



House of Lords  
House of Commons  
Joint Committee on  
Human Rights

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# Legislative Scrutiny: Digital Economy Bill

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**Fifth Report of Session 2009-10**

*Report, together with formal minutes and  
written evidence*

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## Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders made under Section 10 of and laid under Schedule 2 to the Human Rights Act 1998; and in respect of draft remedial orders and remedial orders, whether the special attention of the House should be drawn to them on any of the grounds specified in Standing Order No. 73 (Lords)/151 (Commons) (Statutory Instruments (Joint Committee)).

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### Footnotes

In the footnotes of this Report, references to oral evidence are indicated by 'Q' followed by the question number. References to written evidence are indicated by the page number as in 'Ev 12'.

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## Summary

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The Digital Economy Bill has been introduced to update the regulation of the communications sector. Due to time-constraints we focus on a single issue in the Bill: illegal file-sharing.

### ***Copyright infringement reports***

The Bill establishes a mechanism whereby holders of copyright will be able to issue a ‘copyright infringement report’ to an ISP where it appears that the ISP’s service has been used by an account holder to infringe copyright. ISPs will be required to notify account holders when a copyright infringement report is received in connection with their account. The ISPs will also be required to maintain a list of account holders who have been the subject of such reports.

We consider that it is unlikely that these proposals alone will lead to a significant risk of a breach of individual internet users’ right to respect for privacy, their right to freedom of expression or their right to respect for their property rights (Articles 8, 10, Article 1, Protocol 1 ECHR). However, we call on the Government to provide a further explanation of why they consider their proposals are proportionate.

### ***Technical measures***

The Bill provides for the Secretary of State to have the power to require ISPs to take “technical measures” in respect of account holders who have been the subject of copyright infringement reports. The scope of the measures will be defined in secondary legislation and could be wide-ranging.

We do not believe that such a skeletal approach to powers which engage human rights is appropriate. There is potential for these powers to be applied in a disproportionate manner which could lead to a breach of internet users’ rights to respect for correspondence and freedom of expression. We set out a list of points that the Government should clarify in order to reduce the risk that these proposals could operate in a manner which may be incompatible with the Convention.

### ***Right to a fair hearing***

The Bill provides for provisions for appeals in codes. There is little detail about the right to appeal in the case of copyright infringement reports or decisions about the inclusion of certain individuals’ information on copyright infringement lists. We consider that statutory provision for a right to appeal to an independent body against inclusion on any infringement list would be a human rights enhancing measure.

Without a clear picture of the criteria for the imposition of technical measures it is difficult to reach a final conclusion on the fairness of the process for the imposition of technical measures. This is a further argument against the skeletal nature of the technical measures clauses. We ask for further information about the quality of evidence to be provided and the standard of proof to be applied to be provided on the face of the Bill.

### ***Reserve powers***

Clause 17 of the Bill provides the Secretary of State with the power to amend the Copyright, Designs and Patents Act 1988 by secondary legislation. The broad nature of this power has been the subject of much criticism. In correspondence with us, the Secretary of State explained that the Government intended to introduce amendments to limit the power in Clause 17 and to introduce a 'super-affirmative' procedure. The Government amendments would limit the circumstances in which the Government could use their powers to amend the Act by secondary legislation and would provide a system for enhanced parliamentary scrutiny.

Despite the proposed amendments we are concerned that Clause 17 remains overly broad and that parliamentary scrutiny may remain inadequate. We call for a series of clarifications to address these concerns.

# 1 Bill drawn to the special attention of both Houses: Digital Economy Bill

Date introduced to first House	19 November 2009
Date introduced to second House	
Current Bill Number	HL Bill 1
Previous Reports	None

## Background

1.1 This is a Government bill introduced in the House of Lords on 19 November 2009. The Bill received its Second Reading on 2 December 2009. It began its Committee Stage in the House of Lords on 6 January 2009. The timetable for Report and Third Reading has not yet been set. The Secretary of State for Business, Innovation and Skills, the Rt Hon Lord Mandelson, has made a statement of compatibility under s. 19(1)(a) of the Human Rights Act 1998.

1.2 We are grateful for the human rights memoranda prepared by the Bill Team and for the time taken by members of that team to meet with our staff. We wrote to the Secretary of State on 17 December 2009 asking a number of questions about certain aspects of the Bill with human rights implications or implications for the way in which we conduct our scrutiny of laws and policies for human rights compatibility. We received his response, for which we are grateful, on 14 January 2010. The correspondence is published with this Report.<sup>1</sup>

## Purposes and effect of the Bill

1.3 The main purpose of the Bill is to update the regulation of the communications sector. It introduces a number of measures relating to digital television and radio, including updating of licensing and regulation of video recordings and video games and measures relating to online copyright infringement. It also makes provision for public lending rights to extend to new media. The Bill follows the publication of the Digital Britain White Paper, *Digital Britain: Final Report*, in June 2009.<sup>2</sup>

## Explanatory Notes and Human Rights Memoranda

1.4 The Explanatory Notes to the Bill provide a basic explanation of the Government's view that the Bill is compatible with the ECHR.<sup>3</sup> The supplementary Human Rights Memorandum is relatively detailed and accurately identifies a number of relevant human rights issues. The Bill Team has positively engaged with the JCHR staff and has been positive about the process of scrutiny. We do have some criticisms of the substance of the analysis in the Memorandum, which adopts some practices which we have previously criticised. For example, on the issue of online copyright infringement: the Memorandum does not contain much detail in its analysis of a number of rights; inaccurately identifies the proportionality exercise required; and fails to consider the arguments for justification

1 Written evidence, pp 29-37

2 Department for Culture Media and Sport, *Digital Britain: Final Report*, June 2009, Cm 7650

3 HL Bill 1 (2009-10), EN, paras 228 - 264.

in any detail.<sup>4</sup> In addition, it relies on the Section 6 HRA 1998 duty on both the Secretary of State and OFCOM to argue that certain delegated powers are appropriate and will not be exercised in a manner which breaches Convention rights.<sup>5</sup>

**1.5 We are grateful for the human rights memorandum provided by the Government and for the further prompt assistance of the Bill Team. However, although the memorandum provided by the Departments on this Bill is helpful, and the information relatively full, we generally invite Government Departments to take a more proactive approach to justification for proposed interferences with individual rights. We reiterate our earlier recommendation that Departments should not rely on Section 6 of the Human Rights Act 1998 to justify their view that broad discretionary powers in a Bill or in secondary legislation will operate in a way which is compatible with human rights. Where necessary, relevant safeguards should be provided on the face of the Bill to ensure that delegated powers are adequately defined to afford legal certainty and ensure that Convention rights will in practice be protected.**

## Significant human rights issues

1.6 In the light of the truncated parliamentary timetable for this session, and the higher significance threshold we are therefore applying to our legislative scrutiny work,<sup>6</sup> we focus on a single issue in the Bill: illegal file-sharing. Our decision to prioritise this issue does not mean that we necessarily agree with the Government analysis on any other human rights issues identified in the Explanatory Notes or Human Rights Memoranda, simply that in light of the limited time to inform parliamentary debate we treat this issue as a high priority.

1.7 The Bill contains provisions to combat illegal file-sharing and other forms of online copyright infringement, via a two-stage process: first, by requiring internet service providers (ISPs) to maintain a list of accounts which copyright holders suspect may be infringing copyright; and second, through delegated powers to introduce technical measures, such as disconnection. These proposals have been subject to significant public debate about their implications for the rights of internet users to privacy and freedom of expression and the rights of copyright holders to respect for their possessions (their intellectual property rights). We have received a range of submissions, with arguments both in favour of and against the Government's proposals. We are grateful to the individuals and organisations who responded to our call for evidence on our legislative scrutiny priorities for this session, including on this issue. We publish some of those submissions with this Report.<sup>7</sup> This evidence largely focuses on the question of whether the measures proposed are necessary and proportionate to any interference with the right to respect for private life and the right to freedom of expression caused by the proposals.

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4 See paras 10 – 14; para 20. We previously criticised this approach in, for example, Ninth Report of Session 2008-09, *Borders, Citizenship and Immigration Bill*, HL 62, HC 375, para 1.7

5 See for example, paras 6 and 20. We previously criticised this approach in, for example, Twentieth Report of 2005-06, *Legislative Scrutiny: Eleventh Progress Report*, para 3.7.

6 Third Report of 2009-10, *Legislative Scrutiny: Financial Services Bill and Pre-Budget Report*, HL 21/HC 184, para. 2.1.

7 Some submissions we received referred to a number of issues or priorities outlined in our call for evidence on our legislative scrutiny priorities. A number of these submissions will be published shortly with our next legislative scrutiny report.



1.8 The development of the law in this area has attracted a significant amount of attention in respect of this balancing exercise across Europe. During 2009, agreed amendments to the proposals for a new EU Telecoms Package stressed that:

[T]he Internet is essential for education and the practical exercise of freedom of expression and access to information, any restriction imposed on the exercise of these fundamental rights should be in accordance with the European Convention of Human Rights and Fundamental Freedoms.

Measures taken by Member States regarding end-users' access to or use of services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms and general principles of Community law. Any of these measures regarding end-user's access to or use of services and applications through electronic communications networks liable to restrict those fundamental rights or freedoms may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and their implementation shall be subject to adequate procedural safeguards in conformity with the European Convention on Human Rights and Fundamental Freedoms [...]

Accordingly, these measures may only be taken with due respect for the principle of the presumption of innocence and the right to privacy. A prior fair and impartial procedure shall be guaranteed, including the right to be heard of the person or persons concerned...The right to an effective and timely judicial review shall be guaranteed.<sup>8</sup>

1.9 There are relatively few cases in the jurisprudence of the European Court of Human Rights dealing with the regulation of activity on the internet, although these cases are increasing.<sup>9</sup> The Court has stressed that the rights associated with internet usage are not absolute:

Although freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives such as the prevention and disorder of crime or the protection of the rights and freedoms of others.<sup>10</sup>

1.10 On the other hand, our domestic courts have held that in some limited circumstances, the specific provisions of existing copyright law must be read to give effect to Convention rights, specifically the right to freedom of expression.<sup>11</sup>

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8 Article 1(3)(a), Revised EU Framework Directive. See EUROPA Press Release, EU Telecoms Reform, Memo/09/568, 18 December 2009.

9 See for example, recent consideration of the impact of the internet on libel and the second publication rule: *Times Newspapers (No 1 & 2) v United Kingdom*, App No 3003/02

10 *KU v Finland* [2009] 48 EHRR 52. This case involved the need to balance the privacy rights of a child whose personal details were posted online by a third party on a dating website, inviting contacts for sexual activity. The child's parents sought disclosure of the third party's personal details from the ISP in order to pursue criminal proceedings. The Court held that there had been a breach of Article 8 ECHR as Finland had failed to provide for a mechanism which would allow for disclosure.

11 *Ashdown v Telegraph Group* [2001] EWCA Civ 1142.

1.11 We consider four significant human rights issues, below:

- Compatibility of the copyright infringement report proposals with the rights of service users to respect for privacy and freedom of expression (Clauses 4 – 8, Articles 8 and 10 ECHR);
- Compatibility of the proposal to allow the Secretary of State to introduce further sanctions, including termination or suspension of an internet account, with the rights of service users to respect for privacy and freedom of expression (Clauses 9 – 16, Articles 8 and 10 ECHR);
- Whether both sets of proposals are compatible with the right of service users to a fair hearing (as guaranteed by both the common law and Article 6 ECHR); and
- Whether the proposal to allow the Secretary of State a broad residual power to amend copyright law allows adequate opportunity for parliamentarians to scrutinise his amendments for compatibility with the right to respect for private life and freedom of expression and the right of copyright holders to respect for their enjoyment of their intellectual property (Clause 17, Articles 8, 10 and Article 1 Protocol 1 ECHR).

### ***(1) Copyright infringement reports (Clauses 4 – 8)***

1.12 The Bill would establish a mechanism whereby holders of copyright will be able to issue a copyright infringement report to an ISP where it appears that their internet service has been used by an individual account holder to infringe their copyright ('copyright infringement reports'). ISPs will then be required to issue notifications to internet users who copyright holders suspect are infringing their rights, to let them know that they have received a copyright infringement report relating to their account.<sup>12</sup> ISPs will be required to maintain a list of users who have been issued reports and the number and timing of reports issued.<sup>13</sup> Copyright holders will be able to obtain the list of those users who are recorded from ISPs. The Explanatory Notes explain that copyright holders may then use this information to make an application to the court for an order requiring the ISP to reveal the subscriber personal details. They will then be able to pursue ordinary civil proceedings against that individual for breach of existing copyright law.<sup>14</sup>

1.13 The precise circumstances when and how a copyright infringement report must be issued and the information which it may contain will be governed by an 'initial obligations code'. The Explanatory Notes explain that the code will either be an industry code or will be made by OFCOM. The Bill provides for minimum information to be provided and criteria to be included in the code. This minimum information and criteria include:

- Information about copyright infringement reports, including: the evidence that must be included; the mechanism which must be used for obtaining that evidence; and the form of the report;

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12 Clause 4

13 Clause 5

14 HL Bill 1 (2009-10), EN, para 39.

- Notification requirements for subscribers, including: the mechanism for identifying the subscriber; reports which the ISP must inform the subscriber of; and the requirements and means of notification;
- Enforcement information, including that the Code will be administered by OFCOM or another person (who must be sufficiently independent of copyright owners and ISPs) and that another person will have the function of determining appeals (that person must be sufficiently independent of ISPs, copyright holders and OFCOM). This right to appeal includes: an appeal in respect of the making of a report; identification of the subscriber as a person in respect of whom a report has been made; and retention of the details of an alleged infringement or inclusion of those details on a copyright infringement list).
- A requirement that the code should not be discriminatory, and that it should be objectively justifiable and proportionate in relation to what the code intends to achieve.<sup>15</sup>

1.14 A draft ‘outline’ obligations code was published for discussion during Committee Stage in the House of Lords for discussion. The Government accepts that this outline can be of limited value to the debate, given that the code will be made by either OFCOM or industry agreement. The purpose of the outline is to inform parliamentarians of minimum the Government considers should be covered by the code and to provide a baseline for speedy debate by industry, in the interests of ensuring that these provisions come into force as soon as possible after the Bill is passed.<sup>16</sup>

1.15 The Explanatory Notes accompanying the Bill explain that these provisions may potentially engage both the right to private life and the right to peaceful enjoyment of possessions (Articles 8 and Article 1, Protocol 1 ECHR).<sup>17</sup> The Government Memorandum takes a different view, arguing that these provisions do not engage any rights “as the procedure merely constitutes a deterrent and does not affect subscribers’ rights at all, since they will continue to receive the services they contracted for from ISPs”.<sup>18</sup> We wrote to the Minister to ask for further information about the Government’s view. Although we asked about the rights of both service users and ISPs, we focus here on the rights of individual users, as the principal concerns raised in debates and the evidence we received relate to the rights of individual internet users. In his response, the Minister confirmed the Government’s view that these proposals do not engage Convention rights and argued:

- The sending of notifications and the keeping of lists in themselves do not affect the level of service provided by the ISP and received by the subscriber.
- The list will not reveal names and addresses of the infringing subscribers, although the list will associate copyright infringement reports with an individual subscriber. However, in order for any third party to see any personal information relating to

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15 Clause 8

16 Department for Business, Innovation and Skills, *Infringement of Copyright: Outline of Initial Obligations Code*, January 2010. See also Cover Note to the Outline Code, January 2010.

17 HL Bill 1 (2009-10), EN, para 233

18 Written evidence, p 72

the subscriber, an application would need to be made to the court for an order requiring the ISP to disclose that information.<sup>19</sup>

- The number of reports relating to a subscriber will have to have reached any threshold set out in the code before an ISP is subject to the obligations: “The Government is not requiring ISPs to monitor internet usage by the subscribers or to take any action against an individual subscriber under the obligations other than sending him notifications.”

1.16 The Minister goes on to explain that if these rights were engaged, the Government’s view is that any interference would be fully justified:

Articles 8 and 10 are qualified rights and it is acceptable under the Convention to interfere with these rights if it is in accordance with the law and it is necessary in a democratic society....the receipt of a notification does not impede the subscriber’s access to the internet in any way. Article 1 Protocol 1 is also a qualified right and it is acceptable under the Convention to interfere with this right in the public interest and subject to the conditions provided for by law. Article 1 provides that the right of the State to enforce such laws as it deems necessary to control the use of property is not impaired in any way. The sending of notifications is in the public interest. Copyright holders should be able to protect their copyright and enforce their rights. In the case of online copyright infringement, the involvement of ISPs is needed for them to do so.

1.17 Broadly, we accept the Government’s analysis. In our view, it is likely that these proposals will not engage Article 10, since the practical impact on the service user’s right to continue to access the internet service he is using is not limited. Although it may be argued that the proposals could have a chilling effect on those who wish to use internet facilities, in our view, this effect is likely to be limited. In so far as the proposals may impose a condition on the way in which ISPs will be required to fulfil their contractual obligations to a service user, this may place a limit on the rights and it could be argued that they impact upon the service user’s possession of a contractual right (which may be protected by Article 1, Protocol 1 ECHR). Again, however, we consider that this impact will be limited in the light of the limited practical effect on the users’ rights to access the internet services which they have contracted. However, we note that the Government analysis of the proportionality exercise required by Article 1, Protocol 1 ECHR is inaccurate. While a greater deal of discretion is granted to States in relation to property rights, measures which restrict property rights must be justified by the Government, by showing that the measures concerned are (a) in the public interest and (b) that the measures strike a fair balance between the rights of the individual and the public interest. Although the Government has greater scope in respect of measures of taxation – where its activities need only be “not

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19 The Explanatory Notes explain that in order to secure personal information, the copyright holder will still have to seek a court order for disclosure, as they do now, following the Norwich Pharmacal process. This is named after the first case where the principles were identified (See *Norwich Pharmacal 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 alleged wrongdoing, whether innocently or not, but who is not likely to be party to the proceedings. See EN, para 39.

devoid of reasonable foundation” – it must still show the justification for its activities (as such, it is wrong to say that Government discretion “is not impaired in any way”).<sup>20</sup>

1.18 We consider that there is a stronger case that these provisions may engage the right to respect for private life (Article 8 ECHR) than has been acknowledged by the Government. Although the proposals relate only to a mechanism for the copyright holder to issue reports of their suspicions that their rights have been breached, they do impose a duty on ISPs to collect information about those suspicions. Although this information relates initially to an IP address, the purpose of these proposals is to require the ISP to associate repeat suspicions with a particular account. In effect, the Government will require an ISP to hold information about allegations of unlawful activity against a particular account holder. For obvious contractual reasons, the ISP will also hold the personal details of the account holder, including name and address. In so far as this information is held together, and could allow individuals to ascertain that an individual account holder is suspected of unlawful activity, in our view it is possible that the right to respect for private life could be engaged.<sup>21</sup> However, in the light of the safeguards provided, including the requirement that no personal information about the account holder may be revealed without an order of the court requiring disclosure and the requirement that any information collated will be subject to the ordinary application of the Data Protection Act 1998, we consider that the impact of the proposals, and therefore the extent of any interference with the right to respect for private life, will be limited.

1.19 Against this background, we consider the justification for these measures proposed by the Minister. We disagree with some arguments in the evidence which we received, that copyrights are not protected by Article 1, Protocol 1 ECHR.<sup>22</sup> It is clear from the case-law of the European Court of Human Rights and the European Court of Justice (interpreting the ECHR and the general principles of community law) that the right to respect for property includes intellectual property.<sup>23</sup> It is also expressly recognised as a right in the EU Charter of Fundamental Rights.<sup>24</sup> It is clear that steps taken to protect these rights pursue a ‘legitimate aim’ for the purposes of justifying an interference with Convention rights. The real question in balancing the competing rights concerned is whether the interference with the right to private life is necessary and proportionate to the Government’s objective of protecting the rights of copyright holders. This requires an analysis of the impact on the privacy of the individuals concerned, the degree of harm posed to copyright holders, the availability of other measures of protection and the ability of the measures proposed to meet their goal.

1.20 The Minister told us that existing rules for civil and criminal enforcement should be supplemented for two reasons: (a) for technical reasons relating to shifting IP addresses, “it is difficult for copyright owners to effectively take action against infringers”; and (b) “copyright infringement through use of peer-to-peer is a mass activity undertaken by

20 Third Report of 2009-10, *Legislative Scrutiny: Financial Services Bill and Pre-Budget Report*, HL 21/HC 184, para. 1.13 – 1.16

21 See *S & Marper v United Kingdom*, App No 30566/04, 4 December 2008, where the court outlines its approach to the collection and retention of personal information on a Government database. See also *Leander v Sweden* (1987) 9 EHRR 433; *Z v Finland* (1997) 25 EHRR 371.

22 See for example, Paul Cowling, written evidence, p 67

23 See *Melnychuk v Ukraine* (2006) 42 EHRR 42; *Laserdisken v Kulturministeriet* C-479/04, Judgment 12 September 2006; *Promusicae v Telefonica de Espana* C-275/06, OJ C64/9, 2008.

24 Article 17(2).

significant numbers of people; however each individual infringement is typically of low value. It is simply not practical or economic for copyright owners to undertake a mass programme of infringement identification, apply for a mass of court orders and take mass civil action given that the majority of individual cases will only represent a single low value judgment<sup>25</sup>. In effect, the Government considers that the technical difficulties associated with attaching an individual account to multiple unlawful activities undermine the value of traditional civil and criminal remedies for the rights user.

1.21 The Government has explained that it understands that copyright holders only intend to take infringement action against those individuals who have been subject to a significant number of copyright infringement notices.<sup>26</sup> However, there is nothing on the face of the Bill which translates this intention into a legal limit on the circumstances in which an ISP will be required to disclose a copyright infringement list. The code of obligations will indicate the number of reports necessary before a list is disclosed but there is no limit on how few or how many must be collated before civil action is facilitated by the disclosure of the list. The outline code suggests that the list will not be disclosed until after 30 reports have been received, but does not give an indication of the appropriate timeframe during which these reports should be received (for example 30 reports over six months may show a different level of suspicion than 30 reports over 10 years). This figure can only provide an indication of the figure that the Government considers appropriate: it does not limit in any way the scope of the power to require disclosure.

1.22 Given that the impact on the rights of the individual user is limited and accompanied by safeguards, we accept in principle the Government's argument that these proposals are necessary to allow copyright holders to pursue effective, existing civil remedies. However, we consider that the measure would be more proportionate if the mechanism for the disclosure of copyright infringement lists were limited to those circumstances when a high number of copyright infringement reports have been received. This would ensure that these proposals were more appropriately targeted to meet the purpose identified by the Government and the justification based on the need to supplement the ordinary civil and criminal remedies open to copyright holders. If copyright holders were capable of using this regime to identify users on the basis of a single alleged infringement linked to one address, the Government's justification for the involvement of ISPs in the ordinary civil process falls away.

**1.23 We consider that despite the lack of information on the face of the Bill, it is unlikely that the operation of these proposals alone will lead to a significant risk of a breach of individual internet users' right to respect for privacy, their right to freedom of expression or their right to respect for their property rights (Articles 8, 10, Article 1, Protocol 1 ECHR). The limited impact on these rights by the operation of the copyright infringement reporting mechanism proposed is likely to be justifiable. However, in the light of the concerns raised by internet users and human rights organisations, we recommend that the Government provide a further explanation of its views on why these proposals are proportionate, including by outlining the harm currently suffered by individual copyright holders and the wider public interest in**

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25 Written evidence, p 30

26 Ibid.

**promoting creativity, and why that harm cannot be appropriately addressed by existing civil and criminal penalties for copyright infringement.**

**1.24 In order to consider how these proposals might operate in practice and to assess the proportionality of these measures, we have had to rely on the contents of the Government White Paper, statements during debate and other documents prepared by the Government Bill Team in order to envisage how these proposals might operate. In the light of the fact that the copyright infringement report and any subsequent list may form the basis for the imposition of technical measures which will have a more significant impact, we are disappointed at the lack of detail about the process provided on the face of the Bill.** We return to the difficulties we have experienced in assessing the compatibility of these skeleton proposals, below.

## **(2) Technical measures (Clauses 9 – 16)**

1.25 The Bill provides for the Secretary of State to have the power to require ISPs to take “technical measures” in respect of their subscribers. The Explanatory Notes explain that these measures may include limiting access of subscribers and restricting broadband width. These measures will be governed by a “technical obligations code”, which will provide the detail of the enforcement of technical measures and the appeals system for internet subscribers.

1.26 There is very little detail about the scope of this power on the face of the Bill. The entire technical measures mechanism will be created by a combination of secondary legislation and the “technical obligations code”. A number of key features are undefined or extremely broad:

- Liberty pointed out that there was nothing in the Bill to limit the Secretary of State’s power to copyright infringement cases, and that this power could be used by the State to limit access to politically contentious internet sites.<sup>27</sup> The Secretary of State has since proposed an amendment to limit his power for the purposes of protecting copyright.<sup>28</sup>
- The criteria for making a technical measure will be defined by the Secretary of State.<sup>29</sup> Given that these measures will introduce alternative sanctions to the ordinary civil and criminal process, the scope of the criteria for their imposition will be extremely important.
- Technical measures include any measure which limits the speed or other capacity of a service user, prevents a service user from accessing particular material, suspends the service provided to a subscriber or limits the service provided to the subscriber in any other way. There is nothing in the Bill which would permit the Secretary of State to prevent an individual seeking an alternative service with another ISP. However these measures are extremely broad. For example, although the Government explains that a technical measure may include ‘temporary

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27 Liberty, Second Reading Briefing on the Digital Economy Bill, November 2009.

