



Digital Economy Act Online Copyright Infringement Appeals Process Options for Reducing Costs

The Department for Culture, Media and Sport has redacted some sections of this document as they refer to on-going policy development. The text in these sections has been blocked out.

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Section 1

Executive summary

The online infringement of copyright provisions inserted into the Communications Act 2003 by the Digital Economy Act, 2010 place an initial obligation on internet service providers (ISPs), when informed by Copyright Owners, to notify subscribers of their unlawful behaviour by generating Copyright Infringement Reports (“CIRs”). It also requires that ISPs maintain records of the most frequent offenders, with a view to allowing Copyright Owners to take targeted legal action against these infringers.

The Act gives Ofcom duties to draw up and enforce a code of practice to regulate the initial obligations imposed on ISPs. This Code must confer on internet subscribers the right to bring appeals relating to allegations of online copyright infringement and to acts or omissions under the code. Ofcom must also establish an independent Appeals Body to determine such appeals and sets out the minimum grounds for appeal.

In the light of these functions, and with a view to ensuring effective implementation, DCMS has asked Ofcom to assess the likely cost and level of appeals under the existing proposals and advise on whether a subscriber fee might be needed in order to deter frivolous appeals, and how frivolous appeals could be avoided without the introduction of a fee.

To meet these objectives this report sets out the end-to-end process for the initial obligations specified by the Digital Economy Act, from alleged infringement to appeal. The purpose is to determine the principal drivers of volumes and costs in the appeals system. We then consider what options exist for reducing demand for appeals and achieving appeals cost efficiencies at each stage of the process, while ensuring that legitimate access to the right to the appeal and the overall fairness of the system is not compromised.

For one of these options, the introduction by Government of a subscriber fee for appeals, we establish some simple scenarios with a view to identifying where the key cost sensitivities lie. Finally, we describe how appeals processes operate in other industries and countries, and explore what comparisons can be made between those processes and the process for appealing an allegation of online copyright infringement under the Digital Economy Act.

We begin by setting out the process established by the initial obligations provisions of the Digital Economy Act. The total cost of appeals is driven by a combination of the fixed set-up costs of the independent Appeals Body and the variable costs it incurs in handling and determining appeals. These variable costs are the product of:

1. **The number of notified Copyright Infringement Reports (CIRs)** A CIR is used to document apparent infringements of copyright. Each CIR includes a description of the apparent infringement along with supporting evidence, including the subscriber's IP address and the time at which the evidence was gathered. Copyright Owners generate CIRs which they send to qualifying Internet Service Providers (ISPs). ISPs must notify subscribers of valid CIRs; the Initial Obligations Code specifies the form of this notification.

The number of notified CIRs is therefore driven by the overall level of online copyright infringement, the proportion of infringements which are detected, the proportion of CIRs which Copyright Owners choose to send to ISPs, and the proportion of these which are notifiable to subscribers. (Some may be rejected by ISPs, for example if the CIR does not relate to one of its subscribers or does not comply with the requirements of Ofcom's Code).

2. **The appeals ratio** (i.e. the proportion of notifications which are appealed). This is driven in part by the broad grounds of appeal which are contained in the Digital Economy Act itself. It is also driven by the motivation and incentives of subscribers, which will be affected by issues such as the seriousness with which they view receiving notifications, their level of understanding about the appeals process, the ease with which they can make their appeal, and the number of errors included in CIRs. These points in turn are affected by the publicity surrounding the process and could be susceptible to co-ordinated consumer campaigns.
3. **The unit cost of processing an appeal.** The draft Costs Order anticipates that this will be recovered from Copyright Owners and ISPs through a case fee.

There are a number of options within the Digital Economy Act for reducing costs at each of these stages. These include:

Options requiring action by Government

1. Introduce a subscriber fee for appeals



Options requiring action by Copyright Owners

1. Adopt a graduated approach to issuing CIRs (or impose a cap on the number of CIRs generated)
2. Target Copyright Infringement Reports towards those most likely to lead to appearance on a multiple infringer list, or to a successful court action, or a reduction in levels of infringement

Options requiring action by ISPs

1. Seek to ensure that subscribers understand the implications of receiving a notification, their options to appeal at each stage, and steps they can take to avoid further notifications

Actions Ofcom will undertake as part of implementing the Digital Economy Act

1. Encourage a cost focus in the competitive tender to run the Appeals Body
2. Ensure that the approved procedures of the Appeals Body are efficient
3. Establish tough indicators of performance and monitor these effectively
4. Seek to reduce the number of errors in CIRs (which could lead to a higher appeals volume)

If Government chooses to introduce a subscriber fee for appeals, this is likely to have an impact on the aggregate cost of appeals. However, we do not have evidence with which to predict accurately the level of this impact. This will be driven by the way the fee is implemented - for example whether a separate charge is made for each notification and each CIR - and by the elasticity of demand for appeals associated with introducing a fee set

at any particular level. For illustrative purposes we have set out some scenarios which show the level of cost reduction which might be achieved by the introduction of a fee.

In the case studies annex below we list examples of a number of other appeals, judicial and adjudication schemes, including two (for appeals against examination grade and for use of the court system) where a fee is charged to users. These can be differentiated by the incentives to appeal (including cost where there is a fee), the level of consumer understanding of the issues at stake and other structural considerations.

These schemes provide interesting comparisons but there are also substantive differences when compared to appealing an allegation of online copyright infringement. While we expect that introducing an appeals fee would lead to a reduction in costs, we do not think that these examples offer sufficiently relevant evidence with which to forecast this reduction accurately. It is possible that more precise evidence might be developed through a combination of examining further appeals systems, conducting consumer research, and running an appeals fee pilot scheme.

The introduction of an appeals fee at any stage of the process is likely to raise concerns over barriers to justice. It carries the risk that some subscribers with legitimate concerns are deterred from using a system which was put in place in order to offer them protection. However, despite the differences between the systems, the examinations appeals and court fee examples suggest that there is some precedent for introducing an appeal fee. Furthermore, Government has recently consulted on the impact of introducing non-refundable fee charges for certain types of appeal to the Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal.

If Government is minded to introduce an appeal fee, we expect it will want to consider making this refundable where the appeal is successful. Care should also be taken over the implementation of such a mechanism. For example, a scheme which charged a single fee for the appeal of all CIRs within a notification could be accessible to more people than one where a charge was made for every CIR separately. However, this could also increase the total number of CIRs appealed, leading to higher costs. More generally, it suggests that Government would need to be very mindful of the level at which such a fee is set,

Demand for appeals will also be influenced by the number of CIRs that Copyright owners send and the way they choose to target these. One option for Copyright Owners to consider is adopting a graduated approach to generating CIRs. This could help establish how appeals ratios vary by infringement type and could show which of these are most likely to lead to appearance on a multiple infringer list, or a successful court action, or a reduction in infringement levels.

A further option could be to consider combining a graduated approach to CIR generation with the introduction of an appeals fee through a pilot scheme. This could help establish evidence about elasticity of demand for appeals and give better information about the likely costs of the scheme. Government would need to assess whether the benefits that this approach could bring outweigh the significant delay that it would involve in relation to establishing a full scheme.

[REDACTED]

[REDACTED] Furthermore, Ofcom will ensure a focus on costs and efficiency when assessing bids under the competitive tender to run the

Body, and when approving the procedures of the body. We will also establish tough indicators of performance and monitor these constantly.

Given the time available to us in preparing this advice there are some limitations on the scope of our work:

- We examine the drivers of the total demand for appeals but have not sought to define what makes an appeal “frivolous”.
- There are currently many unknowns in the appeals process which make it difficult to quantify the cost impact of the options we outline; our comment is therefore largely qualitative. It will be for Copyright Owners, rather than Ofcom, to determine whether the costs of participating in the scheme outweigh the benefits it brings.
- We have found little reliable evidence on the likely impact of introducing an appeals fee at any particular level on lower income subscribers. We have therefore not tried to assess this.

There are other actions which could have an impact on the efficiency of the appeals process but which require changes to the primary legislation. These are matters for Government to consider and we have limited our comment to setting out the legal basis on which we have arrived at this conclusion, rather than seeking to assess what impact they might have.

This is particularly relevant for the proposals which the BPI have made to Govt involving the use of “nudge architecture”. This proposes that a subscriber provides information about the alleged infringement, signs a statement of truth that the facts stated in the appeal are correct, and agrees to take steps to prevent further infringements taking place. However, it does not offer a determination of an appeal, which is required by the Act.

Section 2

Introduction

The Digital Economy Act establishes measures aimed at reducing the level of online copyright infringement. It anticipates that these will complement efforts made by Copyright Owners to promote lawful access to their content, and to inform and change the attitude of members of the public in relation to the infringement of copyright. The Act places an obligation on internet service providers (ISPs), when informed by Copyright Owners, to notify subscribers of their unlawful behaviour by generating Copyright Infringement Reports (“CIRs”). It also requires that ISPs maintain records of the most frequent offenders, with a view to allowing Copyright Owners to take targeted legal action against these infringers. The DEA gave Ofcom duties to draw up and enforce a code of practice to regulate the initial obligations imposed on ISPs.

There is a lack of precedent in this area, so it is not possible to calculate the impact of particular actions to reduce the costs of the appeals system with any precision. But, by way of illustration, let us assume that in the first year of operation of Ofcom’s Initial Obligations Code, at least three million CIRs are sent by Copyright Owners to ISPs, and that this results in one million notifications to internet subscribers, telling them of alleged copyright infringements (both figures are conservative estimates based on conversations with stakeholders). Subscribers can appeal both the notification and each of the CIRs which underlies the notification. If just 2.5% of the CIRs and notifications are appealed, at an average processing cost of £400 each (although we will not know this figure for certain until the tender process for the Appeals Body is completed), then the cost of the appeals process prescribed by the Digital Economy Act could easily surpass £40m per year.

This figure remains small when compared to the £400m of annual losses suffered by the main UK creative industries as a result of displaced sales arising from online copyright infringement in the UK¹. Nevertheless, it would form by far the largest cost component of implementing the Digital Economy Act’s measures aimed at reducing levels of online copyright infringement. Copyright Owners have told us that the high cost of appeals represents a significant barrier to participation in the Digital Economy Act process.

