

# Briefing on sections 3-16 of the Digital Economy Act for museums, libraries and archives

## Why should I read this briefing?

- New legislation on copyright protection on the internet will mean new obligations for museums, libraries and archives
- It may have implications for your public internet access services
- It's important to understand your obligations under the legislation because non-compliance has legal, reputational and financial risks
- You currently have the opportunity to influence the Ofcom initial code of obligations, which will enforce the new Act and may apply to your organisation, because it is out for consultation <http://www.ofcom.org.uk/consult/condocs/copyright-infringement/>

## What is this briefing about?

This briefing is to help museums, libraries and archive services try to understand their role and obligations under the terms of the Digital Economy Act 2010 (DE Act)<sup>1</sup>. This Act established legislation on a range of digital communications issues, including online infringement of copyright and the related duties of those providing internet access services to the public.

The DE Act also requires Ofcom to approve an initial obligations code, the draft version of which is currently out for consultation. This will then be followed by a statutory instrument. This briefing document provides some information on relevant elements of that consultation for museum, library and archive services. (Please note that often such services are in turn dependent on your local authority's technical infrastructure / service agreements with broadband providers.) However, services are urged to read the consultation for themselves and respond where relevant to their organisation.

## What is the relevant section of the Digital Economy Act for me and what does it set out?

The relevant portions of the Act are Section 3 to 18 which cover 'online infringement of copyright' and contain the following two provisions:

- The filesharing provisions – Section 3 to 16 of the DE Act. These sections are to be amended into the Communications Act 2003 (COM Act), creating new sections 124A to 124N.3
- The website-blocking provisions – Section 17 to 18 of the DE Act.

Consumer Focus has produced a guide to these sections of the DE Act which is easy to follow: <http://www.consumerfocus.org.uk/assets/1/files/2010/02/Filesharing-provisions-Guide-to-Ofcoms-initial-obligations-code.pdf>

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<sup>1</sup> [http://www.opsi.gov.uk/acts/acts2010/ukpga\\_20100024\\_en\\_1](http://www.opsi.gov.uk/acts/acts2010/ukpga_20100024_en_1)

## Where do museums, libraries and archives fit in relation to the Act?

This is very difficult to say. There is an intention that, where museums, libraries and archives provide public internet access, they should not be exempt from the provisions of the Act. However, there have also been a number of statements of the floor of the House of Commons and the House of Lords about the special requirements of public sector providers of internet access.

To define their rights and obligations under the Act, museums, libraries and archives will need to understand where they fit in the three major legal categories of 'persons' in the Act. The three relevant definitions are:

1. Communications provider
2. Internet Service Provider (ISP)
3. Subscriber

The categories do not appear to be mutually exclusive. Therefore this briefing note describes all three:  
a. the description as it arises in the Digital Economy Act <sup>2</sup>; and  
b. Ofcom's interpretation of these descriptions in their initial consultation document about the Initial obligations code that will be used to enforce the DE Act.

### *1. Communications provider*

The Communications Act 2003 states that a communications provider is

"a person who (within the meaning of section 32(4)<sup>3</sup>) provides an electronic communications network or an electronic communications service."

This is a very broad definition and in the Ofcom guidance it can refer both to a service behind an internet service provider (such as a wholesale service) but also to an end user of an ISP who is not a subscriber. Whether a customer of an ISP is a subscriber or a communications provider, is defined in section 3.20 of the Ofcom consultation document by the nature of the agreement between the two parties:

- Is the service procured from the ISP as an end user of internet services? (subscriber)
- Or is the service procured from the ISP in order to offer a communications service to others? (communications provider)

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<sup>2</sup> The DE Act refers to the 1988 Copyright Act for its definitions, which has since been amended by European legislation, and all of the definitions in the DE Act actually come from the Communications Act 2003, which can be found here: [http://www.opsi.gov.uk/acts/acts2003/plain/ukpga\\_20030021\\_en](http://www.opsi.gov.uk/acts/acts2003/plain/ukpga_20030021_en)

<sup>3</sup> Section 32 (4) refers to communications networks and services as follows:

(a) references to the provision of an electronic communications network include references to its establishment, maintenance or operation

(b) references, where one or more persons are employed or engaged to provide the network or service under the direction or control of another person, to the person by whom an electronic communications network or electronic communications service is provided are confined to references to that other person; and

(c) references, where one or more persons are employed or engaged to make facilities available under the direction or control of another person, to the person by whom any associated facilities are made available are confined to references to that other person.

## 2. Internet service provider

The Communications Act 2003 states that an internet service provider is  
“a person who provides an internet access service”<sup>4</sup>

The issue for public sector institutions with this definition is whether people receiving free access to an internet connection can be classified as subscribers (which would then put said institutions in the class of ISPs). In the case where a charge is made for internet access the definition is somewhat clearer and it could be suggested that in that case the institution would be taking the role of an ISP.

