

<b>Title:</b> Impact Assessment of draft SI "The Online Infringement of Copyright (Initial Obligations)(Sharing of Costs) Order 2012" <b>IA No:</b> DCMS032 <b>Lead department or agency:</b> Department for Culture, Media and Sport <b>Other departments or agencies:</b> Intellectual Property Office, Ofcom	<b>Impact Assessment (IA)</b>			
	<b>Date:</b> 29/03/12			
	<b>Stage:</b> Final			
	<b>Source of intervention:</b> Domestic			
	<b>Type of measure:</b> Secondary legislation			
	<b>Contact for enquiries:</b> Adrian Brazier (020 7211 6023)			

<b>Summary: Intervention and Options</b>	<b>RPC:</b> Green
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Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, One-Out?	Measure qualifies as
£0m	N/A	N/A	No	N/A

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

The Digital Economy Act 2010 contained measures to address the rise in online infringement of copyright which might reduce the incentive for the creative industries to invest in the development, production and distribution of new content. Implementation of the proposed policy would allow copyright owners to better appropriate the returns on their investment. The Act requires an Initial Obligations Code (Code) by Ofcom (for which a separate IA has been produced) to set out how the provisions will work in practice; this will be underpinned by a Sharing of Costs SI (which is the subject of this IA), which sets out how the costs will be apportioned.

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

The overall policy objective of the online copyright infringement provisions in the Digital Economy Act is to help ensure that investment in content is at socially appropriate levels by allowing investors to better appropriate the returns on their investment. Failure to set up an effective cost-sharing process will jeopardise the successful implementation of these provisions. Therefore, the Government is proposing this Sharing of Costs SI which will set out how the costs of implementing the measures should be apportioned between copyright owners and internet service providers (ISPs). The Sharing of Costs SI doesn't introduce any regulation directly itself, but sets out provisions to be included in Ofcom's Code.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

Two options have been considered:

Option 0: Do nothing. In the absence of any secondary legislation, once the Code is in force, ISPs would need to bear the full costs they incur in carrying out their obligations under the Act, and Government would need to meet the full cost of Ofcom's work in setting up and administering the measures. Insufficient clarity in how the costs should be shared would be a risk to effective implementation of the measures.

Option 1 (Preferred option): Introduce the Sharing of Costs SI; this introduces a cost-sharing mechanism for the costs incurred by ISPs, enables Ofcom to recover costs from industry, and introduces an appeals case fee for copyright owners and an appeals fee for subscribers. Ofcom costs and appeals costs will be borne by copyright owners; notification costs will be shared between copyright owners and ISPs in a ratio of 75:25. A regulatory option is necessary because it provides legal certainty for a cost-sharing mechanism to operate effectively.

<b>Will the policy be reviewed?</b> It will be reviewed. <b>If applicable, set review date:</b>					
Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	<b>Micro</b> Yes	<b>&lt; 20</b> Yes	<b>Small</b> Yes	<b>Medium</b> Yes	<b>Large</b> Yes
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)			<b>Traded:</b> N/A	<b>Non-traded:</b> N/A	

*I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.*

Signed by the responsible Minister: \_\_\_\_\_  Date: 19 April 2012

# Summary: Analysis & Evidence

# Policy Option 1

## Description:

### FULL ECONOMIC ASSESSMENT

Price Base Year 2011	PV Base Year 2011	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: £0

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	£12.5m	£12.6m - £16.8m	£105m - £135m

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

Once the Code is in force, copyright owners will bear Ofcom set up and enforcement costs: £6.8m one-off and £3.1m recurring costs. Copyright owners will pay a share of ISP costs from notification and record keeping obligations, and all recurring costs from appeals (this is a transfer, generating zero net cost). This could lead to a cost increase for copyright owners of £1.8m - £6m for recurring notification costs and £5.7m for one-off costs based on applying a 75% share to copyright owners of estimates of these costs. Recurring appeals costs transferred to copyright owners are estimated at £7.7m per year.

