



**Consumer
Focus**
Campaigning for a fair deal

Consumer Focus response to notification of online infringement of copyright initial obligations sharing of cost order

December 2010

Regarding the **Draft Statutory Instrument, 2010 No.0000 Electronic Communications, The Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2011**, as notified to the European Commission under the Technical Standards Directive, Consumer Focus would like to make the following submission under Article 6 of the Technical Standards Directive (Directive 98/34/EC), as amended by Directive 98/48/EC, which states that:

'With respect to rules on services, the Commission and the Committee may consult natural or legal persons from industry or academia, and where possible representative bodies, capable of delivering an expert opinion on the social and societal aims and consequences of any draft rule on services, and take notice of their advice whenever requested to do so.'¹

Consumer Focus is the statutory independent watchdog for consumers across England, Wales, Scotland and for postal consumers in Northern Ireland. Our role is to represent the interests of consumers, particularly those who are disadvantaged. Consumer Focus has been actively working on issues relating to copyright enforcement in relation to peer-to-peer filesharing since 2008. We work on copyright enforcement under our general duty to represent the interests of consumers and our duty to represent disadvantaged consumers in particular. In 2009 and 2010 our policy work has focused on the 'online infringement of copyright' provisions, Section 3 to 18, of the Digital Economy Act 2010.

The Cost Order notified to the European Commission is made under the powers conferred by section 124M and 402 of the Communications Act 2003. The Cost Order specifies provisions that must be included in the initial obligations code about payment by copyright owners and internet service providers of contributions towards costs incurred under the copyright infringement provisions, section 124A to 124N Communications Act 2003, as amended by section 3 to 16 of the Digital Economy Act 2010.

The UK intends to notify an initial obligations code, which would implement section 3 to 16 of the Digital Economy Act, to the European Commission shortly. We have serious concerns about the draft initial obligations code and have provided Ofcom with detailed comments (for more information see **Consumer Focus response to Ofcom consultation on Digital Economy Act 2010 Draft Initial Obligations Code**). We intend to make a detailed submission on the initial obligations code as and when it is notified under the Technical Standards Directive and our submission to the Commission at this stage only concerns the Cost Order.

¹ **Directive 98/48/EC**, amending Technical Standards Directive 98/34/EC, 1998, Article 3, amending Article 6 of Directive 98/34/EC

In relation to the Cost Order that has been notified, we have the following concerns:

- that the notification of the Cost Order is premature, given that the UK Government is currently not able to provide robust estimates on the cost of implementing the initial obligations
- that section 3 to 16 of the Digital Economy Act should have been notified under the technical Standards Directive
- that the cost imposed on Internet Service Providers (ISPs) will increase broadband retail prices for all consumers, leading to low income consumers being priced out of internet access service
- that the initial obligations code will reduce internet access service through Wi-Fi as a result of the cost imposed on Wi-Fi providers, who will be classified as ISP or subscriber
- that the Impact Assessment accompanying the Cost Order does not provide a sufficient rationale for imposing any cost on ISPs
- that the Impact Assessment accompanying the Cost Order fails to establish how the cost split, or the initial obligations, are to 'facilitate progress towards the desired outcome of socially appropriate investment in content'
- that the impact on the UK justice system from the implementation of the initial obligations code has not been acknowledged or quantified
- that the impact on human rights of the initial obligations is not mentioned in the Impact Assessments accompanying the Cost Order or the Digital Economy Act

Premature notification of the Cost Order

Consumer Focus believes that the notification of the Cost Order under the Technical Standards Directive is premature. The likely cost and impact of the initial obligations is currently unknown with the Impact Assessment accompanying the Cost Order stating that the UK Government ‘is currently not able to provide robust estimates [on cost] as it will depend on decisions to be taken in the Code that Ofcom is currently working on’.² Ofcom is in the process of finalising the initial obligations code and the real likely cost of implementing the initial obligations have thus far not been quantified. We believe that Cost Order should only have been drafted and notified once the initial obligations code is finalised and Ofcom has established robust figures on the likely cost of implementation.

