Annex 2

Public Library, University and Educational Public Intermediary submission to the Secondary Legislation Scrutiny Committee on the Digital Economy Act

We write on behalf of public providers of broadband and Wi-Fi – public libraries, universities, schools, archives and other educational establishments such as colleges. Internet provision is central to formal education at schools and universities as well as life-long learning and digital inclusion in the context of public libraries. The increased pressure being put on public and educational intermediaries' provision of internet access by the Digital Economy Act is of great concern to our sectors. Despite Ed Vaizey, Minister for Culture, Communications and Creative Industries writing to our sector in 2011 and saying that *"... libraries and universities will not be in scope of the obligations. Furthermore, we do not envisage a scenario in which they will become subject to obligations either now or in the foreseeable future"*, we find as a result of the draft S.I. issued on the 26th June 2012 by Ofcom that our institutions are effectively being treated by the Act in the same fashion as a single person subscribing to internet services.

Background

As drafted, the Digital Economy Act 2010 envisaged only a simple binary relationship of an individual subscriber subscribing directly to a commercial ISP such as BT, Virgin or TalkTalk. The impact assessment only refers to individuals and commercial ISPs and is silent on public intermediaries who also supply internet access. It is our belief based on the silent nature of the Impact Assessment and the unsatisfactory nature of core definitions within the Act, that public intermediaries were simply forgotten about in the drafting stage of the Bill, and were not even considered by government until questions were raised in the House by the library sector during wash-up.

The central problem from which all the issues faced by public and educational intermediaries stem are the core definitions of 'subscriber', 'internet service provider' and 'communications provider'. These definitions are not mutually exclusive so a library or a school may potentially be all three, and in the vast majority of cases are simultaneously both subscribers and ISPs as well as communications providers. Despite assurances from the Minister, this definitional problem has not been resolved in the draft S.I. so we are left with a costly and unsatisfactory situation where we believe based on our engagement with ISPs that we will be treated by them as subscribers, and if the definition of a qualifying ISP drops to include those with less than 400,000 subscribers, will also have the obligations of a qualifying ISP under the Act.

Case Fees and Appeals Process as Subscribers

As a subscriber an educational institution, or local authority on behalf of a public library, will have to pay a fee for the right to appeal against the receipt of a copyright infringement report. After three such notices, a public intermediary will be put on a copyright infringement list which can upon request be submitted to copyright holders. In regards to this we would like to raise the following issues:

1. A university or public library is likely to reach three CIRs far quicker than a household and therefore the implementation of the Act is in no way proportionate to differing types of subscriber. In effect the draft S.I. does not differentiate for example between a single occupancy flat and the University of Sheffield or Cardiff Public Library in terms of the process surrounding the application of the case fees and the appeals process. We believe that the lack of proportionality in regards to different subscribers and different

types of internet access environments goes against the proportionality required by S.7.124E(1) (k) and S.7.124E.(1) (i) of the Act[1];

2. While an educational establishment or a local authority on behalf of a public library can afford a £20 appeal fee, it is the costs behind trying to identify a particular individual at a particular time on a large network (in certain instances with only one IP address shared between large banks of computers) that concerns us. In its submission to the High Court[2] Research Libraries UK and the Society of College, National and University Libraries stated that "Each notice will need to be appealed on a case by case basis, which will require significant resource. One of our member universities has estimated that even excluding any IT staffing time, the cost of the appeal process for a single university could be as high as £40,000 pa, at a rate of one notification per 400 students. At a national level that would equate to £32 million per annum. None of these potential costs were included in information about the Act prepared for both Houses, as public intermediaries were simply ignored in both regulatory impact assessments." We believe that none of these significant costs have been taken into consideration in the initial impact assessments, when drawing up the Cost Sharing Order, or in the draft Initial Obligations Code;

3. The proposed period to make an appeal after the receipt of a Copyright Infringement Report is 20 days. We believe that in the context of a library, university, school or college who are going to have to liaise between different departments, potentially seek legal advice, as well as try and identify one infringement amongst thousands of network visits, 20 days is far too short a period of time to make a legal appeal. This period of time may be appropriate for an individual household but not for an institution.

Educational and Public Intermediaries as ISPs in the Future

Whereas educational and public intermediaries will initially fall below the threshold envisaged by the draft Initial Obligations Code for Internet Service Providers, and therefore be simultaneously "non-qualifying ISPs" as well as "subscribers" and "communications providers" we are concerned that any amendment to the SI could bring our sector into scope as qualifying ISP in the future. In the way that currently in the Codes institutional subscribers are being treated in exactly the same way as individual subscribers, we would like to raise the very real concern that in future regulations little differentiation may be made between commercial ISPs and public intermediary ISPs, who of course give internet access to citizens not to make a profit but to further public policy goals like education and digital inclusion.

We believe that it would be disproportionate for 25% of the costs of the notification process to be laid at the door of schools, public libraries, colleges and universities. We therefore urge the committee now to ensure that the current proposed Codes define any such split of costs as applicable only to commercially motivated ISPs.

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1 S.7.124E(1) (k) of the Digital Economy Act states that in order to be approved by Parliament the provisions in the Ofcom Code must be "proportionate to what they are intended to achieve." S.7.124E.(1) (i) from the same section also requires that "the provisions of the Code are objectively justifiable in relation to the matters to which it relates".

2 (1) British Telecommunications plc and (2) TalkTalk Group plc v Secretary of State for Business, Innovation & Skills, claim no CO/7354/2010

Commercial Wi-Fi Providers excluded but not Educational and Public Intermediaries

We would also like to point out that while educational and public providers of Wi-Fi and fixed internet access will have to pay a fee to appeal an unauthorised infringement, as well as all the other administrative costs referred to above, a commercial internet provider who intermediates Wi-Fi provision won't have to.

Ofcom has the powers under the Digital Economy Act and the Communications Act to specify "conditions that must be met for rights and obligations under the copyright infringement provisions or the Code to apply in a particular case" (S.5.124C(3)(a)). Hence it has excluded certain commercial categories - namely mobile telcos and commercial Wi-Fi providers – but has chosen not to exclude educational bodies and public libraries that perform important public policy tasks.

To quote from the draft Initial Obligations Code in regards to Ofcom's decision to exclude commercial Wi-Fi providers like BT's Openzone we note that exactly the same arguments that have been put by educational and public intermediaries have been used to exclude commercial suppliers of Wi-Fi. Namely that intermediaries face "technical issues in relation to identifying an individual subscriber from an IP address"[3] – a problem for public libraries and educational establishments just as much as a Telco. Ofcom also states that "We do not have direct evidence about the levels of online copyright infringement taking place on Wi-Fi networks."[4] As pointed out above there is no mention in the impact assessments or anywhere else of the level of copyright infringement on public networks.

In summary we are therefore concerned that the cost code appears to be being arbitrarily applied to certain types of intermediary and not others, which is not proportionate or justifiable. We therefore believe that the implementation of the Act does not comply with S.7.124E(1) (k) or S.7.124E.(1) (i) of the Act that requires the Codes to be both proportionate and objectively justifiable.

Submission from:

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