An appeals process which is both efficient and also ensures adequate consumer protection is key to ensuring that the online copyright infringement provisions of the Digital Economy Act are effective, and that there is consumer and industry buy-in to Ofcom’s Code. This paper analyses the cost drivers behind the appeal process in more detail, and explores options for bringing costs down and ensuring an efficient appeals process is in place.

Much of the cost profile for appeals is driven by the Digital Economy Act itself. This allows for a potentially high case volume by establishing wide grounds under which consumers can appeal and allows the appeal of all Copyright Infringement Reports which lie behind each of the three letters which can be sent to subscribers. It also requires that appeals are determined by a body which is independent of Ofcom.

Nevertheless, we identify a number of options which could help reduce the cost of appeals and which do not require change to the primary legislation, but require action on the part of the Government, Copyright Owners, ISPs or Ofcom. Our assessment of these options is somewhat limited by a lack of reliable evidence on which to base assumptions. For example,

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<http://webarchive.nationalarchives.gov.uk/20100511084737/http://interactive.bis.gov.uk/digitalbritain/wp-content/uploads/2010/04/Digital-Economy-Act-IAs-final.pdf>

the parallels from systems used to appeal decisions on traffic offences, public examinations and planning applications, and those from alternative dispute resolution schemes in the telecoms sector are weak. And schemes in other countries provide few obvious pointers, as their approach to tackling online copyright infringement is either still under development, or too dissimilar in nature, or operates within different legal constraints to provide much insight for the UK.

Given this lack of directly relevant evidence, we think the best way to assess the possible scale of savings made by adopting any of the options we identify is through establishing scenarios. We have done this for the option of introducing a fee for appeals. We recommend that the Government considers the case for additional economic analysis, and possibly stakeholder research, in order to test at a more granular level the feasibility and potential impact of some of the options identified in this advice.

Section 3

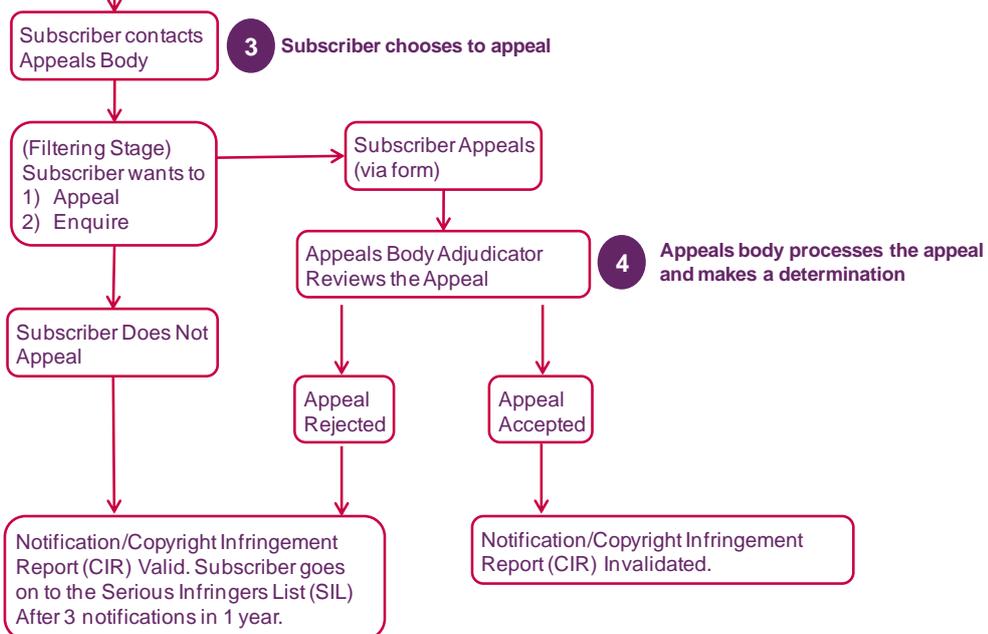
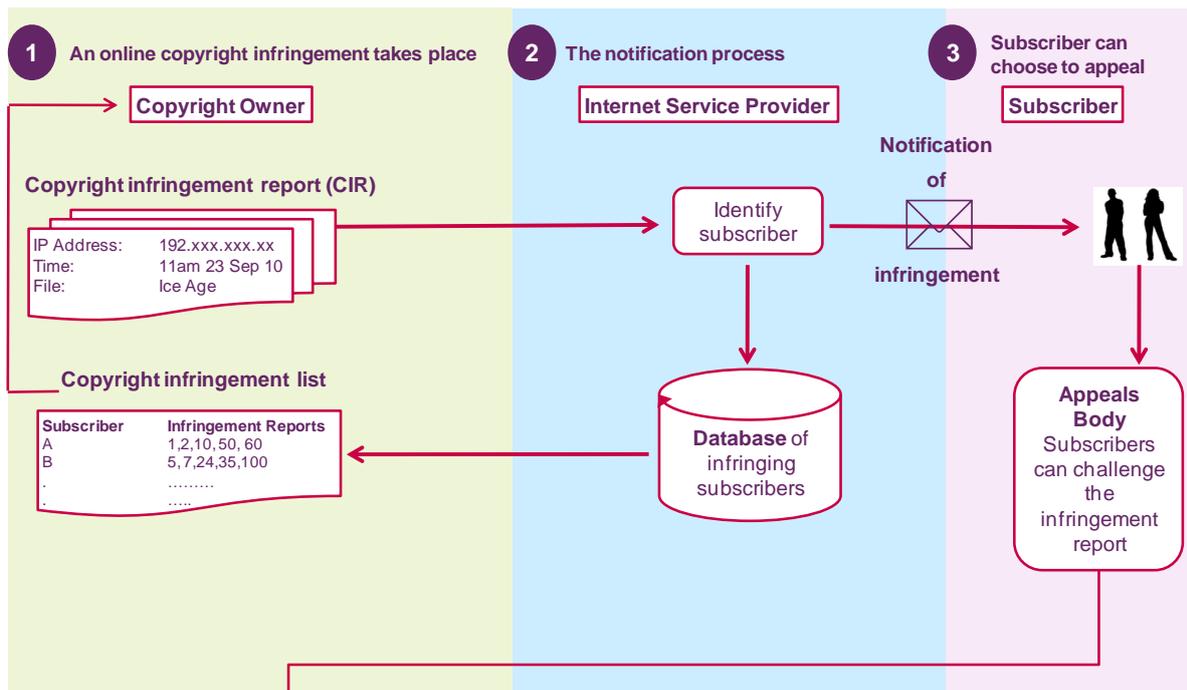
The cost drivers of the appeals process

The online copyright provisions inserted into the Communications Act 2003 by the Digital Economy Act 2010 place obligations on ISPs, when informed by Copyright Owners, to notify subscribers of their unlawful behaviour by generating Copyright Infringement Reports (“CIRs”). It anticipates that these obligations will complement efforts made by Copyright Owners to promote lawful access to their content, and to inform and change the attitude of members of the public in relation to the infringement of copyright.

The initial obligations process can be broken down into four principal components (see diagram below).

1. **An online copyright infringement takes place.**
2. **The notification process.**
 - Copyright Owners identify an IP address associated with an alleged infringement of copyright;
 - Copyright Owners generate a Copyright Infringement Report for each alleged infringement which they send to an ISP. Each CIR includes a description of the apparent infringement along with supporting evidence, including the subscriber's IP address and the time at which the evidence was gathered;
 - the ISP matches the IP address to a subscriber and sends them a letter notifying them of the CIR(s);
 - the ISP records the number of CIRs made against subscribers in an anonymised copyright infringement list;
 - the Copyright Owner can request this list² in order to see which of the reports it has made are linked to the same subscriber. It can then seek a court order to reveal the details of the subscriber, with a view to taking court action against them.
3. **The subscriber can choose to appeal.** The Digital Economy Act requires that subscribers can appeal each notification and each CIR within a notification. It sets out the minimum grounds for appeal (see Annex 2) and also gives guidance on how appeals should be determined. Through its Initial Obligations Code Ofcom has discretion to add further grounds for appeal and must approve the procedures of the Appeals Body.
4. **An Appeals Body processes the appeal and makes a determination.** Ofcom must appoint an independent Appeals Body to determine appeals and must approve its procedures. The Appeals Body incurs fixed set-up costs (Qualifying Costs) and variable costs in processing and determining appeals.

² Whether or not anonymised details of a particular subscriber are included on such a list will depend upon the threshold of notifications/CIRs contained in Ofcom’s Initial Obligations Code.



Source: Ofcom

Appeals costs under the initial obligations provisions of the Digital Economy Act are driven by actions which take place at each of these four stages. They are a combination of the fixed set-up costs of the independent Appeals Body and the variable costs it incurs in handling and determining appeals. These variable costs are the product of:

- a) The number of notified Copyright Infringement Reports
- b) The appeals ratio (ie the proportion of notifications which are appealed)
- c) The unit cost of processing an appeal

The scale of each of these will be determined by the actions of some combination of Copyright Owners, consumers or the independent Appeals Body.

a) The number of notified Copyright Infringement Reports is driven by three factors: the overall level of online copyright infringement, the proportion of infringements which are detected, and the proportion of CIRs which Copyright Owners choose to send to ISPs and which are notifiable to subscribers.

- **Infringement levels** are determined by internet subscribers through a complex interaction of online behaviours, reactions, attitudes, understanding and awareness, within the context of the lawful and unlawful content offers available to them. If infringement levels fall substantially, we should expect a drop in the number of both CIRs and appeals.

Copyright Owners can seek to reduce levels of infringement by educating consumers about the impact of unauthorised use of copyright and by making their content available through convenient and attractively priced lawful alternatives. It is also possible that infringement levels will decline following publicity surrounding the first notifications, early rejection of unmerited appeals, and successful court actions being pursued by Copyright Owners.

The Code anticipates that ISPs have a role to play in reducing infringement through the provision of consumer information on where to secure authorised content and how to secure a home internet connection (which should help prevent infringement arising from hacking).

The Act requires Ofcom to report on Copyright Owners' education campaigns, lawful offers and the number of CIRs notified and legal actions taken.

