The Libraries and Archives Copyright Alliance

Convened by CILIP: the Chartered Institute of Library and Information Professionals

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Mr Campbell Cowie
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By Email to: onlinecopyrightinfringement@ofcom.org.uk

29 July 2010

Dear Mr Cowie

Online Infringement of Copyright and the Digital Economy Act 2010

Consultation on the Draft Ofcom Initial Obligations Code

Response by LACA: the Libraries and Archives Copyright Alliance

I. About LACA

LACA: the Libraries and Archives Copyright Alliance, brings together the UK's major professional organisations and experts representing librarians and archivists to advocate a fair and balanced copyright regime. LACA lobbies in the UK and Europe about the copyright and related rights issues affecting the ability of library, archive and information services to deliver access to knowledge in the digital age.

II. General Points About the Draft Code

The classification of Libraries and Archives and other Intermediaries under the Code

1. We support the right of copyright holders, and also of users of copyright works, to carry out legitimate activities under a fair and balanced legislative regime that supports and furthers the UK's digital economy in the international digital marketplace. However, the potential impact of the Digital Economy Act (DEA) and the Ofcom Code upon public bodies causes us deep concern.

2. We submit our comments in response to the Consultation because the Code 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 – an essential component in the delivery of a 21st century digital Britain.

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3. Libraries, archives and educational establishments such as schools, colleges and universities, and other public intermediaries are the backbone of the UK's infrastructure for the delivery of formal and informal education, creativity and economic development and the Government's digital inclusion agenda. Public libraries, in particular, are key players in the "Networked Nation Manifesto" launched by Martha Lane Fox, UK Digital Champion, on 12th July 2010.

4. It is our contention that organisations offering free public Wi-fi and fixed line internet access, and in particular libraries, archives and educational establishments offering that access, are playing a vital role in furthering the digital agenda of encouraging Internetusage and spreading digital literacy. Therefore a Code which does not address those services in a realistic and helpful manner will undermine the public interest by hindering, rather than helping, the digital agenda.

5. We are aware that the Code is to initially apply only to the seven biggest ISPs with 400,000+ customers in the UK. This level currently excludes public intermediary internet providers from being classified as 'qualifying ISPs". However, we are also mindful that the Code could at some future date be extended to smaller ISPs and other internet access providers. If this becomes the case, we are very concerned that the significant obligations, and costs envisaged by the Digital Economy Act (DEA) are quite inappropriate for bodies such as public and national libraries, local and national archives, museums, local authorities (a number of which are starting to provide city-wide public Wi-fi access), educational establishments (schools, colleges and universities), and smaller intermediaries providing free public internet access such as community halls, pubs and cafes.

6. During debates on the Digital Economy Bill, the then responsible Minister, the Rt Hon. Stephen Timms MP stated on the Parliamentary record (Hansard) 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.** Lord Young of Norwood Green also stated on the record 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."**

7. The definitions and concepts in the DEA are designed for the commercial ISP/individual customer relationship and the Government's hastily produced impact assessments for the House of Lords failed to realistically address the public intermediaries issue. Despite this, the Code needs to address the user/intermediary/upstream provider relationship which it has not adequately done. Indeed it refers constantly to "industry" and "consumers."

8. In our view, the draft Code's requirements are mainly designed for the ISP-consumer relationship where the Subscriber to the ISP is in many cases a natural person, and not for the intermediary relationship where an institution provides free internet access to anyone as a public benefit. Internet intermediaries such as public libraries dealing with walk-in users may not know who has accessed the internet at a particular point in time since a single IP address may be assigned to a whole building. The contractual arrangements for internet access will vary from institution to institution and local authority to local authority.

9. The inappropriateness of the requirements for such intermediary bodies may well produce a chilling effect, particularly on free public Wi-fi provision: Britain risks becoming a closed-access country, against the trend of other developed countries where you increasingly can access the internet for free in a public park, museum, archive or public library.

