

Online infringement of copyright: Initial Obligations Code Ofcom consultation June/July 2012

In responding to this consultation the National Library of Scotland (NLS) concentrates its comments on the ongoing requirement to clarify the position of libraries, and similar public bodies, under the Code. In the broader context, NLS is keen to establish a regulatory framework which provides proper protection for holders of intellectual property rights, while also ensuring that researchers, the public and other consumers of information and creators of knowledge have fair and reasonable access to information and publications.

The status of libraries within the Code

Since the Digital Economy Bill was first published in 2009 libraries have asked for clarification regarding their status under the terms of the legislation. Libraries need to know if they are considered primarily as subscribers, internet service providers (ISPs), communication providers, or a combination of all three, so that they can correctly gauge the current and potential implications of the Act, its Initial Obligations Code, and any future revised code.

NLS was pleased to note assurances by the Secretary of State that libraries would not fall within the scope of the Initial Code¹. The consultation document confirms an acknowledgement of the issues raised by the sector, but we are disappointed that the draft Code itself does not provide the clarity, and reassurance for the future, which we require.

NLS is not currently a subscriber to any of the qualifying ISPs covered by the draft Initial Code, but other libraries, particularly in the public library sector, may not be as fortunate. Similarly there is no guarantee that NLS and many other libraries, particularly in the education and research sectors, may not come within the scope of any expanded list of qualifying ISPs. On that basis the following comments reflect the difficulties perceived by libraries under the Initial Code and any future code.

Libraries and the provision of Wi-Fi services

Many libraries provide free Wi-Fi facilities on their premises. These facilities may be used by both registered and non-registered visitors to the library. We

¹ "As the Code is currently drafted libraries and universities will not be within scope of the obligations. Furthermore, we do not envisage a scenario in which they will become subject to the obligations, either now or in the foreseeable future." Letter from Ed Vaizey to Stuart Dempster, January 2011.

note with interest the decision which has been made to exclude 'public' Wi-Fi providers from the scope of the Initial Code.

The reasons given for this initial exclusion include:

- the lack of evidence relating to online infringement via Wi-Fi networks;
- the inherent restrictions in the use of Wi-Fi for transferring large files; and
- the costs involved in establishing systems which would enable the identification of subscribers.

All these issues are shared by many libraries offering Wi-Fi to their customers. However the consultation document appears to equate 'public' Wi-Fi providers with commercial facilities provided by companies such as BT. Indeed para. 3.98 of the consultation, where it states: "... the initial obligations will still apply to the provision of fixed internet access service which is conveyed by physical means ... to the subscriber's premises, but where the subscriber makes use of Wi-Fi for conveyance within the premises." would seem to place many libraries in the 'subscriber' category.

Libraries as subscribers

The draft Code identifies a 'fixed subscriber' as one 'who receives a fixed internet access service', that is 'an internet access service conveyed by wire, cable, fibre or other material substance to the subscriber's address'. On that basis most libraries would fit this definition, and, if they are a subscriber to a qualifying ISP, will come under the terms of the Initial Code. However the code does not differentiate between individual subscribers and those, such as libraries, which are acting as public intermediaries, purposely providing wider access via their subscription.

In Annex 5 of the consultation Ofcom attempts to clarify the position of libraries and other public intermediaries, but only adds to the existing confusion. In para A5.53 we are told that Ofcom "consider that a person or an undertaking receiving an internet access service for its own use (or that of its employees) is a subscriber, even if they also make access available to third parties, and in that regard, constitute communications providers ..."

In para A5.54 it states that "where an undertaking receives an internet access service essentially and verifiably for the purpose of providing it to third parties (for example, libraries for the purpose of providing a Wi-Fi service to library

users), it would appear reasonable for their upstream ISP to treat them as an ISP or communications provider ...”

There is logic to all these interpretations, but there is no clarity regarding how these multiple criteria will interact under the terms of the Code. Ofcom suggests that public intermediaries discuss these issues with their ISPs to clarify their status, and argue that they should not be treated in the same way as private subscribers. However qualifying ISPs are not required, by the Code, to differentiate between their subscribers, and there is no guarantee that they will be prepared to do so. It is therefore extremely likely that qualifying ISPs will receive Copyright Infringement Reports (CIRs) which will result in notifications being forwarded to libraries and other public intermediaries.

Most libraries will make every reasonable attempt to ensure that online copyright is respected. However, while it may be possible to identify misuse by members of staff, who have logged on to the network using user ids and passwords, it is much more difficult to monitor use by, the much more numerous, customers who access the internet through PCs provided by the library, or through a free Wi-Fi service using their own laptops or tablets.