- **Detection levels.** These are partly within the control of Copyright Owners, depending on the sophistication of the techniques they employ, and the resource they put into detection. If detection levels fall we might expect a drop in the number of CIRs generated and hence also a fall in the number of appeals.

However, detection levels are also determined by the technology used to infringe. The IP addresses of subscribers sharing content over peer-to-peer (P2P) networks are usually visible to third parties, but it is much harder to track users of cyberlocker sites such as Rapidshare, and almost impossible to detect users hiding behind Virtual Private Networks or using encryption.

AFP has reported growth in the number of websites offering advice on how to avoid detection in France³, while Swedish ISP Bahnhof has announced it will run all of its customer traffic through a VPN⁴. If people move to these less visible file sharing methods we might expect detection levels to fall. While this might also mean a drop in the number of appeals, it may mean that the online copyright infringement provisions of the Digital Economy Act were not working.

- **Notification levels** are determined by Copyright Owners. They must commit to an annual number of CIRs as part of the Code implementation; the more they

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<http://www.google.com/hostednews/afp/article/ALeqM5jnxOnCt12WjQIGbOlx4AsTuqtS0Q?docId=CN.G.b5ed066c5c7b913aee54b25ac349f1b0.481>

⁴ <http://torrentfreak.com/wikileaks-isp-anonymizes-all-customer-traffic-to-beat-spying-110127/>

generate, the higher the potential appeal volume (all other things being equal). They may therefore have an incentive to limit the proportion of infringement reports they forward to ISPs in a targeted manner, as each CIR carries a processing cost and is potentially appealable. In the section below on options for reducing the costs of the appeals process we expand on some of the strategies they might pursue to target CIRs efficiently.

Furthermore, not all forwarded CIRs will be notified by ISPs; some will be rejected for operational reasons. The section below also sets out the quality assurance processes Ofcom has put in place to help reduce the number of rejected CIRs and the number of errors identified.

b) The appeals ratio - The Digital Economy Act allows consumers to appeal each notification they receive (up to three within a year) and also each CIR within a notification. The Digital Economy Act sets out wide grounds for appeal, which are mirrored in the draft Initial Obligations Code. These are that:

- the apparent infringement to which the CIR relates was not an infringement of copyright;
- the report does not relate to the subscriber's IP address at the time of the apparent infringement;
- the act constituting the apparent infringement to which a CIR relates was not done by the Subscriber and the Subscriber took reasonable steps to prevent other persons infringing copyright by means of his/her internet access service; and
- the copyright owner or internet service provider has contravened the initial obligations code or an obligation regulated by the Code.

[REDACTED]

[REDACTED]

Nevertheless, while the Digital Economy Act defines the limits of appeal, the appeals ratio remains unknown and, unlike the number of notified CIRs and the costs per appeal, will remain so until after the Code is implemented. The actual figure will be determined by a number of factors, including:

- The number of errors in generating CIRs and the publicity which surrounds this;

- The seriousness with which subscribers view receiving a notification. (It is, after all, a letter stating that a Copyright Owner alleges that a copyright infringement has taken place and informing the subscriber that their name has been added to a list – no action arises unless and until the subscriber is taken to court). Another important factor here is the extent to which subscribers feel responsible for the actions of others who use their access service (children, house-sharers etc). If subscribers take notifications seriously, and suspect or know that another person in the household was responsible, they may wish to appeal. Alternatively, they may in effect accept responsibility for the other user's actions and not do so;
- The level of consumer understanding about how to exercise their rights. The notification letter will set out the appeals process, but media and consumer groups are likely to offer further help. The more consumers understand the process the more they may be likely to use it; and
- A vexatious campaign of co-ordinated appeals could feasibly bring the appeals system down. If a lobby group successfully persuaded consumers to appeal every notification it is unclear how the Appeals Body would cope with the volume.

c) The unit cost of an appeal. These comprise a combination of the fixed set-up costs of the Appeals Body amortised over its contract period, plus the variable costs of processing and determining each appeal. We should know both figures following the Appeals Body tender process which we would expect to initiate once the Code has been made (after it has been laid before Parliament).

- **Appeals Body fixed set-up costs** including accommodation, recruitment costs, training, systems development etc. These are likely to be high because the Appeals Body will have to budget to defray them over a one-year period due to the initial uncertainties as to the extent to which Copyright Owners will continue to participate in the Code process.
- **Appeals Body variable costs** Costs per appeal will be determined through the tender process; the draft Costs Order anticipates that they will be recovered through a case fee. We will not know the actual costs per appeal until after the tender process for the Appeals Body. However, we estimate around £400 / appeal, based on benchmark costs for the independent Ofcom-approved telecoms alternative dispute resolution services CISAS and Ombudsman Services: Communications (previously OTELO), adjusted upwards to account for the additional complexity of the issues at stake in online copyright infringement and the difficulty of determining appeals. For example, the technology behind detection is relatively new, and it can also be difficult to establish who owns copyright for a given piece of content. By contrast parking appeals, for example, tend to involve querying a photograph and its timestamp, and assessing these against a simple set of parking rules. These procedures are comparatively well understood.

Legal and expert adviser costs may be heavily frontloaded as test cases are heard. This may mean costs are much higher in the initial months but we would expect these to decline as precedents are set. The operational costs of the Appeals Body must include the costs of making public its findings and issuing guidance to consumers on issues such as the approach it takes to determining whether “reasonable steps” have been taken to secure a connection which is alleged to have been used to infringe copyright. It will take considerable effort

for the Appeals Body to secure industry and consumer agreement on this; Ofcom will provide support through its role in approving the procedures of the Appeals Body.

Section 4

Options for reducing the costs of the appeals process

There are several possible ways to reduce appeals costs, involving action by either Government, Copyright Owners or ISPs. Some require legislative change while others can be achieved within the Digital Economy Act. There are also a number of actions to minimise costs that Ofcom will take as part of its duties to implement the Act.

Some measures, such as providing convenient and attractively priced lawful access to content and education campaigns to reduce the level of infringements can have a strong impact on overall infringement levels but this may be difficult to quantify. Others have a more direct and obvious effect - reducing the number of CIRs generated for example. It is these options that we examine in this section. We have categorised the options according to which stakeholder needs to take action in order to affect the change.

Options requiring action by Government

1. Charge for appeals

A key objective for any appeals process must be to ensure fair access to the appeals system for those with merited concerns, but to avoid overloading the system with frivolous or vexatious appeals. Perhaps the simplest deterrent against unmerited online copyright infringement appeals might be the introduction by Government of a subscriber fee for appeals. Under the Act, the decision as to contributions towards costs lies with the Secretary of State.

We have looked at a number of appeal, judicial and adjudications systems (see Annex 4 - Case Studies). We found two examples where a user must pay an upfront fee:

- **Examination grades** - schools and colleges, acting on behalf of individual students, pay fees of between £6.75-44.00 for an initial Enquiry About Results, which can include a re-mark. They then pay up to £120 for a first-stage appeal to the awarding body and up to £150 if this proceeds to a second stage. There is no charge for a final appeal to the independent Examination Appeals Board.
- **Court fees** - charges are routinely made for the use of most courts operated by Her Majesty's Courts and Tribunals Service. The minimum fee for a money claim under £300 is £25 rising gradually to £1,670 for claims over £300,000. In judicial review cases, there is a £40 fee at the permission stage and a further £180 if permission is granted. Fees are payable by plaintiffs, not defendants. A remission scheme is in place to help those likely to have difficulty paying a fee. Research into the impact of charging court fees on users indicates that cost is considered to be a very low factor when bringing a court case⁵.

In both cases, there are a number of structural differences which limit the usefulness of drawing comparisons with the online copyright infringement appeals scheme. For example:

- **Incentives to appeal** are likely to be very different. For exam candidates, failure to secure a particular grade may play a direct role in securing a career or a place

⁵ <http://www.justice.gov.uk/publications/docs/changing-court-fees.pdf>, p. i

in further education, while use of the courts is often driven by necessity, sometimes with the prospect of recovering sums of money or asserting rights. In both cases, the risk of a co-ordinated campaign of vexatious appeals to bring down the system seems remote.

By contrast, the incentive for internet subscribers with merited appeals in online copyright infringement cases is to defend themselves against an allegation that their service has been used to infringe copyright; and the possibility of a campaign driven by moral considerations cannot be discounted. This position appears closer to that of a defendant in court proceedings, who does not pay a fee (although costs can be awarded against him), than the plaintiff, who pays.

- **Structural differences** - use of the examination review and appeals system is not open to everyone; exam centres ask for reviews and seek appeals on behalf of applicants. This may introduce some level of screening by the professionals who run these centres when determining whether a case has sufficient merit to put forward for review or appeal. Furthermore, the first stages of determining appeals - where a fee is charged - are undertaken by the awarding body; the second stage - which is free - is considered by the independent body.

The Ministry of Justice states⁶ that court fees are also designed to reflect a proportion of the costs of using the courts system. By contrast any proposed fee for online copyright infringement appeals is likely to be an administrative charge driven largely by the desire to deter vexatious and frivolous appeals, possibly refundable in the event of a successful appeal.

- **Charges and indirect costs** - costs involved in accessing the courts system, the possible need to retain legal or other specialist advice, and the potential for an award of costs against an applicant, all act as deterrents to overloading the courts, with little parallel in the online copyright infringement appeals system.

The other appeals systems we examined, including those for taxation, planning, parking and traffic fines, train fare avoidance and also telecoms alternative dispute resolution schemes, do not typically charge a fee to access the system. However, some have other deterrents in place which help ensure that the system is not overloaded by frivolous or vexatious appeals, such as the possibility of an award of costs against an appellant.⁷

Despite this absence of obvious precedents from other appeals schemes, the imposition of an administrative fee which is similar in nature to that of court fees need not necessarily give rise to concerns surrounding access to justice provided it is set at a level that does not act as a deterrent to genuine appeals. In addition, if a fee were introduced, a remission scheme such as that operated by the Courts might be introduced to ensure access to the appeals system irrespective of means. However, the costs of administering such a scheme would need to be borne in mind. Concerns might further be allayed by providing that any fee payable was refundable in the event that an appeal was successful.

