Online infringement of copyright and the Digital Economy Act: Draft Initial obligations code – Universities UK's response

1. Universities UK is the major representative body of the UK's universities. Our members are the executive heads of 133 universities and colleges of higher education.

2. We welcome the opportunity to comment on Ofcom's Digital Economy Act Draft Initial Obligations Code. However, in this submission we restrict our response to a subset of the questions set out in the consultation document: in particular questions 3.3 and 3.6. We fully support the more detailed submissions made by JANET and the Universities and Colleges Information Systems Association (UCISA).

3. We also note that our primary concern, as to whether universities will be regarded as "ISPs", "Subscribers" or "Communications Providers" (outlined below) is shared by a wide range of bodies representing public intermediaries including schools, public libraries and museums. We share their disappointment 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: indeed the *highest* number of infringement notices received per year that we are aware of is 200 – which given that some universities have as many as 50,000 users, and the BPI alone sends out as many as 20,000 notices *per week* suggests that universities are a very low risk category.

5. Accordingly, 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 the 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:

    - 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

- 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 3.3: Do you agree with Ofcom’s approach to the application of the Code to ISPs?

6. We agree with Ofcom’s intention to focus on those ISPs where there is a substantial problem of copyright infringement, as this is consistent with the requirement for proportionality in Section 7.124e (1)(k). However, we also note that the proposed threshold is based on the number of users rather than the number of infringement reports. Given the low number of reports-per-user that universities receive, we believe that they would be very unlikely to reach a threshold based on the number of reports. However if the threshold continues to be based on the number of users, then the risk is that some larger institutions may qualify, especially if the threshold is lowered over time. If this were to happen, we understand that this would significantly increase the burden on universities associated with copyright compliance in terms of record-keeping, informing of alleged infringement, following the legal requirements of the code and identification of alleged infringers, as well as requiring them to share in the costs of any action leading from an infringement which, we understand, could be quite considerable. As we have noted above we do not believe that the risks of copyright infringement within universities warrant increasing the burden of compliance, or that this would be in keeping with the requirement for a proportionate approach.

7. However, as ‘non-qualifying ISPs’ universities could continue to build on current, effective practice, in reducing/ preventing and monitoring copyright infringement, as underpinned, for example, by the JANET Acceptable Use Policy (see http://www.ja.net/documents/publications/factsheets/077-investigating-copyright-complaints.pdf)

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

8. 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 both JANET and UCISA have noted in their submissions, 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 fulfil 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.

9. 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.

10. We also feel that universities' unclear status would be profoundly unhelpful to rights-holders, since it means they cannot know where to send infringement reports. An infringement report sent to the wrong place is invalid and can be rejected. As we understand it, universities could simultaneously be a 'subscriber' (for example in their capacity as an employer) and an 'ISP' or 'communications provider' (in respect of third party users such as students). As such it is possible to imagine a case in which the same IP address could be used by a member of staff at one time of the day, and a student at another. This would imply that a report in respect of that address should sometimes be sent to the university, and sometimes to JANET. Neither the rights-holder or JANET would have any way of finding out which would be correct in any individual case.

Conclusion

11. We have deeply appreciated Ofcom's willingness to engage with universities, libraries and other public intermediaries during the course of this consultation and appreciate the difficulty of producing a code that will satisfy all parties concerned. Nevertheless we urge Ofcom to consider the unique position which universities occupy and help the sector to continue to fulfil its current responsible role in managing and reducing copyright infringement, without imposing an unworkable or unnecessary burden on the sector at a time of severely constrained resources.