



Online Infringement of Copyright and the Digital Economy Act 2010: Draft Initial Obligations Code

Communications Consumer Panel Consultation Response

1. Introduction

The Communications Consumer Panel (the Panel) is an independent panel of experts established under the Communications Act 2003. Its role is to influence Ofcom, Government, the EU and service and equipment providers, so that the communications interests of consumers and citizens are protected and promoted.

The Panel pays particular attention to the needs of older people and people with disabilities, to the needs of people in rural areas and people on low incomes, and to the needs of small businesses, which face many of the same problems as individual consumers.

The Panel is made up of part-time members with a balance of expertise in consumer issues in the communications sector. There are members representing the interests of consumers in Scotland, Wales, Northern Ireland and England.

Panel Members are appointed by Ofcom, subject to approval by the relevant Secretaries of State. They are appointed in accordance with Nolan principles and are eligible for re-appointment. The Panel is assisted by a small advisory team.

2. Background

The Panel noted during its discussions about the Digital Britain Final report in 2009 that debates around online copyright infringement appeared to be dominated by the interests of copyright holders (rights holders) and internet service providers (ISPs).

The Panel emphasised the need for consumer bodies to be properly involved in the debate when it responded to the last Government's June 2009 consultation on legislation to address illegal peer-to-peer file-sharing. As part of this response, the Panel set out some safeguards it believed should be built into any system designed to reduce online copyright infringement, in order to protect consumers.

This initial set of safeguards formed the foundations of a group of customer principles that the Panel, along with Consumer Focus, Which?, the Open Rights Group and Citizens Advice, published in May this year.

The principles were developed as a guide to help Ofcom, and other policy makers, to take consumers and citizens properly into account when developing the initial obligations code on reporting copyright infringement.

The Panel has adopted an essentially pragmatic approach when formulating the principles. This pragmatism stems from the recognition that measures to reduce online copyright infringement will be implemented following approval of the Digital Economy Act in the last Parliament, regardless of any issues posed by the structure of the Act. There is, therefore, a need to ensure that this implementation happens in a way that protects consumers and citizens' interests.

The consumer bodies recognised that Ofcom does not have the powers to mandate all the measures they believe are necessary to protect consumers. So the principles are also intended as a useful guide for ISPs and rights holders.

There are five overarching principles, based on:

1. The need for cogent evidence
2. The need for clear, unthreatening and non-partisan notifications to be sent to alleged infringers
3. The need for consumers to have the opportunity to appeal against a notification of copyright infringement
4. The need for general education outside the notifications and appeals process on legal alternatives
5. The need for an independent, impartial, transparent, expert, representative and accountable appeals body/process.

A full copy of the principles is attached but below is a summary of the main points.

The **first principle** requires that rights holders must have solid evidence before requesting an ISP to log a copyright infringement report. It is important that the

rights holders provide this evidence to the ISP and that it can be independently verified by an independent body.

This evidence should also be available to alleged infringers.

The **second principle** focuses on the information alleged infringers receive as a result of the generation of copyright infringement reports by rights holders. It is important that notifications sent by ISPs to alleged infringers are positive, clear and easy to understand but also give customers all the information they need.

We recommend that notifications from ISPs take the form of a short letter accompanied by a standard information pack, which would explain the details of the notification process and about how to appeal.

The **third principle** aims to ensure that customers can appeal against any copyright infringement reports raised against them.

The appeals process should be free to customers, it should be simple to access and there should be an independent third party available to advise on the process and on how to gather evidence to support the appeal.

Customers' whose appeal is successful should receive compensation.

The **fourth principle** is aimed particularly at rights holders. We call for rights holders to provide information about legal online content services outside of the notification process.

This means doing more to develop attractive, easy to use and affordable alternatives to illegal downloading, and to better market and promote these services.

The **final principle** sets out standards for the appeals process and appeals body. They should be:

- Independent and impartial, particularly independent from ISPs and rights holders
- transparent; meaning that information on its constitution, budget and work should be easily available to the public
- expert; in terms of technology, copyright and media law, and media use and media literacy
- representative; so it should also include lay consumer members; and
- accountable; to the general public, the Government and Ofcom

3. Response

The Panel considers there to be potential for serious consumer detriment in the draft initial obligations code for addressing online copyright infringement. This detriment arises partly from the structure of the Act itself, which the Panel recognises is outside of the scope of this consultation, and partly from the interpretation of the Act as laid out in the draft initial obligations code.

