

BASIC DETAILS

Consultation title: 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

To (Ofcom contact): Justin Le Patourel

Name of respondent: Gemma Hersh

Representing (self or organisation/s): The Publishers Association

Address (if not received by email): ghersh@publishers.org.uk

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Name Gemma Hersh

Signed (if hard copy)

Introduction

1. The Publishers Association ('the PA') is the representative body for book, journal, audio and electronic publishers in the UK. Our membership of 112 companies spans the academic, education and trade sectors, comprising small and medium enterprises through to global companies. The PA's members annually account for around £4.6bn of revenue, with £3.1bn derived from the sales of books and £1.5bn from the sales of learned journals.
2. The Publishers Association has consistently called on the Government to implement the provisions of the Digital Economy Act (DEA) designed to deal with peer to peer copyright infringement. Accordingly, The PA welcomes the opportunity to respond to Ofcom's *Code for regulating the initial obligations* as a further step towards implementation.
3. The PA is broadly happy with the initial obligations as they currently stand. However, we offer some additional comments and points for clarification, below, specifically regarding the scope of the provisions; the sending and rejection of CIRs; and the appeals process.

Scope of provisions

4. The PA agrees with the threshold set for qualifying ISPs, given that those brought within scope equate to 93% of the broadband market. The PA accepts that bringing mobile network operators and providers of wifi networks within scope at this stage would not be proportionate in terms of costs/benefits. However, we agree that Ofcom should revisit this decision in its first review on the coverage of the Code once the scheme has been up and running for six months
5. For the publishing industry, the exponential growth in ebook sales and increased take up of e-reading and other tablet devices that utilise wifi, means that the consideration of including providers of wifi networks within scope of the Act should receive close attention. As Ofcom notes, the wifi and mobile market continues to expand; the provision of legal services accessible on mobile and other e-reading devices which utilise such technology continues to increase; and fixed line ISPs are expanding their offer of wifi, in particular as part of unlimited data packages. The latter in particular must not provide a loophole for those seeking to place themselves outside the operation of the Act.
6. Further to this, whilst we accept the reasons given for the exclusion of KCOM, Ofcom should monitor the impact of not having this fixed ISP within scope, particularly whether infringement levels within the Kingston-upon-Hull area increase as a result. This should be covered in Ofcom's progress report at the end of the first year of the Act's operation.
7. Ofcom should use all means possible to ensure that any future decisions to bring additional providers within scope of the Act are done in a timely fashion, minimising the need to rewrite The Code. This could be achieved by, for example, bringing all internet providers of any description within scope of the Act, but providing derogation for wifi and mobile providers at the present time.

ISP Notice sending – types of notification

8. We note and accept Ofcom's proposal for four different types of notification. We also note that the Secretary of State cannot impose technical obligations on ISPs until the Code has been in force for a minimum of 12 months; until he has directed Ofcom to produce and obtained from Ofcom an assessment of whether one or more technical measures should be imposed; and only after the enactment of additional secondary

legislation. These provisions will hopefully dispel the myths perpetuated by those who describe the DEA provisions as a “three strikes” approach.

ISP Notice sending – Content of notifications

9. Mindful of that fact that Ofcom is unable to mandate the content of notifications, we look forward to working with ISPs and consumer groups to ensure the content of notifications does not undermine the intent of the Act. The inclusion, for example, of additional marketing material alongside notification letters could detract from the message of the notification itself and may even lead consumers to disregard the notice, if they are mistakenly led to believe it is a marketing mail out from their ISP.
10. Ofcom should make clear that enforcement powers will be used against those who seek to undermine the intent of the Act.

CIR rejection

11. The Initial Obligations Code proposes that ISPs can reject a CIR on the basis that the ISP is not able to identify the subscriber in question and it is not reasonably practicable for it to do so. However, it is unclear on what basis it would not be possible for an ISP to identify a subscriber. Notification is not required if the ISP does not hold the subscribers postal address, but this is a potentially massive loophole and could easily be exploited by ISPs wishing to evade notice sending. It strikes us as reasonable to expect ISPs to obtain relevant customer postal addresses in order to send a notice. In such circumstances it may be appropriate to allow notifications to be sent via email, if this is the only way an ISP can contact its subscriber. We welcome assurances from Ofcom that any ISP using the excuse of no postal address to undermine the intent of the Act will be subject to action by the regulator.
12. Whilst we welcome the fact that ISPs have to tell copyright owners which ISP the alleged infringer is subscribed to (if it was not them at the time of infringement), no longer being a subscriber of an ISP should not be a reason why a notice is not sent. If the alleged infringement took place whilst the subscriber was a customer of that ISP, the ISP should still be required to send a notice. This need not place additional burdens on an ISP, as it may simply require use of information already held in line with the Data Retention Directive. ISPs should be able – and obliged – to send a Notice when information is held on record, in line with existing obligations.

Appeals process

13. The PA welcomes the proposed provisions governing the Appeals process. A period of 20 days to lodge an appeal is an appropriate timeframe, and we believe a nominal fee of £20 strikes the right balance, ensuring the appeals process remains accessible, yet deters vexatious appeals. The grounds on which a subscriber may appeal have also helpfully been clarified. It is hard to see how or why the proposed provisions will lead to an increase in subscriber broadband fees, as has been suggested by some organisations.