10. The most pressing issue for libraries and archives arising from the draft Code is **the uncertainty about their status under the Code:**

    a. **whether they are to be classified as "ISPs" or "Subscribers", and**

    b. **if classified as "ISPs" that they may in future become "qualifying ISPs" rather than "non-qualifying ISPs" or "Communications Providers".**

    The same dilemma applies to any cultural or educational institution or public space (e.g. city-wide open Wi-fi) offering internet access to patrons.

11. **Para.3.21** notes the importance of clarity over the question of which services qualify as ISPs and also notes the wide range of business models of Wi-fi services: "from BT to Starbucks, via community Wi-Fi". Our concern, however, is that the draft Code fails to deliver that clarity regarding the position of fixed line and Wi-fi internet access providers in general and libraries and archives in particular.

12. **Para.3.28** states that libraries "…might fall to be considered as ISPs". While acknowledging that currently such providers might not collect data on their patrons or customers, it concludes that they may have to start doing so in order to comply with the DEA. The issue of whether this would be a reasonable or realistic expectation is not addressed.

13. A comparison of **Paras. 3.22** and **3.30** suggests that if institutions offering public Wi-fi and fixed line internet access are not classified as "ISPs" (on which question a degree of uncertainty is implied) then they will be classified as "Subscribers". The uncertainty in itself is unhelpful. The wider issue is that in dealing with the obligations of qualifying as an "ISP" or in being classified as a "Subscriber", institutions offering internet access to the public will be forced to curtail those services because of the unreasonable level of legal and financial risk to which they may be exposed following implementation of the Code. Such an outcome is against the public interest.

14. It seems clear from certain provisions of the DEA that Ofcom has been given discretion specifically to exclude certain types of internet providers as "non qualifying ISPs". For example, DEA s.5(3)(a) provides that:

    (3) The provision that may be contained in a code and approved under this section includes provision that—

    (a) specifies conditions that must be met for rights and obligations under the copyright infringement provisions or the code to apply in a particular case;

15. At the same time the internet access provided by Wi-fi and fixed line services of this kind forms a minute proportion of broadband services in the UK, even if such provision were to increase. It is hard to see how the requirement of proportionality in the content of the Code, which is emphasized in the legislation, for example at DEA s.7(1)(k), could possibly be met if those services are subject to the same regime of reporting and record keeping which applies to large commercial ISPs.

16. **We urge that libraries and archives and similar institutions offering public internet access should be clearly classified in the Code as "Communications Providers" for the purposes of the DEA, and therefore be exempt from the Code, or they should be classified as a non-qualifying category (e.g. "non-qualifying ISP") as provided by DEA s.5(3)(a).**

17. We also urge that Ofcom investigates the use of other sections of the DEA to exempt public intermediaries from undue obligations and responsibilities, as it intends to do with mobile ISPs.

    a. **Under s.6.124D(5)(h) Ofcom may "make other provision(s) for the purpose of regulating the initial obligations", and**

    b. **S.5.124C(3)(a) states that Ofcom can specify "conditions that must be met for rights and obligations under the copyright infringement provisions or the code to apply in a particular case."**

Other General Points

18. As Ofcom expects "Subscribers" to take "reasonable steps" to ensure infringement does not occur, we would like Ofcom to publish guidance for "Subscribers" to clarify what it considers to be "reasonable".

19. We would also like to see an assurance from Ofcom that it will consult directly with the Information Commissioner to ensure that the Code complies with data protection laws.

III. Responses to Specific 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, 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.

Our answer above assumes that the reference in Question 3.1 to "section 124 of the 2003 Act" is to the new section 124c(4) of the Communications Act 2003 required by DEA s.5.