The Panel believes that Ofcom has not managed to provide sufficient detailed and specific guidance within the initial obligations code to protect consumer and citizens interests to the extent that it is able under the Digital Economy Act. The Panel also believes, as do others, that there is the need for legal clarification on some points in the code to show that it fully complies with the provisions in the Act.

Major areas of concern include:

1. Structural issues; particularly, the independence of the appeals body and the large scope for discretion that it will have. Guarantees of independence must be very strong or the body will not be seen as legitimate. This is particularly true if the appeals body is responsible, for example, for establishing principles early in the process that govern what are 'reasonable measures to secure Wi-Fi' and when they should be taken, and other key matters such as standards of proof in appeals.
2. The potential for consumer confusion: the Panel remains concerned that consumers will find the whole process confusing and contradictory. This is partly because consumers' rights and responsibilities, and the process itself, need to be properly and clearly explained. But it is also due to some considerable legal uncertainty and confusion. For example: the relationship of the DEA framework to general copyright law; and the extent to which consumers should be advised to secure their Wi-Fi.
3. Conflicts of interest: rights holders have a clear interest in developing and promoting a particular view of copyright and in protecting existing business models. They may also have a particular interest in ensuring that the DEA framework is implemented in full; that is, that the Government moves quickly to approve technical measures. The panel believe that the draft code involves an under-appreciation of the commercial interests of the rights holders and ISPs, which may be contrary to the interests of consumers. For instance, many ISPs will have a clear incentive to support the closure of open Wi-Fi networks, in order to increase the number of paying subscribers in the UK.

There may also be an incentive for ISPs to advise multiple-occupancy households - and possibly even families - to move to multiple connections, to avoid the potential that the bill payer becomes responsible for illegal activity carried out by other authorised users over a single household connection. This would also increase the paying subscriber base.

Many ISPs are also content providers and may have particular commercial interests in promoting their own services for example through the notifications process.

The Panel believes that many of these issues may be addressed with guidance provided by Ofcom or from minor redrafting. However, some issues will need further, substantive work, such as providing clarification on the legal application of vicarious liability or the potential effect of the code on public intermediaries.

The Panel is also concerned about the haste with which the DEA framework is being introduced, and the lack of full and formal consultation. For instance, there is no provision for a second consultation on the initial obligations code, nor is there the opportunity to appraise the proposed structure of the appeals body and process beyond the general outline given in this consultation.

Question 3.5: 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?

and

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?

1. There are two high-level issues with the definitions in the consultation and draft code: first, the definitions lack clarity and may give rise to consumer harm in their implementation; and second, they do not relate simply to a general understanding of the terms employed, and so will likely be difficult for consumers to understand and interpret.
2. There is significant potential for confusion over the interpretation and application of the definitions of subscribers, communications providers and ISPs. It is particularly clear from the wording in the consultation document that there is little certainty over how the code will apply to operators of Wi-Fi networks. Paragraph 3.23 of the consultation document defines providers of Wi-Fi

networks who also provide a commercial or public service that is not linked to internet provision as internet service providers. The Panel's concern here is that large public intermediaries, such as libraries, may meet the qualifying criteria of a Qualifying ISP either under the proposed threshold or under future thresholds.

Recent Ofcom research showed that around a third of people who do not have the internet at home use it elsewhere. Over a fifth of those people who accessed the internet at least once or twice a year used libraries to do so.¹

The Panel calls on Ofcom to ensure that public intermediaries do not and will not have any responsibilities of a Qualifying ISP under the code that would either: force them to limit the type of access provided to users to a degree that would disadvantage users of these services in relation to people with access to home broadband services; or shut down services entirely due to cost and administrative burden.

