

Draft Order laid before Parliament under section 124M(5) of the Communications Act 2003, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2011 No. 0000

ELECTRONIC COMMUNICATIONS

The Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2011

Made - - - -

Coming into force in accordance with article 1

This Order is made in exercise of the powers conferred by sections 124M and 402 of the Communications Act 2003⁽¹⁾.

In accordance with section 124M(5) of that Act a draft of this instrument has been laid before Parliament and approved by resolution of each House of Parliament.

Accordingly the Secretary of State makes the following Order.

Citation and Commencement

1. This Order may be cited as the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2011 and shall come into force on the day after the day on which it is made.

Interpretation

2. In this Order—

“the Act” means the Communications Act 2003;

“appeals body” means a person who, under the Code, has the function of determining subscriber appeals⁽²⁾;

“Code” means the initial obligations code approved by OFCOM under section 124C of the Act or made by OFCOM under section 124D of the Act;

“initial costs” means the qualifying costs incurred prior to the start of the first notification period including any such costs incurred prior to the making of the Code;

“notification fee” means the amount set by OFCOM in accordance with paragraph 1 of the Schedule;

(1) 2003 c.21; section 124M was inserted by the Digital Economy Act 2010 (c.24), section 15.

(2) See definition in section 124N of the Communications Act 2003.

“notification period” means—

- (a) the period beginning on a day determined by OFCOM in accordance with the Code and ending on 31st March 2012 or 31st March 2013 as determined by OFCOM; or
- (b) any subsequent period of twelve months beginning on 1st April;

“qualifying copyright owner” means, in relation to a notification period, a copyright owner⁽³⁾ who has given an estimate to a qualifying internet service provider of the number of copyright infringement reports to be made by the copyright owner to the internet service provider in that notification period in accordance with the Code;

“qualifying costs” means the costs incurred by OFCOM or the appeals body in carrying out functions under the copyright infringement provisions⁽⁴⁾ including costs incurred by OFCOM under those provisions in appointing the appeals body or in establishing a body corporate to be the appeals body;

“qualifying entities” means qualifying internet service providers and qualifying copyright owners;

“qualifying internet service provider” means an internet service provider⁽⁵⁾ to which the rights and obligations of the Code apply;

“relevant costs” means costs which would be reasonably and efficiently incurred by a notional qualifying internet service provider in carrying out its obligations under the copyright infringement provisions.

Provision to be made by the Code

3. The Secretary of State specifies that the Code must include the provisions set out in the Schedule.

Enforcement

4.—(1) OFCOM may recover as a civil debt any amount outstanding to it under any provision included in the Code by virtue of article 3.

(2) The appeals body may recover as a civil debt any amount outstanding to it under a provision included in the Code by virtue of article 3 and paragraph 5 of the Schedule.

	<i>Name</i>
	Minister for Culture, Communications and Creative Industries
Date	Department for Business, Innovation & Skills

(3) See definition in section 124N of the Communications Act 2003.

(4) See definition in section 124N of the Communications Act 2003.

(5) See definition in section 124N of the Communications Act 2003.

SCHEDULE

Article 3

PROVISIONS TO BE INCLUDED IN THE CODE

Notification fees

1.—(1) OFCOM must set the amount payable by a qualifying copyright owner for each copyright infringement report which the qualifying copyright owner estimates it will make under the Code during the notification period.

- (2) The amount set may be different for different descriptions of internet service providers..
- (3) The amount set by OFCOM must be based on OFCOM’s estimate of relevant costs.
- (4) Relevant costs may include the costs of—
 - (a) receiving a copyright infringement report;
 - (b) matching the IP address(6) to a subscriber(7) on receipt of a copyright infringement report;
 - (c) generating and sending a notification of the copyright infringement report under section 124A(4) of the Act to that subscriber;
 - (d) retaining records of copyright infringement reports and notifications sent to subscribers, for the purposes of section 124B of the Act or if required to do so by the Code;
 - (e) managing information for the purposes set out in the Code;
 - (f) compiling and providing copyright infringement lists(8) to copyright owners, pursuant to section 124B of the Act;
 - (g) handling enquiries from and providing information requested by a subscriber about notifications received by that subscriber;
 - (h) maintaining appropriate security and access controls for data processed for the purposes set out in the Code to meet the requirements of the Data Protection Act 1998(9); and
 - (i) monitoring compliance with obligations under the copyright infringement provisions(10).
- (5) Relevant costs must exclude—
 - (a) costs payable under a Court order;
 - (b) costs caused by the failure of a qualifying internet service provider to maintain accurate subscriber records; and
 - (c) costs of economic opportunities lost as a result of compliance with obligations under the copyright infringement provisions.
- (6) In setting the amount OFCOM shall have regard to the desirability of—
 - (a) promoting efficiency in the exercise of rights and the performance of obligations under the copyright infringement provisions; and
 - (b) ensuring, as far as practicable, that the notification fees payable by all qualifying copyright owners in a notification period amount to 75% of the total costs incurred by all qualifying internet service providers calculated on the assumption that the total costs of each qualifying internet service provider are equal to OFCOM’s estimate of relevant costs.
- (7) OFCOM must publish the amount it sets as soon as practicable.