In the absence of comparable data we think the only way to try to make some assessment of impact is to create scenarios using credible - but speculative - assumptions. We have attempted this in Annex 3 - Appeals Cost Scenarios, which sets out full details of our assumptions and methodology.

⁶ <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/fees/why-we-charge.htm>

⁷ For further information on other appeals systems see Annex 4.

This conclusion appears similar to that drawn by the Government in its October 2010 consultation on introducing non-refundable fee charges for certain types of appeal to the Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal⁸. In its Impact Assessment, the consultation states:

“We do not know how appellants will respond to the introduction of fees. We have assumed that those appellants who are legally aided or are exempt will not respond to the fee increase (as they will not pay it) and they will appeal at the same level as before. For those appellants who will pay the fee, we assume that some of these appellants will decide not to appeal but we can not predict the size of this effect. Because of this we have used [high and low] assumptions regarding the response to the increase in fees. These assumptions are critical to our estimates of the potential costs and benefits of the policy.”

With more time available we think there are three possible approaches open to the Government through which to generate better evidence from which to assess the impact of introducing a subscriber appeals fee.

- **Case studies from other appeals processes** - in preparing this advice we examined only those processes set out in Annex 4. There may be others from which stronger conclusions about the impact of fees can be drawn for subscriber appeals against online copyright infringement than those we found.
- **Consumer research** - surveying consumers or conducting experiments using behavioural economics may provide insight into the impact of introducing an appeals fee at various levels. The Government used this approach in its 2007 research on the impact of introducing court fees. However, such research would need very careful design to minimise the risk that people may not respond truthfully and that responses might not reflect how they would act in reality. This is particularly likely where there is potential for co-ordinated action designed to destabilise the process established by the Digital Economy Act, which means that analysing people’s individual incentives is not sufficient to forecast the likely number of appeals.
- **Running an appeals fee pilot** - this could help establish evidence about elasticity of demand for appeals and allow for adjustments to be made to the level of any fee accordingly. Furthermore, if combined with a graduated and targeted approach to generating Copyright Infringement Reports (see below) such a pilot give better information about the likely costs of the scheme. Government would need to consider whether the benefits this could bring outweigh the further delays it would entail.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁸ <http://www.justice.gov.uk/docs/tribs-fees-consultation-paper-cp10-10a.pdf>

Options requiring action by Copyright Owners

1. Adopt a graduated approach to issuing CIRs (or cease issuing CIRs when appeals costs reach a threshold) while the ratio of appeals is established and test cases are determined.

This would give Copyright Owners strong control over the number of appeals and related costs. However, if the ratio of appeals is high it would mean low numbers of letters, with a high unit cost, limiting the effectiveness of the scheme and its appeal.

2. Target CIRs towards those most likely to lead to appearance on a multiple infringer list, or to a successful court action, or a reduction in levels of infringement.

Copyright Owners will determine how many of the infringements they identify should be notified through CIRs. They may choose to notify all of them. An alternative strategy might be to target CIRs for those infringement types most likely to lead to an appearance on a multiple infringer list, or to a successful court action, or a reduction in levels of infringement. This would reduce the number of CIRs notified. As each CIR carries a processing cost and is potentially appealable, a targeted reduction in CIRs could lower the costs of appeals.

For example, this might involve generating CIRs for the most persistently offending IP addresses, in the hope of increasing the chance of identifying multiple offenders. This approach would probably involve seeking to determine the frequency and duration with which customer IP addresses are assigned, which varies from ISP to ISP. Supplemental detection measures by Copyright Owners or their agents might help establish whether or not a host sharing files is likely to be the same host previously observed, despite a newly assigned IP address. These could include further analysis of the files shared, continuity of shared files and characteristics of the infringing host such as the operating system and network subnet.

Alternatively, CIRs could be limited to those infringements involving certain genres of content or made using certain sites or at certain times of day. Or Copyright Owners may wish to target seeders and initial uploaders within UK file sharing networks, for example by observing the network characteristics of newly posted torrent files with the aim of determining the identity or location of the initial uploader. (Initial uploaders are individuals that first introduce files into a peer-to-peer network. Seeders are those who have downloaded a full copy of the file and continue to share it, thereby ensuring that future downloads are helped by the presence of a complete copy of the file within the swarm).

Options requiring action by ISPs

1. Seek to ensure that subscribers understand the implications of receiving a notification.

When ISPs send a letter notifying subscribers of an alleged infringement they must explain the process and its implications and set out the options open to the subscriber. This may offer an opportunity to reduce the number of appeals; we expect that some subscribers will be deterred from appealing if they realise that the consequences of receiving a first or second notification are limited, and that even with a third notification no action beyond inclusion on an anonymised list can arise unless the subscriber is taken to court. (Although it is also possible that downplaying the importance of receiving a notification could lower the impact of notifications on reducing levels of online copyright infringement). The media and consumer groups will also have a role to play here in the way they cover the process.

Actions Ofcom will undertake as part of implementing the Digital Economy Act

1. Encourage a cost focus in the competitive tender to run the Appeals Body.

We plan to design a tender which gives scope for bids from a range of potential suppliers, including those which already operate adjudication and arbitration schemes, alongside companies specialising in outsourced project management solutions. In this way we hope to secure some innovative and cost-focused bids. If a suitable bidder cannot be found the requirement to ensure that there is a person with the function of determining subscriber appeals remains and Ofcom may therefore be required to establish an independent Appeals Body itself. This is likely to add significant cost to the appeals process.

The figures in the subscriber fee model in Annex 3 above suggest that the variable case fee will be a substantially bigger determinant of the total cost of appeals than the fixed and set-up costs of the body. This will be an important consideration when evaluating bids; Ofcom procurement guidelines require that a minimum of 30% (and often a higher proportion) of any bid evaluation is made on cost.

2. Ensure that the approved procedures of the Appeals Body are efficient.

The Digital Economy Act requires that Ofcom must approve the procedures of the Appeals Body. This offers an opportunity to ensure that it adopts an efficient approach in the framework within which it makes its determinations (although we cannot fetter its discretion in seeking to influence how it determines individual appeals).

3. Establish tough indicators of performance and monitor these effectively.

We expect to establish key performance indicators through the terms of the tender document and ensure appropriate sanctions if they are not met.

[REDACTED]

Options requiring amendment to the Digital Economy Act.

Whether, how and when to amend the Digital Economy Act are matters for the Government and Parliament. We have set out the options below in the hope they contribute to any such future consideration, not because we endorse any or all of them in general or specifically.

1. Only allow appeals in relation to inclusion on the serious infringers list

This happens with the third notification. This would be a simple way to bring down the number of appeals while maintaining a level of consumer protection, although could lead to

frustration where a subscriber believed the allegation made in the CIR to be incorrect yet had no right of appeal.

2. Remove the right of appeal altogether

The Appeals Body determines whether a subscriber's name appears on a list, not whether they are guilty of an infringement, which has to be determined through the courts whatever the outcome of the appeals process. Again, the lack of any right to appeal could be frustrating for subscribers.

3. Remove the ground of appeal that the act constituting the apparent infringement to which a CIR relates was not done by the Subscriber and the Subscriber took reasonable steps to prevent other persons infringing copyright by means of his/her internet access service

This could significantly reduce the number of appeals. This appeal ground is not allowed in France, where there is a legal duty for subscribers to secure their internet connection against use for copyright infringement. With this legal framework in place, an appeal could only succeed if the Appeals Body considered that the ISP or the Copyright Owner had made a mistake.

4. A “nudge” or “educative scheme”, such as that proposed to government by the BPI/MPA, which seeks to ensure in advance of appeal that appellants have read, understood, and agreed to steps they can take to minimise the risk of further infringement

The scheme proposes that the subscriber signs a statement of truth that the facts stated in the appeal are correct. If using a Wi-Fi connection at the time of the infringement the subscriber must then confirm whether this connection was or has subsequently been secured; if not they are asked to agree to take steps to secure the connection and to ensure that it is not used to infringe copyright. If not using a Wi-Fi connection, they are required to describe the device they use to access the internet and the circumstances under which they believe that some unauthorised person was able to access the internet to infringe copyright and whether they have taken steps subsequently to prevent such similar access.

The proposal is intended to educate subscribers about security measures and to provide information that may assist the appeal body when considering the technical knowledge of the subscriber and the extent to which they were aware of their ability to control access to their internet account.

However, such a scheme does not offer a determination of an appeal. A subscriber could answer the questions that lead to being directed to the information about security processes, but that doesn't mean their appeal is unfounded. It therefore does not meet the requirement on Ofcom to establish an independent body to determine appeals. In addition, Ofcom has no statutory power to implement a scheme like this under the Digital Economy Act.

Furthermore, this sort of scheme suffers from two key problems:

- We are concerned that any proposal in which subscribers are obliged to answer questions of the nature suggested when seeking to bring an appeal (which may be irrelevant to the ground of the appeal itself) may be contrary to the right against self incrimination if responding would be mandatory.
- Additionally, if this is to be taken into account in any subsequent appeal, you might introduce further complexity, and cost, into the process as the appeals

body would need to ensure it kept details of subscribers that appealed a first notification and where they end up in the question tree. This could lead to an additional cost being incurred which might not be much less than a substantive appeals determination.

5. Offer an ADR scheme in the first instance, with the finding appealable to the Appeals Body

See New Zealand example in the International Perspective annex below.

6. Exceptional award of costs against the appellant

Although this device is sometimes used either to recover costs or to deter frivolous appeals in other appeals schemes (see Annex 4 - Comparisons to Other Appeals Schemes) the DEA does not enable the Costs Statutory Instrument made by the Secretary of State to make such provision. Under those provisions, costs may only be awarded in favour of the subscriber but not against them.

Annex 1

1. International perspective

France has implemented a regulated 'three strikes' scheme for tackling online copyright infringement, although as yet no cases have reached the point at which subscribers can appeal against allegations of infringement. In April 2011, New Zealand adopted a similar 'three-notice' approach, due to enter into force in September 2011. There are many differences between the legal frameworks in these two countries and that in the UK, which make it difficult to draw parallels between the appeals processes adopted. Nevertheless, it is interesting to consider other approaches so we set out here the basic principles out of the French and New Zealand processes and also the estimate of the resources required to operate the French process as set out in the Impact Assessment for the second Hadopi Bill⁹.