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

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	£12.5m	£12.6m - £16.8m	£105m - £135m

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

Ofcom will receive payment for set up and enforcement costs: £6.8m one-off costs and £3.1m recurring costs. ISPs will only have to pay a 25% share of the costs associated with the notification and record keeping obligations and no recurring costs from appeals (this is a transfer). This could lead to a saving for ISPs of £1.8m to £6m for recurring notification costs and £5.7m for one-off costs based on applying copyright owners a 75% share to estimates of these costs. ISPs benefit from the transfer of recurring appeals costs to copyright owners, estimated to be £7.7m per year.

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

The implementation of the SI will help to ensure that the proposals on addressing online copyright infringement will 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. The assumptions underpinning the analysis are based on the best available evidence. Total ISP notification costs are contingent on further consultation - for the purpose of this impact assessment we have used estimates from the DEA impact assessment and from Sweet Consulting. A separate impact assessment was produced to accompany Ofcom's Initial Obligations Code.

### BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: N/A	Benefits: N/A	Net: N/A	No	N/A

# Evidence Base (for summary sheets)

## Rationale for Government intervention

An important feature of creative industries like the music, software and film industries is that they are characterised by strong intellectual property rights (IPR). Strong IPR creates an incentive to invest in the development of new and more innovative products since it permits individuals to capture the gains from the new products it creates.

However, with unlawful file sharing, the incentive to invest in new and mainstream artists is undermined because industry cannot capture all the gains generated from its investment. This is because the public goods<sup>1</sup> nature of file sharing and its spillover effects<sup>2</sup> creates a free-riding problem whereby users may enjoy the benefits of file sharing without paying the product's price<sup>3</sup>. The disincentive to invest in artists as a result of free-riding is a particular problem in the music, film and videogames industries because they are characterised by large investment costs and a relatively high risk of failure.

The background to the online copyright infringement provisions of the Digital Economy Act (DEA) are set out below. Key to achieving the desired outcome of optimal investment in content – through the provisions in the DEA – is the need for clarity on how the ensuing costs on internet service providers (ISPs) associated with these obligations are shared between copyright owners and ISPs, and how Ofcom will recover its costs.

## Background

Following consultations in 2008 and 2009, proposals to implement legislation through the DEA 2010 (DEA) were introduced to address the rise in unlawful peer-to-peer 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>4</sup>. The DEA aims to reduce online infringement of copyright by introducing a system of mass notifications designed to educate consumers about copyright and bring about a change in consumer behaviour<sup>5</sup>. The Government anticipates that these “initial 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 online infringement of copyright provisions place obligations on ISPs to take direct action against users who are identified as infringing copyright through unlawful file sharing. Copyright owners will identify instances of unlawful file sharing and will notify the relevant ISP that an IP address has been connected with unlawful activity, through a Copyright Infringement Report (CIR). On receipt of a CIR from a copyright owner, the ISP will be obliged to notify the subscriber whose account has been identified as involved in infringing activity. The ISP will also need to maintain anonymised records of the number of times an individual subscriber's account has been identified as infringing copyright, and to maintain lists of those most frequently identified in connection with alleged infringements, providing copyright owners with these lists on request.

The subscriber who receives a notification letter can choose to appeal. Under the provisions of the DEA, the subscriber is entitled to appeal each notification and each CIR within a notification. Ofcom is obliged by the DEA to appoint an Appeals Body to determine appeals, and must approve its procedures. The minimum grounds for appeal are set out in the DEA.