(6) See definition in section 124N of the Communications Act 2003.

(7) See definition in section 124N of the Communications Act 2003.

(8) See definition in section 124B(2) of the Communications Act 2003.

(9) 1998 c.29.

(10) See definition in section 124N of the Communications Act 2003.

(8) OFCOM may review the amount from time to time and, if it considers appropriate, re-set it in accordance with sub-paragraphs (1) to (6).

(9) OFCOM must publish any revised amount as soon as practicable.

(10) A revised amount shall take effect from the beginning of the first notification period after the date of publication.

Payment of notification fees

2.—(1) Prior to the start of each notification period a qualifying copyright owner must pay to a qualifying internet service provider the notification fees.

(2) The notification fees payable are equal to the amount set by OFCOM under paragraph 1 multiplied by the number of copyright infringement reports calculated in accordance with sub-paragraph (3).

(3) The number of copyright infringement reports is—

- (a) the number of copyright infringement reports which the qualifying copyright owner estimates it will make to the qualifying internet service provider under the Code during the notification period; less
- (b) the difference between the number of copyright infringement reports which that qualifying copyright owner estimated it would make to that qualifying internet service provider under the Code in the previous notification period and the number it actually made to that qualifying internet service provider in that period, if lower.

Qualifying costs

3.—(1) A qualifying entity at the start of a notification period must pay a fee in respect of the qualifying costs estimated by OFCOM to be incurred in respect of that period.

(2) At the start of each notification period OFCOM must notify each qualifying entity of the amount of the fee to be paid and the date for payment.

(3) OFCOM must set the fees with a view to securing that, on the basis of such estimates of the likely qualifying costs as it is practicable for OFCOM to make and taking account of any case fees that may be charged by the appeals body under paragraph 5—

- (a) for each notification period, the aggregate amount of fees payable by qualifying entities to OFCOM in respect of qualifying costs are sufficient to meet, but do not exceed, the total annual amount of the qualifying costs;
- (b) for each notification period, the aggregate amount of fees payable by qualifying copyright owners in respect of qualifying costs represents 75% of the qualifying costs;
- (c) for each notification period, the aggregate amount of fees payable by qualifying internet service providers in respect of qualifying costs represents 25% of the qualifying costs;
- (d)
 - (i) the amount of the fee payable by each qualifying copyright owner represents a share of the aggregate amount of fees payable by qualifying copyright owners in respect of qualifying costs in the notification period;
 - (ii) such share is based on the total number of copyright infringement reports that the qualifying copyright owner estimates it will make under the Code during that period as a proportion of the total number of copyright infringement reports estimated to be made by all qualifying copyright owners under the Code during that period;
- (e)
 - (i) the amount of the fee payable by each qualifying internet service provider represents a share of the aggregate amount of fees payable by qualifying internet service providers in respect of qualifying costs in the notification period;

- (ii) such share is based on the total number of copyright infringement reports all qualifying copyright owners have estimated that the qualifying internet service provider will receive under the Code during that period as a proportion of the total number of copyright infringement reports that all qualifying copyright owners have estimated all qualifying internet service providers will receive under the Code during that period.

(4) As soon as practicable after the end of each notification period, OFCOM must publish a statement in respect of that period showing—

- (a) the total amount of fees that have been received from qualifying entities by OFCOM;
- (b) the total amount of fees that remain outstanding and are likely to be paid or recovered; and
- (c) the qualifying costs incurred in that period.

(5) Any deficit or surplus shown by the statement (after applying this sub-paragraph for all previous notification periods) shall be carried forward and taken into account in fixing the fees to be paid in respect of the qualifying costs OFCOM estimates will be incurred in relation to the following notification period.

Initial costs

4.—(1) Qualifying entities liable to pay fees in respect of qualifying costs in either or both of the first two notification periods must pay a share of the initial costs.

(2) OFCOM must apportion the initial costs with a view to securing, so far as practicable—

- (a) that, in the first notification period, the aggregate amounts payable to OFCOM by all qualifying entities in that period in respect of the initial costs are sufficient to meet, but do not exceed, the initial costs;
- (b) that, in the second notification period, the aggregate amounts payable to OFCOM by all qualifying entities in the first and second notification periods in respect of the initial costs are sufficient to meet, but do not exceed, the initial costs;
- (c) that the aggregate amounts payable by all qualifying copyright owners in respect of the initial costs represent 75% of the initial costs;
- (d) that the aggregate amounts payable by all qualifying internet service providers in respect of the initial costs represent 25% of the initial costs.

