Online Infringement of Copyright (Initial Obligations) Cost-Sharing

About the Alliance

Established in 1998, the Alliance Against IP Theft is a UK-based coalition of 19 associations and enforcement organisations with an interest in ensuring intellectual property rights receive the protection they need and deserve. With a combined turnover of over £250 billion, our members include representatives of the audiovisual, music, video games and business software, and sports industries, branded manufactured goods, publishers, retailers and designers.

The Alliance is concerned with ensuring intellectual property rights are valued in the UK and that a robust, efficient legislative and regulatory regime exists, which enables these rights to be properly protected.

Introduction

The Alliance Against IP Theft maintains that, in relation to the costs associated with fulfilling the Initial Obligations as laid down in the Digital Economy Act, each 'partner' should be responsible for their own costs: copyright owners for the costs associated with investigating and detecting infringement, communicating this infringement to the ISPs, and any subsequent and required consumer awareness campaigns and legal action (given such action is clearly anticipated by the Act); and ISPs for the costs associated with processing the CIRs received from copyright owners, notifying their customers and maintaining the Copyright Infringement List.

We believe this solution is clear, transparent, accountable and non-discriminatory towards smaller copyright owners. It also more accurately reflects the benefits that both copyright owners and ISPs will gain from this process.

It also has the added benefit of not placing any financial or administrative barriers in the way of significant numbers of CIRs being generated – something which is absolutely vital to the success of the Initial Obligations and meeting the objective of reducing illegal file-sharing by 70-80% over two to three years. The system has to be affordable to all wishing to participate.

Question 1: Is the list of included cost items correct? What items should be added or removed? Please give reasons.

The Alliance does not believe the list of cost items is complete. While all of the costs relating to ISP activity in meeting the initial obligations set out in the Digital Economy Act are included, copyright owners' significant investment in detecting and reporting infringing activity is not included. This is manifestly unfair.

These costs are not 'discretionary' as the consultation document asserts. They are not additional to the workings of the obligations – but are in fact absolutely fundamental to them. They are costs copyright owners must incur because of the vast level of infringement taking place via the services provided by ISPs.

In addition, it is difficult to marry such costs not being included in the list of cost items for the purpose of deciding how such costs are to be shared with the, perfectly correct, comment at 5.5 that the level of infringement detection needs to be at such a level to generate significant numbers of CIRs. It is nonsensical to make such a connection between detection and the success of the obligations and then exclude the costs of this critical part of the process. These costs are clearly unavoidable.

The consultation attempts to justify the exclusion of detection costs on the grounds that 'both ISPs and copyright owners will bear additional costs as a result of these obligations' (5.6). While this is certainly true of copyright owners (given detection and legal costs), it is hard to see where the balance will come from in relation to any additional costs to ISPs, which are directly associated with the working of the Initial Obligations in the same way as those which fall to copyright owners.

The same reasoning also applies to litigation costs and the costs of investing in education campaigns that copyright owners are required to undertake, and which will be assessed by Ofcom in its Progress Reports Therefore, these costs should also be included.

In relation to the specifics outlined in s4 of the SI, we assert that:

- The costs associated with s4(2)(d) and (e) are the same and as such should be listed as a single cost item.
- If s4(2)(g) is to remain as an included cost more information is required on how such calls are to be handled by an ISP and how these enquiries relate to the appeals process which is subject to a separate cost allocation. In particular, we would want clear assurances that should calls from subscribers be used by an ISP to promote new services in a bid to generate new business from that subscriber then the cost of processing that call / enquiry would not be attributed to the copyright owner.
- It needs to be made clear within s4(3) that any costs an ISP expends on general communications and marketing around the general provisions of the Act are excluded.

Question 2: do you think this is the right approach to the sharing of notification costs? If not, what should it be? Please give reasons and any supporting evidence.

The process would be made far simpler if 'costs lie where they fall'.