3. The Panel is also concerned about the definition of providers of open Wi-Fi services who, according to paragraphs 3.22 and 3.30 of the consultation document, would be subscribers in the first instance, as long as they were also receiving internet access for their own use as well as to make access available to third parties. These open Wi-Fi providers may include private consumers or SMEs, such as coffee shops or hotels who provide Wi-Fi to their customers for free but leave the connection open to others who are not customers. Their role as communications provider appears to be a corollary to their position as subscriber, and there is confusion as to how the SME model would fit into the definition of an internet service provider.

Ofcom should provide guidance about whether or not the owner of an internet connection, as a subscriber, will be ultimately liable for any use of that connection. It should also provide clear guidance as to the status of people who use open Wi-Fi services but do not own the connection.

The Panel believes that open Wi-Fi services are an important part of widening access to broadband services and that they should be protected as far as possible to this end. It is therefore extremely important that the potential consequences for open Wi-Fi are very carefully considered in the final obligations code, in terms of appropriate technical definitions, guidance given

¹ Ofcom (2009) *Accessing the internet at home: A quantitative and qualitative study among people without the internet at home* by Ipsos Mori London: Ofcom, pg. 28

on how to implement the code, and the advice given to consumers by ISPs and any other bodies.

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.

4. The DEA requires in section 7/124E(2b) that the initial obligations code makes a provision for the standard of evidence that must be included. It is not clear that the draft code complies with this requirement.
5. There need to be minimum standards laid down for quality assurance. The Panel recognises that Ofcom may be reluctant to set what it considers to be arbitrary standards that it is not in a position to understand; however, not only does the DEA require that standards of evidence are set, there would be serious potential for consumer detriment were these not to exist.

The only potentially objective measure in the suggested approach is in subsection 3.5.4 in the draft code, which requires that any examples of quality assurance issues, such as failed copyright infringement reports (CIRs), are identified and any measures to address them noted; however, rights holders should not rely on the number of failed CIRs or other such quality assurance issues to measure compliance with the code. The systems that ISPs will use to identify subscribers are also not subject to defined minimum standards in the code as currently drafted. Thus, there is the potential for error in the checking and matching of CIRs by ISPs.

If invalid CIRs are allowed to pass through the system, consumers will need to assume the unnecessary burden of the appeals process. The cost of extra appeals may give rights holders and ISPs an incentive to avoid invalid CIRs but this cannot be evaluated until the Government publishes its statement on cost-sharing for the initial obligations code. In any case, the Ofcom consultation on tariff setting will not be released under the current timetable until after a statement on the initial obligations code has been published and sent to the EU Parliament for consideration.

It is thus extremely important that measures are included in the code that would preclude consumer harm due to the failure of quality assurance procedures, regardless of the presumed influence on these procedures of the cost of fighting extra appeals.

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.

6. The DEA requires in section 7/124E(3a) that the initial obligations code makes a provision for a requirement as to the means by which an ISP identifies a subscriber. It is not clear that the draft code complies with this requirement.
7. The argument for minimum standards for quality assurance for the means by which an ISP identifies a subscriber is as the argument for minimum standards of quality assurance for evidence produced by rights holders when generating a CIR in question 4.2 above.

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.

8. The DEA requires in section 7/124E(1d) that the initial obligations code makes a provision about how internet service providers are to keep information about subscribers. It is not clear that the draft code complies with this requirement.
9. The notification procedure as laid out in the draft code lacks clarity. There are three particular questions that arise from the process as it currently exists:
 - Once a third notification has been triggered, at what point is the subscriber included on a copyright infringement list?
 - Does the third notification retain ‘third notification’ status for a full 12 months (i.e. even after the CIRs that triggered the first two notifications are no longer valid)?
 - What happens to the status of these update notifications once the CIR that triggered the third notification is older than 12 months? Does the subscriber remain on the CIL until all subsequent CIRs are older than 12 months?
10. The draft code suggests some additional required content for notifications beyond those required by law. The Panel agrees with all the points included in paragraph 5.17 of the consultation document; however, it calls on Ofcom to extend the requirement for ISPs to inform subscribers that CIRs are available on request. This requirement should instruct ISPs to update subscribers automatically of any CIRs received against their account, if the subscriber makes an initial request for this to happen. Subscribers could be updated by email or perhaps by logging on to a website run by the ISP that subscribers could use to check any CIRs against their account.

