ISPA Response to the Initial Obligations Code Consultation

ISPA

The Internet Services Providers' Association (ISPA) UK is the trade association for companies involved in the provision of Internet Services in the UK. ISPA was founded in 1995, and seeks to actively represent and promote the interests of businesses involved in all aspects of the UK Internet industry.

ISPA's membership includes small, medium and large Internet Service Providers (ISPs), cable companies, content providers, web design and hosting companies and a variety of other organisations. ISPA currently has over 200 members, representing more than 95% of the UK Internet access market by volume.

ISPA was a founding member of EuroISPA, the European Internet Service Providers Association based in Brussels, which is the largest umbrella organisation of ISPs globally.

Introduction

ISPA welcomes the opportunity to respond to the Ofcom consultation on the initial obligations Code. ISPA has been involved in discussions with rights holders, Government and now Ofcom about policies designed to reduce online copyright infringement and has responded to many consultations on this issue over the past few years. ISPA maintains that the process leading up to the requirement for this Code was weighted in favour of rights holders and wants to ensure that the Code strikes a more balanced approach which is consistent with Ofcom's wider duties to consumers and also takes account of ISP's legitimate concerns.

The production of the draft Code has not provided confidence for ISPs and their customers that its application will be fair and proportionate. The drafting has not been transparent in that Ofcom drafted it before presenting it to industry, despite the explicit expectation in Parliament and the Digital Economy Act (hereafter 'the Act') that industry would be given an opportunity to draft its own code for Ofcom's consideration. Whilst we recognise Ofcom's inference that industry would not get together to draft its own code and that several stakeholder meetings had been held, there should have been greater opportunity for consultation before the draft code was published. ISPA can only conclude that there has been a disjointed approach to the whole process.

The Act is quite clear in what it requires Ofcom to do. There are numerous instances in the Code of Ofcom going beyond this and making assumptions and requirements not included in the Act. For instance, the Act says that Ofcom has to have a Code in place by January 2011 but there is no requirement for notifications to subscribers to start at this point. Ofcom could and should have considered options for enabling all those affected by the Code to have more time to prepare for its implementation than the proposed timetable allows. Ofcom should also have considered the option of a start-up or soft launch version of the Code with a full implementation version being developed on the basis of early experience. The Code seeks to address an issue between rights holders and end users; too much is being put on the shoulders of ISPs

It is unreasonable to expect complete and informed responses to all aspects of the Code given the dependencies between this Code and Ministerial decisions about the apportioning of costs under the Code and the short timeframe for responses to this consultation. The code is proposing to make significant changes to the way an ISP relates to its customers and runs its business. Industry needs more time to fully analyse and understand the implications of what is being proposed, not least in terms of the impact this will have on customers. Whilst we understand that Ofcom has been put in a difficult position by the Act in terms of the timetable it has been handed, Ofcom should explore options to avoid a disproportionate impact on the Internet industry and its consumers. As the Act is now law and given the events that led to this point, ISPA feels that Ofcom is best placed to set up a fair and robust code. However, as currently drafted the code falls short of this so to ensure that it is fair and robust, Ofcom needs to address the concerns raised in the consultation process by ISPA and others.

ISPA recommends that Ofcom publishes a Code on an interim basis so that a more effective, proportionate and fair Code can be developed on the basis of early experience of a notifications regime. This will also provide Parliament with opportunities for scrutiny before a fully-fledged Code is introduced.

Questions

Application of the Code

Question 3.1: Do you agree that Rights holders should only be able to take advantage of the online copyright infringement procedures set out in the DEA and the Code where they have met their obligations under the Secretary of State's Order under section124 of the 2003 Act? Please provide supporting arguments.

Yes, as Section 124(C) of the Act states rights holders should only be able to send CIRs once they have met the criteria for doing so. ISPA recognises that this is an area in which Ofcom have sought to establish a proportionate approach though we notice that there is no threshold associated with rights holders gaining access to the notifications regime (ie in terms of volumes of committed notifications). We suggest that right holders would also benefit from a soft launch approach to the regime, to enable those rights holders unfamiliar with this approach to online copyright infringement to have an opportunity to learn from the experience of others before being asked to commit to being involved in the fully-implemented regime.