The Impact Assessment accompanying the Cost Order only provides rough estimates in relation to the cost to Ofcom and ISPs from implementing the initial obligations code, stating that:

‘The assumptions underpinning the analysis have been based on the best available evidence. In particular, the total costs of the appeals mechanism have not been quantified to a robust degree because it is impossible at this point to make constructive estimates of volumes of appeals. However these costs could potentially be significant. This will be determined prior to the implementation of the Code of Practice.’³

The Impact Assessment accompanying the Cost Order makes the following rough estimates on the initial obligations code’s implementation cost: the one off setup cost for Ofcom is estimated at £5.1 million and the ongoing cost to Ofcom is estimated at £5.8 million per annum. The cost of the appeals body is estimated at £700,000, covering setup, recruitment and legal costs, system development and maintenance. No estimate on ongoing cost is given, but it is stated that the ongoing cost is likely to be significant. In relation to the cost to ISPs, the Impact Assessment estimates a one off setup cost of £7.6 million and ongoing annual costs of between £7.5 million and £24.5 million.⁴

	One-off setup cost (£)	Annual cost (£)
ISPs	7.6 million*	7.5 million to 24.5 million*
Ofcom	5.1 million*	5.8 million*
Appeals body	0.7 million*	Unknown*
Total	13.4 million	at least 13.3 million to 30.3 million
25% ISPs	3.35 million	at least 3.33 million to 7.58 million
75% copyright owners	10.05 million	at least 9.97 million to 22.72 million

² **Impact Assessment accompanying the draft statutory instrument ‘online infringement of copyright (initial obligations) (sharing of costs) order’**, Department for Business, Innovation and Skills, 15 September 2010, pg.2

³ Ibid pg.2

⁴ Ibid pg.9

* Source: Impact Assessment accompanying the Cost Order

On the basis of these rough estimates the implementation of the initial obligations will result in a total cost of £13.4 million for setup, and at least £13.3 million, but up to £30.3 million ongoing annual costs, while the ongoing cost of the appeals body is unknown. These are significant costs, which are likely to be an underestimate, rather than an overestimate. We are therefore concerned that the UK Government is proceeding in implementing provisions which will impose an unknown, yet likely to be significant, cost on ISPs. We believe it would be prudent for the UK Government to establish robust figures on cost, so as to determine whether the initial obligations are proportionate and objectively justifiable in relation to what they are trying to achieve.

Consumer Focus concern:

- that the notification of the Cost Order is premature, given that the UK Government is currently not able to provide robust estimates on the cost of implementing the initial obligations

Non-notification of the Digital Economy Act under the Technical Standards Directive

Section 3 to 16 of the Digital Economy Act establishes a copyright enforcement process which Ofcom is to implement through an initial obligations code and a code to limit internet access. The Act also places an actual duty on Ofcom to implement the process and Ofcom can only be relieved of this duty by the Secretary of State.⁵ In relation to the initial obligations, which Ofcom is currently implementing and to which the notified Cost Order relates, the Digital Economy Act makes very detailed and prescriptive requirements. These requirements prevent Ofcom from significantly altering the process that is set out in the Act. For more information on the requirements specified by the Digital Economy Act see '[Filesharing provisions – Guide to Ofcom's initial obligations code](#)' which we have recently published.

Consumer Focus therefore questions why it is only the secondary legislation, ie the Cost Order and the initial obligations code, that is being notified under the Technical Standards Directive, and not the primary legislation, ie the Digital Economy Act. At this stage it is not possible to significantly change the process established in the Digital Economy Act, as the secondary legislation needs to comply with the requirements of the primary legislation, and the Act cannot be amended through the secondary legislation that is being notified.

