approach by Government aimed at reducing online copyright infringement through a complementary mix of enforcement, consumer education and encouragement to industry to develop and promote online services offering lawful access to copyright works.
- 1.3 The DEA provisions insert amendments to the Communications Act 2003 ("CA03") to create two new obligations for internet service providers. These are referred to as the "initial obligations". They are to:
  - Notify their subscribers if the internet protocol ("IP") addresses associated with them are reported by copyright owners as being used to infringe copyright; and
  - Keep track of the number of reports about each subscriber, and compile, on an anonymous basis, a list of those subscribers who are reported on above a threshold to be set in the Initial Obligations Code. This list is referred to as a "Copyright Infringement List" ("CIL"). After obtaining a court order to obtain personal details, copyright owners will be able to take action against those included in the list.<sup>2</sup>
- 1.4 The DEA provides that the implementation and regulation of the initial obligations must be set out in a code. In the absence of an approved code drawn up and agreed by industry, it falls to Ofcom to make a code in accordance with the requirements of the DEA provisions.
- 1.5 Consequently, on 28 May 2010 we published a consultation document – Online Infringement of Copyright and the Digital Economy Act 2010: Draft Initial Obligations Code – in which we set out our proposals for the Code. In this interim statement we refer to this consultation as "the May 2010 consultation".<sup>3</sup>
- 1.6 This interim statement and notice details our proposed conclusions on the May 2010 consultation. It also sets out the general effect of the draft Code which is included at Annex 3, which we are proposing to make. Publication of this interim statement has been delayed due to a number of factors, including a judicial review of the DEA provisions, a subsequent appeal to the Court of Appeal and the revision by Government of secondary legislation in relation to the cost sharing arrangements as a result of that litigation.

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<sup>2</sup> [http://www.opsi.gov.uk/acts/acts2010/en/ukpgaen\\_20100024\\_en\\_1](http://www.opsi.gov.uk/acts/acts2010/en/ukpgaen_20100024_en_1) at paragraph 31.

<sup>3</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/copyright-infringement/summary/condoc.pdf>

- 1.7 Below, we set out the key proposals that we made in the May 2010 consultation and then set out the amendments we have subsequently made to them.

## **Our May 2010 consultation proposals**

- 1.8 In summary, our May 2010 consultation proposed that:

- Initially the Code should only apply to fixed ISPs with more than 400,000 subscribers;
- The accuracy of copyright owners' evidence-gathering systems and ISPs' internet protocol (IP) address-matching systems should be managed using a self-certification approach;
- Copyright owners would have ten working days from gathering evidence within which to submit it to ISPs, who would then have ten working days to identify the subscriber and send a notification (if appropriate);
- There should be a three-stage notification process with at least one month between each notification, which should be written in plain English and contain sufficient information to inform subscribers about their situation. The first two notifications could be sent by post or email, the third by recorded delivery post;
- Subscribers should be placed on the CIL if they had received a first, second and third notification within a 12 month period;
- Copyright owners could ask for the list every three months and ISPs would have five working days in which to provide it; and
- There should be an independent appeals process through which subscribers could appeal on the grounds specified in the DEA provisions. We also reflected the fact that the grounds for appeal specified were non-exhaustive by proposing that subscribers could appeal on any other ground as to why an act or omission should not have occurred.

## **Amendments to our previous proposals**

- 1.9 The key proposals that we made in the May 2010 consultation are unchanged as set out later in this document. However, we have made the following amendments to the proposal contained in our May 2010 consultation. These amendments, and our reasons for them, are detailed in this statement and reflect stakeholder responses to our consultation and instructions we have been given by Government in accordance with the approvals process set out in the DEA.

- We have amended the definition of the internet access services and internet access providers that are within scope of the Code to clarify that only providers of fixed internet access supplying services over more than 400,000 broadband-enabled lines will be subject to the initial obligations. Internet access providers which do not meet these criteria (for example, mobile network operators and providers of Wi-Fi services) are outside the scope of the Code. This is on the basis that costs of participation would be disproportionately high compared to the expected low reduction in overall levels of online copyright infringement that participation would bring;

- We have added in paragraph 2 of the Code a further qualification provision, that where all fixed ISPs within a Group (as defined in section 1261 of the Companies Act 2006) provide internet access services over more than 400,000 broadband-enabled lines in aggregate, they will each be qualifying ISPs. This removes ISPs' ability to avoid the application of the Code by making changes to their corporate structure;
- The Code now specifies that, in the event a qualifying ISP falls below the qualification threshold (for example as a result of customer churn), it will remain subject to the initial obligations for the duration of the notification period in which it ceases to meet the threshold and for the notification period which immediately follows. This is so that copyright owners which have funded ISP investment in CIR processing systems have a reasonable period during which they can benefit from this investment. We consider this reasonably balances the interests of the copyright owner and ISP;
- In the May 2010 consultation we said that copyright owners must detail to Ofcom the processes that they have put in place to audit their evidence-gathering systems. We have now specified that copyright owners will be required to have their procedures approved by Ofcom before they can send any reports of apparent copyright infringement to ISPs. We expect that a copyright owner will be well placed to secure approval from Ofcom if it adopts evidence-gathering procedures that comply with a publicly-available specification which Ofcom is prepared to sponsor. ISPs are not required to have their subscriber identification processes approved by Ofcom, though failure to comply with the requirement for accurate address matching is likely to be considered a material breach of the Code, triggering enforcement action and a fine where appropriate. We believe that ISPs have clear incentives to ensure their processes are robust in order to avoid reputational damage with their subscribers. However, Ofcom also proposes to sponsor a specification for matching IP addresses to individual subscribers which we would encourage ISPs to adopt on a voluntary basis.
- The Code now clarifies the standard for obtaining evidence of copyright infringement. It now specifies that a copyright owner may only send a CIR if it has gathered evidence in accordance with the approved procedures which gives reasonable grounds to believe that:
  - a subscriber to an internet access service has infringed the owner's copyright by means of the service; or
  - has allowed another person to use that service and that person has infringed the owner's copyright by means of that service.
- In the May 2010 consultation, we proposed that a copyright owner could only participate in the notification scheme if it had paid the fees due to ISPs and Ofcom under the cost-sharing arrangements made by the Secretary of State. The Code no longer makes advance payment of these fees a qualifying condition which a copyright owner must satisfy in order to be able to send CIRs to an ISP. In the interests of improving certainty as to the identity of copyright owners which are participating in the scheme, it now provides that until the copyright owner pays the fees due to the ISP in full, the ISP is not required to send notifications to its subscribers in relation to that copyright owner's CIRs. A failure to pay the fees due to Ofcom will not impede the processing of CIRs but is likely to lead to enforcement action by Ofcom against the copyright owner for recovery of the amount owed.

- We initially proposed that CIRs must be sent within ten days of the evidence of infringement being gathered. To bring this into line with the DEA provisions, the Code now requires that CIRs must be sent within one month of the evidence being gathered. We also require that CIRs are submitted in an electronic format and using a standard form. We have also removed provisions in the May 2010 consultation draft requiring notifications to take account of guidance that Ofcom may issue in relation to the form and content of such notifications and to comply with any directions that Ofcom may make. This is on the grounds that it is doubtful that this is within the scope of the powers conferred on Ofcom by the DEA provisions;
- Similarly, in the May 2010 consultation we proposed that ISPs should have ten days from receipt of a CIR to send a notification to the relevant subscriber. We have now altered this to one month to bring the Code into line with the DEA provisions;
- In the light of responses to the May 2010 consultation we have removed ISPs' discretion under the Code to reject CIRs as invalid based upon their "reasonable opinion" on the basis that this provides an overly broad discretion;
- We initially proposed that first and second and notifications could be emailed by ISPs to subscribers, and that the third notification should be posted by recorded delivery. But because of concerns that ISPs may not always have the relevant email address for subscribers and, in relation to the third notification, the expense of recorded delivery, we have now decided that all notifications should be posted using first class mail;
- We have also removed a provision in the May 2010 consultation enabling us to give directions to the ISP as to the form of the notification since the DEA provisions do not confer this power on us. Notifications must be in writing and each qualifying ISP must have a standard form in relation to each type of notification which should be in plain English and consistent, as far as possible, with the other types of notification;
- We have added a further requirement that notifications must state the number of CIRs held by the qualifying ISP at the time of sending the notification which relate to IP addresses allocated to the subscriber. This is intended to provide more complete information to the subscriber about allegations of infringement that have been made to their ISP and help them assess whether to seek copies of these additional CIRs;
- We have introduced a requirement that the gap between the date on which the previous notification was sent and the date on which the evidence was gathered in relation to a subsequent infringement which triggers the next notification must be at least 20 days. This is to give the subscriber an opportunity to modify their behaviour (or secure their connection) before a subsequent notification is sent;
- Previously we proposed that copyright owners would only be able to request a copyright infringement list once within any three-month period, and that ISPs would have five days to provide the list. On the basis of submissions from copyright owners and ISPs we have now decided that copyright owners can request a list every month, and ISPs will have ten working days to provide it;
- In the May 2010 consultation we did not specify the period of time that a subscriber has to make an appeal to the appeals body. We have now decided

that this period will be 20 working days from the date of receipt of a notification or, in the absence of a notification, the date on which the subscriber became aware of the appealable act or omission. This is to provide a balance between the desirability of allowing subscribers a reasonable time to appeal and the certainty that comes from applying a reasonable limit;

- We have amended the provision of the Code which specified that oral hearings should only be held in exceptional circumstances to reflect our view that this is a matter which is more appropriately dealt with in the appeals body's procedural rules;
- We have introduced a requirement that a CIR must specify the time at which the evidence suggests that an infringement took place. This is in addition to the previous requirement that the CIR specify the time at which the evidence was gathered. This addition is in support of the requirement in the DEA provisions that the appeals body must find in favour of the subscriber unless the copyright owner shows that the apparent infringement was an infringement of copyright and the report relates to the subscriber's IP address at the time of that infringement;
- On the instruction of Government we have removed the ability for subscribers to appeal on any other ground on which they choose to rely; and
- On the instruction of Government we have removed the requirement for ISPs and copyright owners to provide a statement showing how their processes and systems are compliant with the Data Protection Act.

## Next steps in the implementation process

- 1.10 Ofcom must now make the Code. But before we can do this, we are required by section 403(4) CA03 to give notice of the draft Code to those likely to be affected by it, publish a notice of the draft provisions of the Code and consider any representations which are made before the date specified in the notice.
- 1.11 This document, as published, constitutes the notice we are required to give for the purposes of section 403(4) CA03. It also sets out the general effect of the draft Code, which is included at Annex 3. Since we have already consulted on the substance of the Code in the May 2010 consultation, we are allowing one month for representations to be made on the drafting of the proposed order, expiring on 26 July 2012.
- 1.12 Having considered the representations we receive and made any amendments to the draft Code that we consider appropriate as a result, the Code will be notified in draft by the Government to the European Commission under the Directive 98/34/EC (as amended by Directive 98/48/EC) ("the Technical Standards Directive"). The purpose of the notification is to enable the European Commission and Member States to consider whether the provisions of the Code which apply to ISPs could give rise to barriers to trade. We expect that this process will take at least 12 weeks.
- 1.13 Once these procedures are complete and any revisions to the Code that may result have been made, we will, subject to the approval of the Secretary of State, make the Code and publish a final statement. The Code will then be laid in Parliament. We anticipate this process will begin in late 2012, so that the Code can come into force by January 2013.

- 1.14 The Code will include provisions for the apportionment of costs incurred by Ofcom, the appeals body, and qualifying ISPs, as set out in an order to be made by the Secretary of State under section 124M CA03 (“the Costs Order”). We have published a separate consultation on tariffs and charges (“the costs consultation”),<sup>4</sup> which will cover the amounts payable by copyright owners (i) to ISPs for the processing of CIRs, and (ii) to Ofcom in respect of Ofcom costs in making and implementing the Code and the costs of establishing the appeals body. The costs consultation should be read in conjunction with this document since the issues which it considers are relevant to the application of the Code, as proposed in this document.
- 1.15 The costs consultation will be followed with a statement on the tariffs after the Code is laid in Parliament. Once the Code is in force, we will then invite copyright owners to commit to volumes of CIRs and will then determine the final charges they must pay to Ofcom and to ISPs. ISPs will then be expected to make the necessary investments in processing systems and Ofcom will appoint an independent appeals body, with a view to the first notifications being sent in early 2014. We will begin a review of which ISPs are included within the scope of the Code, once the scheme has been in operation for six months.
- 1.16 While this document focuses on the Code, we note that the DEA offers a wider framework for copyright owners to invest in a set of complementary activities which are designed to tackle online copyright infringement. Specifically, there are clear expectations that copyright owners will :
- Inform and change the attitude of consumers in relation to copyright infringement;
  - Invest to enable lawful access to their content; and
  - Take targeted legal action against serious infringers, increasing the credible threat of further action against those who persist in infringing copyright.
- 1.17 These activities are intended to underpin the developing market for online content and ensure that consumers are aware of how to find attractive content through lawful means. We will monitor how these are taken forward by copyright owners and, in accordance with additional obligations placed on Ofcom in the DEA provisions, we will report regularly to Government on both the effectiveness of the Code and also on these broader measures.
- 1.18 Finally, in addition to the Initial Obligations outlined above, the DEA provisions also provide for the imposition of further ‘technical obligations’ designed to reduce levels of online copyright infringement. These would oblige ISPs to take technical measures (e.g. bandwidth throttling, limiting or blocking access and temporary account suspension) against relevant subscribers in certain circumstances.
- 1.19 The Secretary of State cannot impose these technical obligations on ISPs until the Code has been in force for a minimum of 12 months and he has directed Ofcom to produce, and obtained from Ofcom, an assessment of whether one or more technical measures should be imposed. The introduction of a technical measures framework by the Secretary of State, including a right of appeal to the First Tier Tribunal (a judicial body), would require additional secondary legislation. Hence, while the imposition of technical measures could ultimately form part of the framework to tackle online copyright infringement under the DEA provisions, they do not form part of the draft Code and are not discussed in this interim statement.

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<sup>4</sup> <http://stakeholders.ofcom.org.uk/consultations/infringement-implementation/>

## Section 2

# Introduction

## Purpose of this interim statement

- 2.1 The DEA received Royal Assent in April 2010. The provisions it contains impose new responsibilities on Ofcom for implementing measures aimed at significantly reducing online copyright infringement.
- 2.2 These measures form part of a multi-pronged approach by Government aimed at reducing online copyright infringement, through a complementary mix of enforcement, consumer education, and encouragement to industry to develop and promote online services offering lawful access to copyright works.
- 2.3 The DEA provisions give Ofcom a new duty to make a code by order for the purpose of regulating new obligations imposed on ISPs, aimed at tackling online infringement of copyright. Following our May 2010 consultation on the draft Code, this document sets out our interim views on the substance of the Code we are proposing to make. It also constitutes a notice of the draft order we are proposing to make for the purposes of section 403 CA03. These views remain subject to:
- Any observations or comments that may be received from the European Commission or other Member States following the notification of the draft Code under the Technical Standards Directive; and
  - Any representations we receive in response to this notice.
- 2.4 The publication of this interim statement on our May 2010 consultation has been delayed until now as a result of a decision by Government to suspend its review of the draft Code, pending the outcome of a judicial review of the DEA provisions, a subsequent appeal to the Court of Appeal and the consequent need to revise secondary legislation in relation to the arrangements for sharing the costs of the scheme for regulating the Initial Obligations which is set out in the Code.

## Background to the Code: overview of Government policy and legislation

- 2.5 In December 2005, the Chancellor of the Exchequer asked Andrew Gowers to conduct an independent review into the UK Intellectual Property Framework. The Review was published on 6 December 2006 (the “Gowers Review”).<sup>5</sup> On the issue of online copyright infringement, the Review made the following recommendation:

Recommendation 39: Observe the industry agreement of protocols for sharing data between ISPs and rights holders to remove and disbar users engaged in ‘piracy’. If this has not proved operationally successful by the end of 2007, Government should consider whether to legislate.

- 2.6 Following the Gowers Review, Government organised for a Memorandum of Understanding (MOU) to be agreed between key stakeholders, including ISPs,

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<sup>5</sup> [https://financialsanctions.hm-treasury.gov.uk/gowers\\_review\\_index.htm](https://financialsanctions.hm-treasury.gov.uk/gowers_review_index.htm)

copyright owners and Government to consider and to trial solutions for reducing online copyright infringement.<sup>6</sup> Ofcom chaired the discussions which led to a trial process for notifying subscribers where they appeared to copyright owners to have infringed copyright. This demonstrated that such a process was feasible. However, the participants did not agree to take the process forward on a voluntary basis.

2.7 Therefore, in January 2009, Government set out proposals for reducing online copyright infringement in its Digital Britain interim report, explaining how it intended to legislate.<sup>7</sup> In June 2009, Government set out its conclusions in the Digital Britain final report.<sup>8</sup> In particular, it stated it would give Ofcom a duty to take steps aimed at reducing copyright infringement. Specifically, Government said that, in order to fulfil that duty, Ofcom will require ISPs to accept obligations to:

- “Notify account holders when informed in an agreed format that their account appears to have been used to infringe copyright”; and
- “Maintain and make available (on the basis of a court order) data to enable the minority of serious repeat infringers to be identified. This will allow targeted court action against those responsible for the most damaging breaches of copyright.”

2.8 The report anticipated that the implementation of these measures would result in a significant reduction in unlawful file-sharing but warned that, if it did not, further action would be required. It therefore proposed to introduce backstop powers to enable Ofcom to impose further conditions on ISPs to apply specified technical measures on subscribers to prevent unlawful online copyright infringement. The technical measures the Government said it would consider specifying in legislation included website blocking and caps to the speed and capacity of a subscriber’s internet access service.

2.9 Although not exactly as proposed, many of the proposals in the Digital Britain report were implemented in the DEA, which received Royal Assent on 8 April 2010.<sup>9</sup> The DEA amends the CA03 by the insertion of new sections (124A to 124N CA03).

2.10 The DEA provisions create obligations for ISPs within the scope of a code to be made by Ofcom (in the absence of an appropriate industry code), where their internet access services may have been used for the purposes of copyright infringement. As the explanatory memorandum to the DEA sets out, the initial ISP obligations are to:

- “Notify their subscribers if the internet protocol (“IP”) addresses associated with them are reported by copyright owners as being used to infringe copyright”; and
- “Keep track of the number of reports about each subscriber, and compile, on an anonymous basis, a list of those subscribers who are reported on above a threshold to be set in the Initial Obligations Code. After obtaining a court order to obtain personal details, copyright owners will be able to take action against those included in the list.”<sup>10</sup>

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<http://webarchive.nationalarchives.gov.uk/20080726153746/http://www.berr.gov.uk/files/file47139.pdf>

<sup>7</sup> [http://www.culture.gov.uk/images/publications/digital\\_britain\\_interimreportjan09.pdf](http://www.culture.gov.uk/images/publications/digital_britain_interimreportjan09.pdf)

<sup>8</sup> <http://www.culture.gov.uk/images/publications/digitalbritain-finalreport-jun09.pdf>

<sup>9</sup> Note that the ability to introduce the blocking of access to specific websites will require additional secondary legislation.

<sup>10</sup> [http://www.opsi.gov.uk/acts/acts2010/en/ukpgaen\\_20100024\\_en\\_1](http://www.opsi.gov.uk/acts/acts2010/en/ukpgaen_20100024_en_1) at paragraph 31.

- 2.11 Section 124D of the 2003 Act requires that, in the absence of industry agreeing a code, Ofcom should make a code for the purpose of regulating these obligations within six months of the entry into force of the relevant provisions or such date as the Secretary of State might specify. Government has extended the deadline for making the Code on three occasions, with the latest extension expiring on 31 March 2013.
- 2.12 Ofcom must be satisfied that any code it makes satisfies the criteria in section 124E which prescribe the basis of the provisions which the Code must address, in relation to: copyright infringement reports, notifications, copyright infringement lists, retention of information, subscriber appeals, administration, enforcement and the sharing of costs. The specific requirements in relation to the last of these will be set out in an order made by the Secretary of State under section 124M of the 2003 Act (“the Costs Order”).
- 2.13 The DEA also inserted provisions into the CA03 requiring Ofcom to assess and report on progress to help the Secretary of State to monitor and assess trends in online copyright infringement and to ascertain the effectiveness in reducing infringement levels of the obligations set out in the DEA. Interim reports must be submitted on a three-monthly basis with full reports submitted annually. Ofcom’s reporting duty is not a matter dealt with in the Code, apart from in relation to the sharing of costs for this activity.

## Structure of this document

- 2.14 The subsequent sections of this statement set out our original proposals, stakeholder comments and our interim decisions on the issues on which we consulted. They also set out the general effect of the draft Code which is included at Annex 3, which we are proposing to make.
- 2.15 The particular areas of the Code treated by each section are as follows:
- **Section 3 considers the application of the Code:** including the conditions that copyright owners must satisfy in order to take advantage of the Code; the criteria that determine which ISPs will be subject to the Code; and whether mobile ISPs and Wi-Fi services should be eligible for inclusion.
  - **Section 4 considers the requirements relating to copyright infringement reports (CIRs):** including the content of CIRs; ensuring the accuracy of evidence gathering; and deadlines for submission of CIRs.
  - **Section 5 covers subscriber identification and making notifications:** including ensuring accuracy in the process of identifying subscribers; and the notification process and content of notifications.
  - **Section 6 focuses on copyright infringement lists (CILs).**
  - **Section 7 considers our proposals relating to subscriber appeals.**
  - **Section 8 covers the relevant arrangements for the sharing of costs:** including the types of entities paying and/or incurring costs; the types of costs to be recovered; and the types of fee that will recover these costs.
  - **Section 9 discusses the provisions for administration, enforcement, disputes and information gathering:** including procedures for investigating

complaints and handling disputes; and enforcement action following a contravention of the Code.

- **Section 10 concludes by setting out next steps.**

- 2.16 Each section begins by introducing a particular aspect of the Code, and includes a summary of our original proposals in the May 2010 consultation and the relevant consultation questions.
- 2.17 We then summarise the relevant stakeholder responses under four main headings:
- ISP stakeholders – including fixed and mobile ISPs, and industry bodies;
  - Copyright owner stakeholders – including individual copyright owners and trade associations;
  - User group stakeholders – including groups focusing on consumers, citizens and digital rights; and
  - Other stakeholders – including public intermediaries, individuals and others that fall outside the previous three categories.
- 2.18 Following the summary of stakeholder responses we set out our interim decisions on the issues on which we consulted. This includes our response to the comments we have received from stakeholders, and explains where we have revised our original proposals and our reasons for doing so. Where a number of different issues have been raised, we deal with each separately and in turn.
- 2.19 Alongside our interim decisions on the matters of consultation, we also set out the general effect of the revised version of the draft Code.
- 2.20 Finally, this interim statement includes six annexes. These set out:
- How to respond to this consultation (Annex 1);
  - A cover sheet for consultation responses (Annex 2);
  - The draft Initial Obligations Code that we are proposing to make (Annex 3);
  - An overview of the subscriber notification process (Annex 4);
  - A discussion of the interpretation of key statutory definitions in the DEA provisions (Annex 5); and
  - A list of selected abbreviations (Annex 6).

## **Important terms used in this document**

- 2.21 Throughout this document we refer to a number of key terms. We include the most important here for reference:
- “**CA03**” – the Communications Act 2003.
  - “**DEA**” – the Digital Economy Act 2010.

- **“DEA provisions”** – the amendments made by the DEA to the CA03 that create new obligations for internet service providers (**ISPs**).
- **“Initial obligations”** – new obligations created by the DEA for ISPs that require them to:
  - Notify their subscribers following receipt of reports of copyright infringement (**“CIRs”**) from copyright owners; and
  - Provide copyright owners on request with an anonymised list of subscribers who have received multiple notifications (also known as the **“copyright infringement list”** or **“CIL”**).
- **“the May 2010 consultation”** – Ofcom’s consultation on the draft initial obligations code (*Online Infringement of Copyright and the Digital Economy Act 2010: Draft Initial Obligations Code*).<sup>11</sup>
- **“the Code”** – the draft Online Infringement of Copyright (Initial Obligations Code) Order (see Annex 3).
- **“section 403 CA03”** – section 403 of the Communications Act that requires Ofcom to give notice of the draft Code to those likely to be affected by it, publish a notice of the draft provisions of the Code and consider any representations which are made before the date specified in the notice.
- **“the Costs Order”** – an order to be made by the Secretary of State under section 124M CA03 detailing the apportionment of costs incurred by Ofcom, the Appeals Body and Qualifying ISPs.
- **“the costs consultation”** – a separate consultation on tariffs and charges (“the costs consultation”) published by Ofcom alongside this document. It covers the amounts payable by copyright owners (i) to ISPs for the processing of CIRs, and (ii) to Ofcom in respect of Ofcom costs in making and implementing the Code and the costs of establishing the appeals body.<sup>12</sup>

2.22 In addition, a list of the most common abbreviations used in this document can be found at Annex 6.

## How the initial obligations relate to ‘technical obligations’

2.23 In addition to the Initial Obligations outlined above, the DEA provisions also provide for the imposition of further ‘technical obligations’ designed to reduce levels of online copyright infringement. These would oblige ISPs to take technical measures (e.g. bandwidth throttling, limiting or blocking access or temporary account suspension) against relevant subscribers in certain circumstances.

2.24 The Secretary of State cannot impose these technical obligations on ISPs until the Code has been in force for a minimum of 12 months and he has obtained an assessment by Ofcom of whether one or more technical measures should be imposed. The introduction of a technical measures framework by the Secretary of State, including a right of appeal to the First Tier Tribunal (a judicial body), would require additional secondary legislation. Hence, while the imposition of technical

<sup>11</sup> <http://stakeholders.ofcom.org.uk/consultations/copyright-infringement/?a=0>

<sup>12</sup> <http://stakeholders.ofcom.org.uk/consultations/infringement-implementation/>

measures could ultimately form part of the framework to tackle online copyright infringement under the DEA provisions, they do not form part of the draft Code and are not discussed in this interim statement.

## Section 3

# Application of the Code

## Introduction

- 3.1 It is important to ensure from the outset that it is clear to whom the rights and obligations under the Code will apply. Indeed, under section 124C(3) to (5) CA03, it is clearly envisaged that the Code should specify conditions for rights and obligations under the DEA amendments to apply to ISPs and copyright owners respectively. In this section, we describe the qualifying conditions set in the draft Code in relation to ISPs and copyright owners and our reasons for them.

## Application of the Code to copyright owners

### Our proposals

- 3.2 In the May 2010 Consultation, we proposed that, to be a qualifying copyright owner for a given notification period, a copyright owner must have provided estimates of the number of copyright infringement reports (“CIRs”) it intends to make two months before the beginning of the notification period. The copyright owner must also have met its obligations in respect of the payment of costs under the Costs Order.

### Consultation questions

- 3.3 In the May 2010 Consultation we asked the following questions regarding the application of the Code to copyright owners.

*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 124M of the 2003 Act? Please provide supporting arguments.*

*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.*

### Stakeholder responses

#### Responses from ISP stakeholders

- 3.4 ISPs who responded agreed that copyright owners should only be able to take advantage of the online copyright infringement procedures set out in the DEA provisions and the Code where they have met their obligations under the Secretary of State’s Order under section 124M of the 2003 Act (the Costs Order). BT’s response was typical in this respect:

There should be no question arising of ISPs being required to undertake activities under the DEA or of consumers and citizens facing allegations unless demonstrable and enforceable commitments are first made by copyright owners.

3.5 Everything Everywhere was more specific:

It is unreasonable to oblige ISPs to commit resource and incur costs (e.g. diverting investment from other projects, allocating personnel, initiating projects for technical solutions, process development and capital expenditure or negotiating/re-negotiating arrangements with outsourced service providers) before there is a firm commitment from copyright owners to ensure that ISPs will be able to recover these costs under the Order.

3.6 Telefonica O2 said that clarification was needed as to whether ISPs can use the systems established under the Code to meet the requirements of a Norwich Pharmacal Order made by copyright owners outside of the Code. It also noted that clarity was needed about whether the Code requires copyright owners to meet their obligations “from day 1” of the Code or whether a more complex arrangement is to be established to allow copyright owners to join over time.

3.7 Other comments made by ISPs on this issue included:

- That copyright owners would benefit from a soft launch approach to the regime (ISPA);
- Concerns that there is nothing to stop copyright owners continuing to send notifications and other correspondence outside of the Code (KCOM);
- There should be provision for the review of forecasts or measures designed to incentivise accurate forecasts (KCOM);

3.8 With regard to question 3.2, most ISPs disagreed that two months was an appropriate lead time for the purposes of planning ISP and copyright owner activity, particularly for the initial notification period. Most ISPs (and related stakeholders), including BT, KCOM, LINX, Telefonica O2, ISPA and Everything Everywhere suggested between six to nine months would be necessary. Sky suggested that four months may be sufficient; other ISPs said 12 months would be required.

3.9 ISPs stated that the new obligations would require significant planning and investment to implement, and the design and scale of these systems would depend on the volume of CIRs they would be required to process. Everything Everywhere’s response was typical:

ISPs will need to implement new (or adapt existing) systems, solutions and processes. This requires the allocation of management time and human resource, allocation of financial resource including possibly diversion of investment from other parts of the business, technical and operational project work and review of existing arrangements with suppliers or new arrangements with suppliers (for instance, where the ISP has outsourced or intends to outsource the relevant systems or processes). In order to be able to implement a project with such far reaching consequences, it is imperative that ISPs have certainty that there is a legal requirement to implement these solutions and be in a position to gauge the capacity required from these solutions. In other words, before any project work can be undertaken, the Code must have come into force and the ISP must have an understanding of the expected volume of CIRs, which can only be achieved after receipt of CIR forecasts from copyright owners.

- 3.10 BT made similar points, particularly with regard to the need for certainty, but also proposed a staggered implementation:

The evidence, therefore militates against proceeding on a single “big bang” start date involving many ISPs, whether they were previously involved in the P2P MoU or not. If there are ISPs, such as those with well-established content interests, who are on a faster track for implementation than others, then provided their costs do not form the basis for calculating other ISPs costs, perhaps they should press ahead and provide some of the road-testing for the DEA that is currently lacking.

- 3.11 Some ISPs (including Virgin Media and Sky) considered that two months would be appropriate for subsequent notification periods. However, most ISPs felt that two months would still be too short even for subsequent notification periods.

### Responses from copyright owner stakeholders

- 3.12 Most copyright owners said that it was not reasonable to expect them to provide upfront estimates on the volume of CIRs. In particular, the Premier League said that it did not believe that the issue of cost sharing and access to the notification regime necessarily needed to be linked. BPI said that if copyright owners were to be asked to make a significant financial contribution to the Code processes then it is imperative that their views are taken fully into account, for example, on the time between notifications.

- 3.13 Several copyright owners and related parties, including the Alliance Against IP Theft (AIP), BPI, ITV, Publishers Association, UK Music and UKTV, said that the need to provide forecasts and pay costs upfront would be detrimental to smaller copyright owners. In particular, the Publishers Association said:

Paying costs upfront ... would bar most SMEs from the process on the basis of financial risk and this therefore creates an unequal commercial playing field. The existence of both of these barriers will not only have a negative impact on publishers, but also on the Government target to reduce online piracy by 70-80% through these measures.

Clearly it is unacceptable for any legal provisions to be placed financially or administratively beyond the reach of SMEs, when larger companies may still be engaged in the process. We feel strongly that the needs of SMEs should be taken into consideration throughout this process.

- 3.14 Additionally, several copyright owners and related parties, including The Creative Coalition Campaign, ELSPA,<sup>13</sup> PACT and FAST, stated that there were practical difficulties with the proposal. In particular, that it is impossible to estimate the number of CIRs without knowing how much they will be charged for a CIR.
- 3.15 However, some copyright owners, such as Channel 4, said that they should only be able to use the system if they had met their obligations in respect of costs and agreed that it would help ISPs to have a firmer indication of the level of CIRs.

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<sup>13</sup> In September 2010 ELSPA relaunched itself as the Association for UK Interactive Entertainment (UKIE).

However, they also expressed concern that it would be very difficult to provide meaningful estimates in practice.

- 3.16 The UK Film Council said that if money was to be paid in advance, it should be paid to Ofcom only, not ISPs, and that if not used should be reimbursed with interest.
- 3.17 With regard to question 3.2, most copyright owners said that the two-month lead time for planning purposes was appropriate for the initial notification period. However, the BBC thought that two months was too short, particularly in the first year. It argued that copyright owners may need up to six months to procure third party detection services and review infringing activity (particularly if the copyright owner was a public body and had to abide by EU public procurement procedures).
- 3.18 Some copyright owners, including AIP, MPA, BPI, ELSPA and Publishers Association, said that in subsequent years the lead time should be shorter, for example, one month.
- 3.19 Several copyright owners, including AIP, BPI, ELSPA, PACT, UK Film Council and UK Music, stated that the notification period was too long. AIP noted that it would prevent copyright owners participating for specific content. UK Music proposed a notification period of three months, with a lead-in time of two months.

#### Responses from user group stakeholders

- 3.20 User groups' responses to these questions were limited. In summary:
  - BeingThreatened said that the concern was not with those copyright owners allowed to use the scheme, but rather those who continue to act outside it;
  - Open Rights Group ("ORG") said that copyright owners should have to abide by the Act; and
  - Pirate Party UK agreed in principle with our proposals on the application of the Code to copyright owners, but said that the proposal to provide up-front estimates of CIRs would be problematic for smaller copyright owners.

#### Responses from public intermediaries and other stakeholders

- 3.21 Most public intermediaries – including British Library, JANET, Joint Information Systems Committee (JISC), Libraries and Archives Copyright Alliance (LACA) and Universities and Colleges Information Systems Association (UCISA) – agreed that copyright owners should only be able to take advantage of the online copyright infringement procedures set out in the DEA provisions and the Code where they have met their obligations under the Secretary of State's Order under section 124M CA03.
- 3.22 With regard to question 3.2, several public intermediaries, including The British Library, JANET, JISC and UCISA – said that two months for planning would be sufficient for ISPs already in scope, but not for an ISP that has not previously fallen within scope. JANET referred to a report prepared for BIS by Mott MacDonald which referred to six to nine months as a reasonable time required by ISPs to develop and introduce new systems for the automation of infringement report processing.
- 3.23 LACA said that if libraries and archives are in scope as qualifying ISPs the timescales are "excessively onerous".

