



Cover note to the outline code

ON-LINE INFRINGEMENT OF COPYRIGHT

The initial obligations against online infringement of copyright, as set out in clauses 4 and 5 of the Digital Economy Bill, need to be underpinned by a code. The draft clauses set out the overall objectives and requirements of the obligations but do not provide the necessary level of detail to allow industry to discharge the obligations or for copyright owners to properly use these obligations.

Rather it has always been the intention that the detail of how these obligations will work in practice, along with the necessary consumer safeguards would be set out in an underpinning code. This is a fast changing area of technology and consumer behaviour and the processes behind the obligations need to be flexible and adaptable if the obligations are to remain proportionate and effective. Finally the regulations bringing the obligations into effect should be as light touch as possible, representing the minimal regulatory burden on industry.

It is hoped that industry will be able to come forward with a code (or parts of a code) that Ofcom can consult on and approve to underpin the obligations and in effect bring the obligations into force. We hope that in drawing up a proposed code industry will seek input from consumer groups.

If industry proves unable to do so, Ofcom is required to step in and produce, consult and impose a code. However Ofcom will only be able to impose its own code once it becomes clear industry cannot produce a code. Failure by industry to produce an acceptable code would delay the obligations coming into effect.

Leaving the development of the code to industry/Ofcom has two drawbacks. The level of detail contained in the clauses is of necessity sparse and it is clear that many involved in the Parliamentary scrutiny process are seeking more detail on what the code will cover and how it might operate. The time available for industry and other stakeholders to develop a code is limited, not least if the obligations are to be brought into effect with minimal delay.

This note therefore is intended to serve three purposes. Firstly, to provide greater clarity to the Select Committee as to what Government itself considers are the key areas for the code to cover. Secondly, to provide a rough template to help industry in developing a code and to hopefully ensure that the obligations can be brought in swiftly. Finally it provides a quick reference to all the requirements for the code currently set out in the Bill.

The outline code is drawn from a number of sources. The Bill itself sets out a number of elements the code must have and other optional elements. In addition the



Explanatory Notes, the consultation on unlawful file-sharing and the Government's response provide further detail on what the code should cover.

Finally we expect stakeholders themselves will identify issues that the code should cover, which will come to light either during industry discussions on the code or during the Ofcom consultation. In addition, we anticipate the code remaining a live framework, subject to review as parties affected by the code identify and propose changes based on experience. A list of all the elements so far identified and their sources is at Annex A.

This code will not cover any arrangements or requirements that may arise if and when a decision is taken to introduce a further obligation on technical measures. If a further obligation is introduced such arrangements and requirements may be a matter for a separate code or the initial obligations code may be amended.

BIS/DCMS
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ONLINE INFRINGEMENT OF COPYRIGHT – WHAT THE INITIAL OBLIGATIONS CODE MIGHT LOOK LIKE

Introduction

The initial obligations against online infringement of copyright, as set out in clauses 4 and 5 of the Digital Economy Bill, need to be underpinned by a code. It is hoped that industry will be able to come forward with a code (or parts of a code) that Ofcom can consult on and approve to underpin the obligations and in effect bring the obligations into force. We hope that in drawing up a proposed code industry will seek input from consumer groups.

If industry proves unable to do so, Ofcom is required to step in and produce, consult and impose a code. However Ofcom will only be able to impose its own code once it becomes clear industry cannot produce a code. This is consistent with the Government's view that industry should play the lead role in addressing online copyright infringement, with regulation providing a backstop where it is required to do so. Failure by industry to produce an acceptable code would delay the obligations coming into effect.

Producing this note is intended to serve two purposes. Firstly, to provide greater clarity to the Select Committee as to what Government itself considers are the key areas for the code to cover. Secondly, to provide a rough template to help industry in developing a code and to hopefully ensure that the obligations can be brought in swiftly.

The Bill itself sets out a number of elements the code must have and other optional elements. In addition the Explanatory Notes, the consultation on unlawful file-sharing and the Government's response provide further information.

