2010 - Department for Business Innovation and Skills consultation on Online Infringement of Copyright Cost Sharing

This is JANET(UK)'s response to the Department for Business, Innovation and Skills consultation on "Online Infringement of Copyright (Initial Obligations) Cost-Sharing [1]". JANET(UK) is the operator of JANET [2],the UK's National Research and Education Network, which connects universities, research establishments, colleges and regional schools networks to each other and to the Internet. JANET and its connected organisations have been recognised by rights-holders and in Parliamentary debate of the Digital Economy Bill as having very effective policies and processes to reduce infringement of copyright by users of the network.

In responding to this consultation, we are unable to determine the implications for JANET and its customers, since it is very unclear which, if any, of us fall into the category of "ISP" defined in section 16 of the *Digital Economy Act 2010* [3]. Indeed the Minister has stated in Parliament that the status of all 180 universities (and presumably also all 450 Further Education Colleges, which may have the same range of relationships with JANET and their users) would have to be determined individually. In drafting this response we have therefore focused on the clarity of the proposals and the incentives and benefits that would be created by the proposed allocation of costs.

We note however that this problem of definition will further increase the uncertainty in both costs and impact of the proposed scheme. In its Impact Assessment of March 2010 [4] the Government could not determine whether the number of ISPs subject to these Regulations would be 5 or 450; the uncertainty over the status of universities, colleges and other organisations means that this number could in fact be over a thousand. We believe that clarifying the scope of regulation is vital if the legislation is to achieve its intended purpose of reducing online copyright infringement.

We also agree with the consultation document's assessment that clarity on the likely scale and allocation of costs is essential to allow appropriate systems to be put in place. We therefore support the consultation's call (in paragraph 5.13) for more information on the approximate number of Copyright Infringement Reports (CIRs) that are likely to be sent to ISPs. Indeed we believe that it will be impossible to make significant progress on the Initial Obligations Code (which will set thresholds in terms of numbers of CIRs) without this information.

Our responses to the specific questions in the consultation document are as follows:

Question 1: Is the list of included cost items correct? What items should be added or removed? Please give reasons.

We believe that all listed costs are correct.

Past experience of JANET and its customers suggests that there may well be further significant costs in dealing with Copyright Infringement Reports that are either incorrectly formatted or incorrectly addressed. These costs will be disproportionately high for those ISPs that use automated systems, since such CIRs will have to be dealt with manually.

We also consider that the consultation document may under-estimate the initial costs of agreeing, across a potentially large number of qualifying ISPs and qualifying rights owners, a common machine-readable format for CIRs to be automatically processed. We also anticipate that the Serious Infringers List, which is required to group CIRs both by subscriber and by rights owner, may require significant additional development rather than being a simple addition to existing subscriber databases.

Question 2: Do you think this is the right approach to the sharing of notification costs? If not, what should it be? Please give reasons and any supporting evidence

We agree with the consultation document (and the Mott MacDonald report) that ISPs will need to make significant capital investments to implement the reporting and notification scheme. The report suggests a number of ways that ISPs can be assured that this investment will be repaid, however the consultation document does not make clear which of these will be used to calculate the fee per CIR. Without guaranteed recovery of their investment, ISPs are likely to use less efficient processes, increasing the overall costs.

We agree with the consultation document that differences in ISPs' business models (for example whether they are small and use manual processes for CIRs or large and choose to automate) and network infrastructures (for example whether they use Network Address Translation equipment that may need upgrading or replacement) will produce significant variations in their actual costs, and therefore that the fees must differ for different groups of ISPs.

We consider that it is reasonable for Ofcom to set CIR fees for each group at a level that gives ISPs an incentive to process CIRs efficiently. However the incentive on ISPs must not lead them to save costs in damaging ways, such as reducing the security with which they hold customer data. Since the costs of operating the notification system, estimated in paragraph 5.11 of the report, are significantly greater than the maximum penalty that can be imposed for breach of the *Data Protection Act 1998*, we consider that this is a significant risk. We recommend that this "efficiency incentive" should be controlled and reviewed by Ofcom to ensure that these harmful effects do not arise.

Question 3: Do you think the 75:25 ratio is the correct one? If not, what should it be? Please give reasons and any supporting evidence

As above, we are concerned that requiring ISPs to pay at least 25% of the costs may well encourage them to take harmful short-cuts with the security of customer data. The consultation suggests that the 25% contribution will encourage efficiency, however this incentive is already provided by Ofcom's setting of the fee level: an ISP with less than optimally efficient processes will in fact suffer a loss of more than 25% of the cost of the scheme. We therefore consider that the ISPs' 25% portion should be reduced at least to

eliminate this double counting, and that the benefit of any remaining ISP contribution must be balanced against the significant risk of encouraging harmful behaviour.

Question 4: Do you think this is reasonable? Do you have an alternative formulation that addresses the issue in a more effective way? Please give reasons.

We agree with the assessment that Ofcom's initial costs are likely to be significantly greater than the operating costs. However we again observe that the scale of these costs is very hard to assess given the uncertainty over the number of parties covered by the Regulations.

We agree that there does seem to be a risk of some copyright owners free-riding by delaying their registration in the scheme while benefitting from others' investment in efforts to reduce overall infringement, however we cannot see a better way to avoid this than the extended cost recovery period proposed in the consultation document.