Consumer Focus concern:

- that section 3 to 16 of the Digital Economy Act should have been notified under the Technical Standards Directive

⁵ [Digital Economy Act 2010](#), Section 6/124D, subsection 1, 2 and 3

Impact of the cost imposed on qualifying ISPs, consumers and Wi-Fi providers

Consumer Focus is concerned that the Impact Assessment accompanying the Cost Order makes no mention of the impact the cost imposed on qualifying ISPs would have on consumers and Wi-Fi providers. In relation to consumers we are concerned that the imposed cost would increase the price of broadband for all consumers and as such is likely to make internet access unaffordable for low income consumers. In relation to Wi-Fi providers, who may be classified as ISPs or subscribers under the initial obligations code, we are concerned that the imposed cost would lead to a reduction in internet access through free and commercial Wi-Fi networks.

Consumer Focus is particularly concerned that the Impact Assessment accompanying the Cost Order makes no mention of the anticipated impact on consumers arising from imposing costs on ISPs. This likely impact on consumers has been mentioned in the final Impact Assessment for the Digital Economy Act, which states in relation to cost imposed on qualifying ISPs that:

‘Under the assumption that ISPs fully pass down to consumers the annual increase in costs, we expect broadband retail prices to increase between 0.2% and 0.6%. 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 between 10,000 and 40,000. This would represent additional revenue lost by the ISP industry between £2 and £9 million per annum.’⁶

‘According to the OECD, the average monthly broadband retail price in 2007 in the UK was about £20, £240 annually. Broadband Stakeholder Group estimates that the number of UK broadband connections in the same year was of 14.5 million. 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, broadband retail prices would increase between £0.40 and £1.40 per year. This represents an increase of the annual price between 0.2% and 0.6%.’⁷

On the basis of the rough estimates provided in the Impact Assessment accompanying the Cost Order the proposed 25/75 split would result in around £3.35 million one off setup costs and an ongoing annual cost of at least £3.33 million, but up to £7.58 million, for ISPs. Though these figures are likely to be an underestimate and do not include the ongoing cost of the appeals body. This cost is likely to have a significant impact on the price of broadband and low income consumers’ ability to afford broadband, given that the Impact Assessment for the Act estimates that an annual cost to ISPs of between £6 million to £20 million would result in between 10,000 and 40,000 UK households being priced out of broadband. We therefore believe that the Impact Assessment accompanying the Cost Order should have mentioned consumers as an affected group and outlined what steps have been taken to mitigate the anticipated impact on low income consumers.

⁶ **Digital Economy Act 2010 Impact Assessment**, BIS, IPO & dcms, April 2010, pg.76

⁷ Ibid pg.76 footnote

Consumer Focus is also concerned that Wi-Fi providers are not mentioned in the Impact Assessment accompanying the Cost Order. This gives the impression that the initial obligations do not apply to such internet service providers, or that no cost is likely to be imposed on them. However, when Ofcom published its draft initial obligations code it has made it clear that Wi-Fi providers would be classified as either ISPs or subscribers by the initial obligations code. Ofcom stated that:

'In principle, operators of Wi-Fi networks would fall within the definition of internet service provider where the service is provided by means of an agreement with the subscriber, even where this is oral or implicit... Where a Wi-Fi network is provided in conjunction with other goods or services to a customer, such as a coffee shop or a hotel, our presumption is that the provider is within the definition of internet service provider... Nevertheless, Ofcom's proposal for the threshold for determining a Qualifying ISP would initially exclude those operators since the number of subscribers would not meet the required threshold.'⁸

As such Ofcom has stated its intent to classify some Wi-Fi providers as internet service providers, but assumes that these Wi-Fi providers would have less than 400,000 subscribers and so be non-qualifying ISPs. We do not believe that it is prudent for Ofcom to make such an assumption in the absence of an assessment of how many users are served by Wi-Fi provided through an agreement or in conjunction with other goods or services.

