Please send responses to: onlinecopyrightinfringement@ofcom.org.uk or online at https://stakeholders.ofcom.org.uk/consultations/copyright-infringement/howtorespond/form
Deadline: 30th July 2010

WESTMINSTER CITY COUNCIL RESPONDING TO
The Online Infringement of Copyright and the Digital Economy Act 2010 consultation
(based on the SCA Response to the Ofcom Document
"Online Infringement of Copyright and the Digital Economy Act: Draft Initial Obligations Code")

Introduction

1.

Westminster City Council is a Central London corporate authority providing a wide range of public services to some 230,000 residents as well as the highest number of visitors of any European city. IT, and particularly web-based applications (whether internal or external), play a crucial role in the way we offer services such as parking, payment, Libraries and advice to our residents and visitors. Westminster has made a substantial investment in the development of IT through such projects as the Wireless City and more recently the shift toward infrastructure-free cloud based services. We can reasonably claim to be a benchmark for other Local Authorities and a key player in the development of Pan-London working.

Given this background, the Digital Economy Act has a significant impact for Westminster - particularly given the ambiguities within the Act on the definitions for public intermediaries as ISPs or subscribers.

2.

Westminster plays a key role through its libraries in improving digital inclusion within the community. Often with third sector partners, the Libraries last year helped over 5500 people gain skills needed to be more confident online. This work ranged from supporting elderly residents with no computer skills, guiding start-ups in accessing valuable business information, helping job-seekers search for work online and build CVs, to educating teenagers on how to access reliable information and avoid copyright infringement. This is an essential service in supporting the current government's agenda to get everyone online. Westminster Libraries now get over half a million hits each year to online resources they subscribe to. Westminster Libraries provide over 200 computers for the public which are in full use over 66% of the time. In response to the changing needs of the public they also provide 30 laptops and WiFi access.

Westminster City Council (WCC) has a Digital Inclusion Framework and a Councillor acting as a Digital Champion in Westminster. There are 3 initiatives to get all Westminster residents online by end of 2012. This is in line with the Prime Minister's support of the UK Digital Champion, Martha Lane Fox and Race Online 2012. Firstly the Community Computer scheme recycles WCC computers and gives them to voluntary organisations and individuals within Westminster for no cost. Secondly the IT Forum provides a network for voluntary organisations and support in their work. Thirdly, Westminster InTouch is a website providing a focal point for IT training and resources within Westminster and also a forum for voluntary organisations to exchange information and find out what businesses and WCC can offer them to realise the full benefits of IT. Over 10,000 Westminster residents have benefited from these schemes since May 2009.

3.

Whilst the Government's intentions for the Act are understood, we feel that there are significant problems with its application, and much further thought needs to be given to the final form of the Ofcom Code of Practice. We have set out our concerns and suggestions in the following paragraphs.

- costs for changing current systems if your authority was classed as an ISP in the future would be appropriate.

  These costs are unknown and create a further pressure on LAs during a time of financial austerity – this is covered in a paragraph below.

- the level of infringement reports from copyright holders per annum in the past couple of years would also be appropriate, if you have had any – the Digital Economy Act 124E 1(k) requires that the Ofcom codes are "proportionate to what they are intended to achieve".

  We have based our response on the questions proposed by Ofcom below, but as a preliminary point Westminster is not convinced that the relationship of the Act to European law on copyright and on the wider issues of privacy, competition, data protection and human right legislation, have been adequately assessed. As examples of the way in which the ECJ could impact on the DEA:

  - a recent ruling (Infopaq v Danske Dagblades Forening (DDF)) that whilst transient copying of copyright materials was exempted, the act of printing removed that exemption. In this case the 'materials' comprised an 11 word extract used by a clippings firm; and
  - a current action by UK groups the Open Rights Group (ORG), Statewatch and Privacy International challenging the European Data Retention directive, and arguing that the European Court of Human Rights has repeatedly held that the metering of traffic data without the consent of the subscriber constitutes an interference with the rights to respect for private life and correspondence.
  - The current challenge to the DEA by BT and Talk Talk, which is thought may eventually reach the ECJ.

