

DIGITAL ECONOMY ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Topic 2: Online infringement of copyright

Background

31. The Act includes provision concerned with online infringement of copyright. This is particularly, but not exclusively, in response to infringement of copyright in the fields of music, film and games. The Act inserts new sections 124A to 124N in the Communications Act 2003 (“the 2003 Act”), which, once a supporting code approved or made by OFCOM has been put in place, impose obligations on internet service providers (“ISPs”) who meet the criteria set out in the code. The obligations require ISPs to:
 - Notify their subscribers if the internet protocol (“IP”) addresses associated with them are reported by copyright owners as being used to infringe copyright; and
 - Keep track of the number of reports about each subscriber and, on request by a copyright owner, compile on an anonymous basis a list of those subscribers who are reported on by the copyright owner above a threshold set in the initial obligations code (“relevant subscribers”). After obtaining a court order to obtain personal details, copyright owners will be able to take action against those included in the list.
32. The obligations will be underpinned by a code approved by OFCOM or, if no industry code is approved, made by OFCOM. The code will set out in detail how the obligations must be met.
33. In case the initial obligations prove insufficient to reduce significantly the level of online infringement of copyright, the provisions also grant the Secretary of State a power to impose further obligations (“technical obligations”) on ISPs. These would be imposed on the basis of reports from OFCOM and any other matter that appears to the Secretary of State to be relevant no sooner than 12 months after an initial obligations code enters into force, and would require ISPs to take measures to limit internet access to certain subscribers. Technical measures could only be used against subscribers who met the threshold for inclusion in a copyright infringement list under the initial obligations. Technical measures would be likely to include bandwidth capping or shaping that would make it difficult for subscribers to continue file-sharing, but other measures may also be considered. If appropriate, temporary suspension of broadband connections could be considered.
34. OFCOM would be subject to an obligation to prepare a code setting out the procedural mechanisms to give effect to the technical obligations of ISPs. The technical measures were described more fully in the consultation document issued on 16 June 2009, as supplemented by the government statement published on 25 August 2009¹.

¹ <http://www.berr.gov.uk/consultations/page51696.html>

35. To safeguard the interests of consumers, the provisions also require appeals processes to be set up as part of the underpinning codes. These include the right to appeal decisions of ISPs to impose technical measures. Appeals are required to be to a person independent of OFCOM, with a further right of appeal to the First-tier Tribunal in the case of technical obligations. No technical measure can be imposed if an appeal is in the process of being considered.
36. The provisions also set out how the costs of operating such a system may be shared. Funding from cost apportionment will enable an underpinning code to be developed by interested parties.
37. To illustrate how the provisions might work in practice, possible processes of notification and court action are outlined below:
 - Copyright owners identify cases of infringement and send details including IP addresses to ISPs;
 - The ISPs verify that the evidence received meets the required standard, and link the infringement to subscriber accounts;
 - The ISPs send letters to subscribers identified as apparently infringing copyright. They keep track of how often each subscriber is identified;
 - If asked to do so by a relevant copyright owner, ISPs supply a copyright infringement list showing, for each relevant subscriber, which of the copyright owner's reports relate to that subscriber. The list does not reveal any subscriber's identity;
 - Copyright owners use the list as the basis for a "Norwich Pharmacal"² court order to obtain the names and addresses of some or all of those on the list. At no point are individuals' names or addresses passed from the ISP to a copyright owner without a court order;
 - Copyright owners send "final warning" letters direct to infringers asking them to stop online copyright infringement and giving them a clear warning of likely court action if the warning is ignored; and
 - Copyright owners take court action against those who ignore the final warning.
38. The intention is that copyright owners would be held to the same standards of evidence of copyright infringement as for the initial obligations, and that the procedure for reporting infringement of copyright would be the same as well.
39. Sections 17 and 18 enable regulations to be made about the granting by a court of injunctions against service providers to block access to websites that are, or are likely to be, used to infringe copyright.