For example, The Cloud provides Wi-Fi against payment in the City of London and reportedly offers 'more than 350,000 people who work in and visit the area access to wireless broadband'. The Mayor of London now plans to roll out a similar service across London, stating that: 'London is the home of technological innovation. We in City Hall are doing our best to keep up, and one of our most important projects is called Wi-Fi London'.⁹ Because The Cloud provides internet access under an agreement and against payment, it would be an 'internet service provider' as per the definition offered in the draft initial obligations code. The Cloud may already provide internet access service to more than 400,000 subscribers, which would make it a qualifying ISP under the draft initial obligations code. If a service like The Cloud was rolled out across London, potentially allowing millions of people to access wireless broadband, it would almost certainly become a qualifying ISP under the definition provided in the draft initial obligations code. Being a qualifying ISP would impose initial obligations on Wi-Fi providers, and the providers would have to pay 25 per cent of implementation cost as proposed in the notified Cost Order.

We are also concerned about the likely cost imposed on Wi-Fi providers who are to be classified as subscriber under the initial obligations code. As the British Hospitality Association, the British Beer and Pub Association, and the British Holiday and Home Parks Association have pointed out in their consultation response to Ofcom on the draft initial obligations code:

'the consultation also indicates (paragraph 3.22) that open access Wi-Fi networks where there is no payment from, or agreement with, users would not be exempt internet service providers, and (paragraph 3.30) that an undertaking receiving an internet access service for its own purposes is a subscriber, even if access is made available to third parties. (There is also an issue about whether a hotel could be an internet service provider if the IP addresses have been allocated by the original ISP.)

⁸ **Online Infringement of Copyright and the Digital Economy Act 2010: Draft Initial Obligations Code**, Ofcom, 28 May 2010, pg.15

⁹ **Can London Go WiFi?**, BBC News, 19 May 2010

The first of these paragraphs (3.22) would appear to bring many businesses, such as pubs, coffee shops and restaurants, within the scope of the Act, because there is generally no agreement with, or payment from their customers for this service. The second of these paragraphs (3.30) may be sufficiently widespread to bring most hotels, parks, pubs and restaurants within its scope, simply because most of them use a (single) internet access service both for business traffic (for example, online booking of rooms and holiday caravans) and to provide guests with internet facilities. It appears that this would make them 'subscribers' subject to sanctions...¹⁰

As subscribers, Wi-Fi providers would be liable to receiving notifications from their ISP to the effect that a copyright owner has made a copyright infringement report against them for alleged copyright infringement. It is envisaged by Ofcom that any subscriber receiving three copyright infringement reports or more in the course of 12 months, would be placed on a 'copyright infringement list', which would make them subject to court action by the copyright owner and technical measures, should they be introduced at a later date. Wi-Fi providers who are classified as subscribers would be able to avoid being placed on the 'copyright infringement list' if they appeal against copyright infringement reports through the appeals body that is to be set up by Ofcom. Wi-Fi providers classified as subscribers are hence likely to incur an ongoing cost of appealing against notifications in order to avoid court action and technical measures being imposed on them at a later date.

In order to avoid being classified as subscriber Wi-Fi providers who serve less than 400,000 users may resort to providing Wi-Fi against payment in order to become a non-qualifying ISP. Those who provide free Wi-Fi to more than 400,000 users do not have this option, as becoming a commercial Wi-Fi provider would mean they become a qualifying ISP under the initial obligations code. The cost associated with the implementation of the initial obligations code could make large scale Wi-Fi networks serving 400,000 subscribers or more potentially unviable, because as subscribers or qualifying ISPs a significant cost and risk would be imposed on them. We are therefore concerned that the initial obligations code will reduce the availability of Wi-Fi to consumers in the UK and will prevent the establishment of large scale Wi-Fi networks. Therefore Wi-Fi providers should have been considered as an affected group in the Impact Assessment accompanying the Cost Order.