28 Written evidence, p 30

29 Clause 11

suspension’, there is nothing on the face of the Bill which clearly limits suspension of an account to a limited time-frame.<sup>30</sup>

- Although the Government intends these proposals to be part of a ‘graduated’ response to copyright infringement, there is nothing on the face of the Bill which requires the Secretary of State to demonstrate that the initial obligations code set out above is inadequate to protect copyright and further administrative provision for technical measures is necessary and proportionate. Although the Secretary of State can direct OFCOM to report on whether technical obligations should be imposed, OFCOM is not required to consider whether technical obligations are necessary or which measures would be proportionate, only whether they will be effective. In any event, the Secretary of State may initiate technical obligations in pursuit of the assessment of OFCOM or *for any other consideration*. As the Bill stands, the Secretary of State could make an order in relation technical measures the day after the coming into force of Clause 11, for any reason he saw fit.<sup>31</sup>

1.27 We wrote to the Minister to ask why it was appropriate for these details to be left to secondary legislation and a statutory code. He explained:

Much of the detail of how the provisions will operate is being left to the codes as this will allow for flexibility. The codes will need to be amended from time to time so that they can stay relevant and effective as time passes and circumstances change.<sup>32</sup>

1.28 On a number of occasions in the past, we have explained our view that such a skeletal approach to powers which engage human rights is not appropriate. There must be adequate detail on the face of the Bill to allow for an assessment of whether the provisions will operate in practice in a way which protects individual rights. If any safeguards are necessary to protect individual rights, these should be on the face of the Bill.<sup>33</sup> **The lack of detail in relation to the technical measures proposals – and in particular, in relation to the scope of technical measures, the criteria for their imposition and the enforcement process – has made our assessment of the compatibility of these proposals with the human rights obligations of the United Kingdom extremely difficult. As we have explained in the past, flexibility is not an appropriate reason for defining a power which engages individual rights without adequate precision to allow for proper parliamentary scrutiny of its proportionality.**

1.29 The Government accepts that the operation of these provisions may interfere with the right to respect for private life, the right to freedom of expression and the right to peaceful possession of property. The Explanatory Notes explain:

The rights are engaged because affecting the ability of the subscriber to access the internet at a given speed or, potentially at all will tend to affect their ability to communicate with others by on-line methods (by e-mail, and through instant

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30 Clause 10. Although the Government have recently provided a valuable reassurance that “suspension” should be given the Collins English Dictionary interpretation, which refers to temporary limitations, there is no limit on renewal of any suspension or any restriction placed on the broad non-exhaustive list in Clause 10, which allows for limits to be applied in “any other way”. See HL Deb, 22 January 2009, Cols 1085 – 1086.

31 New Sections 124G – 124H. Clause 11, New Section 124H(1)(b).

32 Written evidence, p 30.

33 See for example, Twenty-first Report of 2005 -06, *Legislative Scrutiny: Eleventh Progress Report*, HL Paper 211, HC 1216, paras 3.10 – 3.13.



messaging and contributions to internet discussions). This would tend to affect their private and family life in the widest sense, but also Article 10 rights to freedom of expression and information.<sup>34</sup>

1.30 We disagree with the view expressed by some witnesses that these measures do not engage Convention rights.<sup>35</sup> We consider that the Government is right to identify that these measures will engage both Article 8 and Article 10 ECHR. We do not understand why the Government refer to the engagement of Article 8 in “the widest possible sense”. Article 8 ECHR protects private and family life, home and correspondence. We consider that the limitation of access to an individual internet account (and any associated e-mail accounts), has a very direct impact on the right to respect for correspondence.<sup>36</sup> A number of witnesses who wrote to us considered that technical measures could have a broad impact on individual users and their families. Limitation or suspension of an account may affect not only the account holder, but any associated users (children, family members or flatmates).<sup>37</sup> They may use this account not only for leisure purposes but also may require internet access for work or education.<sup>38</sup> Concerns have also been raised that these provisions may have a particular impact on businesses and public authorities who provide wi-fi ‘hotspots’ for communal use.<sup>39</sup>

1.31 On the other hand, other witnesses argued that the impact on the right to respect for private life and the right to freedom of expression would be limited. Technical measures would apply to only one account. Service users would be able to open another account to access the internet, or would be able to access the internet subject only to defined limitations.<sup>40</sup> Some witnesses indicated that warnings would be given of any relevant sanction before the sanction would be imposed. BPI (British Recorded Music Industry) obtained a legal opinion that in principal obligations of this type would not be incompatible with the Convention. That opinion highlighted the “very significant challenges for rights holders in identifying those responsible for infringements of copyright and then in taking action to prevent further infringement”.<sup>41</sup>

1.32 The Explanatory Notes argue that any interference is justified:

Such interference does not render the provisions incompatible with the Convention. The provision represents an acceptable balance between subscribers’ rights and the public interest in the protection of copyright of third parties. Copyright owners have limited methods of protecting their copyright, which may be less effective across national boundaries....By providing for a warning to subscribers that they are

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34 HL Bill 1 (2009-10), EN, para 235

35 See, for example, Alliance Against IP Theft, written evidence, p 41

36 Although the European Court of Human Rights has accepted that availability of alternative formats and means of correspondence will be relevant to the degree of impact measures restricting correspondence will have, and on the question of proportionality, Article 8 remains engaged by steps taken to control the means by which individuals correspond with each other. See for example, *Chester v UK* App No 32783/96, 11 September 1997. In this case, the State had no obligation to provide prisoners with the facility to communicate by telephone when there were existing and adequate facilities for postal correspondence. This case concerned positive duties to secure communication for prisoners, not steps taken by the State to regulate means of correspondence otherwise open to private individuals.

37 See, for example, Action on Rights for Children, written evidence, p.37.

38 Ibid.

39 See for example, HL Deb, 2 December 2009, Cols 781 - 783

40 See, for example, BPI, written evidence, p 44

41 Ibid.

infringing the rights of others and providing them an opportunity to rebut the assumptions underlying that warning before technical measures are taken against them, these provisions strike the appropriate balance between the rights of subscribers and the rights of copyright holders.

1.33 While striking a ‘balance in the public interest’ is an accurate description of the test for justification of infringement of the right to respect for possessions, justification of infringements of the right to freedom of expression and the right to respect for private life and correspondence require a different and more onerous exercise of justification by Government. The Government must show that the proposed interference is prescribed by law and necessary in a democratic society to meet a legitimate aim.<sup>42</sup> In short, the Government must provide evidence that the measures are necessary and proportionate to a legitimate aim. The Government Memorandum accurately identifies that protecting the rights of copyright holders is a legitimate aim. However, neither the Explanatory Notes nor the Memorandum gives a more detailed explanation as to why the Government considers that the proposals are necessary or proportionate given existing civil remedies for copyright holders and the proposals for copyright infringement reports and lists in the Bill.

1.34 In response to our request for further information, the Minister outlined the justification set out above, in relation to initial obligations and added:

The Government hopes that the initial obligations...will be effective but if they are not it needs to be able to take further appropriate action to curtail the activities of persistent infringers who have disregarded the warnings should circumstances demand it.

Technical measures will hinder or deny subscribers access to the internet and their e-mail correspondence so that their right to freedom of expression and private and family life may be affected. No one has a conditional right to access the internet. If a subscriber does not pay the ISP will eventually cut him off. The Government believes that the measures will be an acceptable balance between subscribers’ rights and the public interest in the protection of the interests of copyright owners. The Government considers that this will be legitimate and proportionate action and is necessary for the protection of the rights of copyright owners. The latter have limited methods of protecting copyright and these methods may be less effective across national boundaries than within a single jurisdiction. Infringement over the internet is likely to cross national boundaries. These provisions will enhance the effectiveness of copyright protections.

Copyright owners have to provide evidence of the apparent infringement in a (copyright infringement report) and the code has to set out requirements about the means of obtaining such evidence and the standard of evidence. The notification by the ISP to the subscriber has to include such evidence. Technical measures will only be taken against serious infringers.

1.35 We consider that, in the light of the more serious impact of technical measures on the rights of individual users, as outlined above, it is important for the Government to set out

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42 The language in Articles 8 and 10 ECHR differ slightly, but the test is broadly the same. The Government must show that any interference is necessary and proportionate to meet a legitimate aim.

its justification for these proposals clearly. This view is reinforced by the recent reiteration by the EU that measures to restrict internet access must be compatible with Convention rights and provide adequate protection for due process. We return to the right to a fair hearing, below. Against this background we have a number of concerns about the justification offered by the Government.

1.36 We accept that no individual has a fundamental right to access the internet, *per se*. However, as we have explained above, it is generally accepted that measures taken to limit individual access to internet services by the State will engage Articles 8 and 10 ECHR. We do not agree that a comparison can be drawn with the power of the ISP to terminate services for non-payment, as this involves the exercise of a contractual right which forms the basis for the service provision. This is very different from the State taking positive measures to restrict the basis on which an individual user may access services from an ISP with whom he has an existing service contract and, possibly, from accessing an internet account (and associated e-mail accounts).

1.37 Since the rights outlined above are engaged, the Government has a responsibility to demonstrate its justification for interfering with them. This will include consideration of the seriousness of the impact on the rights of individual service users, the degree of harm suffered by copyright holders and the necessity and proportionality of the measures proposed to protect copyright holders. This assessment will be highly fact sensitive, and without the full details of how technical measures will operate in practice, it is difficult for us to form a view about human rights compliance. As drafted, the Bill authorises the indefinite suspension of an individual account on the basis of the suspicion of a copyright holder that a single infringement of copyright has occurred. That account may be used by the account user and his family for work and education and suspension may limit the ability of family members to access e-mail accounts associated with the service provided by that ISP. It is unclear how technical measures will affect individuals' ability to access an alternative service in practice.

1.38 Looking at the potential interference from this perspective, it appears to us that the Government should be required to provide more detailed justification than it has provided in the Explanatory Notes and the Human Rights Memoranda. As we explain above, this should include evidence of the harm suffered by individual copyright owners and the wider harm to the public interest. It should also aim to demonstrate why the Government considers that additional technical measures – of varying degrees of severity – will be necessary, proportionate and accompanied by adequate safeguards for the rights of individual users. The Government view is that adequate safeguards will apply, because individual copyright holders will provide evidence and will only seek sanctions against “serious infringers”.<sup>43</sup> However neither of these limitations are outlined on the face of the Bill and the standard of evidence expected or the standard of proof to apply has not been clearly explained. **We reiterate our invitation to the Government to provide fuller justification for its proposals.**

**1.39 In our view, it is impossible assess fully whether these proposals will operate in a compatible manner in practice without more detail of the proposed mechanism for technical measures. Because of the lack of detail on the face of the Bill and the limited**

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43 Written evidence, p 34.

foundation for justification provided for the breadth of these proposed powers, we acknowledge the concerns about the potential for these powers to be applied in a disproportionate manner which could lead to a breach of internet users' rights to respect for correspondence and freedom of expression.

1.40 There are a number of issues which could helpfully be clarified; some on the face of the Bill, in order to reduce the risk that these proposals could operate in a manner which may be incompatible with the Convention. We recommend that the Minister clarify:

- a) the precise intended impact of these proposals on individual accounts, including (i) whether technical measures may include indefinite suspension of an account and whether any service limitations imposed will be for a specified time-frame and/or renewable; and (ii) any potential impact the imposition of technical measures may have on the ability of a user to secure an alternative service;
- b) the minimum criteria which would be required to be satisfied before the imposition of technical measures. The Government has indicated that technical measures will follow the issue of copyright infringement notices. It would be helpful if the Government could clarify whether (i) the imposition of technical measures will be subject only to the initial assessment of the copyright holder that it appeared that the individual service user had breached his or her copyright; and (ii) if so, would the same standard of evidence and proof be required for the imposition of technical measures as would be required for the issue of copyright infringement reports?

1.41 We recommend that the Bill be amended to make it clear that technical measures may only be introduced after an assessment by OFCOM of the necessity and proportionality of these new measures, taking into account the impact of the initial obligations code. In so far as it is possible, we recommend that the Bill should be amended to provide additional details on the minimum criteria for the imposition of technical measures, including the standard of proof which must be applied; the "trigger" for the imposition of such measures; and any relevant defences for service users who have taken all reasonable measures to protect their service from unauthorised use and who have not knowingly facilitated the use of their service for the purposes of infringing copyright.

### ***(3) Right to a fair hearing (Article 6 ECHR)***

1.42 The Bill provides for both the initial obligations code and the technical obligations code to make provisions for appeals against decisions of the relevant enforcement body (which could be an industry body, a specialist body or OFCOM).<sup>44</sup>

1.43 There is very little detail on the face of the Bill or in the Explanatory Notes about the right to appeal in the case of copyright infringement reports or decisions about the inclusion of certain individuals' information on any copyright infringement lists. The Government does not consider that these decisions involve a determination of rights, so

Article 6 ECHR is not engaged. Liberty argues that these proposals would be improved if the rights of subscribers to appeal were included on the face of the Bill.<sup>45</sup>

**1.44 We accept that there is no clear answer to whether the decisions taken during the process of issuing copyright infringement reports and infringement lists involve the determination of any individuals' civil rights and that it is unlikely that Article 6 ECHR is engaged. However, in the light of the acceptance by the EU that a fair process is necessary for regulation of individual service users' access to the internet, we consider that statutory provision for a right to appeal to an independent body against inclusion on any infringement list at this stage would lead to a fairer procedure and so be a human rights enhancing measure.**

1.45 The Government accepts that the exercise of powers pursuant to the proposals on technical measures are likely to involve the determination of civil rights, and so must provide for a hearing by an independent and impartial tribunal. The Bill provides inadequate detail to determine whether the initial decision maker will be adequately independent and impartial. It does however provide for the technical obligations code to provide a two-tier appeals process: first to an as yet unidentified reviewing body (who must be independent of ISPs, copyright holders and OFCOM), then a further appeal to the First-tier Tribunal on grounds that the initial decision was based on an error of fact, was wrong in law or unreasonable. The technical obligations code must also deal with the power to award costs. It may provide that the imposition of technical measures is suspended pending an appeal. However, the Bill does not require that they must be suspended until a hearing takes place.

1.46 In his reply to our request for further information, the Minister said:

It is envisaged that if an order is made imposing technical obligations on ISPs, either the order or the underlying code will provide that a subscriber must receive a number of written warnings before the level of infringements associated with him reaches the trigger level for a technical measure to be taken against him. It is envisaged that a final letter will be sent setting out the nature of the measure and when it will be applied. However the subscriber will have a period in which to request their case be heard by the independent body. It will then be for the body to consider the case on its merits and decide whether the sanction should be applied.

If the body upholds the sanction, the subscriber will have a further period to appeal this decision to the First-tier Tribunal. The Government intends that the sanction will only be applied once the appeals process has been exhausted or a subscriber chooses not to take the appeal further.<sup>46</sup>

1.47 The Minister also told us that it was envisaged that the First Tier Tribunal would have the power to conduct a full rehearing of all the issues in any case and that any application fee would be 'modest' and the Tribunal would be able to award costs in favour of the successful applicant.<sup>47</sup>

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45 Liberty, Second Reading Briefing, November 2009.

46 Written evidence, p 30

47 Ibid.

**1.48 Although there is very little detail about the appeal mechanism, the enforcement and reviewing bodies on the face of the Bill, it is our view that, provided the time frame for review and appeal is adequate and the measures are routinely suspended until the right of appeal is exhausted, it is unlikely that these provisions will be structurally incompatible with Article 6 ECHR. The provision of a review by an independent reviewing body and a full right to appeal before the First Tier Tribunal, prior to the imposition of any sanction is adequate to meet the requirements of the Convention for a hearing by an independent and impartial tribunal.**

1.49 We do however have some concerns about the substance of the right to appeal provided in the Bill and its compatibility to comply with the right to a fair hearing. As we noted above, there is nothing on the face of the Bill which indicates the criteria which will be applied in order to trigger technical measures, nor is there any indication of the type of evidence that will be required or the standard of proof that will be applied. Without these details, it is difficult to assess what value the right to appeal will have, because it is difficult to consider whether the original decision to apply technical measures involves a fair consideration of the rights concerned. For example, it appears that technical measures may be imposed on the same “trigger” as copyright infringement reports. That is, on the basis of evidence presented by a copyright holder that his or her rights appear to have been infringed. It is difficult to assess what the individual responsible for imposing a technical measure will assess: whether the individual copyright holders’ rights have been infringed or simply whether they have complied with the process for a copyright infringement report and that the relevant user continues to create the appearance that their rights are being infringed. In the light of the fact that these technical measures will in effect provide an alternative to the application of ordinary civil, and in some cases, criminal sanctions, we consider that the latter option could lead to a risk of unfairness and incompatibility with Article 6 ECHR and common law procedural fairness. In our view, the independent and impartial tribunal, in this case the First Tier Tribunal, must be able to consider the substance of the determination of the relevant rights and any relevant defences, including whether the basis for determination is supported by evidence.

**1.50 Without a clear picture of the criteria for the imposition of technical measures, it is difficult to reach a final conclusion on the fairness of the substantive decision making process for the imposition of technical measures and its compatibility with Article 6 ECHR and the common law. We recommend that at a minimum, the Government must be required to confirm that the First Tier Tribunal will be able to consider whether an infringement of copyright has occurred and any defence that no infringement of a copyright holders’ rights has been committed or knowingly permitted by the account holder. Further information about the quality of evidence to be provided and the standard of proof to be applied should be provided, ideally on the face of the Bill, and at a minimum by the Minister during the course of debates on these provisions. In addition, we recommend, for the avoidance of doubt, that the Bill require that the technical obligations code must provide for any appeal rights to suspend the application of technical measures and for costs of any successful appeal to be recoverable by any successful applicant.**

#### **(4) Reserve powers (Clause 17)**

1.51 Clause 17 proposes that the Secretary of State should retain a reserve power to amend the Copyright, Designs and Patents Act 1988 – including the proposals in the Bill – by secondary legislation. This power is limited to changes for the “purpose of preventing or reducing the infringement of copyright by means of the internet” and will be available “if it appears to the Secretary of State appropriate to do so having regard to technological developments that have occurred or are likely to occur”. The power may be exercised to impose new powers or duties on individuals or to require the payment of fees. It does not permit the Secretary of State to modify or create criminal offences. Orders under this power are subject to affirmative resolution. The Explanatory Notes explain that the Government considers that this residual power is necessary for a “flexible” response to “meet technological evolution”.<sup>48</sup> The Government explains that these powers are limited in so far as they are subject to the duty on the Secretary of State to act in a Convention compatible way. In addition, the Government has stressed that the Minister will not be allowed to act incompatibly with the requirements of EU law or the general principles of domestic administrative law.

1.52 The limitations highlighted by the Government in their response to queries raised about the need for such a broad reserve power range from narrow statutory limits which prevent amendment to the criminal law and limits which generally apply to all secondary legislation. There has been little Government justification for the breadth of this reserve power other than the need for the Secretary of State to respond swiftly and flexibly to changing technological conditions. In the light of the breadth of the other powers proposed in this Bill, we wrote to the Minister to ask for further justification, but no more specific reasons were given.<sup>49</sup> As we have explained on numerous previous occasions, where a power has the potential to have a significant impact on individual rights, ideally the scope of that power should be defined in primary legislation and accompanied by such safeguards as to ensure that the power will be exercised in a proportionate way.<sup>50</sup> The scope of this power was also criticised by the Delegated Powers and Regulatory Reform Committee and the Constitution Committee of the House of Lords, both of which recommended that Clause 17 be deleted from the Bill.<sup>51</sup>

1.53 In his response to our letter, the Secretary of State explained that the Government intended to introduce amendments to limit the power in Clause 17 and to introduce a ‘super-affirmative’ procedure for these orders. The Government amendments would change the proposal, limiting the power to amendments ‘for the purpose of preventing or reducing any infringement of copyright by means of the internet’ where the Secretary of State is ‘satisfied that’ the infringement is ‘having a serious adverse effect on businesses or consumers’ and ‘making the amendment is a proportionate way to address that effect’.

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48 HL Bill 1 (09-10), EN, Para 239

49 Written evidence, p 30

50 See for example, Twelfth Report of 2007-08, *Legislative Scrutiny: 1) Health and Social Care Bill*, HL Paper 66/ HC 379, paras 1.42 – 1.43.

51 Delegated Powers and Regulatory Reform Committee, Second Report of 2009-10, *Contaminated Blood (Support for Infected and Bereaved Persons) Bill [HL]; Digital Economy Bill [HL]; Equality Bill – Parts 1 to 5; Third Parties (Rights against Insurers) Bill [HL]*, HL Paper 24, para 19. See also Fourth Report of 2009-2010, *Personal Care at Home Bill etc*, HL Paper 41, paras 2 -9. House of Lords Constitution Committee, Sixth Report of Session 2009-2010, *Clause 17 of the Digital Economy Bill*, HL Paper 40.

However, this removes the existing limitation that the proposals respond to technological developments.

1.54 The super-affirmative procedure would require the Secretary of State to consult “such persons” that the Secretary of State “thinks likely to be affected” by the order and any such persons he thinks fit. After consultation, a draft and explanatory document will be laid before Parliament for 60 days. The Secretary of State must then have regard to any representations, any resolutions of either House and any recommendations of any Committee of either House of Parliament charged with reporting on the draft order during that 60 day period. If any Committee charged with reporting on the draft order makes a negative recommendation in relation to it, the Secretary of State may only proceed with the draft after either a resolution of the relevant House affirming the order or a resolution rejecting the recommendation of the Committee.<sup>52</sup>

**1.55 In the light of the breadth of this proposed reserve power and the need for a delicate balance to be struck between the right to freedom of expression and the property rights of copyright holders in any changes to copyright law, we are concerned that Clause 17, as amended, remains overly broad.**

**1.56 We welcome the Government’s decision to introduce the use of the super-affirmative procedure. However, we recommend that:**

- c) The Minister should explain why parliamentary scrutiny of any relevant human rights issues will be adequate without any power for Members of either House to propose amendments to the draft order.**
- d) Any explanatory memorandum accompanying an order made under Clause 17 should include an assessment of the Government’s view on the compatibility of the proposals with the human rights obligations of the United Kingdom, including the European Convention on Human Rights.**
- e) The Government should be required to clarify which Committees it would consider ‘charged’ to report on any relevant proposal, other than the Joint Committee on Statutory Instruments (JCSI). We are not required to report on any secondary legislation other than remedial orders laid under the Human Rights Act 1998, but we do report from time to time on proposals in secondary legislation which we consider raise particular human rights concerns. We would be grateful if the Government would explain how a negative recommendation from our Committee or its successors would affect the Government’s approach to an order.**



## 2 Bills not requiring to be brought to the attention of either House on human rights grounds

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2.1 Applying the higher significance threshold which we have agreed to apply during this parliamentary session,<sup>53</sup> we consider that the following Bills do not raise human rights issues of sufficient significance to warrant us undertaking further scrutiny of them:

- Energy Bill.

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53 Third Report of 2009-10, *Legislative Scrutiny: Financial Services Bill and Pre-Budget Report*, HL 21/HC 184 , para. 2.1.

