British Library Response to the Ofcom Document "Online Infringement of Copyright and the Digital Economy Act: Draft Initial Obligations Code"

Introduction:

1. The British Library welcomes the opportunity to comment on the Draft Initial Obligations Code. The Library plays a vital function in the life of the nation as a cultural heritage resource by managing, preserving, and ensuring access in perpetuity to the UK's national published archive and the national repository of sound. The Library is an integral component of both the national research infrastructure and the UK science base, and it plays a correspondingly significant role in ensuring the research excellence of the UK.

2. We fully support the right of copyright holders and users to enjoy a fair and balanced legislative framework that encourages the UK digital economy to thrive in an increasingly competitive international market. However, we are very concerned about the potential impact of the Digital Economy Act (DEA) and the code upon public bodies.

3. Libraries, schools and universities as well as other public intermediaries are a major source of education, creativity and economic development in the United Kingdom. They perform many important public policy roles ranging from the education of citizens, through to being a key platform of the digital inclusion agenda. For example public libraries are central to the "Networked Nation Manifesto" launched by Martha Lane Fox, UK Digital Champion, on the 12th July 2010.[1] As stated in paragraph 2 we are concerned that as the Act and the draft code currently stand they cut directly across vital public policy goals, and at a time of extraordinary pressure on public finances, risk inadvertently adding significant additional costs on public intermediaries, that are disproportionate to the extremely small levels of copyright infringement across public networks.

4. The Rt Hon. Stephen Timms MP clarified on the parliamentary record during debates on the Digital Economy Bill that "the Bill requires Ofcom to draw up a code to govern how technical measures would be applied. The code will need to recognise and address the particular position of public services and institutions of that kind."[2]

5. Lord Young of Norwood Green is also on record in Hansard stating that "we urge university and library representative bodies to get involved in the code process. We would find it hard to approve any code that did not recognise in some way the particular position of these and similar institutions."[3]

6. We look forward to working further with Ofcom to ensure that the particular position of public intermediaries are catered for adequately and proportionately in the initial obligations code.

General Comments:

1. Public intermediaries like libraries are unable to respond adequately to this consultation from an informed position as it is unclear in terms of the definitions in the Digital Economy Act, whether public bodies would be classed as "ISPs", "subscribers" or "communications providers". The definitions in the Act, and definitions in attendant legislation for a "communications provider", are not mutually exclusive and overly simplistic, and many

[1] http://www.bbc.co.uk/news/10575266 - Martha Lane Fox want all citizens of working age online

[2] 6th April 2010.Hansard Column 921.

[3] 8th April 2010. Column 1726.

organisations could simultaneously be an ISP, subscriber as well as communications provider. The Act essentially envisages a bipartite relationship between a Telco and a household or individual. A neat relationship where an ISP assigns a single IP address to an identifiable registered fixed subscriber, with whom it has entered into a contract. As the diagram in Appendix 1 show this does not reflect the realities of public intermediary provision of internet access. Schools and public libraries for example may or may not know who accessed the internet at a particular point in time, they may assign a single IP address to a whole building or swathe of computer banks, and who in the network hierarchy subscribes to broadband access contractually will vary from institution to institution and local authority to local authority. Much of the problem with stretching the Act beyond a commercial ISP / individual customer relationship comes from the fact that the definitions and concepts in the Act do not countenance the complexity of the user / intermediary / upstream provider relationship. This view is given further weight by the fact that neither impact assessment produced for the Houses of Parliament referred to public intermediaries, and the Ofcom Draft Code refers habitually to "industry" and "consumers."

2. Evidence gathered to date suggests that the level of online copyright infringement across public networks is extremely small. Middlesex University for example gives internet access to over 34,000 students per annum and has never received an infringement notice from a rights holder. Another similar sized university gives access to 25,000 student and 2,000 staff and has received 6 alleged infringement notices over the past 6 years.

3. 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 and store information about them, initial implementation would cost £47,500, with ongoing annual costs of circa £4000. Scaling this across the entire public library sector on a like for like basis, the cost for implementation of this software alone would be £214 million with ongoing annual costs to the sector of £18 million. Of course these are only some of the costs that would likely be incurred by libraries at a time of extraordinary pressure on public funding.

4. S.7.124E(1) (k) of the Digital Economy Act states that provisions in the Ofcom 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 requires that "the provisions of the code are objectively justifiable in relation to the matters to which it relates". The evidence gathered to date of the level of alleged infringement combined with initial costs relating to certain types of software would strongly suggest that bringing public intermediaries in scope of the Act would be disproportionate, as well as not objectively justifiable in relation to the level of online copyright infringement on public networks.

