

Online Infringement of Copyright and the Digital Economy Act 2010

Interim statement and notice of a proposal to make an order

Response by The National Library of Wales

July 2012

Executive Summary

- There is still uncertainty regarding the status of public intermediaries, such as libraries and universities, in relation to the Digital Economy Act's measures against online infringement of copyright.
- The amendment affecting Wi-Fi providers adds to this uncertainty. Many libraries that provide publicly accessible Wi-Fi networks would have great difficulty in determining whether they are an ISP or a subscriber.
- The Consultation Document strongly suggests that libraries should be treated as ISPs or Communication Providers, but no such certainty is given in the Code. It would appear that most public intermediaries would be subscribers and would therefore be treated in the same way as domestic households.
- In addition to the uncertainty regarding status, the hidden costs of the appeals process and the limited time in which to compile and submit an appeal will also threaten the publicly accessible internet services currently provided by public intermediaries.
- We foresee that the perceived risks associated with providing access to the internet will lead to a 'chilling effect' as many public intermediaries such as libraries and universities would rather cut their services than bear the cost of introducing technical measures and/or managing and appealing against Copyright Infringement Notices.
- We ask that Ofcom states more clearly, either in the Code or by other legally enforceable means, the status of public intermediaries in relation to the Act. This would minimise its detrimental, and potentially disastrous, effect on those internet access services.
- Unless these issues are addressed, we argue that the potential impact on public intermediaries will mean that the Code has failed to implement the Act in a way that is proportionate and objectively justifiable.

1. About The National Library of Wales

- 1.1 The National Library of Wales (NLW) is the largest library in Wales and holds over 6.5 million printed volumes. It is one of the five legal deposit libraries in the UK and approximately 67,000 books and 100,000 periodical and newspaper issues are added to the collection annually. NLW's collections also

include:

- Around 1,900 cubic metres of archival material;
- The most comprehensive collection of paintings and topographical prints in Wales, totalling over 60,000 works;
- Wales's largest collection of portraits (c.15,000 paintings and portrait pictures);
- The largest collection of photographic images in Wales (c.1,000,000 images);
- Wales's largest cartographic collection (c.1,000,000 maps)
- The National Screen and Sound Archive of Wales, which contains over 5.5 million feet of film, more than 250,000 hours of video, and over 200,000 hours of sound recordings.

- 1.2 NLW welcomes over 80,000 visitors through its doors every year and has over 18,000 registered users.
- 1.3 NLW has also embraced the use of digital technologies as means of widening access to the collections. Our digital collections are growing apace and they already include about 2.5 million pages of historical newspapers and journals, 1 million pages of wills and over 600,000 digitised images. Access to the historical newspapers and journals, our largest digitisation project to date, will be available from 2013 and our aim is eventually to make the entire printed record of Wales and the Welsh freely available, to be searched and read by anyone on the internet.¹ By providing access to our collections in this way, NLW has extended its community of users far beyond those who are able to visit the building in Aberystwyth and the websites are currently visited by around 950,000 unique users each year.
- 1.4 NLW's concerns about the impact of the Initial Obligations Code are not only relevant to our own services but also to those of other libraries, including university and public libraries, and other educational, cultural and heritage organisations throughout the UK. Libraries, archives, museums, universities, schools and other educational organisations, to which we refer in this document as 'public intermediaries', play an important role in providing internet access services to their users. In recent months, we have been involved in discussions between the libraries and higher education communities and Ofcom, we have been reporting to the Welsh Higher Education Libraries Forum Copyright Group,² and we have also been in contact with CyMAL, the branch of the Welsh Government responsible for

¹ http://www.llgc.org.uk/fileadmin/documents/pdf/Welsh_print_online.pdf

² <http://whelf.ac.uk/background.shtml>

museums, archives and libraries,³ to highlight the issues associated with the current draft of the Code. It has become clear from these discussions that the provision of internet services across public intermediaries varies greatly in nature; each has its own set of arrangements within the organisation, with its respective ISP and with its own subscribers. Yet, in spite of the diversity among them, these organisations share a common concern regarding the impact of the Digital Economy Act on their services to the public.