# Conclusions and recommendations

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## Explanatory Notes and Human Rights Memoranda

1. We are grateful for the human rights memorandum provided by the Government and for the further prompt assistance of the Bill Team. However, although the memorandum provided by the Departments on this Bill is helpful, and the information relatively full, we generally invite Government Departments to take a more proactive approach to justification for proposed interferences with individual rights. We reiterate our earlier recommendation that Departments should not rely on Section 6 of the Human Rights Act 1998 to justify their view that broad discretionary powers in a Bill or in secondary legislation will operate in a way which is compatible with human rights. Where necessary, relevant safeguards should be provided on the face of the Bill to ensure that delegated powers are adequately defined to afford legal certainty and ensure that Convention rights will in practice be protected. (Paragraph 1.5)

## Copyright infringement reports (Clauses 4-8)

2. We consider that despite the lack of information on the face of the Bill, it is unlikely that the operation of these proposals alone will lead to a significant risk of a breach of individual internet users' right to respect for privacy, their right to freedom of expression or their right to respect for their property rights (Articles 8, 10, Article 1, Protocol 1 ECHR). The limited impact on these rights by the operation of the copyright infringement reporting mechanism proposed is likely to be justifiable. However, in the light of the concerns raised by internet users and human rights organisations, we recommend that the Government provide a further explanation of its views on why these proposals are proportionate, including by outlining the harm currently suffered by individual copyright holders and the wider public interest in promoting creativity, and why that harm cannot be appropriately addressed by existing civil and criminal penalties for copyright infringement. (Paragraph 1.23)
3. In order to consider how these proposals might operate in practice and to assess the proportionality of these measures, we have had to rely on the contents of the Government White Paper, statements during debate and other documents prepared by the Government Bill Team in order to envisage how these proposals might operate. In the light of the fact that the copyright infringement report and any subsequent list may form the basis for the imposition of technical measures which will have a more significant impact, we are disappointed at the lack of detail about the process provided on the face of the Bill. (Paragraph 1.24)

## Technical measures (Clauses 9-16)

4. The lack of detail in relation to the technical measures proposals – and in particular, in relation to the scope of technical measures, the criteria for their imposition and the enforcement process – has made our assessment of the compatibility of these proposals with the human rights obligations of the United Kingdom extremely

difficult. As we have explained in the past, flexibility is not an appropriate reason for defining a power which engages individual rights without adequate precision to allow for proper parliamentary scrutiny of its proportionality. (Paragraph 1.28)

5. We reiterate our invitation to the Government to provide fuller justification for its proposals. (Paragraph 1.38)
6. In our view, it is impossible to assess fully whether these proposals will operate in a compatible manner in practice without more detail of the proposed mechanism for technical measures. Because of the lack of detail on the face of the Bill and the limited foundation for justification provided for the breadth of these proposed powers, we acknowledge the concerns about the potential for these powers to be applied in a disproportionate manner which could lead to a breach of internet users' rights to respect for correspondence and freedom of expression. (Paragraph 1.39)
7. There are a number of issues which could helpfully be clarified; some on the face of the Bill, in order to reduce the risk that these proposals could operate in a manner which may be incompatible with the Convention. We recommend that the Minister clarify:
  - a) the precise intended impact of these proposals on individual accounts, including (i) whether technical measures may include indefinite suspension of an account and whether any service limitations imposed will be for a specified time-frame and/or renewable; and (ii) any potential impact the imposition of technical measures may have on the ability of a user to secure an alternative service; (Paragraph 1.40)
  - b) the minimum criteria which would be required to be satisfied before the imposition of technical measures. The Government has indicated that technical measures will follow the issue of copyright infringement notices. It would be helpful if the Government could clarify whether (i) the imposition of technical measures will be subject only to the initial assessment of the copyright holder that it appeared that the individual service user had breached his or her copyright; and (ii) if so, would the same standard of evidence and proof be required for the imposition of technical measures as would be required for the issue of copyright infringement reports? (Paragraph 1.40)
8. We recommend that the Bill be amended to make it clear that technical measures may only be introduced after an assessment by OFCOM of the necessity and proportionality of these new measures, taking into account the impact of the initial obligations code. In so far as it is possible, we recommend that the Bill should be amended to provide additional details on the minimum criteria for the imposition of technical measures, including the standard of proof which must be applied; the "trigger" for the imposition of such measures; and any relevant defences for service users who have taken all reasonable measures to protect their service from unauthorised use and who have not knowingly facilitated the use of their service for the purposes of infringing copyright. (Paragraph 1.41)

### Right to a fair hearing (Article 6 ECHR)

9. We accept that there is no clear answer to whether the decisions taken during the process of issuing copyright infringement reports and infringement lists involve the determination of any individuals' civil rights and that it is unlikely that Article 6 ECHR is engaged. However, in the light of the acceptance by the EU that a fair process is necessary for regulation of individual service users' access to the internet, we consider that statutory provision for a right to appeal to an independent body against inclusion on any infringement list at this stage would lead to a fairer procedure and so be a human rights enhancing measure. (Paragraph 1.44)
10. Although there is very little detail about the appeal mechanism, the enforcement and reviewing bodies on the face of the Bill, it is our view that, provided the time frame for review and appeal is adequate and the measures are routinely suspended until the right of appeal is exhausted, it is unlikely that these provisions will be structurally incompatible with Article 6 ECHR. The provision of a review by an independent reviewing body and a full right to appeal before the First Tier Tribunal, prior to the imposition of any sanction is adequate to meet the requirements of the Convention for a hearing by an independent and impartial tribunal. (Paragraph 1.48)
11. Without a clear picture of the criteria for the imposition of technical measures, it is difficult to reach a final conclusion on the fairness of the substantive decision making process for the imposition of technical measures and its compatibility with Article 6 ECHR and the common law. We recommend that at a minimum, the Government must be required to confirm that the First Tier Tribunal will be able to consider whether an infringement of copyright has occurred and any defence that no infringement of a copyright holders' rights has been committed or knowingly permitted by the account holder. Further information about the quality of evidence to be provided and the standard of proof to be applied should be provided, ideally on the face of the Bill, and at a minimum by the Minister during the course of debates on these provisions. In addition, we recommend, for the avoidance of doubt, that the Bill require that the technical obligations code must provide for any appeal rights to suspend the application of technical measures and for costs of any successful appeal to be recoverable by any successful applicant. (Paragraph 1.50)

### Reserve powers (Clause 17)

12. In the light of the breadth of this proposed reserve power and the need for a delicate balance to be struck between the right to freedom of expression and the property rights of copyright holders in any changes to copyright law, we are concerned that Clause 17, as amended, remains overly broad. (Paragraph 1.55)
13. We welcome the Government's decision to introduce the use of the super-affirmative procedure. However, we recommend that:
  - a) The Minister should explain why parliamentary scrutiny of any relevant human rights issues will be adequate without any power for Members of either House to propose amendments to the draft order. (Paragraph 1.56)

b) Any explanatory memorandum accompanying an order made under Clause 17 should include an assessment of the Government's view on the compatibility of the proposals with the human rights obligations of the United Kingdom, including the European Convention on Human Rights. (Paragraph 1.56)

c) The Government should be required to clarify which Committees it would consider 'charged' to report on any relevant proposal, other than the Joint Committee on Statutory Instruments (JCSI). We are not required to report on any secondary legislation other than remedial orders laid under the Human Rights Act 1998, but we do report from time to time on proposals in secondary legislation which we consider raise particular human rights concerns. We would be grateful if the Government would explain how a negative recommendation from our Committee or its successors would affect the Government's approach to an order. (Paragraph 1.56)

# Formal Minutes

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**Tuesday 26 January 2010**

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Dubs The Earl of Onslow	Dr Evan Harris MP Fiona Mactaggart MP Mr Virendra Sharma MP
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Draft Report (*Legislative Scrutiny: Digital Economy Bill*), proposed by the Chairman, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph. Paragraphs 1.1 to 2.1 read and agreed to.

Summary read and agreed to.

*Resolved*, That the Report be the Fifth Report of the Committee to each House.

*Ordered*, That the Chairman make the Report to the House of Commons and that Lord Dubs make the Report to the House of Lords.

Written evidence was ordered to be reported to the House for printing with the Report, together with written evidence reported and ordered to be published on 1 December and 12 and 26 January.

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[Adjourned till Wednesday 3 February at 2 pm

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## Written Evidence

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### **Letter from the Chair of the Committee to The Rt Hon Lord Mandelson, Secretary of State for Business, Innovation and Skills, dated 17 December 2009**

#### **Digital Economy Bill**

We are grateful for the human rights memorandum provided by the Department of Business, Innovation and Skills and the Department for Culture, Media and Sport for this Bill.

We consider that the proposals in the Digital Economy Bill on online infringement of copyright may raise significant human rights issues and would be grateful for some more detailed information on the Government's views on compatibility with the ECHR.

In particular, I would be grateful if you could explain:

- a) why the Government considers its proposals to introduce obligations for Internet Service Providers (ISPs) to issue copyright infringement reports to internet subscribers and maintain lists of alleged infringements (Clauses 5-8) do not engage the right to respect for private life and correspondence (Article 8 ECHR), the right to freedom of expression (Article 10 ECHR) and the right to peaceful enjoyment of possessions (Article 1, Protocol 1 ECHR), as enjoyed by both ISPs and internet users;
- b) why the Government considers its proposals to introduce powers for the Secretary of State to introduce obligations on ISPs to take technical measures to sanction internet subscribers in relation to copyright infringement (including by removing or barring access to services) (Clauses 9 – 16) are necessary in a democratic society and proportionate to the interference which they may pose to the right to respect for private life and correspondence (Article 8 ECHR), the right to freedom of expression (Article 10 ECHR) and the right to peaceful enjoyment of possessions (Article 1, Protocol 1 ECHR), as enjoyed by both ISPs and internet users;
- In particular, we would be grateful if you could:
  - Explain the Government's justification for these measures in light of both (a) existing measures for the protection of copyright and (b) proposals in respect of copyright infringement listing and reporting in this Bill; and
  - provide evidence for the Government's view that these measures are necessary and capable of meeting the legitimate aim of protecting the rights of copyright holders.
- c) why the Government considers that the provisions for determinations in pursuit of these powers and obligations are compatible with the right to respect for a fair hearing before an independent and impartial tribunal (Article 6 ECHR);
- In particular, we would be grateful if you could explain:
  - How the Government envisages the appeal mechanism proposed in respect of technical measures will operate in practice;



- Whether any hearing by the First Tier Tribunal will involve a full rehearing of the issues in the case;
  - What costs rules will apply in respect of applicants seeking to challenge technical measures;
  - Whether technical measures will automatically be suspended pending the outcome of any appeal;
  - Whether it is appropriate for these details to be left to the technical obligations code.
- d) why the Government considers that a reserve power for the Secretary of State to further amend copyright law – including the provisions in the Bill - is necessary and proportionate in light of the other proposals in the Bill (Clause 17);
- e) how the decision to leave much of the detail of these proposals to secondary legislation and statutory codes provides adequate opportunity for Parliamentary scrutiny of the human rights issues raised by the Bill.

### **Letter to the Chair of the Committee from the Rt Hon Lord Mandelson, Secretary of State for Business, Innovation and Skills, dated 14 January 2010**

#### **Digital Economy Bill**

I am grateful for the Committee's letter seeking information on the Government's view on compatibility with the ECHR. As expressed in our original memorandum, the Government believes the Bill is fully compatible with the ECHR. Please find detailed answers to your questions below.

- a) why the Government considers its proposals to introduce obligations for internet service providers (ISPs) to issue copyright infringement reports (CIRs) to internet subscribers and maintain lists of alleged infringements (clauses 5-8) do not engage the right to respect for private life and correspondence (A8 ECHR), the right to freedom of expression (A10 ECHR) and the right to peaceful enjoyment of possessions (A1 Protocol 1 ECHR) as enjoyed by both ISPs and internet users.

The Committee is referring to an ISP's obligations under the Bill to notify subscribers of alleged infringements (if the initial obligations code requires the ISP to do so), and to maintain lists showing which CIRs made by a copyright owner are linked to which subscribers but without showing those lists giving the names and addresses of those subscribers.

The Government does not consider that any of the rights as enjoyed by ISPs or subscribers under Articles 8 or 10 or Article 1 of Protocol 1 are engaged by these obligations. The notifications will warn subscribers of alleged infringements. They will also inform subscribers how to properly protect their wireless connections and how to install controls on which websites or protocols members of their household can visit or use. It might be argued that receiving a notification may make a subscriber feel uneasy but the code will set out the requirements as to the form and contents of the notification and will ensure that it is couched in reasonable terms that should explain how to avoid infringing in the future. If the subscriber then stops infringing, he will receive no further notifications and no action will be taken against him. If however he persists, the tone and language of the notification will become stronger.

The sending of notifications and the keeping of such lists in themselves do not affect the level of service provided by the ISP and received by the subscriber. The subscriber's access to and use of the internet, including their email correspondence, is not curtailed in any way. If however the subscriber ignores the notifications and persists in infringing the copyright of the owner or allowing others to do so, then the owner may apply to the ISP for a list in relation to a particular period. The list will not reveal names and addresses of any of the infringing subscribers. It will however indicate whether a number of copyright infringement reports relate to the same individual subscriber which will in turn indicate whether there are serious persistent infringers. The copyright owner may then apply to the court for an order to force the ISP to reveal the names and addresses of these infringers which will enable the owner to take civil action against them if it wishes.

Without the involvement of the ISP the copyright owner is unable to identify who is using one of the internet protocol (IP) addresses allocated to the ISP at any particular moment in time as each time a subscriber logs on he will be using a different IP address<sup>54</sup>. The copyright owner by himself is only able to see the IP address which is offering copyright material for downloading by others and to tell from published IP lists which ISP is the provider for a subscriber who appears to have infringed his copyright. This makes it difficult for copyright owners to effectively take action against infringers. Currently they have to rely on obtaining a "Norwich Pharmacal" order<sup>55</sup> to require ISPs to reveal the physical address behind the IP one. In addition they have no means of knowing who are the most serious persistent file-sharers.

The number of CIRs relating to a subscriber will have to have reached any threshold set out in the code before an ISP is subject to the obligations. The Government is not requiring ISPs to monitor internet usage by the subscribers or to take any action against an individual subscriber under the initial obligations other than sending him notifications. The initial obligations only require the ISP to react in particular circumstances to requests from copyright owners.

The intention is that copyright owners will bear the largest part of the costs that ISPs incur in relation to notifications. The Secretary of State will be making an order under the new section 124L in clause 15 which will include provision to be included in the code about the payment by copyright owners of contributions towards the costs that ISPs incur. A draft of the order containing a working assumption of how costs might be divided is being made available for the Committee stage in the House of Lords. The Government intends to consult on the issue.

The Government believes that even if it might be argued that to some extent Convention rights are engaged by the proposals in clauses 5-8, any interference with those rights would be fully justified. Articles 8 and 10 are qualified rights and it is acceptable under the Convention to interfere with these rights if it is in accordance with the law and it is necessary in a democratic society for the protections of the rights of others. As mentioned above the receipt of a notification does not impede the subscriber's access to the internet in any way. Article 1 of Protocol 1 is also a qualified right and it is acceptable under the Convention to interfere with this right in the public interest and subject to the conditions provided for by law. Article 1 provides that the right of a

54 An Internet Protocol (IP) address is a numerical identification and logical address that is assigned to devices participating in a computer network utilising the Internet Protocol for communication between its nodes. Although IP addresses are stored as binary numbers, they are usually displayed in human-readable notations, such as 208.77.188.166 (for IPv4), and 2001:db8:0:1234:0:567:1:1 (for IPv6).

55 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.

State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest is not impaired in any way. The sending of notifications is in the public interest. Copyright owners should be able to protect their copyright and enforce their rights. In the case of online copyright infringement the involvement of the ISPs is needed for them to do so, as explained above. The provisions in the Bill strike a fair balance between the rights of the subscribers, ISPs and copyright owners.

- b) *why the Government considers its proposals to introduce powers for the Secretary of State to introduce obligations on ISPs to take technical measures to sanction internet subscribers in relation to copyright infringement (including by removing or barring access to services) (Clauses 9-16) are necessary in a democratic society and proportionate to the interference which they may pose to the right to respect for private life and correspondence (A8 ECHR), the right to freedom of expression (A10 ECHR) and the right to peaceful enjoyment of possession (A1, Protocol 1 ECHR) as enjoyed by both ISPs and internet users.*

*In particular we would be grateful if you could:*

- Explain the Government's justification for these measures in light of both (a) existing measures for the protection of copyright and (b) proposals in respect of copyright infringement listing and reporting in this Bill; and*
- provide evidence for the Government's view that these measures are necessary and capable of meeting the legitimate aim of protecting the rights of copyright holders*

Clause 11 provides the Secretary of State with a power to make an order imposing technical obligations on ISPs to take technical measures against particular subscribers. The Government intends to bring forward an amendment so that it is clear on the face of the Bill that action will only be taken under clause 11 to prevent or reduce online copyright infringement by subscribers. As a public authority for the purpose of section 6 of the Human Rights Act the Secretary of State will have to exercise the power compatibility with the Convention. After consultation Ofcom will make a code of practice setting out all necessary procedures to give effect to the measures. This is a reserve power. The Government hopes that the initial obligations (i.e. the proposals in respect of copyright infringement listing and reporting in this Bill) will be effective but if they are not it needs to be able to take further appropriate action to curtail the activities of persistent infringers who have disregarded the warnings should circumstances demand it.

Copyright infringement through use of peer-to-peer (P2P) file-sharing technology is a mass activity undertaken by significant numbers of people; however each individual infringement is typically of a low value. It is simply not practical or economic for copyright owners to undertake a mass programme of infringement identification, apply for a mass of court orders and take mass civil action given that the majority of individual case will only represent a single low value infringement.

The Articles cited above will potentially be engaged if technical obligations are imposed. ISPs will have to curtail or temporarily suspend the service that they provide to subscribers. Depending on the nature of the measure, imposed, subscribers will either have their accounts suspended for a period of time or restricted in some way. Suspension would prevent the subscriber from using their internet connection to infringe copyright. A restriction of the service would hinder any attempts to infringe copyright, typically by reducing the speed so that copying a file would take far longer than before or by imposing an upper size limit on the volume of internet traffic a user

could undertake in a given period. As even the smallest content files are quite large, any level of infringement would quickly use up the allowed limit and prevent any further activity in that period. Any measure restricting speed would not prevent a user from using basic email or browsing as well as other functions provided the user did not continue with online infringement or any other high volume activities. Whether suspension or a speed of volume restriction is a more proportionate measure to prevent copyright infringement will depend on the period for which the suspension is imposed plus the individual circumstances of a subscriber. We expect the underlying code about technical obligations to consider this issue.

Technical measures will hinder or deny subscribers' access to the internet and their email correspondence so that their right to freedom of expression and private and family life may be affected. No one has an unconditional right to access the internet. If a subscriber does not pay a bill the ISP will eventually cut him off. The Government believes that the measures will be an acceptable balance between the subscriber's rights and the public interest in the protection of the interest of the copyright owners. The Government considers that this will be legitimate and proportionate action and is necessary for the protection of the right of copyright owners. The latter have limited methods of protecting copyright and these methods may be less effective across national boundaries than within a single jurisdiction. Infringement over the internet is likely to cross national boundaries. These provisions will enhance the effectiveness of copyright protection.

Copyright owners have to provide evidence of the apparent infringement in a CIR and the code has to set out requirements about the means of obtaining such evidence and the standard of evidence. The notification by the ISP to the subscriber has to include such evidence. Technical measures will only be taken against serious infringers.

*c) why the Government considers that the provision for determination in pursuit of these powers and obligations are compatible with the right to respect for a fair hearing before an independent and impartial tribunal (A6 ECHR)*

The Government believes that the provision in the Bill is compatible with Article 6.

Each of the codes will provide for a person to have to have the function of administering and enforcing it including the function of resolving copyright infringement disputes. The person must be sufficiently independent of copyright owners and ISPs. A copyright infringement dispute is a dispute between one or more owners, ISPs and subscribers and relates to an act or omission in relation to an obligation or the code. A challenge to a decision in relation to a dispute of such a person could be made by way of judicial review to the Administrative Court.

Each code will also provide for a person to have the function of resolving subscriber appeals. The latter are defined in the inserted section 124E (6) for the purposes of the initial obligations code and in the inserted section 124J(5) for the purposes of the technical obligations code. The person with this jurisdiction must be sufficiently independent of ISPs, copyright owners and Ofcom. In the case of the initial obligations code a determination of a subscriber appeal may be the subject of a judicial review challenge and would be heard in the Administrative Court. The Bill provides that provision must be made in the technical obligations code for determination of a subscriber appeal to be appealed to the First-tier Tribunal, including on grounds that it was based on a error of fact, wrong in law or unreasonable.

The requirements about evidence about apparent infringements in the CIRs and the notification have been referred to above. When a subscriber receives a notification he does not have to take any action even if he thinks that the notification has been sent to him in error.

*In particular, we would be grateful if you could explain:*

*How the Government envisages the appeal mechanism proposed in respect of technical measures will operate in practice;*

It is envisaged that if an order is made imposing technical obligations on ISPs, either the order or the underlying code will provide that a subscriber must receive a number of written warnings before the level for a technical measure to be taken against him. It is envisaged that a final letter will be sent setting out the nature of the measure and when it will be applied. However the subscriber will have a period in which to request their case be heard by the independent body. It will then be for the body to consider the case on its merits and decide whether the sanction should be applied.

If the body upholds the sanction, the subscriber will have a further period to appeal this decision to the First-tier Tribunal. The Government intends that the sanction will only be applied once the appeals process has been exhausted or a subscriber chooses not to take the appeal any further.

*Whether any hearings by the First-tier Tribunal will involve a full rehearing of the issues in the case;*

As mentioned above the Bill provides that provision must be made in the technical obligations code for a determination of a subscriber appeal to be appealed to the First-tier Tribunal, including on grounds that it is based on an error of fact, wrong in law or unreasonable. This might therefore involve a full rehearing of the issues as the First-tier Tribunal considers appropriate.

*What costs rules will apply in respect of applicants seeking to challenge technical measures;*

The intention is that any level of costs falling to an applicant is not such as to deter any legitimate case. There is some merit in a modest fee to deter purely frivolous cases. If the subscriber is successful the Tribunal would have the power to make an award of costs in his favour.

*Whether technical measures will automatically be suspended pending the outcome of any appeal;*

This is the Government's intention and it intends to make this clear to Parliament in Committee.

*Whether it is appropriate for these details to be left to the technical obligations code;*

Before any technical measures are imposed, secondary legislation is required to place an obligation on ISPs to take the measure in question. The new section 124H in clause 11 empowers the Secretary of State to specify in the order the criteria for taking a technical measure against a subscriber, any steps to be taken as part of the measure and when they are to be taken. It is envisaged that any order will deal with these matters but leaving detail to the code. That will provide flexibility as the code may be amended in the light of changing circumstances and technological developments.

- d) *why the Government considers that a reserve power for the Secretary of State to further amend copyright law – including the provisions of the Bill – is necessary and proportionate in the light of other proposals in the Bill (clause 17)*

Clause 4-16 provide mechanisms to tackle certain types of online copyright infringement, in particular those such as peer-to-peer filesharing where copyright material is offered by many people to many people for unauthorised downloading. These mechanisms depend on the fact that copyright owners are able to identify that this type of infringement is taking place and discover the IP addresses associated with an infringement but not the name and address of the individual subscriber to whom that IP address was allocated at that time. However, whilst that type of copyright infringement is the most prevalent today, the Bill (or existing legislation) may not provide mechanisms to deal with nascent and emerging types of copyright infringement in an effective and timely way.

One emerging technology increasingly used for copyright infringing behaviour is that of direct download services (online data repositories, sometimes referred to as ‘cyber lockers’). Due to the way these services work, it is not possible for the rights holders to identify IP addresses of users as it is with peer-to-peer networks. This in turn means that the notification system introduced by clauses 4-16 cannot be used to contact infringing users. If a service of this latter sort were to develop and grow to the point that action was necessary (and it may have already reached this point) then various approaches may be useful, for example clarification or simplification of the injunctive relief available already in the Copyright Designs and Patents Act. It should be stressed however that at this time we do not know exactly how these future threats will develop nor exactly what will be necessary to address them.

It is for this reason that the power in clause 17 is required. Not to allow sweeping or arbitrary changes to copyright law, but to allow a flexible response to be made in a timely fashion to emerging threats to our valuable creative industries.

It is recognised of course, that a power such as this needs to be targeted, and subject to suitable safeguards. As such, the clause and power are already narrowly drawn, and may only be used for the specific purpose of addressing online infringement. The power may not be used for more general changes, such as rewriting what does, or does not, constitute copyright infringement and it may not be used to alter or amend any criminal offences.

The power can also only be exercised in a way that is consistent with our obligations under European laws such as the e-commerce Directive and the Human Rights Convention. This means that it cannot be used to institute general monitoring of internet use, or in any other way which would be contrary to our commitment to human rights.

In addition to these existing safeguards however, we have decided that it is right to amend the clause to further restrict its application and to further strengthen the safeguards that will apply to its use.

The amendments will introduce a threshold that must be reached before any action is taken, based on the infringement having a serious effect on business or consumers. The Secretary of State will need to be satisfied that the test is met before the power can be used. Furthermore, the amendments will mean that the clause explicitly states that action taken must be proportionate in light of the nature of the infringement, and the adverse effects, that it is intended to address.

In addition to the amendments detailed above, we also intend that exercise of the power follow a “super-affirmative” resolution procedure. This will require the Secretary of State to consult any persons likely to be affected by the measures proposed plus anyone else that the Secretary of State thinks fit and, if he wishes to proceed after consultation, to lay a draft order before Parliament together with an explanatory document describing the infringement of copyright at issue and its effect on business or consumers and why he is satisfied that the proposed measures are proportionate. The amendment will provide a minimum of 60 days in Parliament for consideration of the draft order made under this power, during which time parliamentarians and committees may communicate to the Secretary of State any concerns they may have. The Secretary of State then must take those concerns into account before moving on to lay an order for affirmative resolution of both houses. The Secretary of State may not continue with a draft order in light of a recommendation to the contrary from a committee of either House charged with reporting on the draft order, unless that recommendation is itself overturned by resolution of that House.

This time will also allow public discussion of any proposals, and time for any concerned stakeholders to approach parliamentarians and submit their thought to committees of either house.

e) *How the decision to leave much of the detail of these proposals to secondary legislation and statutory codes provides adequate opportunity for Parliamentary scrutiny of the human rights issues raised by the Bill:*

In light of the comments from the Delegated Powers and Regulatory Reform Committee the Government intends to bring forward an amendment so that any order made under the new section 124H (Obligations to limit internet access) will be subject to the affirmative procedure. Similarly the Government has said that it accepts that Committee’s recommendation that any order under the new section 124L in clause 15 (Sharing of costs) should be subject to the affirmative procedure.

The Government has also accepted the Committee’s recommendation that the negative procedure should apply when an initial obligations code produced by industry is approved by Ofcom, just as it does when a code is made by Ofcom.

Bringing forward amendments in response to the recommendations will ensure an increased level of Parliamentary scrutiny. The affirmative procedure already applies to an order under clause 14 (Enforcement of obligations: substitution of the amount of the maximum penalty).

Much of the detail of how the provisions will operate is being left to the codes as this will allow for flexibility. The codes will need to be amended from time to time so that they can stay relevant and effective as time passes and circumstances change. The Bill sets out provision the codes must or may make, it also provides that the code provisions must be objectively justifiable, proportionate and transparent.

I hope you will agree that the above explain satisfactorily the Government’s views on the Bill’s compatibility with the ECHR.

## Memorandum submitted by Action on Rights for Children

### The Digital Economy Bill:

#### Proposals to restrict or suspend Internet access

ARCH is a children's rights organisation with a particular focus on the effects of developments in Information Technology on children's privacy, consent and data protection rights.

The Digital Economy Bill sets out amendments to the Communications Act 2003 to permit the imposition of sanctions, including restriction or suspension of broadband access, where it is believed that a network has been used to download material unlawfully.

We believe that the proposals are manifestly unfair and disproportionate, and that they fly in the face of Government policy on education and social exclusion. Their impact upon children does not appear to have been considered and we can only assume that no discussion has taken place with the Department for Children, Schools and Families.

#### Fairness and proportionality

On a broadband network it is impossible to identify which particular member of a household has downloaded illegal content - or indeed, whether any member at all has done so. However, the proposals will affect every member of a family, regardless of guilt or innocence.

Not everyone is aware of the need to secure their network connection, particularly when they have little knowledge or experience of information technology. In particular, those receiving help under the Home Access programme, which we discuss below, are almost by definition likely to come into that category. Unsecured networks are always vulnerable to network 'piggy-backing', a problem that is likely to increase if bandwidth restriction and account suspension are introduced. If families face penalties because of the unlawful activities of a stranger, they are in effect being punished for being victims.

Parents and children can be confused by the range of sites offering downloads, and insufficient education is provided about how to distinguish between sites offering legal and illegal content when both are equally available. Moreover, it is fair to say that most people, especially children, have scant knowledge of copyright law and are not always aware of potential infringements. Will a child realise that it may be wrong simply to accept a file from a friend?

