**Universities and Colleges Information Systems Association**

University of Oxford
13 Banbury Road
Oxford OX2 6NN

Tel: +44 (0)1865 283425
Fax: +44 (0)1865 283426
Email: admin@ucisa.ac.uk

**www.ucisa.ac.uk**

**Online Infringement of Copyright and the Digital Economy Act 2010 – Draft Initial Obligations Code**
**UCISA response to the Ofcom consultation**

1. This response is from UCISA, the Universities and Colleges Information Systems Association. UCISA is a membership organisation representing those responsible for delivering information management systems and technology services in universities, colleges and other institutions. UCISA membership is institutional and has almost 100% coverage within the Higher Education sector and a number of members from the Further Education sector.

2. In compiling our response to the consultation, we note that the Code is currently focussed on fixed Internet Service Providers (ISPs) with over 400,000 subscribers. However the Code also states that its scope may be extended to other ISPs. Consequently our response assumes that universities and colleges may fall under the scope of the Code in the future.

**3.** It is our assumption that, when the code is implemented, universities and colleges will either be regarded as *communications providers* as defined in the *Communications Act 2003* or as *ISPs*. If this is the case then universities and colleges will be able to continue to develop our current effective policies and procedures for reducing copyright infringement. All users of institutionally provided systems will be bound by conditions of use; many institutions have based their regulations or conditions of use on UCISA's model regulations (see http://www.ucisa.ac.uk/publications/modelregs/modelregs.aspx). Although the user may not sign such conditions of use specifically, they are usually referenced in and so are part of the student regulations and staff conditions of employment. These conditions of use are rigidly enforced; as a consequence the level of copyright infringement remains relatively low. The effectiveness of these policies and procedures has been recognised by rights holders and in the Parliamentary debate of the Digital Economy Act. We are deeply concerned that implementing the Code with universities and colleges regarded as *subscribers* would require us to abandon those policies and procedures and replace them with something rather less effective and disruptive to the operation of the network in our member institutions.

**4.** Whilst we welcome the Code and acknowledge Ofcom's achievement in producing a Code that addresses many of the issues raised regarding domestic broadband connections, we are concerned that the impact of attempting to apply a single Code to the whole of UK Internet provision is deeply flawed and would be extremely disruptive to the higher and further education sector if universities and colleges are expected to act as *subscribers*. We note that the draft Code (paragraph 3.25) states that "attention must focus on the provider of the final leg of the internet distribution chain, i.e. the point at which information about subscribers may be gathered". We believe that, under this definition, universities and colleges are the providers of the final leg of the internet distribution chain and so should be not be regarded as *subscribers* but as *ISPs* or *communications providers*.

5. UCISA would welcome the opportunity to work with Ofcom in collaboration with JANET (UK) and other sector related bodies to develop a Code more appropriate to the operation of the sector which reflects the current good practice, recognised as effective by rights holders and Parliamentarians alike.

**Q3.1 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 when they have met their obligations under the Secretary of State's Order under Section 124 of the 2003 Act?**

6. We agree with the proposal laid out in the draft Code; ISPs will need to have sufficient notice in order to implement the policies and procedures required to ensure Copyright Infringement Notices (CIRs) are processed efficiently and accurately. The volume of infringement in the higher and further education sector is low. Most institutions will already have procedures in place for processing copyright infringement reports which have been recognised as effective by rights holders. It may be that a *light touch* version of the Code is required to standardise arrangements across the sector; as we have previously stated in paragraph 5 of this response, UCISA would be happy to work with Ofcom to establish an appropriate code.

**Q3.2 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?**

7. Where the policies and procedures exist in an ISP, two months should be sufficient for a Qualifying ISP to plan activity with an existing or new Qualifying Copyright Owner. We do not believe that two months is sufficient for cases when an ISP moves from non-qualifying to qualifying status, noting the Mott-McDonald report to DBIS which suggested a six to nine month period to implement an automated system to process CIRs was "optimistic".

