

<b>Title:</b> <b>Impact Assessment accompanying the draft statutory instrument "online infringement of copyright (initial obligations) (sharing of costs) order".</b>  <b>Lead department or agency:</b> Business, Innovation and Skills <b>Other departments or agencies:</b> Culture Media and Sport, Intellectual Property Office Ofcom	<b>Impact Assessment (IA)</b>
	<b>IA No:</b> BIS 0115
	<b>Date:</b> 15/09/2010
	<b>Stage:</b> Final
	<b>Source of intervention:</b> Domestic
	<b>Type of measure:</b> Secondary legislation
<b>Contact for enquiries:</b> Stephen Fernando 020 7215 6320	

## Summary: Intervention and Options

### What is the problem under consideration? Why is government intervention necessary?

The Digital Economy Act 2010 included a package of measures designed to help create an environment in which investors are better able to recoup returns on their investment. These are needed because the public good nature of file-sharing and the accompanying spillover effects can encourage unlawful peer-to-peer (P2P) file sharing, reducing the incentives for investment in new content. These measures will be underpinned by a cost sharing mechanism. Copyright owners who are likely to benefit most will bear most of the costs while ISPs incur a smaller share of the costs to ensure that they have incentives to reduce instances of online infringement and ensure efficient behaviour with regards to meeting their obligations.

### What are the policy objectives and the intended effects?

The policy objective is to help ensure that investment in content is at socially appropriate levels by allowing investors to better recoup the returns on their investment and so that consumers can continue to benefit from online use. The Government is proposing secondary legislation to ensure the cost of the obligations imposed on ISPs are shared between copyright owners and ISPs and that Ofcom can recover costs incurred in drawing up the code and setting up the appeals mechanisms. Failure to set up an effective cost-sharing process will reduce the incentives to develop new commercial models and investment in content.

### What policy options have been considered? Please justify preferred option (further details in Evidence Base)

Two policy options have been considered:

Option 0: Do Nothing. In the absence of any other option, ISPs would face the full costs incurred by the notification and record keeping obligations alone and they would not be shared with the copyrights holders.

Option 1: (Preferred Option): Introduce an Order in Parliament which enables Ofcom to recover its costs; enables Ofcom's and appeals costs to be shared in a 75:25 ratio between copyright owners and ISPs respectively and enables Ofcom to put a process in place to ensure that the notification costs to ISPs are shared between copyright owners and ISPs in an indicative 75:25 ratio. This is because only a regulatory option can provide legal certainty for a cost sharing mechanism between ISPs and copyright owners to operate effectively.

<b>When will the policy be reviewed to establish its impact and the extent to which the policy objectives have been achieved?</b>	It will be reviewed 07/2012
<b>Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review?</b>	Yes

**Ministerial Sign-Off** For final proposal stage Impact Assessments:

***I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.***

Signed by the responsible Minister:



Ed Vaizey MP ..... Date: 15<sup>th</sup> September 2010

# Summary: Analysis and Evidence

# Policy Option 1

**Description:** Introduce an Order in Parliament which enables Ofcom to recover its costs

Price Base Year 2008	PV Base Year 2010	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: 0

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	-	-	-
High	-	-	-
Best Estimate	£10m	£9m - £22m	£87m - £199m

### Description and scale of key monetised costs by 'main affected groups'

In the absence of this Order the ISPs would face the full costs incurred by the notification and record keeping obligations alone and they would not be shared with the copyrights holders. Copyright owners will have to pay a share of the ISPs' costs associated with the notification and record keeping obligations (this is a transfer of costs). This could lead to a cost increase for copyright holders of £9m - £22m for recurring costs and £10m for one-off costs based on applying a 75% share to Ofcom estimates of total costs to ISPs. Ofcom is expected to incur one-off costs of £5.8m and ongoing costs of £5m per annum as a result of its monitoring and enforcement activities, devising a Code of Practice and the establishment of an appeals mechanism.