Question 3.2: Is two months an appropriate lead time for the purposes of planning ISP and Copyright Owner activity in a given notification period? If a notification period is significantly more or less than a year, how should the lead time be varied? Please provide supporting evidence of the benefits of an alternative lead time.

ISPA does not agree that two months is an appropriate lead time for the forward planning period for the start of the Code. As completely new obligations are being placed on ISPs, a longer period of time is required so that ISPs can fully work out their obligations under the Code and make the necessary changes to systems and processes in preparation. An ISP included within the Code regime should have at least six months notice of the rights holders who have qualified for the scheme and how many CIRs each rights holder will be sending that ISP. The ISP should also receive upfront payment by those rights holders to make the necessary investments in preparation for the Code’s implementation. Without a more realistic approach to the timeframes involved, it will not be possible to implement a workable system to process the number of CIRs which Ofcom has told ISPs to expect.

There is an obvious solution to this significant problem. The Act states that a code must be in place six months after the provisions of the Act come into force (January 2011). However, it does not require that CIRs have to be sent and processed immediately so there is no need for Ofcom to start the first notification period in January. Given the complex and unknown nature of what is being proposed, ISPA would recommend a longer period of time for full implementation with a transition period to trial systems and processes before notices can be sent. This will help to produce a more workable system for ISPs, consumers and rights holders based on learning during the transition period. Without this approach, the system is set up to fail.

Question3.3: Do you agree with Ofcom's approach to the application of the Code to ISPs? If not, what alternative approach would you propose? Can you provide evidence in support of any alternative you propose?

Question 3.4: Do you agree with the proposed qualification criteria for the first notification period under the Code, and the consequences for coverage of the ISP market, appropriate? If not, what alternative approaches would you propose? Can you provide evidence in support of any alternative you propose?

As an association representing members on both sides of the threshold, ISPA does not have a agreed view on whether a threshold of 400,000 subscribers and confining the Code to fixed-line ISPs is fair and proportionate, though we share the concerns of Ofcom and Government that the Code should not fall disproportionately on to smaller ISPs. We query the blunt approach Ofcom has taken in proposing this particular threshold and the implication that the Act provided for no other approach. Although we recognise that Ofcom was given a short time period to develop and implement the Code by the Act, ISPA believes that Ofcom has neglected its duty to consider more balanced criteria, including options for developing these over time based on early experience of the notifications regime.

Ofcom is subject to the requirement that the provisions of the Code are objectively justifiable, non-discriminatory, proportionate and transparent. To ensure that Ofcom meets this requirement, Ofcom needs to guarantee that any threshold meets this. Ofcom states that evidence from rights holders shows there is a correlation between the size of an ISP's subscriber base and the levels of infringement. However, no evidence in support of this has been provided in the consultation document or in stakeholder meetings. This decision is therefore neither objectively justifiable nor transparent, which suggests it may also be discriminatory and disproportionate. Similar concerns remain about the decision to exclude mobile ISPs entirely. Ofcom also states that it has data on the levels of infringement taking place on ISP's network (3.15.3). If this kind of data is available, ISPA would suggest that a more fair and transparent threshold would be one based on the level of infringement taking place on a network rather than the number of subscribers.

Ofcom has not fully taken into account the interests of ISPs serving business users and providing wifi services including for public bodies like libraries and universities. Some of these ISPs appear to be brought into scope because of the arbitrary way Ofcom has chosen to interpret the definitions contained in the Act, particularly who it has brought into scope as an ISP, and others since they are within organisations captured because of their large consumer ISP bases. To reflect the breadth of the internet market, Ofcom should look separately at the impact on these

business-based ISPs and on the wifi market. Similar concerns about the disproportionate impact of the scope decisions are raised. Ofcom needs to take into account the full extent of the UK broadband market.

Question 3.5: Do you agree with Ofcom's approach to the application of the 2003 Act to ISPs outside the initial definition of Qualifying ISP? If you favour an alternative approach, can you provide detail and supporting evidence for that approach?