- 3.24 Logica said that two months was the minimum possible, and that three or four should be considered.

### **Our interim conclusion and general effect of Part 2 of the draft Code in relation to qualifying copyright owners**

- 3.25 Question 3.1, concerning the conditions under which a copyright owner can take advantage of the online copyright infringement procedures set out in the DEA provisions, has been largely answered by the draft Costs Order to be made under section 124M CA03. The draft Costs Order has been laid before Parliament and must be approved by both Houses of Parliament before it can be made.

- 3.26 The draft Costs Order defines “qualifying copyright owner” as follows:

“qualifying copyright owner” means, in relation to a notification period, a copyright owner who has:

- (a) made an estimate of the number of copyright infringement reports it will make to a qualifying internet service provider in that notification period; and
- (b) provided that estimate to the qualifying internet service provider and to OFCOM in accordance with this Code.<sup>14</sup>

- 3.27 This definition of a qualifying copyright owner has been incorporated into the draft Code.<sup>15</sup> Hence, only a copyright owner which has provided estimates to qualifying ISPs and to Ofcom in accordance with the requirements of the Code is eligible to send CIRs. Given the obligation to incorporate the provisions of the Schedule to the draft Costs Order (which includes the definition of qualifying copyright owner) into the Code,<sup>16</sup> this is not a matter over which Ofcom has discretion.

- 3.28 The requirements of the Code contained in Annex 3 of this document which apply to the provision of estimates are now as follows:

- other than the first notification period, the estimate must be provided in writing to qualifying ISPs and Ofcom at least 2 months before the beginning of the notification period;
- in relation to the first notification period, estimates must be provided in writing by a date to be determined by Ofcom. Our proposed timetable for setting the fees payable for sending CIRs in the first notification period and for copyright owners to submit estimates on the basis of those fees is set out in the consultation on the implementation of the Costs Order.

- 3.29 The only other requirements in the Code that a copyright owner must satisfy before it may send a CIR to a qualifying ISP are:

- obtain approval from Ofcom of its procedures for gathering evidence;

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<sup>14</sup> Paragraph 1 of the Schedule to the draft Costs Order

<sup>15</sup> Paragraph 1 of the Schedule to the draft Code

<sup>16</sup> See Article 3, draft Costs Order.

- gather evidence in accordance with the approved procedures which gives reasonable grounds to believe that there has been an infringement of its copyright by means of an internet access service.
- 3.30 These obligations in relation to the gathering of evidence are considered in more detail in Section 4 below.
- 3.31 In relation to the requirement to provide advance estimates of the number of CIRs to be sent in a notification period, some copyright owners responded that it would not be possible to do so because the price of a CIR is unknown. We recognise this concern and have set out our proposals to address it in the costs consultation published separately. As explained in that document, Ofcom proposes to run an iterative process, through which CIR prices and estimates can be finalised, drawing on work we have conducted to establish the costs of a notionally efficient ISP in processing CIRs, and on our estimates of Ofcom's costs and of the costs of establishing the appeals body.
- 3.32 Some copyright owners also suggested that the requirement for up-front estimates and payment could mean that some copyright owners, notably SMEs, could be prevented from participation in the notification regime for administrative and financial reasons.
- 3.33 The approach to cost sharing set out in the draft Costs Order links the costs of participation directly to the extent of participation: in principle, a copyright owner of any scale should be able to choose a level of participation and investment proportionate to their exposure to infringement and financial scale. We anticipate that costs will be viewed in the context of the economic impact of online copyright infringement. The Government's impact assessment for the DEA (which included data provided by copyright owners) estimated the annual costs to creative content industries of displaced sales attributable to online copyright infringement at £400m.<sup>17</sup> This would suggest that even a relatively limited conversion of infringement into legitimate sales could result in significant additional revenue to industry. Information from trial schemes and available consumer surveys in the UK and internationally suggest that between 30% and 70% claim that they would alter their behaviour if their ISP notified them that their account was linked to an allegation of infringement.
- 3.34 It may be true that individual SMEs are less able than large copyright owners to forecast their likely exposure to online infringement, and consequently the likely value to them of participation. As set out above, the draft Costs Order makes it a condition of participation that copyright owners provide estimates of CIRs in advance of a notification period and Ofcom does not have discretion to disapply this requirement. However, it may be possible for SME operators to engage with trade bodies which indicate they are likely to make commitments to CIR volumes, and either join them at the beginning of a notification period, or even assume responsibility for some of their CIR estimates during a notification period. By aggregating uncertain demand across participants, such agencies may be able to make up-front commitments which make it easier for SME members to participate.
- 3.35 In addition, in the interests of simplicity, to dovetail more easily with the requirements of the draft Costs Order, and to improve certainty as to the identity of qualifying copyright owners, the draft Code has now been refined so that the ability of a copyright owner to send CIRs under the Code is no longer conditional on advance payment of notification fees to qualifying ISPs and of fees in respect of initial and

<sup>17</sup> <http://www.ialibrary.bis.gov.uk/uploaded/Digital-Economy-Act-IAs-final.pdf>, p.64.

qualifying costs to Ofcom. Under the revised Code, even if a copyright owner does not pay notification fees to the Qualifying ISP by the due date, it may still send CIRs to that ISP under the Code. However, the qualifying ISP is under no obligation to process these until it receives payment of the relevant notification fees in full.<sup>18</sup> In contrast, if the copyright owner pays the relevant notification fees but fails to pay fees for initial and qualifying costs to Ofcom, the qualifying ISP's notification obligation is unaffected (i.e. the CIRs in question must be processed by the Qualifying ISP in accordance with the Code). However, the copyright owner is likely to be subject to enforcement action by Ofcom for recovery of the fees.

- 3.36 The timetable for payment of notification fees and fees in respect of initial and qualifying costs is discussed in paragraphs 4.32 – 4.36 of the costs consultation.
- 3.37 A concern was raised, largely by ISP stakeholders, over the proposed lead time of two months for the purposes of planning ISP and copyright owner activity. Most ISPs argued that this lead time was too short to allow them to invest appropriately in plant and in operating capacity, whether for the first notification period or in later ones.
- 3.38 As noted above, we accept this concern in relation to the first notification period and set out our revised proposals for the lead time in advance of that period in the costs consultation.<sup>19</sup>
- 3.39 However, the arguments that it will be necessary for qualifying ISPs to have a longer lead time for subsequent notification periods, even after they have implemented CIR processing systems, are less credible; for later notification periods, the lead time will be the two months proposed in our original consultation. We discuss below (see section 3.119) the possibility that in future we may alter the qualification criteria of the Code, to cover additional ISPs. In the event that we do so, we would also consider what, if any, refinements might be needed to the Code in relation to the provision of estimates to ISPs that would be brought within scope as a result.
- 3.40 Finally, ISP stakeholders queried whether they could use systems established under the code to meet the requirements of a Norwich Pharmacal order.<sup>20</sup> We can see no reason why this would not be permitted. Regarding certain respondents' views that copyright owners should be required to abide by the DEA provisions and the Code to the exclusion of any other activities aimed at enforcing copyright in an online environment, Ofcom does not have any powers to impose such a requirement.

## Application of the Code to Internet Service Providers

### Our proposals

- 3.41 In the May 2010 Consultation, we proposed that, consistent with the explanatory notes to the Digital Economy Act:<sup>21</sup>

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<sup>18</sup> See paragraph 18(h) of the Schedule to the draft Code.

<sup>19</sup> <http://stakeholders.ofcom.org.uk/consultations/infringement-implementation/>

<sup>20</sup> Where there is evidence of wrong-doing, a court may order a person involved in the wrong-doing, albeit innocently, and who has information about the identity of the wrong-doer, to disclose that information to the plaintiff so that they are able to bring a legal action. This is known as a "Norwich Pharmacal" order and may be sought by a copyright owner whose copyright has been infringed online to obtain the name and address of the subscriber of the relevant account from the ISP whose internet access service was used to facilitate the infringement.

<sup>21</sup> <http://www.legislation.gov.uk/ukpga/2010/24/notes/contents>

- The Code should not initially apply to mobile ISPs because, first, mobile networks are currently less conducive than fixed networks to online copyright infringement and, secondly, the mobile network operators' (MNOs') capital expenditure could outweigh the benefits of their initial inclusion; and
- The Code should initially apply only to those fixed ISPs with more than 400,000 fixed internet access subscribers, i.e. BT, Telefonica O2, Orange,<sup>22</sup> Post Office, Sky, TalkTalk Group and Virgin Media.

3.42 We also proposed that we would regularly review the level of copyright infringement among non-qualifying ISPs (both mobile and fixed) and the qualification criteria for inclusion in the Code. We noted that we will be able to gather the necessary information to determine this as part of our reporting function.<sup>23</sup> We anticipate that gathering this information will involve collating data from copyright owner detection processes and corroborating these with independent sources of research.

3.43 We proposed that, as appropriate, we would alter the qualifying criteria so as to require the participation in the Code of any ISP where this is objectively and proportionately justified by the scale of infringement. In making such an assessment we would review evidence of alleged infringement across those ISPs outside the scope of the Code and consider the costs, feasibility and proportionality of requiring them to comply with the obligations. We anticipate that any amendment to the qualification criteria would be made sufficiently in advance of any notification period to ensure that copyright owners are aware of those ISPs to which they may submit estimates of CIRs for the purposes of the Code.

## Consultation questions

3.44 In the May 2010 Consultation we asked the following questions regarding the application of the Code to ISPs.

*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?*

*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? If not, what alternative approaches would you propose? Can you provide evidence in support of any alternative you propose?*

## Stakeholder responses

3.45 These questions set out two discrete proposals in our approach to ISPs: (i) the proposal that the initial application of the Code should only cover fixed broadband

<sup>22</sup> Since July 2010, Orange has formed one half of Everything Everywhere, the joint venture formed by France Telecom and Deutsche Telecom to run the Orange and T-Mobile brands. T-Mobile does not currently offer fixed broadband services.

<sup>23</sup> The ability of Ofcom to request information from ISPs under section 135 CA03 in order to carry out its functions under the DEA provisions has since been held to be unenforceable for failure to notify the provision under the Technical Standards Directive (*R (on the application of BT and TalkTalk) v Secretary of State for Culture, Media, Sport and the Olympics* [2012] EWCA Civ 232, paragraph 44). Ofcom is still able to exercise its section 135 powers to request information from copyright owners for the purpose of carrying out its functions under the DEA provisions. In addition, under paragraph 39 of the Code, Ofcom is able to require information and assistance from qualifying copyright owners and qualifying ISPs for the purpose of carrying out its functions under the Code.

providers, and not mobile providers; (ii) the proposal that the initial application of the Code should only cover fixed broadband providers with more than 400,000 subscribers. However, many stakeholder responses addressed these two questions together (in some cases in combination with questions 3.5 and 3.6 discussed below). The section below therefore combines the two questions.

### Responses from ISP stakeholders

- 3.46 BT argued that the 400,000 subscriber threshold was arbitrary and that it would lead to market distortion. BT proposed instead that there should be an initial period during which Ofcom analyses CIRs before deciding who is in scope:

Further, we would question Ofcom's ability in any event to use its general power under section 124(5)(h) of the 2003 Act to create a new mechanism for calculating a threshold based on the number of subscribers an ISP has when the DEA makes provision only for a threshold based on the number of CIRs received by that ISP. The general power granted is in relation to regulating the initial obligations which already exist, and does not extend to rewriting the DEA to provide for an alternative method of determining which ISPs the new legal obligations will fall on, when the primary legislation did not anticipate this.

BT also argued that the CIR threshold should be dynamic, with ISPs which fall below the threshold removed from the list of qualifying ISPs.

- 3.47 BT further argued that it was unreasonable to include public Wi-Fi services in the provisions of the Code while excluding mobile ISPs. BT argued that public Wi-Fi and mobile internet access provision should be treated similarly because the technology (including IP allocation technology) used to provide public Wi-Fi works in a similar way to mobile technology. As a result, public Wi-Fi shares the same issues as mobile in terms of identifying subscribers.
- 3.48 TalkTalk considered Ofcom's approach to be unacceptable, ill-conceived and requiring more analysis. It argued that the threshold does not provide sufficient clarity in relation to the treatment of subsidiaries, discriminates against large ISPs, and will distort competition and increase churn; nor is there adequate justification for the proposed exclusion of mobile. It also expressed concern about the possibility that non-qualifying ISPs would advertise themselves as such.
- 3.49 Sky also argued that the threshold would be discriminatory, with many significant ISPs excluded and would simply lead to consumer switching. It suggested that mobile broadband is increasingly a substitute for fixed access, and that the exclusion of mobile was also inappropriate. Sky raised concerns that it will take a considerable time to review and reset the threshold, including a wider range of ISPs – increasing the risks of switching and the burden on those initially subject to the Code.
- 3.50 Virgin Media broadly agreed with the proposals for the initial coverage of the Code, providing the threshold is revised following an initial period. However, Virgin Media disagreed with proposals to treat Wi-Fi operators as ISPs and also proposed that some classes of provider such as hotels or libraries might be permanently excluded. Virgin also argued that the limited internet access service that it provides to some subscribers' TV set-top boxes should be excluded.

- 3.51 Everything Everywhere supported the exclusion of mobile and the proposed threshold but had concerns about the way Ofcom reached its decision. Although it agreed that a thorough assessment was not possible for the first period, it suggested that the Code must provide greater clarity on the way a CIR threshold will work in future. Everything Everywhere proposed that the threshold should depend on an ISP's share of the total volume of infringement, measured by the proportion of CIRs they receive, with a *de minimis* threshold.
- 3.52 Telefonica O2 similarly supported the exclusion of mobile, but argued that the basis for selection of the threshold was unclear and based on an unsubstantiated link between subscriber numbers and levels of infringement. Ofcom should ensure the qualification criteria adopted from the start are right. Telefonica O2 questioned what robust new evidence might be used to set a new threshold in future (for example, would CIRs be generated for non-qualifying ISPs). It also suggested that a more natural breakpoint fell between the largest four ISPs and the remainder of the market.
- 3.53 ISPA preferred the use of infringement data to set a threshold, if possible.
- We query the blunt approach Ofcom has taken in proposing this particular threshold and the implication that the Act provided for no other approach. Although we recognise that Ofcom was given a short time period to develop and implement the Code by the Act, ISPA believes that Ofcom has neglected its duty to consider more balanced criteria, including options for developing these over time based on early experience of the notifications regime.
- 3.54 KCOM supported the threshold but suggested subscriber numbers should not be calculated on a group basis.
- 3.55 LINX supported Ofcom's intention to avoid placing a burden on small ISPs that would be disproportionate to any benefit that could be achieved from the scheme. However, it argued that number of subscribers was an arbitrary basis for setting a threshold; instead LINX recommended a transitional period during which copyright owners generate CIRs but these are not passed onto ISPs.
- 3.56 The Mobile Broadband Group (MBG) supported the exclusion of mobile, and noted there was no evidence of significant volumes of infringing content on mobile networks. They also pointed to a number of developments in relation to mobile broadband which they felt would help ensure it did not become a platform for significant infringement in future. These included:
- Unlimited data packages on mobile becoming less common in future (e.g. the decision by O2 to end unlimited data offerings for contract customers);
  - Operators' development of legitimate content deals with copyright owners (e.g. services based on operators' portals and smartphone apps); and
  - Measures to optimise network performance for all customers which include enforcement of fair use policies by some MNOs, which can limit subscribers' ability to share files.
- 3.57 MBG also indicated that disproportionate network costs relating to recording IP address allocation would be incurred by MNOs if they were subject to the Obligations. In common with other ISPs, MBG argued Ofcom should not use subscriber numbers in the future to set the threshold.

- 3.58 One ISP was concerned that ISPs below the threshold would become attractive for those carrying out online copyright infringement, to the detriment of those ISPs, and proposed a lower threshold of 50,000 subscribers or turnover of more than £5m per annum.
- 3.59 Thus supported the threshold proposals, and argued that switching would be limited as most subscribers are (a) tied into contracts and other services (e.g. triple or quadruple play) and (b) typically unaware of the way their access service may be being used by others in their premises.
- 3.60 ISPA, KCOM and Thus all raised questions about the revision of the threshold; ISPA asked whether Ofcom would need to change the Code each time; KCOM agreed with a review process, but said that it should not start for at least nine months and should be subject to consultation. Thus requested clarification of the review timetable and process.

### Responses from copyright owner stakeholders

- 3.61 Although there was some support for the approach proposed, in general copyright owners expressed concern about the effect of exclusions, and wished for greater clarity on the timetable both for including mobile operators and adjusting the subscriber threshold.
- 3.62 AIP and the Publishers Association agreed to initial limits on the coverage of the obligations, but wanted regular reviews of the threshold, based on effective measurement, and an 18-month timetable for including mobile operators. BPI also suggested mobile operators should be given 18 months to comply with the Initial Obligations.
- 3.63 The BBC, ITV, C4, ELSPA, UK Music and UKTV agreed with the proposals subject to regular reviews (perhaps quarterly) of the threshold/exclusions, monitoring of infringement activity on initially excluded ISPs and of switching behaviour, and a clear process for including ISPs initially outside scope.
- 3.64 FAST was concerned that the language of the Code risks wider exclusions. For example, FAST queried whether Virgin Media and Sky might be excluded because subscribers to their internet services frequently also take other services such as television or telephony. It also thought that many intermediaries, such as libraries, will be neither subscribers nor ISPs – and therefore wholly outside the Code. FAST proposed that coverage should include operators providing access services to businesses as well as consumer-focused ISPs.
- 3.65 The UK Film Council felt that the costs to ISPs such as mobile operators should not be a consideration in determining the scope.
- 3.66 The BPI asserted that online copyright infringement is currently taking place on mobile networks and is likely to increase as mobile networks become faster and smartphone usage increases. The BPI asserted that, because it can be difficult for a copyright owner to distinguish whether an IP address relates to the fixed, mobile or Wi-Fi network of an ISP, where an ISP qualifies as a result of their fixed line subscriber base, then all of the services offered by that ISP should also be deemed as qualifying.
- 3.67 The BPI proposed that where a small ISP exceeds the average for the number of infringements per subscriber over one or more quarters by a margin of 20% or more,

it should have to comply with the Code provisions from the following period. BPI also referred to evidence it had regarding infringements per week for each of the major ISPs. However, it noted that its evidence gathering is currently limited in scale and it is not therefore possible to determine accurately what proportion of an ISP's subscribers are regularly engaged in infringement.

- 3.68 With regard to KCOM in the Hull area, the BPI said: "although it has only around 180,000 subscribers, these are all located in or around the city of Hull, giving KCOM a virtual monopoly of internet access provision in that region. It would be perverse, and surely unintended consequence of the introduction of the Code, if one geographical region of the UK were to be entirely excluded from the effect of an Act of Parliament ... there would be no disincentives to infringers on its subscriber base whatsoever, and therefore nothing to prevent this region becoming a hotbed of online copyright infringement."

### Responses from user group stakeholders

- 3.69 The Pirate Party agreed Ofcom's proposals were logical, but questioned the clarity of the definitions.
- 3.70 Consumer Focus argued that since the threshold was not based on levels of infringement it risked imposing a disproportionate cost on ISPs with low levels of infringement.

### Responses from other stakeholders

- 3.71 A number of stakeholders challenged the proposal that, once an ISP becomes a qualifying ISP, it should remain one whatever its performance against the threshold criteria. They included BCS, the British Library, JANET, JISC, and UCISA.
- 3.72 Among this group, JANET suggested that this both removes an incentive for ISPs to reduce infringement and contradicts 124C(5) of the DEA which suggests that ISPs would be reassessed against the threshold in each reporting period.
- 3.73 The British Library noted that, while the explanatory notes to the DEA state that "once in scope, ISPs would have to comply with the obligations and to continue to do so even if the number of CIRs later fell below the threshold", this would appear to contradict requirements in the Act itself that any code must be "proportionate" and that the "provisions are not such as to discriminate unduly against particular persons or against a particular description of persons."
- 3.74 The Coalition for a Digital Economy (COADEC) broadly agreed with the proposals and believe that they are consistent with the Act.
- 3.75 Universities UK agreed with Ofcom's intention to focus on those ISPs where there is a substantial problem of copyright infringement, as this is consistent with the requirement for proportionality in Section 124E(1)(k). However, it was concerned that a threshold based on the number of users rather than the number of infringement reports could unfairly penalise universities, if it was applied in future. Universities currently receive low numbers of infringement reports per user, and would be very unlikely to reach a threshold based on the number of reports. However, if the threshold continues to be based on the number of users, then some larger institutions may become qualifying ISPs, especially if the subscriber threshold is lowered. This would clearly create a significant operational and costs burden for the universities so affected.

- 3.76 Universities UK do not believe that the risks of copyright infringement within universities warrant increasing the burden of compliance, or that this would be in keeping with the requirement for a proportionate approach. However, as ‘non-qualifying ISPs, universities would continue to build on current, effective practice, in reducing / preventing and monitoring copyright infringement, as underpinned, for example, by the JANET Acceptable Use Policy.<sup>24</sup>
- 3.77 Most of the stakeholders from this group were nonetheless supportive of the proposed threshold for the initial period, including BCS, the British Library, COADEC, UCISA and JANET.
- 3.78 However, JISC and LACA argued that it was not possible to judge while definitions of ISP and subscriber still remain unclear.

### **Our interim conclusion and general effect of Part 2 of the draft Code in relation to qualifying internet service providers**

- 3.79 Under paragraph 2(1)(a) of the Schedule to the Code, the rights and obligations of the Code will apply to an ISP which:
- provides fixed internet access services over more than 400,000 broadband-enabled lines; or
  - is a fixed ISP within a group which in total provides fixed internet access over more than 400,000 broadband-enabled lines.
- 3.80 A fixed internet access service is defined in paragraph 1 of the Schedule to the Code as an internet access service which is conveyed by wire, cable, fibre or other physical substance to the subscriber’s address. A “fixed ISP” is an ISP which provides a fixed internet access service
- 3.81 Paragraph 2(6) of the Code contained in Annex 3 of this document now provides that if an ISP satisfies either of the qualifying conditions set out at paragraph 3.79 when the Code is in force but subsequently falls below the qualifying threshold, it will remain subject to the rights and obligations of the Code for the duration of the notification period in which that occurs and the notification period which immediately follows.
- 3.82 Our reasons for setting these qualification criteria and our responses to the stakeholder comments are set out in the following paragraphs.

### **Whether the Code should initially apply just to fixed ISPs or also mobile ISPs**

- 3.83 There were conflicting views among stakeholders regarding our proposal to initially exclude mobile ISPs from the Code. However, we consider that this position is objectively justifiable and represents a proportionate approach. We note that it is also consistent with the application of the initial obligations anticipated by the Government, as set out in the Explanatory Notes to the Digital Economy Bill.<sup>25</sup>
- 3.84 With regard to the level of copyright infringement occurring on mobile networks, the mobile network operators have indicated that they have low overall levels of infringement on their networks. This is consistent with evidence collated on behalf of

<sup>24</sup> <http://www.ja.net/documents/publications/factsheets/077-investigating-copyright-complaints.pdf>  
<sup>25</sup> <http://www.publications.parliament.uk/pa/cm200910/cmbills/089/en/10089x--.htm>

copyright owners prior to the May 2010 Consultation, which suggested more than 95% of alleged copyright infringement incidents identified occurred on fixed networks.<sup>26</sup>

- 3.85 Indeed, although several copyright owners suggested in their responses that mobile ISPs should be included, no copyright owner presented evidence that mobile broadband was responsible for significant levels of infringement. In its response, the BPI referred to evidence that it had collected in relation to the proportion of infringements attributable to fixed and mobile networks: “Since 7 June 2010, BPI (via IFPI/DtecNet) has been analysing the platform source of online copyright infringement. While overall the biggest platforms are fixed line, the picture is varied: the largest fixed line infringer has more than 25% of the total weekly infringements, whereas another of the “big 5” fixed operators accounts for c.5%. The highest levels of infringement on a Mobile Internet Access Provider (MIAP) (and where mobile traffic is clearly distinguishable from fixed traffic) are at 2%.” Although the BPI went on to argue that “the scale of the problem on the highest MIAP is already one third of the scale of the problem on one of the fixed line ISPs” we consider that this evidence only supports our view that that the level of online copyright infringement occurring over mobile broadband is likely to be minimal and at significantly lower levels than for fixed ISPs.
- 3.86 With regard to the conduciveness of mobile broadband to online copyright infringement, we consider that the view we set out in the May 2010 Consultation remains accurate. That is, that mobile broadband is currently less conducive to online copyright infringement due to speed and capacity constraints (e.g. caps on uploading and downloading), traffic management policies (e.g. bandwidth throttling at certain times and locations) and generally lower quality compared to fixed services. For example:
- Despite theoretical speeds of up to 21Mbit/s for mobile internet access services in the UK, Ofcom research published in May 2011 found that, as at Q4 2010, the average download speed achieved by those surveyed was 1.5Mbit/s. In comparison, recent Ofcom research found that during November 2011 the average download speed from fixed broadband providers was 7.6Mbit/s.<sup>27</sup>
  - Orange’s lowest-cost contract mobile broadband service has a 500MB per month usage limit.<sup>28</sup> Its lowest-cost fixed broadband service is currently priced at a similar level and has no usage limit.<sup>29</sup>

<sup>26</sup> This evidence was referred to in the second witness statement of Rachel Clark in defence of the application for judicial review made by BT and TalkTalk and was cited by Parker J in support of his finding that the exclusion of MNOs was “a legitimate policy choice for the Defendant to make, having regard to proportionality.” (*R (on the application of BT and TalkTalk) v Secretary of State for Business, Innovation and Skills* [2011] EWHC 1021 (Admin), para 202.) In response to a challenge to this finding in the Court of Appeal, the Court held: “The judge’s conclusion was soundly based on detailed evidence submitted on behalf of the Secretary of State. He was plainly entitled to take the view that the exclusion of ... MNOs represented a proportionate response...” (*R (on the application of BT and TalkTalk) v Secretary of State for Culture, Olympics, Media and Sport* [2012] EWCA Civ 232, para 111.)

<sup>27</sup> For mobile broadband speeds see <http://media.ofcom.org.uk/2011/05/26/mobile-broadband-speeds-revealed/>. For fixed broadband, see <http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/broadband-speeds/bb-speeds-nov-11>.

<sup>28</sup> <http://shop.orange.co.uk/mobile-broadband/dongles>. It is difficult to quantify what usage limits equate to in terms of an equivalent quantity of films or songs, due to differences in format, bitrate and

- O2's lowest-cost contract mobile broadband service has a 1GB limit.<sup>30</sup> Its cheapest fixed broadband service has a usage limit of 20GB per month.<sup>31</sup>

3.87 With regard to cost of compliance, mobile ISPs confirmed the high cost and effort – relative to fixed networks – required to modify their systems and processes in order for the rapid and accurate identification of mobile internet subscribers on the basis of information provided by copyright owners. The additional costs for mobile operators arise from the technical characteristics of typical mobile internet access. Multiple subscribers may share a single publicly-exposed, routable, IP address behind which the mobile subscriber will also make use of a private, non publicly-routable, IP address. Furthermore, each subscriber may use multiple internal private and public IP addresses during an internet session. Such mobile internet access is typically provided by the network management technique commonly referred to as Network Address Translation (NAT). Ofcom has been provided with a range of estimates for the incremental spend resulting from such technology in order to implement the initial obligations, of up to tens of millions of pounds. The lowest estimates would still require a capital investment likely to be several times greater than that which fixed line broadband operators are likely to face.

3.88 With regard to the AIP's argument that Ofcom should not take into account cost and feasibility when determining coverage of the Code, we consider that it would be unlawful for Ofcom not to do so. Aside from Ofcom's general duty to act in a proportionate manner, section 124E(1)(k) of the 2003 Act places an explicit obligation on Ofcom to be satisfied that the Code is proportionate, which includes the setting of the threshold.

3.89 Therefore, we consider that it is our duty to weigh the costs of imposing an obligation on an ISP against the benefits that it might reasonably be expected to achieve when setting the initial scope of the Code. This view is supported by the explanatory notes to the Act which state:

The government's intention is for the obligations to fall on all ISPs except those who are demonstrated to have a very low level of online infringement. This is on the basis that it would be disproportionate (in cost terms) to require an ISP to incur significant costs to counter a problem that does not exist to any significant degree on its network. The proposal is therefore for the Code to set out qualifying threshold criteria, based on the number of CIRs an ISP receives in a set period of time. The government anticipates that most small and medium-sized ISPs and, possibly, the mobile networks would fall under the threshold.<sup>32</sup>

3.90 Therefore, given that the available evidence indicates that mobile ISPs would have to incur significantly higher costs in order to comply with the Code but this would only achieve a minimal reduction in overall levels of online copyright infringements, we have concluded that it is appropriate to exclude mobile ISPs from the scope of the Code initially. We will begin a review of the coverage of the Code, once the scheme has been in operation for six months. If there is evidence of significant online

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encoding. As an indicative comparison, the capacity of a CD is 740MB-800MB and the capacity of a single layer DVD is 4.7GB.

<sup>29</sup> <http://shop.orange.co.uk/broadband/?cmsPagelId=05031a>

<sup>30</sup> [http://shop.o2.co.uk/promo/o2mobilebroadband/tab/Pay\\_Monthly](http://shop.o2.co.uk/promo/o2mobilebroadband/tab/Pay_Monthly)

<sup>31</sup> <http://www.o2.co.uk/broadband>

<sup>32</sup> <http://www.legislation.gov.uk/ukpga/2010/24/notes/division/5/2/4>

copyright infringement on networks currently outside the scope of the Code, we will consider the extension of the Code's coverage.

- 3.91 We note that the deployment of faster "4G" services such as Long Term Evolution (LTE) or WiMAX may lead us to revisit some of our analysis in relation to mobile internet access providers, since the faster speeds and reduced latency they offer may make these networks more conducive for infringement. But at this stage we understand that no operators have proceeded beyond technical trials of these technologies. While LTE offers very high theoretical download speeds, questions remain about the average actual download speeds likely to be achieved by typical users, and the extent to which these are comparable to those provided by fixed services.
- 3.92 Moreover, the spectrum suitable to enable widespread deployment of "4G" services is not currently available. While Ofcom is proposing to vary the licence of one mobile operator (Everything Everywhere) to allow it to deploy LTE using some of its spectrum at 1800MHz, this would not enable it to launch such services until the end of 2012 at the earliest.<sup>33</sup> Other operators are unlikely to be in a position to roll out UK-wide deployment of LTE before the end of 2013. Consequently, since widespread consumer adoption of LTE services is unlikely in the immediate future, it does not alter our current assessment of the conduciveness of mobile networks for infringement. As and when 4G services launch and are adopted by consumers, then we will consider them in our review of the coverage of the Code.

#### Whether the Code should initially apply to Wi-Fi providers

- 3.93 A number of stakeholders argued that issues facing Wi-Fi providers are largely similar to those facing mobile providers and that both should therefore be excluded from the Code.
- 3.94 We do not have direct evidence about the levels of online copyright infringement taking place on Wi-Fi networks. However, like mobile broadband, public Wi-Fi speeds are typically limited by contention and have higher congestion rates. Furthermore, we understand that session times are limited on some public Wi-Fi services, and that people often use "hotspots" for short periods, for example while in the lobbies of hotels or public buildings, making the transfer of larger files less convenient. We further note that in many cases Wi-Fi users of Peer-To-Peer software may have difficulty in establishing incoming connections, and may even fail to share content correctly. For all these reasons, we consider that public Wi-Fi is potentially less conducive for infringing activity than fixed networks.
- 3.95 With regard to cost of compliance, we accept that mobile broadband and Wi-Fi services face similar technical issues in relation to identifying an individual subscriber from an IP address. We understand that Wi-Fi providers typically use Network Address Translation, which would usually require them to modify their systems to allow the logging and retention of the data necessary to enable them to comply with the Code. We understand that the costs of these developments are likely to be high.
- 3.96 Furthermore, BT (one of the main providers of public Wi-Fi via its Openzone and FON products) says that the "vast majority" of Openzone users purchase on a pay-as-you-go basis, rather than via a subscription. Where providers offer Wi-Fi in this way, in many instances the subscriber address data collected for pay-as-you-go

<sup>33</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/variation-900-1800mhz-lte-wimax/summary/condoc.pdf>

users will be neither reliable nor easily verifiable. For the reasons set out below at paragraph A5.43, we accept that we cannot require that ISPs collect this information as a consequence of being subject to the initial obligations.

- 3.97 We have therefore concluded that it is also appropriate to exclude Wi-Fi providers from the scope of the Code on the basis that inclusion is likely to lead to them incurring substantial costs to achieve a minimal reduction in overall levels of online copyright infringements. Again, if our review of the scope of the Code finds that there is evidence of significant online copyright infringement on networks currently outside the scope of the Code, we will consider extending the coverage of the Code.
- 3.98 To be clear, the initial obligations will still apply to the provision of a fixed internet access service which is conveyed by physical means (for example, copper, fibre or cable) to the subscriber's premises, but where the subscriber makes use of Wi-Fi for conveyance within the premises.