It is not good enough merely to say that providers should give families 'advice' on these matters (Clause 4(5)) when an infringement notice is served. It can be difficult to master new technology, and it is easy to forget how intimidated new users may already feel. This is all the more likely where parents have learning difficulties or are not used to engaging with written material. Such families are also more likely to be amongst those with low family incomes, and who are thus the least able to pay financial penalties. Being required to provide 'advice' in an infringement notice does not necessarily correspond to ensuring that the advice is comprehensible to the recipient.

The only redress that a family will have against suspension is to appeal against a decision taken by the Secretary of State. Again, this will have a disproportionate effect upon those who simply do not understand what is happening. Executive orders are a cost-cutting measure which put the individual to the expense and inconvenience of making an application, rather than being given the opportunity to respond to allegations. In our view, such a drastic step as suspension should



only be taken following consideration of all the relevant factors by a court. This protection is particularly important for children, who have no locus in law to challenge a decision and are reliant upon their parents to do so. A court hearing would provide an opportunity for consideration of the impact of suspension upon the children of a family.

### **The potential effect on children's education**

Given the content of this Bill, it is surprising that the Government has recently announced the launch of its 'Home Access' programme<sup>56</sup>, designed to give laptops and Broadband access to more than a quarter of a million families who cannot afford to buy them. We welcome this scheme because we are aware that children without a home internet connection face considerable disadvantages.

The Home Access programme is designed to ensure that all children and their parents are able to use the internet on the basis that:

“There are still a significant number of learners who lack access to a computer and internet at home. It has been shown that home access can enhance learner achievement, increase motivation and improve parental engagement, which in turn raises their children's attainment. Recent evidence has also suggested that having home access to a computer could help learners achieve a two grade improvement in one subject at GCSE.”<sup>57</sup>

As the Schools Minister, Jim Knight MP, said in March 2009:

"It is impossible to overstate the importance of IT to today's children...It is vitally important that we close the digital divide and do not allow it to swallow children from families who may not be able to afford a computer or the internet. We will support these families to ensure that the educational and social benefits of 21st century technology are available to them.”<sup>58</sup>

Since 2003, when the Communications Act was passed, Internet access has come to play an increasingly vital role in education. It is no longer a luxury item, nor an optional extra in education provision. The Internet itself provides a rich source of learning materials, and many schools place curriculum content online to give pupils access out of school hours. Some organise student support groups online to enable pupils to discuss homework assignments.

Internet access also promotes the development of effective home-school partnerships by giving parents ready access to school information online, and providing a ready means of communication with their child's teachers. The DCSF points to research demonstrating that internet access boosts children's educational achievement by increasing their parents' involvement with their education and schools. Indeed, its recent Home Access programme announcement<sup>59</sup> says that:

56 'Free laptops and broadband for 270,000 families across the country in ground-breaking scheme'; 11th January 2010. [http://www.dcsf.gov.uk/pns/DisplayPN.cgi?pn\\_id=2010\\_0011](http://www.dcsf.gov.uk/pns/DisplayPN.cgi?pn_id=2010_0011)

57 Home Access programme website: [http://schools.becta.org.uk/index.php?section=oe&catcode=ss\\_es\\_hom\\_02&rid=15871](http://schools.becta.org.uk/index.php?section=oe&catcode=ss_es_hom_02&rid=15871)

5 'First families receive computers under Home Access Programme': <http://news.becta.org.uk/display.cfm?resID=39686>

6 'Free laptops and broadband...' etc. op.cit

7 Article 2 Protocol 1 [http://www.opsi.gov.uk/ACTS/acts1998/ukpga\\_19980042\\_en\\_3#sch1-pt2](http://www.opsi.gov.uk/ACTS/acts1998/ukpga_19980042_en_3#sch1-pt2)

8 Article 28/29 UNCRC: <http://www2.ohchr.org/english/law/crc.htm#art28>

‘The Government is currently legislating to make reporting to parents online by 2012 a legal guarantee in the Children, Schools and Families Bill.’

It is extraordinary that the Government, which has repeatedly underlined its commitment to education, could consider sacrificing to the demands of industry children’s access to an educational resource which it quite rightly identifies as vital. The restriction or suspension of broadband access would not merely be inconvenient for children; it would damage their education. As such, the proposals in our view engage Article 2 Protocol 1 of the European Convention on Human Rights<sup>60</sup> and Articles 28 & 29 of the UN Convention on the Rights of the Child<sup>61</sup>. We are not aware that the Government has considered these implications.

### **The potential effects on young people**

It is not only school pupils who would be disadvantaged by lack of Internet access. Government-commissioned research into the needs of young people who are not in education, employment or training identified “*lack of home access to computer and Internet*” as a significant barrier to service use, recommending that this problem is solved by “*Provision of technology at home along with connectivity and help in using IT*”<sup>62</sup>. The number of young people who are classified as ‘NEET’ has remained unacceptably high and has been further aggravated by the current recession. Any policy that may increase the obstacles that such young people face is simply unacceptable.

### **Social Exclusion**

The role that availability of home access to IT plays in reducing social exclusion has been identified by a Ministerial task-force on home access to technology:

“Strong evidence exists for the potential educational, economic and wider benefits of home access to technology.”<sup>63</sup>

Indeed, it was in direct response to that task-force’s final report that the Home Access programme was originally established.

Those without Internet access also face other kinds of social exclusion. It is commonplace for children and young people to make arrangements for social activities via social networking sites and email. Depriving them of these facilities hinders the development of their friendships and social activities.

The effect on parents will have a significant impact upon their children. Those parents who arrange to work at home via the Internet in order to be available for their children outside school hours will be faced with the problem of finding child-care; those who run small businesses will be deprived of their source of income. Both of these eventualities will inevitably increase child poverty.

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62 ‘Digital Exclusion Profiling of Vulnerable Groups: Young People not in Education, Employment or Training.’ Citizens Online and National Centre for Social Research for the Department for Communities and Local Government, October 2008

63 ‘Extending Opportunity: Final Report of the Minister’s Taskforce on Home Access to Technology’, July 2008

If the Government is serious about increasing digital inclusion, it needs to take rather more effective steps to ensure that families fully understand the potential pitfalls. Otherwise, schemes such as 'Home Access' may become something of a poisoned chalice. The government also needs to acknowledge that if it intends functions and services to be moved online, it has a corresponding responsibility to ensure that nothing prevents access to them.

The proposals set out in the Bill are disproportionate, draconian and manifestly unjust. They will penalise the innocent, damage children's educational opportunities, aggravate poverty and social exclusion and undermine government policy in other areas. In our view, they need far wider consideration in the context of overall government policy. File-sharing cannot be treated as a standalone issue when the proposed remedy for infractions has far-reaching implications for education and social exclusion policy. The Government's approach as set out in this Bill appears incoherent, and we fervently hope that Parliament does not allow it to pass in its present form.

January 2010

### **Memorandum submitted by the Alliance against IP Theft**

JCHR Press Notice No.6 highlights nine priority areas for scrutiny in 2010. These have been identified based on the significance of the human rights issues involved and the likelihood of legislation being passed before the end of the parliamentary session.

The Alliance Against IP Theft's submission focuses on just one of these priorities: *illegal file sharing*.

The committee raises two potential human rights issues which require separate consideration:

- f) The maintenance by ISPs of a list of IP addresses which copyright holders suspect may be infringing copyright;
- g) The introduction, if needed, of technical measures, including disconnection, against infringers.

#### **1. Maintenance by ISPs of a list of IP addresses which copyright holders suspect may be infringing copyright**

The Alliance is clear that the creation and maintenance of such a list does not infringe human rights and is in compliance with all European directives. IP addresses alone are not personal data. It is information publicly available when engaging in file-sharing activity. This view is supported by Graham Smith of Bird & Bird in his leading legal textbook on the subject where he says that "an IP address alone, at least in the context of the public internet, would in most cases be unlikely to be personal data" (p.696 "Internet Law and Regulation", 4<sup>th</sup> Ed, 2007).

Even if such information were deemed to be personal data, two sections of the Data Protection Act (DPA) provide certain relevant exemptions:

Section 29 provides an exemption where the processing of personal data is for the prevention or detection of crime. Under the Copyright, Designs and Patents Act 1988, filesharing can attract both civil and criminal liability. Therefore, Section 29 would apply in circumstances where rights

holders are processing IP addresses and passing them to ISPs to help prevent copyright infringement.

Section 35 of the DPA provides an exemption where the processing is necessary for the purpose of legal proceedings, the obtaining of legal advice or for establishing, exercising or defending legal rights. Section 35 would apply in this instance as the maintenance of the database is to facilitate targeted legal proceedings by rights holders.

It is worth remembering that, under the proposals in the Digital Economy Bill, at no point do rights holders know the true identity, or any other personal details, of the person behind the IP address. That is why ISPs are required to send notifications to suspected infringers without giving personal details to rights holders. As is the situation now, personal details would only be revealed via a court order.

## ***2. Introduction, if needed, of technical measures, including disconnection, against infringers.***

The BPI has obtained and shared with the Alliance comprehensive legal opinion from Richard Spearman QC on this issue. The question asked was whether there are any impermissible human rights interferences when restricting the internet access of ISP subscribers' account used for copyright infringement, following prior notifications. Spearman QC concluded that there were not.

The Committee raises the question as to whether such measures are compliant with Article 8 (an internet users' right to respect for their private life) and Article 10 (their right to freedom of expression). These are not absolute rights and access to the internet is not a fundamental human right. Rights derived from these articles must be balanced with the rights of copyright holders who are suffering significant harm as a result of online copyright infringement. The measures being proposed in the Digital Economy Bill – notification process to be followed if necessary by imposition of technical measures for repeat infringers – are a proportionate response to this harm.

In addition, as recognised in Recital 59 of the Copyright Directive, ISPs are often best placed to bring such infringing activities to an end. Moreover, ISPs, like utility providers, already contractually provide for such restrictions on services provided to their subscribers' services in their terms and conditions of use.

## ***Conclusion***

There are compelling reasons to accept that an IP address does not constitute personal information and even if they were, the DPA already provides for exceptions for the prevention of crime and the purpose of undertaking legal proceedings.

It is important that the debate within the Committee acknowledges that copyright is a fundamental property right protected by international convention, the ECHR, and European and UK law. Therefore, the question is not whether property rights should be protected per se but rather whether the measures being proposed to protect them are proportionate.

The Alliance understands the human rights concerns that have been expressed but is confident that the proposals contained in the Digital Economy Bill, both those which would come in as

primary powers under the Act and the technical measures which are proposed to come in under reserve powers, are proportionate and do not infringe human rights.

### ***About the Alliance***

Established in 1998, the Alliance Against Intellectual Property (IP) Theft is a UK-based coalition of 20 associations and enforcement organisations with an interest in ensuring intellectual property rights receive the protection they need and deserve. With a combined turnover of over £250 billion, our members include representatives of the audiovisual, music, video games and business software, and sports industries, branded manufactured goods, publishers, retailers and designers.

The Alliance is concerned with ensuring intellectual property rights are valued in the UK and that a robust, efficient legislative and regulatory regime exists, which enables these rights to be properly protected. Our Members work closely with trading standards and local police forces to reduce the harm caused by intellectual property crime in local communities and ensure legitimate businesses and traders are able to operate fairly.

We work closely with the Department for Business, Innovation and Skills and the UK Intellectual Property Office to raise awareness of the harm caused by IP theft. We are also participants in the IP Crime Group, which facilitates cross departmental dialogue and joint working amongst the relevant enforcement bodies and organisations.

### ***Alliance Members***

Anti-Counterfeiting Group  
 Authors' Licensing and Collecting Society  
 British Brands Group  
 BPI (British Recorded Music Industry)  
 British Video Association  
 Business Software Alliance  
 Cinema Exhibitors Association  
 Copyright Licensing Agency  
 Design and Artists Copyright Society  
 Entertainment and Leisure Software Publishers Association  
 Entertainment Retailers Association  
 Federation Against Copyright Theft  
 Film Distributors Association  
 Institute of Trade Mark Attorneys  
 Motion Picture Association  
 Premier League  
 Publishers Licensing Society

### ***Associate members:***

Anti-Copying in Design  
 British Jewellery, Giftware & Finishing Federation  
 Video Standards Council

January 2010

### **Memorandum submitted by Simon Baldwin**

Input from civil society into legislative scrutiny work:

I have concerns about (1) 'Illegal file-sharing' for a number of reasons. Firstly, some parts of the Digital Economy Bill seem to try and ignore the process of a fair trial, potentially circumventing going through a court entirely. There is also a low standard of evidence potentially allowing people to be accused (and have overly harsh punishments imposed against them and their family) even when nothing had been done by them. There doesn't seem to be any provisions against rights-holders who make too many false accusations (e.g. preventing them from making further accusations if a large proportions of their accusations are false). There seems to be a need to disconnect people from the internet, which is disproportionately unfair, and will severely affect people livelihoods and education if done. Also, the Bill wants to give overly large powers to the secretary of state to modify copyright law as they see fit, ignoring the parliamentary process, which I am against.

January 2010

### **Memorandum submitted by BPI**

#### ***SNAPSHOT SYNOPSIS OF RICHARD SPEARMAN QC'S OPINION ON HUMAN RIGHTS***

- Are there any impermissible human rights interferences when restricting the internet access of ISP subscribers' accounts used for copyright infringement, following prior written notifications ("Graduated Response")?
- Richard Spearman QC ("Leading Counsel") provides a detailed 25-page Opinion and concludes that there are not. He therefore shares Lord Mandelson's view that the Digital Economy Bill ("DEB") is compatible with the European Convention on Human Rights ("ECHR").
- Leading Council's opinion is that copyright is a fundamental property right protected by international convention, the ECHR, and European and UK law. The question is not whether copyright should be protected, but how?
- Leading Counsel asks two core questions:
  - Is Graduated Response an impermissible interference of ECHR Article 8 (the right to privacy) or Article 10 (the right to freedom of expression)?
  - Does Graduated Response impermissibly interfere with ECHR Article 6 (the right to a fair hearing)?
- Article 8 & 10 rights are not absolute. Access to the internet is not a fundamental human right. Articles 8 & 10 must be balanced with the rights of copyright holders who are suffering significant harm as a result of online copyright infringement. Graduated Response and the

implementation of technical measures to restrict internet access of subscribers' accounts used for copyright infringement are a proportionate response.

- As recognised in Recital 59 of Copyright Directive, ISPs are often best placed to bring such infringing activities to an end. Moreover, ISPs – like gas, electricity and water providers – already contractually provide for such restrictions on services provided to their subscribers' services in their terms and conditions of use.
- As to Article 6, a right to a fair hearing does not necessarily mean a right to an oral hearing. It means a fair opportunity to put one's case to an independent body. The recent amendment 138 to the Telecoms Package merely restates this position.
- Accordingly, it is entirely proper to devise and implement a procedure, following Graduated Response, which provides subscribers with an opportunity to put their case to such a body before having their internet account restricted.

***RE: HUMAN RIGHTS CONSIDERATIONS RELATING TO SANCTIONS WHICH COULD BE IMPLEMENTED BY ISPS IN RESPECT OF COPYRIGHT INFRINGEMENT UNDERTAKEN USING THE INTERNET***

**OPINION**

**Introduction and executive summary**

1. I am asked to advise on the human rights considerations which arise in relation to the introduction of certain measures which are effective to prevent the unauthorised dissemination of copyright works over the internet. In essence, there are two main aspects on which my advice is sought. First, whether the implementation of such measures constitutes an impermissible interference with the rights of customers ("Internet Account Holders") of Internet Service Providers ("ISPs") guaranteed by Article 8 (the right to privacy) and Article 10 (the right to freedom of expression) of the European Convention on Human Rights and Fundamental Freedoms ("the ECHR"), which is now embodied in the Schedule to the Human Rights Act 1998 ("the HRA"). Second, whether the proposed scheme violates the rights of Internet Account Holders to a fair trial, guaranteed by Article 6 of the ECHR.

2. The background, in brief, is that there has been very widespread consultation on this issue, and the government has now prepared draft legislation which is incorporated in its Digital Economy Bill ("DEB"), which formed part of the Queen's speech on 18 October 2009. The consultation proposed a range of technical measures to be applied to internet accounts identified as being used to infringe copyright, and these feature in the DEB. Pursuant to section 19(1)(a) of the HRA, Lord Mandelson states in the DEB that in his view the provisions of the DEB are compatible with Convention rights view of the fact that the provisions of the DEB may change in the course of Parliamentary debate, the advice which follows focuses on points of principle rather than on the detail of those provisions.

3. On the one hand, the position of copyright owners is that their rights are significantly harmed by the viral unauthorised dissemination of their property over the internet; that the impact on an individual of sanctions such as account suspension or slowing down internet access is not only limited but is also a proportionate response to the need to protect the- property rights of copyright owners; that where an individual Internet Account Holder makes a deliberate choice to

continue violating the law (or to continue to allow his or her internet connection to be used for this purpose) after being expressly warned to cease to do so that can and should be taken into account when evaluating the validity of any complaint of violation of the individual's rights arising from the imposition of sanctions; and that the balancing of competing interests comes down clearly in favour of copyright owners and can appropriately be catered for by a scheme which sets out the sanctions for specified (mis)conduct and which does not necessarily require an oral hearing before a court (or tribunal).

4. On the other hand, it is my understanding that the position of ISPs (and, no doubt, also the position of individual Internet Account Holders who wish to continue exploiting copyright works, or who wish not to be prevented from allowing others to do so using their internet connections, without regard to the rights of copyright owners) is, essentially, to the contrary effect.

5. In my view, for the reasons detailed below, the arguments of copyright owners in this context are to be preferred. In particular, so far as concerns the first major issue on which I am asked to advise:

1. I consider that it should be acknowledged at the outset that the correct starting point for the debate is not *whether* copyright should be protected but *how* that should be done. As set out in more detail below, copyright is a property right which is recognised and protected by domestic legislation, by international convention, by European law, and by Article I of the First Protocol to the ECHR (which is a "Convention right" within the meaning of section 1 of the HRA).

2. In this regard, as in other areas of the law (such as defamation) the advent of the internet has brought about a sea change in the patterns of behaviour of individuals and in the nature and extent of the problems faced by those whose rights may be infringed by means of telecommunications. On the one hand, effective enforcement of the rights of copyright owners by other methods is difficult if not, in practical terms, impossible. On the other hand, individual Internet Account Holders are normally in a position to ensure that a particular internet account is not used for infringing activity and thus to avoid the basis for imposition of any sanction<sup>64</sup>

3. The proposed measures would not restrict an individual's right to access the internet as such, but would instead be applied to a particular Internet Account and would thus focus on the ability to access the internet using the identified Internet Account and/or on inhibiting infringing use of the particular Internet Account.

4. There is persuasive case law which expressly rejects the argument that access to the internet is a fundamental human right, and which accepts that restricting or preventing access to the internet would not necessarily be a disproportionate response in relation to any impact on existing human rights.

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<sup>64</sup> In those cases where this is not so - for example, individuals whose internet connections are accessed without their knowledge and/or for reasons beyond their control - under the proposed scheme (discussed further below) the Internet Account Holder will receive warnings and will be able to raise arguments in accordance with the definitions of "copyright infringement dispute" and "subscriber appeal" which it is intended to insert as section 124E of the Communications Act 2003 (see Clause 8 of the DEB)..



5. Indeed, the fact that rights guaranteed by the ECHR cannot normally be raised to defeat the enforcement of rights recognised at common law or conferred by statute is reflected in the entitlement of ISPs by contract - and that of gas, electricity

6. So far as concerns the second major issue on which I am asked to advise, in summary:

1. Under the common law of England, the right to a hearing does not necessarily mean a right to an oral hearing, and still less does it necessarily mean a right to have legal representation even in formal hearings, but, rather, at least in the context of civil proceedings or disputes, it means that each side must have a fair opportunity to put its case to the body determining the contest.

2. The position is essentially the same with regard to the determination of "civil rights and obligations" under Article 6 of the ECHR. Article 6 does not define the content of the "right to a fair hearing", and the Commission and the European Court of Human Rights ("ECtHR") have not attempted any such definition, but have instead proceeded by articulating a number of principles. One example of this is the principle of entitlement to fair presentation of evidence although, here again, the Strasbourg institutions have not laid down any specific set of evidential rules as a requirement of the guarantee of this right. When considering the issue of "a fair hearing" the fundamental principle is whether the proceedings as a whole are fair.

3. In the present context, I can see no reason in principle why it should not be possible to devise and implement a procedure which complies with the right to a fair and impartial hearing which forms part of the common law of England and which is guaranteed by Article 6 of the ECHR. Further, I consider that this can be done without incorporating a requirement that there should be an oral hearing (and still less an oral hearing before a court) before any sanction is imposed. Indeed, I consider that these points are apparent from the requirements in the Telecoms Package (discussed further below), which include (i) that measures may only be taken with due respect for the principle of presumption of innocence and the right to privacy, (ii) that a prior fair and impartial procedure shall be guaranteed, including the right to be heard of the person or persons concerned, and (iii) that the right to an effective and timely judicial review shall be guaranteed. These requirements do not connote a right to a determination at first instance by a court with an oral hearing, but, rather, a right for each Internet Account Holder to have a fair opportunity to put his or her case to an impartial tribunal, together with a right of reconsideration by a court.

### ***The rights in play on the first issue***

7. Copyright has its origins in the common law, but is now derived from the provisions of the Copyright, Designs and Patents Act 1988 ("the 1988 Act"). In accordance with section 1(1) of the 1988 Act: "Copyright is a property right which subsists in accordance with this Part in the following descriptions of work-(a) original literary, dramatic, musical or artistic works, (b) sound recordings, films, broadcasts or cable programmes ... ". In accordance with section 2(1) of the 1988 Act: "The owner of the copyright in a work of any description has the exclusive right to do the acts specified in Chapter II as the acts restricted by the copyright in a work of that description."

8. Reproducing a work in any material form, without the licence of the copyright owner, including by storing the work in any medium by electronic means, is an infringement of copyright by copying (see section 17 of the 1988 Act). Communication to the public of a work (including making it available to the public by electronic transmission in such a way that members of the public may access it from places and at times chosen by them) is an infringement of copyright (see section 20 of the 1988 Act), if done without the licence of the copyright owner. It is also (see section 16(2) of the 1988 Act) an infringement to authorise others to do any of these acts. In addition (see section 24(2)): "Copyright in a work is infringed by a person who without the licence of the copyright owner transmits the work by means of a telecommunications system (otherwise than by broadcasting or inclusion in a cable programme service), knowing or having reason to believe that infringing copies of the work will be made by means of the reception of the transmission in the United Kingdom or elsewhere."

9. Further, the 1988 Act also provides that the distribution and communication to the public of sound recordings can amount to a criminal offence (see section 107(2A)).

10. Accordingly, (for example) making copyright works available using the internet, without the licence or consent of the copyright owner, such that those works may be downloaded and copied by others at a place and time individually chosen by them is an infringement of copyright: see *Polydor Ltd and others v Brown and others* [2005] All ER (D) 375 (Nov) "Connecting a computer to the Internet, where the computer is running P2P software, and in which music files containing copies of the Claimant's copyright works are placed in a shared directory, falls within the infringing act."

11. The rights which are conferred by the 1988 Act are recognised under international convention and are harmonised under European law: see the Berne Conventions of 1886 and 1971 and Council directive (93/98/EEC) of 29 October 1993. Naturally and unsurprisingly, such rights have also been accepted by the courts as forming part of the fundamental right to property, for example by the European Court of Justice in *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* [2008] 2 CMLR 17 (a case which is discussed further and in more detail below).

12. Those rights are also recognised by Article 1 of the First Protocol to the ECHR, which (as has already been mentioned above) is now embodied in the Schedule to the HRA:

#### Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the condition provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

13. Article 1 of the First Protocol to the ECHR is a "Convention right" within the meaning of section 1 of the HRA.

14. Further "Convention rights" within the meaning of the HRA are Articles 8 and 10 of the ECHR:

## Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such that is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

## Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

15. As the Court of Appeal observed in *Ashdown v Telegraph Group Ltd* [2002] Ch 149 at §25: "The second paragraph of [Article 10] is particularly significant. In a democratic society there are many circumstances in which freedom of expression must, of necessity, be restricted. In particular untrammelled exercise of freedom of expression will often infringe the "rights of others", both under the Convention and outside it ... More pertinent in the present context is the right recognised by Article 1 of the First Protocol". These observations apply with equal force to the second paragraph of Article 8.

16. There is a public interest as well as a private interest in upholding each of these different Convention rights. So far as copyright is concerned, there is a clear and well recognised public interest in encouraging and rewarding creativity. In addition, given that copyright is accorded recognition and protection by the law, the activities of infringers are contrary not only to the financial interests of copyright owners (which naturally extend to all those many individuals who make their livings from the music and film industries) but also to the interests of the law abiding public.

17. This is apparent, not least, from what has been said in the context of sentencing people for criminal offences involving infringement of copyright. For example, in *R v Bennett* [2007] EWCA Crim 2371, in dismissing the defendant's appeal and upholding a sentence of 4 years' imprisonment for operating a website and forums that were concerned with the distribution of films and music, the Court of Appeal cited with apparent approval the following remarks of the sentencing judge:

"The entertainment business is a very big one, and it has a huge turnover, and this contributes very substantially to the tax income of the revenue. The loss to the industry by pirating is enormous, and there has recently been a great deal of coverage in the press about loss inflicted on the industry by piracy, and there is a growing public awareness of the scale of this problem; and it is not only the industry who expect severe sentences for this sort of activity, but it is the public who also are concerned; and of course the public lose because the loss to the industry forces the industry to increase their prices to cover the loss, and it is the ordinary members of public who find themselves having to pay more."

18. At the same time, protection of the rights of the owners of copyright works which goes too far could lead to an unduly inhibiting effect on freedom of expression (and, for that matter, free trade), which would be contrary to the public interest. The balancing of these considerations underpins both the recognition of copyright and the exceptions to protection which are contained in the 1998 Act.