However, even in the case that the institution can define itself as an ISP in relation to its fixed line connections to PCs in the building, the Ofcom consultation document poses difficult questions about whether this is also the case for any wifi offered in this context:

3.22 (p15) “In principle, operators of Wi-Fi networks would fall within the definition of internet service provider.... It may not, however, apply to open access Wi-Fi networks where there is no payment from, and no agreement with, those making use of them. In those circumstances, the person making open access Wi-Fi available would themselves be a subscriber”.

Therefore a museum, library or archive may find that they are classified both as an ISP and a subscriber.

## 3. Subscriber

The Communications Act 2003 states that a subscriber is  
“in relation to an internet access service... a person who – (a) receives the service under an agreement between the person and the provider of the service; and (b) does not receive it as a communications provider”

This definition would appear to exclude those institutions who have an agreement to provide public access to the internet.

However, Ofcom’s consultation document places importance on the nature of the agreement between two parties. It may be that the legal agreement to supply internet access does not reside with the individual museum, library or archive itself, but with a central procurement from the Local Authority (LA). In this case, as the legal agreement is between the Local Authority and a communications provider, the LA could be classed as an ISP allocating IP addresses to the various agencies and institutions on whose behalf it has procured internet access and the library, museum or archive may either be classed as a subscriber or none of the above and the responsibility for adhering to the Digital Economy Act would rest with the LA.

### **How do I find out what category my institution fits into?**

In order to understand the exact legal status of your institution, contracts and relationships will need to be reviewed, but it is not clear to what extent it will be possible to apply to Ofcom or another independent body for clarification as to your status with regard to all of the services you offer. Given the unclear drafting of the act such issues may only be resolvable through case law.

This is an issue that could perhaps be better addressed in the draft initial obligations code.

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<sup>4</sup> An internet access service is “an electronic communications service that(a) is provided to a subscriber; (b) consists entirely or mainly of access to the internet; and (c) includes the allocation of an IP address or IP addresses to the subscriber to enable that access”

## Implications of the different definitions

If you have clarified your legal position in relation to the Act, it is somewhat easier, using the legal framework of the Act and Ofcom's draft Code of Conduct, to understand what your proposed responsibilities and actions would be.

### *What if we're a communications provider?*

In this case you would be exempt from the provisions in the Act as all 'communications providers' are outside of the scope of the legislation. However, you would fall into the provisions of the 2003 Communications Act and a separate set of responsibilities with regard to copyright that Ofcom already currently administrate.

### *What if we're an ISP?*

As an ISP, under the provisions of the Act, you would have the following role and responsibilities:

- To receive copyright infringement reports (CIRs) from copyright owners<sup>5</sup>
- To notify subscribers using your service of the CIR if the Ofcom initial obligations code requires you to do so, within one month of receiving the report
- To provide a copyright owner with an 'infringement list' (i.e. a list of copyright infringements that have been recorded on your network) of 'relevant subscribers' or those who have gone over a limit of infringements as set out by the initial obligations code.<sup>6</sup>
- To take 'technical measures' if required to do so, against relevant subscribers to prevent copyright infringement (e.g. limiting internet speed or refusing access).<sup>7</sup>
- To contribute to the cost of the subscriber appeals process.<sup>8</sup>
- Together with the copyright owner, to reimburse reasonable costs of subscribers who successfully appeal a copyright infringement report (CIR).
- To share the overall costs of administrating the terms of this legislation with copyright owners and to share the costs of the appeal process with copyright owners and subscribers if they appeal.<sup>9</sup>

The draft Initial obligations code that Ofcom is currently consulting on has a number of clarifications. It suggests that ISPs would only come in scope where they have 400,000 subscribers or more. They have identified seven ISPs that fall into this category and propose only to include these seven in the code to begin with. However, this would be subject to review and more ISPs would be included if they have a large number of CIRs recorded against them. What this number would be has not been set out. Whether this means that by definition those receiving bandwidth from these ISPs are then subscribers has also not been clarified.

Therefore, as things currently stand, even if a museum, library or archive service were in the ISP category they would not come into the scope of the initial obligations code. They could however, come into scope at a future date, or be classed as a subscriber.

