BIS | Department for Business Innovation & Skills

ONLINE INFRINGEMENT OF COPYRIGHT (INITIAL OBLIGATIONS) COST SHARING

HM Government Response

SEPTEMBER 2010

HM GOVERNMENT RESPONSE TO THE CONSULTATION ON ONLINE INFRINGEMENT OF COPYRIGHT (INITIAL OBLIGATIONS) COST SHARING

Summary

- The notification costs of ISPs and Ofcom as regulator are to be split 75:25 between copyright owners and ISPs on the basis of the costs of an ISP which is an "efficient operator" as verified by Ofcom (as proposed in the consultation document). The regulator costs also include the costs related to the appeals system.

- There should be no fee for subscribers to appeal against a notification letter. However the Government retains the power to introduce one at a later date should it become clear that a large number of vexatious appeals result.

- The deadline for Ofcom to complete the initial obligations code will be extended by 3 months to reflect the need to notify the cost regulation separately under the Technical Standards Directive.

Detail

Cost apportionment

The main two groups of stakeholders - copyright owners and ISPs - not surprisingly had opposing views on how costs might be apportioned. Little new evidence was submitted, although copyright owners repeatedly called for their detection costs to be included. This argument was rejected as the initial proposal to share costs 75:25 was made in the full knowledge that copyright owners did have these separate costs to bear. At the level of the individual copyright owner the level of detection activity (and any legal action) is a matter for them. It was considered these were largely "business as usual" costs that copyright owners would face as part of protecting their own copyright material.

Calls by ISPs and consumer groups for all costs to fall to copyright owners were also rejected. Placing part of the costs on ISPs mean they have a real incentive to ensure they adopt the most effective and efficient process in processing CIRs and issuing notifications.

The arguments for the apportionment of Ofcom and appeal body costs are less clear cut. ISPs argue that the regulations are to benefit copyright owners and they should therefore pay all these costs; set against this is the principle that those who are regulated should cover the cost of the regulator. The argument that appeals would only result from errors made in identifying infringements was

rejected as it remains entirely possible that the ISPs could make processing errors. Again sharing appeal costs between ISPs and copyright owners provides a further incentive to ensure the processes are as robust as possible.

Fee to access the appeals system

Charging a (modest) fee refundable if successful was considered as a possible means to discourage frivolous appeals. This would have required additional safeguards to protect the less-well off as well as a structure to both receive fees and refund successful appeals. Under the initial obligations the appeal is against a notification letter or a CIR, and no penalty would be imposed against a subscriber unless the case was brought before a court. It was therefore clear that imposing a fee would add significant additional costs and complexity to the process, and that this would be disproportionate when set against a perceived risk of large-scale frivolous appeals. Consequently it was decided that no fee would be levied. However, the Government will retain a power to impose a fee should there be a significant number of vexatious appeals.

It should also be noted that the issue of appeals fees may need to be revisited if and when technical measures are introduced.

Timetable

The DEA requires Ofcom to have an approved code in place within eight months of the DEA gaining Royal Assent. In effect this means by the end of December 2010. However this timetable was drawn up on the assumption that the cost provisions could be notified to the European Commission under the Technical Standards Directive as part of the Code. However, we now consider that the cost order requires separate notification under the Directive – a process which requires a minimum of three months. As this is an additional time factor entirely outside of Ofcom's control, the Secretary of State will be granting an extension of three months to Ofcom to reflect this.

SUMMARY OF RESPONSES

A total of 40 responses were received to the consultation, and these have been grouped together below under the headings of copyright owners, Internet Service Providers, consumer groups, and others, including individuals, law firms and research organisations.

This represents a summary of the responses received. It should NOT be taken as a representation of HM Government's position. This is given in the Government's own response.

All non-confidential responses have been placed on the BIS website.

1. Copyrights owners' response to the consultation on cost-sharing

A total of sixteen copyright owners or their representatives responded to the consultation. There was consensus between copyright owners on both the desirability and necessity of sharing costs of the process between copyright owners and ISPs, as well as the key points of concern with the proposed Statutory Instrument, which was considered [by them] to be unfair to copyright owners.

Key points and concerns from copyright owners

- Copyright owners (COs) felt the proposal does not take any account of the resource that they must commit in order for the process to work at all. They regarded that if the process was to be effective in the stated aim of significantly reducing the level of online infringement of copyright then the effort involved in investigating and notifying infringements was not optional. Similarly, if Ofcom were to report on the efforts made by copyright owners on education and taking legal action, on which the Secretary of State would in part base his decision on whether further measures were required, these were not purely discretionary but *de facto* statutory duties, the cost of which should be taken into account. They raised some concern over some of the eligible costs included for ISPs.

- COs claimed the proposal ignores the economic benefit to ISPs, both in the past in terms of driving uptake of broadband through easy access to content (the "polluter pays" principle) and currently in terms of the advantages of reducing the stress caused to their networks through widespread infringement. Research commissioned by the copyright owners is also quoted that predicts significant advantage to ISPs from entering into partnership with copyright owners, only feasible if the level of illicit traffic is significantly reduced.

- Copyright owners consider the 75:25 split to be, in any case, entirely arbitrary, and urge an approach whereby costs lie where they fall. There was widespread concern that, if the costs are loaded onto copyright owners in this way, there would be a disincentive for copyright owners to use the system, and in particular smaller copyright owners would be unwilling to spend such significant funds in an attempt to defend they rights.