#### Whether fixed internet access services provided via a connected TV should be excluded from the scope of the Code

- 3.99 Virgin Media submitted that fixed internet access services provided via television set-top boxes or connected televisions (such as its TiVo box) should be excluded from the scope of the Code because the likelihood of infringement by this type of access is negligible, while the cost of compliance would be unduly high because the services in question make use of NAT technology. We recognise that its reasoning is similar to the grounds we have set out above for not extending the application of the Code to the provision of mobile and Wi-Fi internet access. Nonetheless, we do not consider an exclusion for the type of internet access services with which Virgin Media is concerned can be justified.
- 3.100 First, we understand that, typically, the provision of fixed internet access via a connected TV or set-top box will use the same physical connection to the premises as internet access provided via a router. It is doubtful whether, in these circumstances, the ISP would generally be aware that its subscriber was making use of these devices. We therefore question whether any such exclusion would serve a meaningful purpose.
- 3.101 However, this is not the case for Virgin Media's TiVo service, which does use a dedicated cable connection. Nevertheless, we accept that the costs Virgin would incur in matching IP addresses to a TiVo subscriber would be high because the addresses would be allocated via NAT technology. Furthermore, because of the technical specification of the TiVo service, we think it highly unlikely that in practice it will receive CIRs in relation to TiVo subscribers. In order to use the service for infringing activity, substantial technical hurdles would have to be overcome, and as a result we consider the risk of infringement by means of a TiVo service to be negligible.
- 3.102 Accordingly, we consider that there is no need for the exemption requested by Virgin Media. We note, in addition, that such an exemption would entail a further refinement of the definition in the Code of a fixed internet access service. This carries a material risk that, from the perspective of copyright owners and subscribers, the qualification criteria become unduly complex and adversely affect the transparency of the Code.
- 3.103 Finally, the Code provides that Qualifying ISPs are not required to issue a notification to a subscriber following receipt of a CIR if "it is unable to identify the subscriber and it is not reasonably practicable to do so". In the unlikely event that there are instances

of TiVO devices being subverted to enable the use of the TiVO access service for infringing P2P activity, Virgin could decline to issue notices to the relevant subscriber on that ground.<sup>34</sup>

### Setting the threshold for inclusion in the Code

3.104 As noted in the stakeholder responses above, there were also conflicting views relating to our proposal to limit the initial application of the Code to fixed ISPs with more than 400,000 subscribers. The key points of those who disagreed with this proposal were:

- It would be more appropriate to base the threshold on actual infringement levels;
- It is discriminatory to apply the Code only to large ISPs;
- The existence of a threshold will lead to the distortion of competition by encouraging subscribers to switch to other ISPs;
- Ofcom should provide certainty about how coverage will be extended in the future or even establish a mechanism for bringing new participants within scope in the future; and
- The Code should cover KCOM in the Hull area due to its monopoly status.

3.105 A number of respondents disagreed with our proposal to base the threshold on subscriber numbers, claiming that a threshold based on actual observed levels of infringement by ISP (generated perhaps as part of a pilot scheme or other early experience of the notifications process) would be more robust and more in keeping with the intention of the DEA provisions.

3.106 We have considered this approach but do not think it is practicable. As far as we are aware there is no independently audited data on infringement levels by network which would provide a robust basis for determining on its own the application of the Code to ISPs on basis of actual levels of infringement.<sup>35</sup> In order to obtain such data, we would have to conduct a pilot scheme whereby 'dummy' CIRs are generated and then processed by ISPs in order to validate them. However, under the DEA provisions no obligation to process CIRs exists unless an ISP meets the qualifying threshold, and so such a threshold could not be derived from a pilot scheme in this way without the voluntary, widespread co-operation of ISPs. It is doubtful whether such co-operation would be forthcoming but, in any event, such a scheme would in all likelihood add significantly to the overall time and cost of implementation and accordingly we have rejected it.

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<sup>34</sup> As set out in detail in the costs consultation, the cost-sharing scheme which underpins the implementation of the initial obligations is designed to enable qualifying ISPs to recover from qualifying copyright owners a proportion of the costs of compliance which are efficiently and reasonably incurred. The costs consultation seeks to identify those costs. The current assessment of such costs in the costs consultation does not include the additional costs associated with matching IP addresses allocated via NAT technology. On the basis that such costs will be very high but will yield little benefit given the negligible risk of infringement via this type of access, we do not consider that these are costs which would be reasonably and efficiently incurred by a qualifying ISP. Accordingly, in the absence of reasonable means to match an IP to a subscriber, the qualifying ISP is not required to send a notification.

<sup>35</sup> The Hargreaves Review of Intellectual Property and Growth noted the general lack of statistically reliable data on levels of copyright infringement (<http://www.ipo.gov.uk/ipreview.htm>).

- 3.107 In the absence of audited data sufficiently robust to establish independently a threshold based on infringement levels by network, we think that subscriber numbers provide a reasonable proxy for likely infringement levels. As the premise of the DEA provisions was that online copyright infringement is a mass market problem,<sup>36</sup> we believe it is appropriate to set the initial threshold on the basis of subscriber numbers, at a level that captures over 90% of subscribers to fixed internet access services.
- 3.108 We note that evidence submitted by copyright owners about the distribution of alleged online copyright infringement activity indicates that there is a broad correlation between the number of subscribers that an ISP has and the level of alleged infringements on their service. While we acknowledge the limitations of this data (specifically that it has not been independently audited), we consider it does provide support for the view that it is proportionate and reasonable to base the qualification threshold on subscriber numbers.<sup>37</sup>
- 3.109 With regard to the level of our proposed threshold, we need to make two clarifications. First, in the May 2010 Consultation we stated that the 400,000+ subscriber threshold would cover seven ISPs representing 96.5% of the residential and SME broadband market. This statement was based on incorrect information provided by one of the ISPs. Having corrected this error and included the most recent available data at the time of this statement, we estimate that the threshold covers six ISPs representing 93.5% of the broadband market.
- 3.110 Second, some respondents were unclear regarding the unit of measurement for the threshold. For clarity, the analysis underlying the proposals in the May 2010 Consultation was based on the number of broadband-enabled lines over which the ISP provides an internet access service to a subscriber (i.e. lines providing broadband services using DSL, cable modem, FTTx or LLU technology) and not on subscriber numbers. We consider that this unit of measurement is appropriate since it is information that is readily available for all ISPs and is typically used by them to state the size of their subscriber base. We are not aware of any fixed ISPs which would satisfy a 400,000 subscriber threshold but not a threshold of 400,000 broadband-enabled lines over which its services are provided. In practice, therefore, this distinction would not affect which ISPs will be qualifying ISPs for the purposes of the application of the Code.
- 3.111 Therefore, in the interests of clarity at the time of publication, there are six ISPs that would be covered by this threshold:
- BT (including Plusnet) – 6.3 million;<sup>38</sup>
  - Virgin Media – 4.4 million;<sup>39</sup>
  - TalkTalk – 4.1 million;<sup>40</sup>

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<sup>36</sup> See for example the Government's Impact Assessment for the Digital Economy Act (<http://webarchive.nationalarchives.gov.uk/20100511084737/http://interactive.bis.gov.uk/digitalbritain/wp-content/uploads/2010/04/Digital-Economy-Act-IAs-final.pdf>).

<sup>37</sup> See fn 22. This evidence was also cited in the second witness statement of Rachel Clark in defence of the application for judicial review made by BT and TalkTalk and the Government's reliance upon it was endorsed by both by Parker J and the Court of Appeal.

<sup>38</sup> BT results, 31 March 2012, <http://www.btplc.com/Sharesandperformance/Quarterlyresults/PDFdownloads/q412KPIs.pdf>

<sup>39</sup> Virgin Media results, 31 March 2012, <http://investors.virginmedia.com/phoenix.zhtml?c=135485&p=irol-financial-results>

- Sky – 3.9 million;<sup>41</sup>
- Everything Everywhere (Orange and T-Mobile) – 0.7 million;<sup>42</sup> and
- Telefonica O2 (including Be) – 0.6 million.<sup>43</sup>

3.112 We are not aware of any other ISPs that fall into the category of qualifying ISP at this time. As shown in the table below, even if we reduced the threshold significantly it would have only a small impact on the overall coverage of the scheme. For example, dropping the threshold to 50,000 lines would expand coverage to five further ISPs (none of which has more than 150,000 lines) and increase coverage of the market by only 2.3%.

3.113 These smaller ISPs would face proportionately higher costs to deliver their obligations under the Code. The smallest ISPs, for which investment in automated processing may be uneconomic and unaffordable, might have to rely on less efficient and more costly manual processes to execute their obligations. The operating costs to both copyright owners and ISPs of sending CIRs under such manual processes would be significantly higher, potentially constraining or even reducing to negligible levels copyright owners' demand for CIRs to be processed by those small ISPs. In the absence of robust data suggesting copyright infringement levels on the networks of these small ISPs is disproportionately high, compared to their market share, and taking account of the objective of effecting a change in mass market behaviour, it does not appear to us that it would be proportionate to include smaller ISPs within the scope of the Code at this time.

**Table 1: Impact of different threshold levels on coverage of the scheme**

|                           | Number of ISPs | Market Coverage |
|---------------------------|----------------|-----------------|
| More than 1,000,000 lines | 4              | 86.5%           |
| More than 400,000 lines   | 6              | 93.5%           |
| More than 50,000 lines    | 11             | 95.8%           |
| <b>Total</b>              |                | <b>100%</b>     |

Source: Ofcom.

### Potential for competitive distortion

3.114 Both BT and TalkTalk argued that the notification process will lead to greater switching between ISPs by subscribers who receive notifications. In these circumstances, they say the threshold could have two potential effects: a higher level of switching for qualifying ISPs than for ISPs outside the threshold, and subscribers switching from qualifying ISPs to those outside the threshold.

3.115 The Act clearly envisages that there should be a threshold<sup>44</sup> and inevitably this means that the conditions applying to those ISPs that meet the threshold differ from

<sup>40</sup> TalkTalk results, 31 March 2012,

<http://www.talktalkgroup.com/~media/Files/T/TalkTalk/pdfs/reports/2012/2012-05-17.pdf>

<sup>41</sup> Sky results, 31 March 2012,

[http://corporate.sky.com/documents/pdf/latest\\_results/q3\\_1112\\_press\\_release](http://corporate.sky.com/documents/pdf/latest_results/q3_1112_press_release)

<sup>42</sup> Everything Everywhere results, 31 March 2012,

<http://everythingeverywhere.com/2012/05/02/everything-everywhere-results-for-the-first-quarter-to-31-march-2012/>

<sup>43</sup> Telefonica O2 results, 31 March 2012,

[http://www.telefonica.com/en/shareholders\\_investors/pdf/rdos12t1-eng.pdf](http://www.telefonica.com/en/shareholders_investors/pdf/rdos12t1-eng.pdf)

those that apply to those ISPs that do not. It does not follow, however, that this will result in appreciable competitive distortion. That will depend on the extent to which a significant number of subscribers switch away from qualifying ISPs as a result of the initial obligations and the impact of the initial obligations on the ability of the qualifying ISPs to compete for subscribers.

3.116 In setting the threshold, we do not have sufficient evidence that a significant number of subscribers would be likely to churn either from qualifying ISPs to non-qualifying ISPs or from one qualifying ISP to another. While it is plausible that some would churn, a number of factors could reduce the propensity of subscribers to switch, as highlighted by Thus in its submission. For example:

- Many subscribers (particularly subscribers that are active switchers) are likely to be subject to a minimum contract term and potentially early termination charges,<sup>45</sup> and
- More than half of UK households currently buy communications services as part of a bundle.<sup>46</sup> For these subscribers, the decision to switch could also involve the decision to switch other services such as Pay-TV. In some cases, switching bundles of services is likely to be more complex compared to switching a standalone service, as consumers may need to simultaneously navigate multiple switching processes for different elements of the bundle.

3.117 In addition, it is unclear that the application of the initial obligations will be a competitive constraint on the ability of qualifying ISPs to win new subscribers. We consider that it is unlikely that smaller ISPs will have an incentive to actively pursue customers on the basis that the initial obligations do not apply to them<sup>47</sup> and therefore we expect that the key components of competition between ISPs will remain price and quality of service. We do not consider that these will be affected by the application of the initial obligations.

3.118 The 400,000+ line threshold covers 93.5% of the retail broadband market and covers every ISP with significant scale. Given that there is no reliable evidence available to us to demonstrate either increased switching or the likely effect of any such switching, we consider that our proposal to launch with a small number of large ISPs, while keeping the situation under review, is pragmatic, as well as objectively justifiable, not unduly discriminatory, and proportionate.

3.119 Furthermore, the possibility that the scope of the Code could be extended where we receive evidence of a significant increase in infringing activity on smaller networks should also serve to provide incentives for those ISPs to take steps to ensure that infringement remains at a low level. This view was also expressed at paragraph 51 of the explanatory notes to the DEA provisions.

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<sup>44</sup> For example, see explanatory note 51 to the Act

<http://www.legislation.gov.uk/ukpga/2010/24/notes/division/5/2/4>.

<sup>45</sup> While it is possible to take broadband services without an annual contract (e.g. Plusnet allows some consumers to leave with 10 days notice), most ISPs require consumers to take a minimum term contract of 12 or 18 months.

<sup>46</sup> Data from Ofcom's Technology tracking study in Q1 2011 show that 53% of households now buy communications services as part of a bundle.

<sup>47</sup> It seems implausible that an ISP would wish to promote its service as providing a safe harbour for those engaging in unlawful online infringement of copyright. Likewise, the bandwidth demands on ISPs' backhaul and core capacity that results from such activity would appear to make it unlikely that there could be an economic advantage in promoting a service that might be particularly attractive to such customers.

Hull

- 3.120 With regard to the situation in Hull, we acknowledge that as KCOM falls below the threshold we are setting, there will be no fixed ISP covered by the Code in the Hull area. However, KCOM's total broadband lines account for less than 0.8% of the UK retail broadband market and therefore are unlikely to be contributing significantly to the total volume of copyright infringement in the UK.
- 3.121 Furthermore, as of 31 March 2011, KCOM had fewer than 100,000 broadband lines in the Hull area itself, significantly less than suggested by some copyright owners.<sup>48</sup> We consider that the same arguments regarding the proportionality of the threshold of 400,000 lines apply equally in respect of KCOM regardless of its geographic exclusivity in the Hull area. In particular, it would be disproportionate to apply the Code to KCOM in light of the costs which would need to be incurred and the number of subscribers across which those costs would need to be spread. Given the lack of any evidence to suggest that the levels of infringement occurring on KCOM's network are of particular significance compared with other ISPs, we have therefore decided not to include KCOM at this time. We will of course consider including KCOM as part of the process of reviewing the Code.

Conclusions on proposed threshold

- 3.122 We have decided to retain our proposal of a threshold based on customer base (as measured by the number of broadband-enabled lines over which internet access services are provided). Our proposal was based on three premises. First, the premise of the Act that online copyright infringement is a mass market problem. Second in the absence of independently audited data sufficiently robust to establish a threshold based on actual levels of online copyright infringement on individual networks and services, we have used market shares as a proxy for likely levels of infringement on individual networks. The available evidence submitted by copyright owners about the distribution of alleged online copyright infringement does, notwithstanding its limitations, provide support for the view that it is proportionate and reasonable to base the qualification threshold on subscriber numbers.
- 3.123 Third, smaller ISPs would face proportionately higher marginal processing costs to be able to fulfil their obligations and this, in turn, would materially increase the cost copyright owners would have to pay to send a CIR to those ISPs. We therefore continue to believe that a threshold based on the size of ISP is objectively justifiable and proportionate at this time.
- 3.124 It is important to note that the current threshold is a pragmatic approach intended to get the Code scheme operational. As noted above, we will begin a review of the coverage of the Code once the scheme has been up and running for six months. At this time, better data should be available on which to design criteria based on the proportion of online copyright infringement attributable to the internet access services of individual ISPs. We will consult on any revised approach we may propose as a result of our review. We will look to publish this consultation alongside our first annual progress report to the Secretary of State. We expect that any changes relating to the proposed threshold we then made to the Code would need to be notified to the European Commission under the Technical Standards Directive; like the draft Code, they would also need to be made by way of a Statutory Instrument, approved by the Secretary of State and subject to Parliamentary scrutiny through the negative resolution procedure.

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<sup>48</sup> [Ofcom](#) / KCOM.

- 3.125 That review will also provide an opportunity to assess the impact, if any, of the threshold on customer switching to the extent that information may be available to evidence consumer churn following the application of the online copyright infringement provisions.
- 3.126 Finally, we have introduced two refinements to the application of the qualification threshold for ISPs. First, the Code now provides that an ISP which satisfies the threshold criterion and has received an estimate of CIR volumes from copyright owners for a given notification period should be subject to the obligations for that notification period and the subsequent one, even if its status relative to the threshold changes (e.g. the number of subscriber lines falls below 400,000). This is because, under the Cost Sharing Order, an ISP subject to the obligations may be compensated by Copyright Owners during its first notification period for investment in CIR processing systems whose useful life is two or more years. The Copyright Owners which have funded this investment should have a reasonable period during which they can benefit from the CIR processing systems to whose costs they have contributed. We consider two years is a reasonable period to allow such benefits to be realised, balancing the interests of the Copyright Owner noted above with those of the ISP. We do not believe that it is proportionate for an ISP to remain within scope indefinitely under such circumstances, as we had initially proposed in our consultation and as was suggested (under a CIR-based threshold) in the explanatory notes to the Act: "Once in scope, ISPs would have to comply with the obligations and to continue to do so even if the number of CIRs later fell below the threshold". This approach would risk reducing incentives on ISPs to reduce infringement levels on their networks.
- 3.127 Second, we have added in paragraph 2 of the Code a further qualification provision, namely that where all fixed ISPs within a Group (as defined in section 1261 of the Companies Act 2006) provide internet access services over more than 400,000 broadband-enabled lines in aggregate, they will each be qualifying ISPs.<sup>49</sup> Therefore, on this basis BT and its subsidiary Plusnet would each be a qualifying ISP, as would Telefonica O2 and its subsidiary Be, and TalkTalk and its AOL subsidiary. We have inserted this obligation to remove ISPs' ability to avoid the application of the Code by making changes to their corporate structure.

### Definitions under the Act

- 3.128 The definitions of "internet service provider", "subscriber" and "communications provider" are set out in the DEA provisions and cannot be subject to amendment in the Code. Nonetheless, their interpretation is relevant to the application of the Code and has been the subject of considerable stakeholder comment both in responses to the May 2010 Consultation and subsequently. In particular, we are aware that public intermediaries, such as libraries and universities whose activities include the provision of internet access services, have a number of concerns about their status.
- 3.129 **A summary of stakeholder comments on this issue and our understanding of how the definitions apply is set out in Annex 5 to this document, with a view to assisting stakeholders understand how the DEA provisions may apply to them. While we cannot fetter our discretion in relation to the future revision of the ISP qualification threshold, we also set out the issues that might be relevant in the event we consider its extension to public intermediaries.**

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<sup>49</sup> Subject to the provisions outlined below in paragraphs A5.40 – A5.43 regarding ISPs that offer pay as you go internet access and are not able to identify subscribers.

## Section 4

# Copyright infringement reports

## Introduction

- 4.1 Section 124A CA03 creates an obligation for an ISP within the scope of the Code to notify subscribers where a copyright owner reports to an ISP that it appears that a copyright infringement has been carried out by means of the subscriber's internet access service. The DEA provisions also set out what must be included in a copyright infringement report (CIR) and require the Code to make provisions relating to the evidence on which the CIR is based.
- 4.2 Below we set out how we propose to implement these requirements with regard to CIRs, as set out in Part 4 of the draft Code.

## Our proposals

- 4.3 In the May 2010 Consultation we proposed that a CIR sent by a copyright owner to an ISP should include:
- The name and registered address of the qualifying copyright owner;
  - Where relevant, the name and registered address of the person on whose behalf the qualifying copyright owner is authorised to act and evidence of authorisation;
  - Identification of the work in which copyright in the UK is said by the qualifying copyright owner to subsist (the "Relevant Work"), including the title of the Relevant Work and a description of the nature of the Relevant Work;
  - A statement that there appears to have been an infringement of the owner's copyright in the Relevant Work;
  - A description of the apparent infringement, including the filename, a description of the contents of the file, and (where appropriate) hash code<sup>50</sup> of the infringing content;
  - A statement that, to the best of the qualifying copyright owner's knowledge, no consent has been given by the owner of the UK copyright in the Relevant Work for the acts described in the preceding paragraph to have occurred;
  - The date and time using Universal Coordinated Time (UTC) on which the evidence was gathered, including both the start and end time of the relevant session;
  - The IP address associated with the apparent infringement;
  - The port number used to conduct the apparent infringement;

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<sup>50</sup> A hash code is a unique identifier, associated with a digital content file. Within the context of P2P networks a hash code is created when a digital content file is shared via a P2P network. Alteration or modification of the content file, without creating a new hash will lead to a mismatch. Hash code matching can also be used as part of the process of verifying the identity of a content asset. Cryptographic hash functions are used to identify files uniquely and to verify the integrity of the file.

- The website, or protocol, via which the apparent infringement occurred;
  - A unique infringement identifier (UII) allocated to the CIR by the qualifying copyright owner; and
  - The date and time of issue of CIR.
- 4.4 To ensure allegations of copyright infringement are evidentially robust and accurate, we proposed in the May 2010 Consultation that a copyright owner (or an agent acting on their behalf) should, before submitting their first CIR (and from then on an annual basis), provide Ofcom with a quality assurance report, which details the processes and systems used by the copyright owner (or any party acting on its behalf) to gather evidence, including steps to ensure the integrity and accuracy of evidence, audits of its systems and addressing quality assurance issues. We also proposed that as part of a quality assurance report a copyright owner (or their agent) should include a statement of compliance with relevant data protection laws.
- 4.5 In the May 2010 Consultation, we proposed that the qualifying copyright owner must send the CIR to the qualifying ISP within ten working days of the required evidence having been gathered, rather than the maximum of one month set out in the DEA.

### Consultation questions

- 4.6 In the May 2010 Consultation we asked the following questions regarding the proposed content, underlying evidence gathering and delivery of CIRs.

*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?*

*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.*

*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?*

### Stakeholder responses

#### Responses from ISP stakeholders

- 4.7 With regard to the content of the CIR, most ISPs considered Ofcom's proposal largely satisfactory. However, several ISPs suggested amendments, such as:
- LINX suggested the CIR also describe the means by which the evidence was obtained;
  - One ISP suggested that time should be recorded in GMT rather than UTC and that the CIR should include a signed statement from the copyright owner;
  - The MBG suggested the CIR should also include the file format, file sharing application / protocol, file size and IP addresses and port numbers related to both the source and destination;

- Everything Everywhere said the phrase “to the best of the qualifying copyright owners knowledge” should be deleted to clarify that copyright owners must be certain before sending CIRs; and
  - Virgin Media thought the primary copyright owner should be listed prominently, but that Ofcom should resist other unnecessary items.
- 4.8 ISPs also raised issues regarding the form of the CIR and other practical issues. Most ISPs agreed that CIRs should be standardised; Thus suggested it should be XML. Some ISPs appeared to believe that the CIR would be sent by post in paper form.
- 4.9 However, some ISPs rejected the idea that CIRs could be meaningful. For example, ISPA said “an IP address is generally considered insufficient evidence for identifying individuals who engage in unlawful filesharing.”
- 4.10 Sky said that Ofcom’s power to introduce new elements was too broad.
- 4.11 ISPs were divided in their views on the appropriateness of Ofcom’s proposal for a quality assurance process. Several expressed significant concerns about the proposals. Everything Everywhere and the MBG both stated that copyright owners’ processes should be independently accredited. BT referred to the equivalent system in France, where Hadopi has approved certain detection agencies. ISPA said Ofcom should specify requirements for obtaining evidence of infringement rather than creating a quality assurance approach. TalkTalk Group said that the inaccuracy of IP address matching means that quality assurance procedures are irrelevant.
- 4.12 However, some ISPs, including KCOM, LINX, Thus and Virgin Media, agreed with Ofcom’s proposal.
- 4.13 Most ISPs agreed that ten working days from when the evidence was gathered was an appropriate period for copyright owners to submit CIRs, although LINX suggested it should be expressed as 14 calendar days. Some ISPs, including the MBG and Everything Everywhere said that copyright owners should submit CIRs as quickly as possible, with MBG adding that this should certainly be no more than ten working days.
- 4.14 Additionally, some ISPs, including Telefonica O2 and Sky, suggested that the Code should be amended to refer to ten working days from the “alleged infringement taking place”, rather than “from the evidence being gathered”.

#### Responses from copyright owner stakeholders

- 4.15 Regarding the content of CIRs, most copyright owners broadly agreed with our proposals. Some copyright owners raised specific concerns. For example, the BBC noted that the extent of the information would likely require a third party specialist, who may have an incentive to goldplate the process; FAST noted what it perceived as an ambiguity with regard to the definition of copyright owner; ITV said that it would be important for Ofcom to keep the content of CIRs under review.
- 4.16 In addition, AIP, BPI, Premier League and Publishers Association proposed specific amendments with the intention of ensuring that the CIR was not unnecessarily restrictive with regards to the type of online copyright infringement. In particular, this group proposed the following changes to the Code:

- 3.3(e) be amended to read “a description of the apparent infringement, which may include (by way of example only) the filename, URL or other means of identifying the infringing content, a description of the infringing content and the contents of any associated data, and (where appropriate) hash code of the infringing content”;
  - 3.3(i) be amended to read “relevant port numbers used to conduct apparent infringement”; and
  - 3.3(j) should be amended to read “the website, protocol, application, online location or internet-based system via which the apparent infringement occurred”.
- 4.17 With regard to the quality assurance approach to ensuring data quality and consistency, most copyright owners supported Ofcom’s proposals. UK Film Council noted that it was an approach Ofcom has successfully used elsewhere, such as price comparison websites. Other specific comments included:
- A quality assurance process should not promote one detection approach over another;
  - Within any quality assurance process, it was necessary to protect commercial sensitivities and proprietary information; and
  - The quality assurance process should create a rebuttable presumption that evidence is correct.
- 4.18 Some copyright owners disagreed with Ofcom’s proposals on quality assurance. The BBC expressed reservations about a self-certification approach and thought Ofcom should set required standards based on current information. FAST thought it was inappropriate and disproportionate for Ofcom to propose quality assurance as the DEA provisions make no reference to such a process. UKTV thought Ofcom should take initial responsibility for assuring quality.
- 4.19 Most copyright owners agreed with our proposal that they must send CIRs to ISPs within ten days of the evidence being collected. The Creative Coalition Campaign said that most copyright owners were planning to send CIRs sooner than ten working days from when the evidence is gathered.
- 4.20 The BBC agreed that timeliness is important, but noted that timescales are linked to evidence gathering processes and cost, and that where an agent is involved more than ten days may be necessary. ITV suggested 20 working days would be a more realistic timeframe. UKTV said that ten days was not inappropriate.

#### Responses from user groups

- 4.21 With regard to the content of CIRs, stakeholders representing user groups made a variety of comments.
- BeingThreatened said that subscribers should not be misled that the only evidence against them is the IP address;
  - CMA said that IP addresses were a network resource and should not be used to identify people;
  - ORG said it was clear that the content of CIRs needs to be standardised; and

- The Pirate Party UK said that the list in 3.3 of the Code was reasonable, but only the statement that there appears to have been an infringement of copyright is “evidence”. It cited testimony from an academic expert arguing that IP addresses only have suggestive value. It also suggested the CIR should include an approximate value of the material.
- 4.22 Most user groups disagreed with Ofcom’s proposal for a quality assurance process. The Communications Consumer Panel, ORG, Consumer Focus and Pirate Party all said that they did not believe that Ofcom’s proposed approach was compatible with the DEA. In particular, the Communications Consumer Panel said:
- It is not clear that the draft code complies with this requirement [in section 7/124E(2b) regarding standard of evidence].
  - There need to be minimum standards laid down for quality assurance. The Panel recognises that Ofcom may be reluctant to set what it considers to be arbitrary standards that it is not in a position to understand; however, not only does the DEA require that standards of evidence are set, there would be serious potential for consumer detriment were these not to exist.
- 4.23 BeingThreatened said that a high quality-controlled approach was needed to define and maintain standards within the evidence gathering sector. Citing the issues that had arisen in relation to ACS:Law’s activities, it expressed concern about the ability of self-certification by copyright owners to secure data gathering accuracy.
- 4.24 BeingThreatened also said that the list of minimum requirements set out by Ofcom was a good start, and provided what it considered to be the minimum list of requirements for robust evidence.
- 4.25 Which? said that it was important to know the error rates of copyright owners’ evidence gathering methods to inform the judgements of the appeals body.
- 4.26 With regard to the proposed obligation on copyright owners to submit CIRs within ten working days of the evidence being gathered, user groups agreed that it was necessary to minimise the time between evidence gathering and subscriber notification. In particular:
- BeingThreatened said it would strongly argue against any lengthening and noted that in cases related to ACS:Law typically five months may have elapsed following the collection of evidence;
  - ORG thought subscribers should have the right to receive CIRs immediately and also the right to information collected on them by third party agencies; and
  - Pirate Party UK said it was essential to minimise the time between evidence gathering and subscriber notifications. It recommended five working days.

#### Responses from other stakeholders

- 4.27 JANET and JISC agreed with our proposals for content of CIRs. The British Library said that the Code should be amended to ensure that copyright owners consider the question of licensing through third parties as well as whether the copying, even if unauthorised, might be covered by one of the exceptions in UK law.

- 4.28 With regard to both our proposals for a quality assurance scheme and our proposals that copyright owners have ten working days to submit CIRs to ISPs from gathering the evidence, the British Library, JANET and JISC agreed.

## **Our interim conclusion and general effect of Part 3 of the Code**

- 4.29 Part 3 of the revised Code contained in Annex 3 of this document enables a qualifying copyright owner to make a CIR to a qualifying ISP if it has evidence gathered in accordance with procedures approved by Ofcom which give it reasonable grounds to believe that a subscriber to an internet access service has infringed its copyright or that the subscriber has allowed another person to use the service and that other person has infringed its copyright by means of the service.
- 4.30 A CIR made under Part 3 must include the information specified in paragraph 5(1) of the Code and must be sent to the qualifying ISP within one month of the evidence being gathered.
- 4.31 In relation to each notification period, a qualifying copyright owner cannot send a CIR before it has provided a report to Ofcom setting out its procedures for gathering and verifying evidence of copyright infringement and Ofcom has approved the report. In considering whether to approve it, Ofcom will consider whether the evidence gathered in accordance with the procedures specified will meet the standard specified in the Code. The qualifying copyright owner must publish the report, subject to redactions on confidentiality grounds, as soon as reasonably practicable after delivery to Ofcom.
- 4.32 Our reasons for these provisions and our responses to the stakeholder comments summarised above are set out in the following paragraphs.

### **Content of CIRs**

- 4.33 Taking into account the views of stakeholders we have made the following changes to the proposed content of CIRs:
- We have amended the list of information which is required to be included in a CIR to take into account the point made by some copyright owners that not all forms of copyright infringement are identified by way of a filename. The Code now states that CIRs must include information which would enable the subscriber to identify the means used to identify the copyright work and to gather evidence. We consider that these changes are reasonable and necessary;
  - We have introduced a requirement that a Copyright Infringement Report (CIR) must specify the time which the evidence suggests that an infringement took place. This is in addition to the previous requirement that the CIR specify the time at which the evidence was gathered. This addition is in support of the requirement in the DEA provisions that the appeals body “must find in favour of the subscriber unless the copyright owner shows that...(a) the apparent infringement was an infringement of copyright; (b) the report relates to the subscriber’s IP address at the time of that infringement”<sup>51</sup>;
  - We have also removed the qualification that “to the best of the knowledge of the qualifying copyright owner” no consent had been given by the owner of the copyright to the acts giving rise to the alleged infringement. We agree that a CIR

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<sup>51</sup> See section 124K(5) of the Act.

should not be sent unless the copyright owner has satisfied itself that the owner of the copyright did not consent to the acts in question;

- The CIR must also provide sufficient information to enable the subscriber to identify the means by which the evidence of infringement was gathered. We expect that this will be by way of a link to the relevant report that the copyright owner will be required to publish in relation to its evidence gathering processes. Copyright owners must gather the evidence on which CIRs are based in accordance with their published processes which Ofcom has approved (see paragraphs 4.38-4.53 below); and
- We have also removed the reference to a “registered” address as we recognise that certain copyright owners may be individuals and will not therefore hold a registered address. However, in the majority of cases, we anticipate that the copyright owner will be a company in which case the registered address should be provided.

4.34 However, there are other proposals that after consideration we do not believe are necessary. In summary:

- With reference to the suggestion that time recorded in CIRs should be recorded in GMT, we disagree as we understand that UTC is the appropriate measure for network co-ordination. However, with regards to notifications, the draft Code specifies that any notification sent by the ISP as a result of the CIR must be readily comprehensible to consumers. We consider that this is likely to mean using BST or GMT depending on the time of year, and not UTC;
- Given the anticipated high volumes, the electronic nature of CIRs and the accuracy obligations on copyright owners in the Code, we consider the idea of a signed statement is impractical and unnecessary; and
- We understand that the inclusion of the IP address and port number of the party detecting infringing behaviour may aid the identification of subscribers on mobile, Wi-Fi or ISP networks where Network Address Translation (NAT)/Port Address Translation (PAT) is employed. However, the inclusion of the detecting IP address on a CIR could also help users to avoid detection if it becomes widely known. Therefore, since mobile and Wi-Fi networks are initially excluded and we understand that NAT/PAT are not ordinarily deployed on fixed ISP retail networks at this time, we do not propose to make the provision of inbound IP addresses and port numbers mandatory. But if mobile ISPs are brought within scope of the Code or fixed line ISPs introduce wide scale NAT/PAT (or for other technical reasons), Ofcom may consider whether an amendment to the Code requiring that the detecting IP address be included within the CIR should be made.

4.35 Responses indicate that some stakeholders are not clear as to the form of CIRs. For example, some stakeholders suggested that they would be paper documents. We have always considered that, in order to enable efficient processing by the ISP, CIRs would be issued electronically using a standard machine-readable form (for example XML) to present the information required. We have therefore included a requirement to that effect in the draft Code.

4.36 We disagree that the definition of copyright owner is ambiguous. Section 124N of the Act states:

“copyright owner” means—

(a) a copyright owner within the meaning of Part 1 of the Copyright, Designs and Patents Act 1988 (see section 173 of that Act); or

(b) someone authorised by that person to act on the person's behalf;

4.37 Thus the definition applies to two related types of person – the owner of copyright and a person acting on its behalf. In the Code, we have proposed that where the copyright owner submitting a CIR is someone falling under part (b) of the definition above, it is also required to identify the copyright owner falling under part (a) on whose behalf it is acting.