ISPA agrees with Ofcom's approach where it states that it will take into account a number of factors before extending the number of qualifying ISPs – such as consumer interest, cost and the level of infringement appearing to take place. That said there is a need to know how this will be decided. ISPA would question whether Ofcom intend to revisit and change the Code every time an ISP reaches the as-yet undetermined threshold or if there will be staggered rounds of threshold redefinition.

Whilst Ofcom has detailed some of the reasons why an ISP may be drawn in, we are further concerned that the formative discussions around implementation of the Act are taking place without full consideration and consultation of ISPs likely to be drawn in at a later stage. ISPs outside of the threshold are now in the uncertain position of not knowing if, when and for what reason the code may be applied to them and therefore how much they should engage with the detailed development of the Code.

As well as changing business models for small businesses where internet access is not the main area of business – such as hotels and cafés - Ofcom's proposals in the code for wholesale providers will change the way the broadband chain works. The proposals contain implicit obligations on ISPs, such as collecting data they do not already keep, changing terms and conditions, making agreements with wholesalers and putting obligations on wholesale providers, not contained in the Act. To get this data Ofcom is requiring ISPs to make large changes to existing business models. The code needs to reflect the complex nature of the UK market and keep the scope of the Code simple and narrow. It should also clarify and clearly state what it sees as necessary obligations to ensure the effective working of the Code. The definitions should be properly applied and not used in a way which brings into scope of the Code organisations such as libraries, which are clearly not ISPs in any meaningful way.

Definitions

Question 3.6: Do you agree with Ofcom's approach to the application of the Act to subscribers and communications providers? If you favour alternative approaches, can you provide detail and supporting evidence for those approaches?

Ofcom is including organisations that were previously not defined as communications providers, such as universities, libraries and museums, in the Code. There is a need for the definitions to be looked at again in more detail so that all are clear who is a subscriber and who is an ISP and Ofcom needs to provide clear justification for its definitions. Ofcom says that clarity is provided as wifi providers do not meet the qualifying threshold, however, ISPA does not view this as satisfactory as the issue is only being postponed.

The treatment of wifi networks in particular needs more work. According to Ofcom's definition, where there is an agreement with the customer or users of the wifi service, such as a café or hotel, the wifi operator would be considered an ISP. So if they qualify then they would have to process CIRs and send notification letters. This creates a problem for the wifi operator as they may not be able to identify the customer that allegedly committed the infringement and even if they can, may not have sufficient details to contact them. Furthermore, the Code states that a wifi operator – including in the offices of small businesses - is deemed a subscriber for providing an open wifi connection and so will be subject to CIRs. Given the open nature of this kind of broadband access, it is difficult to know what reasonable steps could be put in place to prevent infringement aside from expensive filtering software. The uncertainty, risk and cost of this would severely curtail the use of open wifi networks, something the Act does not to intend to do.

CIR reports

Question 4.1: Do you agree with the proposed content of CIRs? If not, what do you think should be included or excluded, providing supporting evidence in each case?

Question 4.2: Do you agree with our proposal to use a quality assurance approach to address the accuracy and robustness of evidence gathering? If you believe that an alternative approach would be more appropriate please explain, providing supporting evidence.

Ofcom has identified a lot of standard information that should be included in the CIR. It is useful for consumers that some information contained is in a standardised form for clarity. However, ISPA questions the technical validity of the information sent through a CIR.

The Code assumes that the methods used by rights holders and third parties are a good standard of evidence. ISPA strongly questions the methods that rights holders use to detect and collect data on alleged copyright infringement. ISPs do not know exactly what methods will be used to potentially identify its customers and there have been many instances of users being targeted by rights holders on poor evidence. As far as ISPA is aware, these methods have never been tested in a UK court and there are several examples from Europe where such methods have not stood up to legal scrutiny[1]. On its own, an IP address is generally considered insufficient evidence for identifying individuals who engage in unlawful filesharing. Moreover, WEP encryption used for wireless routers is not sufficiently secure to prevent access by an external user to a secured router. The generally recognized problem of users spoofing an IP address to hide their identity may become more widespread as a result of this Act.