Finally we expect stakeholders themselves will identify issues that the code should cover, which will come to light either during industry discussions on the code or during the Ofcom consultation. In addition, we anticipate the code remaining a live framework, subject to review as parties affected by the code identify and propose changes based on experience. A list of all the elements so far identified and their sources is at Annex A.

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Issues to be addressed in the code

1. Copyright infringement reports (CIRs)

a) What is a CIR?

The CIR is a report sent by a copyright owner to an ISP which details an alleged infringement of copyright. The new subsection (3) in clause 4 sets out what a CIR is and what it must contain (ie) that an infringement of copyright appears to have taken place, the description of the apparent infringement and supporting evidence. The code will add other requirements for example about the format of the CIR. It is expected the additional requirements would also include the manner in which it is sent to an ISP.

b) Who can issue a CIR?

This is left to the code to set out. One option would be to limit this to the copyright owner themselves. This approach has the benefit of ensuring that the copyright owner is taking responsibility for the issuance of the report and is accepting associated liabilities. In the context of compiling repeat infringer lists, ISPs will be expected to retain lists to allow individual copyright owners to identify those who have repeatedly infringed their copyright. Such process would be simplified were the issuance of copyright reports to be limited to copyright owners. It would also allow flexibility in cases where an individual copyright owner chooses not to issue reports to a particular ISP as a result of a discrete commercial arrangement of the sort we hope the legislation will encourage. However, many parts of the creative economy work through organisations such as collecting societies or trade bodies, and it may therefore be sensible for such bodies to provide a coordinating or processing role, even if they are not actually responsible for the issuance of the report. Also copyright can be licensed to other parties. We expect therefore that the code may allow copyright owners, their authorised legal representatives or the authorised copyright licence owner to be able to issue a CIR, provided that only one party can do so for any alleged copyright infringement (or else there might be multiple CIRs relating to the same incident).

At the very least for each CIR the ultimate copyright owner should be identified and, in nominating a third party to act on their behalf, agree to abide by the code. This is important given the need for Ofcom to be able to request information from copyright owners required in the production of the reports required under clauses 9 and 10.

In addition only those parties who abide by all the relevant provisions of the code or legislation should be able to issue a CIR – for example a copyright owner wishing to issue a CIR would have to agree to cover their share of any costs as set out in legislation or the code.



c) Standards of evidence required

It is in the interests of all parties involved that the standards of evidence associated with a CIR are as high and robust as possible. The Government wants the framework to ensure that notifications will only be sent to subscribers where there is real and strong evidence linking them to the alleged infringement. Copyright owners do not want the bad publicity and damage that significant false accusations would result in. Consumers and citizens want the re-assurance that notifications are only sent where there is strong evidence linking individuals with an infringement.

As a minimum we expect the code would require that the method of detection was via a robust and reputable technology (which was open to independent/Ofcom scrutiny), that a copy of the copyright material (or significant part thereof) was captured as part of the detection process, the copyright owner had verified that it had reason to believe that the usage identified was an infringement, the uploading IP address was captured and that an exact date/time stamp was taken.

d) Process for submitting a CIR to an ISP

ISPs do not want to have to handle CIRs in a wide variety of formats or processes. Apart from the additional costs, processing data in a range of formats increases the risk of error. It would make sense for copyright owners to be able to access a standard format and to a standard process. Whether one format would work for all ISPs or whether there would need to be ISP-specific formats (to allow for integration into existing ISP “business as usual” systems) is something the code might consider.

e) Notice to ISPs of expected volumes of CIRs

Government has made it clear to all stakeholders throughout that we expect significant volumes of notifications (and therefore significant numbers of CIRs) to be generated. This is a large-scale problem and it can only be addressed through large-scale activity and education, supported by the promotion of lawful services and targeted civil action, which itself requires an effective process for identifying the most egregious infringers. Handling such volumes of CIRs and notifications is likely to require significant investment by ISPs, potentially in both technical processing systems and staff. However in order that ISPs can plan ahead and budget they will need credible estimates of volumes of CIRs they can expect to receive from copyright owners in a given period.