### Ensuring accuracy of evidence gathering

4.38 The importance of accurate evidence gathering was a common concern across many stakeholder responses, although there were differing views on the best way to ensure accuracy. Flaws in evidence gathering were one of the key criticisms levelled at the letter writing campaign carried out by ACS:Law. A number of internet subscribers claimed that they had been falsely accused and threatened by ACS:Law. The judge in 27 cases before the Patents County Court was highly critical of the reluctance of ACS:Law to subject its evidence and evidence-gathering techniques to judicial scrutiny.<sup>52</sup>

4.39 The legislation is clear that evidential standards must be addressed in the Code. There is a requirement in the DEA provisions that the Code must specify in relation to CIRs, “the standard of evidence that must be included”. The rest of this section deals with our interim conclusions about this standard of evidence.

4.40 We recognise that the robustness of the evidence on which CIRs are based will be a key factor in securing the reputation of the notification scheme under the Code and its likely effectiveness. Therefore, in order to address the concerns of stakeholders and clearly discharge our obligations under the DEA provisions, we have made the following modifications to the draft Code.

4.41 First, we have made it a requirement of the draft Code that a copyright owner may only send a CIR if it has gathered evidence which gives reasonable grounds to believe that:

- A subscriber to an internet access service has infringed the owner’s copyright by means of the service; or
- The subscriber has allowed another person to use the internet access service and that other person has infringed the owner’s copyright by means of the service.

4.42 This is an objective standard. It will only be met if the evidence, viewed objectively, provides reasonable grounds for believing that an online copyright infringement has taken place.

4.43 Having considered carefully the wording of the DEA provisions, we have come to the view that we are constrained by that wording from imposing a higher evidential standard on the copyright owner. Specifically, the right of a copyright owner to send a CIR which is created by section 124A(1) of the Act is triggered if it: “*appears to a copyright owner that-* (a) a subscriber to an internet access service has infringed the

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<sup>52</sup> *Media C.A.T. Ltd v Adams* [2011] EWPC 6

owner's copyright by means of the service; or (b) a subscriber to an internet access service has allowed another person to use the service and that other person has infringed the owner's copyright by means of the service." (emphasis added).

- 4.44 The DEA provisions also refer repeatedly to "an apparent infringement"<sup>53</sup> which is defined in section 124N of the Act as "the infringement of copyright that [the CIR] states *appears* to have taken place" (emphasis added). On an interpretation of these provisions, we consider that the Parliamentary intention was that a copyright owner should not have to establish definitively that an infringement of copyright has taken place before sending a CIR but may do so if it has reasonable grounds for believing that is the case.
- 4.45 That said, we draw attention to the grounds of appeal in section 124K of the Act and specifically the requirements that:
- The subscriber must be able to appeal on the grounds that the apparent infringement to which a CIR relates is not an infringement of copyright (section 124K(3)(a) of the Act); and
  - The appeals body must determine an appeal in favour of the subscriber if the copyright owner is unable to show that there was an infringement of copyright (section 124K(5)(a) of the Act).
- 4.46 In the light of these provisions (which are included in the draft Code), a copyright owner wishing to reduce the risk of appeal and to contribute positively to the reputation of the scheme and its potential effectiveness, should do all it reasonably can to verify that an infringement of copyright has taken place before issuing a CIR. That will require it to satisfy itself of the following:
- The work identified in the CIR is an original work in which copyright exists;
  - The person issuing the CIR (or the person on whose behalf s/he is authorised to act) has title to that copyright;
  - There was an act which infringed copyright;
  - That act was done by the subscriber or someone they allowed to use their internet service; and
  - That act was carried out without the permission of the copyright holder.
- 4.47 The second set of modifications we have made to the draft Code is intended to secure the accuracy of copyright owners' evidence gathering procedures. Thus, copyright owners are now required to submit those procedures for approval to Ofcom before sending their first CIR and on an annual basis from then on. Furthermore, a copyright owner may only send a CIR to a qualifying ISP for processing if the evidence on which it is based has been gathered in accordance with the procedures approved by Ofcom.
- 4.48 When deciding whether to give approval, the draft Code requires Ofcom to consider whether evidence gathered in accordance with the procedures will give reasonable grounds to believe that an infringement of copyright has occurred.

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<sup>53</sup> See, for example, section 124A(3)(b), (6)(c) and (8) of the Act; section 124E(5)(c) of the Act; section 124K(3)(a), 5(a) and (6)(a) of the Act

- 4.49 For the purposes of reviewing and approving the copyright owners' evidence-gathering procedures, we are proposing to sponsor the development of an evidence-gathering technical standard by an independent standards body. Our expectation is that a copyright owner will be well placed to secure approval from Ofcom if it adopts evidence-gathering procedures that comply with the standard that is developed.
- 4.50 The standard should also allow independent parties to audit and certify copyright owner evidence-gathering processes, thus creating systems which will establish stakeholder confidence. We would also expect that the development of a standard would address the concerns of those copyright owners, notably the MPA, which expressed a wish to see other copyright owners adopt an approach to evidence gathering as robust as their own.
- 4.51 In order to ensure transparency for subscribers who may be the subject of a CIR, copyright owners will be required to publish a report describing their evidence-gathering procedures, subject to redactions on confidentiality grounds (e.g. commercially confidential or proprietary information) and as soon as reasonably practicable after delivering it to Ofcom.
- 4.52 Several stakeholders suggested that an accreditation scheme could create a rebuttable presumption at the appeals stage that the evidence gathered by the copyright owner was accurate. We do not consider that it is open to Ofcom to make such provision in the Code. The statutory framework requires that the appeals body, in carrying out its function of determining appeals, must be independent of Ofcom, as well as ISPs and copyright owners. Therefore, the appeals body must be free to determine on a case by case basis whether evidence gathered in accordance with procedures approved by Ofcom is sufficient to establish an infringement of copyright. It is, however, possible that such a presumption will develop in time if there is a body of decisions from the appeals body confirming that evidence gathered in accordance with the approved procedures discharges the burden of proof on the copyright owner in an appeal.
- 4.53 Finally, on the instruction of Government we have removed the requirement for ISPs and copyright owners to provide a statement showing how their processes and systems are compliant with the Data Protection Act. In preparing CIRs and notifications copyright owners and ISPs remain subject to all existing legal obligations, including (but not limited to) the Communications Act 2003, the Data Protection Act 1998, the Computer Misuse Act 1990 and the Regulation of Investigatory Powers Act 2000.

### **Deadline for submission of CIRs**

- 4.54 In the May 2010 consultation we proposed that copyright owners should be required to send CIRs within ten working days of evidence being gathered. This received widespread support among stakeholders. However, the wording of the relevant DEA provision specifies that CIRs should be sent to ISPs within the period of one month beginning with the day on which the evidence was gathered. As the Code should as far as possible reflect the wording of the DEA, we have amended the Code so that copyright owners must send CIRs within one month beginning on the day on which the evidence of the apparent infringement was gathered (i.e. the date included in the CIR as required at paragraph 5(1)(g) of the Code).
- 4.55 We note that several stakeholders particularly emphasised the importance of minimising the period between evidence gathering and subscriber notifications. We also note responses from the Creative Coalition Campaign that most copyright

owners are planning to send CIRs within ten working days anyway. However, we are constrained by the wording of the DEA provision referred to above and so have not made this a requirement of the Code.

## Section 5

# Identifying subscribers and making notifications

## Introduction

- 5.1 Section 124A CA03 requires qualifying ISPs which receive CIRs to identify the subscriber to which the CIR relates and send notifications as required by the Code. The DEA provisions also set out:
- The mandatory content of the notifications;
  - That the Code can require additional content in the notifications; and
  - That the Code must set out how the notification process works.
- 5.2 In this section we set out how, following consultation, we have decided to implement these requirements with regard to identifying subscribers and making notifications, as set out in Parts 4 and 5 of the Code.

## Ensuring accuracy in the process of identifying subscribers

### Our proposals

- 5.3 In the May 2010 Consultation, we proposed that ISPs had to identify subscribers based on the information included in CIRs unless it was not possible or the CIR was incomplete or out of date. We proposed various circumstances in which it may not be possible for an ISP to identify a subscriber, such as the IP address not being allocated to the ISP or not in use by one of the ISP's subscribers at the time of the alleged infringement. We proposed that in these circumstances ISPs should notify the relevant copyright owner within ten working days of receiving the CIR using a standard set of rejection codes.
- 5.4 To ensure that the process of matching IP addresses to subscribers is accurate and robust, we proposed in the May 2010 Consultation that ISPs should, before issuing their first notification (and on an annual basis from then on), provide Ofcom with a quality assurance report. This would detail the processes and systems used by the qualifying ISP to match information provided in CIRs to subscriber accounts, including steps to ensure the integrity and accuracy of evidence, audits of its systems and proposals for addressing quality assurance issues.

### Consultation questions

- 5.5 In the May 2010 Consultation we asked the following questions regarding the identification of subscribers and the treatment of invalid CIRs.

*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.*

*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.*

## Stakeholder responses

### Responses from ISP stakeholders

- 5.6 With regard to the treatment of invalid CIRs, most ISPs agreed with the general approach and rejection reasons we proposed.
- 5.7 A key issue raised by ISPs is cost. Most ISPs – including BT, Everything Everywhere, KCOM and Telefonica O2, as well as ISPA – stated that the costs for processing a CIR must be recovered by the ISP, regardless of whether it is valid or invalid.
- 5.8 BT also said that there was no reason for rejection codes to be treated as a priority and therefore no need for a ten-day notification obligation back to copyright owners. Several ISPs also suggested that copyright owners should not be able to resubmit an invalid CIR.
- 5.9 Regarding our proposal for a quality assurance approach for ISPs' IP matching, there was not a consensus between ISPs. Most ISPs agreed with the approach in general. However, Thus questioned whether it was necessary at all and Everything Everywhere, the MBG and Telefonica O2 said it should be a formal accreditation scheme.
- 5.10 Some ISPs also raised particular points including:
- BT noted that different products would require different processes;
  - BT was also concerned that a quality assurance process would expose confidential systems and processes;
  - ISPA said that a quality assurance regime should have a minimal imposition on ISPs' systems; and
  - Sky considered that the powers Ofcom had given itself in 4.5.6 and 4.6 of the Code were too broad.

### Responses from copyright owner stakeholders

- 5.11 Several copyright owners – including the BBC, Channel 4, ITV and UKTV, as well as Creative Coalition Campaign and FAST – agreed or broadly agreed with our proposals for the treatment of invalid CIRs. Channel 4 noted it could think of other rejection reasons, for example, 'CIR incomplete' and 'copyright owner not paid'. Creative Coalition Campaign said it agreed except for the "reasonable opinion of the ISP" reason, which it thinks is too broad and should be removed.
- 5.12 However, several other copyright owners – including AIP, BPI, ELSPA, Premier League and Publishers Association – disagreed with several of the rejection reasons proposed by Ofcom. In particular, they considered:
- The IP address not being used by one of the qualifying ISP's subscribers should not be a reason for rejecting a CIR and that wholesale ISPs should be required to pass on CIRs to their Virtual ISP customers;

- ISPs should be required to send notifications even if a subscriber has left the ISP before the date of notification;
  - ISPs should nearly always have an email or postal address for a subscriber and therefore that rejection reason is unnecessary;
  - The rejection reason that the subscriber is “not receiving a fixed internet service from a Qualifying ISP” makes no sense; and
  - Giving ISPs the discretion to reject CIRs in their reasonable opinion is too broad.
- 5.13 In addition, PACT said Ofcom should keep the reasons why ISPs may reject invalid CIRs under regular review. The Premier League considered that a CIR should not be invalid simply because it does not contain some specific technical identifier. The Publishers Association said that the turnaround time proposed for ISPs was too long and that copyright owners should have the time to correct any information and re-submit a CIR.
- 5.14 The MPA was concerned that the ten-day period for ISPs to notify a copyright owner of an invalid CIR risked hampering the effectiveness of the notification process, and suggested a shorter period of two business days.
- 5.15 With regard to Ofcom’s proposals for a quality assurance regime for ISPs’ IP matching processes, most copyright owners – including AIP, the BBC, BPI, ELSPA, ITV, PACT, Publishers Association, UK Film Council and UK Music – agreed. AIP noted that ISPs were likely to have concerns regarding confidentiality of their systems and processes. The BBC said that ISPs should be subject to independent third party audit.
- 5.16 FAST and UKTV both disagreed with Ofcom’s proposals for quality assurance approach. FAST because the 2003 Act does not refer to such a process; UKTV because it considered that Ofcom should take responsibility.

#### Responses from user group stakeholders

- 5.17 Stakeholders representing consumers and user groups largely agreed with Ofcom’s proposals for the handling of invalid CIRs.
- 5.18 BeingThreatened said that “Any CIR that falls outside the guidelines must be ruled invalid and not allowed to be resubmitted at a later point, nor be counted towards the qualification criteria for addition to the list of copyright owners.”
- 5.19 Pirate Party UK thought that Ofcom’s proposals were sensible. However, it also suggested that invalid CIRs should have negative effects on copyright owners and that if these call into question other CIRs, the copyright owner’s CIRs should be rejected wholesale.
- 5.20 Consumer and user group stakeholders had different opinions regarding Ofcom’s proposals for a quality assurance regime for ISPs’ IP address matching processes. BeingThreatened broadly agreed with Ofcom’s proposals, but said there should be no direct self-certification, and that independent audits and transparency were both important.
- 5.21 The Communications Consumer Panel noted that Section 124E(3)(a) of the 2003 Act requires that the Code makes a provision for a requirement as to the means by which

an ISP identifies a subscriber and that it is not clear that Ofcom's proposal complies with this obligation. The Panel also proposed that Ofcom should set minimum standards.

- 5.22 ORG also said that Ofcom's proposal did not comply with the Act, since the Draft Code does not define the process by which subscribers are identified but instead only requires that the qualifying ISP complies with the process outlined in its own quality assurance report. It also claimed it was unclear how the quality assurance process complied with DEA requirements, to be objectively justifiable, proportionate, non-discriminatory and transparent.
- 5.23 Pirate Party UK said that transparency is very important.

#### Responses from other stakeholders

- 5.24 JISC and JANET agreed with Ofcom's proposals for the handling of invalid CIRs. The British Library recommended a further category, i.e. "the CIR refers to activity undertaken on a non-qualifying network." They said this addition would prevent a qualifying ISP from submitting a CIR to a non-qualifying body.
- 5.25 JANET and JISC agreed with Ofcom's proposals for a quality assurance process for ISPs' IP address matching processes. The British Library expressed concerns that while the processes may be possible for larger organisations "it is difficult to envisage a smaller organisation like a public library or a school, if they become a qualifying ISP, being able to manage such procedures".

#### **Our interim conclusion and general effect of Part 4 of the Code (identification of subscribers)**

- 5.26 Part 4 of the Code contained in Annex 3 of this document requires a qualifying ISP to establish procedures for the accurate identification of subscribers from IP addresses specified in CIRs and provide a report to Ofcom detailing those procedures prior to the start of each notification period. The ISP must publish that report (subject to redactions of confidential information) as soon as reasonably practicable after its delivery to Ofcom.
- 5.27 On receipt of a CIR from a qualifying copyright owner, the qualifying ISP is required to identify the subscriber to which the IP address specified in the report related at the time of the apparent infringement. That requirement does not apply in certain limited circumstances specified in Part 5 of the Code. These include:
- the CIR does not meet the requirements of Part 3 of the Code;
  - the subscriber does not receive a fixed internet access service from the ISP;
  - the ISP is not able to identify the subscriber in question and it is not reasonably practicable for it to do so;
  - the copyright owner has not paid the notification fees in full to the ISP; and
  - the copyright owner has already sent to the ISP the number of CIRs which it estimated it would send prior to the notification period in question.
- 5.28 Our reasons for these provisions of the Code and our responses to the comments of stakeholders relevant to them are set out in the following paragraphs.

## Non-application of notification requirements

- 5.29 With regard to the circumstances in which ISPs are not obliged to send notifications, we have taken into account the responses received and have made a number of amendments as set out in paragraph 18 of the Code. In particular, we have:
- Re-titled the section as “Circumstances where notification requirements do not apply” and redrafted to remove any unnecessary suggestion of a failure on the part of copyright owners;
  - Consolidated the two lists in paragraphs 4.2 and 4.3 in the May 2010 Draft Code into a single list to remove confusion and duplication;
  - Clarified that a qualifying ISP is not required to pass on CIRs or make notifications if the IP address was allocated to another ISP at the time of the apparent infringement but must notify the copyright owner of the identity of that other ISP (see paragraph A5.46 below);
  - In relation to the ISP not having the contact details of the subscriber, specified that the notification is not required if the ISP does not hold the subscriber’s postal address;
  - Added as a reason for not processing a CIR that the number of CIRs submitted by the qualifying copyright owner in the relevant notification period exceeds the number of CIRs that the copyright owner estimated it would send to the ISP;
  - Clarified that any CIRs sent prior to the date on which the first notification period begins do not require qualifying ISPs to take action under the DEA and Code; and
  - Removed the ability for ISPs to not process a CIR for “some other reason ... in the reasonable opinion of the qualifying ISP”.
- 5.30 We recognise concerns relating to the ability of a wholesale ISP to reject CIRs where these relate to the subscribers of a downstream ISP. However, we disagree with some copyright owners that the DEA provisions allow Ofcom to require qualifying ISPs providing wholesale services to downstream ISPs to forward CIRs to these ISPs so that these CIRs are processed in accordance with the Code. The obligation established in the DEA provisions and imposed in the Code is the obligation on the ISP to notify its subscriber of a CIR, not another ISP.
- 5.31 Thus, the Code provides that if the downstream ISP is a qualifying ISP, it is required under the Code to make arrangements in order to ensure the processing of CIRs attributable to its subscribers (we discuss this further at A5.44-A5.47 below). Where neither the upstream ISP nor the downstream ISP are qualifying ISPs, there is no obligation on either ISP to action the CIR or send a notification. However, where the upstream ISP is a qualifying ISP, it is required to notify the copyright holder of the identity of the downstream ISP in order to enable it to send the CIR to the correct ISP. This is also discussed in paragraph A5.46 below.
- 5.32 With regard to an ISP not having the contact details of the subscriber, we agree with copyright owners that it would be reasonable to expect that most of the initial qualifying ISPs would hold this information for billing purposes. However, we consider that this is still a legitimate reason for not processing a CIR in those cases where the ISP does not hold the address. Also, as we have now concluded that

notifications should be posted by first class delivery and not sent by email, we have removed the reference to an electronic address in the Code. In addition, as noted at A5.43 below, paragraph 18 of the Code provides for the circumstances where notification requirements do not apply in cases where address information is not held and it is not reasonably practicable for the ISP to obtain such information.

- 5.33 We agree with some copyright owners that allowing ISPs not to process a CIR for some other reason in their reasonable opinion provided an overly broad discretion. Therefore, we have removed this reason.
- 5.34 Additionally, for clarity we have added that where the volume of CIRs from a qualifying copyright owner exceeds the volume that they had estimated for the same period, the ISP is not obliged to process those CIRs. This is because the ISP will not have received any contribution from the copyright owner towards its costs of processing such additional CIRs.
- 5.35 We disagree with some copyright owners that ISPs should be required to send notifications to people who are no longer subscribers. The obligation to notify only applies to current subscribers and therefore the ISP is not obliged to send them a notification.

#### Quality assurance for IP address matching

- 5.36 With regard to our proposals for a quality assurance process for IP address matching, unlike copyright owners' evidence gathering, we continue to believe that this is an appropriate approach. We consider that ISPs have the appropriate incentives to ensure that they are identifying the correct subscriber, as incorrect notifications are likely to cause them customer service problems and non-recoverable costs. However, given the concerns raised – in particular by user groups – about a self-certification approach, we have decided that it is appropriate for details of those processes to be provided to Ofcom in report form and published. To clarify, the processes should detail both how the ISP identifies the customer from the IP address and also how the ISP determines that the customer is a subscriber (and not an ISP or communications provider).
- 5.37 Published ISP reports may exclude information that would seriously and prejudicially affect their interests, e.g. commercially confidential or proprietary information. Failure to comply with the requirement for accurate address matching is likely to be considered a material breach of the Code, triggering enforcement action and a fine where appropriate.
- 5.38 We can see that a standard for IP address matching could be useful and even desirable for ISPs in this regard. Therefore, we are proposing to sponsor the development by an independent standards body of a standard for ISPs in relation to the identification of subscribers from IP address and time and date stamp given in the CIR. This standard would not be mandatory, but we would encourage ISPs to participate on a voluntary basis.
- 5.39 Several stakeholders suggested that an accreditation scheme could create a rebuttable presumption at the appeals stage that the identification of the subscriber by the ISP was accurate. As we note above in the section on copyright owners' evidence gathering, we do not believe that approval against a standard does provide such a presumption. Nonetheless, by incorporating measures intended to enhance the accuracy of evidence gathered by copyright owners and ISPs, our expectation is

that this should result in a reduction in the number of appeals and consequent appeal costs.

## Notification process and content of notifications

### Our proposals

- 5.40 In the May 2010 Consultation, we proposed a time-based, three notification process where the first CIR triggers the first notification; the second notification is triggered by the first CIR received on or after one month but no more than six months from the date of the first notification; and the third notification would be triggered by the first CIR received on or after one month from the date of the second notification. The subscriber would be added to the copyright infringement list at this point.
- 5.41 We also proposed that those on a copyright infringement list should be sent update notifications, in the event that further CIRs are issued against their account, so that subscribers would be able to appeal against these CIRs.
- 5.42 The DEA provisions prescribe a certain level of information in notifications. In the May 2010 Consultation we transposed these legal requirements into our draft Code. We also proposed some additional requirements for the notifications, including further information on data protection and retention, the registered address of the copyright owner, a statement that the copyright owner has the ability to bring a legal action for damages in relation to an infringement and a requirement for ISPs to inform the subscriber that other CIRs are available on request.
- 5.43 We also proposed that first and second notifications could be emailed or posted by ISPs to subscribers, and that the third notification should be posted by recorded delivery.

### Consultation questions

- 5.44 In the May 2010 Consultation we asked the following questions regarding our proposals for the notification process and the content of notifications:

*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.*

*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?*

### Stakeholder responses

#### Responses from ISP stakeholders

- 5.45 Most ISPs – including Everything Everywhere, ISPA, KCOM, LINX, the MBG, Telefonica O2, Thus and Virgin Media – broadly agreed with Ofcom's proposals for a time-based approach for triggering notifications. Several said that the period between notifications should not be less than a month.

5.46 Similarly, ISPA said that the time-based approach was fairly reasonable, but suggested that the number of CIRs necessary to trigger notification should be greater than one, i.e. five or ten.

5.47 However, BT and TalkTalk both disagreed with Ofcom's proposals. BT stated:

The notification process indicated in paragraph 5.11 does not seem to be more proportionate or objectively justifiable than the other two options in any respect. It is very rigid and far fewer CIRs would be required to trigger notification and escalation against a subscriber compared with the method envisaged by BIS. Basing the process on just three CIRs received in three successive months does not amount to an approach that deals with "behaviour over time" as asserted and it is not fair or proportionate. The elimination of all factors that could provide some proxy for taking account of seriousness and level of seemingly persistent infringing activity is not an improvement. As BT has indicated in earlier comments, the way that copyright owners currently choose to detect suspected infringing activity includes intrinsic value assessments. Ofcom should develop an approach that factors that in to improve the proportionality and objective justification for the notification process.

We do not believe a one month period between the first notification being sent to a subscriber, and the possibility of a second CIR being issued with a subsequent notification is sufficient. This also applies between the 2nd and 3rd notifications. The current timeframe within the document allows 10 days for a rights holder to send a CIR, and another 10 days for an ISP to have the opportunity to reject a CIR. Assuming after 20 days, a notification is sent, this gives a very small window for mail delivery, the subscriber to receive, open and understand the notification, and then have the opportunity to change behaviours, or take action to identify the source of the alleged infringement.

5.48 TalkTalk proposed the following approach:

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); and

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).

5.49 Everything Everywhere, the MBG, Sky and Virgin Media disagreed with Ofcom's proposal for update notifications, arguing that it is not required by the Act and is unnecessary as the subscriber was already on the copyright infringement list.

5.50 Regarding the cost of sending notifications, BT welcomed the ability to email the first and second notifications and Sky said that recorded delivery was costly.

- 5.51 BT and KCOM suggested the content of notifications should be standardised. However, Virgin Media said it is necessary to retain the flexibility to adapt notifications.
- 5.52 Everything Everywhere and the MBG suggested that the notifications should include details of all CIRs since the last letter. However, Virgin Media considered that this was not necessary, saying that it should be sufficient just to refer to the accumulated CIRs in the notification.
- 5.53 Everything Everywhere and the MBG considered that the information obligations on ISPs should more appropriately be placed on copyright owners. They considered that in order to meet this need copyright owners should establish online resources and a hotline. However, LINX stated that the specified content was sufficient, and that the notifications should not be a marketing channel for copyright owners.
- 5.54 ISPA said the notifications should be less assumptive and less negative about peer-to-peer technology, which it noted had legitimate uses.
- 5.55 TalkTalk said that the notifications should set out more clearly the issues on vicarious liability. It also suggested that ISPs should be able to add anything they consider appropriate, but that the name or title of the content should not be included in a notification because it may be sensitive personal data.

#### Responses from copyright owner stakeholders

- 5.56 Most copyright owners – including AIP, BPI, Channel 4, ITV, PACT, Publishers Association, UK Film Council and UK Music – supported the time-based approach. However, the BBC, FAST and UKTV supported CIR volumes as the trigger for notifications. The BBC was concerned that the copyright infringement list will include both people who have infringed three times in 12 months and those who have infringed multiple times. FAST said that in the software industry small numbers of high-value infringements could cause significant damage and suggested therefore a volume-based approach, with low volumes of CIRs triggering notifications.
- 5.57 Several copyright owners – including AIP, BPI, ELSPA, ITV and Publishers Association – expressed concerns about the length of time between notifications and the maximum of six months between the first and second notifications.
- 5.58 AIP, BPI and Publishers Association suggested 21 days between the first and second notifications, and 14 days between the second and third. ITV suggested two weeks between notifications. AIP noted that 21 days was the time given to appeal to Crown Court or to challenge parking tickets. AIP also suggested that the month was based on taking into account people taking holidays of more than three weeks, and it provided data suggesting that the average length of holiday was significantly shorter than three weeks.
- 5.59 AIP said that it may prove difficult to identify the same infringer twice in a six-month period and suggested that the second notification should be sent if triggered within 12 months from the first notification. BPI said that second notifications must be made within six months of the first or this will distort composition of the copyright infringement list.
- 5.60 With regard to the delivery of notifications, BPI said that the deterrent effect of mail is much stronger than email. BPI also noted that interception may be more likely on email and that the email addresses held by ISPs are frequently wrong or not used.

- 5.61 Most copyright owners agreed with the content of notifications proposed by Ofcom. Several – including AIP, BPI, Publishers Association and UK Music – said that nothing in the tone or content should run counter to or undermine the spirit of the Initial Obligations or DEA. AIP and BPI said that ISPs should only be able to send information relating to that covered by the Code. BPI said that copyright owners must be allowed to contribute to drafting of notifications and approve their final form; while AIP suggested that ISPs should be required to get approval from Ofcom for their notifications.
- 5.62 The BBC said that the notifications are likely to be most effective when combined with targeted and effective measures to educate users.
- 5.63 UK Music said that the first notification should be marketing-led and that communications must be pitched appropriately to switch users to licensed alternatives. It said that even on the third notification the tone should be supportive and encouraging and still be aiming to move the subscriber to licensed services, but that the potential ramifications should be plainly and explicitly explained. UK Music urged Ofcom to involve a consumer or marketing psychologist in the drafting process.

#### Responses from user group stakeholders

- 5.64 BeingThreatened agreed with the time-based approach proposed by Ofcom, but was concerned that accidental infringement could lead to enforcement against low-level infringers. To address this it proposed a different approach in which the trigger for a notification would be two proven infringements from the same copyright owner more than one day apart.
- 5.65 However, most user groups disagreed with Ofcom. ORG said that our proposal was not compliant with the DEA and conflated CIRs and notifications, and copyright owners and their agents. Pirate Party UK acknowledged that a time-based approach would be straightforward to implement but said it would be unbalanced, disproportionate to and unpredictable for subscribers. It said that value would be a more logical trigger for notifications.
- 5.66 Both Consumer Focus and The Communications Consumer Panel suggested we require ISPs to notify subscribers of all CIRs, not just the ones triggering notifications. The Communications Consumer Panel also expressed concern about ISPs using email for the first and second notifications.
- 5.67 Regarding the content of notifications, most user group stakeholders suggested that there should be standardised notifications and information packs or both. The ORG said that standardised information is important and required by the Act. It also considered that there was additional information that would be beneficial to subscribers. The Communications Consumer Panel said that notifications should also inform subscribers about their right to appeal; whether information collected on subscribers under the Initial Obligations Code could be used for technical measures (if and when it is required); and provide more information on legal action and possible damages.
- 5.68 Which? said that it was important that notifications should make clear to subscribers that they may not be personally responsible for the alleged copyright infringement, and viewed the DEA provisions as muddying the waters around liability for copyright infringement.

5.69 In addition:

- BeingThreatened said that the notifications should provide clear advice on the length of copyright terms;
- ORG stated that the Draft Code failed to comply with the DEA's requirements for notifications, by ignoring some requirements and misrepresenting others; and
- Pirate Party UK said that it would be more useful to refer to the DEA rather than Communications Act. This was because it thought most versions of the Communications Act on the web are more likely to be the 2003 version, rather than a version incorporating the amendments made by the DEA.

### Responses from other stakeholders

5.70 JANET and JISC agreed with our proposals regarding the time-based approach to notifications and the content of the notifications.

5.71 The British Library said that whereas a time-based solution is pragmatic, it was concerned that the Draft Code did not appear to distinguish between the level of potential infringement that can happen in a household, and that in a university with over 30,000 network users. It said that if public intermediaries are to be classed as a subscriber the level of alleged infringements must be proportionate to the type of subscriber.

5.72 With regard to the content of the notifications, the British Library said that the word "exploit" is inaccurate, and recommended the following wording: "...takes place when a person downloads, copies, or passes to others all, or a substantial part of a copyright work without the owner's permission and under circumstances where none of the limitations and exceptions to copyright embodied in law apply." It said it was important that the information sheet accurately reflects UK law and recommended an explanatory note explaining to the recipients of a CIR what copyright limitations and exceptions exist.

### **Our interim conclusion and general effect of Part 5 of the Code (notification of fixed subscribers)**

5.73 Paragraphs 10 – 14 of Part 5 of the Code contained in Annex 3 of this document set out the different types of notifications that an ISP must send to a subscriber on receipt of a CIR and when those notifications must be sent. This notification process is illustrated in diagrammatic form in Annex 4 to this document.

5.74 In summary, the Code provides for four different types of notification:

- the initial notification which is sent on receipt of a first CIR matched to the subscriber in a 12 month period;
- the intermediate notification, which is sent on receipt of another CIR matched to the subscriber in a 12 month period;
- the infringement list notification, which is sent on receipt of a third CIR matched to the subscriber in a 12 month period and which informs the subscriber that it is eligible for inclusion on a copyright infringement list (see section 6); and

- the further infringement list notification, which is sent on receipt of a CIR matched to the subscriber within 12 months of the sending of an infringement list notification or further infringement list notification to remind the subscriber that it remains eligible for inclusion on a copyright infringement list.
- 5.75 In each case, the Code requires that the relevant notification is sent to the subscriber within one month of receipt of the CIR. In relation to the intermediate notification, the infringement list notification and the further infringement list notification, the Code also specifies the minimum time that must have elapsed since the sending of the previous notification (1 month in the case of the first two, 3 months in the case of the last). The Code also specifies that an intermediate notification or an infringement list notification can only be sent if the date on which the evidence for the CIR triggering the notification is at least 20 days after the date of the sending of the previous notification.
- 5.76 Part 5 also contains provisions which specify the content which the notifications must include. All notifications must contain the information set out in paragraph 16 of Part 5 (which includes the information contained in the CIR). There is separate provision in relation to the content for each of the different types of notification,<sup>54</sup> which is intended to ensure that the subscriber is given information about where the notification comes in the notification process and what further action may follow under the Code, for example, if further CIRs are matched to that subscriber. The ISP is required to prepare standard form for each type of notification specified in the Code, having regard to the need for them to be readily comprehensible to subscribers and, as far as practicable, consistent with each other.<sup>55</sup>
- 5.77 Paragraph 15 of part 5 requires that all notifications are sent to the subscriber by first class post. Paragraph 17 of Part 5 imposes record-keeping obligations on the ISP in relation to CIRs that it receives and notifications that it sends. The ISP must keep these for 12 months and no longer unless the circumstances in paragraph 18 apply (circumstances where notification requirements do not apply). In this case, the ISP may destroy the CIR whenever it chooses prior to the expiry of the 12 month deadline for document destruction.
- 5.78 We explain in the following paragraphs our reasons for these provisions and our responses to stakeholder comments on the notification process.

### Process for notifications

- 5.79 Having taken into account the responses of stakeholders, we have concluded that:
- A time-based, three notification approach is appropriate;
  - One month is an appropriate minimum time between one notification being sent and the next being triggered by another CIR, provided that at least 20 days have elapsed between the date of the previous notification and the date on which the evidence was gathered in relation to a CIR triggering a subsequent notification;
  - The third notification should be triggered by two prior notifications in the previous 12 months, rather than necessarily a first and a second notification;

<sup>54</sup> Paragraph 11(2) in relation to the initial notification; paragraph 12(2) in relation to the intermediate notification; paragraph 13(2) in relation to the infringement list notification; and paragraph 14(2) of the further infringement list notification.

<sup>55</sup> Paragraph 16(3) of the Schedule to the Code.