As indicated above, we do not think a flat fee per notice is the right approach to the sharing of notification costs. Such an approach merely serves to create additional, complex, issues, which are simply impossible for copyright owners to answer. These include the need for:

- Copyright owners to say how many CIRs they are planning on sending before knowing how much the flat fee for each CIR will be; and
- Copyright owners to be able to say how many CIRs they will send to each individual ISP

If a copyright owner is not already detecting infringement, in the method anticipated, when the Code comes into force, and many copyright owners are not, it is simply impossible for them to be able to know

how many CIRs they will send, let alone how these may be split across the different ISPs. This is for the simple reason that, until a copyright owner starts detecting, it cannot know the extent of infringement of its copyright works via illegal P2P.

In addition, the proposed approach based on upfront payments in turn requires a mechanism to deal with under and over estimates of CIRs and a need for Ofcom to monitor and audit the actual costs the ISPs are incurring in relation to what they are recouping via the flat fee.

The Alliance strongly believes that if each party were responsible for its own costs then these issues would not arise and would make the process more simple, transparent and accountable.

Question 3: do you think the 75:25 ratio is the correct one? If not, what should it be? Please give reasons and any supporting evidence.

As discussed above, with the absence of detection costs in the cost list, we do not accept the proposal that costs are split 75:25 in favour of the ISPs.

The expectation that copyright owners will be required to bear almost the entirety of the costs of this process fails to take account of the benefits ISPs will draw from both the reduction in infringing activity on their networks and the significant marketing opportunity the initial obligations provides, particularly for ISPs which either already have, or are planning to have, their own legal content services.

It is clear that for the initial obligations phase to be successful, so that a continuation onto technical measures is given a chance of being avoided, ensuring a sufficient volume of CIRs are generated is vital. The ultimate objective of this process is to deliver widespread behavioural change which can only occur if letters are sent on a mass scale. For this to take place significant numbers of CIRs need to be sent to ISPs, which in turn relies on copyright owners undertaking significant levels of investigation and detection.

This not only increases the costs for copyright owners (providing further proof of how these costs are not 'discretionary') but crucially, if the costs of either a) participating in the process – a particular concern for smaller rights holders which will be discussed later or b) detecting and issuing CIRs on the levels required, are too high, then there is a danger that copyright owners may be priced out of the process.

Question 4: do you think this is reasonable? Do you have an alternative formulation that addresses the issue in a more effective way? Please give reasons.

This section attempts to address two separate, but connected, issues.

1. Estimation of Ofcom's costs
2. Recuperation of Ofcom's costs

With regard to the estimate given of Ofcom's costs, without a more detailed breakdown it is difficult to comment on whether we agree or not that Ofcom's costs will be of similar scale to those incurred by HADOPI in France. However, initial thoughts are that Ofcom's costs will be significantly less given what HADOPI actually is. HADOPI will:

- Match IP addresses with the identities of the subscribers
- Track repeat infringers
- Monitor piracy and the legal market
- Grant certificates to legitimate services

- Monitor technological progress in the field of content protection
- Report annually on its activities and the meeting of the obligations
- Hear initial appeals

The complex cost formula proposed also increases costs for Ofcom which should have a bearing on any final decision.

Also, while we do not object to the provision in the draft order for Ofcom to recover its costs over a two year period, we would appreciate further information on why Ofcom's costs are estimated to be higher simply because it has to work faster, and a detailed breakdown on what proportion of Ofcom's fixed costs are to be transposed into the Initial Obligations process.

Question 5: do you think the broad 75:25 cost split should be used to apportion the cost of the regulator functions and appeals? If not, why not and how should they be funded?

Whilst we accept that Ofcom's costs as regulator and the cost of establishing and administering the appeals process should be met by copyright owners and ISPs, we strongly disagree that these costs should be split 75:25 in favour of the ISPs for two reasons.

First, it is important that no single interest is seen as 'owning' the process. Having the funding of the appeals body and Ofcom so heavily weighted towards copyright owners surely raises questions over this neutrality.

Second, section 13(3) and (4) of the Digital Economy Act provides for three grounds of appeal:

1. That the apparent infringement to which the report relates was not an infringement of copyright;
2. That the report does not relate to the subscriber's IP address at the time of the apparent infringement.
3. That either the copyright owner or ISP contravened the Code or an obligation regulated by the Code.

From this it is very clear that a subscriber's ground for appeal may just as likely be based on a fault by an ISP as a copyright owner. Given this, it would be grossly unfair for copyright owners to be expected to pay the majority of the costs of appeals. It would be akin to copyright owners paying for someone else's mistake and provides little incentive on the part of ISPs to ensure they are as accurate as they can possibly be.