19. In the context of the present case, it is not so far as I am aware being suggested that any additional exception should be added to the detailed statutory scheme contained in the 1998 Act (to the effect, for example, that Internet Account Holders should be entitled by law to exploit copyright works free of charge without the licence of copyright owners through the medium of the internet, albeit that they are not lawfully entitled to exploit those works in that way by other means). Accordingly, the underlying argument which confronts copyright owners would appear to be to the effect that although it is not disputed that the activities which are sought to be made the subject of sanctions against Internet Account Holders constitute infringements of copyright, those activities should not be made the subject of such sanctions on the ground that those sanctions are an inappropriate response to the infringements in question. However, while not expressed as such, the upshot of this argument is to the same effect as a suggestion that some additional exception should be added - yet any such suggestion ought to be approached with care in light of the balance already struck by the 1998 Act.

20. The extent to which there is a public interest in upholding Article 8 and Article 10 rights depends upon the type of exercise of those rights which is in issue. That is also relevant when it comes to striking a balance between competing rights (a topic which is considered separately below).

21. So far as Article 8 is concerned, the notion of "private life" is a broad concept and includes rights of autonomy, dignity, respect, self-esteem, to control the dissemination of information, and to establish and develop relationships with other people. Further, "the more intimate the aspect of private life that is being interfered with, the more serious must be the reasons for interference before the latter can be legitimate" (see *Douglas v Hello! Ltd* [2001] QB 967, Keene LJ at §168).

22. Classic examples of interferences which require strong justification are those concerning intimate information about matters such as the home, health, matrimonial confidences, medical information, and information relating to sexual relationships; but not, so far as I am aware, interfering with an individual's internet access, not generally but solely through the medium of a particular account.

23. So far as Article 10 is concerned, as Baroness Hale explained in *Campbell v MGN Ltd* [2004] 2 AC 457 at §§158-159:

"There are undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others. Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life. Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals' potential to play a full part in society and in our democratic life. Artistic speech and expression is important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value. No doubt there are other kinds of speech and expression for which similar claims can be made."

24. In the present context, the nature of the interference with Article 8 and Article 10 rights which will result from the prevention or restriction of any individual's use of a particular internet connection will depend upon (a) the purposes for which that individual uses the internet connection concerned and (b) the extent to which his or her use of the internet will be prevented or restricted by the measure in question. For example, if the individual needs an internet account for purposes of study, interference with that account will require greater justification than if he or she (a) uses it to access pornography or (b) can study by other means. In this regard, one aspect of the attribution of a higher free speech value to educational speech and expression than to receiving and imparting pornography is that there is considered to be a greater public interest in fostering the former than the latter.

25. In the result, as discussed further below, the public interest may be determinative when striking a balance between competing rights. See, for example, Lord Hoffmann in *Campbell* at §56:

"...While there is no contrary public interest recognised and protected by the law, the press is free to publish anything it likes. Subject to the law of defamation, it does not matter how trivial, spiteful or offensive the publication may be. But when press freedom comes into conflict with another interest protected by the law, the question is whether there is a sufficient public interest in that particular publication to justify curtailment of the conflicting right. In the example I have given, there is no public interest whatever in publishing to the world the fact that the citizen has a drug dependency. The freedom to make such a statement weighs little in the balance against the privacy of personal information..."

### ***Balancing rights in connection with the first issue***

26. It is clear that members of BPI (British Recorded Music Industry) Limited ("the BPI") enjoy rights under the ECHR of significance and relevance. As rights holders those members enjoy rights under the 1998 Act and Article 1 of the First Protocol to the ECHR. Moreover, in accordance with Articles 8(2) and 10(2), these are rights which necessarily must be taken into account in any balancing exercise which arises with the competing rights under Article 8 and/or Article 10 of the ECHR.

27. There are a number of consequences of the existence of the rights of copyright owners under the 1988 Act and Article 1 of the First Protocol to the ECHR. In particular, in having regard to

Articles 8 and 10 for the purposes of sections 3, 6 and 12 of the HRA65, it is necessary to recognise that copyright owners are seeking to protect their own rights under the 1988 Act and under Article 1 of the First Protocol. In considering both Article 8 and Article 10, it must be acknowledged that one of the recognised exceptions set out in Articles 8(2) and 10(2) which is capable of justifying curtailment, respectively, of the right to respect for private and family life and correspondence and of the right to freedom of expression (which includes the right to receive and impart information and ideas) is engaged, namely the protection of the rights of others (that is to say, in the present context, the rights of copyright owners under the 1998 Act and under Article I of the First Protocol).

28. However, the rights of (a) individual Internet Account Holders and/or (b) other internet users (for example, family members) and or (c) ISPs under the ECHR are also engaged in the present context. In the result, I consider that any measures which restrict internet speed or prevent the use of a particular internet account will need to be implemented in a manner which does not violate (that is to say, which accords sufficient regard to) the rights guaranteed by Articles 8 and 10 of the ECHR.

29. The correct approach when conducting a balancing exercise where both Article 8 and Article 10 rights under the ECHR are involved, in accordance with the guidance given by the House of Lords in *Re S* [2005] 1 AC 593 (Lord Steyn at §17), is that: (i) neither Article as such has precedence over the other (ii) where the values under the two Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary (iii) the justifications for interfering with or restricting each right must be taken into account (iv) finally, the proportionality test - or "ultimate balancing test" - must be applied to each. In my view, that approach is also applicable in the present context, where the balance falls to be struck between Article I of the First Protocol on the one hand and Articles 8 and 10 on the other.

30. The interplay between Article I of the First Protocol to the ECHR on the one hand and Article 10 on the other was considered in *Ashdown v Telegraph Group Ltd* [2002] Ch 149<sup>66</sup>. In that case,

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65 Section 3 of the HRA is entitled "Interpretation of legislation" and provides:

"(1) So far as is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible With the Convention rights

(2) This section

(a) applies to primary legislation and subordinate legislation whenever enacted

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; ..."

Public authorities (including the Court, where, for example, the question arises in actions between private individuals) have a statutory duty under section 6 of the HRA not to act in a way which is incompatible with Convention rights.

Section 12 of the HRA is entitled "Freedom of expression" and provides:

"12 .. (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression...

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to-

(a) the extent to which-

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code."

66 The Claimant also had a claim for breach of confidence. But this claim, and, accordingly, the issue of whether there was justification for interference with the Claimant's Article 8 rights, was not before the Court, because this was a summary judgment hearing and the Claimant only sought summary judgment (which he succeeded in obtaining) on his copyright claim.

in the context of considering a defence of fair dealing, the Court of Appeal held (at §71) that the principles to be derived from the authorities which were decided before the HRA came into force, and which are summarised in *Laddie, Prescott and Vitoria, The Modern Law of Copyright*, 3'd Edn, §20.16, are "still important when balancing the public interest in freedom of expression against the interests of the owners of copyright" but that "It is, however, now essential not to apply inflexibly tests based on precedent, but to bear in mind that considerations of public interest are paramount".

31. In reaching that conclusion, the Court of Appeal also held (among other things): (i) (at §28) that, although interference with copyright constitutes interference with a property right in accordance with Article 1 of the First Protocol to the ECHR, and with a right recognized under the Berne Convention and harmonized under European law, in the specific circumstances set out in sections 30(1) and 30(2) of the 1988 Act, and provided there is "fair dealing", those sections represent one of 42 sets of circumstances which are contained in the 1988 Act in which freedom of expression displaces the protection which would otherwise be afforded to copyright (see §§32-33); and (ii) (at §45) that "rare circumstances can arise where the right to freedom of expression will come into conflict with the protection afforded by the 1988 Act notwithstanding the express exceptions to be found in the 1988 Act" where "the Court is bound, so far as it is able, to apply the 1998 Act in a manner that accommodates the right to freedom of expression".

32. To the like effect, in *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* [2008] 2 CMLR 17 the European Court of Justice explained that (i) the fundamental right to property, which included intellectual property rights such as copyright, and the fundamental right to effective judicial protection constituted general principles of Community law; but (ii) there was also a further fundamental right guaranteeing protection of personal data and hence of private life (see §§62- 63). The Court further stated (iii) that it was necessary to reconcile the requirements of the protection of different fundamental rights, namely the right to respect for private life on the one hand and the rights to protection of property and to an effective remedy on the other; and (iv) that the mechanisms for that were contained, first, in Directive 2002/58 itself, in that it provided for rules which determined in what circumstances and to what extent the processing of personal data was lawful and what safeguards should be provided for, and in Directives 2000/31, 2001/29 and 2004/48, which reserved the cases in which the measures adopted to protect the rights they regulated affected the protection of personal data, and, second, resulted from the adoption by the Member States of national provisions transposing those directives and their application by the national authorities (see §§65-66). Finally, the Court stated that (v) although Directives 2000/31, 2001/29, 2004/48 and 2002/58 did not require Member States to lay down, in a situation such as that at issue, an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings, it allowed them to do so, and Community law did require that, when transposing those directives, Member States took care to rely on an interpretation of them which allowed a fair balance to be struck between the various fundamental rights protected by the Community legal order; and (vi) when implementing the measures transposing those directives, the authorities and courts of the Member States should not only interpret their national law in a manner consistent with those directives but also make sure that they did not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality (see §§67-70).

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33. In the latter regard, a failure by a public authority (which includes for this purpose a court or tribunal) to provide effective protection to the rights of copyright owners in accordance with Article 1 of the First Protocol to the ECHR will give rise to a breach of the statutory duty imposed on public authorities by section 6 of the HRA, which provides as follows:

"6. Acts of public authorities.

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right ...

(3) In this section "public authority" includes-

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament."

34. The Court of Appeal has also given guidance as to the correct approach where the balance which falls to be struck is not simply between competing ECRR rights (which is the position addressed in *Re S* [2005] 1 AC 593) but instead also involves, on one side of the scales, a right which is recognised independently of the ECRR. That guidance was given in *HRH the Prince of Wales v Associated Newspapers Ltd* [2007] 3 WLR 222 in the context of a claim for breach of confidence arising from a pre-existing relationship, and is in the following terms (see §§67-68):

"... a significant element to be weighed in the balance is the importance in a democratic society of upholding duties of confidence. that are created between individuals. It is not enough to justify publication that the information in question is a matter of public interest. For these reasons, the test to be applied when considering whether it is necessary to restrict freedom of expression in order to prevent disclosure of information received in confidence is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached. The court will need to consider whether, having regard to the nature of the information and all the

relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public."

35. Further, in *Harrow London Borough Council v Qazi* [2004] I AC 983 the House of Lords held (at §149) that "Article 8 cannot be raised to defeat contractual and proprietary rights to possession".

36. Similarly, in *Kay and others v Lambeth London Borough Council* [2006] I AC 465, Lord Bingham said (at §36) that:

"The public authority owner or landlord has, broadly speaking, a right to manage and control its property within bounds set by statute. The occupier acquires a right, but only a limited right, to occupy. On due determination of that interest, a claim for possession must ordinarily succeed, since any indulgence to the occupier necessarily derogates from the property right of the public authority, whose rights are also entitled to respect. It is not



therefore surprising that in *P v United Kingdom* 67 DR 264, and *Ure v United Kingdom* (Application No 28027/95) (unreported) 27 November 1996, the occupiers' complaints were held to be inadmissible because the public authority's interference or assumed interference was held to be clearly justified. It would, again, require highly exceptional circumstances before article 8 would avail the occupiers."

37. In my view, these cases all point in the same direction:

1. The starting point is that, subject to statutory exceptions - which in the case of the 1998 Act (a) are very detailed and (b) give extensive recognition to circumstances in which the right of freedom of expression should displace their rights - copyright owners are entitled to enforce their property rights in accordance with the provisions of the 1998 Act.
2. However, there may be limited circumstances in which (notwithstanding those detailed express statutory exceptions) Article 10 comes into conflict with copyright.
3. In this context, public interest considerations are paramount, with the result that the test to be applied is whether, in all the circumstances, it is the public interest that copyright should be displaced.
4. Similarly, where the countervailing rights are Article 8 rights, a claim for infringement of copyright will normally succeed, since any indulgence to the infringer necessarily derogates from the property rights of the copyright owner, whose rights are also entitled to respect.

38. Another way of expressing the matter is to say that there is no question of there being an unjustified interference with anyone's rights under Articles 8 and 10 if and to the extent that the restraint imposed relates to material that infringes copyright. In other words, it is possible to apply by analogy Lord Hobhouse's pithy observation in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 238 that "There is no human right to disseminate information that is not true".

39. The fact that rights guaranteed by the ECHR cannot normally be raised to defeat the enforcement of rights recognised at common law or conferred by statute is reflected in the entitlement of ISPs by contract - and in the entitlement of gas, electricity and water providers by statute - to terminate the provision of services, for example in the event of non-payment of charges which are due.

40. Indeed, in the case of ISPs, I understand that contractual provisions agreed by Internet Account Holders typically include a requirement that the service provided must not be used in such a way that it infringes the rights of others, including copyright owners, and a reservation of the right to terminate the service if this requirement is not complied with. Accordingly, there is typically a contractual ground for termination on the very basis which forms the subject of the present Opinion.

41. I do not consider that it could credibly be suggested that enforcement of these contractual (or statutory) rights would amount to an infringement of an Internet Account Holder's human rights.

42. Nor is it easy to see why any violation of human rights should arise where what is sought to be achieved in accordance with the proposed scheme, leading if necessary to the imposition of sanctions, is nothing more than an inhibition on the Internet Account Holder's use of his or her

internet connection for the purposes of infringing copyright which accords with one contractual obligation which he or she has freely entered into with an ISP as a term of his or her account.

43. The balancing exercise might involve a different analysis if there was a human right to access the internet as such. However, that is not the case. On the contrary, I consider that although it is clear that when a balance requires to be struck between competing rights it is relevant to take into account the extent to which stopping or impeding use of the internet involves interference with ECHR rights, it is equally clear that the fact such an interference manifests itself in that way does not give rise to any special considerations. In *KU v Finland* [2009] 48 EHRR 52 when considering the balance between freedom of expression and other legitimate rights, including the prevention of crime, in a context where the only effective remedy available to the applicant whose own human rights had been violated (namely Articles 8 and 13) involved an encroachment onto an internet user's right to freedom of expression and confidentiality of communications the ECtHR stated (at §49):

"Although freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives such as the prevention of disorder or crime or the protection of the rights and freedoms of others."

44. This position is reflected in the Telecoms Package. This is a set of proposed amendments of the European Commission to reform the EU's regulatory framework of Directives for electronic communications networks and services. The European Parliament has proposed amendments to the Telecoms Package in a resolution of 6 May 2009. Both the recitals and the proposed amendment 138 (which I understand is now agreed, subject to formal adoption) reflect the position that restrictions on use of the internet are permissible in accordance with the ECHR:

"Recognising that the Internet is essential for education and for the practical exercise of freedom of expression and access to information, any restriction imposed on the exercise of these fundamental rights should be in accordance with the European Convention for the protection of Human Rights and Fundamental Freedoms..."

"Measures taken by Member States regarding end-users' access to or use of services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law. Any of these measures regarding end-user's access to or use of services and applications through electronic communications networks liable to restrict those fundamental rights or freedoms may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and their implementation shall be subject to adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with general principles of Community law, including effective judicial protection and due process. Accordingly, these measures may only be taken with due respect for the principle of presumption of innocence and the right to privacy. A prior fair and impartial procedure shall be guaranteed, including the right to be heard of the person or persons concerned, subject to the need for appropriate conditions and procedural arrangements in duly substantiated cases of urgency

in conformity with European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to an effective and timely judicial review shall be guaranteed."

45. In my view, these considerations are mirrored in cases involving termination or restriction of use of the internet in other countries and in other contexts.

46. In *TDC Totallosninger A/S v IFPI Danmark* (Case No 49/2005) the Danish Supreme Court upheld an injunction against an ISP prohibiting the ISP from transmitting copyrighted works from two servers, the owners of which had committed extensive infringements of musical and other works managed by IFPI. Among other things, the Court observed as follows:

"The fact that it may very well be possible for TDC to comply with the preliminary injunction only by shutting down the Internet connection to the FTP servers or generally to the subscribers in question, must be taken into account in the proportionality assessment ... [but] The opposite would also not be compatible with Denmark's obligations under [Article 8(3) of the IP Harmonisation Directive]...

It cannot be ruled out that a preliminary injunction of this nature will result in a certain amount of administrative work for TDC. This, however, should be compared with the fact that the defendants have a significant and protection-worthy interest in ensuring that copyright infringements are ended swiftly and efficiently".

47. Further, the Court of the Hague in *BREIN v KPN* [AZ5678; 276747/KG ZA 06-1417] and the District Court of Amsterdam in *BREIN v Leaseweb* [BA7810; 369220/KG ZA 07-840 ABIMV] made orders requiring the removal of web sites by hosting providers, in reliance upon a duty of care arising under the general Dutch law. In the first of these cases, the Court expressly rejected an argument to the effect that, even after "[the ISP's] attention is drawn to obvious (unmistakable) wrongful actions of its contracting parties on the Internet", it would be disproportionate to require the ISP to disconnect the website owner "because the Internet must allegedly be regarded as a vital necessity of life".

### ***Striking the balance in this case - with regard to the first issue***

48. The internet has enabled infringement of copyright to take place easily and globally and on a massive scale. It also presents very significant challenges for rights holders in identifying those responsible for infringements of copyright and then in taking action to prevent further infringement by those responsible. It is not practically possible to institute legal proceedings against millions of persons engaged in infringement of copyright even if the persons responsible for the infringement can be identified - a process which itself typically requires a prior disclosure order against an ISP.

49. However, intermediaries may be able to prevent infringements taking place in circumstances where it may be difficult or impossible for rights owners to identify the primary infringer (who may not be the Internet Account Holder) and/or to take action on a scale which is effective to prevent further infringement. It is against this background that Recital 59 of the European Community Directive 2001/29/EC of 22 May 2001 concerning the harmonisation of certain aspects of copyright and related rights in the information society ("the IP Harmonisation Directive") has recognised that:

"(59) In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end ... "

50. A particularly prevalent form of infringement using the internet involves an individual user of a computer with internet access making available copies of copyright works using peer to peer ("P2P") "file sharing" technology. This technology enables individual users of computers who have installed the relevant P2P software to use the internet to access recordings and other copyright works made available by other internet users and also to make the recordings and other copyright works available to other users.

51. Where it is possible to identify an act of copyright infringement that occurs by making available copies of copyright works online, the person responsible for making available the copyright work will be an infringer of copyright under the provisions of the 1988 Act unless he or she can show that the activity falls within any of the recognised exceptions contained within the Act. In the present context, where commercially released sound recordings are uploaded without permission, none of the recognised exceptions applies. Accordingly, where such infringement can be prevented in a targeted manner that does not impinge upon any other legitimate activity there is no reason to doubt that, on application by the copyright owner(s), infringement would be prevented by injunction even though such an injunction will nevertheless result in a restriction on the individual's right to freedom of expression or to impart information. The appropriate balance will almost certainly be to prevent the infringement. Where, however, the method of preventing infringement will also impact upon lawful activity greater regard must be had to proportionality, and this is the focus of this Opinion.

52. The particular internet connection allocated to a particular account holder ("the Internet Account") that is used to make available copyright works can be identified by rights owners participating as any member of the public can in a P2P network. The process of identification is relatively straightforward and the evidence is robust. Each time the user of a computer connects to the internet and then makes available a copyright work (either as contained in the shared directory of the computer or whilst undertaking the process of download of the work) the recipient of all or part of that work can identify the IP address for the Internet Account that is being used to make the work available. Thus, where rights holders search for works being made available by others, they are then able to record the Internet Protocol (IP) addresses for the particular Internet Accounts that are used to make the works available at that specified date and time. These IP addresses can then be traced back to the Internet Accounts by the intermediaries (that is to say, ISPs). While in appropriate cases that information can be provided to rights holders, typically pursuant to an Order for disclosure known as a Norwich Pharmacal Order<sup>67</sup>, which process involves an interference with the Article 8 rights of Internet Account holders which is regarded as proportionate, there is no need for the information to be disclosed to rights holders with the measures now under consideration.

53. However, although the process of identifying the Internet Account used to infringe copyright is relatively straightforward, it is not always possible to say who was using the Internet Account at the time. Computers can be accessible by more than one individual within a household. Further, it is possible for Internet Accounts to be used without authorisation, for example where the wireless network used in a household is not secured, although it is right to say that (a) it is

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<sup>67</sup> After the case in which the jurisdiction was recognised: *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133.

possible to secure a network easily and without expense and (b) many claims of unauthorised access may be unfounded and (c) notifications to Internet Account Holders prior to the imposition of any technical measure would, I understand, advise them how to secure the wireless router against unauthorised access.

54. Moreover, even if an individual can be identified as the wrongdoer, enforcement against that individual can in practice be time consuming and costly. In the event that an order to pay damages is made against that individual or he/she is ordered to pay a fine, enforcing compliance with such an order can often be very difficult, time consuming and costly.

55. Recognising the need to protect copyright, the practical difficulties in enforcing copyright using traditional litigation methods in the internet age, and the particular position of intermediaries as those best placed to enable such protection, the specific measures aimed at preventing (or substantially reducing) infringements of copyright using the internet which are now under consideration consist of varying sanctions which could be applied to Internet Accounts which are identified as having been used repeatedly to infringe, even after the Internet Account Holder has received clear warning.

56. These measures would not restrict an individual's right to access the internet as such. Instead, they would be applied to a particular Internet Account and would thus focus on the ability to access the internet using the identified Internet Account and/or on inhibiting infringing use of the particular Internet Account (for example by reducing the speed of the particular internet connection).

57. It is my understanding that what is proposed is that before any sanction is imposed an Internet Account Holder will receive not only clear warning but also prior notification of any sanction that is to be applied to his or her Internet Account and that there may be some form of redirection to a warning page on the internet if infringing use of the Internet Account continues. The range of possible sanctions for those who ignore such warning could include: some form of restriction on internet speed to curtail filesharing capability; or temporary suspension of internet access. Plainly, the greater the degree of prior warning and notification, the less scope for it to be argued that the proposed scheme is unfair, unreasonable, or capable of leading to results which are disproportionate.

58. Some of these sanctions may restrict not only infringing activity but also the Internet Account Holder's lawful use of the internet. The extent to which this will occur in practice will depend upon matters such as whether the Internet Account Holder uses the internet for other purposes, whether and to what extent those purposes are lawful, and whether and to what extent the Internet Account holder can access the internet by other means.

59. This adds an extra dimension to the situation where a sanction will necessarily only impinge on infringing activities. In addition, for reasons discussed above, it is possible that if the sanctions are applied they will affect an Internet Account Holder who has not engaged in any infringing activity, albeit that his or her internet connection has been used by others to infringe.

60. It seems to me that this is where questions of proportionality come into play. On the one hand, the proposed sanctions may represent the only, or the most, effective means of preventing infringement; and, further, as discussed above, they need not - and generally speaking they should not - have the practical effect of preventing the Internet Account Holder from accessing

the internet at all. On the other hand, the proposed sanctions may impede lawful as well as unlawful activity.

61. With regard to the first of these complicating factors, there are other situations in which the law is required to cater for circumstances where a particular activity has or may have both legal and illegal aspects. Where a CD contains a number of sound recordings only one or some of which infringes copyright, an injunction will be granted which prevents the exploitation of the infringing sound recording(s) even if that has the effect of restricting the right to exploit the recordings which are not infringing. Similarly, in libel cases, in the event that defamatory and non-defamatory material cannot be separated from one another, for example in a book, an injunction will be granted restraining publication/distribution of the defamatory material notwithstanding the fact that this will also prevent the publication/distribution of the non-defamatory material. In *Roger Bullivant v Ellis* [1987] FSR 172, when considering the ambit of the injunction it would be appropriate to grant to prevent an employee from obtaining an impermissible "springboard" advantage from the wrongful taking of his former employer's card index, the Court of Appeal (per Nourse LJ at p181) stated with regard to the employee that "Having made deliberate and unlawful use of the plaintiffs' property, he cannot complain if he finds that the eye of the law is unable to distinguish between those whom he could, had he chose, have contacted lawfully and those whom he could not".

62. With regard to the second of these complicating factors, an Internet Account Holder will typically undertake a contractual responsibility to control the use of the account. In addition, the Internet Account Holder may be liable for infringement of copyright on the basis that he/she authorises the infringement where he/she has the ability to prevent infringing use and fails to so, especially with knowledge that the Internet Account is being used to infringe copyright. More often, of course, the Internet Account Holder may be liable because he/she is personally making available the copyright works using P2P software. Further, as already discussed above, the system of prior warning will enable Internet Account Holders to take appropriate action to avoid sanctions being imposed.

63. In these circumstances, I do not consider that in principle there is anything wrong or disproportionate about a regime which provides for protection to be accorded to copyright even if, in some circumstances, that may involve restrictions on lawful uses of an Internet Account or may affect an Internet Account Holder who has not personally engaged in infringing activity.

64. Among other things, it is important to remember, as was pointed out by the House of Lords in *Campbell v MGN Ltd* [2005] 1 WLR 3394 (Lord Hoffmann at §26), that although (in accordance with *Re S*) a balancing of rights may require "an intense focus on the comparative importance of the specific rights being claimed in the individual case":

"But concentration on the individual case does not exclude recognising the desirability, in appropriate cases, of having a general rule in order to enable the scheme to work in a practical and effective way."

### ***The right to a fair hearing - one aspect of the second issue***

65. It is relevant to consider the nature of the individual Internet Account Holder's right to be heard before a sanction is applied in respect of his or her Internet Account. Article 6 of the ECHR states as follows:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law... "

66. The like requirements are reflected in amendment 138 to the Telecoms Package, which provides not only that measures of the kind which are now under consideration should only be imposed if they are "appropriate, proportionate and necessary within a democratic society" (considerations which form the subject of my advice on the first issue which is set out above) but also (among other things) that the implementation of such measures "shall be subject to adequate procedural safeguards in conformity with the [ECHR] ... including effective judicial protection and due process" such that "these measures may only be taken with due respect for the principle of presumption of innocence", and "prior fair and impartial procedure shall be guaranteed, including the right to be heard of the person or persons concerned", and "the right to an effective and timely judicial review shall be guaranteed. "

67. Section 6 of the HRA (quoted above) is also relevant in this context. For the purpose of that section, a regulatory or adjudicative body empowered to deal with the problem of online copyright infringement will fall within the definition of a public authority. Accordingly, it will be obliged to act in a manner which is compatible with the parties' ECHR rights, including (where relevant) the Article 6 right to a fair trial. However, I consider that in principle there is no reason why a scheme cannot be devised which accords with Article 6 and enables effective enforcement in this context.