ISPA welcomes Ofcom's consideration that third parties should be independently audited to ensure robust processing. However, the draft Code only states that Ofcom may require that systems and processes used to gather evidence be subject to audit by an appropriate party. This should be mandatory. There have been numerous examples of users being targeted by rights holders in a non-transparent and unfair manner that has not resulted in litigation. If rights holders are using IP harvesting companies, ISPs and users need to know who these companies are and what methods they will be using. The Act states that Ofcom must specify requirements for obtaining evidence of infringement and the standard of evidence rather than creating a quality assurance approach (Section 7/124E(2)). Ofcom will need to review this.

Ofcom's approach to the Code infers that the subscriber is responsible for infringement carried out by another person on their connection: for example flatshares and families. However, there is no legal basis for this. The Copyright, Designs and Patents Act is clear that an individual is only guilty of infringement if they committed the act themselves or authorised the infringement by another. Merely being the holder of an account identified as infringing does not mean that the subscriber has authorised infringement and there is no responsibility in law for a subscriber to protect their connection. The CIR and letter writing proposed by Ofcom suggests that the subscriber is responsible. Ofcom needs to provide a clear legal basis for reaching this conclusion.

[1] For example: Tribunale di Roma, http://www.scl-elearning.co.uk/4th-annual-policy-forum/pdf/SCL_4th_Annual_Policy_Forum_D1S2_Andrew_Murray.pdf; Danish case, http://www.edri.org/edrigram/number7.22/antipirates-going-down

Ofcom should also say what the definition of an infringement is in terms of size of file – is it a portion of the file, a significant portion or the whole file?

Question 4.3: Do you agree that it is appropriate for Rights holders to be required to send CIRs within 10 working days of evidence being gathered? If not, what time period do you believe to be appropriate and why?

Ten working days seems like an appropriate length of time. However, as the system being proposed is new, Ofcom's main concern should be with ensuring a fair and proportionate process. A soft launch at say levels of notifications similar to the MoU trial in 2008 would help all stakeholders understand the impact of this and alternative timeframes for the CIR processes.

Identifying subscribers

Question 5.1: Do you agree with our proposals for the treatment of invalid CIRs? If you favour an alternative approach, please provide supporting arguments.

ISPA is concerned about the number of invalid CIRs that its members may receive once the Code is in operation. ISPA members involved in the MoU in 2008 reported that they received a high proportion of invalid notifications from the BPI (around a third was typical), such as duplicate requests for the same subscriber or non-valid IP addresses. There is no reason not to expect a similar level of invalid CIRs under the Code regime. Invalid CIRs also raise a problem around how they are logged. Given the likely frequency of invalid CIRs ISPs will be receiving, ISPA calls on Ofcom to look into the reasons for this in more detail to give clarity to ISPs before launching the Code.

It is premature to set details for invalid CIRs without defining cost details first. Whether a CIR is valid or not, ISPs should be paid for processing requests. In particular, ISPs should be reimbursed for the processing of invalid CIRs and they should count towards the CIR allocations of rights holders.

On more general points around costs, Ofcom need to look at different tariffs that take into account different circumstances, such as method of delivery or size of provider. The forecasts provided by copyright owners that are used to derive the fee per CIR should be used as a firm commitment and if copyright owners do not deliver the volume they forecast they should be required to pay for the unused portion.

That said the list of reasons why CIRs maybe invalid included in point 5.3 appears to be fairly comprehensive start but other reasons could also be stated. For example the information may not be in the right format or have not gone through the system properly, there maybe missing information or duplicates.

Question 5.2: Do you agree with our proposal to use a quality assurance approach to address the accuracy and robustness of subscriber identification? If not, please give reasons. If you believe that an alternative approach would be more appropriate please explain, providing supporting evidence.