### Other key non-monetised costs by 'main affected groups'

There will also be a cost to copyright owners and ISPs from the operation of the appeals process. We are currently not able to provide robust estimates as it will depend on decisions to be taken in the Code that Ofcom is currently working on.. The level of the appeals costs will be determined by the provisions in the code and the operation of the code. The SI simply determines the allocation of these costs between copyright owners and ISPs.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	-	-	-
High	-	-	-
Best Estimate	£10m	£9m - £22m	£87m - £199m

### Description and scale of key monetised benefits by 'main affected groups'

ISPs will only have to pay a share of the costs associated with the notification and record keeping obligations (this is a transfer). This could lead to a saving for ISPs of £9m to £22m for recurring costs and £10 million for one-off costs based on applying a 75% share to Ofcom estimates of total costs to ISPs.

### Other key non-monetised benefits by 'main affected groups'

The implementation of the Statutory Instrument will help to ensure that the proposals on addressing online copyright infringement would facilitate progress towards the desired outcome of socially appropriate investment in content, thus generating significant benefits for copyright owners, consumers and Government.

### Key assumptions/sensitivities/risks

Discount rate (%) 3.5

This Impact Assessment should be read in conjunction with the Impact Assessment accompanying the Digital Economy Act 2010. In the absence of spare capacity, complying with the obligations could reduce the resources available for further investment in new content.

The assumptions underpinning the analysis have been based on the best available evidence. In particular, the total costs of the appeals mechanism have not been quantified to a robust degree because it is impossible at this point to make constructive estimates of volumes of appeals. However these costs could potentially be significant. This will be determined prior to the implementation of the Code of Practice.

Impact on admin burden (AB) (£m):			Impact on policy cost savings (£m):		In scope
New AB: N/A	AB savings: N/A	Net: N/A	Policy cost savings: 0		Yes

## Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?	United Kingdom				
From what date will the policy be implemented?	30/03/2011				
Which organisation(s) will enforce the policy?	Ofcom				
What is the annual change in enforcement cost (£m)?	Not Known				
Does enforcement comply with Hampton principles?	Yes				
Does implementation go beyond minimum EU requirements?	N/A				
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)	Traded: N/A		Non-traded: N/A		
Does the proposal have an impact on competition?	Yes				
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?	Costs: 100%		Benefits: 100%		
Annual cost (£m) per organisation (excl. Transition) (Constant Price)	Micro N/A	< 20 N/A	Small N/A	Medium N/A	Large N/Q
Are any of these organisations exempt?	Yes	Yes	Yes	Yes	No

## Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on...?	Impact	Page ref within IA
<b>Statutory equality duties</b> <sup>1</sup> <a href="#">Statutory Equality Duties Impact Test guidance</a>	Yes	13
<b>Economic impacts</b>		
Competition <a href="#">Competition Assessment Impact Test guidance</a>	Yes	12
Small firms <a href="#">Small Firms Impact Test guidance</a>	Yes	12
<b>Environmental impacts</b>		
Greenhouse gas assessment <a href="#">Greenhouse Gas Assessment Impact Test guidance</a>	No	-
Wider environmental issues <a href="#">Wider Environmental Issues Impact Test guidance</a>	No	-
<b>Social impacts</b>		
Health and well-being <a href="#">Health and Well-being Impact Test guidance</a>	No	-
Human rights <a href="#">Human Rights Impact Test guidance</a>	No	-
Justice system <a href="#">Justice Impact Test guidance</a>	No	-
Rural proofing <a href="#">Rural Proofing Impact Test guidance</a>	No	-
<b>Sustainable development</b> <a href="#">Sustainable Development Impact Test guidance</a>	No	-

<sup>1</sup> Race, disability and gender Impact assessments are statutory requirements for relevant policies. Equality statutory requirements will be expanded 2011, once the Equality Bill comes into force. Statutory equality duties part of the Equality Bill apply to GB only. The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

## Evidence Base (for summary sheets) – Notes

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

### References

Include the links to relevant legislation and publications, such as public impact assessment of earlier stages (e.g. Consultation, Final, Enactment).

No.	Legislation or publication
1	Digital Economy Act: Impact Assessments_ <a href="http://interactive.bis.gov.uk/digitalbritain/digital-economy-bill/related-documents/">http://interactive.bis.gov.uk/digitalbritain/digital-economy-bill/related-documents/</a>
2	BIS Impact Assessment accompanying the consultation on the draft instrument “online infringement of copyright (initial obligations) (sharing of costs) order <a href="http://www.bis.gov.uk/Consultations/online-infringement-of-copyright?cat=closedawaitingresponse">http://www.bis.gov.uk/Consultations/online-infringement-of-copyright?cat=closedawaitingresponse</a>
3	Ofcom consultation on Online Infringement of Copyright and the Digital Economy Act 2010 <a href="http://www.ofcom.org.uk/consult/condocs/copyright-infringement/">http://www.ofcom.org.uk/consult/condocs/copyright-infringement/</a>
4	

+ Add another row

### Evidence Base

Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form (recommended maximum of 30 pages). Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).