Section 3: Obligation to notify subscribers of reported infringements

40. This section inserts section 124A of the 2003 Act, which obliges ISPs to notify subscribers of copyright infringement reports ("CIRs") received about them from copyright owners. It describes what CIRs and notifications to subscribers must contain, the procedures that copyright owners must comply with when making CIRs, and the procedures that ISPs must follow when sending subscriber notifications.
41. Copyright owners are currently able to go online, look for material to which they hold the copyright and identify unauthorised sources for that material. They can then seek to download a copy of that material and in doing so capture information about the

² An equitable remedy taking its name from the order made in the case of *Norwich Pharmacal Co. v Commissioners of Customs and Excise* [1974] AC 133. A Norwich Pharmacal order requires a respondent to disclose certain documents or information to the applicant. The respondent must be a party who is involved or mixed up in a wrongdoing, whether innocently or not, and is unlikely to be a party to the potential proceedings.

source including the IP address along with a date and time stamp. However, they do not have the ability to match this information to the broadband subscriber to whom that IP address was allocated at that precise time. This information is only held by the subscriber's ISP. Therefore, the copyright owner relies on the ISP's ability to match the IP address to the name and address of the subscriber concerned.

42. However, the ISP is unable to pass this information on to the copyright owner without a court order. To do so would breach data protection and privacy law. To help ensure that the subscriber is made aware that their account appears to have been used to breach copyright, section 124A imposes an initial obligation on the ISP, in relevant cases, to notify the subscriber if the ISP receives a CIR from a copyright owner. There are maximum time limits of one month between when an infringement is detected and a CIR sent to an ISP, and between when a CIR is received and when a notification is sent to the subscriber.
43. The notification from the ISP must inform the subscriber that the account appears to have been used to infringe copyright, give the name of the copyright owner who has provided the report, provide evidence of the apparent infringement, direct the consumer towards legal sources of content, include information about subscriber appeals and the grounds on which they may be made, and provide other information. It also requires ISPs to make available advice on protecting internet access services from unauthorised use, taking into account that different protection will be suitable for different subscribers such as, for example, domestic subscribers, libraries, and small and medium business. The code may require the notification to include other material as well, such as a statement that information about the apparent infringement may be kept and disclosed to the copyright owner in certain circumstances. Further apparent infringements using the subscriber's account may result in additional notifications.

Section 4: Obligation to provide infringement lists to copyright owners

44. ISPs have to keep a record of the number of CIRs linked to each subscriber along with a record of which copyright owner sent the report. Under section 124B of the 2003 Act, inserted by section 4, an ISP may be required to provide a copyright owner with relevant parts of those records on request ("copyright infringement lists"), but in an anonymised form so as to ensure compliance with data protection legislation. The code must set the threshold for determining who is a relevant subscriber who may be the subject of a copyright infringement list that the ISP provides to a copyright owner. The threshold may be set by reference to any matter, including the number of CIRs made (see section 7).
45. A CIR represents a single breach of copyright at a moment in time. Up until now, a copyright owner has had no way of knowing whether the subscriber behind that breach habitually infringes copyright online or whether the breach represents a curious individual trying file-sharing for the first and only time. Because of this, the high costs involved in legal action have deterred copyright owners from enforcing their rights. By allowing copyright owners to target only the most serious repeat infringers, copyright infringement lists provided by ISPs are intended to make legal action a more attractive and effective tool for copyright owners to use in respect of their copyright.
46. The lists will be made available to copyright owners on request in an anonymised form. For example, while a list might (for example) identify subscriber 936 as being linked to the most CIRs, it would not include any personal information about subscriber 936. In order to get this personal data, the copyright owner would need a court order. However, the list would allow the copyright owner to identify subscriber 936 as someone against whom legal action may be appropriate.

Section 5: Approval of code about the initial obligations

47. The obligations provided for in new sections 124A and 124B will not have effect until there is a complementary code in force that has been approved or made by OFCOM.

