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Chartered Institute of Library and Information Professionals in Scotland

Scottish Library & Information Council

Introduction

The Scottish Library and Information Council is the advisory body to the Scottish Government, its Ministers and its members on library and information matters. CILIP in Scotland is the professional body for individual library and information sector workers and is part of CILIP UK. We welcome the opportunity to comment on the Ofcom draft code of practice to accompany the Digital Economy Act 2010 (DEA2010), "Online Copyright Infringement Initial Obligations Code".

We note that the scope of the Code is currently restricted to fixed Internet Service Providers (ISPs) with over 400,000 subscribers but that the operation of the Code may be extended to other ISPs following regular reviews of evidence of online copyright infringement across all service providers. Consequently our response is drafted on the assumption that many of our members' organisation may fall under the scope of the Act in future. Libraries are important generators of intellectual capital in the knowledge economy. This type of knowledge-based capital is now seen by economists as the main source of growth, competitiveness and employment. There is widespread concern in the sector about the impact of the Digital Economy Act 2010. Whilst recognising the legitimate needs of content owners to protect their intellectual property rights SLIC and CILIPS believe the Act to be poorly considered legislation which presents significant problems for Scotland's ability to deliver on the aspirations for Digital Britain, equality and diversity, learning and skills development. We are extremely concerned that the overall proposals for ISPs and service providers will put an undue burden on public services in the current climate.

Libraries across Scotland provide free access to the internet through public libraries, schools and further and higher education. Much of this connectivity is provided in part through the JANET connection into universities, colleges and local authorities through GLOW. In Scotland, public libraries alone provide almost 8 million hours of free internet access and this has increased virtual visitors to libraries by 25% year on year for the last 3 years and now stands at 13 million visitors a year. This is in addition to 28.5million patrons who personally visit libraries. Any interruption in service which could result in the removal of connectivity will have a huge impact on research, learning, community engagement, informal learning and the use of on-line government services. **We therefore believe such organisations should be classified as communications providers under the definitions of the Communications Act (2003) making them exempt from the majority of the Act's major provisions.**

SLIC and CILIPS urge Ofcom to carefully consider our response along with others from the sector and recommend action to protect the interests of publicly funded organisations to enable them to deliver on government policy

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.

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 a qualifying ISP to plan activity with a Qualifying Copyright owner, but will not be sufficient for an ISP not currently covered by the Code if Ofcom changes its rules to include that ISP.

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?

As it stands, there is scope for substantial confusion as to who constitutes an ISP versus a subscriber, in particular with respect to libraries and other public intermediaries. A critical issue for public intermediaries (schools, universities, local authorities, public libraries and museums etc) is whether they will be defined as "Internet Service Providers" ("provides an internet access service") "Subscribers" (an entity who "receives an internet access service") or "Communications Providers" for the purposes of the Act. This definition could also have a wider and as yet unseen impact. The impact of the Code on public intermediaries such as libraries will depend on how they are classified i.e. the Code has the potential to be significantly disruptive and less effective if public intermediaries such as libraries are expected to act as 'subscribers rather than 'communications providers'.'

As the Ofcom consultation is envisaged no public intermediary has been named as a qualifying ISP. We are nevertheless concerned that the benchmark for being a qualifying ISP may drop in the future as serial infringers change ISP and their modus operandi, and therefore at some point in the future publicly funded organisations may come into scope as a qualifying ISP. If this is the case we are concerned that the significant obligations, and costs envisaged by the Act are simply not appropriate for bodies as varied as schools, museums, local authorities, colleges, universities and public libraries.

However at this juncture we are very concerned that public intermediaries could be viewed as a "subscriber" by a copyright holder or a qualifying ISP upon approval of the Ofcom codes by Parliament. **Public intermediaries have public policy goals to educate, as well as promote the digital inclusion agenda.** In addition levels of infringement across public networks are currently very low, in part due to hard work by the sector in implementing practical methodologies and acceptable user terms aimed at minimising online copyright infringement.

Given the low levels of infringement across our networks we are very concerned that being viewed as a "subscriber" and becoming embroiled in the appeals process, is not proportionate to the intentions of Government as stated in S.124E(1)k of the Act. The Act also essentially envisages a bipartite relationship of commercial Telco giving internet access to a named and contracting householder, who equates often to a single static IP address. Public intermediaries often form consortia or rely on separate legal entities to contract for bandwidth so the entity who faces the user is not necessarily the contracting party. IP addresses are also within the sector often dynamic, and attributed to a whole building, or bank of computers so identifying infringement by a specific individual is often impossible, or at best an expensive manual process. Given the complexity of linking an IP address to an individual we are concerned that the proposed appeals process which requires that in order for infringement to be proved an IP address should equate to a specific "subscriber" will mean that public intermediaries are more likely to be viewed as a subscriber by a copyright holder for the purposes of prosecution under the Act.

Given the public policy role of our libraries combined with the fact they act as **neutral "quasi domestic space" and "mere conduits" for internet access, not knowingly facilitating infringement,** we believe libraries should be viewed either as a communications provider, and therefore exempt, or as a non-qualifying category as allowed for by S. 5.124C 3(a).

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?

Whilst it is obviously sensible to include the biggest ISPs in the code, until the criteria for "ISP" and "subscriber" are clarified, it is impossible to judge whether Ofcom's general approach is sensible or not. We therefore welcome attempts to clarify the definitions of ISP, communications provider and subscriber since, as currently stated, definitions are insufficiently clear to allow public intermediaries to determine their status.

