The Society of Chief Librarians

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29 July 2010

Dear Sir or Madam

Re: Online Infringement of Copyright and the Digital Economy Act: Draft Initial Obligations Code

The following response to your consultation on the above item is submitted by the Society of Chief Librarians, the organisation representing the senior officers responsible for public libraries in England Wales & Northern Ireland. As such it reflects the potential impacts of the Digital Economy Act, 2010 (DEA) on 3,500 public libraries and the 288mn visitors who use them for information, learning & recreation each year. All of those libraries provide access to the Internet in one way or another, often for direct use by customers through the almost 33,000 People's Network computer terminals. They are often the only point of Internet access to residents without access at home, in college or at work.

We are particularly concerned about the ambiguity of definitions within the legislation and draft code. It is not clear whether public libraries or other 'public intermediaries' such as museums, archives, universities & colleges are categorised as ISPs, subscribers, neither or potentially both at the same time.

The DEA appears to work against the concepts of the Digital Britain report for encouraging digital inclusion and in the worst cases may cause public intermediaries to choose to restrict or remove access to the Internet rather than fund the not insignificant costs of accurate logging and recording Internet use to specific IP address level at a specific date and time and the linking of that to the individual customer. To do that would affect those customers most in need of support and restrict access to public information essential in promoting effective democracy.

Considering the current very low levels of notification of copyright infringement through public intermediaries due to the processes in place to prevent and advise against such breaches, it does appear an over engineered system that is being proposed. It will lead to further administrative burdens and consequent costs on public intermediaries just at the time of significant spending reductions being imposed. The DEA 124E 1(k) requires that the Ofcom codes are "proportionate to what they are intended to achieve". We urge you to reflect that and create a specific category of 'non-qualifying ISPs' for those ISPs that are also public intermediaries.

Responses to specific questions are given below.

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 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.*

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 A critical issues 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.

Currently as the Ofcom consultation is envisaged at this point 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 our organisation comes in 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, universities and public libraries.

However at this point in time 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 libraries have public service goals to educate, as well as promote the digital inclusion agenda. Also 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 these 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 appeals process envisaged by the Act which requires in order for infringement to be proved that an IP address is proved to equate to a specific "subscriber", will means 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 service role of the public library combined with the fact we act as neutral and "mere conduits" for internet access, not knowingly facilitating infringement, we believe they should be viewed either as a communications provider, and therefore exempt, or as a non-qualifying category ISP 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?*

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.

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 service 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?*

3.5 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, 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 new measures to remain within 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.

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 No.

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 also in the future 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.

At the same time the lack of clarity in the definitions of the Act as applied public libraries will mean they have 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. Almost all public libraries operate 'Acceptable Use Policies', which indicate to customers what is or is not permitted on their networks. Many use filtration software that can be used to block illegal file sharing sites. Also the access is often authenticated to a library management system. However, there is no requirement to be a member to use the services other than loans of items, membership qualification restriction have been reduced and there is often no requirement to provide contact details in order to use the library and its services. The introduction of such restrictions may deter many users and reduce the reach of the digital services necessary to everyday life in the modern world.

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 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.

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

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 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.*

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 public intermediaries are likely to be targeted if they have several employees or customers 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 which they have no knowledge or responsibility. Public libraries tend to have acceptable use policies deterring inappropriate/illegal activity across the libraries network and similarly local authorities have staff policies on use of the Internet to prevent infringement or discipline those found to have undertaken illegal activity.

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 recommend that Ofcom ensure that public intermediaries cannot be the recipients of such codes.

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 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.*

7.1 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.*

8.1 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 learning and access to knowledge in the digital world.

Conclusions

We are very concerned about the implications of the DEA and the current Code as is, for HEIs and FEIs.

- These measures will impact detrimentally on digital services offered to those who live work or study and use the public libraries provided in England

- We receive and supply 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, our internet connection as a whole could be jeopardised

- We 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 public libraries 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 libraries, universities, schools, local authorities, museums etc without careful consideration of the potential costs, loss of connectivity, and other serious ramifications significant damage could be done to the progression of digital inclusion.

Yours faithfully,

Nicky Parker
President of the Society of Chief Librarians