

The Digital Economy Act 2010

Impact on educational institutions and public libraries

These guidance notes set out the position of public libraries and educational institutions under the Digital Economy Act (2010) and proposals in the draft Initial Obligations Code (2012) made under the Act.

It highlights the lack of clarity as to whether your institution will be regarded as Communication Provider, Internet Service Provider (ISP) or subscriber under the Act and the implications of each.

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1. Recommendations

If the Initial Obligations Code becomes operational in 2014 as planned your institution should:

- **Contact your ISP** prior to the enactment of the initial Obligation Code and assert that your institution is a communications provider or a non-qualifying ISP under the terms of the Act and not a subscriber and therefore should not receive Copyright Infringement Notices
- **Appeal within the 20 days period** allowed if your institution receives a Copyright Infringement Notice from an ISP. One of your grounds for appeal should be that the ISP did not follow the Initial Obligations Code as your institution is a communications provider or non-qualifying ISP and not a subscriber
- **Demonstrate an active programme of minimising copyright infringement** at your institution – see the section on this at end of this document. Whatever your status under the Act this will be important in minimising risk of legal action being taken against you successfully.

2. Introduction

Technology has transformed universities, public libraries, education, wider society and the economy. The importance of the internet to our economy is recognised by the UK Government through a range of policy statements, the most recent being the Race Online 2012 and its Manifesto for a Networked Nation.

University and public library resources are used by students, researchers, businesses, families and individuals to support all forms of learning and knowledge acquisition. These services improve digital literacy, support online creativity, and promote the governmental agenda of digital inclusion.

The role of public libraries is vital in providing digital inclusion and it is estimated by the Department of Culture, Media and Sport that half of all people who use internet in a public space do so from a library.¹

3. The Digital Economy Act 2010

The Digital Economy Act includes provisions relating to the UK's internet infrastructure. Specifically, section 3 to 16 in the Act includes measures relating to online infringement of copyright by placing obligations on Internet Service Providers (ISPs) under an "Initial Obligations Code" and a subsequent "Technical Obligations Code".

Under the Initial Obligations Code, ISPs are obliged to notify their internet subscribers where copyright owners have detected an "apparent infringement" on their connection. This requires them to establish a "copyright infringement list" of subscribers which is to be made available to copyright owners. It is then expected that copyright owners will take subscribers on the copyright infringement list to court for civil copyright infringement.

Ofcom, the regulator for UK communications industries, is tasked with drafting the Initial Obligations Code, which is then laid before Parliament and once approved, comes into force. Ofcom has consulted on a draft Initial Obligations Code in 2010, and published a revised code, for consultation, in June 2012

Under the Technical Obligations Code ISPs will have an obligation to take "technical measures" against subscribers on the "copyright infringement list". Such technical measures may include a measure which "limits the speed or other capacity of the service provided to a subscriber" or "suspends the service provided to a subscriber". The Act states that the earliest the Technical Obligations Code can be implemented is one year after the Initial Obligations Code has been in force.

¹

http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/images/consultation_responses/modernisation_review_public_libraries.pdf

4. The Digital Economy Act, public libraries and educational institutions

Definitions of “ISP”, “subscriber” and “communications provider”

The core definitions of “ISP”, “subscriber” and “communications provider” in the Act are simplistic, and do not reflect the more complex intermediated internet provision that exists in educational institutions and public libraries - see below. These definitions cannot be amended in the Code.

A “subscriber”

A subscriber is anybody who received internet access service from one of the ISPs “under an agreement between the person and the provider of the service; and does not receive it as a communications provider”.

An “ISP”

An ISP is simply defined as “a person who provides an internet access service”. However, in order to be classed as a “qualifying ISP” and therefore subject to the ISP related obligations an ISP will have to have over 400,000 broadband enabled lines. This will include the big UK consumer and business ISPs including BT, TalkTalk, Virgin Media, BSkyB, O2 and Everything Everywhere.

A “communications provider”

A communications provider is defined as “a person who provides an electronic communications network or an electronic communications service.” There is not currently awareness of any definition or advice from Ofcom that explains clearly what constitutes a communications providerⁱ.

The legislation sees two players with a direct relationship - a commercial ISP and an individual or member of a private household who pays the internet bill. Despite this, universities, colleges, public libraries and schools, and in turn local authorities upon which many schools and libraries depend, fall within the scope of the Actⁱⁱ.