The spreadsheet also contains an emission changes table that you will need to fill in if your measure has an impact on greenhouse gas emissions.

#### Annual profile of monetised costs and benefits\* - (£m) constant prices

	Y <sub>0</sub>	Y <sub>1</sub>	Y <sub>2</sub>	Y <sub>3</sub>	Y <sub>4</sub>	Y <sub>5</sub>	Y <sub>6</sub>	Y <sub>7</sub>	Y <sub>8</sub>	Y <sub>9</sub>
<b>Transition costs</b>	10	0	0	0	0	0	0	0	0	0
<b>Annual recurring cost</b>	9-22	9-22	9-22	9-22	9-22	9-22	9-22	9-22	9-22	9-22
<b>Total annual costs</b>	19-32	9-22	9-22	9-22	9-22	9-22	9-22	9-22	9-22	9-22
<b>Transition benefits</b>	10	0	0	0	0	0	0	0	0	0
<b>Annual recurring benefits</b>	9-22	9-22	9-22	9-22	9-22	9-22	9-22	9-22	9-22	9-22
<b>Total annual benefits</b>	19-32	9-22	9-22	9-22	9-22	9-22	9-22	9-22	9-22	9-22

\* For non-monetised benefits please see summary pages and main evidence base section



Microsoft Office  
Excel Worksheet

## Evidence Base (for summary sheets)

*It is recommended that this Impact Assessment is read in conjunction with the Impact Assessment on online copyright infringement accompanying the Digital Economy Act.*

### Background

Following consultations in 2008 and 2009, proposals to implement legislation through the Digital Economy Act 2010 were introduced to address the rise in unlawful peer-to-peer (P2P) file-sharing, which can reduce the incentives to invest in the development, production and distribution of new content by preventing investors in the creative industries from fully appropriating the returns on their investment<sup>2</sup>.

Under the Act, ISPs (Internet Service Providers) will be required to take direct action against users who are identified as infringing copyright through P2P. The Act aims to reduce online infringement of copyright (OIC) by introducing a system of mass notifications designed to educate consumers about copyright and bring about a change in consumer behaviour<sup>3</sup>. While copyright owners would have to bear the costs of detecting infringements and sending copyright infringement reports to ISPs, this would be balanced by support to copyright owners to bring targeted civil actions against suspected illegal file sharers. Therefore, two obligations – to be underpinned by a code of practice to be approved by Ofcom - have been placed on Internet Service Providers (ISPs):

- when notified by rights owners, to inform subscribers of alleged unlawful activities and to send notifications to subscribers who have been identified in relation to alleged infringements of copyright.
- for ISPs to maintain anonymised records of the number of times an individual subscriber has been so identified, to maintain lists of those most frequently identified in connection with alleged infringements and to provide copyright owners with lists on request.

Furthermore, copyright owners and ISPs will be required to contribute towards the costs that Ofcom incurs in discharging its duties in relation to these obligations such as the approval or the development and making of a Code of Practice. In addition to these two parties, subscribers can – if necessary – also be required to contribute to costs relating to the establishment and running of an appeals mechanism that will operate under the supervision of Ofcom.

There was a consultation between March and May 2010 on the implementation of secondary legislation through an Order, which will set out how the costs associated with two obligations on ISPs will be shared, the coverage of costs, and the associated mechanisms relating to subscriber appeals and Ofcom.

Meanwhile, Ofcom have concluded their consultation on a code of practice, “the Online Copyright Infringement Initial Obligations Code”, which ended on 30 July 2010. Its consultation document proposes that only fixed ISPs with more than 400,000 subscribers be initially subject to the code thus focusing the obligations on the 7 ISPs that provide access to more than 96% of the market. This will ensure that this is a proportionate means of delivering objectives of the Digital Economy Act.

### Rationale for Government Intervention

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<sup>2</sup> File sharing – the exchange of content files containing audio, video, data or anything in digital format between users on a computer network.