11. The Panel is concerned about sections 5.5 and 5.6 of the draft code, which give ISPs the option to send first and second notifications to subscribers either by email or by post.

ISPs have an incentive to use email only for first and second notifications, in order to save on the cost of generating hard-copy letters and of postage. However, this approach runs the serious risk that subscribers will only receive the third notification. There are many reasons why subscribers may not receive email-only notifications, including:

- ISPs may have the incorrect email address, or one that people do not check regularly or at all
- The volume of emails many people receive may mean that people miss it
- The notification subject header may look like spam and so be ignored by the subscriber, or go into a spam folder
- If ISPs use email for marketing purposes, subscribers may think it is a marketing email and ignore it

If the third notification is the only notification a subscriber receives, there is little opportunity to influence behavioural change before the subscriber is included on a copyright infringers list. It seems counter-intuitive to build a system that is in danger of simply notifying people of their impending inclusion on a copyright infringement list, since the stated aim of this whole first phase of the DEA framework is to reduce online copyright infringement through behavioural change.

Also, if the third notification is the only one a subscriber receives, it could cause considerable distress. The third notification will be the most alarming in tone, since there will be an assumption that the subscriber has ignored the first two notifications.

The Panel calls for Ofcom to amend the code to require that all notifications are sent by post, and may also be sent by email. The first two notifications need not be sent by recorded delivery.

12. Subsection 5.11(a) of the draft code should be amended to read “a statement that *an* IP address....” to reflect the shifting nature of IP address allocation.

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?

13. The content of the notifications should not be aimed only at communicating the existence of valid CIRs and the potential for escalation if subscribers continued to be identified by valid CIRs. The notifications should also be aimed at informing subscribers of their right to appeal. The language in paragraph 5.21 of the consultation document appears to implicitly assume the guilt of the identified subscriber, which is reflected in the drafting of the template letters in annex 6.

For instance, there is just one sentence near the bottom of the letter that references the right to appeal. This information must be made more prominent.

14. The Panel considers that the most appropriate way to communicate much of the information relevant to subscribers is through the use of a standard information pack. The Panel recognises that ISPs will wish to communicate with their own subscribers in a way that reflects their subscribers' circumstances and their own style of marketing communication; however, the Panel calls on Ofcom to recommend that standardised information is sent to subscribers that details the process in general, the appeals process and where subscribers can access independent advice.

Standardised advice will not only provide greater certainty for subscribers but also for ISPs. ISPs may be subject to appeals based on information in the notifications they send to subscribers, so some standardised information would help them to comply with the code. This would also minimise the likelihood that a subscriber would need to enter into the appeals process.

The draft information sheet included in annex 6 of the consultation document is a good starting point for a standardised document but needs to be clearer. In particular:

- Point 2 should include a neutral, simple and clear explanation of what copyright is for. The first sentence in this point does not explain why copyright exists.
- Point 5 is not logical, as b) does not necessarily follow from a). For example, if the subscriber herself (rather than another person) has used the connection to infringe copyright, then b) is not triggered. Also, for b) to prevent another using the connection to infringe copyright, it is not only necessary to secure the connection. It is also necessary to ensure that it is secured from other members of the household.

- Point 7 needs to be preceded or succeeded by an explanation of what a copyright infringement list (CIL) is for. In the explanatory notes accompanying the Digital Economy Act, paragraph 45 states that CILs are “intended to make legal action a more attractive and effective tool for copyright owners to use in respect of their copyright.” Thus, as we understand it, a CIL has two uses: first, to help rights holders identify repeat infringers and target legal action; and second, to identify repeat infringers in case of the introduction of technical measures. Both of these uses need to be explained factually and in plain English, with reference to the legislation. It should not be threatening in any way.
- Point 7 also needs to be simplified and broken up into more questions with shorter answers.
- Point 17 in the information sheet should be revised or expanded to explain the situation regarding technical measures. It should either include an explanation of the circumstances under which a subscriber’s connection may be affected by their inclusion on a CIL or, if there is no possibility that inclusion on a CIL during the Phase 1 period may be used in case of technical measures, this should be clarified and explained as to how this fits with the provision in the Act.
- The information sheet should also include information on the applicability of vicarious liability and under what circumstances subscribers now have a legal obligation to secure their Wi-Fi.