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

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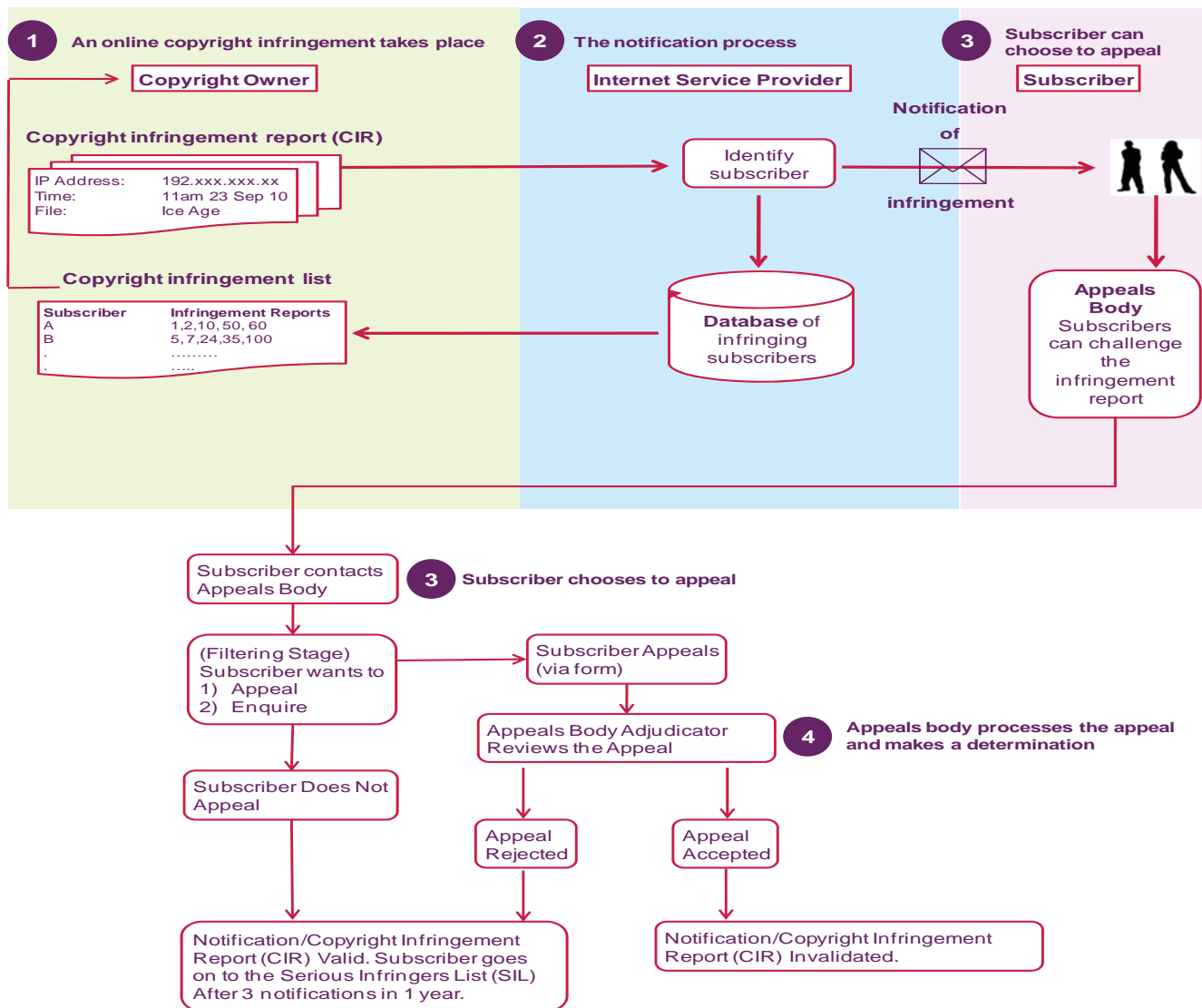
<sup>1</sup> Public goods are those goods which are non-rival and non-excludable in consumption. Non-rival in consumption means that one person's consumption of a good or service does not reduce the amount which can be consumed by another person, and non-excludable means that it is not possible to prevent another person from consuming it.

<sup>2</sup> Spillover effects arise when one person's actions have an impact on a third party.

<sup>3</sup> A similar case arises with Research and Development (R&D) whereby a company cannot capture all the benefits of its R&D activity because it cannot fully retain the knowledge that it creates. Knowledge spills over to other companies through various mechanisms, including personnel changing jobs or copying.

<sup>4</sup> File sharing – the exchange of content files containing audio, video, data or anything in digital format between users on a computer network.

<sup>5</sup> The Digital Economy Act inserted sections 124A to 124N into the Communications Act 2003 relating to online infringement of copyright.