1. France

It is not possible to appeal subscriber notifications alleging infringement under the French 'three strikes' regime, as these are considered 'reminders' of the law, without legal effect in themselves. However, Hadopi (the government agency created to administer the Hadopi law) has chosen to accept contact from subscribers and we understand that around 10% of those who received first notifications have contacted them. Often this may often be with a view to securing more information about the allegation, rather than as a precursor to a claim of innocence.

There is a right to an administrative hearing before Hadopi, as part of Hadopi's consideration of a case before deciding whether to forward it to the judiciary, who may decide to apply sanctions. It is a private hearing before three magistrates from the Hadopi Board. No conditions or payment for accessing the hearing are envisaged. It will be funded from general taxation and free at the point of use for subscribers, rights holders and ISPs. Hadopi has not publicly evaluated possible volumes of hearing requests.

Based on its findings, Hadopi may choose not to pursue a case further, or to refer the file to the public prosecutor. The Government Impact Assessment expected that 50,000 cases per year would be referred.

Two routes are available to the public prosecutor, where he considers there is sufficient evidence to prosecute:

1. A new, streamlined procedure before a single magistrate in the criminal courts, introduced as part of the Hadopi laws (where there is considered to be 'no significant harm'). The Impact Assessment expected this to be used in 80% of the cases referred, i.e. 40,000 cases per year.

Under this procedure, the magistrate considers the file prepared by Hadopi. He has no powers to investigate further, and decides the case without a hearing. The rights holder may ask the magistrate to hold that it is a civil party so that it may subsequently apply for damages. The magistrate may dismiss the case or issue a criminal order imposing sanctions:

⁹ This became [Loi n° 2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur internet](#) [Law no.2009-1311 of 28 October 2009 on the criminal-law protection of literary and artistic property on the Internet]

- ‘Negligence’ (where the subscriber failed to secure their Internet connection enabling infringement by any party): suspension for one month
- ‘Negligence’ plus evidence that the subscriber personally infringed copyright: suspension for one year
- During either period of suspension there may also be a requirement to pay subscription and cancellation charges to the ISP, and prohibition from subscribing to another internet service

If the subscriber does not challenge the decision, it becomes final. If he wishes to challenge the decision, the public prosecutor may bring the case before the magistrate (sitting alone) for a hearing. The Impact Assessment estimates that the order will be challenged in 50% of the 40,000 cases using this route (or 20,000 cases per year).

2. A standard procedure before a single magistrate in the criminal courts under general copyright law (used where there has been ‘significant harm’, e.g. a high number of downloads or history of infringing). The Impact Assessment expected this route to be used in 20% of the cases referred for sanctions, i.e. 10,000 cases per year.

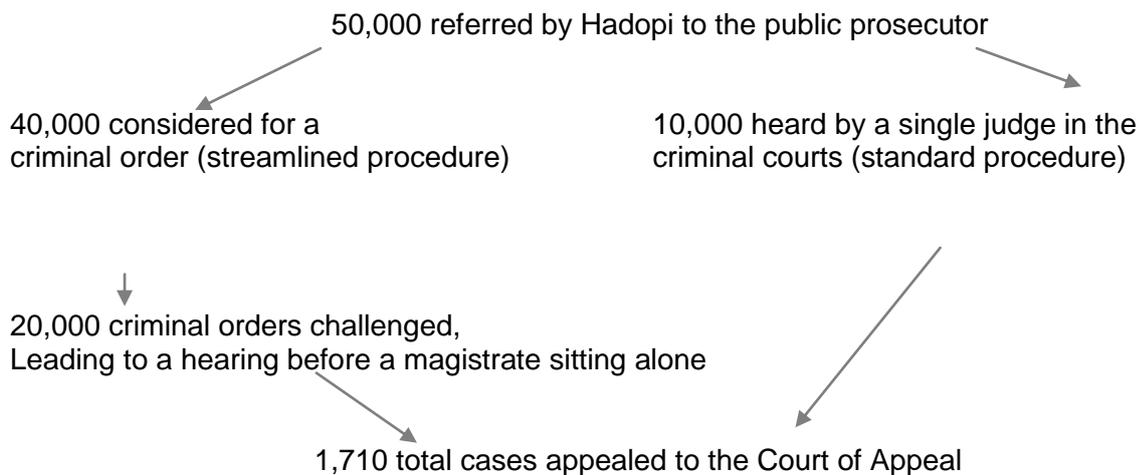
The magistrate may dismiss the case or decide the following sanctions:

- Internet account suspension for one year, a requirement to pay subscription and cancellation charges to the ISP, and prohibition from subscribing to another Internet service. Hadopi may provide evidence in such cases (this is a new sanction introduced by the Hadopi laws); or
- €300,000 (c. £250,000) fine and a three-year prison sentence (existing sanctions under general copyright law)

Alternatively, if the prosecutor considers there is not sufficient evidence to prosecute, he may refer the file to the Police for criminal investigation.

The decision of the magistrate in the streamlined procedure (following a challenge) or of the criminal court in the standard procedure may both be appealed to the Court of Appeal. The Impact Assessment expected that to occur in 5.7% of the 30,000 cases involving a hearing under either the streamlined procedure or the standard procedure (or a total of 1,710 per year from the two legal routes).

Impact Assessment assumption on cases taken into account, per year:



In total, the Impact Assessment anticipates 13.9 full-time equivalent (FTE) Public Prosecutor resources required across the streamlined and standard procedures, in addition to 12.10 magistrate FTEs and 83.45 civil servant FTEs.

2. New Zealand

The New Zealand Act (2011)¹⁰ gained assent on 18 April 2011 and is due to enter into force on 1 September 2011. The Act amends the Copyright Act 1994 to provide copyright owners with a fast-track civil law alternative to existing remedies under general copyright law in order to enforce their rights against infringing file sharing by internet account holders. (The Copyright Act allows right holders to commence a civil action against an account holder and provides for remedies including orders to cease infringement and to award damages, but it is considered too slow and costly a process).

The 2011 Act provides for a three notification process, with the possibility of sanctions in the form of a fine or Internet suspension. The latter remedy requires secondary legislation in order to enter into force. All notifications may be challenged and sanctions may be appealed.

When a copyright owner provides an 'internet protocol address provider' (IPAP) with information identifying an IP address at which copyright infringement is alleged to have occurred as a result of file sharing, the IPAP must match the IP address and send an 'infringement notice' to the subscriber. The subscriber can challenge the notification by contacting the IPAP, which forwards the challenge to the rights holder for consideration.

The rights holder responds to a challenge via the IPAP¹¹. A challenge is deemed to be accepted if it has not been rejected by the rights holder within 28 days from the date of the notice. In this case, the notice is cancelled and treated as if it had not been issued, unless the infringement subject to challenge did not itself trigger a notice, in which case the notice remains valid but the infringement is treated as if it were not included.

¹⁰ Copyright (Infringing File Sharing) Amendment Act 2011

<http://www.legislation.govt.nz/act/public/2011/0011/latest/DLM2764312.html>

¹¹ Defined as 'a person that operates a business that, other than as an incidental feature of its main business activities, (a) offers the transmission, routing, and providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing; and (b) allocates IP addresses to its account holders; and (c) charges its account holders for its services; and (d) is not primarily operated to cater for transient users' (Article 122A(1)).

If the rights holder rejects the challenge, the subscriber may raise it again in any enforcement proceedings (see below).

As described in the Cabinet Paper accompanying the Bill¹², Government officials have been advised by right holders that ISPs (the term used in the Bill) should expect around 15,000 notices per month in the first few months (from an internet user population of around 3.4 million) after the legislation has come into force, and that this will fall to around 1,000 per month after six months or so. The idea is that a number of people will stop infringing after receiving the notices. Officials also understood from advice and discussions with ISPs that they mostly have systems in place enabling them to identify and match IP addresses, and have some storage capacity. Therefore the Government recommended that ISPs meet their own costs for collecting, maintaining and processing data to meet their obligations under the Bill. It also recommended that rights holders pay a fee to the relevant ISP for every notice sent by the ISP, to cover the administration costs. However, the Act provides that an IPAP may charge right holders for performing any of the functions required of it under the Act. Rates may be prescribed by regulation, which would be binding on IPAPs.

The Act provides for a fast-track system of enforcement, to sit alongside existing copyright enforcement provisions. Once a subscriber has been issued with a third notification, the rights holder may seek an order from the Copyright Tribunal for a sum of up to \$15,000 (c. £7,000) and/or an order from a District Court for the IPAP to suspend the account holder's internet account for up to six months (civil remedy). The provisions on suspension do not come into effect immediately but only following secondary legislation ('Order in Council') by the Governor General, specifying the date after which applications may be made to the District Court. The Act does not specify any conditions triggering secondary legislation. Commerce Minister Simon Power has said that this "will enable the Government to work with stakeholders to monitor and review the situation and determine when a further deterrent may be needed".

In order to take a complaint to the Tribunal, the loss must be quantified as under \$15,000. Claims for over \$15,000 may be pursued in the District Court under existing law.

Proceedings before the Copyright Tribunal will take place without a hearing, unless the account holder requests a hearing or the Tribunal considers that one should be held. It is presumed that each incidence of filesharing identified in an infringement notice constituted copyright infringement, the information in the notification is correct, and the notice was issued in accordance with the Act. A subscriber may submit evidence or give reasons why any of those presumptions do not apply to any of the identified infringements. It is then up to the rights holder to satisfy the Tribunal that the relevant presumptions are correct.

Appeals of the decisions of the Copyright Tribunal and the District Court are to the High Court. The Government did consider whether the Copyright Tribunal should also hear appeals but concerns were raised about the sanctioning and appeals body being one and the same.