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?*

3.3.1 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.

3.3.2 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 Westminster 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.

3.3.3 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 intermediaries have public policy 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.

3.3.4 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.

3.3.5 We feel that given our public service role combined with the fact that we act as neutral and "mere conduits" for internet access, not knowingly facilitating infringement, we believe Local Authorities 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).

3.3.6 Westminster has applied a range of policies and guidance to its staff to strengthen network security and to define the ways in which staff may use the internet. However, under the Act ISPs will be required to monitor their customers' use of their networks and report any "suspicious activity". As with other elements of the Act, "suspicious activity" is ill defined. The implication is that ISPs themselves will need to define what is meant here, a situation that will lead to inconsistent standards being applied, with the legitimate activities of Westminster staff and 'customers' being challenged unfairly.

3.3.7 Lord Young has indicated that public Wi-FI access (including that provided through Libraries) could not be exempted from the Act. However, Westminster City Council has

for some years been working to develop public Wi-Fi through its Wireless City Programme – an initiative that it sees as crucial to enhancing London's economy and the flexibility of its service delivery to residents and visitors. The Act implies that a Wi-Fi provider may be an ISP or a subscriber, depending on the type of service and the nature of their relationship with their consumers – the key test being the extent to which the bandwidth provided can be used for file sharing, However, the Act does not adequately define this test – it is unclear whether Westminster City Council could be considered as an ISP or subscriber in relation to Wi-Fi provision.

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.

3.6.1 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.

3.6.2 At the same time the lack of clarity in the definitions of the Act as applied to Westminster City Council will mean we 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. It is extremely difficult for any Local Authority to assess the operational and financial implications of the technological infrastructure that could be needed to comply with any as yet undefined obligations under the Act. Without clearer guidance from Ofcom this places an unreasonable burden on Local Authorities at a time of financial austerity and when better use of such funds would be to support the government initiative to get everybody online.

Westminster Libraries and Archives work to ensure that copyright infringements are reduced. Posters are displayed in all sites warning the public not to breach copyright legislation including online infringement. To use computers, customers have to provide proof of name and address to get a library membership. They log on with their unique membership number and PIN and then each time have to agree to acceptable standards of use. Records are kept of customers logging on via the Netloan booking sy*stem.*

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.

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.

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.*

5.3.1 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.

5.3.2 To quote from the BIS's own factsheet: "*Westminster libraries provide an example of the type of action that libraries take. Users book in to use a PC for a particular period. They are registered to allow the library to distinguish between different user groups – children, adult, student etc. They use "Websense" to filter traffic on their fixed network. This allows them to ensure that different user groups can access different types of sites – for example ensuring that children using their facilities cannot access adult sites. It also blocks the use of P2P technology. In the case of Westminster, their central location and proximity to mainline rail connections means a large proportion of users are transient and only use the facilities to check e-mails."* This again calls into question the way in which the act could be applied effectively to such 'transient users' – a significant implication for Local Authorities should subsequent case law define them as an ISP within the terms of the Act, with a liability for the actions of its 'subscribers'.

5.3.3 Westminster has applied a range of policies and guidance to its staff to strengthen network security and to define the ways in which staff may use the internet. In addition to the direct web-based services provided to the public Westminster City Council makes extensive use of homeworking for its staff. The majority of our workers are enabled to work from home on a regular basis (and some entirely home-based), through a corporate machine or via their home PC, with access to the internal WCC network being provided via a VPN system. By its nature our reliance on web-based services to the public and on homeworking means that a great deal of sensitive commercial and customer data passes through out internet connections – as well as data that is copyright protected. We view with disquiet the requirement of the Act that ISPs should implement surveillance technologies (and report to rightsholders). We would wish to see stronger protections within the Ofcom guidelines against the abuse of such surveillance.

5.3.4 There is a concern that given the lack of clarity within the Act on proof and data, behavioral marketing firms in the mold of could benefit from the raw data to target our users of our services.

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 by Westminster City Council.

- 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 us 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.