Consumer Focus concerns:

- that the cost imposed on ISPs will increase broadband retail prices for all consumers, leading to low income consumers being priced out of internet access service
- that the initial obligations code will reduce internet access service through Wi-Fi as a result of the cost imposed on Wi-Fi providers, who will be classified as ISPs or subscriber

¹⁰ **Response of the British Hospitality Association, British Beer and Pub Association, and British Holiday and Home Parks Association**, Ofcom consultation On: Online Infringement of Copyright and the Digital Economy Act 2010: Draft Initial obligations code, July 2010, pg.3

Rationale for imposing cost on internet service providers

Consumer Focus is concerned that no reasonable rationale is provided for imposing a significant cost on ISPs. In relation to imposing 25 per cent of the cost on ISPs the Impact Assessment accompanying the Cost order states:

‘While copyright owners should contribute to the costs of securing additional returns on their investment (beyond the returns that they currently achieve) which result from Government actions to ensure socially appropriate investment, cost sharing is required in order to:

- ensure that ISPs have incentives to comply with its notification and record keeping activities as efficiently as possible
- ensure that ISPs have incentives to reduce the number of instances of online copyright infringement¹¹

The Impact Assessment accompanying the Cost Order offers no evidence to the effect that placing the cost on qualifying ISPs would incentivise their compliance with the initial obligations code. Similarly, it does not demonstrate that in the absence of imposing 25 percent of the cost on ISPs, they would be more likely to not comply with the initial obligations code. Non-compliance with the initial obligations code by qualifying ISPs can lead to a fine of up to £250,000 by Ofcom¹² and we believe that this is incentive enough for qualifying ISPs to comply with the initial obligations code. Given that the cost imposed on ISPs is likely to lead to an increase in broadband prices for all consumers and impact especially on low income consumers’ ability to afford internet access, we believe that any cost should only be imposed on ISPs if there is a compelling rationale and the negative impact on low income consumers mitigated.

Furthermore it is not clear how it would be possible for smaller ISPs to ‘reduce the number of instances of online copyright infringement’ on their networks in compliance with the ‘mere conduit’ principle, as established in Article 12 of the Directive 2000/31/EC.¹³ As such, placing initial obligations and the associated cost on ISPs with over 400,000 subscribers is unlikely to lead to a reduction of copyright infringement on the networks of smaller ISPs. As stated in our response to the consultation on the draft initial obligations code, we believe that Ofcom should clarify that under UK and EU law internet service providers have no duty to ‘ensure online infringements of copyright remain at a low level’. Furthermore Ofcom should acknowledge that users who are determined to continue the infringement of copyright online are likely to migrate away from what Ofcom defines as ‘qualifying internet service providers’ and towards the ‘non-qualifying internet service providers’, ie smaller ISPs. It is difficult to see what these smaller ISPs would be able to do about this.

Consumer Focus concern:

- that the Impact Assessment accompanying the Cost Order does not provide a sufficient rationale for imposing any cost on ISPs

¹¹ **Impact Assessment accompanying the draft statutory instrument ‘online infringement of copyright (initial obligations) (sharing of costs) order’**, Department for Business, Innovation and Skills, 15 September 2010, pg.8

¹² **Digital Economy Act 2010**, Section 14/124L, subsection 2

¹³ **Directive on Electronic Commerce, Directive 2000/31/EC**, Article 12

Aim of the initial obligations and cost split

Consumer Focus is concerned that the Impact Assessment accompanying the Cost Order does not show how the cost split, or the initial obligations code, are to achieve what the impact assessment states to be the aim of the initial obligations, ie helping:

‘to ensure that the proposals on addressing online copyright infringement would facilitate progress towards the desired outcome of socially appropriate investment in content, thus generating significant benefits to copyright owners, consumers and Government’.¹⁴

Consumer Focus has been working on the Digital Economy Act since its introduction to parliament, and to our knowledge the stated aim of the Act was to reduce online copyright infringement, not to achieve ‘socially appropriate investment in content, thus generating significant benefits to copyright owners, consumers and Government’. When Ofcom consulted on the draft initial obligations code it provided the following rationale for the Digital Economy Act and the initial obligations:

‘The Digital Economy Act (DEA) was passed by Parliament in April 2010. It grants Ofcom new responsibilities for implementing measures aimed at significant reducing online copyright infringement. These measures form part of a multi-pronged approach by Government aimed at reducing online copyright infringement, through enforcement, educating consumers about copyright, and the encouraging industry to develop lawful alternatives.’¹⁵