Source: Ofcom

The Government intends for the online copyright infringement provisions of the Act to be enacted through two pieces of secondary legislation: a Code to be made by Ofcom, which will set out the details of how the provisions will work in practice – and for which a separate impact assessment has been produced; and a Sharing of Costs statutory instrument (SI) which will set out how the implementation of the provisions is to be paid for and which will be replicated within the Code. The Sharing of Costs SI is the focus of this impact assessment. This SI does not introduce any regulation directly itself – obligations on industry will only come into force with the Code.

### Sharing of Costs SI

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>6</sup>.

The implementation of the Sharing of Costs SI was consulted on publicly between March and May 2010, and the Government response along with a Final Stage Impact Assessment was published in September 2010. The Government decided that relevant costs incurred should be shared between copyright owners and ISPs in the ratio 75:25. The draft SI, reflecting this decision, was notified to the European Commission under the Technical Standards Directive and then laid in Parliament. The draft was subsequently withdrawn and amended in the light of a drafting comment by the Joint Committee on Statutory Instruments, Ministerial Decisions and the High Court Judgment in the Judicial Review

<sup>6</sup> <http://www.bis.gov.uk/Consultations/online-infringement-of-copyright>

Proceedings. The judge ruled that ISPs cannot be made responsible for the costs incurred by Ofcom or the Appeals Body in setting up, administering and enforcing the initial obligations. This did not apply to the costs incurred by ISPs in performing their own duties under the DEA, or to appeals case fees. The SI was renotified to the Commission in August 2011.

The Claimants appealed to the Court of Appeal, which delivered its Judgment in March 2012. In the light of that Judgment the draft SI has been amended again so that the relevant copyright owner involved in an appeal now bears the case fee and ISPs will not be liable to contribute.

The proposed cost-sharing mechanism is set out below.

The Government also seeks to amend the Sharing of Costs SI to require subscribers to pay a £20 fee to access the appeals system. It is envisaged that such a fee would deter individuals from appealing casually, with the intent of disrupting the system, but would be sufficiently modest not to have a disproportionate effect on those with legitimate reasons to appeal. In cases where appeals are upheld, individuals would have their £20 fee refunded. A range of potential costs of the appeals mechanism are set out below.

### Purpose of this impact assessment

This impact assessment assesses the costs and benefits of the Sharing of Costs SI. A separate impact assessment assesses the costs and benefits of implementing the Obligations Code, and so addresses the impacts of introducing the online infringement of copyright proposals. By contrast, no new costs or benefits are introduced through the Sharing of Costs SI and it affects only the distribution of impacts between parties. Hence, the overall net effect of the Sharing of Costs SI is zero (because costs transferred from one party to another cancel out overall).

### Costs incurred by Ofcom

In implementing the online infringement of copyright provisions of the DEA, Ofcom will incur costs relating to:

- The development and making of the Code;
- The establishment of the Appeals Body to be used for subscriber appeals.
- Monitoring and enforcing the initial obligations, and producing progress reports.

The Sharing of Costs SI enables Ofcom to recover these costs from qualifying copyright owners.

### Costs incurred by the appeals mechanism

The operation of the Appeals Body will generate costs through the processing of appeals cases.

Subscribers who wish to access the appeals system will face the cost of a fee.

### Costs incurred by ISPs through the notifications scheme

The Sharing of Costs SI will enable Ofcom – following further consultation with stakeholders – to set a flat fee based on the costs which an ‘efficient operator’ would incur in processing a CIR. This fee would be payable by copyright owners for each CIR sent to an ISP. It 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 Ofcom’s Code;
- Retaining records of CIRs and notifications sent, for the purposes of preparing lists of repeat copyright infringers (Copyright Infringement Lists), and providing these to copyright owners as required;
- Managing subscriber identification information and handling enquiries from and providing information requested by a subscriber about notifications received about that subscriber.

