

MLA Consultation response

Ofcom consultation: Online infringement of copyright and the Digital Economy Act: Draft initial obligations code

Introduction

The MLA Council is the government's agency for museums, libraries and archives. Leading strategically, MLA promotes best practice in museums, libraries and archives to inspire innovative, integrated and sustainable services for all.

MLA welcomes the opportunity to feed into the draft obligations code. Libraries can play an important role in supporting the government's ambitions for 100% digital participation by 2012. To this end the public library network has promised to support the race online campaign by reaching out to 500,000 digitally excluded people by the end of 2012.

There is a danger however that an unintended consequence of the Digital Economy Act will be the withdrawal of internet access and support for people to get online in public libraries.

MLA key messages

- **Legal definitions** - MLA, in agreement with the British Library and other organisations representing public intermediaries, is concerned that the categories for public intermediaries have not been made clear. Many organisations fall into either or all of the three categories "ISP" "communications provider" or "subscriber, which would have implications for the service they provide.
- **Non qualifying ISPs** – Within the Act there are a number of clauses¹ which would provide a basis for ensuring that public sector intermediaries are described as 'non qualifying ISPs' in the same manner as mobile ISPs. We would encourage Ofcom to give this serious consideration.
- **Costs** - the level of online copyright infringement across public networks is extremely small. The costs, however of complying with the initial obligations code could reach into hundreds of millions of pounds across a public library network of 3,000 service points and 151 library services in England alone. The ongoing costs of compliance would also be in the millions of pounds per year and are not justified by the levels of infringement on their networks.
- **Impact on services** - the excessive costs of complying with the code of practice as it currently stands, and the risks associated with being considered a subscriber, mean that many, if not all, public libraries may have to remove their internet provisions for the public.

¹ S.7.124E.(1) (k) of the Digital Economy Act states that provisions in the Ofcom initial obligations code in order to be approved by parliament must be "proportionate to what they are intended to achieve".

S.7.124E (1) (i) from the same section also required that "the provisions of the code are objectively justifiable in relation to the matters to which it relates".

S.6.124D(5)(h) allows Ofcom to "make other provision(s) for the purpose of regulating the initial obligations."

S.5.124C(3)(a) states that Ofcom can also specify "conditions that must be met for rights and obligations under the copyright infringement provisions or the code to apply in a particular case."

Response to the questions in the consultation

Q3.1 Do you agree that Copyright Owners should only be able to take advantage of the online copyright infringement procedures set out in the DEA and the Code when they have met their obligations under the Secretary of State's Order under Section 124 of the 2003 Act?

This provision in the code implies a capacity and capability on the part of the ISP to enter into such communications with the Copyright Owners (potentially in their hundreds or even thousands), and that the ISP will have the power to enforce these obligations. It does not consider the huge administrative burden to the ISP in dealing with each individual Copyright Owner, whether any reports is eventually made or not.

Public sector intermediaries are unlikely to possess these resources. If a public library, for example, is designated as a qualifying ISP, there may be no dedicated member of staff to take on this role, and any member of staff assigned this role may not have the status or confidence to enforce the rights of ISPs set out under the code. We would ask:

- What support will be provided in this instance?
- How will Ofcom monitor whether Copyright Owners are diligently engaging with ISPs before sending out infringement notices?
- What protection will be given to small ISPs to avoid coercion?
- What redress will small ISPs have for volumes of infringement notices that are higher than those projected?

While we understand that these provisions are initially designed for a limited number of large ISPs, the code must also work for a greater number than that for which it was initially designed, who may have smaller constituencies and less resource, as there is nothing to preclude the code being extended to these in the future.

Q3.2 Is two months an appropriate lead time for the purposes of planning ISP and Copyright Owner activity in a given notification period?

We would echo UCISA's response that two months is not long enough for a previously non-qualifying ISP to set up these systems. Nine months is a more realistic timeframe, however we would ask:

- what support will be provided to help public sector ISPs install these systems?

One public library has estimated that if in the future it were to be classed as a qualifying ISP and it were to implement logging software that would allow them to identify users, implementation would cost £47,500 with ongoing annual costs of c.£4000. Scaling this across the entire public library sector on a like for like basis, the cost for initial implementation would be £213,750,000 with ongoing annual costs to the sector of 18 million.

Q 3.3 Do you agree with Ofcom's approach to the application of the Code to ISPs?

We fundamentally disagree with this approach as it could apply to public sector intermediaries. The terms of this section imply a clear ISP/subscriber relationship, at a fixed IP address, in a financial agreement that would be continuous and ongoing. However despite the lack of consideration of their specific circumstances, public sector intermediaries could easily come into scope if usage of their networks spikes for any reason – e.g. a particularly successful campaign to get digitally excluded people online.

We would query:

- what reporting obligations would be put in place for ISPs to determine when they reach the 400,000 subscriber threshold
- how that threshold would be deemed to have been achieved when IP addresses can be allocated not just to subscribers but also to terminals
- whether, given the nature of the public library computer network, it is tenable to potentially consider a single public library as a subscriber under these terms, given that each service point offers hundreds of hours of public broadband access as a public service each week.

Q 3.4 Do you agree with the proposed qualification criteria for the first notification period under the Code and the consequences for coverage of the ISP market?

We would refer you to our response for Q 3.3.

Q 3.5 Do you agree with Ofcom's approach to the application of the 2003 Act to ISPs outside the initial definition of Qualifying ISP?