68. Given (a) the mass scale of online infringing activity that takes place in the UK, (b) the fact that Internet Accounts that are being used to infringe copyright can be identified with certainty, (c) the fact that sanctions in respect of the Internet Account tackle the problem effectively and proportionately and (d) the fact such sanctions necessarily require that intermediaries play a role in prevention where notified that a particular Internet Account is being used for infringing purposes, it seems to me that a system can and should be capable of being developed which complies with all the requirements envisaged by proposed amendment 138 to the Telecoms Package (including effective judicial protection and due process and respect for the presumption of innocence so far as concerns the Internet Account Holder) but which equally does not require rights holders to apply to Court before the imposition of sanctions where such repeated applications would be disproportionate.

69. As Lord Bingham observed in *Brown v Stott* [2003] I AC 681 at 693: "What a fair trial requires cannot, however, be the subject of a single, unvarying rule or collection of rules. It is proper to take account of the facts and circumstances of particular cases, as the European court has consistently done."

70. In that case (upheld by the European Court of Human Rights in *O'Halloran & Francis v UK* [2008] 46 EHRR 21) the public interest in addressing the problem of road traffic incidents was held to justify the particular mechanisms in place which required a driver to disclose to the authorities the identity of the driver of a vehicle identified as having committed an offence pursuant to section 172 of the Road Traffic Act 1988 which arguably conflicted with the driver's privilege against self-incrimination and by consequence right to a fair trial. Lord Bingham stated (at p704):

"The high incidence of death and injury on the roads caused by the misuse of motor vehicles is a very serious problem common to almost all developed societies. The need to address it in an effective way for the benefit of the public, cannot be doubted. Among other ways in which democratic governments have sought to address it is by subjecting the use of motor vehicles to a regime of regulation and making provision for enforcement by identifying, prosecuting and punishing offending drivers... There being a clear public interest in enforcement of road traffic legislation the crucial question in the present case is whether section 172 represents a disproportionate response or one that undermines a defendant's right to a fair trial, if an admission of being the driver is relied on at trial...I do not for my part consider that section 172, properly applied, does represent a disproportionate response to this serious social problem, nor do I think reliance on the defendant's admission, in the present case, would undermine her right to a fair trial."

71. Furthermore, the suggestion that Article 6 requires an oral hearing was rejected by the House of Lords in *R v Parole Board, ex parte West* [2005] I WLR 350. That case concerned challenges by two determinate sentence prisoners to the revocation of their licences. The respondent to the appeal was the Parole Board, which accepted that in resolving challenges to revocation of their licences by determinate sentence prisoners it was under a public law duty to act in a procedurally fair manner, and further accepted that in some cases (such as where there was a disputed issue of fact material to the outcome) procedural fairness might require it to hold an oral hearing at which the issue might be contested, but resisted the argument that there should be any rule or presumption in favour of an oral hearing in such cases, and contended instead that neither the common law nor the ECHR required such a rule or such a presumption. The House of Lords essentially accepted those submissions, and held that in resolving such challenges the Parole Board had a public law duty to act in a procedurally fair manner and to adopt a procedure that fairly reflected the interests at stake, that whether an oral hearing was necessary would depend on the circumstances of each case, and that an oral hearing would not be required in every case but was likely to be called for where facts were in issue.

72. In fact, the House of Lords has ruled that for the requirement of a "fair and public hearing" to be satisfied Article 6 does not require that there should always be an oral hearing at every stage even in criminal proceedings: see *R (Dudson) v Secretary of State for the Home Department* [2006] I AC 245. That case concerned the consideration by the Lord Chief Justice of his recommendation in relation to the tariff of a juvenile who had been imprisoned at Her Majesty's Pleasure, which essentially required him to consider each case afresh in the light of facts which had already been determined at the trial and commented on by the judiciary, so that essentially his task was to assess where the claimant's case should be placed on the scale given his age at the time of the murder and his progress since he was taken into custody. It was held (among other things) (i) that the application of Article 6 to proceedings other than at first instance depended on the special features of the proceedings in question, and (ii) that account had to be taken of the entirety of the proceedings, and the overriding question, which depended on the facts of each case, was whether the issues that had to be dealt with at the stage in question could properly, as a matter of fair trial, be determined without hearing the applicant orally. Taking all the special features of the proceedings into account, the absence of an oral hearing before the Lord Chief Justice did not violate Article 6(1) of the ECHR.

73. Indeed, the authors of *The Law of Human Rights*, 2<sup>nd</sup> Edn, citing Strasbourg jurisprudence, state at §11.429 as follows:



"In civil cases, there is only a right to be present at an oral hearing in cases in which the "personal character", conduct of the applicant is relevant, or where the particular experience that he may have undergone can only be explained orally".

### **Access to the court - another aspect of the second issue**

74. The ECtHR has recognised that there is an implied right of access to the court which is inherent in the right stated by Article 6: see *Golder v United Kingdom* [1975] I EHRR 524 at §35.

75. So far as concerns administrative decisions, this right may be limited to a court exercising judicial review functions. In other words, (i) even though a first instance decision maker is not itself an independent and impartial tribunal, decisions taken by such a person are not incompatible with Article 6(1) provided that they are subject to review by an independent and impartial tribunal which has full jurisdiction to deal with the case as the nature of the decision requires (see *R (Alconbury) v Secretary of State for the Environment* [2003] 2 AC 295) and (ii) having regard to the scope of Article 6(1) as extended to administrative decisions which are determinative of civil rights, such a decision may properly be made by a tribunal which does not itself possess the necessary independence to satisfy the requirements of Article 6(1) so long as measures are in place to safeguard the fairness of the proceedings and the decision is subject to ultimate judicial control by a court with jurisdiction to deal with the case as its nature requires (see *Rana Begum v Tower Hamlets LBe* [2005] 2 AC 430).

76. Applying these considerations in the present context, it seems to me that the proposed system will be compatible with this aspect of Article 6 on the basis that (a) the first instance tribunal will itself possess the necessary independence to satisfy the requirements of Article 6(1) and (b) further and in any event, it is proposed that (in the language of amendment 138 to the Telecoms Package) there will be "a right to an effective and timely judicial review" (although - in further enhancement of the Article 6 rights of Internet Account Holders, and although such a limitation might satisfy the tests laid down in the *Alconbury* and *Rana Begum* cases - this latter right will not be limited to consideration by a court on traditional English administrative law grounds for judicial review).

### **The ECHR and the proposed scheme**

77. Although the precise method of achieving the correct balance will be a matter for consultation, I consider that there is no reason why a process cannot be developed where notification to the Internet Account Holder of the intended sanction is given, which notification would then afford the Internet Account Holder the ability to challenge the evidence that his or her Internet Account has been correctly identified before the sanction is imposed. In particular, a system could be adopted whereby any individual whose Internet Account is identified as being used to infringe copyright would initially be sent an educational-style letter. Where that Internet Account is found to have been used again for infringing purposes, after a specified period and/or after further warnings, a more robust letter could be sent warning of the sanction (whether a temporary suspension of internet access or other technical measure) which is to be imposed. This letter could make clear when the sanction will be imposed and state that the Internet Account Holder has a right to challenge the imposition of the sanction on specified grounds (such as misidentification of the account or authorisation).

78. If the Internet Account Holder chooses to challenge the sanction, and the challenge cannot be resolved in the first instance by the ISP and/or right-holder without the need for a more formal determination, the challenge could be considered by a designated independent body, which, if the challenge fails, would be empowered to enforce greater sanctions upon the challenger than would have been imposed had the challenge not been made. This mirrors other systems already in use in the UK in comparable circumstances (such as sanctions for speeding or parking offences). If my understanding is correct, it is further proposed that there should be an entitlement for any Internet Account Holder who is dissatisfied with a decision at first instance to seek a determination from a court, and, moreover, that this will not be restricted to a court exercising judicial review functions.

79. In light of the detailed analysis set out above, and the way in which it is believed that sanctions would be imposed, it is possible to address the specific human rights concerns that I am told have been expressed by ISPs and others and to ensure that effective measures are introduced to ensure that copyright infringement is prevented. In brief:

1. Is there a human right to access the internet?

In my view, the answer to this question is: No. In short, issues concerning access to the internet (and it is right to repeat that the restriction contemplated relates to the Internet Account and not the internet as such) fall to be considered and resolved in accordance with the existing framework of the ECHR and thus by applying the appropriate approach to balancing the various rights and freedoms which are engaged. By analogy, there is no human right to use the telephone: both are simply technological means of communication, and the like considerations apply to restrictions in respect of both.

2. The right to privacy is enshrined in the ECHR, and, in particular, this fundamental right includes the right to correspondence. Will the proposed restrictions breach the Internet Account Holder's right to privacy?

Again, in my view, the answer to this question is: No. The right to respect for private and family life, home and correspondence which is guaranteed by Article 8 is a qualified right. The proposed sanctions would not involve personal information being disclosed by ISPs. Further, this privacy right may be subject to such restrictions as are necessary for the protection and rights of others, including the rights conferred on copyright owners under both the 1998 Act and under Article I of the First Protocol to the ECHR, which are (i) of significance and importance; (ii) subject to protection in accordance with international conventions and statute; and (iii) rights which it is in the public interest to protect. As in the case of *Foxley v United Kingdom* [2001] 31 EHRR 25, a restriction on correspondence would be in accordance with the law and would not involve any inspection of correspondence such that the restriction would not breach legal professional privilege or confidentiality. The Internet Account Holder will or should have access to other means of communication, with the result that there will be a limitation on the restriction of his/her Article 8 rights. Restrictions can and should be imposed in a proportionate manner - possibly, although this is not necessarily required, involving a system of warnings or notifications before sanctions are imposed - which takes proper account of countervailing rights. Provided this is done, any interference with Article 8 rights will nevertheless not amount to a violation of those rights.

3. Will the proposed sanctions amount to an unjustified restriction on an Internet Account Holder's freedom of expression?

I would give the same answer *mutatis mutandis* with regard to Article 10 as I have given above with regard to Article 8.

4. Aren't constraints on freedom of expression usually imposed only as a last resort?

I would repeat the answer given above with regard to Article 10.

5. Are measures such as temporary Internet Account suspension really proportionate?

In my view, for the reasons already discussed above, and subject always to the details of the proposed scheme, the answer to this question is: Yes. The internet presents huge challenges for rights holders in identifying those responsible for infringements of copyright and then in taking action to prevent further infringement by those responsible. These challenges must be considered alongside the clear public interest in the protection of copyright. As recognised in Recital 59 of the IP Harmonisation Directive, in many cases it will be intermediaries who are best placed to bring such infringing activities to an end. It is my understanding that there is a range of sanctions which could be imposed. These could include: some form of restriction on internet speed to curtail file sharing capability; or temporary suspension of internet access through that particular Internet Account. It seems to me that these sanctions would be proportionate. Indeed, in the absence of the imposition of measures in respect of Internet Accounts it may be legitimate to ask whether the English system of law is paying sufficient regard to the rights of copyright holders under the ECHR. Certainly, their rights appear to have been substantially and progressively eroded following the advent of the internet, at huge cost not only to themselves but also to the public purse, and it is far from clear whether any other effective measures are available to them to halt or slow down this trend.

6. Will the sanctions place a disproportionate restriction on legitimate content?

7. Is there a likelihood that innocent parties will be punished for the wrong-doings of others?

8. Account holders should be presumed innocent until proven guilty. Does the proposed system for tackling internet copyright infringement undermine this legal principle?

9. Will sanctions be imposed with no system of challenge or redress for the account holder?

In my view, all these matters overlap. Further, while these are all matters which depend upon the details of the scheme, I consider that there is no reason in principle why a scheme cannot be devised and implemented which fully answers each of these concerns. The question of whether any sanction may be disproportionate is, at bottom, fact sensitive, but is bound up (among other things) with (i) the degree to which the internet is being used for infringing purposes and the opportunities afforded to the Internet Account Holder to bring infringing use to an end before sanctions are sought to be imposed and (ii) the precise nature of those sanctions. Similar considerations apply to the issues of whether there is a likelihood that innocent individuals will suffer sanctions as a result of the wrongdoing and whether the proposed system will undermine the principle that Internet Account Holders

should be presumed to be innocent until they are proven guilty. I would prefer to view the matter in terms of it being fair and reasonable to hold those who have the means to prevent infringement and the knowledge that infringement is taking place responsible for the infringing use even if (which may reasonably be regarded as the logical starting point in the absence of evidence to the contrary) they are not personally guilty of carrying out the infringing activities. Provisions for challenges and redress are plainly capable of being incorporated into the proposed scheme, and my understanding is that it is intended they should be.

### **Conclusion**

80. I trust that I have answered sufficiently fully all the questions on which I have been asked to advise. If anything which I have written appears unclear or incomplete, however, I should be pleased to advise further if asked to do so. This Opinion is addressed to the BPI and is solely for its benefit. It is not to be transmitted or disclosed to any other party (other than the BPI's legal advisers) or relied upon by any other party or used for any other purpose or referred to in any public document or filed without my consent, which shall be expressed in writing. Notwithstanding the foregoing, I confirm that this Opinion may to be provided to the Government, or to those otherwise engaged in the current ongoing political process and debate, by the BPI, for the purpose of information only, since I understand that such persons may wish to know the nature of my advice to the BPI. However, no one other than the BPI may rely upon this Opinion for their own benefit or for that of any other person or entity, and I accept no legal liability to any other person or entity other than the BPI.

January 2010

### **Memorandum submitted by Paul Cowling**

To the honourable members of the House of Commons Joint Committee on Human Rights.

I write to you in response to your request for submissions on rights issues related to forthcoming legislation. In particular I would like to raise points for consideration in respect of the Digital Economy Bill (I'd include comments on other legislation but sadly I don't have the time before your deadline).

The key point raised in your press release is "*whether (the bill) strikes the right balance between the right of artists to the peaceful enjoyment of their possessions (the intellectual property in their work) (Article 1 Protocol 1) and internet users' right to respect for their private life (Article 8 ECHR) and their right to freedom of expression (Article 10 ECHR)*".

#### ***The enjoyment of property.***

Protocol 1 Article 1 of ECHR states:

*"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."*

Or as the guidelines to the human rights act puts it... "Everyone has the right to use, develop, sell, destroy or deal with his or her property in any way they please."

In the case of non-commercial copying of a physical book, disk or file containing a copyrighted work I would note that:

- The owner of the physical goods has rights under this article to use and deal with it as they will.. including making and sharing copies.

Current (and the proposed) law seeks to prevent an individual from exercising these rights to the preferential interest of the rights of intellectual property holders.

The relevant UNHCR Article 27 identifies “protection of the moral and material interests” - not immaterial rights.

Non-commercial copying of a work

- does not affect the moral rights of a copyright holder (to be identified as the author of a work)
- does not result in a material benefit
- does not preclude a rights holder from 'use, develop, sell, destroy or deal' their immaterial rights.
- Does not deprive a rights holder of their possession – the intellectual property remains, even in the copy.

Nor, I would say, does a hypothetical and unsubstantiated loss of a sale constitute a material possession.

And, as I understand it, a future sale would not constitute a possession under the ECHR either

I thus contend that when a internet user copies a file (and shares it) the immaterial rights holders is not deprived of 'enjoyment of property' under Protocol 1 Article 1 – instead, what they have lost is the legal privilege of preventing another person enjoying their Article 1 right to enjoy their own bought and paid for property. I ask you to consider very carefully what further rights infringements are justified in enforcing this privilege which already to a very great degree constrains the rights of internet (and other) users.

### ***I am not my brother's keeper.***

The proposed bill also includes a provision that for me has a significant and unacceptable rights impact. It makes a network subscription or account holder liable for copyright infringement carried out through their internet connection. This appears to be included because of an intention to use IP addresses as evidence of infringement and these are rarely uniquely identifiable to an individual.

Making an account holder responsible for what goes on on their network connection places a duty on them that they do not have the rights and privileges to conduct, and cannot comply with without violating the rights of those in their 'household'. Households sharing a network connection take many forms: householders with lodgers, adults jointly leasing a home, teenagers or young adults living at home. It is easy to see that to ensure no copyright infringement is taking place – or that previous infringement has ceased – an account holder has only two choices – to

have full visibility of households activity, or to exclude selected members of a household from using the network connection.

This represents either a gross invasion of privacy (under Article 8 ECHR) which they have no legal power or privilege to conduct – or an infringement of their rights to receive and impart information (Article 10 ECHR) which they likewise have no right to enforce.

Note that these rights infringements are totally separate from privacy issues surrounding ISPs or rights holders monitoring internet activity to detect copyright infringements, or rights infringements relating to using Internet disconnection as a punishment. Putting this responsibility on network account holders places them in an impossible position and will result in any number rights abuses behind closed doors and affect a great many people who are not in any way suspected of copyright violation (as well as a few who are).

The wish to use inadequate evidence as the basis for copyright enforcement is for me an absurd reason to institutionalise widespread breaches of individuals' rights to privacy and to receive and impart information.

As the quote below shows it is the governments positive obligation to protect individuals' rights against, in this case, other members of their household.

“The Court of Human Rights has established that the State has a dual responsibility in terms of the right to respect for family life. Article 8 is not just about ensuring that public authorities do not arbitrarily interfere with a person’s private life. It also imposes positive obligations on authorities to take steps to provide the rights and privileges guaranteed by Article 8 and to protect people against the activities of other private individuals which prevent the effective enjoyment of these rights.”

Operational Guidance on Article 8, Human Rights Act 1998: OG 71 C2-18 September 2000

Thus it is the government's obligation to not put network account holders in the position of needing to infringe the rights of other members of their household to comply with the aims of the bill. Fundamentally the provision to hold network account holders responsible is untenable from a human rights perspective (as well as unjust).

Does the bill strike the right balance between the rights of artists and the rights of users?

In my view it doesn't come close....

January 2010

### **Memorandum submitted by the Creative Coalition Campaign**

JCHR Press Notice No.6 identifies nine priority areas for scrutiny in 2010, based on the significance of the human rights issues involved and the likelihood of legislation being passed before the end of the parliamentary session. The Creative Coalition Campaign’s (CCC) submission focuses on just one of these priorities: *illegal file-sharing*. The Creative Coalition Campaign is a grouping of entertainment unions supported by the TUC and creative business representatives which has joined forces with the aim of protecting jobs in the creative industries by calling on Government to enact targeted measures against illegal peer-to-peer file-sharing in the Digital Economy Bill.

Although we feel an obligation to respond to the points raised, the CCC strongly believes that to suggest that measures to tackle illegal file sharing may violate human rights is to devalue the very concept of human rights. As such, it undermines struggles in this country and around the world for genuine human rights in the face of persecution, false imprisonment, torture and the denial of legitimate freedoms.

In addition, we believe that the millions of employees represented by the UK's creative industries have a right to be properly compensated for the work they produce. Illegal file-sharing robs them of this right.

The Committee raises two potential human rights issues which require separate consideration.

1. The maintenance by ISPs of a list of IP addresses which copyright holders suspect may be infringing copyright.
2. The introduction, if needed, of technical measures, including disconnection, against infringers.

### ***1. Maintenance by ISPs of a list of IP addresses which copyright holders suspect may be infringing copyright***

The CCC is clear that the creation and maintenance of such a database does not infringe human rights. IP addresses alone are not personal data. It is information publicly available when engaging in file-sharing activity.

It is worth remembering that, under the proposals in the Digital Economy Bill, at no point do rights holders know the true identity, or any other personal details, of the person behind the IP address. That is why ISPs are required to send notifications to suspected infringers without giving personal details to rights holders. As is the situation now, personal details would only be revealed via a court order.

### ***2. Introduction, if needed, of technical measures, including disconnection, against infringers.***

The Committee raises the question as to whether such measures are compliant with Article 8 (an internet users' right to respect for their private life) and Article 10 (their right to freedom of expression). These are not absolute rights and access to the internet is not a fundamental human right. Rights derived from these articles must be balanced with the rights of copyright holders who are suffering significant harm as a result of online copyright infringement. The measures being proposed in the Digital Economy Bill – notification process to be followed if necessary by imposition of technical measures for repeat infringers – are a proportionate response to this harm.

### ***Conclusion***

We disagree that the measures against illegal file-sharing should even be questioned as a human rights issue. However, given this consultation is taking place, we feel obliged to respond and highlight the compelling reasons to accept that an IP address does not constitute personal information and even if they were, the DPA already provides for exceptions for the prevention of crime and the purpose of undertaking legal proceedings.

It is important that the debate within the Committee acknowledges that copyright is a fundamental property right protected by international convention, the ECHR, and European and UK law. Therefore, the question is not whether property rights should be protected per se but rather whether the measures being proposed to protect them are proportionate.

The Creative Coalition Campaign is confident that the proposals contained in the Digital Economy Bill, both those which would come in as primary powers under the Act and the technical measures which are proposed to come in under reserve powers, are proportionate and do not infringe human rights.

### ***About the Creative Coalition Campaign***

Supporters of the creative coalition campaign include: The Association of British Orchestras, The Alliance Against IP Theft, BECS, BECTU, BPI, British Video Association, The Cinema Exhibitors' Association Limited, Design and Artists Copyright Society, Directors UK, Entertainment Retailers Association, Equity, Federation Against Copyright Theft, Federation of Entertainment Unions, Film Distributors' Association, Motion Picture Association, Musicians Union, Pact, PPL, Premier League, The Publishers Association, TUC, UK Screen Association and Unite.

January 2010

## **Memorandum submitted jointly by the Department of Culture, Media and Sport and the Department for Business, Innovation and Skills**

### ***Introduction***

1. This memorandum is provided jointly by the Department for Culture, Media and Sport and the Department for Business, Innovation and Skills in respect of the Digital Economy Bill. This memorandum sets out the reasons why the Departments consider that the Bill is compatible with the European Convention on Human Rights. A declaration of compatibility has been made by Lord Mandelson in respect of the Bill.

### ***General Assessment of compatibility with Convention rights potentially engaged by the Bill***

2. The Committee is provided, with this Memorandum, with a copy of the Explanatory Notes to the Bill, which set out the Departments' analysis of the individual clauses, and also give details of the Departments' analysis of the overall compatibility of the Bill with the European Convention on Human Rights.

3. The Departments have considered the compatibility of all the clauses of the Bill with the European Convention on Human Rights. Only those clauses which raise any potential compatibility issues are referred to below. The Departments are satisfied that there are no Convention rights potentially engaged by the remainder of the clauses.



## ***Detailed Assessment of compatibility with Convention rights potentially engaged by the Bill***

### ***Power for Ofcom to require information from network providers (clause 2)***

4. The clause gives Ofcom additional power to require certain information to be provided to it under the existing power given to Ofcom in section 135 of the Communications Act 2003. Article 8 is potentially engaged by this provision but whether the exercise of such a power breaches the Convention would depend on the circumstances and use of the power.

5. The power to require additional information is necessary to enable Ofcom to fulfil its new reporting duties under this clause in relation to the resilience of the United Kingdom's communications infrastructure and to internet domain names. It is possible that some of that information may constitute commercially confidential information. Such information supplied by network providers is capable of being information which would engage Article 8.

6. Ofcom is a public authority for the purposes of section 6 of the Human Rights Act and will and must therefore exercise any power compatibly with Convention rights. Sections 137 and 393 of the Communications Act 2003 places restrictions on the gathering and disclosure of information gathered under powers under that Act. The Departments do not therefore consider that conferring this power on Ofcom breaches Article 8.

7. Whilst the Departments do not consider that Article 6 of the Convention is engaged in relation to these provisions, the Departments note that the Joint Committee was concerned about the information gathering powers given to Ofcom under what became section 135 of the Communications Act 2003 and drew Parliament's attention to these powers in relation to Article 6 of the Convention. However, the Departments would note that the Joint Committee was concerned in relation to the power then taken because it considered that there was a risk of self-incrimination contrary to Article 6 of the Convention. The purpose of the present provision, whilst it does entail the provision of information, is not of the same nature as that which caused the Committee concern during the passage of the Communications Bill. In particular, the concern of the Committee during the passage of the Communications Bill was because the information would be expected to be used in the context of the application of penalties to network providers. However, the present provisions are not akin, insofar as the information supplied will be used for the purposes of informing government policy and not for the purpose of incrimination, and Article 6 of the Convention is not therefore engaged in relation to the provisions of this Bill.

### ***Online infringement of copyright (clauses 4 – 17)***

#### **Notification provisions**

8. The Articles which are potentially engaged by this provision are Article 8 and Article 1 of the First Protocol.

9. Article 8 and Article 1 of the First Protocol are potentially engaged as follows. The Bill will place requirements on internet service providers (ISPs) to comply with two initial obligations; to send notifications to subscribers who have been identified by rights holders in relation to alleged

infringements of copyright, and to maintain internal records of the number of times an individual subscriber has been identified and to maintain lists of those most frequently identified.

10. The sending of letters to internet subscribers notifying them of their alleged copyright infringements does not engage either Article 8 or Article 1 of the First Protocol, as the procedure merely constitutes a deterrent, and does not affect subscribers' rights at all, since they will continue to receive the services they contracted for from ISPs.

#### **Additional technical measures**

11. The Articles which are potentially engaged by this provision are Article 6, Article 8, Article 10 and Article 1 of the First Protocol.

12. Once the notification provisions set out in paragraph 5 have been operative for a certain period of time, the Secretary of State will have the power to direct ISPs to impose technical measures on internet subscribers which may include temporary suspension, bandwidth capping and bandwidth shaping. Ofcom will adopt a code of practice setting out all the necessary procedural aspects to enable ISPs to give effect to these measures.