In the Cabinet Paper on the Bill¹³, the Ministry of Justice estimated that both Crown and departmental cost for the Copyright Tribunal would be \$408,000 (c. £200,000) in the first year, \$838,000 (c. £400,000) in following years plus a one-off capital cost of \$201,000 (c. £100,000) in the first year, based on the assumption that 1,800 cases go to the Tribunal. The rights holder would be required to pay a fee to lodge the claim with the Tribunal but this fee

¹²[http://www.med.govt.nz/upload/71039/FINAL%20PUBLIC%20Cabinet%20Paper%20for%20the%20Copyright%20\(Infringing%20File%20Sharing\)%20Amendment%20Bill%202010,%20RIS%20Atta.PDF](http://www.med.govt.nz/upload/71039/FINAL%20PUBLIC%20Cabinet%20Paper%20for%20the%20Copyright%20(Infringing%20File%20Sharing)%20Amendment%20Bill%202010,%20RIS%20Atta.PDF)

¹³[http://www.med.govt.nz/upload/71039/FINAL%20PUBLIC%20Cabinet%20Paper%20for%20the%20Copyright%20\(Infringing%20File%20Sharing\)%20Amendment%20Bill%202010,%20RIS%20Atta.PDF](http://www.med.govt.nz/upload/71039/FINAL%20PUBLIC%20Cabinet%20Paper%20for%20the%20Copyright%20(Infringing%20File%20Sharing)%20Amendment%20Bill%202010,%20RIS%20Atta.PDF)

would only cover a small proportion of the Tribunal's costs. Cost recovery in a tribunal is generally set at 25% of the full cost. This means that the Crown would need to fund the remainder of the cost (75%) of the Tribunal. It was proposed that the fee to lodge a claim with the Tribunal should be set at about the same cost of the Disputes Tribunal, which is between \$30 and \$100 (c. £15 and £50) depending on the amount sought under the claim, so the majority of the costs of the Tribunal would fall to the Crown.

Annex 2

2. Digital Economy Act appeals grounds and determinations

The minimum grounds for appeal set out in the Act (which must be provided for under Ofcom's Initial Obligations Code) are as follows:

124K (5) The code must provide that an appeal on any grounds must be determined in favour of the subscriber unless the copyright owner or internet service provider shows that, as respects any copyright infringement report to which the appeal relates or by reference to which anything to which the appeal relates was done (or, if there is more than one such report, as respects each of them).

- the apparent infringement was an infringement of copyright, and
- the report relates to the subscriber's IP address at the time of that infringement.

(6) The code must provide that, where a ground mentioned in subsection (3) is relied on, the appeal must be determined in favour of the subscriber if the subscriber shows that

- the act constituting the apparent infringement to which the report relates was not done by the subscriber, and
- the subscriber took reasonable steps to prevent other persons infringing copyright by means of the internet access service

(7) The powers of the person determining subscriber appeals must include power

- to secure so far as practicable that a subscriber is not prejudiced for the purposes of the copyright infringement provisions by an act or omission in respect of which an appeal is determined in favour of the subscriber;
- to make an award of compensation to be paid by a copyright owner or internet service provider to a subscriber affected by such an act or omission; and
- where the appeal is determined in favour of the subscriber, to direct the copyright owner or internet service provider to reimburse the reasonable costs of the subscriber.

(8) The code must provide that the power to direct the reimbursement of costs under subsection (7)(c) is to be exercised to award reasonable costs to a subscriber whose appeal is successful, unless the person deciding the appeal is satisfied that it would be unjust to give such a direction having regard to all the circumstances including the conduct of the parties before and during the proceedings.

3. Cost scenarios for the introduction by Government of an appeals fee

Introduction

We looked at a number of appeals, judicial and adjudications schemes with a view to assessing the possible impact of Government introducing a fee for subscriber appeals against allegations of online copyright infringement.

Other schemes gave some general pointers towards the overall propensity of eligible users to appeal but two schemes we examined where a fee was charged did not offer clear evidence on the impact that this had on use of the scheme. All of the schemes were sufficiently different in nature from the online copyright infringement appeals process to raise doubts about their usefulness as a comparator.

Absent such evidence we think the only way to try to make some assessment of impact is to create scenarios using credible - but speculative - assumptions. In this section we attempt to do this, setting out in full the details of our assumptions and methodology (the calculations can be seen in the accompanying spreadsheet).

Key assumptions

A number of assumptions underpin our scenario modelling. While we believe that these assumptions are credible, they are speculative, due to the paucity of evidence on which to base them.

- **CIR and notification volumes.** For all scenarios we calculate figures on the basis of 1 million CIRs generated and sent to ISPs in a year and then compare this with 5 million CIRs. This range is based on some indicative suggestions made to us by Copyright Owners, but the actual number could differ and will not be agreed until the tariff-setting process prior to the Code coming into force.

Not all CIRs generated by Copyright Owners will be notified to subscribers. Some may be rejected by ISPs for operational reasons, for example where the information contained is incomplete or the IP address identified cannot be matched to a subscriber. However, for simplicity we have ignored these rejected CIRs in our calculations.

- **Appeals ratios.** For the purposes of this exercise, we assume that each notification relates to 2.5 CIRs. However, for simplicity we assume that only the CIRs are appealed, (and not also the notifications). We then explore a range of CIR appeals ratios.

We start with the assumption under scenario 1 that between 5% and 20% of CIRs might be appealed. This equates to appeals from between 12.5% and 50% of those who receive a notification. We then make a further assumption for scenario 2 that the introduction of a £5 appeals fee leads to a substantial drop in the proportion of appeals – we suggest a range of 1% - 5%. For scenario 3, where a £10 fee is charged, we assume this drops to 0.5% - 3%.

These figures are speculative – they are not based on evidence about the deterrence effect of different fees. In Annex 4 we compare figures from other appeals, judicial and adjudications schemes and in each case we explore the reasons why these differ from appeals against allegations of online copyright infringement under the Digital Economy Act. In each case we find many differences - comparisons of appeals ratios should therefore be made with caution. For example:

- **Consumer understanding** of the issues at stake seems likely to be a driver of appeals ratios. It is possible that some of the issues at stake, for example the encryption of wireless internet signals, may be more complex to many consumers than issues commonly involved in challenging traffic offences, examinations results, or telephone bills.
- **Ease of access to the appeals system.** Appeals systems vary according to whether submissions can be made by post, online, by telephone or through a hearing in person. The proposal for online copyright infringement is that only online appeals are permitted. The Code requires that all recipients of CIRs are internet subscribers so we might typically expect them to be more comfortable using an online system than the wider population. However, some may be put off by the limited options available to them.
- **Cost arrangements.** Some appeals systems are free - others charge. In some, such as traffic offences, there is also the potential for an award of costs against the appellant (or the enforcement authority) where the adjudicator finds (under certain circumstances) that the appeal was made frivolously, vexatiously or unreasonably. (In practice, for traffic offences at least, this does not happen often; London PCN appeals costs awards were made in just 0.004% of appeals cases in 2009/10). The threat of a costs award may deter some appellants. Under the Digital Economy Act the appeals body may only award costs against a Copyright Owner or ISP but not against a subscriber¹⁴.
- **Appeal incentives.** For many people, whatever they are appealing against, the key determinant of whether to appeal will be the same - i.e. a belief that they have been wrongly penalised. However, other incentives exist which vary, for example, in traffic offences the desire to avoid a fine or possibly points on a licence. Furthermore, it seems plausible that the proportion of appeals which come from those who disagree with the principle of the process rather than its application could be higher for online copyright infringement appeals than those in other areas. For example, Ofcom media literacy research for 2011 suggests that 32% of adults believe that unauthorised file sharing should be legal.

Further analysis of appeals fees will want to examine how appeals ratios might change over time. Our model examines the appeal ratio for the first year only. However, we might expect this to change in future years, once the success rate of early appeals in the early months of the scheme's operation is known and the results of test cases have been publicised. And in this context it seems likely that the accuracy of Copyright Owner and ISP procedures in identifying infringements and relevant subscribers will be important. If the Appeals Body rarely finds that errors have occurred, consumers may start to feel less inclined to appeal.

¹⁴ Section 124K(7)(c) Communications Act 2003

However, this is not clear-cut; although 64% of Parking and Traffic Adjudicators appeals were upheld in 2009/10, this does not appear to have led to an increase in appeals, with only 1.2% of Penalty Charge Notices appealed.

- **Unit cost of an appeal.** For all scenarios we then use a variable case fee - comprising assessment by an adjudicator or a specialist legal resource - of £400 per appeal. This is loosely based on figures for Cisas and Ombudsman Services: Communications, the independent Ofcom-approved telecoms dispute resolution services, although these bodies consider disputes between two parties rather than appeals so the comparison is not like-for-like. The actual cost may differ; there may be efficiency savings driven by the higher anticipated volume of appeals for online copyright infringement (Cisas and Ombudsman Services: Communications combined deal with around 9,000 per annum). On the other hand we anticipate that some online copyright infringement cases will be particularly complex, and this may drive costs up.
- **Subscriber fee processing costs.** If a subscriber appeals fee is introduced, we assume that it costs £2 to process this fee and £1 to process a refund in the event of a successful appeal. Ofcom has an enterprise class online payments system used for processing spectrum licence renewals; if the Government decided to impose a subscriber fee we could explore options for adapting this for use by the appeals body during the tender process. We assume that all payments and refunds are made online and that processing costs are independent of the level of fee charged.
- **Appeals success rate** We also assume that 20% of appeals are successful. Figures for other appeals mechanisms vary substantially; for example 2010 exam grades were changed in 20% of Enquires About Results, but 64% of appeals decided by the Parking and Traffic Adjudicators in 2009/10 were successful. Our figure assumes that the quality assurance processes required by the Code for CIRs and notifications will reduce the number of errors and that, at least in the absence of an effective consumer education programme, a lack of technical understanding will make it difficult for subscribers to provide convincing evidence to support their claim. (The evidence for our figure is very weak, but in any event doubling or trebling the rate has little impact on the overall costs figure for appeals).
- **Appeals Body set-up and fixed costs.** We include £700k set-up and fixed costs for the independent Appeals Body based on conversations with providers of similar services. This assumes a body starting from scratch; we would expect lower set-up costs if the Appeals Body is run by an organisation with an existing infrastructure for determining appeals or arbitration. Fixed costs include accommodation, recruitment, training and systems development. These costs will to some degree be determined by appeals volumes; for example a body processing 10,000 appeals would expect fewer staff and lower accommodation costs than one processing a million appeals. We have not included the cost of funding the first three months of operations for the appeals body, during which time it will not be able to recover case fees.