We would refer you to our response to Q 3.3 and would add that it would be entirely inappropriate and disproportionate to include public libraries and other public sector intermediaries as qualifying ISPs in the code. As set out above, the costs would be disproportionate to the benefit – both for the institutions involved and for the UK economy as a whole.

Q 3.6 Do you agree with Ofcom's approach to the application of the Act to subscribers and communications providers?

This question presupposes that Ofcom has a clear approach to the application of the Act to subscribers and communications providers. Despite the descriptions in paragraphs 3.30 and 3.31 in the consultation document it is still unclear how a subscriber would be identified in the context of a public sector network offering public access to the internet. It is also unclear who would make this decision – Ofcom, the Copyright Owner or someone else? Even the appeals process does not appear to be set up to make these distinctions.

MLA is very concerned that, by default, public libraries, museums and archives offering public internet access will be considered to be subscribers by Copyright Owners and targeted as single individuals. In the context of the extremely low threshold for sending out a CIR, public institutions offering access to hundreds of members of the public a week.

There is no mention of the application of the Act in relation to a communications provider in the current Ofcom draft code of practice and therefore we cannot comment on its suitability.

Q 4.1: Do you agree with the proposed content of CIRs?

We do not agree with this proposal as it does not require the rights holder to consider the potential that a licence has been issued by them or an agent and doesn't consider limitations and exceptions.

Q 4.2: Do you agree with our proposal to use a quality assurance approach to address the accuracy and robustness of evidence gathering?

Yes, we agree with this proposal

Q 4.3: Do you agree that it is appropriate for Copyright Owners to be required to send CIRs within 10 working days of evidence being gathered?

Yes, we agree with this proposal, however we would echo UCISA's concerns that the 10 day period be clearly defined as this will have significant implications on how long institutions are required to store usage data.

Q 5.1 Do you agree with our proposals for the treatment of invalid CIRs?

We agree with these proposals broadly, with the following exceptions:

- It is important that one reason for not processing a CIR is that the network upon which an infringement is alleged to have taken place is the network of an excluded category / not a subscriber.
- We would also support UCISA's request for an additional reason for invalidity, relating to discrepancies in time recording between ISPs and copyright holders.

Q 5.2 Do you agree with our proposal to use a quality assurance approach to address the accuracy and robustness of subscriber identification?

This process is entirely sensible and proportionate where subscribers are allocated fixed IP addresses and are in long-term agreements to provide internet access with ISPs. However, in many situations on public sector networks where the public is provided with internet access, this information is very difficult to acquire. It would either require a complete change in the way that public internet access is provided or a complex monitoring system that could track individual subscribers as they move terminal or onto wi-fi networks. The costs of either intervention would be very high and, as we have stated in our introduction, could result in public access being withdrawn as financially unsustainable.

Q 5.3: Do you agree with our proposals for the notification process?

In the instance that public libraries and other public sector intermediaries are identified as subscribers, this threshold is so low that even given the negligible levels of copyright infringement on these networks, there is a high risk that they could easily be subject to inclusion on a copyright infringement list. Given the huge numbers of people using public sector networks this would not represent a significant or persistent problem on any given network – as each notification could be triggered by separate individuals on the network. The information and education role of CIRs would therefore not work – even if the individuals responsible were identified and educated, new individuals could trigger another CIR. We would therefore argue that, in the case where public sector networks providing public access to the internet are identified as subscribers, a much higher threshold should be applied.

We would also highlight the role that public libraries play in educating the public about safe and lawful use of the internet, and would argue that Copyright Owners' money would be better spent in supporting education programmes via public intermediaries, than in prosecuting said intermediaries.

Q 5.4 Do you believe we should add any additional requirements into the draft code for the content of the notifications?

While this code may work well for large ISPs currently identified as 'qualifying' in relationship to domestic internet supply, it is inadequate to deal with the issue of public sector networks providing public broadband access. As it currently stands, the code will have the effect of reducing public access to the internet, particularly for the most vulnerable and excluded in society. Library services may be forced to close down their public internet access because:

- If they are subscribers there is a high risk they could be placed on a copyright infringement register, due to the low thresholds for CIR notices
- If they are ISPs and come into scope the costs of putting monitoring and notification arrangements in place would be too great

Q6.1 Do you agree with the threshold we are proposing? Do you agree with the frequency with which Copyright Owners may make requests?

We have pointed out some of the problems with the thresholds for inclusion on a copyright infringement list in previous responses.

We agree with UCISA that a 5 day response to collate and send such information is very tight and that 10 working days would be a more appropriate response time for ISPs.

Q 7.1 Do you agree with Ofcom's approach to subscriber appeals in the Code?

The overall approach is appropriate, with the following caveats:

- There does not currently appear to be any way for an institution to appeal against a status ascribed to it by a Copyright Owner – e.g. for a public library to argue that it should not be the subject of CIRs because it is an ISP rather than a subscriber
- There is no way for a public library, in the event that it is satisfied to be categorised as a subscriber, to log the 'reasonable steps' it has taken to avoid copyright infringement prior to the appeals process. This means that institutions could have to respond to appeals regularly with the same defence, incurring costs and reputational risks that may be unacceptable and could therefore result in termination of public internet access

Q 8.1 Do you agree with Ofcom's approach to administration, enforcement, dispute resolution and information gathering in the Code?

We agree with this approach.

Contact

Astra Farquharson
Senior Public Affairs Adviser
Museums Libraries & Archives Council
Astra.farquharson@mla.gov.uk
T: +44 (0) 20 7273 8293
F: +44 (0) 20 7273 1404
www.mla.gov.uk

27 July 2010