



**Consumer
Focus**
Campaigning for a fair deal

Consumer Focus response to the consultation on online infringement of copyright (initial obligations) cost sharing

Introduction

Consumer Focus is the statutory independent watchdog for consumers across England, Wales, Scotland and (for postal consumers) Northern Ireland.

Our role is to represent the interests of consumers, particularly those who are disadvantaged. We operate across the whole of the economy, persuading businesses, public services and policy makers to put consumers at the heart of what they do.

Consumer Focus has been working on copyright related issues through our predecessor organisation, the National Consumer Council. We want to see a digital economy characterised by competitive, dynamic and innovative markets to which consumers have meaningful access and in which they are empowered to make informed choices. And we want to see a copyright culture that supports this by striking a fair balance between creators, investors and consumers.

In response to the ‘[Online Infringement of Copyright \(initial obligations\) cost sharing](#)’ consultation issues by the Department for Business, Innovation and Skills (BIS), Consumer Focus recommends that the Government imposes the full cost of the obligation for Internet Service Providers (ISPs) to notify subscribers of apparent infringements of copyright identified by copyright owners. This includes the cost arising to ISPs, to Ofcom and from the appeals process that needs to be established.

Consumer Focus furthermore recommends that the Government imposes no fee on consumers for using the appeals mechanism that will allow them to defend themselves against the allegations made by the copyright owners. If they had to bear any cost consumers could be prevented from making legitimate appeals. It appears unacceptable that the Digital Economy Act requires consumers to prove their innocence in the face of allegations made by copyright owners, it would be equally unacceptable for the Government to ask consumers to pay for this privilege.

Recommendations:

- Impose the full cost associated with the obligation to notify subscribers of copyright infringement reports submitted by the copyright owners, this includes the cost arising to ISPs, Ofcom and from the appeals process
- Impose no fee on consumers for using the appeals process

Consultation background

This consultation concerns the sharing of costs relating to the initial obligations on online infringement of copyright. The Digital Economy Act 2010 imposes two obligations on internet service providers (ISPs):

- ISPs will be required to send notifications to subscribers whose Internet Protocol (IP) address has been identified in relation to alleged infringements of copyright through peer-to-peer filesharing
- ISPs are to maintain (anonymised) records of the number of times an IP address has been so identified and to maintain lists of those most frequently identified and provide copyright owners with lists on request

Both obligations would be underpinned by an initial obligations code drawn up and approved by Ofcom (consultation is ongoing).

Digital Economy Act 2010: requirements in relation to cost

This consultation sets out options for provisions, specified by order, to be included in the initial obligations code; it covers payments towards costs incurred under the code to ISPs, copyright owners and Ofcom, as well as the any cost arising in relation to subscriber appeals.

Section 12 (124J) of the Digital Economy Act 2010 provides that the initial obligations code must make 'any provision about contributions towards meeting costs that is required to be included by an order under section 124M;' and states that there must be 'adequate arrangements under the code for the costs incurred by OFCOM in administering and enforcing the code to be met by internet service providers and copyright owners.'¹

Section 13 (124K) requires that the initial obligations code makes adequate arrangements 'for the costs incurred by that person in determining subscriber appeals to be met by internet service providers, copyright owners and the subscriber concerned.'²

Section 15 (124M) establishes that,

'(1)The Secretary of State may by order specify provision that must be included in an initial obligations code or a technical obligations code about payment of contributions towards costs incurred under the copyright infringement provisions.' And that 'Any provision specified under subsection (1) must relate to payment of contributions by one or more of the following only – (a) copyright owners; (b) internet service providers; (c) in relation to a subscriber appeal or a further appeal by a subscriber to the First-tier Tribunal, the subscriber.'³

In the absence of an order, costs incurred by the various parties would fall where they lie, ie ISPs, copyright owners would all be responsible for meeting their own costs. ISPs would face therefore an open-ended commitment to process and action notifications. Furthermore Ofcom would be unable to recover costs and would require direct funding from Government.⁴

¹ **Digital Economy Act 2010**, Section 15 (124M), subsection 1 and 2

² **IBID**, Section 13 (124K), subsection 7(c)

³ **IBID**, Section 15 (124M), subsection 1 and 2

⁴ **Online Infringement of Copyright (initial obligations) cost sharing**, Department for Business, Innovation and Skills (BIS), March 2010, p8

Previous Government: proposal for sharing of cost

The previous Government proposed that the:

- 'Copyright owners should bear all their own costs in detecting infringements, sending the information onto ISPs in the required form and to the required standard, ie sending the copyright infringement reports (CIRs), and the cost of any legal action'
- 'ISPs and copyright owners should share the cost of processing the CIRs, maintaining the infringer lists and issuing of any notifications to subscribers (the notifications costs). The mechanism for this was to be via the payment of a 'flat fee' by the copyright owner for each CIR sent to an ISP'
- 'ISPs and copyright owners should share the costs incurred by Ofcom in relation to the provisions of' the Digital Economy Act Sections 3 to 16'