15. Subsection 5.11(e) of the draft code requires that information about the ability of rights holders to bring legal action for damages is included in the notifications. This requirement is not in the DEA but the Panel agrees that subscribers should be informed about this process. However, the information needs to properly describe the legal process that a rights holder may undertake. The Panel asks that this section sets out more clearly the full implications of a breach of copyright.

16. Subsection 5.11(g) of the draft code requires that notifications advise subscribers of reasonable steps they can take to protect their internet access from unauthorised use and prevent online copyright infringement in the future; however, with no guidance as to what might constitute reasonable steps, ISPs are free to give advice that may be worthless or even damaging to consumers. The Panel recognises that the details of what constitutes reasonable steps will be worked out by the appeals body through precedent but there needs to be guidance from Ofcom on what this means so that:

- subscribers can have some certainty and
- the appeals body can appreciate the wider context of its decision, for instance, in terms of the potential societal effects of closing open Wi-Fi.

The Panel recognises that there is a tension between DEA section 3/124A(6h), where the Act requires only that notifications should contain information about protecting the internet connection from unauthorised usage, and DEA section 13/124K(6b), where the Act requires appellants to show that they took reasonable steps to prevent other persons infringing copyright by means of their internet connection. However, Ofcom must employ extreme caution in how it interprets this tension.

The inclusion of the extra line in subsection 5.11(g) in the draft code about preventing online copyright infringement changes the nature of the responsibility that was placed on subscribers in DEA section 3/124A(6h). The nature of accountability becomes qualitatively different when subscribers are made responsible not only for protecting their connection against unauthorised use but also for protecting their connection from copyright infringement committed by authorised users of their connection. Without clear guidance on what this means for subscribers' liability, there will be much greater temptation for ISPs and others to advise that subscribers protect their connections at the highest level 'just in case'. This advice may not only be motivated by concern for subscriber welfare but also by a desire by ISPs to increase the number of individual internet connections.

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

17. The Panel recognises that there is a tension between DEA section 4/124B(3), where the Act defines the threshold of a relevant subscriber by number of CIRs reached, and DEA section 7/124E(5), where a relevant subscriber is defined by reference to any matter, including "one or more of the number of CIRs, the time within which the reports are made, and the time of the apparent infringement to which the reports relate." At the moment, the draft code complies with section 7 but not section 4; thus Ofcom must clarify its definition of the threshold in the code to ensure that it does not contravene one of the requirements of the DEA.

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.

18. The independence of the appeals process is central to its legitimacy.

Independence is particularly crucial given the large scope for discretion the appeals body will have early in the process to determine key matters such as the “reasonable steps” that subscribers can or should take to prevent others infringing copyright on their internet connection.

The Panel calls on Ofcom to lay out in the code a set of requirements for guaranteeing this independence. The code should make explicit provisions for the appeals process to meet the requirements of the final principle in the consumer bodies’ customer principles document. This principle requires that the appeals process, and appeals body, should be:

- independent and impartial, particularly from ISPs and rights holders. This is essential if the process is to enjoy legitimacy and should be reflected in a majority lay membership, including members that are completely independent of industry, security of tenure for the chair and board members, and budgetary independence;
- transparent. To include the maintenance of a website containing public information including membership of the appeals body, budgeting, numbers of appeals, numbers of adjudications, and nature of the adjudications;
- expert. The appeals body should include independent membership with expertise in: i) the value of evidence likely to be served relating to ISP logs, IP addresses and other technical matters, ii) copyright and media law relating to fair use and peer-to-peer networks, and freedom of expression, iii) media use and media literacy of internet users;
- representative. The appeals body should, in addition, include lay consumer members; and,
- accountable, to the general public, Parliament and Ofcom

19. The availability of independent advice is also crucial to securing the optimum outcome of the DEA process for consumers. The code should require a well advertised and funded independent advice body, which can not only advise on the DEA process but also on copyright law or, at the very least, advise subscribers of where they can get independent advice on copyright law.

Any advice service needs to be very robust and the advisors knowledgeable, so as not to err on the side of caution and cause an unnecessary chilling effect on internet usage. The service should be available at low cost to the person seeking advice and should meet accessibility requirements.