- In terms of Ofcom's costs they felt there was even less justification for tilting the balance in favour of the ISPs, and the general view is that these should be split on a 50:50 basis. The COs cast doubt about the validity of using the French HADOPI as a comparator for Ofcom costs, many responses pointing to the different responsibilities of the bodies and suggesting that Ofcom should be able to perform its functions significantly cheaper.

- There was a consensus among COs that the risk of vexatious appeals and campaigns to overload the system was very real, raising the cost of the appeals process and making it more difficult for genuine appeals to get heard quickly. They felt a refundable, affordable fee was the best policy.

2. Internet Service Providers' response

11 responses were received from companies and intermediaries representing ISP and communications companies. Most ISP respondents (9) said that copyrights holders should bear all costs of notification and set up (and so simplify procedures and regulation); two of these mooted a fall back position of a 90:10 split. The remaining two respondents, including an ISP who is also a content owner, felt that 75:25 might still be appropriate, albeit with reservations about contributing to Ofcom's functions and the appeals process

Key points and concerns from ISPs

- ISPs strongly felt copyrights holders, as "sole beneficiaries" of the obligations, should pay all costs incurred by ISPs. Otherwise a 'copyright enforcement' tax would be imposed on innocent customers, cost sharing could reduce broadband uptake, slow down essential innovation needed to properly solve the problem of copyright infringement and distort competition between ISPs.

- According to ISPs, the "incentive" arguments for departing from an orthodox beneficiary-pays principle remained flawed and would, in effect, be an ISP (and subscriber) subsidy to rights holders' existing revenue streams, chilling the development of new business models. ISPs claimed they needed no additional incentive to keep their operating costs to a minimum or develop their commercial strategies.

- There were particular concerns by ISPs about the current uncertainty of scale and business forecasts, - especially important for imminent and significant capital expenditure decisions. To mitigate, rights holders might commit to making minimum levels of requests – or indeed pay ISP costs in advance.

- ISPs said there was little evidence why rights holders should be treated differently from, for example, law enforcement agencies which pay 100% ISP costs for their obligations on ISPs under the RIPA legislation.

- ISPs have different architectures, business models and customer profiles that are not susceptible to fixed level fees. This is especially so where there was a fragmented supply chain, involving intermediaries, before reaching the end consumer or business. Business chains involving Wi-Fi, libraries and universities would encounter similar problems.

- Those ISPs that serve entry level and new broadband subscribers were especially concerned that wider policy aims to promote digital inclusion will be affected. Competitive services for low-income customers are important.

- Mobile ISPs felt that their need to ascribe dynamic IP addresses in real time – "hundreds of mobile customers appear as a single public address" - would incur greater capital expenditure to maintain records that have no value or benefit elsewhere in their business (a 'dead asset') and put them at a competitive disadvantage.[1] Mobile providers apply a fair use policy, including traffic management and believe that they compete successfully against piracy–based alternatives.

- ISPs believe that while they might have control over the cost of the customer notifications process they have little locus in cost efficiency in other parts of the process - in particular the costs of Ofcom's functions and appeals. ISPs have little leeway in quality of evidence issues e.g. problems correctly identifying the subscriber were likely to be rare.

3. Consumer

Consumer Groups – four responses

These were focused on only two issues – the question of whether there should be a fee to access the appeals system, and where costs should fall.

[1] Unlike fixed ISPs, mobile operators allow many customers to "share" the same IP address at the same time. It is possible to use the TCP or UDP port number to identify which subscriber was linked to an allegation of copyright infringement, however this would require the mobile networks to install additional technology to allow them to do so. The process of connecting the private IP address used by a subscriber to the public IP address used at a point in time is called "mapping" or "natting".

Key points and concerns from consumer groups

- All consumer groups felt there should be no fee for appeals (although one suggested the appeals body could impose a cost if an appeal was deemed "frivolous"). The infringement is an *alleged* infringement and people should be able to challenge the allegation. Any fee would deter people from doing so.

- Two groups felt all costs should fall to copyright owners, one felt the ratio should be 80:20 (CO:ISPs). These two consumer groups argued that most broadband subscribers do not infringe copyright but any cost to the ISPs would be passed onto all their subscribers. These higher broadband costs could extend the digital divide further with the less well-off sections of society either discontinuing broadband or electing not to subscribe (this is a particular concern given the wider economic situation). The fourth group offered no opinion on costs.

4. Others

Legal societies– two responses

- Generally both were content with the overall approach and proposals. Both agreed with the 75:25 ratio and both felt there should be a fee to access the appeals system (with safeguards for the less well off).

- One respondent commented that Ofcom's estimated costs appeared high. Also it was suggested that eligible costs should include any "Ofcom audit" costs and that both capital and operational expenditure should be eligible.

Individual respondents (three)

The individual responses all focused on one or two issues only.

- The only common issue raised (by all three) was costs. All felt all costs should fall to copyright owners as sole benefactors from the obligations.

- One respondent felt there should be no appeal fee and one raised concerns over standards of evidence.

- (A common issue raised by consumer groups and individuals was that any cost falling on ISPs would be passed onto subscribers, the majority of whom do not file-share or have an interest in many of the creative genres.)

Other

- One research organisation/consultancy submitted a response. They felt all costs should fall to copyright owners and that there should not be a fee for appeals. In their view the 'flat fee' approach was flawed and the estimates of damage to the creative industry similarly flawed. Indeed they had serious reservations over the accuracy or methodology of the consultation and the Digital Economy Act.

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