Question 6: should subscribers have to pay a fee to access the appeals system? If so, at what level and how should economically vulnerable people be protected? Please give reasons and any supporting evidence.

While access to the appeals process cannot be restricted, we agree with the comments in 5.21 that having a system which was free to access would leave the process open to abuse by frivolous appeals which would likely be stimulated by organisations with the ultimate objective of overwhelming the system.

This is a unique system and one which could see hundreds of thousands of people launch frivolous appeals following internet campaigns. This would make it exceedingly difficult for those with genuine appeals to be heard in a swift and effective manner. Were this to be allowed to happen, the integrity of the entire system could be put in doubt.

Therefore, there has to be some mechanism to guard against such activity. One way may be found in fining those whose appeals are not only unsuccessful, but are deemed by the Appeals Body to have been totally unfounded and initiated in bad faith. While this may have the benefit of not restricting entry to the appeals system, collecting such fines from people unwilling to pay would throw up numerous other problems.

A further solution is for there to be a fee levied on appeals. The levelling of such a fee is anticipated in the Act in s13(7) and may at the discretion of the person deciding the appeal be reimbursed – with the subscriber's reasonable costs met – if the appeal is determined in favour of the subscriber.

Question 7: Does the Order achieve all these objectives? If not, please specify which aim(s) you feel the Order fails to achieve and why.

As outlined above, we reject the assumption that ISPs should have the "bulk" of their costs covered by copyright owners.

It is wrong to assert that it will only be copyright owners that benefit from this process and therefore copyright owners should carry the majority of costs.

Even Charles Dunstone, the head of Carphone Warehouse, stated in an article in the Daily Mail that reducing online infringement would benefit the company, saying: "for the record, we make no money out of copyright infringement. The extra traffic costs us money as we have to add additional capacity to the network to carry the data"[1].

Furthermore, a study by Ovum, commissioned by the BPI, assesses that if ISPs launched their own music service it would reduce churn by 10% over 5 years, with a positive impact of $162m[2].

ISPs have built and expanded their services by offering access to content – and increasingly rich media content such as films and TV programmes. In fact, only earlier this month BT announced that a key objective for the coming year was to enhance their TV offering[3]. Their pricing structure also includes higher pricing for higher bandwidth usage. This means that they have a direct interest, and role to play, in ensuring their customers are accessing that content legitimately and not using the service to conduct unlawful activity. Part of this responsibility must manifest itself in bearing some of the costs of ensuring their services are being used legitimately.

Copyright owners already invest millions of pounds annually investigating incidents of infringement. There is also an expectation that copyright owners will be taking targeted legal action – using the repeat infringer database – which, again, given the list of costs to be shared that this consultation anticipates, is a cost which falls squarely on copyright owners. The obligations are designed to create a much-needed partnership between ISPs and copyright owners in tackling online copyright infringement and it can only be a true partnership if costs are shared fairly.

In addition, we have not seen any evidence to justify Ofcom setting different fees for different groups of ISPs.

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[1] Daily Mail 17 Jan 2010 http://www.dailymail.co.uk/money/article-1244025/MONDAY-VIEW-The-copyright-crackdown-pay-for.html

[2] "Is there a commercial argument for ISP music services" Ovum, December 2009

[3] http://www.btplc.com/News/ResultsPDF/q410release.pdf

Question 8: If you answered "no" to Question 7, please set out how you think the order should be changed.

The order needs to be amended in the following ways.

1. The following costs incurred by copyright owners should be added to Section 4(2):
    a. Investigating and detecting infringing activity for the purpose of generating copyright infringement reports
    b. Litigation taken under the Initial Obligation Code
    c. Education awareness campaigns designed to promote the provisions contained within the Initial Obligations Code
2. Section 4(4)(b) – amended to allow for a fairer allocation of costs between ISPs and copyright owners
3. Section 5(2)(c) and (d) – amended so that Ofcom's costs (including those of the Appeals Body) are met 50:50 by copyright owners and ISPs
4. Section 6(1) – amended to allow copyright owners to pay retrospectively to ensure small copyright owners and those copyright owners not already undertaking detection are not discriminated against.
5. Section 7(4)(c) and (d) – amended to ensure these costs are met 50:50 by copyright owners and ISPs.
6. Section 2(a) – amended to say that "notification period" is three months (see answer below)

Question 9: Do you agree with the process that the Order establishes in terms of when copyright owners may participate?