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?*

1. We note the uncertainties and inconsistencies around the definition of an ISP discussed in our introduction. Much greater clarity is required.
2. Secondly we believe that the cost-sharing regime will be too onerous if in the course of time it comes to be applied to libraries, archives and other providers of Wi-fi and fixed line internet access to the community.
3. As stated above, our contention is that libraries, archives, museums and other community providers of public Wi-fi and other public internet access, should as a group be **specifically classified as "Communication Providers or as a non-qualifying category such as "non qualifying ISP"** under DEA s.5(3)(a), and therefore be removed from the provisions of the Code which will apply to actual or potential "qualifying ISPs" and also to the provisions which apply to "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?*

The terms used in the DEA need to be pragmatically applied to the realities of internet provision by public intermediaries. It is impossible to judge how appropriate is Ofcom's general approach unless Ofcom clarifies the criteria which define what is an "ISP" and what is a "Subscriber",

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?*

1. As the Code stands, the current definition of "Qualifying ISP" could readily be extended by Ofcom to include libraries, archives, museums, educational establishments, community halls, etc. and other bodies which provide free Wi-fi and other internet access to the community. Such community internet services should be reclassified as "Communication Providers" or "non qualifying ISPs", so they are clearly outside the provisions of the Code which apply to "Qualifying ISPs" and "Subscribers".
2. We reiterate that the status of fixed line and Wi-fi services offered by libraries and others under the Code needs to be clarified and a less onerous, more realistic, regime developed. The present position of uncertainty about whether such community services could be regarded as "Subscribers" or could in future be drawn into the provisions of the Code that apply to "Qualifying ISPs", is unworkable. It will threaten the future of public interest services which are an important component of the digital agenda. To leave the Code as it is in this respect is disproportionate.
3. At **Para. 3.17** the draft Code states that: "We propose Ofcom should regularly review the qualification criteria, taking into account the number of subscribers and the volume of potential CIRs made by Copyright Owners in relation to ISPs not covered by the Code". However, in the absence of actual CIRs under the Code's regime, it is difficult to know how "potential CIRs" will be estimated and therefore difficult to know how objective and proportionate any proposed extension of Qualifying ISPs would be.
4. The current requirements of the draft Code, including a requirement that internet access providers collect address details from all their users, and the proposal that they should shoulder a proportion of the costs (possibly as much as 25%) associated with potential infringements, is too onerous for public service and other community providers and could lead to many of these institutions withdrawing or abandoning their offer of Wi-fi or other internet connections to patrons or public.
5. We understand that the implementation of logging software to identify individual users and store their information could cost a public library service as much as £47.5K with

ongoing annual costs of around £4K. Across the national public library service this could amount to some £214m with annual costs of some £18m. Yet it seems that in universities which typically give access to some 25,000-35,000 people a year, the copyright infringement level by students is very small (e.g. 0 to 6 copyright infringement notices in six years is typical). In public libraries this is likely to be equally small, if only due to bandwidth restrictions.

6. The DEA s.7.124E(1)(k) states that in order to be approved by Parliament the Ofcom Code's provisions must be "proportionate to what they are intended to achieve." S.7.124E.(1)(i) additionally requires that "the provisions of the code are objectively justifiable in relation to the matters to which it relates". From the available evidence to date of the level of alleged infringement combined with initial costs for public intermediaries to implement the draft Code as it stands strongly suggests that any future classifying public intermediaries as "qualifying ISPs' would be disproportionate and unjustifiable with regard to the level of online copyright infringement on public networks.
7. In the broader context of the Coalition Government 's continuing commitment to drive the Digital Agenda forward and to empower as many people as possible, regardless of their economic circumstances, in the use of the internet, this would be a very retrograde step.

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 our important cultural and educational role, combined with our "mere conduit" function not knowingly facilitating infringement, an utterly 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?*

1. 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.*

1. In general, yes (apart from the caveat below). 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.
2. In addition, it is important that there should be another reason for not processing a CIR, that is if the CIR is received by a "non-qualifying ISP".

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 institutions.

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?*

1. 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.*

1. 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.

IV. Conclusion

The issue of how libraries and archives should be classified under the Code pervades our response to this consultation on the draft Code. **This is the absolutely fundamental issue that must be resolved before the Code is finalised and implemented.**

We urge Ofcom to initiate direct discussions with the major library and archive bodies and professional associations. LACA is a body that represents a wide range of library and archive organisations and professional bodies on copyright and related policy matters. We would be happy to facilitate discussions between our members and Ofcom about this major issue.

Response compiled by Chris Holland and Barbara Stratton on behalf of LACA: the Libraries and Archives Copyright Alliance http://www.cilip.org.uk/laca

July 2010

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