## **Policy Options**

### **Option 0: Do nothing**

In the absence of secondary legislation to set out how the costs incurred under the DEA should be shared by industry, it is not likely that a voluntary arrangement would be made, leading to a lack of clarity which would challenge the successful implementation of the online infringement of copyright provisions in Ofcom's Code. Once the Code is in force, in the absence of a cost-sharing mechanism, ISPs would bear their full costs in implementing the measures rather than sharing these costs with the principal beneficiaries of the provisions. Furthermore, neither Ofcom nor the independent appeals body would be able to recover costs from industry, meaning that these costs would fall to Government.

This option is included to serve as a theoretical baseline against which to assess the impact of Option 1 – the proposed statutory instrument – which is the Government's preferred policy option.

### **Option 1: Enact the Sharing of Costs SI (preferred option)**

Under this option, the draft SI would be laid in Parliament, addressing the following issues:

- The recovery of costs incurred by Ofcom as a result of set-up, monitoring and enforcement activities;
- The requirement for the payment of a flat fee by copyright owners to ISPs for processing each report submitted. This fee would be set by Ofcom, based on the costs which an efficient operator would incur in processing a CIR;
- The recovery of costs incurred by the Appeals Body;
- A requirement on subscribers to pay a fee to access the appeals system.

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 that only a regulatory option can provide. In the absence of legislation, we do not expect that ISPs and copyright owners would be able to come to an agreement on cost sharing, jeopardising successful implementation of the provisions which will come into force with Ofcom's Code.

## **Assessment of costs and benefits**

### **Costs from Ofcom**

The current proposals allow the costs incurred by Ofcom in setting up, monitoring and enforcing the initial obligations to be recovered from qualifying copyright owners, including their work on establishing the Code. Total Ofcom costs have been estimated by Ofcom (in line with initial consultation) to amount to £6.8m set-up costs, including those for the appeals body, and recurring costs of £3.1 million per annum. These costs will fall to copyright owners once they participate in the new scheme.

### **Ofcom analysis on appeals mechanism costs**

Subscribers may be able to appeal against every notification letter that they receive from their ISP, and against every CIR for which the subscriber's account has been identified as being used to infringe copyright. Work has been carried out by Ofcom to assess the likely costs of the appeals system and the possible options for keeping these costs to a reasonable minimum. It is clear that a large volume of casual, or 'vexatious' appeals claims – potentially driven by a campaign against the Act – could drive up the cost of the appeals system by a substantial degree. The impact of appeals costs being driven too high would be that the whole notifications system becomes unworkable, and copyright owners would take a view that the benefits would not significantly outweigh the costs. In those circumstances they would not generate any CIRs – or incur any costs.

There will be a cost to copyright owners from the operation of the appeals process, and to subscribers who choose to access the appeals system and will be required to pay a fee. Truly robust estimates for these are contingent on future work, therefore are not known with certainty at this point. However, it should be noted that copyright owners have strongly indicated that they will set, and not exceed, a budget for CIR notifications and appeals. Within the set budget, the precise number of CIRs will depend upon the related cost of handling appeals; the greater the proportion of appealed notifications, the fewer

notifications that will be sent. Therefore, whilst the proportion of notifications which will be appealed is not known with certainty, this ratio will affect the *distribution* of costs between notifications and appeals, rather than the *extent* of the cost to copyright owners. We show for illustrative purposes some scenarios, using a range of estimates for the volume of notifications and appeals ratios to demonstrate possible distributions of costs.

Ofcom analysis suggests that if Government introduces a subscriber fee for appeals, this is likely to have an impact on the aggregate cost of the appeals system<sup>7</sup>. However, robust evidence with which to estimate the level of this impact is contingent on information not yet available. The main unknown driver of this impact is the elasticity of demand for appeals associated with introducing a fee at any particular level<sup>8</sup>.

The Government has based its estimates on the best available evidence including comparisons with other appeal processes. Both Ofcom and Government have made extensive efforts to identify comparators. However, it is difficult to benchmark the level of fee against comparable systems, because of the weak parallels between the appeals mechanism outlined here and other systems, such as those used to appeal decisions on traffic offences, public examinations and planning applications. Furthermore, the final design of the independent Appeals Body which will deal with the appeals is yet to be determined. Therefore, at the current time, costs incurred in setting up and operating the appeals mechanism are subject to some uncertainty.