13. Articles 8 and 10 and Article 1 of the First Protocol are potentially engaged as follows. When following the rules specified by the Secretary of State and the procedural provisions specified by Ofcom in a code for giving effect to the technical measures (as set out at paragraph 8) in respect of a subscriber's internet account, ISPs will potentially be hindering subscribers from accessing the internet (and hence their e-correspondence), or from having the broadband connection speed/content they contracted for. These measures may amount to interferences in the right to respect for private life, the right to freedom of expression and the right to peaceful possession of property. The rights are engaged because affecting the ability of a subscriber to access the internet at a given speed, or, potentially, at all, will tend to affect their ability to communicate with others by on-line methods (by email, and through instant messaging, and contributions to internet discussions). This would tend to affect their private and family life in the widest sense, but also Article 10 rights to freedom of expression and freedom of information. Such interference does not render the provisions incompatible with the Convention, however for the reasons set out in paragraph 10.

14. Both Article 8 and Article 1 of the First Protocol are qualified rights. It is acceptable under the Convention to interfere with such rights provided that the interference is in the public interest and in accordance with the law. Article 10 is likewise a qualified right, and it is acceptable under the Convention to interfere with this right in the interests of a democratic society and in accordance with the law. This provision represents an acceptable balance between subscribers' rights and the public interest in the protection of the copyright of third parties. In particular, the qualifications to Article 8 and Article 1 of the First Protocol require consideration of the rights of others. Copyright holders have limited methods of protecting that copyright, which may be less effective across national boundaries, and accordingly, therefore, where it is infringed on the internet. Moreover, subscribers may be infringing the rights of more than one copyright holder at a time, and these provisions permit action on behalf of many copyright holders. By warning subscribers that they are infringing the rights of others, and permitting them to rebut the assumptions underlying that warning, and only when a warning is not heeded by imposing technical measures, these provisions strike the balance appropriately between the rights of subscribers and the rights of copyright holders. The case of *Promusicae Telefonica de*

*España*<sup>68</sup> recognised that the effective protection of copyright constituted a legitimate interest, and provided guidance on the criteria to be followed to strike a fair balance between the various fundamental rights (see in particular paragraphs 57 to 70 of the judgment).

15. Article 6 is potentially engaged as follows. A determination by ISPs when applying the rules made by the Secretary of State for the imposition of technical measures is likely to amount to a determination of a civil right or obligation within the meaning of Article 6 of the Convention. The legislation provides for appropriate review mechanisms by an independent and impartial tribunal, and these mechanisms render the provisions compatible with the Convention. Effectively, the subscriber will be able to seek a review of the decision of the ISP, in the first instance by an independent tribunal, as set out by Statutory Instrument (at the same time as Ofcom adopts a code of practice). Appeals to decisions of that tribunal will be to the first-tier tribunal. Both appeals to decisions of the independent tribunal and the first-tier tribunal may have the effect of suspending the application of the technical measure, until independent tribunal or first-tier tribunal resolves the appeal.

16. Accordingly, the legislation is consistent with the Convention, insofar as the proposed technical measures are designed to pursue the protection of a legitimate interest (i.e. protection of copyright), are appropriately targeted, proportionate for the purposes of safeguarding the legitimate interest they are designed to protect, and subscribers will have access to a review by an impartial tribunal and an appeal to the first tier tribunal to challenge the ISP's decision to impose technical measures on them.

17. As set out in paragraph 15, the legislation provides for subscribers to be able to appeal the ISP's decisions on the imposition of technical measures in the first instance, to an impartial tribunal set out in legislation made by Ofcom. Subsequently, subscribers will have a right to appeal that tribunal's decision to the first-tier tribunal. With reference to any decision in respect of technical measures, the legislation provides that the imposition of those technical measures may be postponed pending the determination of an appeal by the impartial tribunal and/or the first-tier tribunal.

### ***Power to amend copyright provisions***

18. No Articles are engaged by the provision itself as the provision only contains a power and has no immediate substantive effect.

19. Clause 17 inserts a new section 302A into the Copyright, Designs and Patents Act 1988. It enables the Secretary of State to make provision by order to amend Part 1 or Part 7 of that Act for the purpose of preventing or reducing online copyright infringement, if it appears to the Secretary of State appropriate to do so having regard to technological developments that have occurred or are likely to occur.

20. Articles may be engaged by an exercise of the power but the power will have to be exercised in a manner which is compatible with Convention rights as section 3 of the Human Rights Act 1998 requires powers to be exercised in a manner that is compatible with those rights.

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68 Case C-275/06, [http://curia.europa.eu/jurisp/cgi-in/gettext.pl?where\\_&lang\\_en&num=79919870C19060275&doc=T&ouvert=T&seance=ARRET](http://curia.europa.eu/jurisp/cgi-in/gettext.pl?where_&lang_en&num=79919870C19060275&doc=T&ouvert=T&seance=ARRET)

***Power in relation to domain name registries (clauses 18 – 20)***

21. The Articles which are potentially engaged by these provisions are Article 1 of the First Protocol and Article 6.

22. The provisions amend the Communications Act 2003 in order to regulate internet domain name registries. They are the entities that allocate internet domain names to end users. Internet domain names (such as [www.google.co.uk](http://www.google.co.uk)) underpin the addressing system for the Internet. The provisions give certain powers to the Secretary of State in circumstances where there has been a serious failure of a registry because either: (a) the registry itself, its end-users (owners of or applicants for domain names) or registrars (agents of end-users) have been engaging in unfair practices (such as cyber-squatting or registering misleading domain names); or (b) the registry does not have adequate arrangements for dealing with complaints in connection with domain names.

23. In either case the Secretary of State may only act if the failure has (a) adversely affected or is likely adversely to affect the reputation or availability of electronic communications networks or services provided in the UK, or the interests of consumers or the public in the UK, and (b) if the registry has been allowed a reasonable period for making representations (and that period has expired). In those circumstances, the Secretary of State may appoint a manager in respect of the property and affairs of the registry to secure that appropriate steps are taken to remedy the failure or the consequences of the failure, and/or the Secretary of State may apply to the court to seek an order making such alterations to that registry's constitution as are necessary to secure that appropriate steps are taken to remedy the failure or the consequences of the failure. The registries will have a right of appeal on both the facts and the law to the Competition Appeal Tribunal, an independent body, from a decision to appoint a manager (and thence to the Court of Appeal on a point of law), and the registry will have a right of appeal to a higher court in respect of a court decision to alter its constitution.

24. Rights under Article 1 of the First Protocol are qualified rights. It is acceptable under the Convention to interfere with such rights provided that the interference is in accordance with law and is necessary in the public interest. The measures to be taken by the Secretary of State are only to be taken in circumscribed circumstances, to secure specified aims, following adequate opportunity for the registry to make representations. The registries will be able to appeal the decision thereafter. Therefore, although the appointment of a manager and/or the alteration of a registry's constitution may amount to interference in the property rights relating to a particular registry, these provisions nonetheless represent an appropriate balance between the private rights of registries and their owners to conduct their businesses freely and the public interest in ensuring that the entities which register internet domain names do not operate in a manner which impacts negatively upon consumers, the general public, or the reputation of the UK's internet economy.

25. Alteration of the constitution of a registry and the appointment of a manager also arguably engage the determination of civil rights and/or obligations pursuant to Article 6 of the Convention. However, with regard to the proposed right for a court to alter the constitution of a registry, Article 6 rights are secured by the fact that (a) alteration can only take place after the Secretary of State has applied to the court for an order to alter the constitution of a designated registry, and (b) that the court's decision will itself be appealable to a higher court. Furthermore, the alteration the court may make is limited to the changes that are necessary for securing that the

registry rectifies a relevant failure or remedies the consequences of such a failure. With regard to the appointment of a manager over the affairs and property of the registry, Article 6 rights are secured by the fact that (a) the powers of the manager are limited by the provision that the sole purpose of the appointment is to secure that the registry rectifies the relevant failure or to remedy the consequences of the failure, and (b) that the decision is appealable on both the facts and the law to the Competition Appeal Tribunal (and thereafter to the Court of Appeal on a point of law).

26. In those circumstances, the provisions relating to the possible alteration of the constitution of a registry or the appointment of a manager do not amount to a breach of Article 6 of the Convention.

***Power for the Secretary of State to re-impose conditions under the regulatory regime for Channel 3 and Channel 5 licence holders (clause 37)***

27. The Article which is potentially engaged by this provision is Article 1 of the First Protocol.

28. Article 1 of the First Protocol is potentially engaged as follows. The Secretary of State currently has the power under section 263 of the Communications Act 2003 to provide that conditions which are included as part of the regulatory regime for any service should cease to be so included, whether permanently or on a temporary basis. Those conditions include, for example, programming quotas, and conditions in relation to news and current affairs programming. The power is being extended to provide that the Secretary of State has power to re-impose conditions which were previously excluded by an order made under section 263. This may adversely affect the rights of licence holders if conditions are re-imposed on the licences which they hold.

29. Rights under Article 1 of the First Protocol are qualified rights. It is acceptable under the Convention to interfere with such rights provided that the interference is in accordance with law and is necessary in the public interest. The regulatory regime at Part 3 of the Communications Act 2003 is applicable to public service broadcasters. Those broadcasters apply for licences on the basis that they wish to be public service broadcasters, and with the expectation that conditions will be placed upon their licences to secure compliance with a regime designed to protect the public service nature of their broadcasting output. This provision strikes an appropriate balance between the rights of broadcasters and the general public interest in securing a robust regulatory regime for public service broadcasting.

30. Furthermore, during the licence application procedure, broadcasters will have structured their businesses to meet the conditions which Ofcom would impose on that licence as part of the regulatory regime. It is those conditions which would potentially be removed and reimposed. As no orders have been yet made removing conditions, broadcasters will take the advantage of any measures which remove conditions, but will also have structured their businesses in the expectation that they would have to accommodate those conditions which currently form part of the regulatory regime applicable to them.

***Power to allow Ofcom to levy penalties for failure to meet licence conditions (clause 38)***

31. The articles which are potentially engaged by this provision are Articles 6 and Article 1 of the First Protocol.

32. Article 6 is potentially engaged as follows. Ofcom may impose a penalty on a licence holder who fails to comply with particular provisions of a licence which was granted as the result of an auction following a direction given by the Secretary of State. The imposition of this penalty will be a determination of civil rights under Article 6. However, the procedures involved in determining those civil rights are not such as to amount to a breach of Article 6 for the reasons set out in paragraph 33.

33. Ofcom is a statutory body, established under the Communications Act 2003, and is required to act in a proportionate and reasonable manner itself in accordance with section 6 of the Human Rights Act. Moreover, an appeal against a decision to levy such a penalty will lie to the Competition Appeal Tribunal, an independently constituted body. The availability of such an appeal secures compliance with Article 6 of the Convention.

34. Article 1 of the First Protocol is potentially engaged because the levying of a penalty arguably amounts to a deprivation of licence holders' possessions. However, Article 1 of the First Protocol is a qualified right, and interference is permitted by the Convention if prescribed by law and in the public interest. This provision strikes an appropriate balance between the rights of individual licence holders and the public interest in the opening up of spectrum to further competition in the field of mobile broadband, and ensuring that those who use spectrum are properly regulated. Safeguards against the disproportionate exercise of this power include a ceiling on the amount of the penalty, the requirement that the amount be appropriate and proportionate and the duty of Ofcom to give reasons regarding the imposition of a penalty.

***Provisions in relation to video games classification (clauses 40 - 41 and Schedule 1)***

35. The Articles which are potentially engaged by these provisions are Article 6, Article 8, Article 10, and Article 1 of the First Protocol.

36. The Bill will amend the VRA to extend the statutory classification requirement to cover all video games that are suitable to be viewed by persons aged 12 or over. The provisions implement the recommendations of Professor Tanya Byron's review, *Safer Children in a Digital World*. Currently video games are exempted from classification unless they contain gross violence, human sexual activity or other matters of concern listed in sections 2(2) and 2(3) of the VRA. Video games will now only be exempt from the statutory classification requirement if i) they fall within the existing exemptions set out in section 2(1) of the VRA (namely, they are designed to inform, educate or instruct, or they are concerned with sport, religion or music), ii) they are arcade games, iii) they do not meet certain threshold criteria listed in new subsection 2A, or iv) they are considered suitable to be viewed by persons under 12 years and this has been confirmed in writing by the designated authority.

37. The Bill will also amend the VRA to allow more than one designated authority to make arrangements under section 4 of that Act. There will be an authority designated for video games and another separate authority designated with respect to other video works.

### **Classification of video games**

38. Article 10 is potentially engaged as follows. The right protected by Article 10 encompasses the freedom to receive and/or impart information and ideas (including negative or offensive information<sup>69</sup>). Article 10 affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. The designated body is concerned with classifying video works, which includes the provision of age ratings to apply to those works and advice on what is contained within the work. The amendments to be made to the VRA by these provisions with respect to video games mean that more of those games fall within the ambit of the Act and hence are subject to a classification requirement. It is arguable that the classification requirement interferes with the Article 10 rights of producers and publishers to impart information to the public.

39. Article 10 is a qualified right, and interference with this right is compatible with the Convention if prescribed by law and necessary in a democratic society in the interests of a legitimate aim (for example the protection of health or morals and/or the prevention of crime and disorder). The system of regulation and control provided by the VRA and the amendments to it to be made by these provisions form a range of domestic standards which represent an acceptable balance between the rights of producers and publishers to distribute their work and the legitimate interest in the protection of health or morals, and the prevention of crime or disorder. One of the purposes of the classification of video games is to better protect children from the impact of age-inappropriate material and thus to protect the health and morals of those children. The VRA and the changes to it made by these provisions do not amount to a breach of the rights enshrined by Article 10 of the Convention.

40. The changes to be made to the VRA potentially engage Article 1 of the First Protocol. The measures may affect the profitability or viability of the producers and publishers of video works and games, and therefore their economic interests connected with the running of those businesses.

41. Article 1 of the First Protocol is a qualified right, and interference with that right is compatible with the Convention if in accordance with the law and necessary in the public interest. This measure strikes an appropriate balance between the rights of businesses to operate freely, and the need to protect public health and morals. The impact of the VRA and these changes is not to prevent businesses from operating freely, but to ensure that they operate freely within a system of regulation that is aimed at better informing parents and consumers about what they will be viewing, having special regard to the ready availability of video recordings and video games to children and young adults. The public interest lies in the protection of children and young adults from viewing games or other video recordings which may be unsuitable for their age or stage of development.

### **Appeals from classification decisions**

42. Article 6 is potentially engaged as follows. It is proposed that the designated persons who make decisions on classification will be the principal office holders of the Video Standards Council. In designating those persons, the Secretary of State must be satisfied that adequate arrangements will be made for an appeal from classification decisions. The Secretary of State will require that the appeal body that will hear such appeals will be structurally independent of that

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69 Handside v UK (1979) 1 EHRR 737.

organisation, in that no members of the Video Standards Council will sit on the appeal body. An appeal from a determination as to whether a video game is suitable for classification and if so, the determination of the classification (age rating) that applies to it, is arguably a civil right for the purposes of Article 6.

43. The Departments have considered whether the appeal system to be set up falls within the category examined by the European Court of Human Rights in *Tsfayo v United Kingdom*<sup>70</sup>. If it were to fall within that category, notwithstanding the availability of judicial review against the determination of the appeal body, it is possible that the system would amount to a breach of Article 6. However, the system to be set up in this case can properly be distinguished from *Tsfayo*. This is primarily because the appeal body is structurally independent from the designated persons who will make the initial decision as to classification. However, the Departments also note that the ECtHR made the distinction<sup>71</sup> between processes where the issues to be determined required a degree of professional knowledge where a decision is made as a result of discretion in the wider policy framework from a decision solely on a question of fact. The appeal right to be created will operate along the lines of the former, and therefore there will be no breach of Article 6, when considering that judicial review will also be available against the decision of the appellate body.

### Offences

44. Article 6 of the Convention is engaged as follows.

45. The structure of offences under the Video Recordings Act, which will apply to the classification regime by virtue of the amendments made by these provisions, provides for a series of offences. Under those offences the primary burden of proof rests with the prosecution to establish all the elements of each offence. Defences are available to an accused requiring the defendant to prove on reasonable grounds his knowledge or belief of certain facts or circumstances pertaining at the time of the offence.

46. The Departments have carefully considered these provisions, bearing in mind that the Video Recordings Act was enacted in 1984, prior to the Human Rights Act 1998. The Departments have considered, in particular, whether the offences to be applied to video games by virtue of the amendments made by this Bill infringe against the presumption of innocence enshrined in Article 6(2) of the Convention. As part of this consideration, the Departments recall that it is established by Strasbourg and domestic jurisprudence that Member States are permitted to “penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence”<sup>72</sup>, and thus Article 6(2) does not create an absolute prohibition against burdens of proof being placed on an accused.

47. The gravamen of the offences (the prevention of the supply and distribution of works, including video games, in breach of classification systems set up for the protection of the public, particularly children) is such that it is reasonable to provide a defence to those offences that rests on the knowledge of a particular accused at the time he committed the offence. As such, these provisions do not breach the presumption of innocence set out at Article 6(2) of the Convention. The following paragraphs are included, however, to show that, even if it is considered that the

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70 [2007] LGR 1.

71 In paragraph 46 of its judgment.

72 *Salabiaku v France* (1988) 13 EHRR 379, at paragraph 27.



defences are in fact a constituent mental element of the offence itself that the provisions remain compliant with the Convention.

48. Rights under Article 6(2) are, notwithstanding their importance, qualified rights, and it is acceptable under the Convention to make provisions which might infringe those rights were they not justified and proportionate. Placing a burden of proof on an accused to prove his state of knowledge is such a justified and proportionate measure. An accused charged with an offence under the Video Recordings Act has a full opportunity to demonstrate his belief or knowledge at the time of the commission of the offence. It is reasonable and proportionate to place this burden upon the accused, given that those matters are within the accused's knowledge, or are matters to which he, more than the prosecution, has access. Further, given the legitimate aim being pursued, the general public interest in maintaining the robustness of the classification system particularly to protect children from access to inappropriate material, and the nature of the penalties to which a person convicted of one of the offences would be subject, placing a burden of proof on an accused as to his reasonable belief is proportionate. For these reasons, these provisions do not amount to a breach of the presumption of innocence set out at Article 6(2) of the Convention.

#### **Enforcement of classification provisions**

49. Article 8 is potentially engaged as follows. Section 17 of the VRA sets out entry, search and seizure provisions. These measures would arguably amount to interferences with the right to respect for private life.

50. Article 8 is a qualified right. It is acceptable under the Convention to interfere with such rights provided that the interference is in the public interest and in accordance with the law. The purpose of these provisions is to prevent crime and/or to protect the rights of others. Judicial authorisation governs the use of the powers set out in section 17 of the VRA; a justice of the peace must authorise a constable to enter and search premises and he can only do so if he is satisfied on oath that there are reasonable grounds for suspecting that an offence under the Act is being committed, and that there is evidence that the offence is or has been committed are on those premises. A constable may only seize property in these circumstances if he has reasonable grounds to believe that that property may be required as evidence in relation to criminal proceedings under the Act. The VRA sets out adequate and effective safeguards to ensure that there is no abuse of the powers, and that the law governing the searches and subsequent seizure of property is clear, accessible and subject to judicial oversight. In those circumstances, the provisions amount to an acceptable balance between Article 8 rights, and the public interest in upholding, by criminal sanction if appropriate, the classification system.

51. Article 1 of the First Protocol is potentially engaged as follows. Section 21 of the VRA provides for the forfeiture of any video recording where a person is convicted of any offence under the Act and a court orders that the goods are to be forfeited. The forfeiture of goods would arguably amount to an interference with the rights enshrined by Article 1 of the First Protocol.

52. Rights under Article 1 of the First Protocol are qualified rights. It is acceptable under the Convention to interfere with such rights provided that the interference is prescribed by law and is necessary in the public interest. Where a criminal offence has been committed and goods seized that were the subject of those proceedings, it is in the public interest to dispose of such property to further prevent the commission of offences and the spread of illegal material. The court cannot make a forfeiture order unless it gives the owner of the goods (or any person with an interest in

the goods) an opportunity to be heard or to say why the order should not be made. An order cannot be made until after the time to appeal against a conviction has expired and, if an appeal has been instituted, that appeal has been determined. This provision represents an acceptable balance between the private rights of persons adversely affected by the loss of their possessions through forfeiture and the public interest in the proper operation of the classification system and the enforcement of that system.

### ***Copyright licensing (clauses 42 and 43 and Schedule 2)***

#### **The granting of licences in relation to orphan works and rights**

53. The Article which is potentially engaged by this measure is Article 1 of the First Protocol.

54. Article 1 of the First Protocol is potentially engaged as follows. Section 116A of and paragraph 1A of Schedule 2A to the Copyright Designs and Patents Act 1988 (CDPA) which will be introduced by clause 42 and Part 2 of Schedule 2 will allow the Secretary of State to make regulations for the authorisation of licensing bodies and other bodies to license the use of orphan works or rights (which will be defined in Regulations, see below). The compulsory licensing of an orphan work or right is potentially an interference with the rights of the unidentified or untraced right holder.

55. To the extent that Article 1 of the First Protocol is engaged, it is a qualified right, and interference with this right is compatible with the Convention if prescribed by law and necessary in the public interest. This measure strikes an appropriate balance between the private interests of right holders in controlling use of their works or rights, and the public interest in allowing the use of works or rights where consent cannot be obtained because the right holder cannot be identified or traced. Section 116A(6), also introduced into the CDPA by clause 42, gives the Secretary of State power to make regulations determining when a work is classified as an orphan work and when it ceases to be so. Paragraph 1A(6) of Schedule 2A, introduced by clause 42(2) and Part 2 of Schedule 2, gives the Secretary of State power to make regulations determining when performers' rights are classified as orphan rights and when they cease to be so. It is intended that such regulations will impose adequate checks to ensure that works or rights are not so classified when the right holder can be identified and contacted and so is capable of giving consent to the use of their work or rights. Secondly, the Secretary of State may by regulations made under section 116A(3) of and paragraph 1A(3) of Schedule 2A to the CDPA introduced by clause 42 and Part 2 of Schedule 2 provide for the treatment of royalties collected, including holding money for the owner of the orphan work or rights, should they subsequently be identified, allowing compensation for use which they have not authorised. Finally, the Secretary of State has powers under section 116A(4) of and paragraph 1A(4) of Schedule 2A to the CDPA introduced by clause 42 and Part 2 of Schedule 2 to determine through regulations the rights and obligations in respect of an orphan work or rights if the owner of the work is subsequently identified. It is in the public interest that orphan works and rights should be available to the public, subject to safeguards for that owner should he subsequently be identified, which can be provided by regulations.

#### **Extended licensing**

56. Section 116B of and paragraph 1B of Schedule 2A which is introduced into the CDPA by clause 42 and Part 2 of Schedule 2 provides for the Secretary of State to authorise extended

licensing schemes. It is doubtful that Article 1 of the First Protocol is engaged in relation to the rights of a non-member of a licensing body whose works are licensed by that body under an extended licensing scheme because that right holder can opt out of the scheme. If Article 1 of the First Protocol is engaged, the measure is compatible with the Convention because it strikes an appropriate balance between the interests of the right holder in controlling use of their works, and the public interest in users having access to simplified licensing systems for use of copyright works and performers' rights.

**The regulation of licensing bodies and bodies that are licensed to use and authorise the use of orphan works and rights**

57. The Articles which are potentially engaged by this measure are Article 6 and Article 1 of the First Protocol.

58. Licensing bodies license the use of copyright or performers' rights owned by their members, collect in royalties and distribute these to members after deducting the expenses of collection. The Secretary of State will have powers under section 116C, Schedule 1A and paragraph 1C of Schedule 2A to the CDPA all introduced by clause 42 and Part 2 of Schedule 2 to make regulations requiring licensing bodies to adopt a code of practice if they are authorised to license orphan works or rights or to carry out extended licensing or where it appears to the Secretary of State that their self-regulation fails to protect the interests of right owners, licensees, prospective licensees or members of the public.

59. The Secretary of State will also have powers to determine through regulations made under section 116A(5) of and paragraph 1A(5) of Schedule 2A to the CDPA, again introduced by clause 42 and Part 2 of Schedule 2, that a person shall cease to be authorised to license the use of orphan works or rights or a licensing body shall cease to be authorised to carry on extended licensing where it has failed to comply with requirements in those regulations. The Secretary of State will have powers under paragraph 2(2) of Schedule 1A, introduced by clause 42(2) and Part 1 of Schedule 2, to make regulations determining when the regulatory requirements cease to apply to a licensing body that is not authorising use of orphan works or rights or carrying on extended licensing. There is nothing inherent in the powers introduced by this clause that could be challenged as a breach of the Convention. Compatibility with the Convention will depend on the circumstances and use of the powers.

60. Article 6 and Article 1 of the First Protocol are potentially engaged as follows. The imposition of regulatory requirements on a licensing body so that it is not able to continue with its licensing activities unless it complies with that regulation may be a determination of civil rights and obligations within the meaning of Article 6. Similarly, where a licensing body has been authorised to license the use of orphan works or rights or to carry on extended licensing, the removal of that authorisation and the rights attaching to it may be a determination of civil rights and obligations. The requirements of Article 6 are met because a licensing body will be able to apply for judicial review of any decision to impose regulation or to remove authorisation. The same considerations apply to the powers under regulations to remove an authorisation from a body other than a licensing body to use or to authorise the use of orphan works. That is, such a body will be able to apply for judicial review of any decision to remove authorisation.

61. Article 1 of the First Protocol is a qualified right. Interference with the right is compatible with the Convention if in accordance with the law and necessary in the public interest. This measure

strikes an appropriate balance between the rights of licensing bodies to operate freely and the public interest in ensuring that their business practices are transparent and take proper account of the interests of licensees and, where relevant, the members they represent and the general public.

62. The removal of the right to license the use of orphan works or rights or to operate an extended licensing scheme would similarly amount to an interference with rights conferred by Article 1 of the First Protocol. Those rights will be established in detail in regulations, which will set out the circumstances under which the rights can be exercised. The jurisprudence of the European Court of Human Rights has made clear that, where a right is granted, it does not amount to a deprivation of that right if it is withdrawn when exercised in a manner which is inconsistent with conditions which made the exercise of that right possible<sup>73</sup>.