Copyright owners themselves will have to budget for the level of enforcement activity they will undertake. The two main elements here are the actual costs of infringement detection and the flat fee they will be charged per CIR they send to the ISP. They will be able to calculate these costs in advance and therefore be able to inform the ISPs as a whole how many CIRs they will expect to generate in a given period. Details on



how costs incurred by the ISPs, Ofcom and the First Tier Tribunal will be provided through an Order.

f) Timescales for submitting and actioning CIRs

The ultimate aim of the legislation is to shift people's behaviour from the unlawful to the legal. In order to do so, the information and the education/enforcement activity needs to be current. Copyright owners should have a maximum time open to them to pass on the CIR to an ISP; similarly ISPs should have a maximum time to process and action the CIR.

g) Feedback to copyright owners

It will be important to know what happens to the CIRs received by the ISPs. All CIRs should either be processed (letter sent/subscriber added to the CIL/CIR allocated against a subscriber) or rejected as non code compliant. This would provide a control on the processes of both ISPs and copyright owners. One possibility would be for each ISP to routinely provide a summary report to each copyright owner who provided the CIRs, copied to Ofcom.

2. Notification letters from ISPs to subscribers

a) What information these must/may contain

The new subsection (5) in clause 4 sets out what the notification letter must contain but allows the code to add extra requirements. One option might be for the code to set out the format and language to be used under each element. The code could also allow for the tone and format to change for the second and subsequent letters sent to the same subscriber. A further area that the code may address would be advice or information about a subscriber could respond or appeal to a notification letter.

b) How many notifications should be sent, how they would be sent (post/e-mail or a combination thereof) and at what trigger levels

Research and real-world examples are limited but it is clear that multiple letters do result in greater numbers of individuals stopping infringing. Their other main advantages are it minimises the risk that notification letters do not reach the subscriber, and that it strengthens the case for copyright owners in the event of any court action as it demonstrates the subscriber had multiple warnings to change their behaviour. The downside is the additional cost and the risk that too many warnings without any consequences reduce the credibility of any deterrent. The BIS consultation on P2P file-sharing (June 2009) found that most respondents felt three letters an appropriate number.



One additional factor is the time period between the first letter and any later warning. The aim of the notifications is to allow individuals to change their behaviour. There therefore needs to be enough time between the first and second letters to allow them to take action.

The code will need to set out when the letters are sent. The first should be sent the first time a subscriber is linked to an alleged infringement. The second should only be sent after a period of at least x days from the first letter (to allow time for the subscriber to either stop infringing or take steps to prevent infringement (eg by securing a wireless connection or adding parental controls). If three letters were adopted, the third letter would act as the final warning.

The consideration for the code would be to strike a balance. Setting the trigger levels too high would decrease the credibility of action and in effect give infringers x amount of free content. Setting the level too low would result in far more “final warnings” which we anticipate would generate excessive numbers of costly appeals. Ironically this too would reduce the deterrent as we only expect copyright owners to take civil action against the most damaging of infringers and we would then have the situation of large numbers of subscribers receiving final warnings who then had no further action against them.

In effect we would expect the code to require ISPs to send letters on (eg) the first infringement; the 10th infringement (or x days after the first letter; whichever is the greater) and the 30th.

c) Ability of ISPs to tailor the message

We expect the code to allow some flexibility in some elements – for example where information is required on where to get legal content, it might allow an ISP to direct the subscriber to the ISP’s own legal offers.

d) No contact details for subscriber

There are some subscribers for whom ISPs do not have any form of contact details which would allow a letter to be sent (ie contact address, billing address or e-mail). Typically these will be pre-pay mobile phone subscribers or mobile broadband (dongle) users. At present this segment is not regarded as significant in on-line copyright infringement, although this might change over time.

The code might consider what steps or action an ISP should take when it cannot send a notification subscriber (ie) when it does not hold the postal address, billing address or e-mail of the subscriber.