5. There are also other sections of the Act that can be used by Ofcom to essentially exempt public intermediaries from obligations and responsibilities, as it is intends to do with mobile ISPs. 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."

6. We would also bring to Ofcom's attention the parallels between the arguments it has given for excluding mobile ISPs in section 3.12 of the Draft Initial Obligations Code, and the situation public intermediaries find themselves in. As with Mobile Network Operators (MNOs) public intermediaries will receive blocks of IP addresses and have therefore limited allocations of IP addresses, and as outlined in paragraph 1 above will often allocate IP addresses to buildings, banks of computers, as well as individual machines non-statically. This is far from the one subscriber, one static IP address scenario envisaged by the Act. As with MNOs as outlined in paragraph 3 of this section, if public intermediaries were in-scope of the Act as an ISP in the future, it is likely significant costs would have to be incurred in spite of the negligible level of alleged infringements across public networks.

7. While according to the proposed Ofcom code public intermediaries are currently out of scope as a qualifying ISP in the first instance, we are concerned that the thresholds may change and be lowered increasingly bringing local authorities, public libraries and other public intermediaries in scope. In the short term we are however very concerned that as from 2011 such bodies will be viewed by ISPs and Copyright holders as subscribers. This will mean that public intermediaries will be subject to copyright infringement reports, the appeals process and at some point in the future potentially "technical measures". Given that the appeals process requires proof that an IP address is that of the accused subscriber we believe it will be far easier to prove a particular computer owned by a public intermediary equated to the infringing IP address, rather than pursuing the individual concerned. Clearly the prospect of the costly pursuit of intermediaries being held responsible for the activities of their users is of grave concern and a situation we are very keen to avoid.

Specific Comments:

1. **Definitions:** The views expressed by Ofcom in paragraphs 3.22, 3.23 and 3.30 in relation to definitions of ISPs and subscribers are confusing, and non-mutually exclusive. For example from the perspective of a public library giving free unmonitored wifi access, the statement in 3.22 that where no payment and no agreement is signed, the provider will be classed as a subscriber would lead the library to believe itself to be a subscriber. However the following sentence states that "where a wi-fi network is provided in conjunction with other goods and services … our presumption is that the provider is within the definition of internet service provider." As a public library offers many differing goods and services it would also therefore simultaneously be viewed by Ofcom as an ISP. Such contradictory statements exemplify extremely well the confusing position that public intermediaries find themselves in.

2. Public intermediaries believe it is not acceptable for Ofcom to leave bodies that give internet access to up to 30 million people a year and perform such important public policy goals, essentially in a state of limbo in regards to the application of the Digital Economy Act. We are very concerned that there is a high risk that public intermediaries like libraries, universities, local authorities, museums and schools, will incur significant and disproportionate costs in "second guessing" what obligations and responsibilities will be required of them. Having spoken to public library employees many are concerned that in a period of fiscal restraint the confusion created by the Act may lead some local authorities to evaluate the pros and cons of continuing to offer internet services to their users. Clearly any decision to withdraw services would have grave implications for the local community as well as the government's digital inclusion agenda.

3. **Grounds for not processing a CIR:** We would recommend that a further category is added to the list at 4.3.

   "the CIR refers to activity undertaken on a non-qualifying network."

   The addition of such wording would prevent a qualifying ISP from submitting a CIR to a non-qualifying body such as a mobile telco or any other entity to be determined as non-qualifying.

4. **Information contained within a CIR:**

   Under the bullet point which starts "a statement that…", the following extra words should be added to the end: "and that to the best of the owner's knowledge the copying is not under licence, and is of a substantial part of the work, and that the copying does not fall under any of the exceptions to copyright as provided for in the Copyright, Designs and Patents Act."

This change is to ensure that the copyright owner considers the question of licensing through third parties as well as whether the copying, even if unauthorised, might be covered by one of the exceptions in UK law.

5. **Information Sheet**

The word "exploit" is inaccurate. We would recommend the following wording:

"…takes place when a person downloads, copies, or passes to others all, or a substantial part of a copyright work without the owner's permission and under circumstances where none of the limitations and exceptions to copyright embodied in law apply."

It is important that the information sheet accurately reflects UK law. We would also recommend that an explanatory note explaining what limitations and exceptions are to the recipients of a CIR is required.

Response to the Ofcom Questions:

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 - copyright owners should only be able to take advantage of the procedures when they have met their obligations under the Secretary of State's Order.

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.*

Two months is sufficient for an already in-scope ISP to plan activity with a Qualifying Copyright owner. However this is insufficient time for an ISP not covered by the code who is subsequently classed as qualifying.