48. **Section 5** inserts new section 124C in the 2003 Act. This section sets out the requirements for OFCOM's approval of a code regulating matters in connection with the initial obligations. The process by which infringements are detected, the standard of evidence that the copyright owner must meet before an ISP must send a notification, the format of CIRs, and the routes of appeal for subscribers are all issues of detail that section 124C requires the code to deal with. The government hopes that all stakeholders (ISPs, copyright owners and consumers) will contribute to the development of an industry code. Other criteria that an approved industry code may specify include setting in advance the number of CIRs the ISPs will be expected to process in a given period (say, six months).
49. Without these criteria, there would be no obligation for copyright owners to provide infringement information in a standard format and no protection for ISPs in the event that copyright owners set extremely high levels of expected CIRs.
50. The government also envisages that any approved code will also set out the time a copyright owner has to submit a CIR (so that a CIR must relate to a recent infringement) and the time the ISP has to act on the CIR and send a notification to the subscriber (for example, 5 working days) within the outer limits of one month set by the legislation.
51. The government's intention is for the obligations to fall on all ISPs except those who are demonstrated to have a very low level of online infringement. This is on the basis that it would be disproportionate (in cost terms) to require an ISP to incur significant costs to counter a problem that does not exist to any significant degree on its network. The proposal is therefore for the code to set out qualifying threshold criteria, based on the number of CIRs an ISP receives in a set period of time. The government anticipates that most small and medium-sized ISPs and, possibly, the mobile networks would fall under the threshold. However, this exemption would not be a one-off exercise and the qualifying period would be a rolling one (for example, "x" number of CIRs received in a rolling 3 month period). ISPs would need to ensure online infringement of copyright remained at a low level or else face the prospect of passing the qualifying threshold. Once in scope, ISPs would have to comply with the obligations and to continue to do so even if the number of CIRs later fell below the threshold.
52. In order to ensure that any industry code covered all the necessary areas and to a sufficient standard, OFCOM's approval would be needed before the code could come into force. The Secretary of State's consent to the approval would be required.
53. Before approving a code, OFCOM must carry out consultation. Under section 124C of the 2003 Act and section 124E of that Act (which is inserted by section 7), OFCOM would also need to satisfy themselves that the code was objectively justifiable, proportionate and transparent.

Section 6: Initial obligations code by OFCOM in the absence of an approved code

54. **Section 6** inserts new section 124D in the 2003 Act. The new section provides for the making by OFCOM of a code regulating the initial obligations if there is no industry code. The government hopes industry can devise a satisfactory code which OFCOM approves. However, if that does not happen, OFCOM must develop a code themselves for adoption by order. It is possible that stakeholders may be able to reach agreement on parts of the code, which OFCOM can then consider, and, if appropriate, include as part of OFCOM's code. Again, the consent of the Secretary of State would be required for the making of the code.

Section 7: Contents of the initial obligations code

55. **Section 7** inserts new section 124E in the 2003 Act. This sets out what the code underpinning the initial obligations (whether an industry code or OFCOM's own code) must contain. The reason for including the underpinning material in a code, rather than

directly in the 2003 Act, is that it is likely to be detailed and to have to be adapted and refined over time.

56. The code must set out the process by which the initial obligations will operate and the procedures that copyright owners and ISPs must follow in relation to them. It must set out the criteria, evidence and standards of evidence required in a CIR and the required format and content of a notification letter sent to a subscriber. It must not permit any CIR more than 12 months old to be taken into account for the purposes of a notification.
57. The code must also set the threshold applying for the purposes of determining who is a “relevant subscriber” under section 124B (and may therefore be the subject of a copyright infringement list). CIRs which are more than 12 months old must not be taken into account to determine whether the threshold is met and a copyright infringement list under section 124B must not take into account any such CIR.
58. The code must also provide for OFCOM to administer the code and to enforce it in the event of a failure to comply with the code, and it must meet the requirements concerning subscriber appeals (as set out in new section 124K of the 2003 Act, inserted by section 13).

Section 8: Progress reports

59. **Section 8** inserts new section 124F in the 2003 Act. Section 124F places an obligation on OFCOM to prepare full reports (every 12 months) and, subject to any direction by the Secretary of State that they are no longer required, interim reports (every 3 months) about the infringement of copyright by subscribers to internet access services. Each report must be sent to the Secretary of State as soon as practicable after the end of the period for which is prepared. OFCOM must publish their reports but may exclude information they consider they could refuse to disclose under the Freedom of Information Act 2000.
60. These reports are intended to help the Secretary of State to monitor trends in online copyright infringement and to ascertain the effectiveness of the obligations on ISPs. As part of the reports OFCOM are, for the first time, required to produce assessments of the level of online infringement of copyright. The reports must also take account of various factors which might affect the level of online copyright infringement, such as the steps taken by copyright owners to enable subscribers to obtain lawful access to copyright works, and the extent to which copyright owners are making CIRs and following up with legal action against subscribers. They are a source of information for the Secretary of State to take into account when taking decisions about whether to impose additional obligations on ISPs.