The Panel considers that the appeals body is likely to be best placed to give independent advice and calls on Ofcom to require this service of the appeals body in the code. The Panel also calls on Ofcom to require ISPs to advise their subscribers of this independent advice line in their notifications.

20. The appeals process needs to be accessible and usable by the greatest number of consumers. Although the burden of proof should be on the rights holders and ISPs in most appeals, the burden of accessing the system and making the appeal is always on the subscriber. Individual subscribers do not have the benefit of the resources of the major rights holders and ISPs to help them put together and defend an appeal. Thus, there should be provision for helping subscribers with the submission process, which may also be provided by the independent advice service.

The Panel also calls on Ofcom to ensure that the code take better account of the needs of disadvantaged and vulnerable consumers. For instance, the requirement to submit all appeals in writing means that there will be many subscribers who may be deterred from appealing due to difficulties with written communication.

21. The scope of the discretion that will be afforded to the appeals body according to the draft code is currently vast, to the point of creating legal uncertainty. This will make it extremely difficult for consumers to understand what they should expect from the appeals process, and what it expects from them.

The Panel recognises that the DEA section 13/124K(2c) requires that the appeals body is, for practical purposes, independent of Ofcom; however, it believes that there is scope for Ofcom to provide guidance within the code on certain areas.

First, there should be some guidance in subsection 7.10 in the code on the time limits that the appeals body should set for appeals to be submitted. Any time limit on submissions for appeal from subscribers must take into account, in general:

- the likely level of legal knowledge
- ability to make a case
- ability to understand what they have been accused of
- the time it takes to seek out and receive advice
- the time it takes to gather necessary evidence
- the time it takes to write and submit a case

The final three points should also take into account the continuation of normal activity in the alleged infringer's life, such as work or study.

Second, there needs to be guidance as to what constitutes reasonable steps that subscribers can take to prevent other persons infringing copyright by means of their internet access, taking into account:

- Clarity on the position of vicarious liability
- Technical knowledge of subscriber
- The desirability of maintaining wider uses of Wi-Fi that may not benefit from total lock-down of the connection. For instance, open Wi-Fi that helps towards Digital Britain objectives by making access to internet more widespread, or cultural uses like online gaming or downloading legitimate software.

This guidance could be laid out in subsection 7.21.

Third, DEA section 13/124K(8) allows costs not to be reimbursed if the appeals body decides it would be unjust, and that this is reflected in the code in subsection 7.28. The consultation document does not explain why it may be unjust to award costs and it would be useful to have some guidance on what circumstances might warrant this decision.

22. There are also some areas in the appeals process, as laid out in the draft code, that require clarification.

The wording in subsection 7.23 of the draft code does not reflect that in the DEA section 13/124K(5). The DEA clearly places the burden of proof on the rights holder or ISP to show that the apparent infringement was an infringement of copyright and that the CIR relates to the subscriber's IP address at the time of the alleged infringement, in order to reject a subscriber appeal. This has been transposed into the draft code as "if the Appeals Body is satisfied that there is sufficient evidence to show that..." with no mention of rights holders or ISPs. The code should accurately reflect the provisions made in the DEA regarding the burden of proof when rejecting a subscriber appeal.

Subsection 7.24 says that appeals on any of the five grounds given in section 7.12 can be allowed if the subscriber shows that the act constituting the alleged infringement was not done by them and that they took reasonable steps to prevent other persons infringing copyright by means of the internet access service. However, the DEA seems to say that these two burdens of proof on subscribers are required only in instances when grounds of appeal are either that:

- The alleged infringement was not an infringement of copyright; or

- The CIR does not relate to the subscriber's IP address at the time of the alleged infringement.

This should be clarified and reflected in the code.

3. Conclusion

The Panel recognises that transposing the provisions in the Digital Economy Act into a coherent initial obligations code is a difficult task. However, it believes that Ofcom has not encompassed the consumer and citizen interest in the draft code to the extent that it is able under the DEA framework. The problems are both in the detail of the drafting and in the assumptions underlying the code. The Panel thus calls on Ofcom to review the draft code significantly, in order to avoid serious consumer detriment in its implementation.