2. About NLW as a user and provider of access to the Web and online services

- 2.1 NLW receives its internet access services from JANET, the research and education network.⁴ JANET's status in relation to the Act is not yet clear, but it is believed that it is either a non-qualifying ISP or a communications provider and that it could become a qualifying ISP if the Code were reviewed in the future.
- 2.2 NLW has a single agreement that covers use of the internet both by employees and by members of the public.⁵ The agreement also covers our online services (i.e. the online catalogue and NLW websites). We believe that many libraries (and public intermediaries in general) would have similarly 'bundled' arrangements with their ISPs. This is particularly relevant to the amendments which will affect certain Wi-Fi providers. The scope of the agreements between ISPs and public intermediaries could lead to difficulties in demonstrating that the internet access service is received 'essentially and verifiably for the purpose of providing it to third parties'.⁶
- 2.3 NLW employs about three hundred members of staff. All members of staff have access to the Web during working hours and have agreed comply with the organisation's Acceptable Use Policy. As is the case in other large organisations, the Web is essential to the successful day-to-day operation of the Library. Suffice to say that the impact of a restriction on NLW's use of the Web, both of which has been suggested as punitive measures under the Digital Economy Act, would result in complete inability to deliver our services.
- 2.4 NLW provides access to users on the premises through fixed-line terminals and a Wi-Fi network. We regard this provision as essential to our services. Users have unrestricted access to the Web on about 25 fixed-line terminals which are located in the reading rooms. The Wi-Fi network, which is available

³ <http://wales.gov.uk/topics/cultureandsport/museumsarchiveslibraries/cymal/?lang=en>

⁴ <https://www.ja.net/>

⁵ NLW has a 'sponsored connection' to JANET. For further details, see <http://www.webarchive.ja.net/services/connections/connecting/types/index.html>

⁶ *Online Infringement of Copyright and the Digital Economy Act (2012)*, A5.54

in spaces that are accessible to the public, can only be used by registered NLW members.

- 2.5 The agreement with our ISP covers NLW's online services. These include our online catalogue, which is now the only method of searching across the collections and requesting items. They also include the websites which display our digital collections. Any changes to the arrangement with our ISP could therefore not only have an impact on users and staff on the premises, but also on the many thousands of users throughout the world who access and use NLW's online services.
- 2.6 NLW has already taken measures to restrict activities that could lead to the misuse of its internet access services for illegal file-sharing and downloading. They include:
- Restrictions on data downloading both on Wi-Fi and terminals
 - Restrictions on downloading onto NLW terminals
 - Log-in to use the Wi-Fi network

We regard these measures as more than sufficient to limit the misuse of our internet access services to infringe copyrights. We are also aware, however, that many other libraries may not have the capacity or resources to put in place such measures. Our concern is that those organisations will decide not to permit internet access to users in order to avoid altogether the costs and perceived risks associated with the provision of the service.

3. Definitions

- 3.1 Our primary concern is the lack of clarity regarding the status of libraries in relation to the Act. We are pleased that the concerns of libraries and universities were noted in the Consultation Document, but it is felt that this issue has still not been addressed adequately either in the Document or, more importantly, in the Code. Unless this issue is addressed, we would argue that the Code will have failed to implement the Act in a way that is proportionate and objectively justifiable.⁷
- 3.2 Since 2010, libraries and universities have been highlighting the potential impact of the Act on public intermediaries, arguing that its detrimental effect will be disproportionate in relation to what the Code is meant to achieve. In a reply to a letter sent by Stuart Dempster, Director of the Strategic Content Alliance, the Minister for Culture, Communications and Creative Industries Ed

⁷ The Digital Economy Act 2010, S.7.124E(1)(k) and S.7.124E(1)(i)

Vaizey assured that 'as the Code is currently drafted, libraries and universities will not be within scope of the obligations'.⁸ The uncertainty surrounding the status of libraries and universities remains, and we urge Ofcom to take steps to deliver this assurance by giving legal certainty to public intermediaries in relation to the Act.