A quality assurance approach, where ISPs provide Ofcom with information to show how they are matching IP addresses, whilst useful, should have minimal imposition on an ISP's systems and processes in assisting rights holders in their disputes. In the interests of proportionality, it should be mandatory for rights holders and the third parties they employ to be subject to a similar approach.

Under existing legislation, ISPs provide law enforcement authorities with data for court purposes and provide a statement that to the best of their knowledge the information is correct. Due to the long standing relationship between law enforcement and ISPs, it is generally accepted that ISP's systems for matching IP addresses are robust. However, ISPs cannot guarantee that the information they are providing is correct and cannot provide more assurance than this. ISPA members could only envisage a similar sort of situation for subscriber identification under the Code.

The proposed Code should be objectively justifiable and proportionate. To ensure that this is the case, ISPs should not be required to collect data that is not already covered by their business records. ISPA is concerned that Ofcom may ask an ISP for too much information and Ofcom needs to be clear in what is it asking for. For example, statements such as "any other information as directed" are too open-ended need to be clearly defined.

Question 5.3: Do you agree with our proposals for the notification process? If not, please give reasons. If you favour an alternative approach, please provide supporting arguments.

Ofcom's proposals for the notification period seem fairly reasonable. However, given some of the problems associated with identifying alleged infringers described above, to ensure that excessive numbers of notification letters are not sent and users subsequently added to a repeat infringers list, the number of notices that trigger a CIR should be greater than one, say 5 or 10.

ISPA has concerns over the operational impact of storing the accumulated CIRs and wants to ensure that users and ISPs are not targeted unfairly by rights holders. For example, a shorter period than to store CIRs would be more proportionate. ISPs retain data for law enforcement purposes and serious crimes for twelve months, data should not be retained for copyright owners for the same length of time.

As drafted, the Code would not prohibit rights holders from playing the system, such as rights holders from targeting an individual ISP with high levels of CIRs. To ensure that the system is fair and proportionate, Ofcom's should address this in the Code by requiring rights holders to scan and capture data across all valid IP ranges for each piece of relevant content and ensure that CIRs sent by copyright owners are spread proportionately amongst qualifying ISPs. Ofcom should also have a mechanism for monitoring the comparative levels of notifications sent by each rights holder to each ISP so that indications of targeting are addressed swiftly. We suggest that any rights holder found by Ofcom to have targeted an ISP unfairly should be suspended from the regime for a defined period (say six months).

Question 5.4: Do you believe we should add any additional requirements into the draft code for the content of the notifications? If so, can you provide evidence as to the benefits of adding those proposed additional requirements? Do you have any comments on the draft illustrative notification (cover letters and information sheet) in Annex 6?

It is imperative that information sent to an ISP's subscriber is clear and understandable for the subscriber to help in the stated aim of reducing copyright infringement. Whilst Ofcom covers a great deal of information that has to be included in the notification, including the identity and address of the person acting on behalf of the rights holders, there is a need for greater consistency in messaging.

Wording should be less assumptive - it must not suggest that the subscriber is responsible for others infringing copyright using their connection and should clearly state that legal action is only likely if they themselves have infringed or authorised others to infringe copyright over a p2p network via their connection.

Letters that are sent should not portray p2p technology in a negative light. There is a great deal of legitimate uses for p2p – such as iPlayer, distribution of open software and the release of government data. Whilst ISPA supports the creation of a standardised approach with a minimum amount of information included, ISPs interact and communicate with their customers in their own

way, as Ofcom rightly identifies. Any system imposed should therefore respect the relationship between an ISP and its customer and offer flexibility for each ISP to tailor their communications.

Copyright Infringement Lists

Question 6.1: Do you agree with the threshold we are proposing? Do you agree with the frequency with which Rights holders may make requests? If not, please provide reasons. If you favour an alternative approach, please provide supporting evidence for that approach.

ISPA agrees with the threshold that is proposed by Ofcom and does not offer an alternative.

We query the five day period that Ofcom proposes ISPs should provide the list upon request from the rights holders. To be consistent with earlier timeframes, we would call for a longer period of 10 days to get the information to the rights holders. The information contained in the list will be detailed and complicated and as no such process is in operation currently, there may be other unknown factors that have not been thought of.