3. Copyright infringement lists (CIL)

a) Nature and form of serious infringer lists – what data needs to be kept

The CIL will facilitate targeted civil action by copyright owners against the most serious alleged infringers. To help this targeting, the CIL held by ISPs should be standardised to allow easy comparison.

Copyright owners will only wish to take action in defence of their own material (eg Disney would only want to take action against individuals who infringed their copyright). The CIL should allow copyright owners to identify which anonymised subscribers are responsible for these infringements and to apply for a court order to obtain the personal details relating to these individuals.

The framework underpinned by the code must clearly be compliant with data protection and privacy laws. ISPs must ensure that their operation and maintenance of CIL's is compliant with those laws, as a minimum. Also the code should set out a time limit for data retention.

The code might consider what information should be included on a CIL in order to allow a copyright owner to obtain a court order securing access to the identity of the relevant subscriber.

b) Process for COs to see the CIL

Providing the CIL is most likely to be an automatic process, with the code specifying the number of CIR's per CO a relevant subscriber receives within a specific period required to trigger the CIL report back to the CO.

Any copyright owner (or their representative – see 1b) who has sent a CIR to an ISP should be able to require the ISP to provide the latest CIL relating to that copyright owner on a regular basis (eg monthly) for a fee to be determined in the Cost Order.

c) Trigger levels for including a subscriber on a CIL

It is our expectation that a subscriber would be included on a CIL – and therefore be included on the anonymised list provided to a copyright owner – after they had been sent the final notification letter (see 2b above) and they have failed to successfully challenge the notification within a specified period.

d) Subscriber rights with regard to a CIL

Under data protection and privacy legislation, individuals can request access to personal information held on them by an organisation. The CIL might fall into this category. The ICO could be approached for guidance which could be included in the



code. The code would need to set out the process and any charges, subject to compliance with the relevant law.

4. Code enforcement procedures

a) What constitutes a dispute

The code will need to set out the areas where one party to the code may have a dispute with another. Possible areas could include whether a CIR is “code compliant”; flat fee payment; volumes of CIRs etc. Only those disputes “in scope” should use the code’s dispute resolution procedure. The Bill itself sets out a definition of copyright infringement dispute in s.124E(6).

b) How disputes should be settled

There needs to be a credible code dispute resolution process. Some disputes may be minor and of a technical nature (for example whether one particular CIR was compliant or not). Other could be far more significant (eg non-payment of fees by a copyright owner). The code should consider who is best placed to resolve these or indeed whether all disputes should be referred to the same body. For code disputes the resolution should be binding (ie a condition that any party operating under the code has to comply with the outcome of the dispute resolution process), although there needs to be consideration of a final external route of appeal. The code might consider whether existing Ofcom processes might be used. Where Ofcom was also the enforcement body then the appeal against a decision would be a judicial review (JR). Where Ofcom had established a separate enforcement body, Ofcom would provide the backstop to the determination of the independent enforcement body. Again, any Ofcom decision would be subject to a JR challenge.

c) How one party might bring a complaint against another

The code might set out a simple one-size process to cover all disputes. However it might be more useful to have a number of standard processes to cover the more minor disputes (eg a standard process for checking whether a CIR is code compliant). It would also need to set out time limits for bringing a complaint under the code given the ephemeral nature of much of the data. A more controversial area would be whether a consumer could bring a complaint against a party (ISP, Ofcom or a copyright owner), rather than use the separate appeals route.

d) The penalties for code breaches and who decides/imposes them

The effect of the new section 124K in clause 14 is that Ofcom may impose a penalty on an ISP for a contravention of an initial obligation or a contravention of an obligation under s.124G(5). The new subsection (5) in clause 8 allows the code to provide who a penalty should be paid to.



5. Appeals procedure

a) How the independent body is set up and resourced

At this stage we are talking about the independent body set up by (but independent from as set out in s8(4)d) Ofcom. The “First Tier Tribunal” would only be required if and when it was decided to introduce a third obligation requiring technical measures to be applied.

The code would need to contain an estimate the level of likely appeals under the initial obligations and Ofcom would be expected to estimate, consequently, the level of resource required to serve these in compliance with the terms of reference.

