## Title:

Ms

## Forename:

Janice

## Surname:

Mcfarlane

## Representing:

Organisation

## Organisation (if applicable):

National Library of Scotland

## What do you want Ofcom to keep confidential?:

Keep nothing confidential

## If you want part of your response kept confidential, which parts?:

## Ofcom may publish a response summary:

Yes

## I confirm that I have read the declaration:

Yes

## Ofcom should only publish this response after the consultation has ended:

You may publish my response on receipt

## Additional comments:

INTRODUCTION
The National Library of Scotland (NLS) is Scotland's largest library, and the only one with legal deposit status. Researchers, utilising our extensive print, manuscript, and audiovisual collections are increasingly supported by online resources provided by ourselves and other internet service providers.

Access to the web is provided ,via JANET, to researchers and staff utilising PCs

provided by us. We also provide wifi access to those using their own laptops in both our reading rooms and other public spaces. We are therefore happy to have this opportunity to respond to this consultation, which could have far-reaching implications for the services we provide.

These services play an important role in supporting academic and personal research across a wide range of subjects. We therefore play a role in both formal and informal education and organisations such as ourselves are crucial to support policies of lifelong learning.

Before responding to the specific questions outlined below, the Library would like to emphasise an issue which is crucial to our views of the DEA and the draft Code of Practice.

THE STATUS OF LIBRARIES UNDER THE CODE:
In common with many other public bodies we had hoped that the Draft Code would clarify our status under the Act. Unfortunately this has not happened and we are still unclear which category applies to ourselves, or other public bodies providing internet services to their users.

Are we ISPs, Subscribers, communication providers, a combination of all of these or none of the above? This lack of clarity makes it virtually impossible to fully evaluate the implications of the Act on the crucial services we provide.

If designated as ISPs there could be substantial cost implications in ensuring an appropriate technological and administrative infrastructure if the Code utlimately covers smaller providers.

If designated as Subscribers there is potential for the loss or significant reduction of service provision due to the acts of a few individuals across a user community of many thousands. It appears that an Act which is primarily drafted to deal with personal subscribers to internet services, will potentially have a major impact on the provision of internet access to thousands of legitimate researchers.

## 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.:

NLS 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.:**

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 relating to the number of subscribers required to qualify. This may be the outcome if regular infringers move to smaller ISPs.

## 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?:

While the decision to initially limit the Code to cover ISPs with a minimum of 400,000 clients, may seem a sensible way to start, it takes no account of the actual level of infringement currently being carried out via these or other, much smaller, service providers.

There is also the potential for regular infringers to switch to other, smaller ISPs, to avoid being caught by the Code. If the criteria for inclusion remains the number of subscribers, and this number is decreased due to an increase in infringing activity in a few, previously excluded ISPs, then, over time, virtually every ISP could be brought under the terms of an amended Code, with all the costs that would involve. It would perhaps be sensible to select ISPs on the basis of current infringing activity.

As outlined above, our views on this matter are also informed by our uncertainty regarding the designation of libraries, and other similar public bodies (schools, universities, museums etc). If we are designated as ISPs under an amended Code the costs and obligations envisaged by the Act could have a considerable impact on our ability to continue providing important services for thousands of non-infringing users.

To reiterate: the designation of bodies such as ourselves as either ISPs or Subscribers, could have a detrimental impact on the provision of legitimate internet access for a wide range of people, as well as imposing considerable administrative tasks on institutions which are already facing considerable reductions in public funding.

## 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?:

See our answer to Q 3.3. Once again we state that until the definitions regarding ISPs, Subscribers and Communication Providers are clarified it is not possible to judge if the proposed criteria are appropriate. It may be appropriate to send a CIR to an individual subscriber who is clearly registered with an ISP. However this criteria is unlikely to be acceptable to an ISP providing services to an organisational subscriber, or to an organisational subscriber providing wifi access to anonymous members of the public.

## 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 libraries and public wifi providers will have to collect name and address details from all users would place a considerable burden on public bodies which have been eager to support public policy on digital literacy and inclusion. For a body such as NLS, whose onsite users are often permanently resident overseas, and may only ever visit our buildings once in their lives the requirement to collect and store such information seems unduly bureaucratic and costly. The costs could be further inflated by the probable requirement for enhanced technical measures to reduce the risks of infringement, as well as potentially 25% of costs associated with alleged infringements. These additional duties and costs could eventually lead to the removal of internet provision to patrons, and the resultant impact on both formal and informal research.

## 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?:

Once again the lack of precise definitions makes it difficult to answer this question. At present it seems likely that NLS would be considered as a subscriber (see para.3.30 of consultation document) by ISPs and copyright owners. Libraries traditionally play a major role in protecting copyright and do not knowingly facilitate infringement. However, if viewed as subscribers, we would be subject to CIRs, the appeals process, and the potential imposition of technical measures aimed at slowing or even disconnecting subscribers. This would have a disproportionate impact on our services to education and the community as a whole. In particular we would emphasise that such steps may be introduced following 3 alleged infringements, probably by 3 different individuals, over a minimum period of 3 months.

## 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 support the views outlined by JANET in this respect that CIR should also contain sufficient evidence to support the allegation of an infringing act and the ownership of the infringed rights.

(Para 4.3) Under the bullet point which starts "a statement that ...", should be added '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 1988 (and subsequent legislation).

We also recommend that the rights 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 agree with this proposal.

## 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.:

While these proposals may work well with individual subscribers the lack of clear definitions for ISPs and Subscribers make it difficult to provide a clear answer in relationship to institutions such as ours.

Additionally we would expect the CIR to contain the information recommended in response to Q4.1.

## 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.:

Yes.

## 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. :

Again our response is impacted by the lack of clarity concerning our status under the Act. We are greatly concerned that, if defined as subscribers, we are in danger of receiving notifications generated by the activity of different individuals using our services, and subsequently find ourselves added to a copyright infringement list. It would be extremely unfair if the vast majority of non-infringing users suffered because of the actions of one or two individuals, who may never use our services again and who could not be clearly identified unless we implemented time consuming

and bureaucratic registration processes for those using our wifi services in public areas.

## 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?:

The notifications should include clear information concerning copyright exceptions so that alleged infringers are fully aware of what actions are allowed. They should also contain information relating to the subscriber’s rights under data protection legislation.

However we believe that public institutions offering internet access to its customers, should not be subject to these notifications.

Ofcom should produce a separate code and procedures to cover such bodies.

## 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 are given longer than 5 days to respond to a request for a copyright infringement list. Perhaps 10 days, in line with the time given to owners to send CIRs would be appropriate.

We are happy with the other suggested timeframes

## 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 providing subscribers with 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 PROVIDED it excludes public bodies acting as intermediaries providing crucial access for online research and access to knowledge in the digital age.