The Impact Assessment accompanying the Cost Order refers to the Impact Assessment for the Digital Economy Act for further information. However, this impact assessment does not provide information on how the initial obligations would encourage investment in content. Instead the Impact Assessment for the Digital Economy Act states in relation to the aim of the initial obligations that:

‘...due to the nature of the technology and the way in which individual infringements are identified, it is not possible for rights holders to identify who are the most frequent or serious unlawful file-sharers, making targeted legal action extremely difficult if not impossible. Legislation is needed to require ISPs to notify subscribers that they appear to be engaged in unlawful activity so that they can alter their behaviour. It is also needed to help rights holders to take targeted action about the most serious infringers.’¹⁶

In any event, the Impact Assessment accompanying the Cost Order fails to establish how the cost order, ie the split of cost, or the initial obligations code, would encourage ‘socially appropriate investment in content’. The impact assessment merely makes the assertion that the copyright infringement provisions of the Digital Economy Act 2010 are necessary ‘because the public good nature of file-sharing and the accompanying spillover effects can encourage unlawful peer-to-peer (P2P) file sharing, reducing the incentives for investment in new content.’¹⁷

¹⁴ **Impact Assessment accompanying the draft statutory instrument ‘online infringement of copyright (initial obligations) (sharing of costs) order’**, Department for Business, Innovation and Skills, 15 September 2010, pg.2

¹⁵ **Online Infringement of Copyright and the Digital Economy Act 2010: Draft Initial Obligations Code**, Ofcom, 28 May 2010, pg.4

¹⁶ **Digital Economy Act 2010 Impact Assessment**, BIS, IPO & dcms, April 2010, pg.57

¹⁷ **Impact Assessment accompanying the draft statutory instrument ‘online infringement of copyright (initial obligations) (sharing of costs) order’**, Department for Business, Innovation and Skills, 15 September 2010, pg.2

It also says 'unlawful peer-to-peer (P2P) file-sharing, which can reduce the incentives to invest in the development, production and distribution of new content by preventing investors in the creative industries from fully appropriating the returns on their investment.'¹⁸ The impact assessment subsequently appears to assert that the cost order itself would increase investment in content by establishing clarity, stating that:

'Key to achieving the desired outcome of optimal investment in content is the need for clarity and certainty on how the ensuing costs on ISPs associated with these obligations are shared between copyright owners and Internet Service Providers, and how Ofcom would recover its costs. In the absence of the implementation of this Order, there exists the possibility of regulatory failure in that the new regulatory framework, which requires ISPs to take direct action against subscribers who are identified as infringing copyright through unlawful P2P file sharing, may not function effectively. This could undermine progress towards the desired outcome of ensuring that investment in content is at socially appropriate levels.'¹⁹

But the Impact Assessment accompanying the Cost Order also appears to state that the cost of the initial obligations could reduce the investment in content, noting that:

'In the absence of spare capacity, complying with the obligations could reduce the resources available for further investment in new content.'²⁰

As such the impact assessment has failed to establish how the cost order, ie the split of cost, or the initial obligations, would lead to increased investment in content by either ISPs, copyright owners or others. Instead the Impact Assessment points to a likely decrease in investment in content as a result of implementing the initial obligations.

Consumer Focus concern:

- that the Impact Assessment accompanying the Cost Order fails to establish how the cost split, or the initial obligations, are to 'facilitate progress towards the desired outcome of socially appropriate investment in content'

¹⁸ Ibid pg.5

¹⁹ Ibid pg.6

²⁰ Ibid pg.2

Impact on justice system

Consumer Focus is concerned that the Impact Assessment accompanying the Cost Order states that there will be no impact on the judicial system from the initial obligations.²¹ The stated aim of the initial obligations is to allow copyright owners to take civil court action against internet subscribers for copyright infringement.²² Indeed, copyright owners are required to do this before technical measures can be considered.²³ When the Digital Economy Bill passed through parliament the Government provided the following explanation:

