

Title:

Mr

Forename:

Chris

Surname:

Holland

Representing:

Organisation

Organisation (if applicable):

British and Irish Association of Law Librarians (BIALL)

What do you want Ofcom to keep confidential?:

Keep nothing confidential

If you want part of your response kept confidential, which parts?:

Ofcom may publish a response summary:

Yes

I confirm that I have read the declaration:

Yes

Ofcom should only publish this response after the consultation has ended:

You may publish my response on receipt

Additional comments:

1. BIALL is the leading professional body in the UK and Ireland for information professionals working with legal information. BIALL is a self-supporting association which draws its income primarily from membership subscriptions.

2. BIALL supports measures to protect the rights of Copyright owners but we are concerned about shortcomings in the Code, which does not adequately address the position of cultural, educational and professional institutions and public authorities

which provide access to the internet for the public and other walk-in patrons. We believe that Libraries and other cultural institutions providing Wi-fi or fixed line internet access to patrons or the public should be clearly defined in such a way that they are removed from the provisions of the Code

3. If libraries do fall within the scope of the Code either as "qualifying ISPs" (3.28) or as subscribers, then they will be subject to provisions which will be too onerous and also wholly disproportionate to the scale of the services they offer viewed as a part of total internet provision in the UK.

4. Libraries and similar institutions and other Wi-fi providers play an important role in promoting the Digital agenda. The effect of defining these institutions as "qualifying ISPs" or "subscribers" under the code would have a very negative effect on the digital agenda in the UK. We believe that this lack of clarity is a serious defect in the draft Code as it stands.

5. We have shared and strongly support the response to this consultation from LACA (The Libraries and Archives Copyright Alliance)

Question 3.1: 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 where they have met their obligations under the Secretary of State's Order under section 124 of the 2003 Act? Please provide supporting arguments.:

Yes, if the provisions of the Code are designed to address economically significant online breaches of copyright, then there should be preconditions placed by the Secretary of State upon qualifying Copyright Owners which they must first meet before they may make use of the procedures. This is necessary in order to prevent the use of the Code to pursue frivolous, vexatious or unfounded claims, which could place unreasonable demands on ISPs. It is also important to maintain a reasonable balance between the rights of Copyright Owners and ISPs.

Question 3.2: Is two months an appropriate lead time for the purposes of planning ISP and Copyright Owner activity in a given notification period? If a notification period is significantly more or less than a year, how should the lead time be varied? Please provide supporting evidence of the benefits of an alternative lead time.:

If libraries, archives, or other cultural institutions such as museums, which act as public intermediaries offering Wi-fi and fixed line internet access, were drawn into the scope of the Code these timescales would be excessively onerous

Question 3.3: Do you agree with Ofcom's approach to the application of the Code to ISPs? If not, what alternative approach would you

propose? Can you provide evidence in support of any alternative you propose?:

We note the worrying lack of clarity with regard to the role of libraries and similar cultural and educational institutions. We believe it is inappropriate that they should be classified as ISPs (and therefore potentially “qualifying ISPs”) or as subscribers within the terms of the Code. The Code emphasises correctly the importance of proportionality. We believe that unless libraries and similar are clearly defined in terms which remove them from the provisions of the Code, the results will be wholly disproportionate.

Question 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, appropriate? If not, what alternative approaches would you propose? Can you provide evidence in support of any alternative you propose?:

It is not possible to say without clearer definitions.

Question 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? If you favour an alternative approach, can you provide detail and supporting evidence for that approach?:

As the Code stands the scope of “qualifying ISPs” could readily be extended by Ofcom to cover libraries, archives, educational institutions and providers of Wi-fi internet access to the community. We believe that this would be disproportionate and would have a strongly negative effect on the role of these organisations in delivering the digital agenda of extending internet access and IT literacy,

Question 3.6: Do you agree with Ofcom’s approach to the application of the Act to subscribers and communications providers? If you favour alternative approaches, can you provide detail and supporting evidence for those approaches?:

No. The definition of “communications provider” is unclear and should be clarified. Given the important cultural and educational role of libraries, an entirely inappropriate outcome would be that libraries and archives, etc. are viewed as “Subscribers” and thus would be subject to copyright infringement reports and the appeals process, and possibly to a future imposition of technical measures aimed at slowing access or temporary disconnection from the internet.

Question 4.1: Do you agree with the proposed content of CIRs? If not, what do you think should be included or excluded, providing supporting evidence in each case?:

The bullet points under Para. 4.3 should in addition include a statement that the copyright owner believes that a substantial part of the work in question has been copied and that he/she/it believes that the act of copying is not covered by one of the exceptions contained within the CDPA 1988. This is important as it will indicate that the copyright owner has properly considered whether or not the specific act of copying may actually be permitted under the terms of CPDA.

