

JISC Response to Ofcom Document “Online Infringement of Copyright and the Digital Economy Act: Draft Initial Obligations Code”

Introduction

1. The Joint Information Systems Committee (JISC)¹ supports UK universities and colleges in the innovative use of technology, equipping them with new ways of working faster and better, through a range of programmes and services. The JISC is funded by the UK Higher and Further Education funding bodies.
2. JISC provides world-class leadership through innovation and new ways of working in research, in learning and teaching, and in corporate and management systems. It supports UK universities and colleges maintain their international reputations for excellence in the use of technology. To help achieve this, JISC is committed to an open environment where open source, open standards, open educational resources, open access and open data support universities and colleges strategic priorities.
3. JISC is ultimately responsible for funding projects across the UK, which themselves make massive contributions to the UK's, EU's and International Knowledge Economy, as well as others which provide the systems, software and services to enable others to contribute extensively to the Knowledge Economy.
4. JISC welcomes the opportunity to comment on the draft Code. We fully support the right of copyright holders 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 draft Code upon universities and colleges.
5. Today's technologies have transformed universities, colleges and wider society. The importance of the Internet to our economy is recognised by the government through a range of policy statements, the most recent being the Race Online 2012 and its Manifesto for a Networked Nation. University and college resources are used by students, academics and researchers, businesses and the public to support innovation and entrepreneurialism. We also work to improve digital literacy, support online creativity, and promote the governmental agenda of digital inclusion. The role of universities, public libraries, museums and other public sector bodies is vital in providing digital inclusion for approximately 30 million people. For example, JANET, the UK's National Research and Education Network, which is funded by JISC, connects universities, colleges and schools, as well as other research-based institutions such as some of the national museums to each other and to the Internet. JANET and its customers' networks are large, fast and complex: the JANET backbone runs at 40 Gigabits per second and many universities have thousands of devices and tens of thousands of users connected to the backbone at speeds up to 10Gbps.
6. The impact of the DEA, and the Code, very much depend on whether JISC's stakeholders, primarily Higher Education Institutions (HEIs) and Further Education Institutions (FEIs), are classed under the Act as ISPs, as subscribers, as both, or as neither. We note that in previous statements the government has stated it has no idea where HEIs and FEIs are likely to be classified, and has urged such institutions to take legal advice on the matter. JISC believes this is an unhelpful approach and that either the government or Ofcom should make clarify this situation. It is unreasonable and unrealistic to await case law on this matter. JISC therefore

¹ Further information about the JISC can be found at <http://www.jisc.ac.uk>

strongly urges Ofcom to clearly define where HEIs and FEIs fall within the definitions provided by the Act, so that these institutions are informed regarding their obligations under the Act.

General comments:

7. We are concerned about the requirement that only ISPs with 400,000 clients or more fall under the Code initially, will be reduced and therefore applicable to universities and colleges, bringing additional technological, legal and financial responsibilities at a time of economic cut-backs. We do not believe that the risks of copyright infringement within universities warrant increasing the burden of compliance, or that this would be in keeping with the requirement for a proportionate approach.
8. Like Universities UK, we believe that as 'non-qualifying ISPs' universities and colleges could continue to build on current, effective practice, in reducing/ preventing and monitoring copyright infringement, as underpinned, for example, by the JANET Acceptable Use Policy (see <http://www.ja.net/documents/publications/factsheets/077-investigating-copyright-complaints.pdf>)
9. We note that certain organisations known as ISPs do not seem to fall within the definition of ISP as provided for in the Act because the Internet service they provide is a small part of a package that includes subscription TV, telephony, etc. and so, strictly speaking, they do not primarily offer Internet connectivity. We wonder how Ofcom justifies such companies' inclusion as qualifying ISPs.
10. Many HEIs are associated with science parks, spin-off companies and incubators for start-up companies. Often, the HEI will provide accommodation and networking facilities for these commercial enterprises. JISC would welcome clarification whether the HEI counts as an ISP or a subscriber in these circumstances.
11. We note that Ofcom expects subscribers to take "reasonable steps" to ensure infringement does not occur. JISC recommends that Ofcom produce some basic guidance regarding what it considers to be "reasonable". Similarly, we believe that Ofcom should ensure that subscriber notifications of alleged infringement list what defences are available to subscribers - that the item was not copied; there was an explicit licence to make a copy; there was an implied licence to make a copy; the copying was done under one of the exceptions provided for in the copyright act, e.g., for non-commercial research or private study, for criticism or review, for judicial proceedings, for visually impaired people, etc.; the complainant is not the copyright owner; copyright in the work has expired; or that the copying was transient and part of a technical process over which the alleged infringer had no control. These are all defences used when someone is accused of infringement, and so MUST be listed when advice is given to subscribers.
12. We also suggest that there needs to be a re-thinking of the appeals process. As a quasi-judicial process, this must be seen to be fair and transparent. Ofcom could give guidance by means of pointing subscribers to resources which may help them in their defence.
13. Finally, we hope that the draft Code will be passed on to the Information Commissioner to check that it is in compliance with the Data Protection Act. We would welcome an assurance that this will be done by Ofcom.

