ISPA comments on the Ofcom Initial obligations code consultation

Introduction

ISPA responded to the DEA Initial Obligations Code back in 2010 where we outlined concerns with the approach Ofcom took to the Code. A significant number of these concerns still exist and we have identified areas that require further work and clarification below.

Generally, we are concerned about the short consultation period for responses to the revised Code. The Code will require our members to make significant changes to the way they run their business and whilst we recognise that work has been ongoing outside of this consultation, we feel that the one month consultation period is inappropriately short. The publication of the Code was delayed multiple times and we believe that it is not justified to provide industry and the significant number of other parties who have an interest in this issue with a reduced consultation period. Furthermore, the line "on the instruction of government" is used on several occasions, we would welcome further detail on this.

Threshold

Further information on how the threshold will develop should be provided. ISPs outside of the threshold are still in the uncertain position of not knowing if, when and for what reason the code may be applied to them, and how much they should engage with the detailed development of the Code. Whether or not someone is brought into the code will have significant implications on costs and tariffs and so a clear understanding of how and why Ofcom will develop the threshold is needed.

Ofcom states that to determine who is in scope it will collate data from copyright owner detection processes and corroborate this with "independent sources of research". This still sounds unsatisfactory. It is also not clear what the role of downstream IP address owners is or what happens if a qualified ISP acquires a non-qualifying ISP and whether there will be a grace period to allow for integration of systems. We would therefore welcome clear guidance on why an ISP may come into scope and the procedure that Ofcom would have to follow in order to extend the Code.

Definitions

The definitions contained in the revised code are still unclear. As we argued in our previous response, there is a danger that they do not replicate the Act. The Act does not mention the term 'non-qualifying ISP' nor does it require ISPs to determine whether some of their subscribers are ISPs or help rights holders identify other ISPs.

Furthermore, we still query whether operators of services who provide internet access as a secondary function should be deemed as ISPs. The status of other intermediaries has not been adequately addressed and we are concerned about the effect of Ofcom leaving industry in a position of having to make a judgment.

We still require further clarity on whether or not the definition of copyright owner includes third party detection agencies and trade associations and query whether this would be justified. We still have concerns that Copyright Infringement Lists (CILs) are not being sent exclusively to the copyright owner who owns the right to the work, particularly as the person authorised to act on their behalf may see notices for more than one copyright owner.

Eligibility

Whilst we acknowledge that Ofcom must verify their evidence gathering techniques first, our members query the decision to allow rights holders to send Copyright Infringement Reports (CIRs) without first having paid up in full to both qualifying ISPs and Ofcom. Rights holders pushed heavily for this system, it is only fair that payment is received from the outset to give clarity to all involved.

The code should contain a clear guarantee that qualifying ISPs will be reimbursed regardless of whether copyright owners actually take part in the first notification period. If ISPs are expected to build systems to receive and store CIRs devoting both time and money, it is only fair that payment should be upfront. If this is not the case, Ofcom should confirm that CIRs cannot be sent prior to payment.

Operation of the scheme

Other questions that remain include how to treat invalid and/or duplicate CIRs. Do they have to be recorded or kept somewhere and will ISPs be reimbursed for the processing of such CIRs? How are CIRs received during the subscriber educational grace period supposed to be treated? What are ISPs supposed to do with notices received during the period of time an ISP has to forward a CIL on to a rights holder? At what stage do those on CILs become “relevant subscribers” for technical measures?

Whilst we touched on this in our earlier response, we believe that it is important to underline that ISPs should be able to set the tone of the notification letters sent to customers. Our members understand their customers and should be free to interact and tailor information as they see fit.

ISPs will be required to provide different types of information dependant on subscribers’ circumstances, for example tailoring messaging to intermediaries. This appears to be going beyond what is included in the Act and also comes with the threat of enforcement action.

The consultation document says that qualifying ISPs must take ‘reasonable steps’ throughout. It would be helpful to clearly explain what reasonable steps actually mean in each context, particularly as enforcement action may ensue.

IP matching

ISPA would welcome further clarity on what is required from ISPs when it comes to IP matching and standards of evidence.

As we argued in our response to the previous consultation, ISPs' IP matching procedures are considered to be sufficiently robust for law enforcement purposes and ISPs should not be required to go beyond established principles for matching procedures. On this basis we do not believe that it would be justified to take enforcement action against ISPs in cases of matching errors, provided that there was no deviation from established principles for IP matching. We are further concerned that revealing how an ISP matches an IP address, determines that the customer is a subscriber and how it can be worked around is a potential security threat.

Data protection

The proposed notification scheme has clear data protection and privacy implications. It is not clear if the Act is compliant with the Data Protection Act and we would welcome further details on compliance and guidance on this with the ICO. Questions such as how long data should be retained for and what should be done with invalid requests, for example, need guidance.

Appeals

As we have seen in recent years, rights holders methods of detecting alleged infringers is not perfect so a fair means of appeal is needed. As argued by consumer organisations and others, a non means-tested fee payable by the subscriber linked to an account of alleged infringement needs to be justified.

Ofcom states that it will engage with stakeholders on the appeals tendering process to ensure the independence, expertise, operational capability and functions of the body. We would welcome further detail on how this engagement will proceed – will it be through a formal consultation or another means?

Enforcement

Whilst we are aware that enforcement measures are not part of the current consultation exercise, we hope that Ofcom will commit to holding a separate consultation on this issue and ensure that any enforcement measures will be soft launched to ensure that processes can be bedded in. There are numerous instances in the Code of enforcement measures being laid down on ISPs and we question this blunt approach from the outset.

Development of the Code

We would welcome further information on how Ofcom intends to further develop the Initial Obligations Code and what the process for making amendments to the Code would look like. Given that the code is proposing a new system, it is important that there is a clear means to rectify or clarify problems identified as the process develops.