If they did come into scope, the code sets out that they would need to:

- Make sure that they are able to comply with the obligations imposed on qualifying ISPs
- Provide Ofcom with a quality assurance report detailing the processes by which they match IP addresses to subscribers and ensuring it is robust and accurate

<sup>5</sup> Digital Economy Act section 3 "Obligation to notify subscribers of reported infringements" p5-6

<sup>6</sup> Digital Economy Act section 4 "Obligation to provide infringement lists to copyright owners" p7

<sup>7</sup> Digital Economy Act section 9 "Obligations to limit internet access: assessment and preparation" p13

<sup>8</sup> Digital Economy Act section 13 "Subscriber appeals" p.17

<sup>9</sup> Digital Economy Act section 15 "Sharing of costs" p.20

- Send out CIRs to all those who infringe copyright on their network<sup>10</sup>
- Send copyright infringement lists of ‘relevant subscribers’ in anonymised form to copyright holders when requested
- Destroy information about CIRs after a 12 month period
- Contribute to the costs of administrating the code
- Receive some support for costs from the copyright owner and administrate this as costs are incurred

#### *What if we’re a subscriber?*

As a subscriber, a museum, library or archive would be liable under the terms of the DE Act to:

- Receive CIRs relating to infringements that have taken place on its premises/using IP addresses allocated through its premises
- Be placed on a ‘copyright infringement list’ if the number of infringements that take place as described in the previous bullet exceed a certain limit – this may result in private civil or criminal action being taken against institutions by copyright holders
- Potentially be subject to technical measures, such as limiting speed of connection or temporary removal of connection if this is deemed an appropriate measure by Ofcom
- Have the right to appeal<sup>11</sup>, and have the right during appeal to state that “reasonable steps” were taken to prevent infringement of copyright – however there are no provisions in the Act for this defense to be presented at an earlier stage and the appeals process would be part funded by your institution

The initial obligations code does not refer to subscriber obligations, however its discussion of how CIRs should be administrated and the thresholds for issuing them have considerable implications for subscribers who receive them.

#### **What are the potential implications for us?**

Whether your institution is a subscriber, a communications provider or an ISP there will be implications that need to be considered:

- What additional administrative processes would have to be put in place?
- What will the cost be of carrying these processes?
- What additional risks should our institution consider in relation to the public internet access it offers?
- What are the implications of this for us and for our users?

The Act states that the initial code of obligations should not discriminate unduly against particular persons or a particular class of person and that they should be proportionate to what they are intended to achieve.<sup>12</sup> Therefore, in considering the draft code it may be useful for Ofcom to find out whether there are any possible unintended consequences for specific groups of consumers from the code and whether applying the code would be proportionate in your case.

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<sup>10</sup> The code proposes that notices be sent out not on the basis of volume of infringement but frequency and therefore all infringements on the networks of qualifying ISPs would require a letter to be sent to the infringer’s address

<sup>11</sup> For a claim to be found to be justifiable in the appeals process, the copyright holder has to link an IP address to “a subscriber” – this may be impossible in a library, museum or archive context, but in that case we do not know whether the institution could be a proxy subscriber for the individual infringer. This will have to be tested in case law.

<sup>12</sup> Digital Economy Act section 7 “Contents of initial obligations code” p.10

### What should my institution do?

MLA recommends that museums, libraries and archives take steps to:

- Establish as far as is possible which (if any) legal category they fall into under the terms of the Act
- If it is their parent institution (e.g. University, LA) that has the legal obligations under the terms of the Act, establish how they might be required to assist this institution and provide advice as to the nature of the service offered to the public in the library
- Understand what obligations the Act and the Code will impose upon them, given the category they fall into (even as a non-qualifying ISP, will you need to take steps to ensure you don't qualify? Will you need to plan for eventual inclusion in the Code?)
- Assess the risks, resources and costs of complying with these obligations
- MLA would encourage affected organisations to respond to the Ofcom consultation, outlining the resource and financial implications for you in complying with the Code, areas you agree with and areas where you would like changes to be made
- Contact MLA with any likely costs of amending current systems to comply with the requirements of the DE Act, for feedback to Ofcom

### Timeline

29 <sup>th</sup> June 2010	Sector briefing seminar at the British Library
30 <sup>th</sup> July 2010	Deadline for Ofcom consultation responses
January 2011	Ofcom Initial Obligations Code comes into force

### What has MLA been doing to represent the interests of museums, libraries and archives in relation to the Act?

The MLA Council is the government's agency for museums, libraries and archives. Leading strategically, we promote best practice to inspire innovative, integrated and sustainable services for all. MLA has undertaken a number of activities to highlight the issues for our sector in relation to the new copyright protection legislation:

- MLA is working in partnership with the British Library, JISC, academic institutions and others to represent the views of the cultural sector on these issues. On some issues we have submitted joint briefings and responses for decision makers within this partnership.
- We have responded to the Digital Britain report, the Gowers Review of Copyright, consultations and drafts of the Digital Economy Bill and we will be responding to the Ofcom draft initial code of obligations.<sup>13</sup>
- MLA has attended meetings with key decision makers in BIS, DCMS and Ofcom to represent the sector and will be attending future meetings as the draft initial code of obligations is amended
- We are working to raise awareness of the obligations in the DE Act among sector organisations via briefing documents and seminars organised together with our partners

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<sup>13</sup> All of our public consultation responses can be found on our website:  
[http://www.mla.gov.uk/what/policy\\_development/consultations/2009](http://www.mla.gov.uk/what/policy_development/consultations/2009)