Question 5: Do you think the broad 75:25 cost split should be used to apportion the cost of the regulator functions and appeals? If not, why not and how should they be funded?

As in our introduction, we believe that costs should be apportioned in a way that provides appropriate incentives to the different stakeholders. We consider that these incentives are different for the three sets of costs – notification (covered in our response to Q3), regulator functions, and appeals. Each of these should therefore be considered and, if appropriate, apportioned separately.

Paying regulatory costs gives stakeholders an incentive to engage efficiently with the regulator. We therefore agree that both rights-holders and ISPs should contribute, but that rights-holders should make a greater contribution to reflect their far greater benefit (£200M per year, according to the consultation document) from the scheme's success. A 75:25 cost split therefore seems reasonable.

However we are very concerned at the incentive that would be created by making ISPs pay part of the costs of the appeals process. It appears that the only way ISPs can reduce these costs is to conceal the existence of the right to appeal when they notify subscribers alleged to have infringed copyright. This would greatly harm the fairness of the process and the ability to detect errors in reporting systems (see Q6). By contrast copyright owners can minimise the number of appeals by ensuring that their notices are accurate, and should be given every incentive to do so. We therefore consider that copyright owners should bear the full cost of the appeals process.

Question 6: Should subscribers have to pay a fee to access the appeals system? If so, at what level, and how should economically vulnerable people be protected? Please give reasons and any supporting evidence.

We very much regret that the appeals system is the Act's only mechanism for identifying errors in infringement reports. In particular there is no possibility for ISPs to check reports against their own flow records, either proactively or on the request of a subscriber. We believe that including such a check within the Code would significantly reduce total costs, harm to subscribers and lost confidence in the scheme when there are systemic errors such as in 2009 when an agency failed to update its systems for US daylight saving and issued hundreds of incorrect breach notices over five days.

We therefore consider that it is essential for a fair and effective process that there be no barrier to appealing, and therefore that there should be no fee (even a refundable one) for doing so.

While we acknowledge the risk identified in the consultation paper, that the appeals process might be used by infringers as a delaying tactic, we think it unlikely in any case that a nominal fee would be effective in preventing this, so the absence of a fee will make little difference to this risk.

Question 7: Does the Order achieve all of these objectives? If not, please specify which aim(s) you feel the Order fails to achieve and why.

There are two areas where we consider the Order is insufficiently clear. Most seriously, we do not believe that Regulation 6(2) will discourage copyright owners from reducing their payments to Ofcom by under-estimating the number of CIRs. The draft appears to implement Mott MacDonald's suggestion that over-estimates (and over-payments) be carried over to the next period. This encourages under-estimation unless there is a strong disincentive, for example that ISPs be entitled to reject any notice above those estimated and pre-paid or that notices over the estimate bear a higher cost. This appears to be missing from the Regulations.

As discussed in the answer to Q2 above, we agree that Ofcom should have the ability to set different fees to reflect different ISP situations. Regulation 4(1) does provide this ability, but later sub-clauses of Regulation 4 refer to a singular "amount" which might suggest that the option of having different amounts may have been removed. However we recognise that this may be a drafting convention.

Question 8: If you answered "no" to Question 6, please set out how you think the Order should be changed.

Apart from changing the cost allocations as in our response to Q5, we do not believe that the flaws in the appeals process can be addressed by changing the Order. As in our response to Q6 we hope that it will be possible to address them in the Code.

Question 9: Do you agree with the process that the Order establishes in terms of when copyright owners may participate?

Yes. We consider that the process as described should give all stakeholders confidence that Copyright Infringement Reports and payments will be handled effectively.

Question 10: Does this process ensure that small copyright owners are able to access the system? If not, what alternative provisions could be made?

We consider that the ability of small copyright owners to access the system is more likely to be affected by the provisions of the Act and the Code than by this Order on allocation of costs.

If those are found to discriminate against small copyright owners then consideration might be given to allowing such copyright owners to send a small number of reports without registration or pre-payment. Setting the limit on the number of notices under this scheme to be lower than the thresholds for the serious infringer list and for second-stage notification would prevent such notices triggering either of those processes and their significantly increased costs for ISPs. It should also remove the incentive for larger copyright owners to attempt to abuse the system. The additional costs (and risk of non-payment) of such a scheme to ISPs, Ofcom and the appeals body would have to be incorporated into Ofcom's assessment of the fee payable per Copyright Infringement Report.

Question 11: The impact assessment sets out the costs as we understand them at this stage. Does this represent a reasonable assessment of the position? Please provide any supporting evidence for your comments.

We strongly agree that costs and their allocation must be clear before stakeholders begin to implement the Act. However we consider that the current uncertainties over the numbers of ISPs covered – whether 5, 450 or more – and the quantity of reports to be sent make it impossible to give meaningful estimates for the total costs of implementing, operating and regulating the process.

Links
[1] http://www.bis.gov.uk/assets/biscore/business-sectors/docs/10-915-consultation-online-infringement-of-copyright.pdf
[2] http://www.ja.net/
[3] http://www.opsi.gov.uk/acts/acts2010/pdf/ukpga_20100024_en.pdf
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