This is JANET(UK)'s submission to the Culture, Media and Sport Committee's call for evidence on the Protection of Intellectual Property Rights Online. JANET(UK) is the operator of the JANET network that connects the UK's universities, colleges, research organisations and regional schools networks to each other, to research and education networks elsewhere in the world and to the public Internet. Our response therefore deals with the first part of the call for evidence, "the implementation, practicality and likely effectiveness of the relevant measures contained in the Digital Economy Act", and in particular its likely impact on the use of networks in education and research. Our response is structured around the questions posed in the consultation paper.

At the time of writing (January 2011), the final version of Ofcom's Implementation Code had not been published. Where appropriate, therefore, this response refers to the draft Code, published for consultation on 28th May 2010.

Whether the new framework has captured the right balance between supporting creative work online and the rights of subscribers and ISPs.

We welcomed the original proposal in the Interim Digital Britain Report in January 2009 to help rights-holders deal more appropriately and cost-effectively with infringers by establishing lists of serious repeat infringers that could be used to target civil action while educating less serious infringers through notices. Since then we consider that the introduction of technical measures has harmed that balance of rights (as discussed further below), while the expansion of scope from domestic ISPs to all internet-connected organisations has caused continuing confusion over the meanings of the terms "ISP" and "Subscriber" and resulted in legislation that affects the rights of many other groups.

Within the JANET network it has proved impossible to determine whether universities and colleges are classified as "ISPs", "Subscribers", "Communications Providers" or fall outside the scope of the Act. The Minister even suggested in the House of Lords that the answer might be different for every university and college. Since these different classifications involve very different duties (an ISP must deal effectively with those of its users who actually infringe copyright: a Subscriber must proactively restrict the behaviour of all its users, whether or not they infringe) it is impossible to know what balance of rights is struck by the legislation, or whether it is appropriate.

The expansion of the Act's scope also means that the rights of other groups using the Internet must be considered. For example organisations (from motorway services and hairdressers to libraries and museums) that provide Internet access for their customers appear to suffer the same definitional problem as universities and colleges. In paragraph 3.28 of their consultation on the Implementation Code Ofcom suggested that all these organisations will have to create expensive, time-consuming and privacy-invasive systems to record their customers' personal details before allowing them to use the Internet. If, instead, these organisations stop providing Internet access then those who cannot use the Internet at home or in the office will lose opportunities to do so elsewhere. Since we not aware of any evidence that these organisations or their customers are a significant source of copyright breaches, this appears to be a disproportionate interference with the rights of both organisations and users.

Whether the notification process is fair and proportionate

Universities and colleges have for many years used a notification process to achieve very significant decreases in copyright infringement by their users, as has been recognised by rightsholders and in parliament. We are therefore particularly concerned that the Act's definitions might class them as "Subscribers", as this effective process would then have to be abandoned since universities and colleges would not receive the infringement reports they need to deal with all infringers.

From experience of operating notification processes we know that it is sometimes impossible to uniquely identify a user from the information provided in a copyright infringement report: in most cases more is needed than just an Internet Protocol (IP) Address and a time. We therefore welcome the recognition in Ofcom's draft Implementation Code that some reports will not be possible to assign to a unique subscriber.

However we are concerned that the draft Code does not provide an effective mechanism for ISPs to detect and report systemic errors in infringement reports. For example one reporting agency recently failed to update its systems for daylight saving time resulting in many reported times being wrong by one hour. Universities detected this problem by comparing the reports to their records of network traffic volumes: something the Act does not appear to allow ISPs to do. Rather than a direct report back to the Agency concerned, it appears that under the Act this problem would only be discovered if enough falsely accused subscribers appealed that the pattern of errors was noticed.

The extent to which the associated costs might hinder the operation of the Act.

In our response to the Department for Business, Innovation and Skills consultation on cost sharing, we expressed concern that making ISPs pay part of the costs of the appeals process would create an incentive for them not to tell their subscribers of the possibility of appealing, thus making the process unfair. The Department's response did not address this concern. However we welcome their conclusion that there should be no fee required to lodge an appeal, since this is the subscriber's only opportunity to challenge the allegation against him.

At what point, if at all, consideration should be given to introducing the additional technical measures allowed for under the Act

We consider that any technical measures sufficient to hinder activities that breach copyright will inevitably also severely limit the subscriber's ability to use the Internet for legitimate activities. Given the increasing use (and promotion by Government) of the Internet for education, business, health and engagement with Government, we consider this a severe punishment and one that will significantly harm other Government objectives. Furthermore, this punishment will be imposed on all those (including pupils, students and home workers) who share a house or business with the alleged infringer. We consider this level of punishment disproportionate to behaviour that falls below the threshold of a criminal offence under the *Copyright, Designs and Patents Act*, and that it should not be imposed without a full examination in court of the evidence and defences.

We are also concerned that any use of the blocking injunctions enabled by clause 17 will significantly reduce the effectiveness of filtering technologies currently used by organisations and ISPs to protect users and their computers against harmful content. Filtering systems only work because users wish to be protected from the types of material – whether indecent images of children or websites containing viruses – that they are currently used against. If,

instead, blocking or filtering is used against content – such as copyright material – that users **do** want to access, this will create a widespread incentive to adopt tools (which already exist and require little technical knowledge) to circumvent filters. Once such tools are in use, all types of filtering become ineffective. We hope that this risk will be given due weight in the Secretary of State's consideration of the proportionality and prejudicial effect of introducing these injunctions.