**Q3.3 Do you agree with Ofcom's approach to the application of the Code to ISPs?**

8. We believe the emphasis within the Code to focus on those ISPs where there is a substantial problem of copyright infringement to be correct. We are concerned that it does not appear to be possible for a Qualifying ISP to move to a non-Qualifying status. This offers no incentive for an ISP to reduce infringement and appears to contradict the *Communications Act (2003)* which states that "rights and obligations do not apply in relation to an internet service provider unless the number of copyright infringement reports the provider receives within a particular period reaches a threshold set in the code".

**Q3.4 Do you agree with the proposed qualification criteria for the first notification period under the Code, and [are] the consequences for coverage of the ISP market appropriate?**

9. We consider starting with the main domestic broadband ISPs as appropriate.

**Q3.5 Do you agree with Ofcom's approach to the application of the 2003 Act to ISPs outside the initial definition of Qualifying ISP?**

10. We welcome attempts to clarify the definitions of ISP, communications provider and subscriber. However we do not believe that the definitions are sufficiently clear to allow a higher or further education institution to determine its status.

11. We do not agree with the conclusion in paragraph 3.28 that libraries, pay-as-you go wifi and mobile providers will have to collect address details from all users before allowing them to access the internet. This appears to contradict the initial purpose of the Digital Britain paper and other policies on widening internet access and does not appear to have been considered in either the impact assessment of the Bill or in the Parliamentary debate. Further we believe

that the assertion made in paragraph 3.31 that the implications of the interpretation will be "challenging" for community broadband schemes to be correct and further contrary to the stated Government desire to widen access to the internet.

12. We do not agree with the statement in paragraph 3.22 that a provider of open internet access must either be an ISP or a subscriber since such provision is provided without any agreement in place with its users. We believe that such organisations are classed as *communications providers* under the definitions within the *Communications Act (2003)*. We believe that if the view expressed in paragraph 3.22 is enforced there is a risk that smaller providers of open internet access will cease to offer access as they will regard to cost of enforcing the Code as prohibitive.

**Q3.6 Do you agree with Ofcom's approach to the application of the Act to subscribers and communications providers?**

13. We do not agree with Ofcom's approach. Paragraph 3.30 in the Code states that an organisation that receives internet access for both its own purposes and to provide access to others will be a *subscriber*. Since universities and colleges both receive internet access and provide access to their staff, students and others they would appear to be classed as *subscribers* by this definition. We believe that this is contrary to paragraph 3.25 of the draft Code which states that "attention must focus on the provider of the final leg of the internet distribution chain, i.e. the point at which information about subscribers may be gathered".

14. We note that treating universities and colleges as subscribers presents a significant risk that individual institutions may be placed on the highest scale of copyright infringement, particularly now the threshold for classification as a *serious infringer* has been reduced to three CIRs in three months. The risk is particularly acute at the start of the academic year when the volume of new users means that it is not possible to educate all individuals before they have access to computing resources and the internet.

15. We believe that universities and colleges should be regarded as either ISPs or communications providers. This would allow the higher and further education sector to continue the effective practices currently employed to reduce copyright infringement in educational institutions. We recognise the desire expressed in the Parliamentary debate that the sector should not be exempt from the provisions of the Act. In the Parliamentary debate on the Bill, Lord Young stated that there was "scope for proportionate, pragmatic solutions to help universities and libraries to comply with the provisions and minimise any administrative burden". We reiterate that we would be happy to work with Ofcom to establish an appropriate code for the sector that meets these requirements.

**Q4.1 Do you agree with the proposed content of CIRs?**

16. We agree with the proposed content of the CIRs. However we believe that the Code should also specify that the timestamps must be synchronised to an international standard time source to reduce the possibility of investigative work being carried out against an incorrect time (which may lead to the CIR being regarded as invalid under the terms laid out in paragraph 5.3 of the code).

**Q4.2 Do you agree with our proposal to use a quality assurance approach to address the accuracy and robustness of evidence gathering?**

17. We welcome the requirement for a Copyright Owner (or related agent) to submit a quality assurance report prior to submission of their CIRs. We would encourage attention to be paid to the use of cached information when compiling CIRs. We understand that some agents

have submitted evidence to universities and colleges using cached information which has proved inaccurate when investigated by the receiving institution. Since the timestamps on the cached information do not tally with the reported activity pattern, it is not possible to identify the alleged infringement in these circumstances. Submission of a CIR using such data should result in the CIR being regarded as invalid.