- ‘Update’ notifications sent every three months to those already on the Copyright Infringement List who have further CIRs issued against their account should be retained. These are now referred to as ‘further infringement list notifications’ in the Code;
  - All notifications should be sent by first class post and that each qualifying ISP must have a standard form in relation to each type of notification which should be in plain English and consistent, as far as possible, with the other types of notification; and
  - It is not necessary to send the third notification by recorded delivery.
- 5.80 We believe that an attempt to assess the intrinsic value of alleged infringements would be too costly and impractical, due to the difficulties of trying to value individual infringements, particularly as prior to the sending of the first CIRs there is no robust existing evidence on which to set a value-based threshold.
- 5.81 We understand the merits of the hybrid time and volume approach proposed by TalkTalk, i.e. it would prevent subscribers receiving a series of notifications based on single events at monthly intervals. But until CIRs are actually being generated, there would be no evidence on which to set the volume threshold, creating a risk of setting it too high. Moreover, the premise of the DEA provisions is to address mass infringement by effecting a change in behaviour over time, and excluding persistent low-level infringers does not seem consistent with this aim. We consider that a one-month minimum period between notifications (subject to the additional provision we have inserted described in paragraph 5.83 below) allows sufficient time for a subscriber to take steps to modify his behaviour or take reasonable steps to secure his connection. Consequently at this stage we believe a purely time-based approach is most appropriate.
- 5.82 We still consider that that one month is an appropriate minimum time between one notification being sent and the next being triggered by a CIR. We have clarified in the Code that this one-month period runs from the date of the previous notification being sent to the subscriber. After that month has expired, the next CIR received would trigger the next notification. We consider that this period will give subscribers sufficient time to make themselves aware of the issues and take action before the next stages of the process are triggered. We consider that any shorter time between notifications would not allow this to happen, and would undermine a key aim of the DEA provisions.
- 5.83 However, we note comments from stakeholders that in some circumstances the period between the sending of a notification, and the gathering of evidence of a new infringement report may leave little time for a subscriber to modify his behaviour or secure his connection before a further notification is sent. We have therefore included an additional requirement that the gap between the previous notification and the date on which the evidence was gathered in relation to a subsequent infringement which triggers the next notification is at least 20 days.
- 5.84 In the May 2010 Consultation, we proposed that the second notification would only be sent if a CIR was received more than a month but less than six months since the first notification. The intention was to address the possibility of a second notification being sent 11 months after a first notification, which would then mean that a third notification could not be sent as it would inevitably be more than 12 months since the first notification. Having taken into account the views of stakeholders, we agree that this proposal placed an unnecessary restriction on the process. Therefore, we have

amended the test for sending the third notification. We have concluded that a third notification should be sent if the subscriber has received two notifications within the previous 12 months, rather than necessarily a first and a second.

- 5.85 We considered that the arguments put forward by user groups and copyright owners with regard to problems of delivering notifications by email were legitimate. While we appreciate that the ability to email the first and second notifications was important to ISPs wanting to limit their costs, we consider that certainty of delivery is more important and therefore have amended the Code to require these notifications to be sent by first class post. Additionally, we have decided that it is also appropriate for the third notifications to be sent first class post, and that recorded delivery is not necessary.

### Content of notifications

- 5.86 We have received valuable detailed comments from many stakeholders, including ISPs, copyright owners, user groups and others in relation to the content of notifications.
- 5.87 We recognise that it is important that subscribers receiving notifications are able to understand the information they are being given. While the Code prescribes certain information that notifications must contain, the DEA provisions do not allow Ofcom to reserve to itself a general power to issue further directions after the code is published to ISPs as to how they should implement those obligations and so we have had to remove this provision from the draft Code. However, we have added a requirement for qualifying ISPs to have regard to the need to ensure that subscribers are able readily to understand the information provided when drafting notifications. As a further aid to comprehension, the Code also requires that qualifying ISPs have standard form notifications and have regard to the need to ensure consistency as far as practicable between different types of notification.
- 5.88 We also recognise the importance of giving subscribers complete information about the allegations made against them in order to help them determine an appropriate response. Our consultation proposed that notifications must include the information contained within the CIR which triggered the notification and must state that the subscriber can require all further information, including further CIRs, held against them. In relation to this second point, we have added a further requirement that qualifying internet service providers must state the number of CIRs they hold at the time of sending the notification which relate to IP addresses allocated to the subscriber, so that the subscriber will know whether or not there are other CIRs which have been linked to their account.
- 5.89 Given the level of interest in the implementation of the DEA provisions, we expect that consumer concerns about the content of notifications will quickly come to our attention. Should such concerns appear to be well-founded, we will consider whether guidance as to the tone and text of notifications may be appropriate. Where there is evidence of serious failings by an ISP in relation to the content of its notification, we are likely to consider enforcement action under the Code, which could allow us to issue directions to take specific steps to the ISP in question to remedy the situation. In addition, we anticipate that ISPs may wish to work with consumer and user groups to ensure that the contents of notifications are appropriately clear.

## Section 6

# Copyright infringement lists

## Introduction

- 6.1 Section 124B (Obligation to provide copyright infringement lists to copyright owners) CA03 creates an obligation for an ISP subject to the Code to provide copyright owners with lists that set out which of the CIRs made by the copyright owner relate to a subscriber (without identifying the individual), where that subscriber has reached a threshold under the Code.
- 6.2 In this section we set out how we propose to implement these requirements with regard to the generation and provision of copyright infringement lists, as set out in Part 6 of the Code.
- 6.3 ISPs will have to keep a record of the CIRs linked to each subscriber along with a record of which copyright owner sent the report. A copyright owner can request an ISP to provide them with relevant parts of those records on request, but in an anonymised form to comply with data protection legislation. This is called a copyright infringement list (CIL).
- 6.4 The information in the copyright infringement list is intended to help copyright owners to target any litigation (for example, applications for Norwich Pharmacal orders) against those subscribers that appear to be responsible for multiple infringements.

## Our proposals

- 6.5 In the May 2010 Consultation we proposed that the threshold for determining who is a relevant subscriber and may therefore be included in a copyright infringement list is that the ISP has sent the subscriber a Third Notification within the previous 12 months and the copyright owner requesting the list has sent at least one CIR relating to that subscriber within the previous 12 months.
- 6.6 We also proposed that copyright owners may not make more than one request for a copyright infringement list to each ISP within any period of three months and ISPs should provide the list within five days of the request.

## Consultation questions

- 6.7 In the May 2010 Consultation we asked the following question regarding the threshold for inclusion on of notifications.

*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.*

## Stakeholder responses

### Responses from ISP stakeholders

- 6.8 ISPs were split on Ofcom's proposal regarding the threshold for the copyright infringement list. Some – including ISPA and KCOM – agreed with the threshold. TalkTalk agreed with the idea of the threshold, as long as it was based on their proposal for notifications. However, LINX said the threshold was too low and the MBG expressed concerns about whether it would work in practice.
- 6.9 Some ISPs – including BT and Everything Everywhere – raised concerns regarding the correlation of information on the lists. There were two issues. First, if the ISPs used the same unique anonymous ID for the same subscriber when reporting to different copyright owners, these different copyright owners might be able to consolidate their lists to identify subscribers common to each other. Second, they queried whether ISPs should allocate a new unique identifier to a subscriber to maintain their anonymity following the disclosure of their identity following a Norwich Pharmacal court order.
- 6.10 Several stakeholders – including BT, ISPA and KCOM – raised concerns regarding who precisely could request a copyright infringement list. In particular, whether a third party acting on behalf of a number of copyright owners should be treated as a single copyright owner or several.
- 6.11 Regarding data protection issues. Everything Everywhere, the MBG and Telefonica O2 suggested Ofcom should ask the Information Commissioner's Office (ICO) to publish guidance and that Ofcom should consult with Home Office regarding the interaction of the Code with RIPA. ISPA, and LINX also raised concerns on these issues.
- 6.12 Most ISPs agreed it was reasonable that copyright owners should only be allowed to request a copyright infringement list every three months. But nearly all ISPs suggested that five working days was too short a period in which to meet a request from a copyright owner for a copyright infringement list. BT, ISPA and KCOM said it should be at least ten working days. Everything Everywhere and the MBG said that it should be 14 days. LINX suggested a month.
- 6.13 LINX suggested that copyright owners should not be allowed to use the information for purposes other than civil litigation. Similarly, ISPA thought it should be a requirement for copyright owners to take legal action and TalkTalk said disclosure should only be for intended or planned court action. TalkTalk suggested that provision of a copyright infringement list should be contingent on a good behaviour commitment by copyright owners.
- 6.14 TalkTalk suggested that copyright owners should be required to delete data within three months of receiving it and that ISPs should be able to delete within three months of passing it on. Sky queried how customers would be added to and removed from a CIL.

### Responses from copyright owner stakeholders

- 6.15 Most copyright owners – including the BBC, Channel 4, ELSPA, ITV, PACT and UK Music – agreed with our proposed threshold. However, some copyright owners – including BPI and Publishers Association – suggested that the second notification should be the threshold. BPI stated:

Only by including subscribers in receipt of second notifications on the CIL can it be guaranteed that the CIL will serve the purpose which Parliament and the Act intend for it – i.e. to provide guidance to copyright owners on appropriate targets for litigation.

- 6.16 Several copyright owners – including AIP, BPI, the BBC, ITV and Publishers Association – suggested that the copyright infringement list should not be restricted to infringements relating to the requesting copyright owner but all CIRs regardless of who submitted it. They said that this was for ease of taking legal action.
- 6.17 Nearly all copyright owners said they should be able to request a copyright infringement list more frequently than every three months. Several suggested one month as an appropriate frequency.

#### Responses from user group stakeholders

- 6.18 Most user group stakeholders disagreed with Ofcom's proposals.
- 6.19 BeingThreatened argued that the third letter should be a final warning rather than the trigger for being included on the copyright infringement list.
- 6.20 The Communications Consumer Panel identified what it considered to be a tension between sections 124B(3) CA03 (which requires the threshold to be set with regard to CIRs) and 124E(5) CA03 (which says the threshold can be set with regard to any matter) with regard to the threshold for the copyright infringement list. The Panel considers that the Code currently complies with 124E(5) but not 124B(3).
- 6.21 ORG made a similar point, i.e. that it considered thresholds are meant to be related to the number of CIRs issued relating to actual copyright owners, whereas the threshold in the draft Code is based on the total number of letters sent by all copyright owners and conflates copyright owners with their agents. ORG stated that therefore Ofcom had not implemented the threshold provisions of the DEA.
- 6.22 Pirate Party UK suggested that we should reduce the period within which the three notifications have to occur to seven months rather than 12 months.

#### Responses from other stakeholders

- 6.23 Logica agreed with Ofcom's proposals for the threshold for inclusion on a copyright infringement list, the frequency with which copyright owners can access the list and the timescale for ISPs to respond to requests.
- 6.24 The British Library said that if public intermediaries are to be subscribers under the Act then thresholds that relate to single households should be different to those that apply to a public institution. LACA agreed, saying there should be variable thresholds depending on the size and type of organisation.
- 6.25 JANET, JISC and UCISA agreed with the threshold for inclusion on the copyright infringement list and that copyright owners should only be able to access the list every three months. However, they all agreed that five days is an unreasonably short period for ISPs within which to respond.

## Our interim conclusion and general effect of Part 6 of the Code

6.26 Part 6 of the Code contained in Annex 3 of this document sets out the following requirements in relation to the provision of a copyright infringement list by a qualifying ISP to a qualifying copyright owner:

- A copyright owner may request from a qualifying ISP, no more frequently than once a month, a copyright infringement list covering a maximum period of up to 12 months;
- Within 10 working days of the request, the qualifying ISP must provide the qualifying copyright owner with a copyright infringement list in an electronic format;
- The copyright infringement list will set out, in relation to each subscriber which has received a copyright infringement list notification or a further infringement list notification within the last 12 months, which of the CIRs sent by the qualifying copyright owner to that ISP within the period requested, relate to that subscriber;
- The copyright infringement list must maintain the anonymity of the subscribers in question.

6.27 Our reasons for these provisions and our responses to stakeholder comments are set out in the following paragraphs.

6.28 Having considered the responses of stakeholders, we remain of the view that the sending of a third notification to a subscriber within a 12-month period is an appropriate criterion for potential inclusion on a copyright infringement list. We consider this criterion strikes the appropriate balance between:

- The need to have an appropriate limit on the number of notifications that an ISP is required to send to the same subscriber;
- The copyright owners' desire to collect information enabling them to target legal action against repeat infringers;
- Providing subscribers with time to obtain advice on measures they can take to reduce the risk that their accounts are used for infringing behaviour; and
- Giving subscribers sufficient time to change their behaviour as a result of the notifications.

6.29 Subscribers that receive further notifications while they are on the copyright infringement list will remain on the list until 12 months after the date on which the last notification is received. CIRs received by an ISP during this period will therefore be registered against those subscribers during this time.

6.30 We disagree with the view of some copyright owners that the copyright infringement list they request should include CIRs relating to other copyright owners. We consider that the obligation set out in section 124B(3) is clear: it requires a subscriber to be included on the copyright infringement list "in relation to a copyright owner and an internet service provider if copyright infringement reports made by the owner to the provider in relation to the subscriber have reached the threshold set in the Initial

Obligations Code” (our emphasis). Therefore, a copyright infringement list should only include CIRs made by the requesting copyright owner.<sup>56</sup>

- 6.31 We disagree with the points made by the Consumer Panel and ORG in relation to the application of section 124B(3) CA03. We consider that taken together sections 124B(3) and 124E(5) are not contradictory. Section 124E(5) clearly allows the threshold to be set by reference to any matter (other than one that contradicts section 124(6) which requires that the threshold cannot relate to a CIR older than 12 months). While it goes on to give some examples, this is neither an exhaustive nor a mandatory list.<sup>57</sup>
- 6.32 In any event, we consider that the threshold we have set does include all of the matters listed in section 124E(5) CA03, given that:
- Each notification is triggered by a CIR and therefore a subscriber must be the subject of a minimum of three CIRs in order to be subject to inclusion on a CIL;
  - The Code specifies the time within which a CIR must be made in order to trigger a second and third notification; and
  - The Code specifies when the evidence of an apparent infringement must be gathered in order to trigger a second and third notification (see paragraph 5.83 above).
- 6.33 We have also set a threshold for the number of CIRs which a copyright owner must have made against a subscriber in order for that subscriber to be “a relevant subscriber” in relation to that copyright owner for the purposes of section 124B(3) CA03; namely one CIR. It is necessary to set the threshold at this level in order to avoid the potential for consumer confusion as to their status on receipt of a third notification within a 12-month period and to maintain the limit on the number of notifications that ISPs are required to send, which we consider to be appropriate and proportionate.
- 6.34 If the threshold were set at a higher level (e.g. two or three CIRs), a subscriber who received three notifications would not be eligible for inclusion on a copyright infringement list if each of the CIRs registered against him or her were made by different copyright owners. This would have to be explained to the subscriber and a further notification would be required once the relevant CIR threshold were met. The requirements of the draft Code in relation to the content of the different types of notifications are already detailed; to make additional provision in relation to both content and notification types would, we consider, materially increase the risk of consumer confusion and could be prejudicial to the public perception of the scheme.
- 6.35 It would also place a further burden on ISPs in terms of monitoring whether subscribers had met the relevant copyright infringement list threshold and in relation to the number of notifications they may have to send. As we have explained, additional complexity will only increase costs to both ISPs and copyright owners of the notification scheme. This in turn could prejudice copyright owners’ willingness to

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<sup>56</sup> 124B(3) states: “A subscriber is a “relevant subscriber” in relation to a copyright owner and an internet service provider if copyright infringement reports made by the owner to the provider in relation to the subscriber have reached the threshold set in the initial obligations code.”

<sup>57</sup> 124E(5) states: “The threshold applying in accordance with subsection (1)(c) may, subject to subsection (6), be set by reference to any matter, including in particular one or more of— (a) the number of copyright infringement reports; (b) the time within which the reports are made; and (c) the time of the apparent infringements to which they relate.”

participate and, hence, the effectiveness of the scheme in tackling mass infringement levels. We are therefore satisfied that a higher threshold for inclusion on a CIL under section 124B(3) CA03 is not justified.

- 6.36 Most copyright owners argued that being able to request a copyright infringement list only every three months would hinder their ability to bring legal action as envisaged by the Act. Most ISPs argued that five days was too short a period for them to be able to respond to a request for a copyright infringement list. In the light of these comments we have amended the relevant time limits so that copyright owners are entitled to request a copyright infringement list once a month and that ISPs have ten working days to respond.
- 6.37 Some ISPs raised concerns in relation to two scenarios: (a) the sharing of data from the anonymised lists between copyright owners to identify subscribers common to each other; and (b) that once a subscriber's identity has been disclosed following a court order, a copyright owner will be able to match past CIRs connected to an individual subscriber's identity with recent CIRs to which the court order does not apply.
- 6.38 On the first point, we observe that copyright owners are subject to data protection and privacy laws and they would have to be satisfied that any disclosure of such information to other copyright owners was in compliance with relevant legislation and regulations. It is also up to ISPs how they structure the copyright infringement list they provide to copyright owners. There is no requirement that subscribers are allocated a unique identifier that would allow such matching across lists. We would suggest that a list which identified groups of CIRs associated with the same subscriber, without incorporating any identifier in relation to that subscriber, would be effective in discharging the ISP's obligation while avoiding concerns in relation to data protection.
- 6.39 On the second point, we note that a copyright owner can choose when it decides to make a Norwich Pharmacal application to obtain the identity of a subscriber. Where that application is made more than 12 months after the subscriber has been included on a copyright infringement list and the subscriber remains on the list at that point, the subscriber's identity will be revealed in relation to all CIRs linked to him/her which have been received during the previous 12-month period.

## Section 7

# Subscriber appeals

## Introduction

7.1 Section 124M of the 2003 Act requires the Code to give subscribers the right to bring a subscriber appeal to an independent appeals body. While the detailed procedures in relation to subscriber appeals will fall to be determined by the independent appeals body, Ofcom must nevertheless ensure that the requirements set out in section 124K of the 2003 Act are met in relation to subscriber appeals. Under this section, Ofcom must appoint an independent person to determine subscriber appeals.

## Our proposals

7.2 In the May 2010 Consultation, we proposed the principal functions of the appeals body, including the grounds for appeal, the determination of subscriber appeals and the establishment of detailed appeals procedures. We also required the appeals body to provide information to Ofcom as necessary and to ensure the anonymity of subscribers making appeals.

## Consultation questions

7.3 In the May 2010 Consultation we asked the following question regarding the appeals process:

*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.*

## Stakeholder responses

### Responses from ISP stakeholders

7.4 There was general agreement across the ISPs in relation to our approach to subscriber appeals that greater clarity was needed across a number of criteria.

7.5 BT was more specific about the usage of the word appeals:

““Subscriber Appeals” are adjudications not appeals. Section 7 of the Code, reflecting the language used in the DEA, purports to set up a process for subscriber ‘appeals’... For there to be an appeal, there has to be an initial decision which can be appealed. That is not the case here. Instead, we just have allegations made by one party against another (i.e. allegations of copyright owners against subscribers) which have not yet been tested in a way which results in an independent finding of copyright infringement”.

7.6 Similarly, TalkTalk stated that the DEA starts in the wrong place as it assumes subscribers are guilty:

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.

- 7.7 With regards to the appeals body and process, TalkTalk made the following comments:
- The onus should be on copyright owners to prove that the subscriber themselves infringed copyright;
  - The overall approach should be as user friendly as possible;
  - There should be a range of support and advice to assist subscriber appeals, and subscribers should be able to appeal anonymously, and within a reasonable time limit;
  - There should be clear guidance on the treatment of open Wi-Fi networks;
  - Copyright owners should provide full evidence to subscribers at outset; and
  - The process must be free to the subscriber (with appeal costs of both subscribers and ISPs paid by the copyright owner(s)).
- 7.8 Some ISPs (Everything Everywhere, the MBG, Telefonica O2) further stated that there needs to be greater clarity in the Code on time limits in relation to subscribers appealing and a cap should be introduced for compensation, stating a 25-day time limit in terms of appealing. Furthermore, they said that only reasonably incurred costs should be awarded to subscribers by the appeals body; compensation should be capped at £5000; and the appeals body should not be able to award for consequential losses or distress.
- 7.9 Moreover, BT, ISPA, Telefonica O2 and TalkTalk mentioned that the burden of proof should be on copyright owners not subscribers and that the financial burden should be borne entirely by copyright owners. They also felt that appeals should be targeted towards rights holders or the actual process rather than towards ISPs. They felt that there should be assurance that access to appeals would be affordable for all.
- 7.10 ISPA commented that quality assurance should ensure that there cannot be many grounds to appeal against IP address matching by an ISP. Everything Everywhere also agreed that comprehensive quality assurance means there cannot be many grounds to appeal and therefore subscribers should appeal against the copyright owner and not the ISP directly.
- 7.11 Virgin Media added that ISPs should not be involved in any processes to the extent that they relate to the infringing activity itself, as they are acting merely as a conduit between copyright owners and subscribers:

On that basis Virgin Media sees ISPs having a limited role to play in the appeals process, and therefore believes that ISPs' liability

(particularly with regard to costs) should be expressly limited to those circumstances where a breach by an ISP of the Code has directly caused a subscriber to be incorrectly identified.

- 7.12 There were further concerns, mainly from BT, around the operation of the scheme in practice. Issues identified included the potential unwillingness of parents to report their children and questions over how subscribers could challenge ISPs' records. LINX also sought further clarity over the circumstances where appeals ought to be upheld (e.g. where a child or guest is using a domestic connection or where a public service is involved). In addition, LINX and BT both recommended that the Code should specify that the effect of a CIR is suspended while an appeal is in progress.
- 7.13 In relation to the Code, Sky also mentioned that the "Reasonable steps" is unclear as the grounds are too broad and there needs to be clarity around what exactly this means. For example, would Sky subscribers following Sky's instructions to encrypt their network qualify as having taken reasonable steps?
- 7.14 Other key points that ISPs raised in relation to the appeals process being fair and transparent, included:
- Hearings should only be held in exceptional circumstances as all appeals should be decided primarily on a documents-only basis (Everything Everywhere);
  - The appeals body should publish its decisions and reasons for fairness and clarity (ISPA);
  - Ofcom should mandate that appeals decisions are published publicly by adding this to the Code (the MBG);
  - The Draft Code did not set out all the detail which section 124K requires, specifically 124K(5) and (6), covering burden of evidence and determination in favour of the subscriber respectively. There are concerns on how the appeals body is appointed and governed and Ofcom provides no guidance (KCOM); and
  - Ofcom should set the parameters for operation of the appeals body and approve the appeals body's procedures as it is in the best position to determine how the body will operate. The Draft Code should go into more detail on some of these issues (the MBG).
- 7.15 In conclusion, many ISPs stated the need for us to consult further on the appeals process and thought that the formation of an effective appeals body will be critical.

#### Responses from copyright owner stakeholders

- 7.16 Copyright owners largely considered that there needed to be a time limit in relation to appealing and that compensation which may be awarded by the appeals body should be capped. For example, AIP stated:

Appeals must be clear, open, robust and transparent. There should be a time limit of 21 Days for a subscriber to appeal. The appeals process must not take into account the technical knowledge of the user and there should be a cap on compensation

- 7.17 The BBC was the only exception and disagreed that subscribers should be entitled to any compensation:

We disagree with the proposal that a successful subscriber might be entitled to “compensation”. Since no steps will have been taken to limit or curtail their online activity, they will have suffered no damage which it would be reasonable to compensate, over and above reimbursement of reasonable legal costs.

7.18 In addition, there was general consensus among AIP, CCC, ELSPA, ITV, Publishers Association, UK Film Council and UK Music that grounds of appeal should be set out in the DEA only, and not on “any other ground”, and that this should be removed from the Code.

7.19 Further comments relating to the approach to appeals included:

- If a subscriber (particularly a subscriber seeking to benefit their local community by providing free internet access) can show they adhered to all possible protections within their network, and took steps to educate users of their network about copyright, then this should be material to the appeals process (UKTV);
- If a subscriber chooses not to appeal the notifications, they should not be entitled to appeal their inclusion in the list. BPI considers there to be no need for a five-day period for the Appeal Body to send copies of the appeal on to ISPs and copyright owners. For what is a simple administrative act, two days are sufficient. This shorter time limit is aligned with the need to secure a tight timetable for the Initial Obligations appeals process (BPI).

7.20 The MPA believes that the incorporation of an appeals body should be guided by Ofcom in terms of a clear remit and rules rather than leaving it unguided:

More broadly the MPA believes that Ofcom should set a clear remit and rules of the appeals body rather than leaving the appeals body unguided. Copyright owners and ISPs need a degree of certainty in relation to how the appeals system will operate and this position means that the grounds for appeal and the appeals process itself should be as defined as possible. Specifically:

- We suggest that more detail should be provided with regards to the make up of the appeals body and the experience/qualifications of those making decisions. These are important in terms of the functionality of the appeals body and the cost.
- It is also vital that, in the same way there are time limits for issuing CIRs and sending notifications, there is a maximum time limit for appeals to be filed and handled.
- There needs to be clarity on how appeals body decisions might be reviewed, whether this be that they are referred back to Ofcom or to a more formal Judicial Review process.

7.21 The MPA also believes that copyright owners should have the right to submit evidence if invited to do so by the appeals body and that the Code should set out an opportunity for them to do so, enabling them to rely on material collected in their evidence-gathering processes and quality assurance reports.

## Responses from user group stakeholders

7.22 In general, user group comments in this area were limited with some agreeing with our approach and others stating that we needed more detail. The Communications Consumer Panel and the Pirate Party had similar things to say:

The Code should make explicit provisions for the appeals process to meet the requirements of the final principle in the consumer bodies' customer principles document. This principle requires that the appeals process, and appeals body, should be:

- Independent and impartial, particularly from ISPs and rights holders. This is essential if the process is to enjoy legitimacy and should be reflected in a majority lay membership, including members that are completely independent of industry, security of tenure for the chair and board members, and budgetary independence;
- Transparent: to include the maintenance of a website containing public information including membership of the appeals body, budgeting, numbers of appeals, numbers of adjudications, and nature of the adjudications;
- Expert: the appeals body should include independent membership with expertise in: i) the value of evidence likely to be served relating to ISP logs, IP addresses and other technical matters, ii) copyright and media law relating to fair use and peer-to-peer networks, and freedom of expression, iii) media use and media literacy of internet users;
- Representative: the appeals body should, in addition, include lay consumer members; and
- Accountable: to the general public, Parliament and Ofcom.

The Panel also said that the Code should require a well-advertised and funded independent advice body, which can not only advise on the DEA process but also on copyright law or, at the very least, on where subscribers can go for independent advice on copyright law. There should also be provision for helping subscribers with the submission process, which may also be provided by the independent advice service, as well as for helping vulnerable consumers (for example those who may be deterred from appeal due to difficulties they have with written communication).

The Panel was also concerned that the "reasonable steps" subscribers can take to prevent others infringing on their connection were not defined, and there should be guidance as to what these "reasonable steps" might include.

7.23 Which? mentioned that an Ombudsman type organisation would be the most effective for an appeals body:

In our 2009 BIS consultation response Which? argued that the appeals body must incorporate expertise and knowledge. An ombudsman scheme with well trained case officers would be able to achieve this relatively straight forwardly. It is only by having this technical capability that clear and robust decisions can be made in individual cases. This is the only way of delivering fairness and due process.

## Responses from other stakeholders

- 7.24 Responses from other stakeholders were limited in this area with the majority agreeing with our approach and a few stating that subscribers should have more information about their grounds of appeal and rights under the DPA (JISC) and that the effects of notification should be suspended while appealed (JANET and UCISA).
- 7.25 LACA mentioned that upfront fees would be unwelcome. It suggested that we could consider adding another additional ground for appeal: "There was an implied or explicit licence to copy the material."

## **Our interim conclusion and general effect of Part 7 (Appeals Body), Part 8 (Subscriber Appeals) and Part 9 (Determination of Appeals) of the Code**

- 7.26 Part 7 of the Code contained in Annex 3 of this document will designate the body to be selected by Ofcom to carry out the functions of the appeals body.<sup>58</sup> Paragraphs 20 – 23 specify certain requirements that the appeals body must meet in carrying out its functions, including:
- Establishing procedures for the determination of subscriber appeals, to be approved by Ofcom;
  - Specifying the form, means of, and time limits for, service of notices and other communications required in the conduct of a subscriber appeal;
  - Providing information to Ofcom for the purpose of carrying out its functions under the DEA provisions;
  - Publishing guidance on its approach to the determination of appeals and publishing every six months a summary of its findings; and
  - Ensuring that the identity of a subscriber bringing an appeal is not disclosed to the copyright owner without the written consent of the subscriber.
- 7.27 Under paragraph 22 of Part 7, the appeals body is able to require the provision of information from a qualifying copyright owner or qualifying ISP which it considers necessary for the determination of an appeal.
- 7.28 Part 8 of the revised draft of the Code sets out the acts which may be the subject of a subscriber appeal and the grounds of appeal. These match, respectively, the definition of a subscriber appeal in section 124N of the 2003 Act and the grounds of appeal specified in section 124(3), (4) and (6) of the 2003 Act.
- 7.29 Paragraph 26 of Part 8 of the revised draft of the Code requires a subscriber appeal to be made by a notice of appeal in a form prescribed by the appeals body, and must include a description of the act or omission being appealed and the grounds of appeal. It also specifies the time (20 days from receipt of a notification; from receipt of details of a CIR; or from the date on which a subscriber became aware of an act or omission in relation to an initial obligation or the Code) by which a notice of appeal must be submitted to the appeals body.

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<sup>58</sup> As set out in the costs consultation, we propose to select the appeals body by way of a tender process conducted through the OJEU procurement process. The anticipated timetable for the tender and establishment of the appeals body is discussed in Section 4 of the costs consultation.

- 7.30 Paragraph 27 of Part 8 outlines the proceedings which the appeals body must follow on receipt of a notice of subscriber appeal. Written submissions made by the qualifying copyright owner or the qualifying ISP must be provided to the subscriber who must be given an opportunity to respond.
- 7.31 Part 9 of the Code makes provision in relation to the determination of appeals by the appeals body, including the circumstances when a subscriber appeal must be determined in favour of the subscriber, in accordance with the requirements of section 124K(5) and (6) of the 2003 Act.
- 7.32 Paragraph 30 sets out the remedial action that the appeals body may require a qualifying copyright owner or qualifying ISP to take if it determines an appeal in favour of the subscriber. These include action to secure that the subscriber is not prejudiced by the act or omission in question, an award of compensation and the reimbursement of reasonable costs, in line with the requirements of section 124K(7) and (8) of the 2003 Act.
- 7.33 Our reasons for these provisions and our responses to stakeholder comments summarised above are set out in the following paragraphs.
- 7.34 Many of the consultation responses we received sought additional clarification on the grounds for appeal. Section 124K of the 2003 Act sets out a number of grounds which must be included in the Code. We have therefore transposed those grounds into the Code and consider that these are sufficiently clear that they do not require further elaboration.
- 7.35 We had previously set out that a subscriber may bring an appeal on “any other ground” to reflect the non-exhaustive nature of the grounds set out in the Act. Following an instruction from Government, which must approve Ofcom’s Code, we have now removed this ground.
- 7.36 Following responses from a number of stakeholders, we have now decided that we should specify a time limit for subscribers to appeal in the Code. We have set this limit at 20 working days from:
- the date of receipt of a notification; or
  - the date on which the subscriber became aware of the issue of a CIR relating to an apparent infringement by the subscriber; or
  - the date on which the subscriber became aware of any other act or omission in relation to an initial obligation or a provision of the Code which is the subject of the appeal.

We consider that this provides a balance between allowing subscribers sufficient time to appeal and the certainty that comes from applying a reasonable limit. This approach is consistent with that we have taken to CIRs and notifications, which are also subject to time limits. To allow flexibility, in individual circumstances the appeals body may decide to extend the time limit, where it deems it appropriate to do so.

- 7.37 We disagree with the BPI’s contention that two days is a sufficient period for the appeals body to send copies of the appeal on to ISPs and copyright owners, as it is insufficiently flexible and restrictive. We think that a five day period is more reasonable and will still enable appeals to be dealt with within a tight timetable.

- 7.38 To address comments from some stakeholders that the Code should allow an opportunity for them to submit evidence to the appeals body if that body invites them to do so, we have included a provision which allows the appeals body to decide whether or not to request written submissions from ISPs and copyright owners. To address concerns from some stakeholders that all evidence is provided to subscribers, we have added a provision that where the appeals body receives further submissions from ISPs or copyright owners, a copy of this information must also be provided to the subscriber.
- 7.39 We have amended the provision of the Code which specified that oral hearings should only be held in exceptional circumstances to reflect our view that this is a matter which is more appropriately dealt with in the appeals body's procedural rules. Those rules must be approved by Ofcom. Given the cost implications, we would not expect the rules to provide for oral hearings as a matter of course, although they will have to ensure that parties are provided with the opportunity of a fair hearing and an effective process.
- 7.40 The issue of how appeals should be determined was raised by many respondents. The DEA provisions are clear that the burden of evidence falls on the copyright owner and ISP respectively to prove that an online copyright infringement has taken place and that it is associated with the subscriber's IP address.<sup>59</sup> While quality assurance may provide the appeals body with a degree of comfort with regard to the quality of copyright owners' and ISPs' procedures, it is for the appeals body to determine whether this evidence is sufficient in any given case. Any attempt by Ofcom to direct or constrain the way this assessment is made risks fettering the discretion of the appeals body in a particular case.
- 7.41 The DEA provisions are also clear that the appeals body must find in favour of the subscriber where it determines that the act constituting the apparent infringement was not done by the subscriber and the subscriber took reasonable steps to prevent other persons infringing copyright by means of his/her internet access service.<sup>60</sup> Again, we believe it is for the appeals body, not Ofcom, to assess the evidence presented by subscribers and to determine the basis on which it will assess the reasonableness of any steps that the subscriber may have taken to secure its internet access service. We consider that the appeals body should be able to impose an objective standard of reasonableness and have therefore removed the requirement proposed in our consultation that it should take into account the technical ability and knowledge of the subscriber in making its determination.
- 7.42 We disagree with suggestions from some stakeholders that the effects of CIRs and notifications (including being placed on a copyright infringement list) should be suspended pending resolution of an outstanding subscriber appeal against the CIR and/or notification. Unlike in the case of technical measures,<sup>61</sup> the DEA makes no provision for the implementation of the Initial Obligations to be halted pending an appeal. Moreover, under the Initial Obligations Code the appeals body has the power to direct a remedy to prevent prejudice under the DEA provisions if a subscriber brings a successful appeal. We also consider that a provision to suspend the Initial Obligations in this way would add unnecessary cost and complexity to the scheme. Finally, since copyright owners are party to any appeal, they will know which of their CIRs are subject to challenge and will be in a position to assess whether legal action is worth pursuing pending an appeal.