‘The whole idea behind the notification system is to reduce the level of online infringement by warnings/education and to facilitate legal action being taken against serious persistent infringers. It is worth reiterating what we said in Committee – nothing is going to happen under the initial obligations until or unless the copyright owner takes civil action against those infringers having obtained their details through a court order. Under the Bill provisions we expect that copyright owners would focus their attention in respect of legal action on those who have been the subject of the most copyright infringement notices. These will be the subscribers who have had multiple letters informing them that infringement is apparently occurring on their connection and providing advice as to how to prevent it if the subscriber themselves is not responsible.’²⁴

The guidance on the judicial system impact assessment explains what should be considered as an impact on the judicial system, which includes:

‘As well as the criminal courts, new policy initiatives could impact on the civil courts, which include the county, family and high court, and the magistrates and probate courts. This will generally be so if the proposal results in more applications to the court... Impacts for the court service, which can have cost implications, include: increased work load due to an increase in the number of cases or in the length or complexity of cases;’²⁵

In relation to the cost of the impact on the judicial system the guidance on the judicial system impact assessment states that:

‘Where there is an impact on the justice system the additional cost must be properly funded and subject to negotiation between Finance Departments. The initial presumption is that the Department responsible for the initiative will be expected to cover the additional costs to the justice system.’²⁶

The implementation of the initial obligations code is bound to have an impact on the UK judicial system, because it is designed so that copyright owners can obtain the subscriber details of those on the ‘copyright infringement list’ through a Norwich Pharmacal order, and then take these individuals to court for civil copyright infringement.

²¹ Ibid pg.3

²² See for example **Digital Britain Report**, BIS & dcms, June 2009, pg.17 and 233

²³ **Digital Economy Act 2010**, Section 8/124F, subsection 5f

²⁴ **Online infringement of copyright: detail regarding clauses 4-16**, BIS, IPO & dcms, January 2010, pg.3

²⁵ **Justice System Impact Test**, Ministry of Justice, December 2009, pg.8

²⁶ Ibid pg.4

Once the initial obligations code is implemented the Chancery Division of the UK High Court and the Patents County Court (soon to be renamed the Intellectual Property County Court) will see an increasing number of applications for Norwich Pharmacal orders and civil copyright infringement cases against subscribers who are on the 'copyright infringement list'.

We therefore have serious concerns that the Impact Assessment accompanying the Cost Order states that there will be no impact on the UK justice system from the implementation of the initial obligations code. The cost to the judicial system arising from the implementation of the initial obligations code is an additional un-quantified cost arising from the implementation of the initial obligations code and in our opinion should have been quantified at this stage.

There are currently a number of significant issues in relation to how copyright infringement disputes are handled in the Chancery Division of the High Court and the Patents County Court. For more information see our recent consultation response **Consumer Focus response on setting the value of claims heard in the Patents County Court**. There are ongoing attempts to reform the Patents County Court so that it becomes a cost effective avenue for resolving lower value copyright infringement disputes, ie where the damages are under £0.5 million. In order to effectively resolve the copyright infringement disputes arising from the implementation of the initial obligations code, which are likely to have a value of up to £5,000 in damages, it is necessary for the Patents County Court to implement a small claims track and a fast track, in addition to the existing multi-track process. We are hoping that a small claims track will be operational by the end of 2011, when the implementation of the initial obligations code is likely to lead to an increase in court cases being brought against internet subscribers for alleged copyright infringement. However, we are concerned that Ofcom has thus far failed to engage in this reform process.

More generally we are concerned that a parallel enforcement process for copyright enforcement was established by the Digital Economy Act, without serious consideration for reforming the existing civil enforcement process. Reforming the existing process is likely to be a more cost effective way of ensuring that copyright owners can enforce their copyright vis-a-vis consumers, rendering the establishment of a costly parallel enforcement process unnecessary.