(3) OFCOM must review at the start of the second notification period the amounts it has charged to qualifying entities in the first notification period in respect of the initial costs and may make refunds in respect of any overpayments, if it considers it appropriate, after taking account of the amounts it charges to qualifying entities in the second notification period.

(4) In carrying out its functions under this paragraph, OFCOM must, so far as practicable, have regard to the following objectives—

- (a) (i) the amount payable by each qualifying copyright owner in the first notification period represents a share of the aggregate amounts payable by all qualifying copyright owners in that period in respect of the initial costs;
- (ii) such share is based on the number of copyright infringement reports which the qualifying copyright owner estimates it will make under the Code during that period as a proportion of the total number of copyright infringement reports estimated to be made under the Code by all qualifying copyright owners during that period;
- (b) (i) the amount payable by each qualifying copyright owner in the second notification period represents a share of the aggregate amounts payable by all qualifying copyright owners in the first and second notification periods in respect of the initial costs;

- (ii) such share is based on the number of copyright infringement reports which the qualifying copyright owner estimates it will make under the Code during the first and second notification periods as a proportion of the total number of copyright infringement reports estimated to be made under the Code by all qualifying copyright owners during those periods;
 - (c) (i) the amount payable by each qualifying internet service provider in the first notification period represents a share of the aggregate amounts payable by all qualifying internet service providers in that period in respect of the initial costs;
 - (ii) such share is based on the total number of copyright infringement reports qualifying copyright owners have estimated that an internet service provider will receive under the Code during that period as a proportion of the total number of copyright infringement reports qualifying copyright owners have estimated all qualifying internet service providers will receive under the Code during that period in respect of the initial costs;
 - (d) (i) the amount payable by each qualifying internet service provider in the second notification period represents a share of the aggregate amounts payable by all qualifying internet service providers in the first and second notification periods in respect of the initial costs;
 - (ii) such share is based on the number of copyright infringement reports all qualifying copyright owners have estimated that the qualifying internet service provider will receive under the Code during the first and second notification periods as a proportion of the total number of copyright infringement reports all qualifying copyright owners have estimated that all internet service providers will receive under the Code during those periods.
- (5) At the start of the first and second notification periods OFCOM must notify each qualifying entity of the amount apportioned to it and the date by which such amount must be paid.

Case fees

5.—(1) The appeals body may set a case fee to be charged in respect of each subscriber appeal which it receives.

(2) The amount of the case fee must be approved by OFCOM.

(3) The case fee must be based on the costs that the appeal body may incur in handling and determining a subscriber appeal, to the extent that such costs are not recovered by the fees payable to OFCOM in respect of the qualifying costs.

(4) The appeal body must charge 75% of the case fee to the relevant copyright owner.

(5) The appeal body must charge 25% of the case fee to the relevant internet service provider.

(6) For the purposes of this paragraph—

(a) the relevant copyright owner is the qualifying copyright owner that made the copyright infringement report which is the subject of the subscriber appeal or which led to the act or omission that is the subject of the subscriber appeal;

(b) the relevant internet service provider is the qualifying internet service provider that received that copyright infringement report from the relevant copyright owner.

(7) The relevant copyright owner and the relevant internet service provider must pay their respective shares of the case fee within such period as the appeal body may determine from time to time.

(8) The appeal body may review the amount of the case fee from time to time in consultation with OFCOM.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order specifies provisions that must be included in the initial obligations code (the Code) about payment by copyright owners and internet service providers of contributions towards costs incurred under the copyright infringement provisions in the Communications Act 2003 inserted by the Digital Economy Act 2010.

In Article 3 the Secretary of State specifies that the Code must include the provisions set out in the Schedule.

Article 4 provides that OFCOM and the person appointed to determine subscriber appeals (the appeals body) may recover as a civil debt any amount outstanding to them under provisions in the Code included by virtue of this Order.

Paragraph 1 of the Schedule deals with the notification fees. OFCOM must set the amount payable by a qualifying copyright owner for copyright infringement reports made by it to a qualifying internet service provider under the Code. The paragraph sets out how OFCOM should calculate the amount.

Paragraph 2 deals with the payment of the notification fees.

Paragraph 3 deals with the qualifying costs incurred by OFCOM and the appeals body under the Code. It sets out how fees to cover the qualifying costs are to be apportioned between qualifying copyright owners and qualifying internet service providers.

Paragraph 4 makes provision about the payment by qualifying copyright owners and qualifying internet service providers of amounts to cover the costs incurred prior to the first notification period.

Paragraph 5 makes provision for the appeals body to charge a case fee for each subscriber appeal.

This Order was notified in draft to the European Commission in accordance with Directive [98/34/EC\(11\)](#), as amended by Directive [98/48/EC\(12\)](#).

An Impact Assessment has been produced. A copy may be viewed on BIS website www.bis.gov.uk. Copies have also been placed in the Libraries of both Houses of Parliament.

(11) OJNo. L 204, 21.7.1998, p.37.

(12) OJ No. L 217, 5.8.1998, p18.