Scenario 1 - no subscriber appeals fee

Letters	CIRs	Appeals / CIR	No. appeals	Fixed costs	Variable	Net appeals fee	Total costs
				(£m)	costs (£m)	income (£m)	(£m)
				A	B	C	A+B-C
400,000	1,000,000	5%	50,000	0.7	20	-	20.7
400,000	1,000,000	10%	100,000	0.7	40	-	40.7
400,000	1,000,000	20%	200,000	0.7	80	-	80.7
2,000,000	5,000,000	5%	250,000	0.7	100	-	100.7
2,000,000	5,000,000	10%	500,000	0.7	200	-	200.7
2,000,000	5,000,000	20%	1,000,000	0.7	400	-	400.7

The table above shows that, under the key assumptions listed above, and in the absence of a subscriber fee, total appeals costs could vary from £20.7m for a 5% appeals rate on 1 million CIRs, to £400.7m for a 20% appeals rate on 5 million CIRs. We make a large assumption that the appeals ratio would be at this level in the absence of an appeals fee. Three things stand out from these figures.

1. First, this is a very wide range. At the top end of this range, appeals costs alone are close to the Government's estimate of the total industry loss of £400m arising from displaced sales as a result of online copyright infringement (see Digital Economy Act Impact Assessment, April 2010).
2. Appeals costs are directly driven by the volume of CIRs sent. This emphasises the importance for cost control purposes of Copyright Owners employing a strategy which maximises impact (in terms of delivering successful court actions or reducing infringing activity) for the minimum volume of CIRs sent.
3. Fixed costs (including set-up) of the Appeals Body seem likely to form a very small component of the total costs of appeals. Even under the lowest cost scenario, over 96% of total appeals costs are driven by the variable costs of the case.

Scenario 2 - Government imposes a £5 subscriber appeals fee

Letters	CIRs	Appeals / CIR	No. appeals	Fixed costs	Variable	Net appeals fee	Total costs
				(£m)	costs (£m)	income (£m)	(£m)
				A	B	C	A+B-C
400,000	1,000,000	1%	10,000	0.7	4	0.0	4.7
400,000	1,000,000	2%	20,000	0.7	8	0.0	8.7
400,000	1,000,000	5%	50,000	0.7	20	0.1	20.6
2,000,000	5,000,000	1%	50,000	0.7	20	0.1	20.6
2,000,000	5,000,000	2%	100,000	0.7	40	0.2	40.5
2,000,000	5,000,000	5%	250,000	0.7	100	0.5	100.3

The table above examines the possible cost impact of Government imposing a £5 subscriber fee for appeals. This table employs the same key assumptions as previously, but adds in revenue from the appeals fee, less processing costs (£2 per fee, £1 per refund) and refunds, which apply for the 20% of appeals which are successful. It uses a lower range of possible appeals ratios from 1% - 5%. Again, we make a large assumption in dropping the appeals ratio by so much following the introduction of the £5 fee.

The table shows a range of total appeals costs of £4.7m for a 1% appeals ratio on 1m CIRs, rising to £100.3m for a 5% appeals ratio on 5m CIRs. Under these scenarios the contribution to total costs made by the net revenue generated from the appeals fees is negligible, ranging

from £18k of the £4.7m (0.38%), to £450k of the £100.2m (0.45%). However, the fixed and start-up costs of the Appeals Body start to have a bigger impact, accounting for 15% of the £4.7m costs, declining to 1% of the £100.3m costs.

Scenario 3 - Government imposes a £10 subscriber appeals fee

Letters	CIRs	Appeals / CIR	No. appeals	Fixed costs (£m) A	Variable costs (£m) B	Net appeals fee income (£m) C	Total costs (£m) A+B-C
400,000	1,000,000	0.5%	5,000	0.7	2	0.0	2.7
400,000	1,000,000	1.0%	10,000	0.7	4	0.1	4.6
400,000	1,000,000	3.0%	30,000	0.7	12	0.2	12.5
2,000,000	5,000,000	0.5%	25,000	0.7	10	0.1	10.6
2,000,000	5,000,000	1.0%	50,000	0.7	20	0.3	20.4
2,000,000	5,000,000	3.0%	150,000	0.7	60	0.9	59.8

The table above examines the possible cost impact of Government imposing a £10 subscriber fee for appeals. For this table we lower the range of appeals ratios from 0.5% - 3%.

The table shows a range of total appeals costs of £2.7m for a 0.5% appeals ratio on 1m CIRs, rising to £59.8m for a 3% appeals ratio on 5m CIRs. Under these scenarios the contribution to total costs made by the net revenue generated from the appeals rises marginally, although still accounts for just £29k of the £2.7m (1.1%), and £870k of the £59.8m (1.5%). However, the fixed and start-up costs of the Appeals Body start to have a material impact at the lower end of the range, accounting for 26% of the £2.7m costs, declining to 1% of the £59.8m costs.

Conclusions

If Government decides to impose a subscriber appeals fee, we expect it will wish to do so at a level which minimises the risk that those on lower incomes are disproportionately deterred from making legitimate appeals but at a level high enough to deter frivolous appeals. We assume that the costs of any means testing mechanism would be high.

Our appeals ratio scenarios are purely speculative - they are not based on evidence about the deterrence effect of different fees. To determine the appropriate fee level, it would be helpful to try to find more evidence on this. One possible way to achieve this would be to examine more case studies from other appeals mechanisms which shed light on the propensity to appeal at different appeal fee levels. Alternatively, one might try surveying consumers on what fee would deter them. However, there is a risk that people might not respond truthfully given the emotive nature of the issue, and also that responses might not reflect how they would act in reality. This is particularly likely where there is potential for co-ordinated action designed to destabilise the process established by the Digital Economy Act, which means that analysing people's individual incentives alone is not sufficient to forecast the likely number of appeals. It might be possible to consider a sliding scale of fees, where for example the first appeal is free, but rises on the second or third appeal. This might increase the likelihood that people only appeal where they genuinely think they have a case.

A final alternative is to determine the appropriate fee level based upon actual observed subscriber behaviour. This could involve piloting the online copyright infringement notification scheme for a short period to determine subscribers' propensity to appeal at given appeals fee levels. This approach would probably delay the full implementation of the Initial

Obligations Code and Government would need to determine whether this outweighed the potential benefits.

Annex 4

4. Comparisons to other appeals schemes

Introduction

We looked at a number of appeals, judicial and adjudications schemes in other areas as part of our analysis into the impact of charging a fee for subscriber appeals against allegations of online copyright infringement. Other schemes are particularly useful where they shed light on the impact of any user fee and the overall propensity of eligible scheme users to appeal.

This annex sets out a brief summary of the major schemes that we were able to consider in the time available and assesses their suitability as comparisons to the online copyright infringement appeals scheme. For each example it sets out areas of difference under three headings: **incentives to appeal**, **structural differences**, and **charges and indirect costs**. It looks first at two instances where users must pay a fee to access the scheme, before considering other free-to-access schemes.

Schemes where users must pay a fee to appeal

GCSE and GCE Examinations Appeals

Examinations appeals take place at three stages:

- i) Schools and colleges can submit an Enquiry About Results to the awarding body, which can include clerical, marking and moderation checks.
- ii) They can then appeal to the awarding body under a two-stage process. Appeals can be made against grades, penalties imposed against malpractice decisions, or against decisions made in respect of access arrangements and special consideration.
- iii) If they are still unhappy they can appeal to the independent Examinations Appeals Board. (The EAB has no power to re-mark candidates' work or make judgements about it).

A range of fees applies at each of the stages. Appellants (or their school) will typically have paid to sit the exam. The charge for an Enquiry About Results varies by exam and by awarding body, ranging from £6.75-13.50 for a clerical check and from £33.25-44.00 for a re-mark. First-stage appeals to the awarding body range from £91-120 and second-stage appeals from £150-157. None of these figures is means tested. No fee is levied for a further appeal to the independent EAB (which also pays travelling and subsistence expenses for appellant representatives attending personal hearings).

Ofqual's 2011 report on appeals states that 8.2 million GCSE and GCE awards were made in England Wales and Northern Ireland in 2010. Enquires About Results were made in 2.1% of cases, and grades were changed in 20.3% of these instances. One per cent of queried cases went to a first stage appeal and 24% of first stage appeals went to a second stage. Grades were changed in just 0.0003% of cases appealed at either stage. Between 1999 and 2009 (the latest year for which EAB figures are available) the proportion which went on to be heard by the EAB ranged from five to sixteen per year, and on average 37.7% of these were allowed.

It is difficult to determine what comparisons can be drawn from figures for enquiries and appeals against examining bodies and possible appeals against allegations of online copyright infringement under the Digital Economy Act.

- **Incentives to appeal** - are likely to be very different. For exam candidates, failure to secure a particular grade may play a direct role in securing a career or a place in further education. With such high stakes it seems reasonable to assume that both merited and unmerited exam reviews or appeals will generally be founded in self-interest; the risk of a co-ordinated campaign of vexatious appeals to bring down the exam system seems remote. By contrast, the incentive for merited appeals in online copyright infringement cases is to defend oneself against an allegation of wrongdoing rather than to secure a qualification; and the possibility of a campaign driven by moral considerations cannot be discounted.
- **Structural differences** - use of the examination review and appeals system is not open to everyone; exam centres ask for reviews and seek appeals on behalf of applicants. This may introduce some level of screening by the professionals who run these centres when determining whether a case has sufficient merit to put forward for review or appeal. Furthermore, the first stages of the appeals process - where a fee is charged - are undertaken by the awarding body; the second stage - which is free - is considered by the independent body. All appeals against allegations of online copyright infringement are considered by an independent body.
- **Charges and indirect costs** - we do not have evidence about the impact that charges have had on use of the appeals or enquires systems at any of the stages available to schools and colleges. With more time available it would be worth investigating whether research or impact assessments were made about the deterrent effect of setting fees at any particular level by Ofqual, the EAB or by any of the three examining bodies.