Consumer Focus concern:

- that the impact on the UK justice system from the implementation of the initial obligations code has not been acknowledged or quantified

Impact on human rights

The Impact Assessment accompanying the Cost Order states that there is no impact on human rights,²⁷ ie the Convention rights guaranteed under the European Convention on Human Rights. However, the Explanatory Notes that accompanied the Digital Economy Bill when it was introduced to the House of Lords and the House of Commons state that in relation to the initial obligations, to which the Cost Order relates:

‘Article 8 of the Convention and Article 1 of the First Protocol to the Convention are potentially engaged by these measures. The Bill will place requirements on internet service providers (‘ISPs’) to comply with two initial obligations; to send notifications to subscribers who have been identified by copyright owners in relation to alleged infringements of copyright; and to maintain internal lists of the number of times an individual subscriber has been identified and provide certain (non-identifying) information from those lists to affected copyright owners on request.’²⁸

In relation to the technical measures, which will be based on the copyright infringement reports that have been made by copyright owners against internet subscribers under the initial obligations code, the Explanatory Notes state that these provisions interfere with subscribers’ rights to respect for private life, the right to freedom of expression and the right to peaceful possession of property.²⁹ The Explanatory Notes state that:

‘However, such interference does not render the provisions incompatible with the Convention. The provision represents an acceptable balance between subscribers’ rights and the public interest in the protection of the copyright of third parties. Copyright owners have limited methods of protecting their copyright, which may be less effective across national boundaries than within a single jurisdiction. Infringement over the internet is likely to cross national boundaries. Moreover, subscribers may be infringing the rights of more than one copyright owner at a time, and these provisions permit action benefiting many copyright owners. The measures are necessary and proportionate to a legitimate aim, namely the protection of the rights of copyright owners. By providing for a warning to subscribers that they are infringing the rights of others and providing that technical measures are not taken against them until the appeals process is exhausted, these provisions strike the appropriate balance between the rights of subscribers and the rights of copyright owners.’³⁰

Therefore the Explanatory Notes suggest that the notification of subscribers under the initial obligations code and the appeals body, to which subscribers can appeal against copyright infringement reports made against them, would ensure that the process established by the Digital Economy Act complies with the Convention rights.

²⁷ **Impact Assessment accompanying the draft statutory instrument ‘online infringement of copyright (initial obligations) (sharing of costs) order’**, Department for Business, Innovation and Skills, 15 September 2010, pg.3

²⁸ **Digital Economy Bill, Explanatory Notes, House of Lords**, 19 November 2009, pt.233 & **Digital Economy Bill, Explanatory Notes, House of Commons**, 16 March 2010, pt.245

²⁹ **Digital Economy Bill, Explanatory Notes, House of Lords**, 19 November 2009, pt.235 & **Digital Economy Bill, Explanatory Notes, House of Commons**, 16 March 2010, pt.247

³⁰ **Digital Economy Bill, Explanatory Notes, House of Lords**, 19 November 2009, pt.236 & **Digital Economy Bill, Explanatory Notes, House of Commons**, 16 March 2010, pt.248

Given that the Explanatory Notes accompanying the bill acknowledge that the initial obligations, as well as the technical measures, engage Convention rights, it would have been appropriate to acknowledge the potential impact of the initial obligations in the Impact Assessment accompanying the Cost Order. It would also have been appropriate to include this analysis in the Impact Assessment for the Digital Economy Act, which makes no mention of any potential impact on human rights.

Consumer Focus concern:

- that the potential impact on human rights of the initial obligations is not mentioned in the Impact Assessment accompanying the Cost Order or the Digital Economy Act



Consumer Focus response to notification of online infringement of copyright initial obligations sharing of cost order

If you have any questions or would like further information about our response please contact Saskia Walzel, Policy Advocate, by telephone on 020 7799 7977 or via email: saskia.walzel@consumerfocus.org.uk

www.consumerfocus.org.uk/campaigns/copyright

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Consumer Focus

4th Floor
Artillery House
Artillery Row
London SW1P 1RT

Tel: 020 7799 7900

Fax: 020 7799 7901

Media Team: 020 7799 8004 / 8005 / 8006