Section 9: Obligations to limit internet access: assessment and preparation

61. New section 124G of the 2003 Act, inserted by section 9, confers a power on the Secretary of State to direct OFCOM to assess whether ISPs should be obliged to take technical measures against certain subscribers, or direct OFCOM to take steps to prepare for technical obligations. In particular, OFCOM may be required to carry out a consultation or assess the likely efficacy of different kinds of technical measure, and to report back to the Secretary of State. Technology used for the purposes of online infringement of copyright is changing fast and it is not possible at the time of enactment to know which technical measures would be effective. OFCOM must publish their reports under this section but may exclude information they consider they could refuse to disclose under the Freedom of Information Act 2000.
62. The government’s aim is for the initial obligations in new sections 124A and 124B to significantly reduce online infringement of copyright. However, in case the initial obligations prove not as effective as expected, new section 124H gives the Secretary of State the power to introduce further obligations, should that prove appropriate.

63. If technical obligations are imposed, OFCOM is required to set out supporting provision in a technical obligations code under section 124I (which is inserted by section 11).

Section 10: Obligations to limit internet access

64. New section 124H of the 2003 Act is inserted by section 10 and gives the Secretary of State power to order ISPs to impose technical measures on internet access service subscribers meeting certain criteria. This power can only be used if the initial obligations code has been in force for at least 12 months, and OFCOM have assessed whether technical obligations should be imposed on ISPs.
65. A technical measure may only be applied against a “relevant subscriber”, that is a subscriber who has been linked to sufficient CIRs to make them eligible for inclusion in a copyright infringement list.
66. Proposals for orders under new section 124H are subject to a 60 day period of scrutiny and orders are subject to approval by both Houses of Parliament. Subsections (5) to (10) set out the procedure. In particular they require the laying before Parliament of a proposal in the form of a draft order, accompanied by a document that explains the proposal. There is then a period of 60 days during which the order may not be laid. When preparing the order the Secretary of State must have regard to any representations that have been made during that 60 day period, and to any recommendations of a committee of either House of Parliament charged with reporting on the draft order. When laying the order the Secretary of State must also lay a document that explains any changes made to the proposal that was laid at the start of the 60 day period.

Section 11: Code by OFCOM about obligations to limit internet access

67. If the Secretary of State makes an order under new section 124H of the 2003 Act requiring ISPs to take technical measures against subscribers, OFCOM is under an obligation to adopt (by order) a code underpinning the technical obligations. This is provided for in new section 124I of the 2003 Act, inserted by section 11.
68. Section 124I sets out the procedure for the making by OFCOM of the code on technical obligations. It also provides that the Secretary of State’s approval of the code is required before it can be made, and specifies that the statutory instrument containing the OFCOM order is requires the approval of both Houses of Parliament.

Section 12: Contents of code about obligations to limit internet access

69. **Section 12** inserts new section 124J in the 2003 Act. Section 124J sets out a list of matters which are to be included in the technical obligations code. Thus the code must, for example, include provision in relation to enforcement and meet the requirements concerning subscriber appeals (as set out in new section 124K of the 2003 Act, inserted by section 13). The person hearing appeals from subscribers must be independent (see new section 124K(2)(c)), and OFCOM may set up a body for that purpose (see new sections 124D(5)(e) and 124I(3)).
70. The government envisages that the code would also set out the process by which a technical measure would be taken, and the information that would have to be sent to a subscriber facing such a measure. It would also address how any costs might be apportioned, and set out the dispute mechanism in the event of disagreement between an ISP and a copyright owner.

Section 13: Subscriber appeals

71. **Section 13** inserts new section 124K in the 2003 Act. Section 124K sets out how the mechanism for subscriber appeals is to work. It requires that the initial obligations code and any technical obligations code provide a route for appeals and sets out grounds for appeal. It also requires that the codes must provide for an appeal to succeed unless the

copyright owner or ISP shows, in relation to each relevant CIR, that there has been an infringement of copyright and that this has been correctly linked to the subscriber's internet account. A subscriber appeal must also succeed where the subscriber shows that the infringement was not carried out by the subscriber and that the subscriber had taken reasonable steps to prevent an infringement.

72. Where an appeal is successful, the codes must allow compensation to be paid to the subscriber and also any reasonable costs.
73. In the event of technical measures being introduced, the person hearing subscriber appeals must be able to confirm, overturn or modify the imposition of a technical measure, including in cases where the appeal is unsuccessful but there are exceptional circumstances. The code must also provide for an appeal from the first appeal body's decision to the First-tier Tribunal.
74. Finally, the code must ensure that no technical measure is imposed until the appeals process has been exhausted, or the subscriber has decided not to proceed further with an appeal, or the time limit for appeals has expired.