**Q4.3 Do you agree that it is appropriate for Copyright Owners to be required to send CIRs within 10 working days of evidence being gathered?**

18. We do not believe it is clear from the Code whether the ten days refers to the elapsed time from the alleged infringement or ten days from when evidence of an alleged infringement has been gathered. If the intention is that it is the latter then this has significant implications for the volume of logging data that has to be maintained; a maximum time should be stated between the alleged infringement and the submission of the CIR.

**Q5.1 Do you agree with our proposals for the treatment of invalid CIRs?**

19. We agree with the proposals but believe that an additional reason for invalidity is required: that the report is not consistent with the ISP's flow records. As mentioned in paragraph 17 of our response above, some universities and colleges have reported the use of cached information in the infringement reports they already receive. The pattern of network usage from this cached information does not always match the institution's records as the time stamps recorded in the cache differ from when the incident took place. This is perhaps symptomatic of the use of automated reporting systems. We believe it is important to allow this type of problem to be detected and resolved between the Copyright Owner and the ISP, without requiring the Subscriber to make an appeal (it is possible that it will not be possible to identify an individual subscriber in some cases).

**Q5.2 Do you agree with our proposal to use a quality assurance approach to address the accuracy and robustness of subscriber identification?**

20. In order for the process to work effectively, the processes followed and systems used by both the Qualifying Copyright Owners and the Qualifying ISPs must be of a good quality. Therefore, we welcome the requirement to have subscriber identification processes and equipment audited ahead of live processing. We believe that the cost of such audits should be included in the calculation of ISPs' costs that can be recovered from Copyright Owners.

**Q5.3 Do you agree with our proposals for the notification process?**

21. We believe that a time based notification process is appropriate for domestic subscribers. We do not believe that such a system is fit for purpose when applied to those organisations classed as subscribers under the terms of the Code. As identified in our response to question 3.6 there is a risk that individual higher and further education institutions may be placed on the highest scale of copyright infringement as a result of three unrelated infringements. We believe this to be contrary to the original purpose of the Act and to other Government policies promoting increasing access to the internet for individuals. We do not believe that a 'one size fits all' approach is appropriate and believe that different processes to address internet copyright infringement in domestic and organisational contexts are required.

22. We note that there is no reference to the elapsed time between when an infringement takes place and when a CIR has to be issued. We believe that this should be clarified to allow ISPs to establish appropriate retention schedules for logging data.

**Q5.4 Do you believe we should add any additional requirements into the draft code for the content of the notifications?**

23. We believe the requirements within the draft Code are appropriate for domestic subscribers. However, as we have previously stated we believe that different processes are required for those organisations, if any, that are classed as subscribers. We believe that attempting to apply the same process to both domestic and business internet connections risks damaging copyright enforcement and the wider use of the internet as promoted by a number of Government policies.

**Q6.1 Do you agree with the threshold we are proposing? Do you agree with the frequency with which Copyright Owners may make requests?**

24. We agree with the proposed threshold and the proposed frequency with which Copyright Owners may make requests. We note that the timescale for ISPs to respond a) is extremely short and b) does not specify whether the time limit is the number of elapsed or working days. We believe that a ten working day period to respond to be more appropriate.

**Q7.1 Do you agree with Ofcom's approach to subscriber appeals in the Code?**

25. We agree with the overall approach. However we note that one of the grounds for appeal is that the CIR does not relate to the subscriber's IP address at the time of appeal. There will be some cases, as we noted in our response to question 5.1, where the time information within a CIR does not match the ISP's flow records. In these circumstances the CIR should be rejected without the need for the subscriber to have to appeal. We would also observe that there is no provision for the effect of a notification to be suspended whilst it is being appealed. We believe this to be an omission.

**Q8.1 Do you agree with Ofcom's approach to administration, enforcement, dispute resolution and information gathering in the Code?**

26. We agree with Ofcom's approach.