<sup>3</sup> The Digital Economy Act inserted sections 124A to 124N into the Communications Act 2003 relating to online infringement of copyright.

Key to achieving the desired outcome of optimal investment in content is the need for clarity and certainty on how the ensuing costs on ISPs associated with these obligations are shared between copyright owners and Internet Service Providers, and how Ofcom would recover its costs.

In the absence of the implementation of this Order, there exists the possibility of regulatory failure in that the new regulatory framework, which requires ISPs to take direct action against subscribers who are identified as infringing copyright through unlawful P2P file sharing, may not function effectively. This could undermine progress towards the desired outcome of ensuring that investment in content is at socially appropriate levels.

### ***The sharing of costs between copyright owners and ISPs***

The intention of the Order is to specify the allocation of costs arising from the primary legislation in the Act which places obligations on ISPs when informed by copyright owners through copyright infringement reports to identify and inform subscribers of their illegal behaviour and to maintain record keeping systems.

The Order will enable Ofcom – following another consultation later in the year – to set a flat fee based on the costs which an efficient operator would incur in processing a copyright infringement report (CIR). It would also reflect the 75:25 ratio of the costs to be borne by copyright owners and ISPs. This flat fee would be payable by copyright owners for each copyright infringement report sent to an ISP. This would include the costs of:

- receiving a copyright infringement report and matching the IP address to an individual subscriber's details.
- generating and sending notification of an alleged infringement to that subscriber according to the rules set out in a Code.
- retaining records of copyright infringement reports and notifications sent, for the purposes of preparing copyright infringement lists if required.
- managing subscriber identification information and handling enquiries from and providing information requested by a subscriber about notifications received about that subscriber.
- compiling and providing copyright infringement lists to copyright owners.

### ***Costs to Ofcom***

As part of the primary legislation underpinning the Digital Economy Act there will be costs to Ofcom relating to:

- a) the approval or the development and making of a Code of Practice.
- b) the establishment of the appeals body to be used for subscriber appeals.

The draft Order would enable Ofcom to recover these costs from eligible ISPs and copyright owners.

Furthermore, there will also be costs relating to the operation of the subscriber appeals process by the independent body set up by Ofcom.

## **Policy Options**

### ***Option D: Do Nothing***

Under this option, ISPs would face the full costs incurred by the notification and record keeping obligations alone and they would not be shared with the copyrights holders. The copyrights holders would bear the costs of detecting infringements and sending copyright infringement reports to ISPs, as the benefits accrue almost entirely to copyright owners. This option serves as a theoretical baseline against which to assess the impact of Option 1, the proposed Statutory Instrument, which would set out how the costs associated with two obligations on ISPs will be shared, the coverage of costs, and the associated mechanisms relating to subscriber appeals and Ofcom, would not be implemented. As a result, neither Ofcom nor the appeals body would not be able to recover costs from industry, meaning that it would fall to BIS to cover any costs to Ofcom and the appeals body involved in carrying out their roles and responsibilities set out in the Digital Economy Act. There would also be uncertainty for industry as they would be forced to be more risk averse than necessary when seeking to forecast any potential costs that they would have to incur, leading to a possible misallocation of resources.

### ***Option 1: Enact the draft Statutory Instrument***

Under this option, the draft Statutory Instrument would be laid in Parliament, which, in summary, would cover:

- the recovery of costs incurred by Ofcom as a result of monitoring and enforcement of activities.
- the requirement for the payment of a flat fee - set by Ofcom based on the costs which an efficient operator would incur in processing a copyright infringement report (CIR) - by copyright owners to ISPs for processing each report submitted.
- the ISPs have the majority of their notification costs covered via the payment of a flat fee by copyright owners.
- the appeals body will recover its costs from copyright owners and ISPs.

Non regulatory options such as guidance – as cited in the Principles of Regulation - have not been considered given the specific nature of the problem under consideration – that cost sharing between ISPs and copyright owners and the recovery of Ofcom’s costs require the certainty of legislation that only a regulatory option can provide. In the absence of legislation ISPs and copyright owners would not be able to come to any agreement on cost sharing in the absence of legislation.

In order to assist the Parliamentary debates on the Digital Economy Bill relating to measures on online infringement of copyright, a draft Statutory Instrument was prepared which set out the proposed format and structure for cost allocation. It set out the *working assumption* that the notification costs should be shared between copyright owners and ISPs in the ratio 75:25<sup>4</sup>. In addition, Ofcom and appeals costs would be shared in a 75:25 ratio between copyright owners and ISPs respectively.

