

Ofcom Consultation Online infringement of copyright and the Digital Economy Act

million+ response
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1. million+ is a university think-tank using evidence-based policy to solve complex problems in higher education. We aim to shape policy and funding regimes so that they enable people from every walk of life to benefit from access to universities that excel in teaching, research and knowledge transfer and so that business, the NHS, the not-for-profit sectors and government benefit from the full potential of all universities. We are supported by 27 UK universities that support our mission. These member universities have their own diversity and specialisms.
2. million+ welcomes the opportunity to comment on Ofcom's Digital Economy Act Draft Initial Obligations Code. million+ fully supports the more detailed submissions made by JANET, Universities and Colleges Information Systems Association (UCISA) and Universities UK and therefore we focus our response on the classification of universities within the code.
3. Our primary concern is whether universities will be regarded as "ISPs", "Subscribers" or "Communications Providers" and would argue that universities should be exempt from these classifications (as per similar legislation which was introduced in France). We were disappointed that the passage of the Digital Economy Act through Parliament did not allow, in our view, for sufficient debate of the implications of provisions, largely shaped around a relationship between a commercial ISP and a single domestic user, for the often large and complex organisations we represent.
4. However, we note that Section 7.124e (1) (k) of the Act states that provisions in the Ofcom code must be "proportionate to what they are intended to achieve". Universities already have proven and effective policies and procedures for monitoring and preventing copyright infringement, with conditions of use based for example on UCISA's model regulations and JANET's Acceptable Use Policies. As a result, levels of copyright infringement within universities are low: for example, Middlesex University (a million+ university) provides internet access to over 34,000 students per annum, yet has never received an infringement notice from a rights holder.
5. Despite this we are concerned that the code, as currently drafted, exposes universities to the risk of inappropriate measures. In the best case, universities may be subject to an entirely

unsatisfactory level of uncertainty about how they will be treated for the purposes of the Act. In the worst, the implementation of Act could impose substantial additional costs on institutions at a time when their finances are already likely to be under intense pressure, or lead to reduced or suspended internet access – with seriously detrimental implications for the pursuit of education and research. We therefore urge Ofcom to:

- a. Consider a specific exemption for universities, and other public intermediaries, in line with the treatment of mobile ISPs under Section 5.124c (3) (a); or
- b. Clarify the status of universities as either “Non-qualifying ISPs” or “Communications Providers”, and make it clear that they should not be regarded as “Subscribers” for the purposes of this Act.

Question 3.6: Do you agree with Ofcom’s approach to the application of the Act to subscribers and communications providers?

6. We are deeply concerned that the code as currently drafted leaves open the possibility that universities may be regarded as ‘subscribers’ for the purposes of the Act, since universities both receive internet access and provide access to their staff and students. As Universities UK have noted in their submission, this does not appear to be consistent with the statement in the draft code that “attention must focus on the provider of the final leg of the internet distribution chain”. In fact, our understanding is that universities might simultaneously fulfill the definitions of ‘subscriber’ ‘ISP’ and ‘communications provider’ – leaving universities in the difficult position of not knowing where they stand in relation to the obligations of the code.
7. Universities would find it extremely difficult to operate effectively in providing internet access to their staff and students if classed as ‘subscribers’ – not least because it may be difficult or impossible to identify individual users where an allegation of copyright infringement occurs. The risk of exposure to the ‘technical measures’ available to the Secretary of State to restrict or suspend internet access would severely affect universities’ ability to educate and support research, and would, in our view, be clearly contrary to the public interest.

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