3.3 Libraries and universities have been informed that Ofcom would not be able to clarify their status in the Code without ministerial instruction or an amendment to the Act, even though Ofcom has powers under the Digital Economy Act and the Communications Act to specify 'conditions that must be met for rights and obligations under the copyright infringement provisions or the Code to apply in a particular place'.⁹ The decision made since the last consultation to limit qualification to providers of 'fixed internet access services' has to all intents and purposes exempted certain Wi-Fi providers from the Act. Indeed, two of the reasons given in the Consultation Document to explain the decision to exclude certain 'Wi-Fi providers' have also been presented by libraries and universities:

- The lack of 'direct evidence about the levels of online copyright infringement taking place on Wi-Fi networks';¹⁰
- The technical issues in 'identifying an individual subscriber from an IP address'.¹¹

It is unfortunate that no mention was given to public intermediaries in the impact assessments, which we are sure would have demonstrated that these arguments were equally applicable to them.

3.4 While we do not disagree with the exclusion of Wi-Fi providers, the amendment creates further uncertainty regarding how the Code would apply to libraries which have publicly accessible Wi-Fi networks. It would appear that their status in relation to the Act would depend on the nature of the internet access service and whether or not the use of that service for a publicly accessible Wi-Fi network is part of their wider use of the internet as an organisation. Also, it is not clear how this would affect libraries which offer internet access on fixed line terminals as well as Wi-Fi networks.

3.5 The Consultation Document states that 'public bodies like libraries or universities are likely to be ISPs, providing internet access under an

⁸ Letter from Ed Vaizey, Minister for Culture, Communications and Creative Industries, to Stuart Dempster, Director of the Strategic Content Alliance, 12 January 2011.

⁹ The Digital Economy Act, S.5.124C(3)(a)

¹⁰ *Online Infringement of Copyright and the Digital Economy Act (2012)*, 3.94

¹¹ *Online Infringement of Copyright and the Digital Economy Act (2012)*, 3.95

agreement with their readers and students respectively'.¹² As noted in the document, if a library were regarded as an ISP, it would not be a qualifying ISP as it would not have sufficient number of broadband lines.¹³ In another paragraph, a library providing a Wi-Fi service to library users is given as an example of when an undertaking receives an internet access service essentially and verifiably for the purpose of providing it to third parties and that it would be reasonable for their upstream ISP to treat them as 'an ISP or communications provider in relation to the application of the initial obligations'.¹⁴ While we continue to believe that an exemption for libraries would be the best method of addressing the ambiguity surrounding their status in relation to the Act, we would welcome a statement, in the Code or by other means, that would give libraries legal certainty that they are to be treated as non-qualifying ISPs or communications providers.

- 3.6 It must also be noted that, while being classified as an ISP would give public intermediaries more certainty at this time, there would still be a possibility that future changes to the thresholds for qualification would result in excessive technical and administrative requirements being placed on them. As it stands, qualifying ISPs would be expected to cover 25% of the costs of the notification process, which we believe would be disproportionate if applied to public intermediaries.¹⁵ When clarifying the status of public intermediaries, we would therefore suggest that a distinction be made between commercial ISPs and public intermediary ISPs (which provide access to the internet for non-profitable purposes), and that the costs of the notification process are set in proportion to their status.
- 3.7 In relation to 'the critical question' of 'the position of an individual or undertaking which both receives internet access as an end-user, and also makes it available to others',¹⁶ it would appear that the nature of NLW's agreement (see, 2.2 – 2.5) would mean that it is a subscriber. We believe that, contrary to the assumption made in the Document that libraries receive an internet access service 'essentially and verifiably for the purpose of providing it to third parties',¹⁷ most libraries would have 'bundled' arrangements with their ISPs, which would mean that they are subscribers and should therefore be treated in the same way as a domestic household. Although the Consultation Document refers to lobbies of hotels or public buildings as places where session times may be limited or that people use such 'hotspots' for a

¹² *Online Infringement of Copyright and the Digital Economy Act (2012)*, A5.40

¹³ *Online Infringement of Copyright and the Digital Economy Act (2012)*, A5.48

¹⁴ *Online Infringement of Copyright and the Digital Economy Act (2012)*, A5.54

¹⁵ *Online Infringement of Copyright Initial Obligations Code*, 36(6)(b)

¹⁶ *Online Infringement of Copyright and the Digital Economy Act (2012)*, A5.52 and A5.53

¹⁷ *Online Infringement of Copyright and the Digital Economy Act (2012)*, A5.54

short period,¹⁸ it is unlikely that these public intermediaries would benefit from the amendment to the Code unless they have separate agreements with ISPs for their own use of the internet by employees. Indeed, it could easily be argued that, on the whole, it is the large commercial Wi-Fi providers, such as BT Openzone, that will benefit from the amendment.