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<sup>59</sup> See section 124K(5) CA03

<sup>60</sup> See section 124K(6) CA03

<sup>61</sup> See section 124K(11) CA03

- 7.43 As regards compensation, the 2003 Act sets out at section 124K(7)(c) that the appeals body must have the power to direct a copyright owner or ISP to pay “reasonable” compensation to a subscriber. What is reasonable in any given appeal will depend upon the circumstances of that appeal. Ofcom cannot therefore impose a cap or limitation on the amount of compensation which may be awarded as was suggested by some respondents.
- 7.44 A number of respondents asked for specific detail on the definition of ‘reasonable steps’ taken to prevent others infringing copyright using a subscriber’s connection. In relation to the appeals process, the draft Code sets out a framework in paragraph 27 for the handling of subscriber appeals by the appeals body but it is for the appeals body to determine its rules of procedure within this framework. Those rules will be subject to approval by Ofcom. The determination of appeals is also for the appeals body, subject to the requirements of the DEA provisions, which we describe in paragraphs 7.26 and 7.27 above. Section 124K(2)(c) CA03 requires that the appeals body is independent of Ofcom as well as copyright owners and ISPs in relation to the determination of subscriber appeals. Therefore Ofcom cannot direct or seek to influence the appeals body as to how it should determine substantive issues, such as the actions which amount to reasonable steps for the purposes of s.124K(6) CA03, which may come before it.
- 7.45 We have, however, included a provision in the draft Code that requires the appeals body to issue guidance on its approach to the determination of subscriber appeals and to publish a summary of its findings from time to time. This requirement should allow the appeals body to indicate clearly to subscribers, copyright owners and ISPs how it will approach the determination of appeals and to develop a bank of precedent which will assist in this process.
- 7.46 Several respondents commented in particular on the need for guidance on the status of open Wi-Fi networks run by subscribers. We have set out in Annex 5 to this Interim Statement our understanding of the relevant definitions in the DEA provisions. However, ultimately, the application of the DEA provisions to open Wi-Fi networks is likely to be an issue that the appeals body will be required to determine.
- 7.47 Several ISPs suggested that Ofcom should consult further on the appeals process and the constitution of the appeals body. We think this would add unnecessary delay to the implementation timetable.<sup>62</sup> Once the Code is made we plan to issue a tender to run the body, with selection criteria likely to include independence, experience and expertise, efficiency and transparency of processes, flexibility (particularly the ability to scale up or down rapidly in order to deal with the potential fluctuation of appeals volumes), and cost. While we do not intend to consult formally on these criteria we would welcome engagement with stakeholders on them, particularly in relation to independence and operational capability. As set out above, the appeals body is required to produce procedural rules and it may well consider it necessary to consult on these before they are finalised.
- 7.48 Some ISPs suggested that the full costs of the appeals process should be met by copyright owners. The Government had previously proposed that the costs which the appeals body incurs in handling and determining were to be recovered from a case fee to be split between copyright owners, ISPs and a subscriber fee (refundable in the event of a successful appeal). Following the Court of Appeal judgement on the judicial review of the DEA provisions, ISPs are not longer liable for the appeals body setup costs and the appeals body costs incurred in determining appeals— these, less

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<sup>62</sup> For details of our proposed implementation timetable, see Section 4 of the costs consultation.

the amount recovered from subscriber fees, will be met by qualifying copyright owners.<sup>63</sup> We propose in the costs consultation, that once notifications start, the costs of the appeals body should be recovered from qualifying copyright owners through the case fee.<sup>64</sup>

- 7.49 Some respondents suggested that a range of support and advice should be available to subscribers to help them appeal, and in particular the Communications Consumer Panel suggested that the Code should contain provisions for an independent advice body to advise on the whole Digital Economy Act process. We do not consider that the DEA provisions confer power on us to establish such a body. We recognise the importance of consumer information on these issues and consider that there is adequate provision for this under the Code. First, Ofcom must approve the procedures of the appeals body and we expect that approval would be conditional on them being user-friendly and easy to understand. As noted above, the Code also requires the appeals body to produce guidance on its approach to the determination of appeals. Secondly, the Code specifies that subscriber notifications must contain information on the subscriber appeals process, including advice both on appeals grounds and process.

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<sup>63</sup> <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/r-bt-and-talktalk-v-ss-for-culture-and-others.pdf>

<sup>64</sup> See Section 5 of the costs consultation.

## Section 8

# Sharing of costs

## Introduction

- 8.1 Part 10 of the Code deals with the arrangements for sharing costs incurred by Ofcom, the appeals body and ISPs for their actions under the Code. This part of the Code will reproduce the relevant provisions of the Costs Order, a statutory instrument Government is to make setting out the cost-sharing arrangements: the draft Costs Order is available at Annex 5 of the Costs Consultation.<sup>65</sup>
- 8.2 This draft was submitted to the EU for review under the Technical Standards Directive in August 2011; the draft Order has subsequently been revised to reflect the outcome of the BT/Talk Talk Group Judicial Review Appeal, but the amendment was determined insufficiently significant to require renotification to the EU. The draft Order has been laid before Parliament and will in due course be debated under the affirmative resolution process in the House of Commons and in the House of Lords.
- 8.3 Ofcom has no discretion in relation to the allocation of costs between parties under the Code – once the Costs Order is in force, Ofcom will be required to include the cost-sharing provisions, which Government has consulted upon and determined, in the Code. The remainder of this section sets out the general effect of the provisions of the draft Costs Order, which are to be included in the Code, subject to Parliamentary approval.
- 8.4 The implementation of the Costs Order does delegate a number of decisions to Ofcom, notably in relation to the setting of charges which copyright owners must pay ISPs for the processing of CIRs. The costs consultation sets out how we propose to implement the Costs Order.

## General effect of the provisions of the Costs Order to be incorporated in the Code

- 8.5 The draft Costs Order covers five types of entity paying and/or incurring costs:
- **Qualifying copyright owners:** copyright owners which, having elected to take advantage of the provisions of the DEA, have provided an estimate of the number of CIRs they anticipate sending to qualifying ISPs in advance of the notification period. A qualifying copyright owner is responsible for paying a proportion of the costs incurred under the Code and the DEA by Ofcom, the appeals body and ISPs.
  - **Qualifying ISPs:** these are ISPs which are subject to the Initial Obligations according to criteria set out in the Initial Obligations Code. A qualifying ISP receives payment from qualifying copyright owners covering a proportion of the costs it will incur in complying with the Code.
  - **Ofcom**, which must recover the costs it incurs executing its functions under the DEA and the Code from qualifying copyright owners.

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<sup>65</sup> <http://stakeholders.ofcom.org.uk/consultations/infringement-implementation/>

- **The appeals body**, which must recover the costs it incurs in handling appeals under the Code from qualifying copyright owners and subscribers.
- **Subscribers**, who must pay a fee to make an appeal.

8.6 There are four types of cost to be recovered under the cost-sharing framework:

- **Qualifying Costs:** the costs incurred by Ofcom and the appeals body in carrying out their functions under the DEA provisions and the Initial Obligations Code.
- **Initial Costs:** costs incurred by Ofcom and the appeals body in carrying out their functions prior to the beginning of the first Notification Period, for example the costs of making the Code and establishing the appeals body.
- **Relevant Costs:** these are the costs which Ofcom estimates an efficient ISP will incur in complying with the Code.
- **Appeal Costs:** these are the costs that the appeals body will incur in processing and determining appeals brought by subscribers.

8.7 These costs will be recovered by the following fees:

- **Notification Fee:** the payment a qualifying copyright owner must make to a qualifying ISP for processing a CIR under the Code.
- **Fees for Qualifying Costs:** the payment qualifying copyright owners must make to Ofcom in respect of the Qualifying Costs that Ofcom estimates will be incurred in a notification period. In addition, Appeal Costs may also be recovered through these fees to the extent they are not recovered from the Subscriber Appeal Fees and Case Fees.
- **Fees for Initial Costs:** the amount that qualifying copyright owners must pay to Ofcom in respect of the Initial Costs.
- **Subscriber Appeal Fee:** the fee that a subscriber must pay for each notice of appeal s/he submits to the appeals body.
- **Case Fee:** the charge through which the appeals body recovers the costs of handling and determining an individual subscriber appeal.

8.8 Ofcom must set a Notification Fee which each qualifying copyright owner must pay an ISP for each CIR it estimates it will send to that ISP during a Notification Period. The Notification Fee is intended to be set so as to ensure that 75% of the Relevant Costs, as estimated by Ofcom, are borne by copyright owners and 25% remain with ISPs. This task of setting Notification Fees will be the main subject of Ofcom's consultation on the implementation of the Costs Order.

8.9 Each qualifying copyright owner will be charged a share of the Qualifying and Initial Costs equal to its share of the total number of CIRs which all qualifying copyright owners estimate they will send to all ISPs during a notification period. The Order provides for the Initial Costs to be shared among qualifying copyright owners across the first and second Notification Periods.

8.10 Finally, Appeal Costs are to be recovered through the imposition of a Subscriber Appeal Fee of £20, and through a Case Fee which the appeals body will itself set.

The Case Fee will be recovered from the copyright owner which is party to the appeal.

## Section 9

# Administration, enforcement, disputes and information gathering

## Introduction

9.1 Section 124E CA03 requires the Code to include provision for the administration and enforcement of the Code, including the ability to resolve disputes between qualifying ISPs and qualifying copyright owners. In this section we set out how we have decided to implement these requirements, as detailed in Part 11 of the Code.

## Our proposals

9.2 In the May 2010 Consultation, we proposed that:

- Ofcom should be able to make the directions necessary to give effect to the Code's requirements;
- Ofcom should be able to obtain information and assistance from ISPs and copyright owners for the purposes of administering and enforcing the Code; and
- Ofcom should develop an enforcement and dispute resolution process to deal with complaints about non-compliance with the Code, which strikes the right balance between due process and timely deliberations.

## Consultation questions

9.3 In the May 2010 Consultation we asked the following question about Ofcom's approach to administration, enforcement, dispute resolution and information gathering in the Code:

*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.*

## Stakeholder responses

### Responses from ISP stakeholders

9.4 ISPs generally agreed with Ofcom's proposals, but several expressed concerns regarding their implementation. For example, BT stated:

It would be utterly unreasonable for Ofcom to approach this new area as though it was an area of regulation that has developed over many years, where culpability of communications providers can be assumed (they are not engaged in copyright infringement by providing internet access services) and that it will be proportionate and fair to enforce against them at heavy and strict levels from the outset and for any kinds of failures and omissions.

- 9.5 Some ISP stakeholders – including Everything Everywhere, ISPA and LINX – suggested an interim period before penalties for non-compliance would be applied and that this period would enable ISPs and copyright owners to familiarise themselves with the new regulatory environment.
- 9.6 KCOM and Sky both considered that the information-gathering powers we had proposed were too broad.
- 9.7 The MBG and Virgin Media said that the deadlines within the processes were too tight, and that sometimes representations would not be practical in five days.
- 9.8 Telefonica O2 asked how Ofcom's decisions can be appealed.
- 9.9 There was also general agreement that ISPs would welcome guidelines.
- 9.10 Everything Everywhere said that the dispute resolution process should be able to swiftly consider requests from ISPs to stop processing CIRs where the ISP believes that there is a systemic problem with a particular copyright owner. It said this would prevent ISPs from having to choose between knowingly processing non-compliant CIRs to the detriment of its subscribers and knowingly breaching the Code.

#### Responses from copyright owner stakeholders

- 9.11 AIP and Publishers Association said that the timelines Ofcom has proposed are too short and suggested the extension of five day deadlines to ten days, and ten day deadlines to 15 days. UKTV said that the threshold for fining should be very high, and as a minimum should require deliberate damage or significantly misleading process manipulation.
- 9.12 Several copyright owners expressed concerns regarding the indemnities required of them. The BBC and UKTV said that the risks created by the indemnity would make it less likely that copyright owners would wish to take advantage of the Initial Obligations Code. AIP said that the indemnity should be limited to direct loss or damage.
- 9.13 There was also general agreement that copyright owners would welcome guidelines. UK Music suggested that Ofcom should review these periodically.

#### Responses from user group stakeholders

- 9.14 Pirate Party UK said that the tight timetables could be prejudicial to small copyright owners.

#### Responses from other stakeholders

- 9.15 Most of the other stakeholders that responded – including the British Library, COADEC, JANET, JISC, LACA, Logica and UCISA – agreed with Ofcom's proposals. COADEC urged Ofcom to use these powers actively and aggressively.

### **Our interim conclusions and general effect of Part 11 (Administration and Enforcement of the Code) and Part 12 (Dispute Resolution) of the Code**

- 9.16 Paragraph 39 of Part 11 the Code contained at Annex 3 of this document enables Ofcom to require qualifying copyright owners and qualifying ISPs to provide them

with such information and assistance as they consider necessary for carrying out their functions under the Code.

- 9.17 Paragraphs 39 – 43 deal with the enforcement of initial obligations, the Code, directions made by Ofcom and directions and determinations of the appeals body.
- 9.18 The enforcement process is set out in paragraphs 39 – 41. If there are reasonable grounds to believe that there has been a contravention by a qualifying copyright owner or qualifying ISP, Ofcom will issue a notice of contravention to it, which provides details of the contravention in question, the remedial action that Ofcom proposes to take and the time by which the copyright owner or ISP must make representations in relation to the notice. That period must be greater than 10 working days unless the case is urgent or a serious and repeated contravention.
- 9.19 Having considered any representations made, Ofcom will issue a final enforcement notice to the qualifying copyright owner or qualifying ISP if it is satisfied that it has been in contravention of a provision, direction or determination as notified in the notice of contravention. The final enforcement notice will set out Ofcom's determination and the remedial action that will be taken.
- 9.20 Ofcom's remedial powers are set out in paragraphs 41 – 43 of Part 11 of the Code. They are:
- To direct the ISP or copyright owner to take steps as specified in the final enforcement notice;
  - To impose a financial penalty of up to £250,000; and
  - To order the payment of compensation and costs to any person affected by the contravention.
- 9.21 Part 12 of the Code makes provisions in relation to disputes between qualifying ISPs and qualifying copyright owners in relation to acts or omissions under the Code. A party to such a dispute may bring it to Ofcom for resolution. Ofcom has a discretion to resolve such disputes and will only do so if:
- the dispute submission meets the procedural requirements specified by Ofcom;
  - the parties have made reasonable attempts to resolve the dispute; and
  - there are no alternative means for doing so;
  - there is reason to believe that there has been a contravention of the Code or the initial obligations.
- 9.22 Ofcom will inform the parties to the dispute whether it is appropriate for Ofcom to resolve it. If Ofcom decides that it is, the parties will be given an opportunity to make representations on the matters in the dispute. Ofcom will consider these and may issue a provisional dispute determination, setting out Ofcom's provisional findings and recommended means of resolving the dispute. Again, the parties will be given an opportunity to make representations on the draft determination. Ofcom's final dispute determination will include any remedial action that Ofcom considers appropriate. Ofcom's remedial powers in relation to a dispute include:

- To direct the ISP or copyright owner to take steps to comply with the Code, the initial obligations or a direction made under the Code;
- To direct the payment of compensation in respect of losses incurred by the other party as a result of the contravention;
- To direct the payment of costs incurred by the other party as a result of the reference of the dispute to Ofcom.

9.23 Our reasons for these provisions and our responses to the stakeholder representations summarised above are set out in the following paragraphs.

9.24 Responses broadly fall within two areas: the transparency of Ofcom's procedures for investigating complaints and disputes, and Ofcom's enforcement action where it has established that a contravention of the Code has occurred.

### Procedures for investigating complaints and handling disputes

9.25 In relation to concerns about Ofcom's approach to enforcement in the early days of implementation, in line with our approach to enforcement generally, we will consider on a case-by-case basis whether it is appropriate for Ofcom to open an investigation into any complaint or dispute under the Code, taking account of the likely benefits of enforcement action against the comparative benefits of using our investigative resources in relation to other matters.

9.26 Should we decide to open an investigation into either a complaint or dispute under the Code, our expectation is that our investigative procedures will be broadly in line with those set out in existing guidelines.<sup>66</sup> Stakeholders should note that Ofcom's Dispute Resolution Guidelines published in June 2011<sup>67</sup> set out Ofcom's approach to handling regulatory disputes referred to it under section 185 CA03 and will not apply to disputes brought under the Code.

9.27 In response to comments concerning information gathering, it is worth noting that the new sections 124A to 124N CA03 fall within Chapter 1 of that Act and therefore information gathering powers in section 135 CA03 are available to Ofcom in respect of its enforcement of the Code and resolution of disputes under the Code. Accordingly, we intend to use our formal powers in line with existing procedures and the content and timing of requests for information would take into account the individual circumstances of the matter being considered and the parties involved. In response to concerns raised about ISPs being in a position of having to choose between knowingly processing non-compliant CIRs or knowingly breaching the Code, it is not clear to us how such a situation would arise. Under the Code, if a CIR is non-compliant, an ISP has grounds for not processing that CIR. Specific grounds for not processing a CIR are set out in the Code and it is for the ISP to satisfy itself as to whether they apply.

9.28 In response to comments about the length of time for responding to enforcement notices, we have extended the deadline for responding to a notice of contravention from five days to a minimum period of ten days. However, we have decided that the enforcement procedures can be further streamlined and so have removed the issue

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<sup>66</sup> See <http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/other/guidelines.pdf>.

<sup>67</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/dispute-resolution-guidelines/statement/guidelines.pdf>

of the draft enforcement notice from the process. If Ofcom is satisfied, having considered any representations to a notice of contravention, that a qualifying ISP or copyright owner has contravened the Code, it will proceed to issue a final enforcement notice setting out Ofcom's determination and any remedies required.

- 9.29 In relation to disputes, we consider that the time periods specified in the Code are reasonable and in line with our procedures in relation to other enforcement activities. It should be noted that the Code does allow for the deadlines to be lengthened (or shortened) in appropriate cases.
- 9.30 Ofcom's enforcement decisions and dispute determinations will be subject to appeal by way of judicial review. Ofcom's decisions under the online copyright infringement provisions are not subject to appeal to the Competition Appeal Tribunal as they are included on the list contained in Schedule 8 of the 2003 Act.

#### Enforcement action following a contravention

- 9.31 Penalties for breach of the Code are limited to a maximum of £250,000, but the Secretary of State has discretion to raise this maximum.<sup>68</sup> Any penalties will be made in line with Ofcom's Statement on Penalty Guidelines ("Penalty Guidelines").<sup>69</sup> With regard to the proposal by stakeholders that we should have a moratorium on the application of penalties, we consider that this would be an unlawful fetter on our discretion.
- 9.32 We have considered carefully the comments of stakeholders in relation to the proposal that Ofcom should be able to require copyright owners to indemnify internet service providers. While section 124E(8)(b) of the Act confers a power on Ofcom to include such a provision in the Code, on reflection we are no longer minded to do so for the first phase of implementation. Were we to find a copyright owner had contravened the Code, we would be able to issue a direction, requiring the copyright owner to bring an infringement to an end and to remedy the consequences of that infringement. At this stage, we are unclear as to why the imposition of an indemnity might be effective in addressing any failure by the copyright owner to comply with such a direction, without the need for further enforcement action. We are also unclear as to how we might quantify future losses for the purposes of imposing an indemnity. Accordingly, we have come to the view that it would not be appropriate to make provision for such an enforcement power when there is no certainty as to when or how it might be exercised.

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<sup>68</sup> The maximum civil penalty for a failure to comply with an information request under section 135 CA03 is £2,000,000 with a penalty of up to £500 per day in respect of each day on which the contravention continues. A failure to provide the requested information or the provision of false information may also be an offence under section 144 CA03, for which criminal penalties may be imposed.

<sup>69</sup> <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

## Section 10

# Next steps

- 10.1 This document, as published constitutes the notice we are required to give for the purposes of section 403(4) CA03. Since we have already consulted on the substance of the Code, we are allowing one month for representations to be made on the drafting of the proposed order, expiring on 26 July 2012.
- 10.2 Having considered the representations we receive and made any amendments to the draft Code that we consider appropriate as a result, it will be notified in draft to the European Commission under the Directive 98/34/EC (as amended by Directive 98/48/EC) (“the Technical Standards Directive”). The purpose of the notification is to enable the European Commission and Member States to consider whether the provisions of the Code which apply to ISPs could give rise to barriers to trade. We expect that this process will take at least 12 weeks.
- 10.3 Once these procedures are complete and any revisions to the Code that may result have been made, we will publish a final statement and, subject to the approval of the Secretary of State, make the Code, which will then be laid in Parliament. We anticipate this process will begin in late 2012, so that the Code can come into force by January 2013.
- 10.4 The Code will include provisions for the apportionment of costs incurred by Ofcom, the appeals body, and qualifying ISPs, as set out in an order to be made by the Secretary of State under section 124M CA03 (“the Costs Order”).<sup>70</sup> We have published a separate consultation on tariffs and charges (“the costs consultation”), which will cover the amounts payable by copyright owners (i) to ISPs for the processing of CIRs, and (ii) to Ofcom in respect of Ofcom costs in making and implementing the Code and the costs of establishing the appeals body. The costs consultation should be read in conjunction with this document since the issues which it considers are relevant to the application of the Code, as proposed in this document.
- 10.5 The costs consultation will be followed with a statement on the tariffs after the Code is laid in Parliament. Once the Code is in force, we will then invite copyright owners to commit to volumes of CIRs and will then determine the final charges payable by copyright owners.
- 10.6 As soon as binding commitments have been received from copyright owners, Ofcom will move to appoint an independent body to handle subscriber appeals. While we do not intend to consult formally on the process for appointing the appeals body, we would welcome engagement with stakeholders on issues relating to the independence, expertise, operational capability and functions that we should be looking for. We anticipate that it will take around nine months to run the tender, appoint the body, and for it to develop its procedures and for us to approve them.
- 10.7 In addition to setting up the appeals body, we will look to establish a baseline for the estimated level of online copyright infringement and a methodology to underpin our ongoing duty to report on progress. In preparing for Ofcom’s reporting duties, we will look to engage with stakeholders over how we can best identify and capture relevant information, including that which relates to the development and effective promotion

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<sup>70</sup> The Costs Order was laid in Parliament on 26 June 2012.

of lawful services, initiatives to raise public awareness of copyright and online infringement and enforcement actions taken by copyright owners against alleged infringers. We are required to report quarterly on estimated levels of online copyright infringement, with the first report covering the first full quarter after implementation. Separately, we will report annually on a broader range of measures, as required by the Act. The first annual report will cover the first full year following implementation.

- 10.8 As discussed in detail in the costs consultation, we propose that there should be a nine month lead time between the Code coming into force and notifications being sent, so that ISPs and copyright owners can ensure that they have the appropriate systems and contracts in place for effective implementation. During this period, we would encourage ISPs to engage with consumer and user groups in the preparation of subscriber communications. We would also look to the copyright owners and ISPs to cooperate over the development of systems for the handling and exchange of relevant information, such as the format of CIRs, the management of CIR rejections and the exchange of copyright infringement lists.
- 10.9 Taken together, all these steps introduce variables into the timetable for the implementation of the Code. However, based on current information, we expect that the first notifications may be sent in early 2014.
- 10.10 In addition to the Initial Obligations outlined in the Code and this statement, the DEA provisions also provide for the imposition of further 'technical obligations' designed to reduce levels of online copyright infringement. These would oblige ISPs to take technical measures (e.g. bandwidth throttling, limiting or blocking access and temporary account suspension) against relevant subscribers in certain circumstances. However, the Secretary of State cannot impose technical obligations on ISPs until the Code has been in force for a minimum of 12 months and he has obtained an assessment by Ofcom of one or more technical measures, as directed by the Secretary of State. The introduction of a technical obligations framework by the Secretary of State, including a right of appeal to the First Tier Tribunal (a judicial body), would require additional secondary legislation. Hence, while the imposition of technical obligations could ultimately form part of the framework to tackle online copyright infringement under the DEA provisions, they do not form part of the Code and hence have not been considered by Ofcom in preparing this interim statement.

## Annex 1

# Responding to this consultation

## How to respond

- A1.1 Ofcom invites written views and comments on the draft Code, to be made **by 5pm on 26 July 2012**. Copies of the draft Code can be obtained from the address below.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <https://stakeholders.ofcom.org.uk/consultations/infringement-notice/howtorespond/form>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 2), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email [onlinecopyrightinfringement@ofcom.org.uk](mailto:onlinecopyrightinfringement@ofcom.org.uk) attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Justin Le Patourel  
Head of Online Copyright  
Floor 2  
Internet Policy Team  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA
- Fax: 020 7981 3061
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would help if you can explain why you hold your views on the draft Code and how it might be amended to address your comments.

## Confidentiality

- A1.7 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

- A1.8 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.9 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

## Next steps

- A1.10 Following the end of the consultation period, Ofcom intends to publish a statement by January 2013.
- A1.11 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: [http://www.ofcom.org.uk/static/subscribe/select\\_list.htm](http://www.ofcom.org.uk/static/subscribe/select_list.htm)

## Ofcom's consultation processes

- A1.12 Ofcom seeks to ensure that responding to a consultation is easy as possible. If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at [consult@ofcom.org.uk](mailto:consult@ofcom.org.uk) . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.13 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Graham Howell, Secretary to the Corporation, who is Ofcom's consultation champion:
- A1.14 Graham Howell  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA
- Tel: 020 7981 3601
- Email [Graham.Howell@ofcom.org.uk](mailto:Graham.Howell@ofcom.org.uk)

## Annex 2

# Consultation response cover sheet

- A2.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk).
- A2.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A2.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A2.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at [www.ofcom.org.uk/consult/](http://www.ofcom.org.uk/consult/).
- A2.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

**Cover sheet for response to an Ofcom consultation**

**BASIC DETAILS**

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

**CONFIDENTIALITY**

Please tick below what part of your response you consider is confidential, giving your reasons why

|                      |                          |   |                          |
|----------------------|--------------------------|---|--------------------------|
| Nothing              | <input type="checkbox"/> | Name/contact details/job title              | <input type="checkbox"/> |
| Whole response       | <input type="checkbox"/> | Organisation                                | <input type="checkbox"/> |
| Part of the response | <input type="checkbox"/> | If there is no separate annex, which parts? |                          |

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

**DECLARATION**

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

### **Annex 3**

# **The Initial Obligations Code**

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**DRAFT**

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STATUTORY INSTRUMENTS

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**20XX No. XXXX**

**ELECTRONIC COMMUNICATIONS**

**The Online Infringement of Copyright (Initial Obligations Code)  
Order 20XX**

*Made* - - - - \*\*\*  
*Laid before Parliament* \*\*\*  
*Coming into force* - - \*\*\*

The Office of Communications (“OFCOM”), in exercise of the powers conferred by sections 124D(1), (4) and (5) and 403(7) of the Communications Act 2003 (“the Act”)(a), make the following Order.

OFCOM have given notice of their proposal to do so in accordance with section 403(4)(a) of the Act, published notice of their proposal in accordance with section 403(4)(b) of the Act and have considered the representations made to them before the time specified in the notice in accordance with section 403(4)(c) of the Act.

As required by section 124D(6) of the Act, OFCOM are satisfied that this Order meets the criteria set out in section 124E of the Act.

As required by section 124D(8) of the Act, the Secretary of State has given his consent for the making of this Order by OFCOM.

**Citation and commencement**

1. This Order may be cited as the Online Infringement of Copyright (Initial Obligations Code) Order 2012 and comes into force on [                      ].

**Initial Obligations Code**

2. The Code set out in the Schedule to this Order has effect for the purposes of regulating the initial obligations(b).

Signatory text

Date *Name*  
Office of Communications

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(a) 2003 c.21; sections 124A to 124N were inserted by the Digital Economy Act 2010 (c.24), sections 3 to 16.  
(b) See definition in section 124N of the Act.

I consent to the making of this Order by OFCOM

Date *Name*  
Parliamentary Under Secretary of State  
Department for Culture, Media and Sport

**SCHEDULE** Article 2  
**Online Infringement of Copyright Initial Obligations Code**

**PART 1**  
**Interpretation**

**1. In this Code—**

“the Act” means the Communications Act 2003;

“appeals body” means [       ]

“appeals procedures” means the procedures to be established by the appeals body under paragraph 21(1);

“broadband enabled line” means an electronic communications connection capable of supporting internet access services(**a**) with high data transfer speeds;

“Code” means the provisions contained in this Schedule;

“confidential information” means information which relates specifically to the business or other affairs of a qualifying copyright owner or qualifying ISP, the disclosure of which might seriously and prejudicially affect the interests of the owner or provider to which it relates;

“estimate” means the number of copyright infringement reports(**b**) which a copyright owner(**c**) estimates it will make to a qualifying ISP in a notification period;

“final enforcement notice” means a notice given under paragraph 41(2);

“first notification period” means the period beginning with a day determined by OFCOM(**d**) accordance with this Code and ending on 31st March 2015 or 31st March 2016 as determined by OFCOM;

“fixed internet access service” means an internet access service conveyed by wire, cable, fibre or other material substance to the subscriber’s address;

“fixed internet service provider” means an internet service provider(**e**) that provides a fixed internet access service;

“fixed subscriber”, means a subscriber(**f**) who receives a fixed internet access service;

“further infringement list notification” means the notification sent under paragraph 14;

“group” has the meaning given in section 1261 of the Companies Act 2006(**g**);

“infringement list notification” means the notification sent under paragraph 13;

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(a) See definition in section 124N of the Act.  
(b) See definition in section 124A(3) of the Act.  
(c) See definition in section 124N of the Act.  
(d) See definition in section 405 of the Act.  
(e) See definition in section 124N of the Act.  
(f) See definition in section 124N of the Act.  
(g) 2006 c.46.

“initial costs” means the qualifying costs incurred prior to the start of the first notification period including any such costs incurred prior to the making of this Code;

“notice of contravention” means a notice given under paragraph 40;

“notice of subscriber appeal” means a notice sent by a subscriber to the appeals body as prescribed by the appeals procedures;

“notification fee” means a fee set in accordance with paragraph 33 for each copyright infringement report which a qualifying copyright owner estimates it will make to a qualifying ISP under this Code during the notification period;

“notification period” means—

(a) the first notification period; or

(b) any subsequent period of twelve months beginning on 1st April;

“port number” means the number associated with a data channel used by an internet or other networked software application for the purposes of data transmission;

“qualifying copyright owner” has the meaning given in paragraph 2(5);

“qualifying costs” means the costs incurred by OFCOM or the appeals body in carrying out functions under the relevant copyright infringement provisions including costs incurred by OFCOM under those provisions in appointing the appeals body or in establishing a body corporate to be the appeals body but excluding costs incurred by the appeals body to the extent they are recoverable from fees payable to the appeals body under paragraphs 37 and 38;

“qualifying entities” means qualifying ISPs and qualifying copyright owners;

“qualifying ISP” has the meaning given in paragraph 2(2);

“relevant copyright infringement provisions” means the copyright infringement provisions(a) but not the provisions in sections 124H to 124M of the Act to the extent that they relate to technical obligations(b) or a technical obligations code(c);

“relevant costs” means costs which would be reasonably and efficiently incurred by a notional qualifying ISP in carrying out its obligations under the relevant copyright infringement provisions;

“relevant fixed subscriber” has the meaning given in paragraph 19(6);

“subscriber’s address” means an address specified in an agreement between the subscriber and the internet access provider as a location at which the internet access service is provided;

“subscriber fee” means the fee payable by a subscriber under paragraph 38(1);

“working day” means any day except a Saturday, Sunday, a public holiday in England and Wales or a day which, under the Banking and Financial Dealings Act 1971(d), is a bank holiday in Scotland.

## PART 2

### Application of the Code

#### **Qualifying internet service providers and qualifying copyright owners**

2.—(1) This Code applies to an internet service provider if—

- (a) it provides fixed internet access services over more than four hundred thousand broadband enabled lines in the United Kingdom; or

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(a) See definition in section 124N of the Act.

(b) See definition in section 124G(2) of the Act.

(c) See definition in section 124N of the Act.

(d) 1971 c.80.

- (b) it is a fixed internet service provider within a group that provides fixed internet access services over more than four hundred thousand broadband lines in the United Kingdom.
- (2) An internet service provider falling within the description in sub-paragraph (1) is defined as a “qualifying ISP”.
- (3) OFCOM shall publish a list of each qualifying ISP.
- (4) This Code also applies to a copyright owner which has—
  - (a) established an estimate in relation to a notification period; and
  - (b) provided that estimate to the qualifying ISP and to OFCOM in accordance with this Code.
- (5) A copyright owner which falling within the description in sub-paragraph (4) is defined as a “qualifying copyright owner”.
- (6) If a qualifying ISP has met the conditions in sub-paragraph (1)(a) or (b) but subsequently during a notification period ceases to do so, the rights and obligations of the Code shall continue to apply to it during that notification period and in the notification period which immediately follows it.

### **Contractors**

**3.** Where a qualifying ISP contracts with another person for the provision of fixed internet access services to that qualifying ISP’s fixed subscribers, the qualifying ISP must process any copyright infringement reports received by that person or ensure that any such reports are processed on its behalf in accordance with this Code.