The Bill sets out that the cost of the appeals body is shared between copyright owners and ISPs. There are two sets of costs – start-up costs and running costs. A Cost Order will need to set out how these are apportioned between the parties and this apportionment need not be the same for the two sets of costs (the former could be simply split 50:50 between ISPs and copyright owners; the latter could be apportioned according to the party that provoked the appeal).

b) How consumers might access the body and any costs

Consumers must be able to easily access the body. Given the limited nature of damage that consumer might suffer under the initial obligations there is some justification for the code to consider the possibility of all appeals via a standardised on-line form (to minimise costs and time delay) Any cost to consumers in accessing the body should not be such as to deter the genuine.

c) Terms of reference for the body

The code will need to set out the terms under which a consumer might appeal. It will also need to set out timescales for appeal (and consideration of appeals) and the ability of the body to set out remedies.

6. Scope

a) The threshold at which the obligations bite (on ISPs) and timescale over which it is measured

The new subsection (5) in clause 6 allows the code to set out criteria under which the obligations apply to ISPs. The Explanatory Notes suggest a formula based on the number of CIRs an ISP receives in a given period. The underlying intention is to ensure that only those ISPs where on-line copyright infringement is a problem need to comply with the obligations, in effect where the action required to tackle on-line copyright infringement is proportionate. Ideally the threshold should be such that only



those networks where infringement is a significant problem fall into scope. However agreeing such a threshold will be difficult

A number of copyright owners have been sending versions of CIRs to ISPs as part of a series of bi-lateral agreements. Industry is therefore best placed to provide information on what threshold might be appropriate.

The Explanatory Notes suggested a 3 month period. This would create problems in that at the start of the obligations, ISPs would have to wait 3 months before finding whether they were in scope. This might also cause problems in allocating costs. The code might consider whether a shorter period would be equally valid, although any approach on costs needs to be consistent with the approach to costs taken in the Order.

b) Period of grace for ISPs to comply once in scope

The code might consider whether once an ISP becomes in scope whether they should be allowed a period of grace before the obligations bite. For some ISPs there may be real unforeseen technical issues which require time to resolve.

c) How any interim period between obligations coming into effect and ISPs identified as being in scope is treated

This will depend on whether there is a threshold for ISPs and, if so, the length of the time over which the threshold is measured.

d) Set entry dates for inclusion under the code?

It is suggested that copyright owners be required to notify ISPs of expected volumes of CIRs on a six-monthly basis to allow ISPs to plan ahead (see 1e above). One possibility would be for the code to only allow copyright owners to “join” or leave every six months with the same applying to ISPs who enter into scope. Once signed up, a copyright owner would be locked in for that six month period. Again, this would need to be consistent with the Cost Order.

Under this scenario any copyright owner who wished to use the obligations, notify ISPs on expected volumes of CIRs and to agree to abide by the code would have to do so by a set date (say 1st April). They would then be liable for the relevant costs for the next 6 month period to 1 October. They could then either continue to use the obligations or opt out for the next six months and so on.

Those ISPs in scope would have to abide by the obligations and the code. However any ISP which breached the threshold criteria during a six month period would not be deemed in scope until the start of the next six month period.



Having two defined “entry dates” would simply forward planning and cost allocation; it would also offer ISPs coming into scope a period of grace.

7. Costs

At this stage it is not certain to what level of detail the Cost order might go into. However it is likely that some aspects might be left for the code to resolve. In any event the code would have to be consistent with any Cost order.

a) Handling of Ofcom and appeal body costs

The Cost Order might set out how these would be calculated and apportioned, with the process for how these costs are collected/payments made a matter for the code

b) Indemnification of ISPs by copyright owners

In the event of an ISP suffering damages or loss for example, due to action they took as a result of flawed or incorrect information supplied by a copyright owner via a CIR, the code allows that the copyright owner indemnify the ISP for those losses.

c) Penalties

See 6d above.

d) Compensation

The code might set out compensation for consumers who had suffered damage either as a result of flawed or incorrect data supplied by a copyright owners via a CIR or due to a failing in the process by an ISP which incorrectly linked them to an infringement.

e) Up front (flat fee) payments

The code might set out how copyright owners should pay the flat fee to ISPs. Alternative it could simply require that these are governed via a series of bi-lateral agreements between copyright owners and ISPs.