Court fees

While not an appeals system as such, the principle of paying a fee to access the courts system is well established. A fee is routinely payable to access county and family courts, even for small claims. The minimum fee for a money claim under £300 is £25 rising gradually to £1,670 for claims over £300,000. In judicial review cases, there is a £40 fee at the permission stage and a further £180 if permission is granted. There is a means-tested remission scheme to enable all to access the courts system irrespective of personal means. Appeals against refusal to grant remission are made first to the Court Manager and then to the Area Director – there is no charge for these appeals.

According to Her Majesty's Court Service 1.8m civil claims were issued in the county courts, and these courts also heard 108,930 public law and private law family applications. Research carried out by the Ministry of Justice in 2007 indicated that cost was a relatively minor factor in the decision to go to court (it ranked eighth out of nine factors).¹⁵ Moreover, seven out of 10 respondents said that higher court fees would not have influenced their decision to go to court. This indicates that in certain circumstances the desire to get a final decision or to get justice are more important than cost for most people.

There are a number of grounds for believing that courts fees are not directly analogous to appeals under the online copyright infringement detection and notification scheme.

¹⁵ <http://www.justice.gov.uk/publications/docs/changing-court-fees.pdf>, p. i.

- **Incentives to appeal** - incentives to use the courts scheme and the online copyright infringement appeals scheme are different. Use of the courts is often driven by necessity. In some cases there is also the prospect of recovering sums of money or asserting rights, such as access to family. Similar incentives do not exist for appeals against allegations of online copyright infringement.
- **Structural differences** - under the online copyright infringement scheme the subscriber is effectively defending his position against the allegations in the CIR/notification. This position appears closer to that of a defendant in court proceedings (who does not pay a fee, although costs can be awarded against him) than the plaintiff (who pays the fee).

Court fees also appear to serve a different purpose than any fee introduced for accessing the online copyright infringement appeals process. Ministry of Justice guidance states that fees should, where possible, reflect the costs of using the courts system. (In 2007/2008, 78% of the cost of running the civil and family courts in England and Wales was funded through court fees). By contrast any proposed fee for online copyright infringement appeals is likely to be an administrative charge driven largely by the desire to deter vexatious and frivolous appeals. We expect Government would want to consider refunding the fee in the event of a successful appeal.

- **Charges and indirect costs** - costs involved in accessing the courts system, the possible need to retain legal or other specialist advice, and the potential for an award of costs against an applicant, all act as deterrents to overloading the courts, with little parallel in the online copyright infringement appeals system.

Appeals schemes without a user fee

Planning

Planning decisions in England and Wales are taken by local planning authorities, typically district or borough councils. Applicants must pay a fee to lodge their application, ranging from £150 for a household extension to £250,000 for a large development. If an applicant has exhausted all negotiations with the planning authority and the application is finally refused there is a right of appeal to the Secretary of State for Communities and Local Government. These appeals are dealt with by the Planning Inspectorate.

There is no direct cost for making an appeal, although there is a provision in certain circumstances for costs to be awarded against a party in the case of unreasonable behaviour. There may however be indirect costs - for example an appellant may need to retain professional advice.

According to the Department for Communities and Local Government, 466,000 planning applications were made in England in 2009/10. During the same period the Planning Inspectorate received 16,921 appeals relating to England, an appeals ratio of 3.6%. Of these appeals, the inspectorate allowed 5,553, or 33%.

Again, it is difficult to determine what comparisons can be drawn from figures for appeals against planning decisions and possible appeals against allegations of online copyright infringement under the Digital Economy Act.

- **Incentives to appeal** - failure to secure planning permission can involve significant financial loss, and many applicants will have invested heavily in

planning fees and professional advice. The same is not true of potential online copyright infringement appellants.

- **Structural differences** - in planning cases an appellant is typically appealing a decision on an application that he himself launched, rather than an accusation against him (as in appeals against allegations of online copyright infringement). This personal investment in the case may lead to a different propensity to appeal a decision.
- **Charges and indirect costs** - while a planning appeal is free, appellants are likely to have to spend significant sums on professional advice. This in itself is likely to act as a deterrent to appeal. The potential for an exceptional cost award may also act as a deterrent in some cases, with no parallel for online copyright infringement appeals under the Digital Economy Act.

Direct taxation

The appeals process for disputes over direct taxation (similar but separate processes apply for tax credits, child benefit, indirect taxation etc) is as follows:

- Taxpayers can appeal a decision to Her Majesty's Revenue & Customs (HMRC) with no fee.
- If there is no agreement a taxpayer can apply to have his case formally reviewed by an independent officer at HMRC.
- Subsequent to, or instead of, a review, there is then a further avenue of appeal to a first tier tribunal.

No appeals fees apply at any stage of the process. However, appellants are normally expected to pay their own costs at the first tier tribunal stage, and in many cases are likely to need to retain professional advice. There is also a provision for the exceptional award of costs against either side in cases of unreasonable behaviour. In addition, interest accrues on any unpaid disputed tax and is payable in the event that the HMRC wins the appeal.

According to its annual report, HMRC received 87,179 complaints in 2008/9 across all its business activities (i.e. not just direct taxation). This figure relates to mistakes, delays, poor or misleading advice or guidance and staff behaviour, but excludes matters that can be appealed to the VAT and Duties Tribunal, the General or Special Commissioners, the Appeals Service or the courts such as a disputed assessment or liability decision, or the seizure or restoration of goods or vehicles.

Comparisons between tax appeals and online copyright infringement appeals are difficult for a number of reasons.

- **Incentives to appeal** - for taxpayers in dispute with HMRC there is a direct financial benefit to winning an appeal, unlike online copyright infringement appeals.
- **Structural differences** - the first stages of the appeals process are undertaken by HMRC itself, rather than an independent body. By contrast online copyright infringement appeals are considered by an independent body.
- **Charges and indirect costs** - there are additional deterrents against appealing tax cases, including (in the case of unpaid tax) the continued accrual of interest

during the appeals process, the possibility of an exceptional award of costs against the appellant, and the high possibility of requiring professional advice.

Traffic offences

The Parking Adjudicators consider appeals against Penalty Charge Notices issued by the London local authorities (a separate scheme - the Traffic Penalty Tribunal - exists for offences elsewhere in England and Wales). Anyone who has received a Penalty Charge Notice can appeal to the Parking and Traffic Adjudicator, provided that the correct procedure has been followed.

Appeals against traffic offences are free to consumers. However in certain circumstances there can be an exceptional award of costs against either party in the case of frivolous, vexatious or unreasonable behaviour. While this does not happen often (0.004% of appeals cases in 2009/10), the threat may deter some potential appellants.

These traffic appeals bodies provide useful information on the appeals ratio for traffic offences.

- 1.2% of Penalty Charge Notices for parking and traffic offences issued by the London Enforcement Authorities in 2009/10 were appealed.¹⁶
- 0.6% of London congestion charge fines were appealed in 2009/10.
- Figures were much lower outside of London. The Traffic Penalty tribunal reported that 0.31% of penalties were appealed in 2008/9 (the latest year for which data are available).¹⁷

The majority of traffic appeals appear to be successful. In 2009/10 64% of appeals to the Parking and Traffic Adjudicators were upheld.

Reasons why appeals against traffic offence decisions are not directly comparable to appeals against allegations of online copyright infringement include:

- **Incentives to appeal** - a key determinant of whether to appeal a traffic offence or an alleged finding of online copyright infringement will be the same for many people - i.e. a belief that they have been wrongly penalised. However, a further incentive exists for traffic offences - the desire to avoid a fine or points on a licence. Additionally, it seems plausible that the proportion of appeals which could come from those who disagree with the principle of the process rather than its application is higher for allegations of online copyright infringement than for traffic offences. For example, Ofcom media literacy research found that in 2011 32% of adults believed that unauthorised file sharing should be legal.
- **Charges and indirect costs** - the potential (however small) for an exceptional award of costs (which is not provided for under the online copyright infringement appeals process specified in the Digital Economy Act) may be a deterrent to appeal some parking cases.

¹⁶

<http://www.parkingandtrafficappeals.gov.uk/documents/ParkingandTrafficAdjudicatorsAnnualReport2009-10.pdf>

¹⁷

http://www.trafficpenaltytribunal.gov.uk/downloads/Annual_Statistics_of_the_Traffic_Penalty_Tribunal_0809.pdf

Appeals against Penalty Fares and Concession Withdrawal by Transport Providers

We have been unable to find volume data for the Independent Revenue Collection and Support service which processes payments and appeals for Penalty Fares and Unpaid Fare Notices on behalf of transport providers. The appeals process involves three stages, ending at the Independent Appeals Panel. Access to the system is free at each stage. The differences compared to the online copyright infringement appeals scheme are similar for those set out for traffic offences above.

Telecoms alternative dispute resolution (ADR) schemes

Ofcom approves two ADR schemes for telecoms complaints. Research we have conducted into consumer use and awareness of the schemes provides some possible benchmarks for online copyright infringement appeals ratios. But an ADR seeks to resolve differences between parties to a dispute - this is considerably different to appealing against an allegation of unlawful activity.

Our research suggests that around 12m complaints were made by consumers against telecoms companies in 2010. Of these around 3m had not been resolved eight weeks after first contact, and of these around 2m became eligible for consideration under the ADR schemes. Our consultation into the schemes suggests that 23% of consumers with unresolved eligible complaints were aware of ADR. We therefore assume that 460,000 consumers were potentially eligible to take their case to ADR and were aware that ADR existed. Around 9,000 went to ADR, suggesting a usage ratio of 2% among eligible complainants who were aware of the schemes. Given that, like telecoms providers, subscriber notifications of alleged online copyright infringement must specifically mention that consumers have a right to appeal, then this 2% figure is probably the most appropriate figure to use a comparison. There is no consumer cost to access these systems.

Differences to the online copyright infringement appeals scheme are set out below:

- **Incentives to appeal** - consumers are only eligible for ADR if they cannot resolve a complaint with a telecoms provider after eight weeks. ADR is generally used to resolve disputes over financial loss, alleged sharp practice on the part of the provider or to restore a service that has been cut off.
- **Structural differences** - ADR schemes are dispute resolution schemes rather than formal appeals schemes. Consumers must therefore engage with their provider prior to using the scheme.