## **PART 3**

### **Copyright Infringement Reports**

#### **Issue of copyright infringement reports**

- 4.—**(1) If a qualifying copyright owner wishes to send a copyright infringement report it must comply with the provisions of this Code.
- (2) A qualifying copyright owner may only send a copyright infringement report to a qualifying ISP during a notification period if it complies with each of the two requirements in this paragraph.
  - (3) The first requirement is that—
    - (a) it has established an estimate in relation to that qualifying ISP and that notification period; and
    - (b) that estimate was provided to the qualifying ISP and to OFCOM in writing at least two months before the beginning of the notification period to which it relates, except in the case of the first notification period, when it must be so provided before such day as OFCOM may determine.
  - (4) The second requirement is that the qualifying copyright owner holds evidence gathered in accordance with procedures approved by OFCOM under paragraph 6 which gives reasonable grounds to believe that—
    - (a) a subscriber to an internet access service has infringed the owner’s copyright by means of the service; or
    - (b) a subscriber to an internet access service has allowed another person to use the service, and that other person has infringed the owner’s copyright by means of the service.
  - (5) A copyright infringement report made under sub-paragraph (1) must be sent to a qualifying ISP within the period of one month beginning with the day on which the evidence of the apparent infringement was gathered.
  - (6) A qualifying copyright owner must—

- (a) send a copyright infringement report under this Code—
  - (i) by electronic means;
  - (ii) in a data format that the qualifying ISP can use to transfer that data electronically onto its electronic databases;
- (b) present the information required under paragraph 5 in a uniform format in every copyright infringement report it sends.

### **Content of copyright infringement report**

**5.—**(1) A copyright infringement report must include—

- (a) the name and address of the qualifying copyright owner;
- (b) if the qualifying copyright owner is a person falling within the description in paragraph (b) in the definition of copyright owner in section 124N of the Act, the name and address of the person on whose behalf the qualifying copyright owner is authorised to act and evidence of authorisation;
- (c) an identification of the copyright work<sup>(a)</sup> including the title of the work and a description of the nature of the work;
- (d) a statement that there appears to have been an infringement of the copyright in the copyright work;
- (e) a description of the apparent infringement<sup>(b)</sup> and the evidence gathered of that apparent infringement, including information which would enable the subscriber to identify the means used to obtain evidence of the infringement of the copyright work;
- (f) a statement that no consent has been given by the owner of the copyright in the copyright work for the act giving rise to the apparent infringement;
- (g) the start time and end time and date of the online session (using Coordinated Universal Time) during which evidence of the apparent infringement was gathered;
- (h) the day on which the copyright owner believes the apparent infringement to have taken place;
- (i) the IP address<sup>(c)</sup> associated with the apparent infringement;
- (j) the relevant port numbers used to conduct the apparent infringement;
- (k) the website, protocol, application, online location, internet-based service or internet-based system through which the apparent infringement occurred;
- (l) a unique numerical identifier allocated to the copyright infringement report by the qualifying copyright owner;
- (m) the date and time of issue of the copyright infringement report.

### **Procedures and reports**

**6.—**(1) A qualifying copyright owner must establish and follow procedures for gathering and verifying evidence of copyright infringement which have been approved by OFCOM.

(2) Before the day on which a notification period begins, a qualifying copyright owner must give to OFCOM for approval a report providing details of—

- (a) the procedures;
- (b) the systems introduced by the qualifying copyright owner to ensure the application of these procedures in each case;

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(a) See definition in section 124N of the Act.

(b) See definition in section 124N of the Act.

(c) See definition in section 124N of the Act.

- (c) if these systems include a regular audit or monitoring exercise, a description of these and the intervals at which they will occur; and
- (d) any changes made by the qualifying copyright owner to these procedures and systems during the current notification period.

(3) A report given to OFCOM must be published by the qualifying copyright owner as soon as is reasonably practicable following delivery of the report to OFCOM in such manner as is appropriate to bring it to the attention of subscribers and internet service providers.

(4) A qualifying copyright owner may exclude confidential information from a report published pursuant to sub-paragraph (3).

(5) In deciding whether to approve the report, OFCOM must consider whether evidence gathered under the procedures and systems described will give reasonable grounds to believe that—

- (a) a subscriber to an internet access service has infringed the owner's copyright by means of the service; or
- (b) a subscriber to an internet access service has allowed another person to use the service, and that other person has infringed the owner's copyright by means of the service.

### **Processing of copyright infringement reports**

7. Where a qualifying ISP has received a copyright infringement report from a qualifying copyright owner, it must send an acknowledgement of receipt as soon as reasonably practicable to the qualifying copyright owner.

## **PART 4**

### **Identification of fixed subscribers**

#### **Identification**

8.—(1) Except where any of the circumstances listed in paragraph 18 exist, a qualifying ISP in receipt of a copyright infringement report must identify the fixed subscriber to which the IP address related at the time when the apparent infringement detailed in the copyright infringement report took place.

(2) Where any of the circumstances listed in paragraph 18 exist, the qualifying ISP must inform the qualifying copyright owner which issued the copyright infringement report as soon as reasonably practicable and in any event within the period of ten working days beginning with the day of receipt of the copyright infringement report and—

- (a) specify which of the matters listed in paragraph 18 are relied upon by the qualifying ISP; and
- (b) if paragraph 18(b) is relied on because the IP address contained in the copyright infringement report was allocated by the qualifying ISP to another internet service provider at the time of the apparent infringement, include the identity of the other internet service provider to whom the IP address is allocated.

#### **Procedures and reports**

9.—(1) A qualifying ISP must establish and follow procedures for the accurate identification of fixed subscribers which have been given to OFCOM.

(2) Before the day on which a notification period begins, a qualifying ISP must give OFCOM a report in respect of that notification period which includes—

- (a) the procedures;

- (b) the systems introduced by the provider to ensure the application of these procedures in each case;
- (c) if these systems include a regular audit or monitoring exercise, a description of these and the intervals at which they will occur; and
- (d) any changes made by provider to these procedures and systems during the current notification period.

(3) Any report given to OFCOM in accordance with sub-paragraph (2) must be published by the qualifying ISP as soon as is reasonably practicable following delivery of the report to OFCOM in such manner as is appropriate to bring it to the attention of subscribers and copyright owners.

(4) A qualifying ISP may exclude any confidential information from a report published pursuant to sub-paragraph (3).

## PART 5

### Notification of fixed subscribers

#### **Current copyright infringement reports**

**10.** For the purposes of this Part and Part 6, a copyright infringement report is current only for the period of twelve months beginning with the day on which it was received by the qualifying ISP.

#### **Initial notification**

**11.**—(1) Except where any of the circumstances listed in paragraph 18 exist, a qualifying ISP must send a notification under this paragraph to a fixed subscriber where—

- (a) it has received a copyright infringement report relating to an apparent infringement by the fixed subscriber; and
- (b) it does not hold another copyright infringement report (relating to an apparent infringement by the fixed subscriber) which is current on the day of sending the notification.

(2) A notification under this paragraph must include—

- (a) the information set out in paragraph 16;
- (b) a statement that further apparent infringements by the fixed subscriber may lead to the sending of further notifications; and
- (c) a statement that the commission of copyright infringement can give rise to a claim before a court by a copyright owner.

#### **Intermediate notification**

**12.**—(1) Except where any of the circumstances listed in paragraph 18 exist, a qualifying ISP must send a notification under this paragraph to a fixed subscriber when it receives a copyright infringement report relating to an apparent infringement by a fixed subscriber (“copyright infringement report x”) and—

- (a) on the day of sending the notification—
  - (i) the fixed subscriber has been sent one (but no more than one) notification under paragraph 11 or this paragraph by that qualifying ISP;
  - (ii) the copyright infringement report from which that notification resulted is still current; and
  - (iii) the fixed subscriber has not been sent a notification under paragraph 13 or 14 by that qualifying ISP which resulted from a copyright infringement report which is still current;

- (b) copyright infringement report x was received later than the expiry of the period of one month beginning with the day on which the notification referred to at paragraph (a)(i) was sent; and
  - (c) the day specified as the day on which the evidence of the apparent infringement was gathered in copyright infringement report x is later than the expiry of the period of twenty days beginning with the day on which the notification referred to at paragraph (a)(i) was sent.
- (2) A notification under this paragraph must include—
- (a) the information set out in paragraph 16;
  - (b) a statement that it is the second notification sent to the fixed subscriber within twelve months;
  - (c) a statement that, if further notifications are sent, a copyright infringement list which sets out the copyright infringement reports made by a qualifying copyright owner in relation to the fixed subscriber may be provided to that qualifying copyright owner by the qualifying ISP on request;
  - (d) a statement that a copyright infringement list will not disclose the identity of the fixed subscriber; and
  - (e) a statement that a qualifying copyright owner in receipt of a copyright infringement list relating to the fixed subscriber may apply for a court order for disclosure of the identity of the fixed subscriber and may be able to bring a claim before a court against the fixed subscriber in respect of the apparent infringement.
- (3) A qualifying ISP may send more than one notification under this paragraph to a fixed subscriber where the conditions in sub-paragraph (1) are met.

### **Infringement list notification**

**13.**—(1) Except where any of the circumstances listed in paragraph 18 exist, a qualifying ISP must send a notification under this paragraph to a fixed subscriber when it receives a copyright infringement report relating to an apparent infringement by a fixed subscriber (“copyright infringement report y”) and—

- (a) on the day of sending the notification—
    - (i) the fixed subscriber has been sent two (but no more than two) notifications under paragraphs 11 or 12 which resulted from copyright infringement reports which are still current;
    - (ii) the fixed subscriber has not been sent a notification under this paragraph or paragraph 14 by that qualifying ISP in relation to a copyright infringement report which is still current;
  - (b) copyright infringement report y was received later than the expiry of the period of one month beginning with the day on which the later of the two notifications referred to at paragraph (a)(i) was sent; and
  - (c) the day specified as the day on which the evidence of the apparent infringement was gathered in copyright infringement report y is later than the expiry of the period of twenty days beginning with the day on which the later of the two notifications referred to at paragraph (a)(i) was sent.
- (2) A notification under this paragraph must include—
- (a) the information set out in paragraph 16;
  - (b) a statement that it is the third notification sent to the fixed subscriber within twelve months;
  - (c) a statement that a copyright infringement list which sets out the copyright infringement reports made by a qualifying copyright owner in relation to the fixed subscriber may be provided to that qualifying copyright owner by the qualifying ISP on request;

- (d) a statement that a copyright infringement list will not disclose the identity of the fixed subscriber; and
- (e) a statement that a copyright owner in receipt of a copyright infringement list relating to the fixed subscriber may apply for a court order for disclosure of the identity of the fixed subscriber and may be able to bring a claim before a court against the fixed subscriber in respect of the apparent infringement.

**Further infringement list notification**

**14.**—(1) Except where any of the circumstances listed in paragraph 18 exist, a qualifying ISP must send a notification under this paragraph to a fixed subscriber when it receives a copyright infringement report relating to an apparent infringement by the fixed subscriber (“copyright infringement report z”) and—

- (a) on the day of sending the notification, the fixed subscriber has been sent by the qualifying ISP an infringement list notification (under paragraph 13), a further infringement list notification (under this paragraph), or both, each as a result of a copyright infringement report which is still current; and
  - (b) copyright infringement report z was received later than the expiry of the period of three months beginning with the day on which the qualifying ISP last sent a notification under this Part to the fixed subscriber.
- (2) A notification under this paragraph must include—
- (a) the information set out in paragraph 16;
  - (b) a statement that the notification has been sent to the fixed subscriber as a result of a further copyright infringement report being received by the qualifying ISP;
  - (c) a statement that a copyright infringement list which sets out the copyright infringement reports made by a qualifying copyright owner in relation to the fixed subscriber may be provided to that qualifying copyright owner by the qualifying ISP on request;
  - (d) a statement that a copyright infringement list will not disclose the identity of the fixed subscriber; and
  - (e) a statement that a copyright owner in receipt of a copyright infringement list relating to the fixed subscriber may apply for a court order for disclosure of the identity of the fixed subscriber and may be able to bring a claim before a court against the fixed subscriber in respect of the apparent infringement.

**Service and time of notifications**

**15.** A notification under this Part must be sent by first class post to the fixed subscriber’s postal address within the period of one month beginning with the day on which the qualifying ISP receives the copyright infringement report giving rise to the notification.

**Content of notifications**

**16.**—(1) Notifications sent by a qualifying ISP under this Part must be in writing, using the standard form referred to in sub-paragraph (3) which includes—

- (a) a statement that the IP address allocated to the fixed subscriber has been identified as relating to an apparent infringement;
- (b) a statement that the notification is sent under section 124A(4) of the Act in response to a copyright infringement report;
- (c) a copy of the information required by paragraph 5 to be included in the copyright infringement report giving rise to the notification;

- (d) information about subscriber appeals<sup>(a)</sup>, the grounds on which they may be made and the process by which a subscriber may appeal;
- (e) the number of copyright infringement reports relating to an IP address allocated to the fixed subscriber which the qualifying ISP holds prior to sending the notification;
- (f) information about copyright and its purpose, including the ability of a copyright owner to bring a legal action for damages in relation to an infringement;
- (g) advice, or information enabling the subscriber to obtain advice, about how to obtain lawful access to copyright works;
- (h) advice, or information enabling the subscriber to obtain advice, about steps that the subscriber can take to protect an internet access service from unauthorised use;
- (i) a statement that the fixed subscriber has the right to require the production of information, including copyright infringement reports, held in relation to the fixed subscriber by the qualifying ISP for the purposes of the initial obligations or a provision of this Code; and
- (j) a statement that the qualifying ISP will, so far as is reasonably practicable, not keep any information it holds in relation to that notification longer than the period of twelve months beginning with the day of receipt of the copyright infringement report giving rise to the notification.

(2) For the purposes of sub-paragraph (1)(h) a qualifying ISP must take into account the suitability of different protection for fixed subscribers in different circumstances.

(3) A qualifying ISP must prepare a standard form for each type of notification specified in this Part, having regard to—

- (a) the need to secure that fixed subscribers are able readily to comprehend the information included in a notification;
- (b) the need to secure that there is, as far as practicable, consistency between the different types of notification.

## Records

**17.**—(1) Subject to sub-paragraph (3), a qualifying ISP must retain in a secure manner—

- (a) each copyright infringement report it receives for the period of twelve months beginning with the day of receipt; and
- (b) each notification it sends to a subscriber under this Part for the period of twelve months beginning with the day of receipt of the relevant copyright infringement report.

(2) A qualifying ISP must ensure that, insofar as reasonably practicable, a copyright infringement report and notification retained pursuant to sub-paragraph (1) are not kept for longer than the period of twelve months beginning with the day on which the relevant copyright infringement report was received.

(3) Where any of the circumstances in paragraph 18 apply to a copyright infringement report, the qualifying ISP may destroy that copyright infringement report if it thinks fit prior to the expiry of the period of twelve months beginning with the day of receipt.

## Circumstances where notification requirements do not apply

**18.** The circumstances referred to in paragraphs 8, 11, 12, 13, 14, and 17 are circumstances where—

- (a) the copyright infringement report does not meet the requirements of paragraph 5;
- (b) the IP address contained in a copyright infringement report was not allocated to the qualifying ISP at the time of the apparent infringement;

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(a) See definition in section 124N of the Act.

- (c) the IP address contained in a copyright infringement report was not allocated to a fixed subscriber to enable access to a fixed internet access service;
- (d) the subscriber which is the subject of a copyright infringement report is not a fixed subscriber of the qualifying ISP;
- (e) the qualifying ISP has not been able to identify the subscriber which is the subject of a copyright infringement report and it is not reasonably practicable for the qualifying ISP to do so;
- (f) the qualifying ISP does not hold a postal address for a subscriber which is the subject of a copyright infringement report and it is not reasonably practicable for the qualifying ISP to obtain this information;
- (g) the number of copyright infringement reports made by the qualifying copyright owner to the qualifying ISP in the relevant notification period exceeds the estimate;
- (h) the qualifying copyright owner has not met its obligation under paragraph 34 to pay the qualifying ISP notification fees in full for the relevant notification period; or
- (i) the copyright infringement report was received by the qualifying ISP on a day before the day on which the first notification period begins.

## PART 6

### Identification of repeat infringers and provision of copyright infringement lists

#### **Provision of copyright infringement lists**

**19.—(1)** A qualifying ISP must provide to a qualifying copyright owner on request a copyright infringement list—

- (a) in a data format which the qualifying copyright owner can use to transfer that data electronically onto its electronic databases;
- (b) in a form which does not enable any subscriber to be identified;
- (c) within the period of ten working days beginning with the day on which the request for the list was received.

(2) Subject to sub-paragraph (3), the qualifying ISP must set out in the copyright infringement list, in relation to each relevant fixed subscriber, which of the copyright infringement reports made by the qualifying copyright owner within such period as the qualifying copyright owner may specify, relate to the subscriber.

(3) The qualifying ISP must exclude from the copyright infringement list copyright infringement reports which are not current on the day the list is made.

(4) The maximum period which the qualifying copyright owner may specify in a request for a copyright infringement list is twelve months.

(5) A qualifying copyright owner may not make a further request for a copyright infringement list to a qualifying ISP within the period of one month beginning with the day of making of such a request to that qualifying ISP.

(6) For the purposes of sub-paragraph (3) a relevant fixed subscriber is a fixed subscriber which has received an infringement list notification or a further infringement list notification from the qualifying ISP as a result of a copyright infringement report which is current on the day on which the copyright infringement list is made.

## PART 7

### Appeals Body

#### **Designated Appeals Body**

20. [ ] is the appeals body with the function of determining subscriber appeals.

#### **Appeals Procedures**

21.—(1) The appeals body must establish procedures for the determination of subscriber appeals.

(2) Before giving effect to the appeals procedures, the appeals body must submit those procedures to OFCOM for approval.

(3) Before granting their approval, OFCOM may direct the appeals body to make amendments to the appeals procedures.

(4) The appeals body must publish any procedures approved by OFCOM as soon as reasonably practicable following approval by OFCOM.

(5) The appeals procedures must set out requirements as to the form and means of service of notices and any other communications which are required to be given in the context of a subscriber appeal.

(6) Without prejudice to paragraph 23(1), the appeals procedures must set out time limits for the submission of any notices or communications required to be given in the context of a subscriber appeal.

#### **Information**

22.—(1) OFCOM may require the appeals body to provide them with such information as they consider necessary for the purposes of carrying out their functions under sections 124A to 124L of the Act.

(2) The appeals body may request such information from OFCOM as it considers appropriate for the purposes of carrying out its functions under this Code.

(3) The appeals procedures must include provision pursuant to which the appeals body may require a qualifying copyright owner or qualifying ISP to provide it with such information as it may consider necessary for the purposes of determining a subscriber appeal.

#### **Miscellaneous**

23.—(1) The appeals body may extend any time limit set out in Parts 8 and 9 or the appeals procedures in individual cases where it considers it appropriate to do so.

(2) The appeals body must prepare and publish guidance on its approach to the determination of subscriber appeals in advance of the first notification period.

(3) The appeals body may from time to time revise that guidance as it sees fit.

(4) The appeals body must publish a summary of its findings for—

(a) the period of six months beginning with the day on which the first notification period begins; and

(b) each successive period of six months.

(5) The appeals body must ensure that it does not disclose, directly or indirectly, to a copyright owner the identity of a subscriber which has submitted a subscriber appeal without the express written consent of the subscriber.

## PART 8

### Subscriber Appeals

#### **Right to appeal**

**24.**—(1) A subscriber affected by any act or omission to which this paragraph applies may bring an appeal to the appeals body.

(2) This paragraph applies to the following—

- (a) the making of a copyright infringement report;
- (b) a notification under any of paragraphs 11, 12, 13 and 14;
- (c) the inclusion or potential inclusion of an entry relating to a subscriber on a copyright infringement list; and
- (d) any other act or omission in relation to an initial obligation<sup>(a)</sup> or a provision of this Code.

#### **Grounds of appeal**

**25.** The grounds of appeal which may be advanced by a subscriber are that—

- (a) the apparent infringement to which a copyright infringement report relates was not an infringement of copyright;
- (b) the copyright infringement report did not relate to the subscriber's IP address at the time of the apparent infringement;
- (c) the act constituting the apparent infringement to which a copyright infringement report relates was not done by the subscriber and the subscriber took reasonable steps to prevent other persons infringing copyright by means of the internet access service; or
- (d) there was a contravention of this Code or an obligation regulated by this Code by either a qualifying copyright owner or a qualifying ISP.

#### **Notice of subscriber appeal**

**26.**—(1) The appeals procedures must provide for a subscriber appeal to be made by sending a notice of subscriber appeal to the appeals body in the form prescribed by the appeals procedures.

(2) The notice of subscriber appeal must include—

- (a) a concise description of the act or omission in relation to which the subscriber is bringing an appeal;
- (b) the grounds of appeal;
- (c) if relevant, details of any steps taken by the subscriber to prevent other persons infringing copyright by means of the subscriber's internet access service; and
- (d) a statement of truth that the information contained in the notice is true to the best of the subscriber's knowledge and belief.

(3) A notice of subscriber appeal in relation to a notification under any of paragraphs 11, 12, 13 and 14 must be submitted before the expiry of the period of twenty working days beginning with the day of receipt of the notification by the subscriber.

(4) A notice of subscriber appeal in relation to a copyright infringement report must be submitted before the expiry of the period of twenty working days beginning with the day on which the subscriber receives details of that report.

(5) A notice of subscriber appeal in relation to any other act or omission in relation to an initial obligation or a provision of this Code must be submitted before the expiry of the period of twenty

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(a) See definition in section 124C(1) of the Act

working days beginning with the day on which the subscriber became aware of the act or omission which is the subject of the appeal.

(6) Where a notice of subscriber appeal relates to more than one subscriber appeal, it must be submitted before the earliest day on which an applicable period specified in sub-paragraph (3), (4) or (5) expires.

## **Proceedings**

**27.**—(1) Within the period of five working days beginning with the day of receipt of a notice of subscriber appeal, the appeals body must send a copy of the notice to the qualifying ISP and the qualifying copyright owner concerned.

(2) Where the appeals body sends a copy of the notice of subscriber appeal to a qualifying copyright owner pursuant to sub-paragraph (1), it must ensure that information which would enable the qualifying copyright owner to identify the subscriber which has submitted the notice is not included in the copy of the notice sent.

(3) The appeals body must inform the qualifying ISP or qualifying copyright owner, as appropriate—

- (a) whether it wishes to receive written submissions in relation to the matters raised in the notice of subscriber appeal; and
- (b) where the appeals body wishes to receive written submissions, the day by which those submissions must be received by the appeals body.

(4) Any written submissions made by a qualifying copyright owner pursuant to sub-paragraph (3) must include a statement by the qualifying copyright owner or a person authorised by the qualifying copyright owner for such purposes that the information contained in the submissions is true to the best of that person's knowledge and belief and may include—

- (a) evidence that copyright subsists in the copyright work which is the subject of an apparent infringement;
- (b) evidence that the qualifying copyright owner is the owner of the copyright in the copyright work or is authorised to act on behalf of a person that owns the copyright in the copyright work;
- (c) evidence that the subscriber has infringed copyright in the copyright work, including evidence that the subscriber was not authorised to carry out the act which is the subject of the apparent infringement;
- (d) reasons why any of the information referred to in paragraphs (a) to (c) was not provided in the copyright infringement report; and
- (e) any additional information specified in the appeals procedures.

(5) Any written submissions made by a qualifying ISP pursuant to sub-paragraph (3) must include a statement by a person authorised by the qualifying ISP for such purposes that the information contained in the submissions is true to the best of that person's knowledge and belief and may include—

- (a) evidence or information relating to the measures taken by the qualifying ISP to identify the subscriber under paragraph 8(1); and
- (b) any additional information specified in the appeals procedures.

(6) Where the appeals body has received written submissions from a qualifying copyright owner or a qualifying ISP following a request pursuant to sub-paragraph (3), it must provide a copy of those submissions to the subscriber and must invite the subscriber to submit their own written submissions in response in accordance with the appeals procedures.

(7) The appeals procedures must set out the circumstances when the appeals body may afford any party the opportunity to be heard orally.

## PART 9

### Determination of Subscriber Appeals

#### Determination

**28.**—(1) The appeals body must determine a subscriber appeal<sup>(a)</sup> in accordance with this Part by upholding or rejecting the appeal.

(2) The appeals body must determine the subscriber appeal by reference to—

- (a) the notice of subscriber appeal; and
- (b) any written submissions it has received pursuant to paragraph 27.

(3) The appeals body may make a single determination in relation to two or more subscriber appeals within a notice of subscriber appeal.

**29.**—(1) An appeal on any grounds must be determined in favour of the subscriber unless, as respects any copyright infringement report to which the subscriber appeal relates or by reference to which anything to which the appeal relates was done (or, if there is more than one such report, as respects each of them)—

- (a) the qualifying copyright owner shows that the apparent infringement was an infringement of copyright; and
- (b) the qualifying ISP shows that the copyright infringement report relates to the subscriber's IP address at the time of the infringement.

(2) An appeal on any grounds must be determined in favour of the subscriber if the subscriber shows that—

- (a) the act constituting the apparent infringement to which the copyright infringement 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.

#### Consequential powers of appeals body

**30.**—(1) Where the appeals body has determined a subscriber appeal in favour of the subscriber, it may also determine what (if any) is the appropriate action for the qualifying copyright owner or qualifying ISP to take, including:

- (a) any action to secure so far as practicable that the subscriber is not prejudiced for the purposes of the copyright infringement provisions by any act or omission in respect of which the subscriber appeal has been upheld;
- (b) an award of compensation to be paid by a qualifying copyright owner or qualifying ISP to a subscriber affected by an act or omission in respect of which the subscriber appeal has been upheld; and
- (c) requiring a qualifying copyright owner or qualifying ISP to reimburse the reasonable costs of the subscriber.

(2) The appeals body must direct the reimbursement of costs under sub-paragraph (1)(c) unless it is satisfied that it would be unjust to do so, having regard to all the circumstances including the conduct of the parties prior to the lodging of a notice of subscriber appeal and during the ensuing proceedings.

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(a) See paragraph (a) of the definition of subscriber appeal in section 124N of the Act.

### **Notification of determination**

**31.**—(1) A determination of an appeal in accordance with this Part must be in writing and must include the reasons on which the appeals body has relied in reaching its determination.

(2) Where the determination made by the appeals body requires an amount to be paid by a qualifying copyright owner or a qualifying ISP to the subscriber, the determination must indicate the amount payable and the day by which the amount is due.

(3) The determination of the appeals body must be sent to the subscriber, the qualifying copyright owner and the qualifying ISP in accordance with the appeals procedures.

(4) A qualifying copyright owner or qualifying ISP must comply with any determination made under paragraph 30

(5) A provision of this Code shall not apply to a qualifying copyright owner or a qualifying ISP, as the case may be, in so far as is necessary to avoid a conflict arising between—

- (a) the application of that provision; and
- (b) action that the qualifying copyright owner or the qualifying ISP is required to take in compliance with a determination under paragraph 30.

## **PART 10**

### **Sharing of Costs**

#### **Determination of first notification period**

**32.**—(1) OFCOM must determine:

- (a) the day on which the first notification period begins;
- (b) whether the first notification period ends on 31 March 2015 or 31 March 2016; and
- (c) the day before which qualifying copyright owners must provide estimates in relation to the first notification period for the purposes of paragraph 2(4)(b).

(2) OFCOM must publish the days set out in sub-paragraph (1) as soon as is practicable following their determination.

#### **Notification fees**

**33.**—(1) OFCOM must set a notification fee.

(2) OFCOM may set different notification fees for copyright infringement reports to be made to different descriptions of internet service providers.

(3) A notification fee set by OFCOM must be based on OFCOM's estimate of relevant costs.

(4) Relevant costs may include the costs of—

- (a) receiving a copyright infringement report;
- (b) matching the IP address to a subscriber on receipt of a copyright infringement report;
- (c) generating and sending a notification of the copyright infringement report under section 124A(4) of the Act to that subscriber;
- (d) retaining records of copyright infringement reports and notifications sent to subscribers, for the purposes of section 124B of the Act or if required to do so by this Code;
- (e) managing information for the purposes set out in this Code;
- (f) compiling and providing copyright infringement lists to copyright owners, pursuant to section 124B of the Act;
- (g) handling enquiries from and providing information requested by a subscriber about notifications received by that subscriber;

- (h) maintaining appropriate security and access controls for data processed for the purposes set out in this Code to meet the requirements of the Data Protection Act 1998(a); and
  - (i) monitoring compliance with obligations under the relevant copyright infringement provisions.
- (5) Relevant costs must exclude—
- (a) costs (or in Scotland, expenses) payable under a Court order;
  - (b) costs caused by the failure of a qualifying ISP to maintain accurate subscriber records; and
  - (c) costs of economic opportunities lost as a result of compliance with obligations under the relevant copyright infringement provisions.
- (6) In setting the amount OFCOM shall have regard to the desirability of—
- (a) promoting efficiency in the exercise of rights and the performance of obligations under the relevant copyright infringement provisions; and
  - (b) ensuring, as far as practicable, that the notification fees payable by all qualifying copyright owners in a notification period amount to 75% of the total costs incurred by all qualifying ISP calculated on the assumption that the total costs of each qualifying ISP are equal to OFCOM's estimate of relevant costs.
- (7) OFCOM must publish a notification fee they set as soon as practicable.
- (8) OFCOM may review a notification fee from time to time and, if they consider appropriate, re-set it in accordance with sub-paragraphs (1) to (6).
- (9) OFCOM must publish any revised notification fee as soon as practicable.
- (10) A revised notification fee shall take effect from and in relation to the next notification period after the date of publication.

### **Payment of notification fees**

**34.**—(1) On or before the first day of each notification period a qualifying copyright owner must pay to a qualifying ISP the amount specified in sub-paragraph (2).

(2) The amount payable is equal to the notification fee set by OFCOM under paragraph 33 applicable to that qualifying ISP multiplied by the number of copyright infringement reports calculated in accordance with sub-paragraph (3).

(3) The number of copyright infringement reports is—

- (a) the number of copyright infringement reports which the qualifying copyright owner estimates it will make to the qualifying ISP under this Code during the notification period; less
- (b) the difference between the number of copyright infringement reports which that qualifying copyright owner estimated it would make to that qualifying ISP under this Code in the previous notification period and the number it actually made to that qualifying ISP in that period, if lower.

### **Qualifying costs**

**35.**—(1) A qualifying copyright owner must pay to OFCOM a fee in respect of the qualifying costs estimated by OFCOM to be incurred in respect of each notification period.

(2) OFCOM must notify each qualifying copyright owner of the amount of the fee to be paid and the date for payment.

(3) OFCOM must set the fees with a view to securing that, on the basis of such estimates of the likely qualifying costs as it is practicable for OFCOM to make—

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(a) 1998 c.29.

- (a) for each notification period, the aggregate amount of fees payable by qualifying copyright owners to OFCOM in respect of qualifying costs are sufficient to meet, but do not exceed, the total amount of the qualifying costs in the notification period;
  - (b) the amount of the fee payable by each qualifying copyright owner in a notification period is determined by reference to the proportion that the total number of copyright infringement reports which the qualifying copyright owner estimates it will make under this Code during that period bears to the total number of copyright infringement reports estimated to be made under this Code by all qualifying copyright owners during that period
- (4) As soon as practicable after the end of each notification period, OFCOM must publish a statement in respect of that period showing—
- (a) the total amount of fees that have been received from qualifying copyright owners by OFCOM;
  - (b) the total amount of fees that remain outstanding and are likely to be paid or recovered; and
  - (c) the qualifying costs incurred in that period.
- (5) Any deficit or surplus shown by the statement (after applying this sub-paragraph for all previous notification periods) shall be carried forward and taken into account in fixing the fees to be paid in respect of the qualifying costs OFCOM estimate will be incurred in relation to the following notification period.

#### **Initial costs**

- 36.**—(1) A qualifying copyright owner liable to pay fees in respect of qualifying costs in either or both of the first two notification periods must pay to OFCOM a share of the initial costs.
- (2) OFCOM must, so far as practicable, secure—
- (a) that, in the first notification period, the aggregate amounts payable to OFCOM by all qualifying copyright owners in that period in respect of the initial costs are sufficient to meet, but do not exceed, the initial costs;
  - (b) that, in the second notification period, the aggregate amounts payable to OFCOM by all qualifying copyright owners in the first and second notification periods in respect of the initial costs are sufficient to meet, but do not exceed, the initial costs.
- (3) As soon as practicable after the start of the second notification period, OFCOM must review the amounts they have charged to qualifying copyright owners in the first notification period in respect of the initial costs and may make refunds in respect of any overpayments, if they consider it appropriate, after taking account of the amounts they charge to qualifying copyright owners in the second notification period.
- (4) In carrying out their functions under this paragraph, OFCOM must, so far as practicable, ensure that—
- (a) the amount payable by each qualifying copyright owner in the first notification period is determined by reference to the proportion that the total number of copyright infringement reports which the qualifying copyright owner estimates it will make under this Code during that period bears to the total number of copyright infringement reports estimated to be made under this Code by all qualifying copyright owners during that period;
  - (b) the amount payable by each qualifying copyright owner in the second notification period is determined by reference to the proportion that the total number of copyright infringement reports which the qualifying copyright owner estimates it will make under this Code during the first and second notification periods bears to the total number of copyright infringement reports estimated to be made under this Code by all qualifying copyright owners during those periods.
- (5) OFCOM must notify each qualifying copyright owner of the amount payable and the date by which such amount must be paid.

## **Case fees**

**37.**—(1) The appeals body must set a case fee to be charged for each determination of a subscriber appeal it may make.

(2) If the appeals body proposes to make a single determination in relation to two or more subscriber appeals within a notice of subscriber appeal sent to the appeals body under this Code, only one case fee may be charged in respect of that determination.

(3) The appeals body must set the case fee with a view to securing that, on the basis of such estimates as it is practicable for the appeals body to make, for each notification period the aggregate amount of case fees and subscriber fees it retains are sufficient to meet but do not exceed the costs that the appeals body may incur in making determinations in that period (including the costs of handling and processing the subscriber appeals).

(4) The amount of the case fee must be approved by OFCOM.

(5) The appeals body must charge the case fee to the relevant copyright owner.

(6) For the purposes of this paragraph the relevant copyright owner is the qualifying copyright owner that made the copyright infringement report which is the subject of the subscriber appeal or which led to the act or omission that is the subject of the subscriber appeal.