However, Ofcom's report provides some illustrative estimates – based on a range of potential volumes for notifications and a range of appeals ratios – which show the level of cost reduction which might be achieved by the introduction of a fee, on the assumption that an appeals fee will deter a proportion of casual or 'vexatious' appeals. Ofcom modelled scenarios around introducing a £5 or a £10 fee, compared to introducing no fee at all (Scenarios 1-3). The Department has extrapolated those scenarios to illustrate the level of cost reduction which might be achieved from introducing a £20 fee (Scenario 4). The illustrative examples show the scale of costs under particular assumptions. However, in practise, copyright owners will adjust the number of CIRs depending on the proportion appealed, such that their costs can remain within the budget they set.

### **Scenario 1 - no 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	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

Source: Ofcom

The table above shows that 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. Ofcom make an assumption that the appeals ratio would be at this level in the absence of an appeals fee.

<sup>7</sup> Ofcom (2011) *Digital Economy Act Online Copyright Infringement Appeals Process: Options for Reducing Costs* <http://stakeholders.ofcom.org.uk/binaries/internet/appeals-process.pdf>

<sup>8</sup> That is, the extent to which demand for appeals responds to a change in their price.

### Scenario 2 – Government introduces a £5 subscriber appeals fee

Letters	CIRs	Appeals / CIR	No. appeals	Fixed costs	Variable	Net appeals fee income (£m)	Total costs (£m)
				(£m)	costs (£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

Source: Ofcom

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%. Ofcom make an assumption in dropping the appeals ratio following the introduction of the £5 fee.

### Scenario 3 - Government imposes a £10 subscriber appeals fee

Letters	CIRs	Appeals / CIR	No. appeals	Fixed costs	Variable	Net appeals fee income (£m)	Total costs (£m)
				(£m)	costs (£m)		
				A	B	C	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

Source: Ofcom

The table above examines the possible cost impact of Government imposing a £10 subscriber fee for appeals. For this table Ofcom lower the range of appeals ratios to 0.5% - 3%, on the assumption that a £10 will deter some casual or 'vexatious' appeals.

### Scenario 4 – Government imposes a £20 subscriber appeals fee

Letters	CIRs	Appeals/ CIRs	No. appeals	Fixed costs	Variable	Net appeals fee income (£m)	Total costs (£m)
				(£m)	costs (£m)		
				A	B	C	A+B-C
400,000	1,000,000	0.25%	2,500	0.7	1.0	0.0	1.7
400,000	1,000,000	0.50%	5,000	0.7	2.0	0.1	2.6
400,000	1,000,000	1.50%	15,000	0.7	6.0	0.2	6.5
2,000,000	5,000,000	0.25%	12,500	0.7	5.0	0.2	5.5
2,000,000	5,000,000	0.50%	25,000	0.7	10.0	0.3	10.4
2,000,000	5,000,000	1.50%	75,000	0.7	30.0	1.0	29.7

Source: DCMS/Ofcom

The table above examines the possible cost impact of Government introducing a £20 subscriber fee for appeals. DCMS have extrapolated on Ofcom's methodology, and have lowered the range of appeals ratios to 0.25% - 1.5%.

### Costs from ISPs operating the notifications scheme & costs of the appeals mechanism

Following indicative discussion with those involved, DCMS estimate that the most likely number of CIRs sent annually is 2 million. Copyright owners have estimated an appeals ratio of 0.5% to 1% of CIRs, assuming a £20 subscriber fee. The upper end of this estimate, 1%, is used for calculations as there is arguably more scope for the appeals ratio to be higher than expected, rather than lower, given the uncertainty involved. The estimates of the number of CIRs and the proportion appealed are consistent with the analysis discussed above, as both lie within the ranges extrapolated from the Ofcom



methodology, outlined in Scenario 4. As mentioned above, copyright owners have strongly indicated that they will set, and not exceed, a budget for the notifications scheme and appeals mechanism. Therefore if the ratio of CIRs appealed is higher than expected, then the number of CIRs would be adjusted downward, such that overall costs remain broadly unchanged.