### **Assessment of Costs and Benefits**

#### ***The impact on ISPs and copyright owners***

The draft Statutory Instrument seeks to allocate the costs imposed on ISPs as a result of their notification and record keeping activities between the ISPs and the copyright owners on an equitable basis.

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<sup>4</sup> <http://interactive.bis.gov.uk/digitalbritain/2010/01/draft-statutory-instrument-on-costs/>

While copyright owners should contribute to the costs of securing additional returns on their investment (beyond the returns that they currently achieve) which result from Government actions to ensure socially appropriate investment, cost sharing is required in order to:

- ensure that ISPs have incentives to comply with its notification and record keeping activities as efficiently as possible.
- ensure that ISPs have incentives to reduce the number of instances of online copyright infringement.

Providing a quantitative assessment of the impact of the notification and record keeping obligations is a difficult and complex task because of uncertainties about the number of ISPs that would come within the scope of the Code of Practice and the number of copyright infringement reports that would be issued which in turn will depend on the level of the fee that copyright owners will have to pay.

For example, the Impact Assessment for the Digital Economy Act relied on the assumption that all 450 ISPs would be within the scope of the Code. Using the best available data at the time, it estimated that the one-off capital costs to ISPs would be £35m<sup>5</sup> and £7.5m - £24.5m for the annual average costs of notification over 10 years (Table 1).

Table 1: Costs to ISPs and copyright owners

Type of cost	Amount
One-off capital cost to ISPs	£35m
Average annual costs of notification	£7.5m-£24.5m
Average annual costs of running a call centre to deal with queries about notification letters	£60,000

Source: BIS estimates

Research by NERA, commissioned by rights owners, relied on the assumption that only 20 ISPs would be within scope. It suggested that one-off capital costs to ISPs would be £1.6m (using the same underlying estimate as the initial Impact Assessment) and the average annual cost of implementing the notification regime (using different assumptions) over a two year period would be £8.1m, which is at the lower end of the BIS estimate. The costs covered by this estimate include:

- Recurring costs associated with collating IP addresses matching infringing IP addresses to account owners and sending notifications to infringing account owners (£14.4m over 2 years)<sup>6</sup>.
- The costs of answering initial enquiries and providing additional advice to notification recipients based on these taking 20 minutes for each query (£1.9m over 2 years)<sup>7</sup>.

It should be emphasised that it has proved very difficult to obtain any hard data on the costs associated with the process. Only one of the responses to the consultation provided any new data. This stated that capital expenditure for one ISP would amount to £1.8m and operating expenditure would amount to £3.4m over 2 years for processing half a million copyright infringement reports. This is significantly different to the £80,000 capital expenditure costs assumed in the earlier impact assessments and if correct for all ISPs

<sup>5</sup> An industry estimate of £80,000 per ISP in the development of software and systems to automate the process of identification and notification of infringement

<sup>6</sup> This is based on a weighted average cost of matching infringing IP addresses of £0.56 (£3.14 for firms that have not invested in automation of the process of identification and notification and £0.39 for firms that did invest in automation) and 30p for sending each letter. The population of infringers have been generated by a model by NERA using a number of assumptions.

<sup>7</sup> This is based on an hourly wage of £7.75 with a 21 per cent mark-up for non-wage labour costs. For only answering the initial queries it is assumed that 10 minutes per query is required (£0.9m over 2 years).



in scope there is a risk that the cost to ISPs would be higher than expected, which would also have implications for the flat fee, to be incurred by copyright owners.

To take account of this risk we are using estimates from Sweet Consulting, which are considered to be credible, which suggest that the one-off capital costs for the major ISPs would be £7.6m.

However, for the purposes of this Impact Assessment, we propose to use the estimates for the average annual costs of notification cited in the Impact Assessment accompanying the Digital Economy Act of £7.5m to £24.5m.

### ***Costs to Ofcom***

The current proposals enable Ofcom's and appeals costs to be shared in a 75:25 ratio between copyright owners and ISPs respectively and there are likely to be additional costs to Ofcom to set up, enforce and monitor the development of the Code of Practice.