- 3.8 Categorising public intermediaries as subscribers, potentially subjecting them to the same punitive measures as a domestic household, would significantly undermine non-commercial Wi-Fi provision and internet access in public spaces. The infringement of copyright by three separate members of staff on their workstations, or by three out of a thousand people using the Wi-Fi network for file-sharing, could therefore have a severe impact on the entire service. This possibility, which is very unsettling, underlines the need for legal certainty that public intermediaries would be regarded as non-qualifying ISPs or communications providers in relation to the Act.
- 3.9 We are concerned that public intermediaries that do not already have technical measures in place to mitigate these risks would, due to limited resources, decide to curtail or even cease to provide public access to the Web. A reference was made to the so-called ‘chilling effect’ in the judgement of the judicial review of the Digital Economy Act, which stated that secondary legislation would have to ‘deal explicitly with the position of such subscribers as libraries and internet cafes so that the regulation works fairly and reasonably’.¹⁹ Again, this would be achieved by including a statement in the Code, or providing legal certainty by other means if possible, that public intermediaries should be regarded as non-qualifying ISPs rather than subscribers.
- 3.10 Public intermediaries that wish to continue to offer internet access will be compelled to tighten their security measures on their networks. We fear that the treatment of public intermediaries as subscribers will lead to stringent and burdensome restrictions being placed on free-to-access public Wi-Fi networks, which we would argue is completely disproportionate to what the Act is meant to achieve. Combined with the ‘chilling effect’, we foresee that the Code will significantly undermine economic development and the digital inclusion agenda in Wales as well as in other parts of the UK.

¹⁸ *Online Infringement of Copyright and the Digital Economy Act* (2012), 3.94

¹⁹ <http://www.consumerfocus.org.uk/news/consumer-focus-response-to-bt-and-talktalk%E2%80%99s-challenge-on-the-digital-economy-act>

4. Appeals

- 4.1 In light of the uncertainty regarding their status in relation to the Act, it is reasonable to believe that public intermediaries receiving their internet access services from qualifying ISPs could receive a Copyright Infringement Notice once the Initial Obligations Code is implemented. If, as the Consultation Document implies, a library is more likely to be an ISP than a subscriber, then an appeal will need to be prepared and submitted within twenty working days.
- 4.2 The proposed timeframe of twenty working days in order to issue its notice of subscriber appeal against a Copyright Infringement Notice (CIN) is very limited. An organization such as NLW would need to co-ordinate resources across several sections in order to manage the CIN and submit its appeal. Moreover, legal advice may need to be sought to determine whether or not an appeal can be made (i.e. that the library has been wrongly classified as a subscriber). We recommend that the timeframe should therefore be extended.
- 4.3 The Code states that a subscriber must pay a fee of £20 to the appeals body in respect of each notice of subscriber appeal.²⁰ While this would seem reasonable, we would also note that there could be many hidden costs, especially due to the uncertainty regarding the status of public intermediaries. Research Libraries UK and the Society of College, National and University Libraries has stated that one of its member universities estimated that the cost of the appeal process, excluding IT staff time, could be as high as £40,000 per annum at a rate of one notification per 400 students.²¹ Significant costs could be incurred in seeking the legal advice needed in order to present a robust argument that a public intermediary should be treated as a non-qualifying ISP rather than a subscriber.
- 4.4 The difficulties associated with making an appeal would only serve to compound public intermediaries' concerns that the costs and risks associated with providing access to the internet would be unjustifiable. However, the issues regarding the appeals process could, once again, be addressed by giving libraries and other public intermediaries the level of clarity and certainty required to ensure that they are not treated as subscribers in relation to the Act. By doing so, the number of CINs issued to public intermediaries would be reduced and, where a CIN has been mistakenly sent, providing firm ground on which to base their appeal.

²⁰ Online Infringement of Copyright Initial Obligations Code, 38(1)

²¹ (1) British Telecommunications plc and (2) TalkTalk Group plc v Secretary of State for Business, Innovation and Skills, claim no CO/7354/2010

5. Further discussion

- 5.1 If you wish to discuss any of the points made in this submission in further detail, you are welcome to contact The National Library of Wales using the information provided on the Consultation Response Cover Sheet.

End.