JISC's views on details of the consultation paper:

Our response to the consultation is in several parts. In the first part, we make some specific comments about the text of the consultation document. In the second, we comment on the template notification letters and information sheet; finally, we respond to the questions posed by Ofcom. Please note that our comments refer to the paragraph numbers in the consultation paper. We urge that, where we recommend changes to wording, these are also reflected in the Code when it is published.

3.22 It is not satisfactory to state: “It may not, however, apply to open access Wi-Fi networks where there is no payment....” Ofcom should make its views much clearer as to whether such providers are considered to be ISPs or not. This is crucial to universities and colleges and other public intermediaries. We note that in paragraph **3.30**, Ofcom states that businesses which run unprotected Wi-Fi networks to allow others access are considered to be a subscriber. So Ofcom has shown it is willing to make clear judgements on some problematic cases and we request that it does so throughout the Code.

4.3 The Qualifying Copyright Owner may not have a registered address, so it might be better to state: “registered address, or some other UK address for correspondence”; similarly, the work allegedly infringed may not have a formal title, though usually of course it will have. 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 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 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 in the event that it should transpire that it is not, in fact, the owner of the copyright in question, and that it will refund all costs incurred by the ISP and/or subscribers as a result of its complaint.

5.18 JISC also urges that a notification should include a statement in addition to telling the recipient of their rights under the Data Protection Act to inspect data held about themselves by the ISP and/or the copyright owner, but also of their rights to sue under the Data Protection Act for damages or to get a Court order to block or rectify, if any data held about them is inaccurate and causes them damage.

5.17 as noted earlier, this address could be an address for correspondence instead.

5.18 JISC t considers the use of the words “as far as is reasonably practical” to be unsatisfactory and urges that they be deleted. JISC can see no reason why the ISP cannot routinely delete data after 12 months.

7.5 The grounds for appeal are incomplete. JISC strongly urges Ofcom to add another ground for appeal with a new bullet point, i.e., it is grounds for appeal that there was an implied or explicit licence to copy the material.

JISC’s comments on template notifications

First letter

JISC does not understand why the subscriber has to make contact with the ISP to get information on the further x CIRs received on the subscriber account. It would make more sense for all the CIR details to be sent to the subscriber together? We also strongly urge that the helpline should be a Freephone number. Finally, JISC urges Ofcom to require certain minimum standards for the helpline, e.g., a maximum period of time before the subscriber is in direct contact with a person employed by the ISP to assist.

Second letter

The same comments as for the first letter apply here. We also believe the final sentence ending “...so we don’t have to write to you again” is unnecessarily brusque and should be deleted.

Third letter

JISC believes that if this letter is sent by post it should be sent using Registered Post. Our points on the first two letters also apply here.

Generally on notification letters, we recommend that consideration is given to also supplying these in languages other than English, e.g., Welsh, Gaelic, Urdu, etc., to cater for the needs of non-English speakers.

Information sheet

1 add “(2010)” after “Act”

2 the word “exploit” is incorrect in law. It should read instead along the following lines: “...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 exceptions to copyright embodied in law apply.” JISC believes the information sheet should not mislead a subscriber as to their legal position.

5b similarly, the word “shares” is misleading and should be replaced by words along the lines of: “download, copy or pass on to others”

9 we recommend that the grounds for appeal be as noted earlier, including the point about implied or explicit licences.

10 the words “if so” should be inserted after “and”

12 “(free or charge)” should read “(free of charge)”.

13. We presume the longer period is 6 years, as required by the Limitations Act. We recommend that this be made explicit.

JISC’s responses to the questions set by Ofcom

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.*

3.1 JISC agrees that copyright owners should only be able to take advantage of the procedures where 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.*

3.2 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?*

3.3 JISC believes the approach that it covers only those ISPs with a minimum of 400,000 clients is not helpful. Some large ISPs might only have trivial problems of copyright infringement, whilst

smaller ones may well have a lot of problems. JISC therefore recommends that an alternative approach, based upon statistics provided by copyright owners regarding which ISPs appear to have the most intense infringement activity, would be more appropriate. We are also concerned that Ofcom wishes to keep an ISP in scope for ever, irrespective of its success in reducing or eliminating infringement, or indeed, if it is decided that the number of subscribers is the criterion, irrespective of whether a particular ISP collapses in popularity and ends up with a negligible number of subscribers.

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?*

3.4 Whilst it is obviously sensible to include the biggest ISPs in the Code, until the criteria for what is an ISP and what is a subscriber are clarified, it is impossible to judge whether Ofcom's general approach is sensible or not.