The obligations outlined in the Initial Code are much more relevant for individual subscribers, accessing the internet from their home address. As noted previously NLS does not currently receive its internet services via a qualified ISP, but this may change in the future if the qualifying criteria are expanded. Some libraries will already be within the scope.

NLS received almost 275,000 visits between 1 April 2011 and 31 March 2012. Any or all of these visitors could have made use of our internet services, and many may only have visited us on one or two occasions during that period. Other libraries will experience similar, or even greater, demands on their services. It does not seem reasonable, or proportionate, to treat libraries in the same way as the Code will deal with the limited, and usually identifiable number of people who may access an individual's internet service. To include a library on a Copyright Infringement List (CIL) on the basis of three notifications received during a twelve month period seems inequitable.

It is highly unlikely that libraries will be able to identify the individuals who may be responsible for the alleged infringements. The limited number of notifications required could also make it difficult for a library to identify the most appropriate actions which could be taken to remedy the situation. Of course an appeals process would be available, and we note the proposed charge of £20.00 per appeal, and the time limit of 20 days in which to submit

one. The fee appears reasonable, but the time limit may be too short for libraries with limited staff and IT resources.

Libraries could certainly submit appeals, where appropriate, on the basis that the alleged infringement was not done by the subscriber (the library) and argue that it took reasonable steps to prevent other persons infringing copyright. However, if this latter argument was accepted, it would do nothing to help reduce future allegations of infringements.

Perhaps a better solution would be to simply inform public intermediaries of the number and range of CIRs received against their IP address, as the number of CIRs may be greater than the number of notifications received. This would possibly allow them to obtain much more accurate information regarding the level of infringement which had been identified and develop further, appropriate and proportionate ways of reducing this activity.

The great fear remains that, at some future date, technical measures will be introduced as a penalty for infringing subscribers. This could mean that thousands of law-abiding users of internet services could be penalised due to the illegal activities of a very few. To avoid this, libraries may be forced to introduce additional procedures, which could be costly and difficult to maintain, in order to further tighten access to their services. In other words they may be required to establish systems similar to those required by qualifying ISPs.

Libraries as ISPs

Ofcom has already accepted that libraries may be considered as ISPs in their provision of internet services to their customers. At present they would not be qualifying ISPs under the terms of the Code, and hopefully this would not change in the near or medium future, but, at this stage, there are no guarantees. However this does not mean that the Initial Code's regulations regarding qualifying ISPs could not have an impact on public intermediaries.

If a qualifying ISP accepts that a public intermediary acts as an ISP in relation to the services it provides to its customers, it may reject a CIR on the basis that the IP address contained in the CIR was allocated to another ISP at the time of the alleged infringement. In rejecting the CIR on this basis the qualifying ISP must provide the qualifying copyright owner with the identity of the other (downstream) ISP.

It is not clear from the code (clause 8 (b)) if the downstream ISP must also be a qualifying ISP, but I suspect that it need not. If that is the case then, even if the ISP does not qualify under the Code, there would appear to be nothing to prevent the qualifying copyright owner from taking action against the downstream ISP, thus opening up libraries to an increased threat of legal action.

If the Code is eventually expanded to cover ISPs with many fewer fixed subscribers, then libraries could eventually face increased costs to enable them to develop systems to identify their 'subscribers', and to maintain the records of CIRs received and notifications and CILs sent.

It is not clear whether or not, if a public intermediary is treated as a qualifying ISP, any public Wi-Fi services it provided would be outwith the scope of the Code. We would hope that that would be the case, due to the problems indicated above. Libraries could still face difficulties in identifying customers who used the computer facilities provided by the library, rather than the Wi-Fi service.

Under the proposed division of costs qualifying ISPs would be required to cover 25% of the costs involved in establishing and maintaining the required systems. For the vast majority of libraries this would be unsustainable, unless the requirements for these, much smaller ISPs were greatly reduced.

We are pleased to note that the draft Code does allow qualifying ISPs to avoid the requirement to send notifications if it is not reasonably practicable for them to identify the fixed subscriber, or their postal address. We suspect that this would be the case for the majority of libraries, and therefore the Code would fail to have the desired impact of reducing the level of online infringement taking place in the premises of public intermediaries.

NLS thanks Ofcom for this opportunity to respond to the draft Initial Obligations Code, and we hope that the points we have raised are of use in your considerations of the proposed initial and ongoing steps to reduce online infringement.

July 2012.