For the purposes of this impact assessment, we have used an estimate for the one-off capital costs to ISPs from Sweet Consulting, which Ofcom consider to be realistic. This suggests that the capital costs for ISPs will be £7.6m. Expected capital costs to fall within this estimate include the ISP infrastructure build required to operate the notifications system – including the secure processing and storage of data – as well as the establishment of technical and consumer support mechanisms. As a result of the Sharing of Costs SI, 75% of these costs (£5.7m) will fall to copyright owners once they elect to participate; with ISPs incurring the remaining 25% (£1.9m). This is a transfer of costs within the business sector, with zero net impact.

Recurring costs from notification schemes are driven by the number of CIRs that copyright owners issue. Although the final costs will not be known in advance of further consultation, for the purposes of this impact assessment we apply the assumptions used in the DEA impact assessment of £3 - £10 per letter, which stemmed from earlier consultation with industry<sup>9</sup>. This estimate takes account of expected operational costs including sending notifications to subscribers, technical support for the infrastructure required and consumer support lines. In line with the Ofcom scenarios outlined above, it is assumed that notification letters are 40% of the number of CIRs (this reflects that multiple CIRs may be included in one notification letter where relevant). This implies a total of 800,000 notification letters sent annually, with a total cost of £2.4m to £8m. 75% of these costs (£1.8m to £6m) are incurred by copyright owners through the Sharing of Costs SI. This is a transfer of costs within the business sector, with zero net impact.

The costs of appeals are similarly driven by copyright owners. Estimates of the recurring appeals costs are consistent with the inputs for costs per appeal (£400) and net appeal fee income (£20 revenue per rejected appeal, processing costs of £2 per fee and £1 per refund, with 20% of appeals upheld) outlined in Scenario 4 above. Following the DCMS estimates of 2 million CIRs issued annually and 1% of CIRs appealed, this yields a total net recurring appeals cost of £7.7m. All of these costs fall to copyright owners through the Sharing of Costs SI. This is a transfer of costs within the business sector, with zero net impact. As outlined, whilst the precise ratio of appealed CIRs cannot be known with certainty, copyright owners have indicated that they will stick to the budget they allocate, such that CIR numbers can be reduced if the ratio of appeals is higher than expected.

### Copyright Infringement Reports Tariff

Once the Sharing of Costs SI is in force, Ofcom intends to consult on the level which should be set for the flat fee, to establish a tariff (or tariffs). The Sharing of Costs SI sets out the methodology that Ofcom must apply in setting the CIR tariff. For the purposes of this impact assessment, such a tariff is a transfer within the business sector (from copyright owners to ISPs), with no net cost.

### Subscriber appeals fee

The Government has announced that it intends to introduce a £20 subscriber appeals fee, in order to deter vexatious or non bona fide appeals. The Government intends to review the level of the fee after 12 months of the initial obligations being in effect, in order to assess whether the £20 level is still appropriate.

### Impact on ISPs and copyright owners

The Government seeks to make a 75:25 apportionment of ISP notification costs and to transfer all appeals costs to copyright owners. This is in order to recognise the principle that the main beneficiaries – in this instance, the copyright owners – should pay for the majority of costs, whilst giving a clear incentive to ISPs to develop efficient and effective systems to implement the measures. Under the 75:25 cost ratio, qualifying copyright owners will pay 75% of the cost of processing CIRs and issuing

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<sup>9</sup> BERR (2008) *Consultation on legislative options to address illicit peer-to-peer file sharing*  
<http://webarchive.nationalarchives.gov.uk/20100511084737/http://interactive.bis.gov.uk/digitalbritain/wp-content/uploads/2010/04/Digital-Economy-Act-IAs-final.pdf>

notification letters incurred by ISPs, as well as 100% of appeals case fees. The remaining 25% of ISP notification costs will be met by qualifying ISPs.

