

**Title:**

Please select

**Forename:**

Carolyn

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**Representing:**

Organisation

**Organisation (if applicable):**

University of Birmingham

**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:**

This response is from the University of Birmingham an exempt charity created by Royal Charter in 1900 for the purposes of the advancement of education. The University has approximately 29,000 students and 6,000 staff with a turnover of approximately £400m and an economic impact on the West Midlands region of over £770m.

In compiling our response to the consultation we have had the benefit of reading the

responses provided by JANET UK, UCISA and SCONUL.

We note that the draft Code is currently directed at Internet Service Providers (ISPs) with over 400,000 subscribers. However we are also aware that it is envisaged that at some point in the future the Code may be extended to other ISPs or Communication Providers.

For that reason the University is keen to ensure that Ofcom is aware of the substantial hurdles that the Education Sector would face if the draft Initial Obligations Code of Practice were imposed on education providers as it is currently drafted.

In our view the Code as currently drafted is aimed at ISPs who carry out this activity as their prime purpose. They have in place appropriate management and operational controls to enable them to fulfil the guidance as proposed. For Higher Education establishments the provision of internet access is not a primary purpose. It is a subsidiary facility which enables our academic staff and students to have access to a full range of resources. The contractual relationship between the University and its employees or students is different to that than between an ISP and a subscriber.

In addition the Higher Education Sector by its very nature is familiar with the issues arising from copyright and plagiarism. Indeed Universities are keen to preserve their own copyright in works produced by academics and to ensure that they remain a source of income into the future. Universities therefore ensure that both staff and students are aware of the limitations on copyright use and in general deal very promptly with any complaints by copyright holders. They are dealt with on an informal basis and invariably provide a satisfactory resolution for the aggrieved copyright holder.

The University of Birmingham would therefore suggest that rather than trying to “shoehorn” a HEI into the definition of an ISP or the subscriber (neither of which fit the roles and responsibilities of the University) Ofcom might consider a further definition or category for education institutions which would reflect the specific issues and concerns which we face. The process could also therefore reflect the financial constraints that educational charities face particularly in light of the current economic climate and government cuts.

However in the event that Ofcom is not persuaded by the need to create a separate category for Higher Education Institutions within the proposed Code of Practice, we would support the views put forward by JANET UK and UCISA that it is not appropriate to classify a University as a “subscriber”. If Universities were to be regarded as “subscribers” this would require Institutions to rewrite or abandon those policies and procedures which have worked so well to date. The replacement would appear to be less effective and much more costly and disruptive to the operation of the University.

We would therefore support the proposed report put forward by UCISA that Universities should be regarded as either ISPs or Communication Providers in accordance with the Communications Act 2003 subject to clarification as to the obligations and responsibilities to be placed on those two distinct classifications.

**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.:**

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. The University of Birmingham already has procedures in place for processing copyright infringement reports which have been recognised as effective by rights holders.

The University of Birmingham supports UCISA's proposal for a 'light touch' code and the standardisation of arrangements across the higher education sector. It would also support sector representatives in working with Ofcom to establish an appropriate code.

**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.:**

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.

The University of Birmingham does not believe that two months is sufficient for cases when an ISP moves from non-qualifying to qualifying status. Both the responses from JANET (UK) and UCISA cite the arguments presented in the report by Mott-MacDonald to the DBIS and the University concurs with issues raised in their responses to this question.

**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?:**

The University is concerned that there is no clear indication as to whether Universities will be defined as ISPs, Subscribers or Communication Providers. Furthermore, there are concerns associated with the fact that the benchmark for being a qualifying ISP may drop in future.

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.

**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 University of Birmingham considers that starting with the main domestic broadband ISPs is appropriate. Until the criteria for what is an ISP and what is a Subscriber are clarified it is difficult to comment further with respect to the issues for 'smaller' ISPs.

**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 University would 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.

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.

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.

We also agree with the fuller responses to this question provided by JANET (UK) and UCISA.

**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?:**

The University of Birmingham does 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'.

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, although they sign a declaration agreeing to abide by our 'Conditions of Use' (including respecting copyright), it is difficult to educate all individuals before they have access to computing resources and the internet.

We believe that universities and colleges should be regarded as Communications Providers. This would allow the University to continue the effective practices currently employed to reduce copyright infringement, including enforcement of its acceptable use policies, authenticated access methods and the general information and education it provides to its users in this respect.

We also agree with the fuller responses to this question provided by JANET (UK) and UCISA.

**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?:**

The University of Birmingham agrees with the proposed content of the CIRs, with the following suggested modifications

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).

The Qualifying Copyright Owner should attest that they are in fact the owner of the UK copyright in the work and provide supporting evidence to that fact, and that the alleged infringing copying does not fall under any of the exceptions to copyright or copyright infringement as provided for in the Copyright, Designs and Patents Act.

**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.:**

The University of Birmingham agrees with the fuller responses to this question provided by JANET (UK) and UCISA.

**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?:**

The University agrees that there should be a time limit to the period between the alleged infringement taking place and the receipt by the ISP of the CIR.

However, the manner in which this is expressed in the Code is not clear. Does the ten days refer 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. It would be more appropriate if there is a specified maximum time between the alleged infringement and the receipt of the CIR, e.g. 14 elapsed days.

The Code seems to be silent on the physical format of the CIR, i.e. electronic or hard-copy. Should the Qualifying Copyright Owner send the CIR in hard-copy format, then it might be advisable to specify in the Code that it must be sent ‘recorded delivery’ for the protection of both the QCO and the ISP.

**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.:**

The University of Birmingham agrees with the proposals but believes that there are additional reasons for invalidity. These have been given in the fuller responses to this question provided by JANET (UK) and UCISA.

**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.:**

The University of Birmingham is content with the proposed quality assurance approach on subscriber identification. We also agree with the fuller responses to this question provided by JANET (UK) and UCISA.

**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 University does not believe that a time-based notification system is fit for purpose when applied to those organisations classed as subscribers under the terms of the Code. 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 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.

We also agree with the fuller responses to this question provided by JANET (UK) and UCISA.

**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 University believes that the requirements within the draft Code are appropriate for domestic subscribers. However, 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 and notifications to domestic subscribers, public intermediaries, educational establishments and businesses in this context risks damaging copyright enforcement and the wider use of the internet as promoted by a number of Government policies.

**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. :**

The University agrees 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.

**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.:**

The University agrees with the overall approach.

We believe that the appeals process might be helped by giving subscribers more information about their grounds for appeal and their rights under the Data Protection Act.

We also agree with the fuller responses to this question provided by JANET (UK) and UCISA.

**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.:**

The University of Birmingham agrees with Ofcom's approach in these matters.