Furthermore, as part of legislation underpinning the Digital Economy Act there will be costs from the establishment of an independent body (which is expected to be under the supervision of Ofcom) to hear subscriber appeals. Total Ofcom set up costs are likely to amount to £5.8m with ongoing costs of £5m per annum.

The final design of the appeals body is yet to be determined, as Ofcom will need either to create a new body from scratch, or tender to assign the contract to an existing arbitration service provider. However, Ofcom will be consulting on the criteria which will define the approach to the appointment of the body (for example, in terms of due process, expertise, transparency, accountability) with the specific costs of the appeal body likely to amount to around £700,000, which would cover set up costs, recruitment and legal costs, system development and system maintenance (including an externally facing web page and appeal submission forms, and an internal case logging database).

There are also likely to be potential costs in dealing with appeals, **which are likely to be significant**. These costs have not been quantified as yet to a robust degree: this has been complicated primarily by considerable uncertainty about the likely volume of appeals, which is likely to depend on the approach taken in the code to ensure that the costs of appeals are not disproportionate. This will build on consultation with stakeholders prior to the approval of the Code of Practice.

### **Summary of transfer of costs impacts**

As stated before, the current proposals enable Ofcom to put a process in place to ensure that the notification costs to ISPs are shared between copyright owners and ISPs in an indicative 75:25 ratio. If an indicative ratio of 75:25 is applied to the BIS estimates this would suggest a transfer of recurring costs from ISPs to copyright owners of around £9m - £22m ( $=0.75*(£5m+£7.5m$  to  $£24.5m)$ ) and £10m of one-off costs ( $=0.75*(£5.8m+7.6m)$ ).

### ***Benefits***

If the draft Statutory Instrument is implemented in a timely manner, then the regulatory framework for addressing online copyright infringement would be able to operate efficiently. This will help to ensure that the Government's proposals on addressing online copyright infringement would facilitate progress towards the desired outcomes of socially appropriate investment in content, thus generating significant benefits for copyright owners, consumers and Government.

This is discussed in greater detail in the impact assessment on online infringement of copyright accompanying the Digital Economy Act. It was estimated that annual revenues of rights owners could increase by approximately £200 million<sup>8</sup> under the assumption that 70% of infringers would stop downloading illegally following notification by letter of their unlawful activity<sup>9</sup>, and based on trial data from the Memorandum of Understanding which indicates that this would reduce the volume of illegal downloading by 55%<sup>10</sup>.

## **Competition Assessment**

There are 450 fixed ISPs in the UK with the top seven accounting for around 96% of the residential and SME business broadband market. Ofcom have proposed in their consultation that the Code should only apply to fixed ISPs with more than 400,000 subscribers. There are seven such ISPs – BT, O2, Orange, Post Office, Sky, Talk Talk and Virgin Media.

The other ISPs have been excluded because of evidence received from copyright owners that suggests that the vast majority of alleged infringement is amongst subscribers of those ISPs.

Mobile ISPs have also been excluded because they are less conducive to online copyright infringement due to speed and capacity constraints and because of the excessive capital expenditure needed to identify illegal subscribers.

It is likely that such exclusion could also place mobile ISPs and other fixed ISPs at a competitive advantage compared to ISPs, not only because of not having to potentially bear the costs of implementing the legislation but also through the possibility of offering a more competitive priced and differentiated product to customers which could allow unlawful P2P file-sharing without the risk of being prosecuted legally.

However any significant displacement of illegal activity to smaller ISPs would be addressed by Ofcom who would be able to include them within the scope as well as the potential for smaller ISPs to breach the de minimus threshold and thereby liable to follow the legal obligations with associated costs.

## **Small Firms Impact Test**

As the Ofcom consultation on the initial obligations code has proposed that only the seven largest ISPs initially be included within the scope of the code, it is possible that subject to Ofcom's final decision that small and medium sized ISPs will be exempted from this regulation.

An additional factor to be considered is the size of the fee for processing copyright infringement reports, which is likely to determine whether or not there will be a disproportionate impact on small firms. If the fee is significantly large, as a result of perfectly reflecting high capital costs, then this would place small firms at a disadvantage compared to larger rights owners. Therefore, such firms may

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<sup>8</sup> Approximately 55% of £400 million

<sup>9</sup> Results of the Digital Entertainment Survey (2008) suggest that 70% of infringers would stop illegal P2P downloads after being notified by their ISP.