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?*

Whilst the initial proposal of limiting to commercial ISPs with a minimum of 400,000 direct customers is pragmatic in the medium term the criteria should move to that envisaged by the Act – namely one related to the level of infringement across a network. We also believe that other factors, particularly those relating to public policy goals such as education and digital inclusion, need to be borne in mind when establishing criteria around defining an ISP.

Paragraph 51 of the explanatory notes to the DEA state that "once in scope, ISPs would have to comply with the obligations and to continue to do so **even if** the number of CIRs later fell below the threshold." This would appear to contradict the Act itself that states that any code must be "proportionate" and that the "provisions are not such as to discriminate unduly against particular persons or against a particular description of persons."

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?*

Yes.

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?*

No. As highlighted under the "definitions" section above the examples given are confusing, non-mutually exclusive and give little clarity for public intermediaries as to whether they would be viewed as a Qualifying ISP or not in the future.
We strongly disagree with 3.28 which suggests that all libraries must now monitor at all times who uses their networks. This was not in the economic impact assessment produced by BIS, and will have extremely high cost implications for the sector at a time of severe budgetary restraint. It would also appear to have significant and wide ranging policy implications for government as essentially no one in the UK would be able to access the internet in a public space without providing their registration details first.

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. As outlined above we are very concerned at the lack of clarity in the definitions of the Act and in the Ofcom draft code. We are concerned that the lack of clarity will lead to inappropriate and expensive measures being imposed on public intermediaries. This is coupled with the potential of "technical measures" being imposed on public intermediaries in the future, confusion in the courts, and confusion in the bodies themselves trying to understand their roles and obligations under the proposed Act.

As pointed out already there is a real danger that the appeals process will actively encourage copyright holders to view public intermediaries as subscribers, given that linking an IP address to a physical place is far easier than linking it to a transient individual. This is in spite of low levels of infringement across public networks, and the fact that alleged infringement is highly unlikely to be in any way facilitated by public intermediaries.

Clarification for ISPs must be provided in the Code in line with 124E (3) (a) as it will create clarity as to who is to be regarded as a subscriber and who is not. Currently the Code does not appear to provide such guidance.

We would also point out that there is little Ofcom clarification as to how to define a communications provider. We would very much welcome a dialogue with Ofcom as to whether public intermediaries could be classed as a communications provider as internet access is primarily subscribed to in order to communicate it to the users of a public intermediary.

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?*

Please see the above section - Information contained within a CIR.

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.*

Yes.

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?*

Yes.

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.*

No. Please see the above section - Grounds for not processing a CIR.

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.*

The steps outlined in sections 5.6 – 5.8 are detailed and complex. Whereas a large organisation with a large number of employees may be able to comply with these provisions it is difficult to envisage a smaller organisation like a public library or a school, if they become a qualifying ISP, being able to manage such procedures.

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.*

Whereas a time based solution is pragmatic we are concerned that the draft code does not appear to distinguish between the levels of potential infringement that can happen in a household, as opposed to a university with over 30,000 network users. If public intermediaries are to be classed as a subscriber the level of alleged infringements must be proportionate to the type of subscriber.

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?*

Yes. Please see above.

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*.

As outlined above we believe that thresholds that relate to a single household should be different to that of a public institution, if public intermediaries are to be subscribers under the Act.

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.*

Yes.

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.*

Yes.

Conclusions

As Ofcom is aware from recent meetings with the British Library, many public sector bodies like JISC, Universities UK, Research Libraries UK, Museum Libraries Archives Council etc are very

concerned at the inappropriate application of the Act to public intermediaries like libraries, schools, and universities, and by extension local authorities.

We support the need to tackle online copyright infringement, but question why an Act devised for Telcos and infringing consumers is being stretched to encompass all forms of internet provision in the UK. As highlighted above unless a pragmatic approach is achieved, we believe there will be an adverse effect on the vital areas of digital learning and academic research, as well as the very important digital inclusion agenda. Given the likelihood of extraordinary pressure on the finances of public bodies, we would ask Ofcom to do all it can to avoid inadvertently imposing significant additional legal and IT costs on public intermediaries, especially where they are disproportionate to the extremely small levels of copyright infringement across public networks.

To this end we would strongly urge Ofcom to use the powers given it under the Act to class public intermediaries as a particular non-qualifying category that is not subject to the responsibilities of either an ISP or a subscriber as currently outlined in the Act. Without such clarity of roles in relation to the Act, and a proportionate and common sense approach to the role of public intermediaries, we risk jeopardising years of investment in this country's public digital networks and cutting across vital governmental plans around education and digital inclusion.