2. Importantly, the copyright owner should also be required to furnish evidence to the ISP that he/she is the owner of the copyright or related rights in the work in question and the CIRs should state that the owner has done so. The complainant should be liable to indemnify and reimburse costs incurred by the ISP and affected Subscribers in the event that the complaint (the CIR) turns out to be unfounded

Question 4.2: Do you agree with our proposal to use a quality assurance approach to address the accuracy and robustness of evidence gathering? If you believe that an alternative approach would be more appropriate please explain, providing supporting evidence.:

Quality assurance is an important issue in the context of the identification of subscribers as potential infringers. An additional element of 3rd party auditing of the quality assurance report by an independent assessor should be considered.

Question 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? If not, what time period do you believe to be appropriate and why?:

This sounds reasonable.

Question 5.1: Do you agree with our proposals for the treatment of invalid CIRs? If you favour an alternative approach, please provide supporting arguments.:

In general, yes. It would be wrong for assertions of infringement to be made on the basis of inadequate evidence and there must be procedures in place to prevent this

Question 5.2: Do you agree with our proposal to use a quality assurance approach to address the accuracy and robustness of subscriber identification? If not, please give reasons. If you believe that an alternative approach would be more appropriate please explain, providing supporting evidence.:

Quality assurance is an important issue in the context of the identification of subscribers as potential infringers. An additional element of 3rd party auditing of the quality assurance report by an independent assessor should be considered

Question 5.3: Do you agree with our proposals for the notification process? If not, please give reasons. If you favour an alternative approach, please provide supporting arguments. :

The notification process seems reasonable with regard to "Subscribers"; who are natural persons. However, steps should be taken to avoid the targeting of institutions or organisations regarded as "Subscribers", if users of their networks allegedly infringe copyright without the institution's knowledge or collaboration. This risks serious harm to public intermediaries which may find themselves inappropriately viewed as "in scope" of the Act because of the activities of their users – activity of which they have no knowledge or responsibility. The responsible people who should answer the complainant's case should be the alleged individual infringers, not the institution

Question 5.4: Do you believe we should add any additional requirements into the draft code for the content of the notifications? If so, can you provide evidence as to the benefits of adding those proposed additional requirements? Do you have any comments on the draft illustrative notification (cover letters and information sheet) in Annex 6?:

Under Para. 5.18 the statement of the subscribers rights under the Data Protection Act should be expanded to include their right to sue if information held about them by the ISP

is inaccurate and causes them damage.

2. Information in relation to the notification is to be destroyed 12 months after receipt. We question whether it is appropriate to qualify this with "as far as is reasonably practicable".

Nothing should reasonably stand in the way of fulfilling the requirement to destroy the data after 12 months.

3. In relation to the draft letters in Annex 6: The helpline referred to should be a free phone line. Reasonable service level agreements (SLAs) should be required of the ISPs by Ofcom in terms of speed and quality of response to calls made by subscribers

to the helpline. There should be a requirement that the 3rd letter is sent by registered post in order to ensure receipt by the subscriber

Question 6.1: Do you agree with the threshold we are proposing? Do you agree with the frequency with which Copyright Owners may make requests? If not, please provide reasons. If you favour an alternative approach, please provide supporting evidence for that approach. :

If libraries and similar fixed line and Wi-fi providers are not taken out of scope as subscribers

by being reclassified as “Non-qualifying ISPs”, then it will be important to consider variable thresholds appropriate for the type and size of the organisation. It would not be reasonable or proportionate to apply to a library providing internet access the same threshold which applies to an individual person who a broadband subscriber

Question 7.1: Do you agree with Ofcom’s approach to subscriber appeals in the Code? If not, please provide reasons. If you would like to propose an alternative approach, please provide supporting evidence on the benefits of that approach.:

The general approach seems reasonable. In relation to the possibility that the subscriber may be required to pay an upfront fee in order to make use of the appeals process

(Para. 7.14), we believe that this may unfairly inhibit subscribers who may have good grounds for appeal from using the process, and it is therefore unwelcome.

2. As an additional grounds of appeal the following could be added to the bullet points at Para. 7.5: “There was an implied or explicit licence to copy the material”.

3. In-scope subscribers should also be given more information about the grounds for appeal and their rights under the Data Protection Act.

Question 8.1: Do you agree with Ofcom’s approach to administration, enforcement, dispute resolution and information gathering in the Code? If not, please provide reasons. If you favour an alternative approach, please provide supporting evidence on the benefits of that approach.:

There are no problems with the proposed approach to administration, enforcement and dispute resolution as long as they are proportionate.