Given the definition of a subscriber, and based on discussions with ISPs, we believe there is a high likelihood that public and educational intermediaries that receive internet access, either directly or indirectly, from one of the big ISPs will be treated in the same way as subscribers who are the occupants of a private household.

5. The Ofcom Initial Obligations Code

The Initial Obligations Code provides the framework for the implementation of the measures in the Act relating to ISPs and subscribers. It also establishes the appeals process for notifications of an “apparent infringement” linked to an IP address.

The implication for libraries and educational establishments if viewed as “subscribers”

As stated above, because of the definition of a subscriber in the Act and based on discussions with ISPs, it is understood that there is a high likelihood that public and educational intermediaries will be treated by their ISPs in the same way as subscribers.

The Code places the threshold for inclusion on the “copyright infringement list” at three notifications in 12 months. Ultimately public libraries, universities and other educational institutions who may have many tens of thousands of users are likely to reach this threshold faster than a private household. Therefore public sector organisations are at risk of being placed on the “copyright infringement list”, which under the Initial Obligations Code may mean that they are taken to court for civil copyright infringement, and under the Technical Obligations Code that they may be subject to technical measures by their ISP, such as slowing or suspension of their internet connection².

Libraries and educational establishments as “qualifying ISPs”

As a result of discussions with Ofcom by representatives of the library and university sector, public libraries, schools, colleges and universities will not have the obligations of ISPs in the first instance. This means they will not have to send Copyright Infringement Reports to their subscribers. However, longer term, it is possible that the threshold for placing obligations on ISPs of 400,000 fixed line internet subscribers will be reduced and therefore public libraries and educational institutions may in the future have the obligations of an ISP under the Act also.

Libraries and educational establishments as “non-qualifying ISPs” or “communication providers”

Another possibility is that public libraries and educational intermediaries may be treated by ISPs as non-qualifying ISPs, or communications providers, under the Act. However, based on dialogue with ISPs, whether they are in a position to effectively identify one type of subscriber from another, and therefore not send out a Copyright Infringement Report (CIR), is currently unclear.

In addition to this, whereas public intermediaries may be communications providers, or non-qualifying ISPs, in terms of the Act’s definitions, they are subscribers also, so an ISP may feel they are required by the Act to send out a CIR to a public intermediary.

6. What next for public sector organisations?

Pre-empting the receipt of a Copyright Infringement Report

If the draft Initial Obligations Code is passed without any amendments, in order to pre-empt the receipt of a copyright infringement report we recommend your institution / network or local authority contacts your ISP provider before the start of 2014 to discuss your status under the Digital Economy Act. This is in order to assert that your organisation is a communications provider or a non-qualifying ISP and not a subscriber. If this is successful this should mean that upon the Act coming into force you should not receive a CIR. Janet is already aware that its customers are not subscribers and will continue to expect them to handle any reports of copyright infringement according to the Janet Acceptable Use Policy.

² N.B. The introduction of a technical measures framework requires additional secondary legislation, so the imposition of such measures does not form part of the draft Code.

Responding to a Copyright Infringement Report

If you receive a copyright infringement report it is vitally important that you respond within 20 days. Although unclear at the moment whether an ISP can retract a CIR once issued, we would strongly recommend that you contact your ISP to discuss whether your status is an ISP or a communications provider and therefore whether the CIR has been sent in error.

Appeals

In addition your organisation should appeal to the appeals body that is being set up under the guidance of Ofcom. The process for appealing is currently not established, although the draft Initial Obligations Code provides some relevant information at this point:

25. The grounds of appeal which may be advanced by a subscriber are that —

(c) the act constituting the apparent infringement to which a copyright infringement report relates was not done by the subscriber and the subscriber took reasonable steps to prevent other persons infringing copyright by means of the internet access service; or
(d) there was a contravention of this Code or an obligation regulated by this Code by either a qualifying copyright owner or a qualifying ISP.

It is the recommendation of the guidance notes that the grounds of appeal should be twofold:

1. Your institution and its employees, as the subscriber, did not commit the alleged copyright infringement and did not facilitate it.
2. The qualifying ISP did not follow the code as your status is primarily that of a communications provider or an ISP and not a subscriber.

In order for an institution to appeal we believe that as much evidence as possible is needed to demonstrate that it is not the institution's staff (or perhaps not their users) that have committed the alleged copyright infringement, and that the institution itself has not knowingly facilitated the infringement in any way.