Section 14: Enforcement of obligations

75. **Section 14** inserts new section 124L in the 2003 Act. Section 124L sets out the penalties which may be imposed on an ISP for the contravention of the initial obligations or obligations to impose technical measures, or on an ISP or a copyright owner for a contravention of the obligation to provide assistance to OFCOM under section new 124G of the 2003 Act.
76. The maximum penalty is specified as the sum of £250,000. However, the Secretary of State has a power to increase this amount by order. The order would require the approval of both Houses of Parliament.

Section 15: Sharing of costs

77. The initial obligations and any later technical obligations will give rise to costs. These will include the cost to ISPs of processing copyright infringement reports and issuing subscriber notifications, the costs to ISPs associated with the imposition of any technical measures, OFCOM's costs in approving or preparing the codes, the cost of enforcing them, and the funding of any subscriber appeals to an independent appeals body or the First-tier Tribunal.
78. New section 124M of the 2003 Act, inserted by section 15, confers a power on the Secretary of State to specify by order provision which must be included in the codes and which sets out how costs are to be apportioned between copyright owners, ISPs and, in the case of subscriber appeals, the subscriber concerned. The order must be approved by both Houses of Parliament. The costs are those incurred under the copyright infringement provisions. The purpose of the section is to help ensure that the parties carry out their obligations in an efficient and effective manner and that both ISPs and copyright owners have economic incentives to take action through commercial agreements to reduce online infringement of copyright.
79. The government believes that most of the costs of subscriber appeals to an independent person determining appeals or to the First-tier Tribunal should be funded by industry, so that a subscriber does not face significant costs in making an appeal.

Section 17: Power to make provision about injunctions preventing access to locations on the internet

80. **Section 17** provides a power for the Secretary of State to bring forward regulations about the granting by courts of injunctions requiring service providers to block access to sites, for the purpose of preventing online infringement of copyright. "Service provider" has the same meaning as in section 97A of the Copyright, Designs and Patents Act

*These notes refer to the Digital Economy Act 2010
(c.24) which received Royal Assent on 8 April 2010*

1988 (“the 1988 Act”). A service provider is anyone providing an information society service. An information society service is broadly defined as any service normally provided for remuneration at a distance by means of electronic equipment for the processing (including digital compression) and storage of data and at the request of a recipient of the service (see section 97A(3) of the 1988 Act and regulation 2 of the [Electronic Commerce \(EC Directive\) Regulations 2002 \(S.I. 2002/2013\)](#)). Examples of these include internet service providers, and providers of websites, such as internet storage facilities.

81. Before making such regulations the Secretary of State must be satisfied that online copyright infringement is having a serious adverse effect on businesses or consumers and that making regulations would be a proportionate way to address that effect (see *subsection (3)*). The Secretary of State may not make regulations if to do so would prejudice national security or the detection or prevention of crime.
82. The regulations have to provide that a court may only grant an injunction if the internet location is, or is likely to be, used to host or access a substantial amount of material in infringement of copyright.
83. The regulations have to provide that a court should take into account the extent to which the operator of the site and the service provider have taken steps to prevent infringement of copyright in the material. The regulations must require the court to consider the extent to which the copyright owner had made efforts to facilitate legal access to content. They must also require the court to consider the effect on legitimate uses or users of the online location and the importance of freedom of expression.
84. The regulations must require the court to take into account any representations by a Minister of the Crown.
85. The regulations must require the service provider and operators of the location in question to be given notice of an application for an injunction. They may also provide that a court should not make a cost order against a service provider.
86. The regulations must be made by statutory instrument in accordance with the procedure in sections 17(11) and 18. The instrument must be approved by both Houses of Parliament.

Section 18 Consultation and Parliamentary scrutiny

87. This section sets out the procedure for approval of a statutory instrument under section 17. In particular it requires a consultation, followed by the laying before Parliament of a proposal in the form of draft regulations, accompanied by a document that explains the proposal and the reasons why the Secretary of State is satisfied that the tests in subsection (3) of section 17 have been met. There is then a period of 60 days during which the regulations may not be laid. When preparing the regulations the Secretary of State must have regard to any representations that have been made during that 60 day period, and to any recommendations of a committee of either House of Parliament charged with reporting on the draft regulations. When laying the regulations the Secretary of State must also lay a document that explains any changes made to the proposal that was laid at the start of the 60 day period.