8. Information provision

a) Information required by Ofcom for reports, in determining the flat fee, or any other function

Ofcom will require information from both copyright owners and ISPs in carrying out their duties in relation to on-line copyright infringement. The code might set out the



different types of information required and the process by which Ofcom would receive the information.

Ofcom will most likely use existing information gathering powers in relation to ISP related information, but may require, through the code, additional information to be provided by participating COs - for example much of the information for the drafting of the reports will need to come from copyright owners – see 1b above.

9. Administration

- a) Establishment of any “body corporate”
- b) Code provisions must be objectively justifiable, proportionate, non-discriminatory and transparent



Annex A

From the Bill – things the initial obligations code must/may cover

Must (clause 8)

Means of obtaining evidence of infringement and standard of evidence to be included in a CIR

- Form of CIR
- Time limit for making a CIR
- Provisions about notification of subscribers – means by which ISP identifies subscribers – which reports ISPs must notify subscribers of
- Requirements about the form, contents and means of notification of subscribers
- How ISPs hold subscriber information and for how long
- Provision about contributions towards costs that are required to be included
- That Ofcom or a n other have function of administering and enforcing the code, including dispute resolutions (a n other must be sufficiently independent of ISPs and copyright owners (COs))
- A person has function of determining subscriber appeals independent of COs, ISPs and Ofcom.
- Arrangements for costs related to functions of administering, enforcing the code or determining subscriber appeals must be met by ISPs and COs
- Code provisions must be objectively justifiable, proportionate, non-discriminatory and transparent

May (industry code) (clause 6):

- Conditions that must be met for rights and obligations set out in copyright infringement provisions or code to apply in a particular case (s.124C(3)(a))
- A requirement for COs or ISPs to provide info/assistance to allow determination that a condition in clause 124C(3)(a) applies – (s.124C(3)(b))
- Condition that a right or obligation does not apply to a CO unless CO makes arrangements as to the number of expected notifications (s. 124C(4)(a)) and payment up front (s.124C(4)(b))
- Threshold de minimis level for number of CIR reports received by ISP during a period after code and legislation enters into force before rights and obligations apply at which point ISPs will have to fulfil obligations under the code and legislation in respect of CIRs which were received during that period (s.124C(.5)(a)and (b))
- Payment of penalties by ISPs (s.124E(5))
- CO indemnification of ISPs against any loss/damage resulting from failure of CO to comply with code or copyright infringement provisions (s.124E(5))



May (Ofcom code) (clause 7)

As above plus:

- establish bodies corporate
- determine jurisdiction of said bodies or for the purposes of the code of another person
- confer jurisdiction on Ofcom (but not in relation to subscriber appeals)
- allow for person with jurisdiction to make awards of compensation, direct reimbursement of costs, enforce awards or directions made under code
- any other provision for regulating the initial obligations (s.124D(4))

Explanatory Notes – other items to be covered in the code

- Para 48 Level of infringements to be classified a serious infringer (eg 50). Should this be within a specified period?
- Para 54 Time limits for making CIR (on COs) and for processing/actioning a CIR (on ISPs)
- Para 55 Sets out a suggested formula for thresholds “x number of CIRs received in a rolling 3 months period”)

HMG consultation and response to the consultation

- Number of notification letters (and at what trigger levels of infringing behaviour) eg 3 letters at CIR 1, 10 and 25 within a 3 month period.

Questions/issued raised by stakeholders not covered elsewhere

- Period of grace for MNOs – unlike fixed ISPs, MNOs do not expect to be in scope. However the lead time to install the necessary equipment is long. They are seeking a period of grace if/once they fall in scope to allow installation.
- Will SILs be maintained by copyright owner?
- Will the tone of notification letters change?