Such evidence could include details of the individual who is believed to have infringed, evidence of the existence of a responsible internet usage policy, or any other evidence that would show the institution itself has not infringed or knowingly facilitated any online infringement. Guidance on minimising copyright infringement is below.

7. Minimising copyright infringement³

There are a number of steps that public libraries and educational institutions can take to minimise copyright infringement.

- Institutions should have a copyright policy that sets out procedures for dealing with alleged copyright infringement.
- Institutions should ensure that all staff are aware of copyright law.
- A senior member of staff should be available so staff can refer copyright issues to them.
- Internet users should be educated about copyright issues, including issues relating to copyright and the internet.
- Warning notices about illegal downloading or copying should be posted above computers, photocopiers, scanners and other equipment, and on screen-savers.
- Where possible, access should be blocked to internet sites the sole purpose of which is known to be to facilitate the illegal downloading of materials.
- Charges of alleged copyright infringement should be investigated. Internet users should be treated with respect, observing and preserving their privacy, and considering them to be innocent unless evidence proves otherwise. Junior staff may wish to refer the issue to more senior staff, or to ask another staff member to accompany them when challenging someone whom it is suspected may be breaching copyright in the institution.
- Where breaches of copyright by a member of staff are substantiated, the person should be given additional instruction about copyright law in general and the current incident in particular, and warned that a repetition may result in disciplinary action being taken under the library's employment contract with that staff member.
- Where breaches of copyright by a library user are substantiated, and the user can be identified, the person should be given information about copyright law as this affects library users, and warned that a repetition may result in the person being banned from accessing the internet in the library or institution.
- Charges of alleged infringement should be responded to in a timely manner. Libraries and institutions have the right to challenge and dispute such charges. A legal appeal to the appeals body must be lodged within 20 days of receiving a copyright infringement report from a qualifying ISP. If you are not able to identify individuals who have used computers on dates and times at which breaches of copyright have been alleged it should be reported back to the ISP and the appeals body. You should also be prepared to list the steps taken by your institution to minimise copyright infringement.

³ Adapted from Tony Millet, Chair, LIANZA Standing Committee on Copyright, "*Minimising Copyright Infringement in Libraries: the Responsibility of Librarians*", pp3-4

Supported by



8. References

Further Information can be found here:

<http://www.jisc.ac.uk/publications/briefingpapers/2010/deacompliance.aspx>

OFCOM's interim statement and notice of a proposal to make an order, which includes a copy of code, can be downloaded from: <http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf>

JANET's Acceptable Internet Use Policy: <https://community.ja.net/library/acceptable-use-policy>

9. Notes

ⁱ **Further Note on Communication Providers:** However, although somewhat contradictory, the following is stated in regard to Communication Providers from the June 2012 Ofcom consultation on the Initial Obligations Act:

"A5.53 We consider that a person or an undertaking receiving an internet access service for its own use (or that of its employees) is a subscriber, even if they also make access available to third parties and, in that regard, constitute communications providers potentially subject to general conditions set under section 45 CA03.74

A5.54 Nonetheless, where an undertaking receives an internet access service essentially and verifiably for the purpose of providing it to third parties (for example, libraries for the purpose of providing a Wi-Fi service to library users), it would appear reasonable for their upstream ISP to treat them as an ISP or communications provider in relation to the application of the initial obligations. "

ⁱⁱ **Further note on Internet Access Provided by Public Service Intermediaries:** A briefing paper produced by LINX (the London Internet Exchange), has outlined a number of scenarios in which internet access is received and in turn provided to individual users by organizations such as public sector intermediaries. As a result, it highlights a number of ways that public libraries and educational institutions are different to the private household subscribers envisaged by the Actⁱⁱ.

In particular:

- Public library or university internet access is extremely varied - sometimes through local authorities, in some instances through the Scottish government, and sometimes direct with a commercial ISP or part of a regional educational or public consortium.
- An IP address, which is used to connect to the internet and against which a copyright infringement can be linked, are shared against whole banks of computers in libraries or universities therefore identifying which computer let alone who used it at a particular time can be impossible.
- A university or a large public library can serve many thousands, if not tens of thousands of users. Certainly the educational environment is far removed from the one IP address equating to an individual or householder as envisaged by the Act.
- Internet access is important for everyone, but is a central and core function of education, learning and information provision in schools, universities and public libraries.