As stated above it is important that the definitions used in the Act are made more specific to the realities of internet provision by public intermediaries. Given the significant obligations/liabilities envisaged by the Act, and the low levels of infringement across our networks combined with our public policy role, we believe it is of vital importance for Ofcom to create a de facto exclusion for public intermediaries under the Act.

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?

The suggestion that public intermediaries such as universities, libraries or schools will have to collect at some point in the future address details from all users is onerous on those organisations and users. It will discourage uptake of services and actively works against the Government policy of encouraging people to use the internet and to develop their digital literacy. There also may be data protection issues around this, anticipating a future illegal act. This appears to be a major policy shift, and one that has not been approved by Ministers or debated in Parliament. This, together with the potential costs of implementing new measures to remain within the DEA2010, and technical measures to reduce risks of infringement, as well as potentially 25% of costs associated with potential infringements could lead to some libraries or education institutions no longer offering wifi or other types of internet connections to their patrons, which totally defeats the Government's intention of a Digital Britain.

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?

We do not agree with Ofcom's approach. As outlined above from implementation of secondary legislation it is likely that we will be viewed as a "subscriber" by ISPs and copyright holders and therefore be subject to copyright infringement reports and the appeals process. Potentially in the future, we could face the imposition of technical measures aimed at slowing or potentially temporarily disconnecting "subscribers" from the internet. Given our educational role, combined with our role as a "mere conduit" not knowingly facilitating infringement, brings us to the conclusion that being classed as "subscriber" is wholly inappropriate and potentially contrary to paragraph 3.25 of the draft Code.

At the same time the lack of clarity in the definitions of the Act as applied to public intermediaries such as libraries presents a significant risk to them being placed on the highest scale of copyright infringement and will mean having to plan for at some point potentially being classed as a "qualifying ISP". This will have significant cost and overhead implications for the organisation, ranging from legal advice, policy decisions, through to workflow and technical systems alterations.

We believe that libraries should be regarded as communications providers allowing them to continue the effective practices currently employed to reduce copyright infringement. All the organisations and individuals that use library services are required to comply with conditions of use either at joining or prior to use. There are also posters and other information on display to make individuals aware of their personal responsibilities in using services.

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?

We suggest that the following wording is added to the CIRs "and that to the best of the owner's knowledge the copying 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 whether the copying, even if unauthorised, might be covered by one of the exceptions in the law.

We further recommend that if the owner is required to provide supporting evidence that it is the owner of the copyright in the material in question, and that it provides an indemnity to the ISP and to any subscribers affected

that should it turn out that it is not, in fact, the owner of the copyright in question that it will refund all costs incurred by the ISP and/or subscribers as a result of its complaint.

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.

We are content with the quality assurances procedures outlined.

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?

We would welcome clarification in the Code regarding whether the ten days refers to the elapsed time from when the evidence of the alleged infringement has been gathered which may present significant implications for the volume of logging data that would have to be maintained.

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. 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.

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.

We are content with the proposed quality assurance approach on subscriber identification.

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.

We do not believe that a time based notification is fit for purpose for those organisations classed as subscribers under the terms of the Code. Subscribers that are institutional or organisational, such as public intermediaries are likely to be targeted if they have several employees or students who have been infringing copyright across their networks. This risks serious harm to public intermediaries which may find themselves being inappropriately viewed as "in scope" of the Act for the activities of their users – activity of which they have no knowledge or responsibility. We believe this to be contrary to the original purpose of the Act and to other Government policies promoting increasing access to the internet for individuals. It is our contention that different processes to address internet copyright infringement in domestic and organisational contexts are required.

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?

We recommend that Ofcom ensure that publicly funded intermediaries cannot be the recipients of such codes. A 'one size fits all' approach is not appropriate and risks damaging copyright enforcement and the wider use of the internet as promoted by a number of Government policies.

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.

We recommend that ISPs have longer than 5 days to respond to a request by a copyright owner.

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.

We believe that the appeals process might be helped by giving in-scope subscribers more information about their 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.

We have no problems with the proposed approach to administration, enforcement and dispute resolution as long as they are proportionate and make a de facto exclusion for public intermediaries who are a crucial conduit for online education and access to knowledge in the digital world.

Conclusions
We are very concerned about the implications of the DEA and the current Code for SLIC and CILIPS members Points that we wish to make most strongly include the following:

- These measures will impact detrimentally on digital services offered to citizens and actively work against stated Government policy to encourage increased uptake of digital services because of the barriers which the proposals will put in place
- We receive and supply internet access to hundreds or thousands of individual users, therefore the complexity of our position in relation to copyright infringements must be taken into consideration. If this is not done, our internet connection as a whole could be jeopardised
- Our member organisations already take rigorous practical measures to ensure that copyright infringement is minimised. These measures are highly effective and have been recognised as such by major rights holders
- The DEA2010 and accompanying Code risks imposing significant financial and administrative burdens on our member organisations relating to appeals, compliance, reporting and dealing with complaints – all of which may not have the desired effect of identifying persistently infringing individuals.

We urge Ofcom to carefully evaluate the costs and benefits of applying such a Code to public intermediaries, such as universities, schools, local authorities, museums etc without careful consideration of the potential costs, loss of connectivity, and other serious ramifications.

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