Question 10: does this process ensure that small copyright owners are able to access the system? If not, what alternative provisions could be made?

In response to Questions 9 and 10, the draft order defines "qualifying copyright owners" as a copyright owner who has given an estimate of the number of copyright infringement reports it intends to make in a notification period to a qualifying ISP.

The "notification period" is defined as a period beginning on a day determined by Ofcom in accordance with the Code and ending with the next 31st March or any subsequent period of twelve months beginning on 1st April.

In addition, the Order requires **each** qualifying copyright owner to know in advance (and pay for) how many CIRs they will be sending to **each** qualifying ISP **at the start of each notification period** (assumed to be twelve months).

Such a process:

1. Assumes all copyright owners not only know how many CIRs they expect to generate but what the likely split is to be across ISPs. While some Alliance members may be able to make such an assumption based on past and continuing detection, many Alliance members, particularly the smaller copyright owners, do not currently undertake such extensive detection. This makes it incredibly difficult to make such an assumption. In addition, it would be hoped that over time,

there would be a reduction in copyright theft, meaning it might be difficult to predict how many CIRs would be needed in the final quarter of a year.

2. Requires copyright owners to know on a yearly basis whether they will be using the system, and therefore detecting for infringing content, for the coming year. Again, for smaller copyright owners this will not be an easy process.

Most importantly, both of these are dependent on costs. If the flat fee per CIR is set too high small copyright owners may be priced out of using the legislation. For larger rights holder, the quantity of CIRs they will send will be similarly dependent on the level of the flat fee given annual budget constraints. This is crucial given that for the Initial Obligations to work (and therefore make a progression to technical measures unnecessary) notifications need to be sent on a mass scale – which in turn requires copyright owners to issue significant amounts of CIRs. For copyright owners, it is simply unreasonable to expect them to make any firm commitments on likely numbers of CIRs without first knowing how much it is going to cost them.

While we accept that some estimates will have to be made in order that the ISPs systems are able to cope, to make this a requirement of all copyright owners wishing to participate in the Initial Obligations is unreasonable and impractical. It may be that estimates can only be generated by those copyright owners that already conduct extensive detection.

In addition, 12 months is too long for the "notification period". While some copyright owners may not plan what content they wish to protect over such a long time frame, the more pertinent issue relates to the Code's ability to bring into scope ISPs which have become 'safe havens'.

As we understand it, the Code will establish a threshold by which ISPs will be judged against when deciding whether they are required to abide by it. If some ISPs are 'in scope', there will be others that are not. A process is needed to bring ISPs that may presently sit outside the Code in, should there be a migration of infringement to such networks. This process must be as swift as possible. Allowing infringement to carry on over such ISPs networks for what could in practice be nearly a year is unacceptable. On this basis, we recommend each notification period runs for three months. This would also reflect the quarterly reports required of Ofcom.

Question 11: The impact assessment sets out the costs as we understand them at this stage. Does this represent a reasonable assessment of the position? Please provide any supportive evidence for your comments.

There is considerable evidence to suggest that the cost of implementing the proposals will be substantially less than many ISPs claim and would bring significant benefits to them (NERA, LECG and Sweet Consulting) which we believe the Impact Assessment fails to properly calculate

Alliance members

Anti-Counterfeiting Group
Authors' Licensing and Collecting Society
British Brands Group
BPI (British Recorded Music Industry)
British Video Association
Business Software Alliance

Cinema Exhibitors Association
Copyright Licensing Agency
Design and Artists Copyright Society
Entertainment and Leisure Software Publishers Association
Entertainment Retailers Association
Federation Against Copyright Theft
Film Distributors Association
Motion Picture Association
Premier League
Publishers Licensing Society

Associate members:
Anti-Copying in Design
British Jewellery, Giftware & Finishing Federation
Video Standards Council

At the time of this submission, the BSA has not completed its internal consultation on the submission and therefore has not been able to endorse it.

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