(7) The relevant copyright owner must pay the case fee within such period as the appeals body may determine from time to time.

(8) If there is more than one relevant copyright owner the appeals body must apportion the case fee equally between them.

(9) The appeals body may review the amount of the case fee from time to time in consultation with OFCOM.

(10) The appeals body must publish the amount of the case fee or any revised fee as soon as practicable.

## **Subscriber fees**

**38.**—(1) A subscriber must pay a fee of £20 to the appeals body in respect of each notice of subscriber appeal which the subscriber sends to the appeals body.

(2) The appeals body must refund the subscriber fee to the subscriber if it determines every subscriber appeal raised in the notice of subscriber appeal in favour of the subscriber.

# **PART 11**

## **Administration and Enforcement of Code**

### **Information and assistance**

**39.** OFCOM may require a qualifying entity to provide them with all such information and assistance as they consider necessary for the purposes of carrying out their functions under this Code and the relevant copyright infringement provisions.

### **Notice of contravention**

**40.**—(1) OFCOM may give a notice to a qualifying entity where OFCOM determine that there are reasonable grounds for believing that a qualifying entity is contravening, or has contravened—

- (a) an initial obligation;
- (b) a provision of this Code; or
- (c) a direction made by OFCOM or a determination or direction of the appeals body made in accordance with any provision of this Code.

- (2) A notice of contravention is one which—
  - (a) sets out the determination made by OFCOM;
  - (b) specifies the contravention in respect of which a determination has been made;
  - (c) specifies any financial penalties which OFCOM propose to impose under paragraph 42;
  - (d) specifies any directions which OFCOM propose to make under paragraph 41 or paragraph 43; and
  - (e) specifies the period during which the person notified has the opportunity to make representations to OFCOM about the matters notified.
- (3) The period for making representations must be a period greater than ten working days beginning with the day on which the notice of contravention was sent.
- (4) The period for representations may be shortened if OFCOM—
  - (a) have reasonable grounds for believing that the case is an urgent case or a case of serious and repeated contravention; and
  - (b) consider that a shorter period would be appropriate.
- (5) A notice of contravention may be given in respect of more than one contravention.

### **Final enforcement notice**

- 41.**—(1) This paragraph and paragraphs 42 and 43 apply where—
- (a) a qualifying entity has been given a notice of contravention;
  - (b) OFCOM have allowed the qualifying entity an opportunity to make representations about the matters contained in the notice of contravention; and
  - (c) the period allowed for making representations has expired.
- (2) OFCOM may give a notice to a qualifying entity where they are satisfied that it has, in one or more of the respects notified, been in contravention of a provision or direction specified in the notice of contravention.
- (3) A final enforcement notice must include OFCOM’s determination and may include—
- (a) a direction requiring the qualifying entity to take such steps as may be specified in the notice;
  - (b) details of any financial penalty which is imposed pursuant to paragraph 42; and
  - (c) details of any directions made by OFCOM pursuant to paragraph 43.
- (4) A final enforcement notice may be given in respect of more than one contravention.

### **Financial penalty**

- 42.**—(1) OFCOM may impose a financial penalty on a qualifying entity in respect of any contravention identified in a final enforcement notice.
- (2) The amount of any penalty imposed under sub-paragraph (1) is to be such amount not exceeding £250,000 as OFCOM determine to be—
- (a) appropriate; and
  - (b) proportionate to the contravention or contraventions in respect of which it is imposed.
- (3) OFCOM must have regard to any representation made by the qualifying entity in deciding whether to impose a financial penalty under sub-paragraph (1).
- (4) Where a final enforcement notice is given in respect of more than one contravention, a financial penalty may be imposed in respect of each contravention identified in the notice.
- (5) Where a final enforcement notice is given in respect of a contravention which is continuing, no more than one penalty may be imposed in respect of the contravention identified in the notice.
- (6) Any penalty imposed under this paragraph—

- (a) must be paid to OFCOM within such reasonable period as may be specified in the final enforcement notice; and
- (b) if not paid within the period specified by OFCOM is to be recoverable by them.

### **Compensation and costs**

**43.**—(1) OFCOM may direct a qualifying entity to pay an amount of compensation, to reimburse costs, or to do both, to any person affected by the contravention and identified in a final enforcement notice.

(2) OFCOM must have regard to any representation made by the qualifying entity in deciding whether to issue a direction under sub-paragraph (1).

(3) Where a final enforcement notice is given in respect of more than one contravention, payment of compensation and costs may be directed in respect of each contravention identified in the notice.

(4) Any compensation and costs payable under this paragraph must be paid within such reasonable period as may be specified in the final enforcement notice.

## **PART 12**

### **Dispute Resolution**

**44.**—(1) This paragraph applies in relation to an owner–provider dispute<sup>(a)</sup>.

(2) Any qualifying copyright owner or qualifying ISP which is a party to a dispute may refer it to OFCOM.

(3) OFCOM may decide it is appropriate for them to resolve the dispute where they are satisfied that—

- (a) it is an owner–provider dispute;
- (b) the submissions of the qualifying entity referring the dispute meet the requirements as to form and content which OFCOM may from time to time specify;
- (c) the parties to the dispute have made reasonable attempts to resolve the dispute between themselves;
- (d) there are no alternative means for resolving the dispute; and
- (e) there is reason to believe that there may have been a contravention of the initial obligations or the provisions of this Code.

(4) OFCOM must inform each of the parties to the dispute as soon as reasonably practicable of their decision as to whether it is appropriate for them to resolve the dispute and the reasons for that decision.

(5) Where OFCOM have decided that it is appropriate for them to resolve the dispute they must send a notice to the parties to the dispute inviting them to provide representations on the matters in dispute within the period of 5 working days beginning with the day on which the notice was sent or such other period as may be specified therein.

(6) OFCOM must consider any representations made by the parties to the dispute and may issue a draft dispute determination setting out OFCOM’s provisional findings and recommended means of resolving the dispute.

(7) Where OFCOM have issued a draft dispute determination the parties may submit representations on the matters covered by the draft dispute determination within the period of 10 working days beginning with the day on which the draft dispute determination was sent or such other period as may be specified therein.

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(a) See definition in section 124E(9) of the Act.

(8) OFCOM must consider any representations made by the parties to the dispute on the matters covered by the draft dispute determination and must send a final dispute determination to the parties.

(9) A final dispute determination may include—

- (a) a direction requiring a party to the dispute to take such steps to comply with an initial obligation, a provision of this Code or a direction made under this Code as may be specified in the final dispute determination;
- (b) a direction requiring a party to the dispute to pay compensation to the other party in respect of any losses incurred by that other party in consequence of a contravention of the initial obligations, a provision of this Code or a direction made under this Code;
- (c) a direction requiring a party to the dispute to pay to the other party an amount in respect of costs incurred by that other party in consequence of the reference to the dispute to OFCOM.

(10) This Part does not prejudice the ability of OFCOM to take enforcement action under paragraphs 40 to 43 in respect of any of the matters raised in connection with an owner–provider dispute.

### **EXPLANATORY NOTE**

*(This note is not part of the Order)*

The Digital Economy Act 2010 inserted sections 124A to 124N into the Communications Act 2003 (“the Act”) to regulate online copyright infringement. Under section 124D of the Act, OFCOM has a duty to make a code by order for the purposes of regulating the initial obligations set out in the copyright infringement provisions of the Act. This Order therefore contains an initial obligations code setting out the rights and obligations of copyright owners, internet service providers and subscribers under the copyright infringement provisions of the Act.

The code contained in the Schedule to this Order is the “Online Infringement of Copyright Initial Obligations Code”.

Article 1 of the Order provides that the Order shall come into effect on [     ].

Article 2 of the Order provides for the code contained in the Schedule to have effect for the purposes of section 124D(1) of the Act.

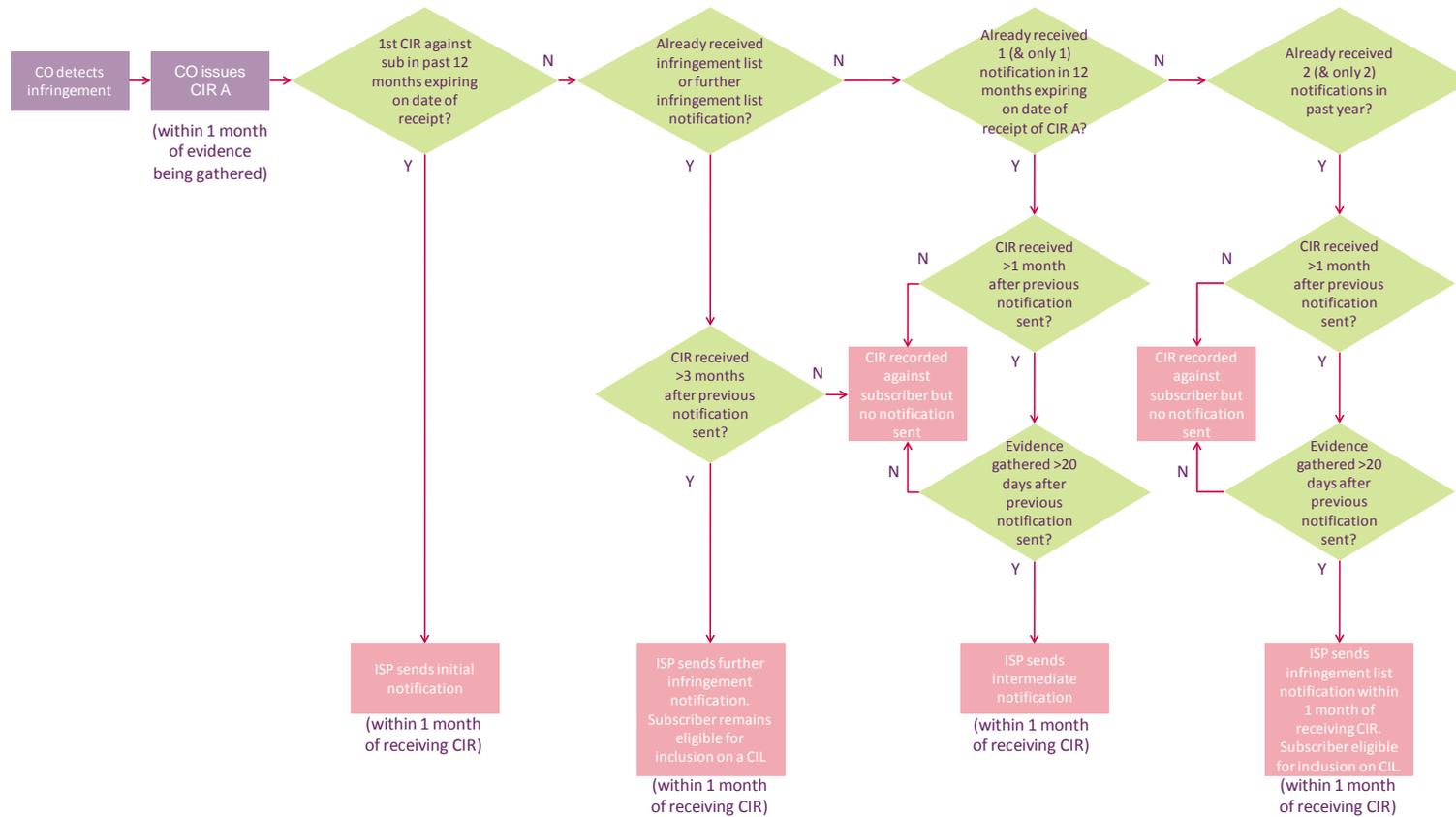
In the Schedule to the Order—

[                     ]

[This Order was notified in draft to the European Commission in accordance with Directive 98/34/EC, as amended by Directive 98/48/EC.]

Annex 4

# The notification process



**Notes:**

- (1) This decision tree represents a simplified version of the detection and notification process only. It sets out the actions an ISP must take on receipt of a valid CIR. For precise details please refer to the Initial Obligations Code.
- (2) Subscribers may appeal each CIR, each notification, each appearance on a CIL and any act or omission under the Code. Appeals must be lodged within 20 working days of:
  - a. the date of receipt of a notification.
  - b. the date on which the subscriber became aware of the issue of a copyright infringement report relating to an apparent infringement by the subscriber; or
  - c. the date on which the subscriber became aware of any other act or omission in relation to an initial obligation or a provision of the Code which is the subject of the appeal.

## Annex 5

# Interpretation of key statutory definitions in the DEA provisions

- A5.1 The definitions of “internet service provider”, “subscriber” and “communications provider” are set out in the DEA provisions and cannot be subject to amendment in the Code. Nonetheless, their interpretation is relevant to the application of the Code. Hence, in the May 2010 Consultation, we discussed the relevant definitions of internet service provider, internet access service, subscriber and communications provider. We noted that, while the definitions in the Act clearly encompassed the main fixed and mobile service providers that we had considered in our discussions about qualifying ISPs, there is a broad range of business models in the internet access market.
- A5.2 In addition to the comments we received in response to our interpretation of these definitions in the May 2010 Consultation, stakeholders have continued to raise questions with us as to how they might apply following implementation of the Code. In particular, we are aware that public intermediaries, such as libraries and universities whose activities include the provision of internet access services, have a number of concerns about their status. As set out in Section 3, these bodies do not meet the ISP qualification threshold and therefore will not be subject to the initial obligations in the initial phase of implementation. They have nonetheless requested clarification as to whether they might become subject to the obligations when the threshold is reviewed and the extent to which they might be treated as a subscriber by their upstream ISP.
- A5.3 In this section we set out stakeholder comment on these issues and our understanding of how the definitions apply in order to assist stakeholders understand how the DEA provisions may apply to them. While we cannot fetter our discretion in relation to the future revision of the ISP qualification threshold, we set out the issues that might be relevant in the event we consider its extension to public intermediaries.

### Our proposals in the May 2010 Consultation

- A5.4 With regard to defining ISPs (both qualifying and non-qualifying), we proposed that:
- Operators of Wi-Fi networks would fall within the definition of internet service provider where the service is provided by means of an agreement with the subscriber, even where this agreement is oral or implicit;
  - Persons making open access Wi-Fi available, where there is no payment from or agreement with those making use of them, would be subscribers;
  - Operators of Wi-Fi networks provided in conjunction with other goods or services to a customer, such as a coffee shop or a hotel, would be internet service providers;
  - Where there is a wholesale and a retail provider of internet access, the wholesale provider is outside the definition of an ISP for the purposes of the DEA in that it is not providing its service to a subscriber directly but the downstream provider is

likely to be within it and therefore subject to obligations if it fulfils the qualification criteria established by the Code. If the downstream provider is not directly receiving CIRs as a result of the wholesale arrangement, it will be required to ensure that it is able to process those CIRs which relate to its subscribers, possibly by entering into a contract for processing services from its wholesale access provider; and

- If operators do not hold information necessary for notifying subscribers, then at such a time as they become a qualifying ISP, they would need to ensure that they do collect this data so as to be able to comply with the obligations in the DEA and the Code.

A5.5 With regard to defining subscribers and communications providers, we indicated that we considered that:

- A person or an undertaking receiving an internet access service for its own purposes is a subscriber, even if they also make access available to third parties, e.g. some businesses provide access in their public areas, and some consumers may also run unprotected Wi-Fi networks; and
- Those who wish to continue to enable others to access their service will need to consider whether to take steps to protect their networks against use for infringement, to avoid the consequences that may follow.

### Consultation questions

A5.6 In the May 2010 Consultation we asked the following questions regarding the definition of qualifying ISPs, subscribers and communications providers.

*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?*

*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?*

### Stakeholder responses

A5.7 These questions were intended to focus on the interpretation provided in the consultation of the definitions in the 2003 Act of 'subscriber', 'ISP' and 'Communications Provider'. In addition, many stakeholders addressed these questions as part of a combined response to 3.3, 3.4, 3.5 and 3.6. The summary below focuses on the additional points raised and combines responses to the questions 3.5 and 3.6.

#### Responses from ISP stakeholders

A5.8 Four concerns were raised by multiple ISP stakeholders:

- Disagreement that the legislation might require ISPs which do not collect subscriber identity information to do so, in the event that they become qualifying ISPs (for example pay-as-you go mobile or Wi-Fi operators);

- Concern over insufficient clarity in the definitions and in the interpretation provided in the May 2010 consultation, and a related failure to recognise the complexity of the internet access value chain, notably in relation to Wi-Fi providers;
- Disagreement with the interpretation relating to the status of businesses (potentially ISPs) providing internet access alongside other services (such as hotels); and
- A desire for greater clarity on the process and timetable for reviewing the threshold for qualifying ISPs.

A5.9 LINX, JANET and the Mobile Broadband Group in particular raised the first of these, with LINX also arguing that the legislation could not require ISPs which did not already do so (such as libraries, hotels etc.) to collect the IP allocation data which enables the identification of subscribers from CIRs.

A5.10 LINX, Everything Everywhere, ISPA, KCOM, TalkTalk, Virgin Media and Thus all raised concerns over the lack of clarity in the definitions and in Ofcom's interpretation. LINX, JANET and TalkTalk in particular challenged the suggestion that an operator providing access to others would always be either a subscriber or an ISP, arguing that in some cases it could be a communications provider (and neither ISP nor subscriber). ISPA argued that libraries are not ISPs "in any meaningful way".

A5.11 ISPA, Virgin Media, BT and LINX also argued that Wi-Fi network providers should be treated differently from other fixed access providers and should potentially be grouped with mobile. Telefonica O2 argued the opposite point (that Wi-Fi operators might be subject to the obligations).

A5.12 KCOM suggested that the proposed definition of "subscriber" is inconsistent with the definition of "subscriber" contained in the General Conditions,<sup>71</sup> and noted that this may cause issues for telecoms providers.

A5.13 The MBG was supportive of an approach which identified Virtual Network operators (who would hold the relevant customer contact information) as the ISP for the purposes of processing CIRs and communicating with subscribers.

A5.14 The MBG noted the difficulties raised, under the 'technical measures' regime, in applying enforcement action against a whole corporate account (a subscriber, in the Act), when only one rogue employee may have been involved in the infringement.

#### Responses from copyright owner stakeholders

A5.15 Copyright owner stakeholders were generally supportive of the definitions and analysis in the statement, noting the importance of including as ISPs operators such as Virtual ISPs, hotels, Wi-Fi providers, etc.

A5.16 They also requested that online infringement generally, and the threshold and definitions specifically, be subject to regular monitoring and review, to ensure that the problem of infringement does not transfer outside the initial group of ISPs.

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<sup>71</sup> General Conditions of Entitlement. See: <http://stakeholders.ofcom.org.uk/binaries/telecoms/ga/general-conditions-25052011.pdf>

- A5.17 AIP, the Publishers Association and PACT noted that questions about subscribers and communications providers offering public Wi-Fi would be resolved if establishments actively managed their networks to prevent infringement.
- A5.18 Creative Coalition Campaign thought that cafes and libraries operating open Wi-Fi should be subscribers (responsible for all activity on that IP address) rather than providers.
- A5.19 FAST was concerned that the definition of Communications Provider might allow some types of business to avoid being treated as subscribers and thereby undermine the intentions of the Code. FAST also felt that the obligations should apply even when the potential recipient of notifications is not a subscriber.
- A5.20 UK Film Council urged Ofcom to find a way to assuage the concerns of public bodies (libraries etc) to ensure the Act does not have a chilling effect on the power of the Internet to stimulate learning and education.

#### Responses from user group stakeholders

- A5.21 User group stakeholders were concerned that Ofcom's interpretation of the Act was overly broad and risked undesirable public consequences, notably restrictions on public intermediaries' provision of internet access.
- A5.22 BeingThreatened wondered whether, in shared households, the individual bill payer would count as an ISP or subscriber; and expressed concern over public internet provision, for example in schools.
- A5.23 The Communications Consumer Panel called on Ofcom to ensure that public intermediaries do not and will not have the responsibilities of a qualifying ISP. Ofcom should provide supporting guidance both to (a) providers of open Wi-Fi and (b) users of open Wi-Fi.
- A5.24 The Pirate Party proposed an exclusion for wireless ISPs in a similar manner to mobile ISPs; and criticised a lack of clarity over the treatment of those who both offer and use an internet access service. It also argued it is beyond the reasonable capability of the average consumer or business to secure their network.
- A5.25 Consumer Focus said that Ofcom should clarify the position of wholesale and retail internet service providers in relation to the definitions contained in the DEA and by extension the initial obligations code.
- A5.26 Which? argued that the definitions of ISP, subscriber and communications provider in the code were confusing and at odds with what members of the public would understand by those terms.
- A5.27 The ORG, like a number of ISPs, challenged Ofcom's analysis that there is negligible scope for there to be communications providers which are not ISPs.

#### Responses from other stakeholders

- A5.28 The most significant concerns raised by other stakeholders were over the potential impact of the definitions on public bodies, including libraries, schools and higher educational institutions: respondents argued that there was insufficient clarity in the definitions, or that the treatment of such bodies either as subscribers or ISPs would be inappropriate and undesirable.

- A5.29 A number of stakeholders also disagreed that a qualifying ISP could be required to collect subscriber identity information, including BCS and JISC.
- A5.30 The British Library argued the “definitions” section was confusing, not mutually exclusive and gave little clarity for public intermediaries as to whether they would be viewed as a qualifying ISP or not in the future. It strongly disagreed with the suggestion that libraries might be required to monitor who uses their networks, noting: (i) the exclusion of this possibility from the economic impact assessment produced by BIS; and (ii) that it would appear to have significant and wide ranging policy implications as no one in the UK would be able to access the internet in a public space without providing registration details.
- A5.31 Similarly, LACA drew attention to the costs of complying with the obligations for libraries, archives, museums etc, suggesting a set-up cost alone of £214m to cover these bodies.
- A5.32 COADEC requested clarification and asked Ofcom to set out a straightforward process for a body to demonstrate that it is a non-qualifying ISP.
- A5.33 UCISA criticised a lack of clarity and argued that a provider of open Wi-Fi is a CP not an ISP or subscriber, and that University and colleges should be either ISPs or CPs.
- A5.34 Universities UK was deeply concerned that universities may be regarded as ‘subscribers’ for the purposes of the Act, since universities both receive internet access and provide access to their staff and students. The risk of exposure to the ‘technical measures’ available to the Secretary of State to restrict or suspend internet access would severely affect universities’ ability to educate and support research, and would, in their view, be clearly contrary to the public interest.
- A5.35 Universities UK and the British Library also requested that clarification for ISPs should be provided in the Code in line with 124E (3) (a) on who is to be regarded as a subscriber and who is not. Public intermediaries should be classed as communications providers as internet access is primarily acquired in order to provide access to the users of a public intermediary.
- A5.36 BCS was concerned that individuals and undertakings may not be able to access the same level of expertise as major ISPs, and could therefore find it hard to secure their networks.
- A5.37 LACA argued that libraries should not be viewed as subscribers, but instead as Communications Providers or non-qualifying ISPs.

## Our views

- A5.38 The relevant definitions in the DEA provisions and CA03 are:
- **Internet service provider** - “a person who provides an internet access service” (Section 124N CA03);
  - **Internet access service** - “an electronic communications service that – (a) is provided to a subscriber; (b) consists entirely or mainly of the provision of access to the internet; and (c) includes the allocation of an IP address or IP addresses to the subscriber to enable that access” (Section 124N CA03);

- **Subscriber** – “in relation to an internet access service... a person who – (a) receives the service under an agreement between the person and the provider of the service; and (b) does not receive it as a communications provider” (Section 124N CA03); and
- **Communications provider** – “a person who (within the meaning of section 32(4)) provides an electronic communications network or an electronic communications service” (Section 405 CA03).

A5.39 These definitions work to define the responsibilities under the DEA provisions as follows: the core obligations apply to (qualifying) **ISPs**, which must process CIRs, send notifications and so on. To be an ISP under the DEA provisions, a service provider must have an **agreement** with **subscribers**, as defined above. If an internet access service is being provided to a **communications provider** (not a subscriber), then the provider of the internet access service will not be an ISP in relation to that communications provider for the purposes of the DEA provisions, and will not be subject to the Code in relation to the processing of CIRs or the sending of notifications which relate to that communications provider.

## ISPs

A5.40 Providers of internet access fall within the definition of internet service provider where the service is provided by means of an agreement with the subscriber, even where this is oral or implicit. This will mean that a very broad range of providers are ISPs for the purposes of implementing the DEA provisions (though they may not be qualifying ISPs, as discussed above in Section 3). For example, a commercial enterprise like a hotel or café providing Wi-Fi to its customers is likely to be an ISP; similarly, public bodies like libraries or universities are likely to be ISPs, providing internet access under an agreement with their readers or students respectively.

A5.41 There may be circumstances where there is a question as to whether the agreement for goods or services extends to the use of the internet access service. However, the initial threshold set in the Code for determining a qualifying ISP will exclude many operators for which this is an issue on the grounds of scale. Operators of such services therefore have clarity as to whether or not the Code applies to them or will be applied to them in the immediate future.

A5.42 The DEA provisions require that the obligation to notify a subscriber requires communication with “the electronic or postal address held by the internet service provider” (124A(9)). Providers such as pay-as-you-go mobile broadband operators, which might fall to be considered as ISPs and are therefore potentially subject to the Code, may not hold such information about their subscribers. In our consultation, we suggested that, if such operators fall within a future definition of qualifying ISP, they would need to ensure that they do collect this data so as to be able to comply with the obligations in the DEA provisions and the Code.

A5.43 We now accept that, as some stakeholders argued, this cannot be inferred from the provisions of the legislation; in fact, a qualifying ISP which has never held subscriber address information is not required to collect it as a consequence of being subject to the initial obligations. Should such a provider become a qualifying ISP whether due to an increase in subscriber numbers or as a result of a revision of the threshold, we would not anticipate that it should be subject to the notification obligation in relation to subscribers for which it holds no contact details. This is made clear at paragraph 18 of the Code which provides for the circumstances

where notification requirements do not apply in cases where address information is not held and it is not reasonably practicable for the ISP to obtain such information.

## Wholesale and retail ISPs

- A5.44 It is clear from the definitions in the DEA provisions that when there is a wholesale and a retail provider of internet access, the wholesale provider does not have obligations as it is providing a service to a downstream communications provider rather than a subscriber. However, the downstream communications provider may well be an ISP (on the basis that it provides an internet access service to one or more subscribers) and may therefore be subject to obligations, in the event that it meets the criteria as a qualifying ISP.
- A5.45 There may be instances where a retail provider of internet access may not have direct control over, or records of, the allocation of IP addresses to its subscribers since this function is performed by an upstream wholesale provider. In this situation, where there clearly is an agreement to provide an internet access service to a subscriber at the retail level, we would consider the retail provider to be the ISP with an obligation to process CIRs. If it does not hold sufficient information to process the CIRs the Code requires it to ensure that it is able to do so. While it is for the qualifying ISP to determine how this is best achieved in relation to its own circumstances, one means of meeting this requirement might be to enter into a contract for processing services with their wholesale access provider.
- A5.46 The Code also makes specific provision for the circumstance when a qualifying ISP is also operating as a wholesale ISP. Under the provisions of Part 5 of the Code, a qualifying ISP is not required to process a CIR where “the subscriber which is the subject of a copyright infringement report is not a fixed subscriber of the qualifying ISP” (paragraph 18(d)). If this is the case because the qualifying ISP has allocated the IP address on behalf of the downstream ISP, it will be required to inform the qualifying copyright owner that it has rejected the CIR for this reason and identify the downstream ISP at the retail level (paragraph 8(2)(b)), whether or not that downstream ISP is itself a qualifying ISP.
- A5.47 The scope for CIRs to be sent to the wrong ISP would be minimised, if qualifying ISPs endeavour to provide copyright owners with information about the blocks of IP addresses which their subscribers use. More broadly, the provision of accurate and precise information about the allocation of IP ranges by qualifying ISPs will be important for the effective operation of the process of estimating CIR volumes, and correct addressing of CIRs. Ofcom will seek to collaborate with qualifying ISPs and copyright owners to secure this outcome.

## Position of libraries and other public intermediaries

- A5.48 Whilst it was clearly the intention of Government that libraries and other similar bodies which provide internet access services should not be exempted as ISPs permanently from the Code,<sup>72</sup> Ofcom does have discretion in determining which ISPs should be subject to the obligations (i.e. qualifying ISPs). The qualification criteria that Ofcom has set in the Code will not catch public intermediaries, such as libraries and universities, as they do not have sufficient number of broadband lines.

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<sup>72</sup> See for example the Government factsheet entitled ‘*Online infringement of copyright: libraries, universities and Wi-Fi providers*’ (February 2010), p. 3, under the heading “*Exemption for libraries?*”. <http://webarchive.nationalarchives.gov.uk/+/http://www.bis.gov.uk/assets/biscore/corporate/docs/digital-britain/factsheets/example-infringement-notifications.pdf>

Any revision of those criteria is likely to be based on evidence of the levels of infringement taking place on an ISP's network. There is a reasonable hypothesis they would not qualify even if the criteria were revised in this way. Many public intermediaries tell us they take active measures to minimise infringement on their networks, and if that is right, they may continue to fall outside the scope of the Code. Even if they did meet a revised threshold, we would still need to consider the proportionality of subjecting different types of ISP to the Code, for example by assessing the conduciveness of their network for infringement, the costs of implementing the systems necessary to comply, and the impact on any of the objectives to which we are required to have regard as part of our general duties in carrying out our functions.

A5.49 As regards cost, we believe libraries do not generally record or retain records of the internet access sessions of their users; and requiring them to do so would entail significant operational and capital investment, compared to a small scale but standard ISP.

A5.50 In relation to our general duties, the following which appear to be potentially relevant in this regard include (but are not limited to):

- Furthering the interests of citizens in relation to communications markets;
- Having regard to the desirability of encouraging the availability of and use of high speed data transfer services throughout the UK;
- Having regard to the vulnerability of children and of others whose circumstances appear to put them in need of special protection; and
- Having regard to the needs of persons with disabilities, of the elderly and of those on low incomes.<sup>73</sup>

### **Subscribers and Communications Providers**

A5.51 Subscribers may be identified in connection with CIRs sent to their ISP, receive notifications, and ultimately, be included on a copyright infringement list provided to a copyright owner on request.

A5.52 The critical question, in relation to subscribers as defined in the DEA provisions, is the position of an individual or undertaking which both receives internet access as an end-user, and also makes it available to others. For example, some businesses provide access in their public areas, and some consumers may also run unprotected Wi-Fi networks to allow others in their community free access to the internet. It has been the subject of debate among stakeholders as to whether such persons and businesses are subscribers or communications providers.

A5.53 We consider that a person or an undertaking receiving an internet access service for its own use (or that of its employees) is a subscriber, even if they also make access available to third parties and, in that regard, constitute communications providers potentially subject to general conditions set under section 45 CA03.<sup>74</sup>

<sup>73</sup> See sections 3(1)(a), 3(4)(e), 3(4)(h), 3(4)(i) CA03

<sup>74</sup> Section 46(2)(a) CA03 provides that general conditions may be applied to "every person providing an electronic communications network or electronic communications service"

- A5.54 Nonetheless, where an undertaking receives an internet access service essentially and verifiably for the purpose of providing it to third parties (for example, libraries for the purpose of providing a Wi-Fi service to library users), it would appear reasonable for their upstream ISP to treat them as an ISP or communications provider in relation to the application of the initial obligations.
- A5.55 We recognise however that there are likely to be cases where such categorisation may be less clear cut. We are strongly supportive of the provision of Wi-Fi services and recognise its contribution to the fulfilment of the Government's desire to increase digital participation. However, those who wish to enable others to access their service will need to consider whether to take steps to protect their networks against use for copyright infringement. It is our expectation that the advice which ISPs are required to provide to subscribers on protecting their networks (as part of the notification letters) may help in this objective, as may more general information which we anticipate will be provided by stakeholders.

### **Appeals and complaints**

- A5.56 There are likely to be many bodies who take an internet access service from a qualifying ISP, and who will be perceived as subscribers by that qualifying ISP, but, as discussed above, may fall within the definition of ISP or communications provider. This means that (subscriber) notifications may be sent to recipients which are in fact ISPs/communications providers. A body which believes it should be treated as an ISP rather than as a subscriber should initially contact its upstream ISP and explain why it believes it should not be treated as a subscriber. If the upstream ISP considers that its customer should be viewed as an ISP rather than a subscriber, the Code makes clear (at paragraph 18) that it may reject a CIR on this basis.
- A5.57 We consider ISPs will be incentivised to determine their customers' status correctly as failure to do so could result either in damage to their relationship with their subscribers or a copyright owner bringing a dispute to Ofcom for breach of the ISP's obligation to process CIRs. We are open to assisting qualifying ISPs to develop policies as to how to categorise customers which make their internet access service available to third parties.

## Annex 6

# List of selected abbreviations

**AIP** – Alliance Against IP Theft

**BCS** – the Chartered Institute for IT

**BIS** – Department for Business, Innovation and Skills

**BPI** – British Recorded Music Industry

**CA03** – Communications Act 2003

**CMA** – Communications Management Association

**CIL** – copyright infringement list

**CIR** – copyright infringement report

**COADEC** – Coalition for a Digital Economy

**CP** – communications provider

**DEA** – Digital Economy Act

**ELSPA** – see “UKIE”

**FAST** – Federation Against Software Theft

**IP** – Internet Protocol

**ISP** – internet service provider

**ISPA** – Internet Service Providers’ Association

**JISC** – Joint Information System Committee

**LACA** – Libraries and Archives Copyright Alliance

**LINX** – London Internet Exchange

**MBG** – Mobile Broadband Group

**MNO** – Mobile Network Operators

**MOU** – Memorandum of Understanding

**NAT** – Network Address Translation

**ORG** – Open Rights Group

**PACT** – Producers’ Alliance for Cinema and Television

**PAT** – Port Address Translation

**P2P** – Peer-to-peer

**SME** – Small and Medium Enterprises

**UCISA** – Universities and Colleges Information Systems Association

**UKIE** – The association for UK Interactive Entertainment

**URL** – uniform resource locator

**UTC** – universal co-ordinated time

**XML** – extensible markup language