Copyright owners will also be responsible for 100% of costs incurred by Ofcom in setting up, monitoring and enforcing the initial obligations, including setting up the independent Appeals Body.

### Impact on consumers

The Sharing of Costs order does not affect the impact on consumers. The Government believes that introducing an appeals fee will have a significant impact on reducing the cost of the appeals process, by deterring casual appeals. For this reason, the Government is seeking to require subscribers to pay a £20 fee to access the appeals system, which will be refundable if the appeal is successful. As stated above, it is envisaged that such a fee would deter individuals from appealing casually, with the intent of disrupting the system.

### Summary of transfer of costs impacts

If the 75:25 ratio is applied to the DCMS estimates this would suggest a transfer of recurring costs from ISPs to copyright owners of £1.8m to £6m from notifications ( $=0.75*(£2.4m \text{ to } £8m)$ ) and £5.7m of one-off capital costs ( $=0.75*£7.6m$ ), once the Code is in force.

The £7.7m recurring appeals costs are all transferred to copyright owners once the Code is in force. The copyright owners will also bear the £6.8m set-up costs (which include appeals body set-up costs) and the £3.1m recurring costs associated with Ofcom's activities.

The total costs transferred to copyright owners (COs) are therefore £12.5m one-off costs (£5.7m capital and £6.8m Ofcom set-up costs) and recurring costs of £12.6m to £16.8m (£1.8m-£6m notifications, £7.7m appeals and £3.1m Ofcom costs). These cost transfers have a net present value over ten years of £105m to £135m. However, as all of these costs are transfers, there is zero net impact overall.

Table 2: Summary of transferred costs

Type of cost	Total	Transferred to COs
Capital	7.6	5.7
Ofcom set-up	6.8	6.8
Ofcom recurring	3.1	3.1
Notifications	2.4-8.0	1.8-6.0
Appeals recurring	7.7	7.7

£m

### Competition Assessment / Small Firms Impact Test

This statutory instrument will not have any impact on competition or small firms in itself – the impact will follow once the Code is in force. Therefore, the impact of the online copyright infringement provisions stemming from the Act on competition, small firms and micro businesses will be assessed in the impact assessment accompanying the Code.

### Other specific impact tests

Other specific impact tests have been considered including 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 protected groups under the Equality Act 2010. Again, after initial screening it has been deemed that no significant impact is anticipated in any case.

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

The Sharing of Costs statutory instrument falls out of scope of the One-In, One-Out (OIOO) rule because the SI does not introduce any regulation by itself and so does not result in direct impacts on businesses. The obligations on industry only come into force once Ofcom's Code of Practice has been made into law. Therefore the OIOO implications are taken into account in the impact assessment for the Code of Practice.

## **Post Implementation Review**

It is expected that a post implementation review, details of which are included in Annex 1, which will be accompanied by a post implementation stage Impact Assessment, will be carried out within two years of the SI being laid in Parliament.

There is a range of activities taking place on online infringement of copyright 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.

## 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 comes into effect.</p>
<p><b>Review objective:</b></p> <p>The objective is to provide advice to the Secretary of State for Culture, Olympics, Media and Sport on the impact on internet access services by measures addressing the infringement of copyright by subscribers.</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> <ul style="list-style-type: none"><li>(a) an assessment of the current level of subscribers' use of internet access services to infringe copyright;</li><li>(b) a description of the steps taken by copyright owners to enable subscribers to obtain lawful access to copyright works;</li><li>(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;</li><li>(d) an assessment of the extent of the steps mentioned in paragraphs (b) and (c);</li><li>(e) an assessment of the extent to which copyright owners have made copyright infringement reports;</li><li>(f) an assessment of the extent to which they have brought legal proceedings against subscribers in relation to whom such reports have been made;</li><li>(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.</li></ul>
<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 an overall target to reduced online infringement of copyright by 75%, through a range of policy measures.</p>
<p><b>Monitoring information arrangements:</b></p> <p>Ofcom would introduce relevant processes as required by the Digital Economy Act 2010.</p>
<p><b>Reasons for not planning a PIR:</b></p> <p>N/A</p>