On more general points, ISPA would call for further clarity on the purpose of the copyright infringement lists. Ofcom states in point 6.6 that the information is intended to help rights holders target litigation against alleged infringers. Based on past experience, rights holders have been reluctant to take legal action against individual users. ISPA would recommend that Ofcom make it a requirement for rights holders to take legal action so the information being gathered is being used for its intended purposes and not just as a holding period before technical measures may be introduced.

The Code states that the list will only contain information directly related to CIRs made by the requesting copyright owner. However, the definition of rights holders includes those that are authorised to act on behalf of another copyright owner. This means that the CIRs will not be limited to individual rights holders and the information could be shared. ISPA would call on Ofcom to specify that rights holders can only access lists of subscribers who have infringed their copyrights and oblige them to not share the data once received.

The keeping of information on subscribers for the benefit of a third party has clear data protection implications. The Code and consultation document contains scant detail on data protection issues and, when used with other forms of information, an IP address can become personal data. It is not clear how processes in the Code will comply with the Data Protection Act. Added to this, there are many other pieces of legislation – ecommerce directive, data retention directive, privacy

directive – that the Code must comply with. Further information on how the code complies with such legislation woule be helpful.

There is also the issue of discrimination in terms of content downloaded. ISPA's understanding of the methods used by rights holders is that certain content is prioritised over others. The aim of the notification period is to reduce levels of infringement generally rather than target specific types of content.

Subscriber appeals

Question 7.1: Do you agree with Ofcom's approach to subscriber appeals in the Code? If not, please provide reasons. If you would like to propose an alternative approach, please provide supporting evidence on the benefits of that approach.

Ofcom is proposing to audit an ISP's systems for matching IP addresses to subscribers as part of the Code. If the system complies with the Code then there cannot be many grounds for complaint against IP matching by an ISP. The role of an ISP in the Code is to pass on information from rights holders that an IP address identified with one of their customers has allegedly been involved in copyright infringement over a p2p network. As explained previously, matching subscriber details through an IP address alone should not be considered as robust evidence. ISPs cannot make a statement stronger than the IP address may have been used for copyright infringement. This means that an overwhelming number of appeals will be due to mistakes made by rights holders rather than ISPs. The financial burden of the appeals process should therefore fall on rights holders.

In the notification process, an ISP is acting as a communications provider between the copyright owner and subscriber so it is not clear under what circumstance an ISP should have to pay any costs. When consumers receive a notification letter it will be sent by their ISP. As the recipient of the letter has an existing relationship with their ISP, they will most likely appeal against their ISP for sending the letter rather than the copyright owner who is actually making the accusation. Appeals should thus be directed directly at rights holders or at the process in general rather than ISPs.

ISPA is concerned over the amount of time an ISP may have to devote for additional representations and hearings, and the fact that the appeals body will have the power to "require information it considers necessary" with failure to do so constituting a breach of the Code without stating what this information is.

The Act states that subscriber appeals can be determined in favour of the subscriber yet the Code contains no such information on how this will be determined. In the interests of clarity Ofcom need to provide further information on this. Moreover, the appeals body is given too much discretion which could lead to capricious decisions being made. Therefore, ISPA would call on Ofcom to make it a requirement for the appeals body to publish its appeals decisions and reasons for conclusions to make the system more transparent and fair. ISPA understands that there may be no further consultation on the appeals process. Given the lack of certainty identified, we would call for further consultation.

Admin, enforcement, etc

Question 8.1: Do you agree with Ofcom's approach to administration, enforcement, dispute resolution and information gathering in the Code? If not, please provide reasons. If you favour an alternative approach, please provide supporting evidence on the benefits of that approach.

As the system being put in place is new, at the very least there should be an interim period before fines for non-compliance are possible.

In terms of information gathering, there is only a certain amount of information that an ISP will be able to provide. ISPs will be in a position where they cannot deliver information that goes beyond their business records.

Ofcom asks if stakeholders would be interested in guidelines on enforcement and dispute resolution. ISPs would welcome guidelines.