The previous 'Government produced a draft Statutory Instrument which set out the proposed format and structure for cost allocation. It set out the Government's working assumption that the notification costs should be shared between copyright owners and ISPs in the ratio 75:25.'⁵

Impact assessment: Cost incurred by ISPs and copyright owners

The consultants Mott MacDonald produced a report for BIS which examined the various cost elements. This identified the main cost elements that ISPs will incur in meeting their obligations as:

Contributions to the development of the Code:

- The detailed specification of the necessary standards for use by all operators in support of the Initial Obligations Code
- The detailed specification, development and operation of systems, either by the ISP itself or payments to a third party to act on behalf of the ISP, to receiving, storing and obtaining subscriber ID relating to each CIR

The processing of CIRs:

- Manage IDs
- Send notifications to subscribers according to an algorithm to be specified in the Initial Obligations Code
- Compile and send lists to digital rights owners (DROs) according to criteria to be specified in the Initial Obligations Code
- Provide documentation in support of Court cases
- Answer questions from subscribers about notifications that they have received
- Maintain appropriate security and access control for data to meet the requirements of the Data Protection Act and any additional requirements
- Monitor regulatory compliance⁶

⁵ **IBID**, p11 and **Draft Statutory Instrument on Costs**, Department for Business, Innovation and Skills (BIS), January 2010

⁶ **Online Infringement of Copyright (initial obligations) cost sharing**, Department for Business, Innovation and Skills (BIS), March 2010, p12

The cost to copyright owners of detecting ‘apparent infringement’ is not known, but the copyright owners claim that it is high.⁷

The impact assessment accompanying the consultation estimates the cost as follows:

Table 1: Costs to ISPs and copyright owners (BIS estimate)	Amount
One-off capital cost to ISPs	£35m
Average annual costs of notification	£7.5m-£24.5m
Average annual costs of running a call centre to deal with queries about notification letters	£60,000
Average annual costs to consumers	£2m-£9m
Average annual capital and operating cost to mobile network operators	£19m
Average annual operating costs to ISPs	Not quantifiable

The cost to Ofcom, and the cost of the appeals mechanism, has not been quantified. The consultation document does state that ‘a rough guide is provided by similar proposals in France to tackle on-line infringement of copyright, which are budgeted at £5 million – £6 million in the first year.’⁸

Appeals: consumer contribution towards cost of appeal

The Digital Economy Act 2010 requires the establishment of an independent body to hear subscriber appeals. Although this will not be part of Ofcom, it is expected that Ofcom will be responsible for establishing the body and channelling costs associated with its establishment and operation. During the passing of the Digital Economy Bill through the House the previous Government always stated that subscribers must be able to access a robust appeals mechanism and that cost should not deter those who feel they have a genuine case. Section 15 allows for the order to provide that subscribers need to contribute towards the cost of appeals although it does not specify they must.⁹

⁷ **IBID**, p13

⁸ **IBID**, p43

⁹ **IBID**, p18

Consultation response

‘Copyright enforcement tax’ for ISPs and consumers

Consumer Focus objects to the concept of ISPs bearing any cost associated with the enforcement of a third party’s civil claims against consumers. In civil copyright infringement cases copyright owners are awarded damages and ‘additional damages’ in relation to any benefits that may accrue to the defendant by reason of the infringement.¹⁰ The notification stage does not prohibit copyright owners from recovering the cost associated with copyright infringement via the courts. The Digital Economy Act envisages copyright owners enforcing their own civil claims in the courts, and Ofcom, among others, will be required to produce regular assessments of the extent to which copyright owners have brought legal proceedings against subscribers in relation to whom copyright infringement reports have been made.¹¹ Even before the Digital Economy Act 2010 received royal assent, copyright owners had the option of:

- sending notifications of apparent infringement to subscribers (as part of an MOU with ISPs)
- obtaining the subscriber details relating to an IP address from ISPs through a Norwich Pharmacal Order
- taking those subscribers to court for civil or criminal copyright infringement

Consumer Focus fundamentally questions the wisdom of establishing a parallel enforcement process for civil claims of copyright infringement against consumers, in addition to the existing process for civil claims and the process for criminal claims. At the very least, ISPs, and by extension UK consumers at large, should not be expected to pay any of the cost associated with the notification process established by the Digital Economy Act 2010.

Consumer Focus urges the Government to ensure that UK broadband consumers, the majority of who do not engage in copyright infringement through peer-to-peer filesharing networks, do not pay a de facto ‘copyright enforcement tax’ on an essential service. To this end, the Government must ensure that those copyright owners who utilise the notification process bear the full cost arising to ISPs and Ofcom from the process, as well as technical measures that may be introduced at a later date. The cost to ISPs arising from the notification process would have a negative impact the achievement of universal access to the internet, and on ISPs’ ability to implement the next generation of broadband.