<sup>10</sup> Aggregate statistics of letters sent to individuals during the trial suggest that 30% of infringers account for 45% of total illegal downloads. This suggests that those infringers downloading the most will be more resistant to stop their unlawful behaviour.

not be able to recoup the benefits derived from the policy. However, Ofcom can set different fees to reflect situations whereby a discrete group of ISPs have significantly different costs.<sup>11</sup>

### **Other specific impact tests**

Other specific impact tests have been considered including the Competition Assessment (which is discussed in detail in the impact assessment on online infringement of copyright accompanying the Digital Economy Act), Legal Aid, Sustainable Development, Carbon Assessment, Other Environment, and Rural Proofing. After initial screening it has been deemed that no significant impact is anticipated in any case.

We have also considered the potential effects of these proposals on race, disability and gender equality. Again, after initial screening it has been deemed that no significant impact is anticipated in any case.

### **The One In, One Out Rule**

Under the One In, One Out rule a measure of similar cost will be removed in order for this measure to be introduced. However, because this Statutory Instrument has a zero net cost, due to the fact that it represents a transfer of costs there will be no need for a One Out to be identified.

### **Post Implementation Review**

It is expected that a post implementation review details of which are included in Annex A, which will be accompanied by a post implementation stage Impact Assessment, will be carried out within two years of the Statutory Instrument being laid in Parliament.

There is a range of activities taking place on online copyright infringement including consumer education, the promotion of lawful alternative services and targeted legal action against serious infringers. Ofcom will be monitoring how these develop and, in accordance with its obligations under the Digital Economy Act.

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<sup>11</sup> It is possible that there may be some significant cost differences for different “groups” of ISPs to comply. The Mott MacDonald report flagged up the cost differences between an automated and manual process. We would anticipate that a small ISP would face higher costs per copyright infringement report than a major ISP in the absence of economies of scale.

## Annexes

Annex 1 should be used to set out the Post Implementation Review Plan as detailed below. Further annexes may be added where the Specific Impact Tests yield information relevant to an overall understanding of policy options.

### Annex 1: Post Implementation Review (PIR) Plan

A PIR should be undertaken, usually three to five years after implementation of the policy, but exceptionally a longer period may be more appropriate. A PIR should examine the extent to which the implemented regulations have achieved their objectives, assess their costs and benefits and identify whether they are having any unintended consequences. Please set out the PIR Plan as detailed below. If there is no plan to do a PIR please provide reasons below.

<p><b>Basis of the review:</b></p> <p>The basis of the review is statutory as it is derived from section 8 of the Digital Economy Act 2010 which requires Ofcom to provide a full report 1 year after the initial obligations code come into effect.</p>
<p><b>Review objective:</b></p> <p>The objective is to provide advice to the Secretary of State for Business, Innovation and Skills on the impact measures addressing the infringement of copyright by subscribers to internet access services.</p>
<p><b>Review approach and rationale:</b></p> <p>The approach would use a number of techniques including an omnibus study, online panel and in-depth interviews and additional economic analysis to cover the following aspects as required by the Digital Economy Act.</p> <p>(a) an assessment of the current level of subscribers' use of internet access services to infringe copyright;</p> <p>(b) a description of the steps taken by copyright owners to enable subscribers to obtain lawful access to copyright works;</p> <p>(c) a description of the steps taken by copyright owners to inform, and change the attitude of, members of the public in relation to the infringement of copyright;</p> <p>(d) an assessment of the extent of the steps mentioned in paragraphs (b) and (c);</p> <p>(e) an assessment of the extent to which copyright owners have made copyright infringement reports;</p> <p>(f) an assessment of the extent to which they have brought legal proceedings against subscribers in relation to whom such reports have been made;</p> <p>(g) an assessment of the extent to which any such proceedings have been against subscribers in relation to whom a substantial number of reports have been made; and</p>
<p><b>Baseline:</b></p> <p>This would be determined by Ofcom, and would correspond to the do nothing option in the Impact Assessment accompanying the Digital Economy Act.</p>
<p><b>Success criteria:</b></p> <p>This is based on a target to reduced online infringement of copyright by 75%.</p>
<p><b>Monitoring information arrangements:</b></p> <p>Ofcom would introduce relevant processes as required by the Digital Economy Act 2010.</p>