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?*

3.5 The suggestion that public intermediaries such as libraries and wifi providers will have to collect address details from all users is onerous on those organisations and users, and is contrary to the government policy of encouraging people to use the Internet and to develop their digital literacy. 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 additional technical measures to remain with the DEA 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. This is also likely to lead to additional costs and a subsequent drain on tax-payers' money from the education budget at a time of austerity. We are therefore opposed to this approach.

The suggestion that a provider of open wifi must be a subscriber and/or ISP does not seem in accord with the definitions in the Act if it does not have any agreement with its users. The approach taken by Ofcom would seem to encourage organisations to offer wifi without any user agreements, and this in turn may lead to increased copyright infringement. Thus, an overly bureaucratic approach could lead to a perverse and unintended contrary result.

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?*

3.6 We are very concerned that the lack of clarity in the definitions of the Act as applied to HEIs, FEIs and JANET, will lead to inappropriate and costly measures being imposed on our universities and colleges, potential loss of Internet and networked access to millions of users, unsuitable, expensive measures against infringement, confusion in the courts, and confusion in the bodies themselves trying to understand their roles and obligations under the proposed Act. This is despite the UK's higher and further education sector's long history of rigorously respecting, monitoring and advising on copyright in the digital and analogue world. Copyright infringement is a serious breach of terms and conditions of access, including the Acceptable Use Policies of JANET and its customers.

Paragraph **3.30** states that any organisation that receives connectivity for its own purposes as to provide to others is a subscriber. But presumably all the seven initial qualifying ISPs do this, so why are they considered ISPs at all? JISC understands that Ofcom's hands are somewhat tied by the ambiguous and perverse definitions in the Act that it has the responsibility for implementing,

and we suggest that Ofcom goes back to government, pointing out the issues that the poor drafting of the DEA raise, and recommending relevant changes to the Act.

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?*

4.1 JISC has recommended some changes to the content of the CIR – see our comments on paragraph 4.3 above.

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.*

4.2 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?*

4.3 We are content with the time period proposed.

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.*

5.1 We agree with the proposals regarding invalid CIRs.

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.*

5.2 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.*

5.3 Subscribers that are institutional or organisational, such as HEIs and FEIs, are likely to be targeted if they have several employees or students who have been infringing copyright. This risks serious harm to HEIs and FEIs, which may find their Internet access restricted or even closed, through no fault of their own. HEIs and FEIs offer PC labs with many networked PCs and with students coming in and out of the room throughout the day. Students often leave the room for a while whilst still connected, and other students can sit at their place and carry on working using the previous student's identity. HEIs also have many students using wifi or fixed-line connections using their own machines, and some will be in rented accommodation where the landlord has installed wifi for the entire house. The processes being set up by Ofcom take no account of these types of citations. Ofcom needs to rethink how the procedures should operate in these circumstances.

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?*

5.4 We have made some recommendations –see above – for changes to wording in notifications, information sheets, etc., where the subscriber is a domestic premise. As noted above, though, these procedures are not appropriate for FEIs and HEIs. JISC strongly recommends that Ofcom

develop a quite separate code and set of procedures for HEIs, FEIs, libraries, shops and offices and public spaces that offer wifi, etc.

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.*

6.1 JISC recommends that ISPs have longer than 5 days to respond to a request by a copyright owner, but otherwise are content with the timescales suggested.

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.*

7.1 JISC has commented above about how the appeals process might be helped by giving 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.*

8.1 JISC agrees with the proposed approach to administration, enforcement and dispute resolution.

Conclusions

It will be clear from this submission that JISC is very concerned about the implications of the DEA and the current Code as is, for HEIs and FEIs. In particular, we believe that these measures will impact detrimentally on digital services offered to citizens by our institutions, and therefore on the creative output of the nation. We support the need to tackle online copyright infringement, but strongly request that clarity is needed on what the status of public intermediaries would be in relation to the terms of the Act. Because public institutions often provide Internet access to hundreds or thousands of individual users, the complexity of our position in relation to copyright infringements must be taken into consideration. If this is not done, public institutions such as libraries, schools or universities might find their whole Internet connection jeopardised, resulting in loss of Internet access to large sections of the public, particularly the 15 million citizens without an Internet connection at home.

Our institutions 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 DEA and accompanying Code risks imposing significant financial and administrative burdens on institutions relating to compliance, reporting and dealing with complaints – all of which may not have the desired effect of identifying persistently infringing individuals. We do not consider that the DEA or proposed Code adequately specifies reasonable obligations for institutions which provide a critical role in access to information and knowledge. Indeed, the lack of clarity for HEIs and FEIs potentially undermines JISC's investment in ICT and puts at risk its funded projects and services – and, ultimately, the UK's HEIs and FEIs ability to contribute extensively to the Knowledge Economy.

JISC therefore urges Ofcom to carefully evaluate the costs and benefits of applying such a Code to public intermediaries, such as universities and colleges, without careful consideration of the potential costs, loss of connectivity, and other serious ramifications.

JISC Executive

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