The cost imposed on ISPs, for the enforcement of copyright owners claims of civil copyright infringement by consumers, is significant and will lead to an increased retail price of broadband, in turn pricing a significant number of consumers out of access to broadband in their home. The impact assessment for the Digital Economy Act 2010 states that,

‘Following our assumption that annual costs to ISPs increase by £6-£20 million per year and that this cost is fully transferred to consumer prices...

¹⁰ Hector MacQueen, Charlotte Waelde & Graeme Laurie, **Contemporary Intellectual property: Law and Policy**, Oxford University Press, 2008, pg.904

¹¹ **Digital Economy Act 2010**, Section 8 (124F), subsection 5(f)

This represents an increase of the annual price between 0.2% and 0.6%.¹²

The first impact assessment for the Digital Economy Bill stated that

‘Studies on the price elasticity of demand have shown that demand for broadband is not very sensitive to price increases. Nonetheless, we estimate that this cost would have a relatively small but permanent effect of reducing demand for broadband connection by between 10,000-40,000. This would represent additional revenue lost by the ISP industry between £2 and £9 million per annum.’¹³

The provisions of the Digital Economy Act relating to copyright infringement through peer-to-peer filesharing networks have been introduced primarily to benefit the copyright owners, who have lobbied aggressively for the previous Government to intervene on the basis that will bring significant financial benefits to their industry. The impact assessment produced for the Digital Economy Bill estimated benefits to copyright owners as a result of recovered displaced sales at £200m per year, with no benefit arising to ISPs or other industries that depend on the provision of internet access. It seems reasonable that those who benefit from the legislation should meet the costs, especially if the cost arises from the enforcement of their claims of civil copyright infringement by consumers.

If the full cost of the notification process is not imposed on the copyright owners, who choose to use the process established by the Digital Economy Act 2010, there is no incentive for the development of new services to support the online market. Copyright owners will find it cheaper to enforce copyright measures than to invest in the growth of the legal market online.

The ultimate aim of the notification obligations is to migrate the majority of consumers engaged in copyright infringement through peer-to-peer filesharing towards the legal market in copyrighted content. However, it is still not clear whether the copyright owners are fully committed to the success of the notification stage. A minimalist approach to the notification obligation, that is the sending of notification without a conscious promotion of legal alternatives, will not achieve the desired reduction in copyright infringement or growth of the legal market online. We are at this stage concerned that some copyright owners do not wish to see the notification stage succeed in reducing copyright infringement so that they can ask the Government to introduce the technical obligation as soon as possible. Therefore the allocation of cost is vital in ensuring that the copyright owners are incentivised towards achieving the goals of the notification obligations.

Recommendation:

- Impose the full cost associated with the obligation to notify subscribers of copyright infringement reports submitted by the copyright owners, this includes the cost arising to ISPs, Ofcom and from the appeals process

¹² **Digital Economy Act 2010 Impact Assessments**, BIS, IPO & DCMS, April 2010, pg.76

¹³ **Digital Economy Bill Impact Assessment**, BIS, IPO & DCMS, November 2009, pg.69

Appeal fee

Consumer Focus opposes any attempt to impose a cost on subscribers for appealing against a copyright infringement report, which is an allegation by the copyright owner that copyright infringement has occurred on the IP associated with the subscriber account. It is unacceptable that consumers should have to go through a no doubt stressful administrative appeals process to defending themselves against allegations made by copyright owners, and under no circumstances should consumers be expected to pay for it. We are concerned that any fee for appeal will price consumer out of bringing legitimate appeals. This consultation, issued by the previous Government, asks how vulnerable people should be protected in relation to possible appeal fees, but has not quantified the likely social and economic impact of the proposed fees, and fails to make any proposals in terms of means testing.

Any attempt by the Government to impose an appeal fee on accused consumers needs to be accompanied by a full impact assessment so that consumers are not priced out of their right to appeal or are put at a disadvantage relative to the copyright owners, who in many cases will have a legal team at their disposal.

The bill currently provides that any copyright infringement report made against subscribers can be used as the basis of imposing a technical sanction against a subscriber. It is hence vital that consumers have real and meaningful access to justice and that they are not prevented from appealing by the cost imposed on them.

As we have seen with the actions of Davenport Lyons and ACS law, receiving letters on such matters may be distressing, and subscribers may not immediately know what to do.¹⁴ Subscribers will have no right to legal aid, so will have to pay for all legal or technical advice themselves. Given the highly complicated and technical nature of the evidence advanced against them, as well as the difficulty in proving WiFi hijacking or unauthorised access by a third party to the internet connection, it will almost certainly be necessary for consumer to take some advice before appealing. This in itself may prevent consumers from pursuing legitimate appeals and while there is a need to reduce frivolous appeals, if there is such thing, the Government needs to clarify how it will be ensured that subscribers will have access to the information they need to defend themselves, and be able to afford an appeal.

Recommendations:

- Impose no fee on consumers for using the appeals process

¹⁴ Chris Williams, **Major law firm drops filesharing threats - Staff continue 'bullying' at smaller outfit**, The Register, 12 May 2009



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