### **Imposition of penalties**

63. Paragraph 3 of Schedule 1A which is introduced into the CDPA by clause 42(2) and Part 1 of Schedule 2 will allow the Secretary of State to make regulations to impose penalties, including financial penalties, on a licensing body if it fails to comply with a Code of Practice imposed under the Schedule. Any such penalty may amount to a determination of civil rights or a criminal charge under Article 6 of the Convention. The nature of the penalty will be determined by the regulations made by the Secretary of State in exercise of the power taken. At that time, it will be necessary to consider whether the extra protections in article 6(2) and 6(3) of the Convention apply, and how they are met when the Regulations are made. These Regulations may provide for a right of appeal to the Copyright Tribunal against the imposition of a penalty; an appeal to such an independent and impartial tribunal is compliant with Article 6. There is nothing inherent in the powers introduced by this clause that could be challenged as a breach of the Convention. Compatibility with the Convention will depend on the circumstances and use of the powers.

### ***Provisions in relation to Public Lending Right (clause 44)***

64. The Article which is potentially engaged by this measure is Article 1 of the First Protocol.

65. Article 1 of the First Protocol is potentially engaged as follows. The measure amends the Secretary of State's power under the Public Lending Right Act 1979 (PLRA) to make Regulations determining works to be included under the Public Lending Right Scheme, with the effect that such Regulations can include non-print works. Expansion of eligibility under that Scheme will involve the inclusion of works not otherwise included. Interference with copyright holders' rights will potentially occur because copyright holders newly included in the Scheme will no longer be able to prohibit or licence the lending (and in the case of soft-copy works, the limited non-permanent electronic copying necessary for that lending) of such works by libraries. Article 1 of the First Protocol will not be engaged until any Scheme amendments are made by Regulations under the expanded power, but paragraph 63 is included to demonstrate that, at the time at which the power would be used, it is assessed that no breach of Article 1 of the First Protocol will in fact take place.

66. Article 1 of the First Protocol is a qualified right, and interference with that right is compatible with the Convention if in accordance with the law and necessary in the public interest. The exercise of this measure strikes an appropriate balance between the private interests of copyright

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73 See, for example, *Gudmundsson v Iceland*, (1996) 21 EHRR CD89.

holders, and the public interest in permitting the extension of the works covered by the Scheme at a time when there is an increasing demand for the lending of books in formats other than in printed and bound format (audio books, for example). Furthermore, the Scheme provides that copyright holders will be compensated for the loss of the power to contract individually with public lending libraries for remuneration on a “rate per loan” basis.

### **Conclusion**

67. In view of these considerations, it is considered that the Digital Economy Bill is compatible with the Convention.

November 2009

### **Memorandum submitted by Neil Martin**

#### ***Illegal File Sharing***

It is clear to me that by targeting IP addresses you have misunderstood how illegal file sharing takes place. It is P2P or peer to peer. The IP addresses that would show up as being involved would be those of the Internet Service Providers themselves, as when you log on to your service provider, they allocate you an IP address automatically. This is not necessarily the same IP address every time you re-connect. Even for broadband users, this changes every time the connection goes down and is re-established. So any illegal downloader does not have a permanent IP address ( a small percentage might, but this would be a very small percentage). If you, as a user, find out what your current IP address is and then locate who 'owns' it via a who is service, you will find that the IP address is listed as belonging to your service provider. Any transgressions therefore would require the service providers to shut themselves down. If, as seems to be current logic, illegal file-sharing is a major issue, we would have to assume that no service provider is able to state that they have no illegal file-sharers amongst their clients and therefore every service provider would have to shut itself down. I think you can see where I am going with this?

January 2010

### **Memorandum submitted by Neil Maybin**

I am writing to respond to your consultation publicised in Press Notice No. 6 dated 4<sup>th</sup> January 2010. The issue I am commenting on is (1) Illegal file-sharing and establishing the just balance between ECHR Article 1 and Articles 8 and 10.

My interest in this area is as an individual who has campaigned successfully for the past eighteen months to prevent commercial companies from intercepting Internet communications to profile people for advertising. I support the rights of copyright holders to profit from their work and so also support existing civil and criminal processes for them to enforce their rights. I work for a company in the software industry where digital rights are essential to free competition and wealth creation.

In assessing whether the provisions of the Digital Economy Bill balances these Articles I think five main factors must be taken into account: the impact on rights holders of the existing situation,

existing remedies for rights holders, the further remedies they are seeking, the impact on human rights of those remedies, and whether the proposed remedies achieve a just balance.

### ***Impact on Rights Holders***

The recording industry has for many decades claimed that each new technology threatens their existence. In the 1960s it was offshore pirate radio; in the 1970s once commercial radio was established in the UK the recording industry limited what could be played via ‘needle time’ restrictions; in the 1980s and 1990s home taping was apparently killing music; and in the last decade unlawful file sharing has apparently been going to destroy all record and film producing companies. Over those decades the recording industry has thrived and indeed a recent Harvard Business School paper has confirmed that as file-sharing has increased, the creative industries have continued to grow. <http://www.hbs.edu/research/pdf/09-132.pdf>

The rights holders have quoted a large financial impact in support of the need to introduce more extreme measures to combat unlawful file sharing. However this has not been reflected in a willingness to fund the Internet Service Providers who will bear the cost of deploying these measures. One might reasonably ask, if they are so certain of the magnitude of their losses, why have they not offered to fund the means to recoup them?

The large figures quoted by the rights holders may represent the retail value of the digital assets being unlawfully shared, but realising that value may not be possible. Much unlawful filesharing is carried out by teenagers and young people who simply would not have the money to buy the material lawfully. And a recent Demos poll revealed that the most prolific older unlawful filesharers also spend more than other consumers buying music lawfully. <http://news.bbc.co.uk/1/hi/technology/8337887.stm>

In summary, unlawful filesharing does not threaten the existence of the recording industry. It may erode their margin, but the extent of this is disputed. The industry could back up their claim of losses from unlawful filesharing by committing to paying for their proposed remedies, but they have chosen not to do so.

### ***Existing remedies for rights holders***

Civil and criminal remedies already exist under the Copyright, Designs and Patents Act 1988. Prolific unlawful filesharers, and individuals facilitating unlawful filesharing, have already been identified and prosecuted. The only apparent barrier to more prosecutions and civil cases is the cost of these.

### ***Further remedies sought by rights holders***

In principle, the Digital Britain Bill introduces two principles:

- That the law be changed to give the rights holders acting in a civil matter similar rights as the prosecution service would have investigating a crime.
- That a significant part of the cost of enforcing this be borne by the Internet Service Providers. In contrast to the recording industry where margins are high, Internet Service Providers typically operate with wafer-thin margins.

### **Impact on human rights of those remedies**

Other respondents will no doubt set out the various impacts of these further remedies under ECHR Articles 8 and 10. Rather than presenting a complete list of these I would like to make the following two points:

- Giving rights holders acting in a civil matter similar rights as the public prosecution service introduces a dangerous precedent. If this is enacted, any individual or organisation could reasonably ask why they should not also be given similar rights. For example, companies may lobby for rights to identify and silence whistle-blowers, or parties in divorce cases may insist on a right to know who their estranged spouse has been communicating with.
- Much of the human rights focus on the detail of the proposals has rightly been on the rights of individuals to privacy. However, the right to engage in lawful *commercial* activity is also affected. For example, as a result of the Digital Economy Bill, Virgin Media plans to put in place a potentially illegal facility to intercept, read and analyse their subscribers' internet activity. This could easily go beyond any analysis (which may itself be unlawful) of lawful communications in search of civil copyright violations. For example, it could be used to give Virgin Media an unfair advantage for the future download service they are planning with Universal, the largest of the four record labels. In particular they could use it to analyse the material delivered by their competitors in this marketplace, Apple's iTunes Store and Amazon's music download service, and also monitor the sales of newer entrants to the market.

Far from having a marginal impact on individual rights, the Digital Britain Bill proposes and encourages intrusion into personal and commercial communications, with an absolute impact.

### **A just balance?**

In summary, the viability of the rights holders' businesses is not threatened by unlawful file sharing. Adequate remedies already exist in law to enable them to initiate civil proceedings and criminal prosecutions where needed. The only barrier to them doing this the cost of action, a cost they appear to want to dump on the Internet Service Providers.

While the impact of unlawful filesharing on the rights holders under ECHR Article 1 is marginal, the human rights impact for individuals under ECHR Articles 8 and 10 is absolute. In a human rights context, the Digital Britain Bill's proposals on unlawful filesharing are therefore disproportionate.

I would be grateful if you could include the ideas I have presented here in your legislative scrutiny priorities for 2010.

January 2010

### **Memorandum submitted by Robert Mckeown**

I would like to bring up a number of issues that I have with the proposed digital economy bill. I hope that what I have to say falls within the topics that your committee have been set up to report on and that by reading this I am not wasting your time.

This current topic area is one that I personally feel is a good example of the trends and technology of our time escaping the perceived realities of yesterday's laws. I would like to make it clear that I feel very strongly that the current right holders that wish to push these laws through have no consideration of the artists that they claim to represent and only have their own profits in mind as they want laws put into place that will make criminals of previously innocent people that wish no harm to other people's well-being or people's property.

Of the proposed Digital Economy Bill I will be blunt in saying that many of the sections and desired enforceable laws that it wishes to bring into force both terrify and shame me to the core. Terrify because many of the laws that it will bring into force are clearly not in the public's interests or well-being, that these are even considered shows that protecting the public is not the main focus of this government but rather to protect the investments of a failing industry. It shames me because I am a member and citizen of the country that this bill is being passed into; it shames me that I am in a country that values more the interests and the well-being of large corporations.

To be more specific as to the sections and issues that I have with the proposed Digital Economy bill, I would like to talk about the following;

### ***Digital Economy Bill proposing disconnection from the internet***

The use of the internet in today's society is near essential; for work, education, online banking, keeping informed of the news and important events, for keeping in touch with family members over any distance and for entertainment purposes. What I am saying by this is that the internet has become a more relied upon service, than any other information medium to date. Any law put in place that would allow for the immediate disconnection or termination of that users internet connection, without due trial or substantial evidence of guilt is one that has been poorly thought out, and, in my opinion, a sign that the person responsible for putting forward such a law, has an even poorer grasp of how the modern world works and the digital economy that many businesses have been built upon and come to rely upon. If such a law is to be put in place, there must be a fair trial for those involved before any action can be taken against them. The accused must be made fully aware of their right to respond to any allegation put to them of breaking the law, what they should expect and how they are able to fight back against this claim. Evidence that they have broken the law should be made fully available to them as soon as possible if an allegation is made.

### ***Clause 17 – Power to amend copyright provisions***

From reading clause 17, it would seem that the Secretary of State will be given the power to amend any section of the digital economy bill. I feel that this will give any person that holds this position within the government too much power, which is fully open to being abused with no or little safe guards put in place. I feel strongly that it is a clause that requires a great deal of revision and work if it is still to be included in this bill.

### ***The effectiveness and accuracy of the evidence that will be used against the individual***

The main way in which people are to be seen as guilty of illegal file sharing is to log IP addresses of users that are connected to Torrents or file sharing sites (torrents being links to servers which contain files being downloaded illegally). Firstly I ask, has an independent evaluation been requested by the government to ensure that the information gathered from this technique is both



accurate and correct. Further, from what I know about the use of the internet, it is possible to mask or alter the IP address and MAC address of a single user and therefore does this not bring into question the validity of any of the evidence gathered? Secondly, as it is proposed at current, the user's internet connection is to be terminated immediately. This only assumes that the party involved is one person, and not say a family that share a single connection or that a third party has taken control of the network without the owners knowledge, which has been shown time and time again as a possibility, with the use of Trojans, viruses and worms. Not to mention the possibility of the existence of an insecure wireless connection that could be hacked, giving the hacker full control over the owner's internet connection. Immediate disconnection will hinder only legitimate users in this case. Time must be taken to ensure that the person accused is first identified before any action is taken.

### ***The privacy of the customer***

The bill includes clauses that will allow the copyright holder and/or government officials to go to an ISP, which is also required to log all activity of their customers, to which the ISP is then expected to hand over all information in relation to the enquired group of people. The wording as to how personal the information gathered by the ISP seems vague at best. However the information would need to include names and addresses if nothing else. I feel that the public would be better served with no information about them gathered as it is a strong breach of personal privacy. I would go on to say that it is dangerously close, if not as bad, as to wiretap people's phones or opening letters sent through the mail. It shows a strong distrust of the people of this country by this government, it shows that this government has no problem selling out to large monopolies and it shows ignorance to wishes and wants of its people. What I strongly believe will happen is people will resort to encryption of all internet traffic in an attempt to limit the use of or accuracy of the ISP's forced snooping. Actions that the government may take at the time is pure conjecture but I can see it as not stretch of the imagination that a new digital arms race that will have me, the tax payer, handing over more money in fighting and enforcing further pointless and ineffective laws.

To finish, I wish to state clearly that the laws to be passed in the Digital Economy bill will largely be over oppressive to the rights of the people of this country, that the laws will turn large percentages of the population into criminals which our already overburdened criminal justice system will have to attempt to deal with, that the bill will prove an ultimate failure to stop or curb file sharing or piracy at all since new ways will be found to work around restrictions placed on them and that I strongly believe that these laws are nothing more than pandering to rich and powerful corporations that are unable to move with technology and the trends of its consumers.

The very last thing that any copyright holder, film studio or record labels have on their minds is the rights of the artists they claim to represent.

I would like to thank you for reading this, I would like to thank you for making it possible for me to put my views across as a citizen of Britain on a bill that I feel will further tarnish and destroy my rights and privacy. I hope that this document was relevant to you committee and that it helps to show the feelings of the public towards the Digital Economy Bill.

January 2010

## Memorandum submitted by Jack Nunn

I would like to present evidence to The Joint Committee on Human Rights regarding the serious implications of the proposed Bill regarding 'illegal file sharing'. I would argue that reform of this Bill is an opportunity to enhance human rights in the UK and beyond. In this short piece of evidence I am presenting I argue that this Bill will put in place laws which are redundant before they become law, and that public perception of the Bill is that the motivation for drafting it seems almost sponsored by The British Recorded Music Industry.

Finally I would like to address the future implications of this Bill by examining the implications it has for supporting international terrorism and costing the NHS billions more in drugs, not to mention threatening the future freedom of research in the field of genetics. The Committee should recognise that new laws need to protect creativity but recognise urgently that the current and proposed system is unworkable and unpoliceable.

When asking whether the Bill "strikes the right balance between the right of artists to the peaceful enjoyment of their possessions and internet users' right to respect for their private life" it is important to place this whole discussion in a much wider context.

In a few years, Satellite Internet access, which communicate broadband signal in a way that satellite phones currently do] will undermine any national governments attempts to censor information transmission over the Internet. In the short-term, cheap pay-as-you-go deals with mobile internet providers present users with similar opportunities to download content anonymously which will utterly by-pass this Bill, thus making it out-of-date before it is even passed. Britain should be leading the way on information transparency and not be distracted by the short-term losses of the music industry, which arguably stifles the very creativity it claims to nurture. This proposed Bill will put in place laws, which, with a slight changing of wording, will ensure that the UK has legal structures in place very similar to the Governments of China and the United States of America in their effective limiting of individual freedom, and far removed from the spirit of the Human Rights Act 1998.

We are at a unique point in human history, as there exists the realisable ideal of creating a viable supra-national and supra-governmental meritocracy through the internet.

The British Prime Minister Gordon Brown recently said that "People have now got the ability to speak to each other across continents, to join with each other in communities that are not based simply on territory, streets, but networks; and you've got the possibility of people building alliances right across the world." The Pirate parties of the world echo movements such as Amnesty International, Sans Frontiers and Greenpeace - yet the Pirate parties are the only of their kind poised to forge a serious political presence in democratic institutions. I believe the Swedish Pirate Party's success in the EU elections has forced their issues onto the political agenda and this Bill threatens to raise support for such organisations within the UK. This point should be seriously considered across all parties, as far as party politics is concerned.

Returning briefly to the distinction between the rights of 'artists' and 'publishers'. The British Recorded Music Industry claimed one of the main reasons for limiting the rights of Internet Service Provider subscribers was to protect the rights of artists, but it is more accurate to describe it as protecting the Copyrights and information monopolies that they hold.

Gordon Brown recently wrote that an "internet connection is now seen by most of the public as an essential service, as indispensable as electricity, gas and water".

If the UK Government, and other leading developed nations of the world are placing such an emphasis on the importance of the Internet, surely vast reforms of copyright laws must follow to realistically reflect the amorphous and decentralised entities that exist through the internet. At present, copyright [whether in a digital arena or not] arguably stifles innovation at the source by limiting the rights of those who access ideas in the public domain and cannot embellish or alter them without fear of infringement - ultimately leading to a limiting of creativity for fear of legal action. In some ways this could be seen as echoing the concept of a 'thought-crime', laid out in George Orwell's *Nineteen Eighty-Four*. In effect, it limits creativity before creativity has had a chance to create. Our elected Governments, legal systems and hired lawyers are working hard to safeguard copyright laws which protect financial rights - built on fundamental ideas about intellectual ownership which a significant proportion of the international community [and British electorate] simply reject. This void must be addressed through diligent political debate rather than greed driven scape-goating. This unique point in human history offers a chance for change, a change which scares those who believe they have something to lose because they fail to see the far reaching potential for reforms. In areas such as copy-right and privacy, these reforms have the potential to affect whole generations of thinkers if implemented with enough foresight.

I believe that the fundamental laws surrounding copyright are currently flawed. There is no doubt that copyright supports and protects the intellectual property, thus ensuring that a future incentive for creative thinking exists - but it does this at the expense of encouraging any alteration or embellishment of the original idea. It supports a legal model where once an idea is born, it is set in stone and sold - rather than the actual 'wiki' model, where an idea exists as an amorphous nebula of collective thinking within the public domain and ownership is as irrelevant as it was in the Middle Ages. New laws need to protect creativity but recognise urgently that the current system is unworkable.

The future of medicine patenting and genetic research is steadily moving in the direction of targeted genetic cures and personalised medication. Organisations will soon seek to copyright genetic sequences and cures.

If a 'pirate', in a non-literal 'cyberspace' interpretation is someone who rejects, for whatever reasons, some or all of the fundamental intellectual property rules of a free-market led political structure [I hesitate to use the term democracy], then this implies we are facing a future of Pirate Crops, Pirate Pharmers and whole Pirate communities operating 'outside' international law as they are labelled pirates for 'stealing' something which some would argue cannot necessarily be owned in the first place, such as a sequence of DNA.

In the 1990s there was a serious attempt to prevent the human genome from being made public by those who decoded it, such as IBM. The structure of the Internet utterly undermined this attempt when an individual decided to publish it freely, paving the way for immeasurable developments in the field, which greed would otherwise have hampered. It doesn't stretch the imagination to foresee immeasurably lucrative medical discoveries being leaked on the internet. I

believe that the same openness that followed the decoding of the human genome must be applied to any future gene therapy advances. Protecting the rights of individuals to access medicines within the UK and across the world should be a priority of any Government.

We cannot allow a situation to occur where the laws societies have created to protect its people strangle it from the inside. If Governments do not agree to radical reform of copyright laws they face an unending and unaffordable game of cat and mouse, which will in turn further fuel the huge organised crime systems currently thriving as a result of copyright laws. The Governments and corporations cannot win and the proposed Bill is naive to say the least.

The Thai Government was the first to openly manufacture anti AIDS drugs outside of international patents, or in other words 'pirate'. The same happens in China and India, but it is done by organised crime to fill the void left by ineffective policies and governing. Drugs pirating is not a harmless operation. It fuels a counter culture of counterfeit and crime which feeds international mafia organisations and everything that implies, such as terrorism. Human greed within a capitalist model will stop at nothing and the current Bill should cease this chance to defeat the grip of profiteers and organised crime on the means of production and thereby creativity itself.

I believe Europe has the most realistic chance to have any meaningful influence. One model which could exist in place of a commercial-free market medicine/crop engineering company could be established by co-operation of the UN with Governments, using Universities to channel funding, while simultaneously ensuring them an amount of research autonomy. Research autonomy would encourage a more humanist moral structure and guard against, for example, the development of cosmetic drugs which make more money.

This committee should consider that this Bill will threaten any chance at creating a free exchange of information between scientific communities developing targeted genetic cures, drought-resistant crops or things far from the current imagination.

January 2010

### **Memorandum submitted by Harry Percival**

The Digital Economy Bill contains a number of proposals designed to address the "threat" of illegal file sharing. My view is that the proposed measures are not only laughably disproportionate, they also represent a major infringements of users' rights:

- The right to the presumption of innocence. Penalties such as disconnection are to be applied based on no more than allegations.
- The punishing of provably innocent parties – even in the case where one member of a household has actually committed some offence, the other members are provably innocent, and yet are punished.

These infringements of users rights, in my view, are enough to throw out this piece of legislation on their own account, no matter what your views on intellectual property and the importance of the internet.

Nonetheless, I'll sketch a couple of arguments to address how disproportionate the proposed penalties are.

- ii. the importance of internet access. Others have said this more coherently than I (notably Cory Doctorow), but the internet, today, represents access to health information, access to education, access to job opportunities, the means of making a living, the means of participating in the democratic process. Removing internet access is not a trivial thing. For illustration, the tax office has proposed that tax returns may only be filed online in future – would someone whose internet has been disconnected be therefore exempt from paying taxes?
- iii. the disproportionate estimates of the harm being done by so-called internet piracy. When VHS recorders came out, the major US film studios lobbied hard to have the technology banned because they feared it would encourage an illegal market in movies recorded from television broadcasts. Today, thanks to the level-headedness of lawmakers, movie studios themselves have gained a massive new revenue stream from VHS movie rental and sales – an income stream which they did not foresee at the time. Incumbents often see the threats of a new technology before they see its potential benefits. Claims by current copyright holders that they are significantly harmed by internet piracy should be viewed with extreme suspicion. No-one can prove that illegal file sharing actually hurts anyone's bottom line, it can only be suspected.

Are these infringements of users rights, this trampling on the presumption of innocence, the explicit punishment of provably innocent people, really worth it?

January 2010

### **Memorandum submitted by the PPA**

PPA is responding to the above Joint Committee on Human Rights ("JCHR") press notice as the representative body for UK magazine, journal and business media publishers.

PPA protects and promotes the interests of print and online publishers of consumer and business media in the UK. PPA has over 200 publishing companies in its membership, which collectively produce more than 2,500 consumer and business media publications, including magazines, journals, directories, websites and events.

A full list of PPA members is available at:

<http://www.ppa.co.uk/cgi-bin/go.pl/ppamembers/index.html>

PPA, through part ownership of the Publishers Licensing Society, has links with the Alliance Against IP Theft.

As such PPA supports the Alliance response to the JCHR Press Notice No. 6 which focuses on the issue of *illegal file sharing*, attached as an annex to this letter.

In particular, PPA agrees that:

- IP addresses alone do not constitute personal data for the purposes of the Data Protection Act 1998 ("DPA");
- even if IP addresses could constitute personal data, the DPA contains relevant exceptions to allow for their processing in relation to tackling copyright infringement;
- Articles 8 (an internet users' right to respect for their private life) and 10 (their right to freedom of expression) of the European Convention on Human Rights are not absolute rights - and must be balanced with the rights of copyright holders who are suffering significant harm as a result of online copyright infringement;
- proposals in the Digital Economy Bill (to notify infringers, which can be followed if necessary by imposition of technical measures for repeat infringers) are a proportionate response to the harm suffered by copyright holders.

January 2010

## **Memorandum submitted by TalkTalk**

### ***Introduction***

TalkTalk welcomes the opportunity to make a brief submission to the Joint Committee on Human Rights in relation to its scrutiny of the Digital Economy Bill for its compatibility with human rights, and specifically the provisions to combat illegal file-sharing.

TalkTalk Group is the largest provider of broadband services to UK homes. We serve over 4 million residential and business broadband customers under the TalkTalk, AOL, Tiscali, Opal and Pipex brands. TalkTalk Group is owned by the Carphone Warehouse plc. We would stress that we agree that the creative industries play an important role in the UK and recognise the challenge that illegal file-sharing presents. We do not condone or encourage such activity, but have concerns that in the detail of the legislation are potentially oppressive measures that will threaten basic human rights.

TalkTalk have significant concerns over the provisions in the Digital Economy Bill on illegal file-sharing (clauses 4 – 17), and believe that this will have a profound impact on the human rights of our customers and other internet users. As the Committee will be aware, the Digital Economy Bill contains provisions to combat illegal file sharing and other forms of online copyright infringement, via a two-stage process: first, by requiring Internet Service Providers to maintain a list of IP addresses which copyright holders suspect may be infringing copyright; and second, through reserve powers, if needed, to introduce technical measures, such as disconnection.

TalkTalk believe that such legislation would impact on internet users' human right to respect for their private life (Article 8 ECHR) and their right to freedom of expression (Article 10 ECHR), as well as the right to fair trial (Article 6 of HRA2). Illegal file-sharing, appropriate sanctions and internet access raise other human rights issues including the right to protection of property (Article 1 of the First Protocol).

### **Respect for private life**

Clauses 4 – 9 cover the first stage of the new proposed approach and impose a number of obligations on ISPs, termed ‘initial obligations’. Clause 4 creates a mechanism to allow a copyright owner to make a copyright infringement report (CIR) to an internet service provider (ISP) if it appears to a copyright owner that a subscriber to an internet access service has infringed the owner’s copyright or a subscriber has allowed another person to use the service and that person has infringed copyright by means of the service, and requires that an ISP who receives a CIR must notify the relevant subscriber. Clause 5 creates a second obligation on ISPs requiring them to provide copyright owners with a ‘copyright infringement list’ for certain subscribers when requested (and when the ‘initial obligations code’ requires).

The disclosure of personal information to copyright owners clearly raises privacy issues. Whilst we think these may be able to be overcome in the development of the code we think it important that the ICO and consumer groups are involved so that the provision of this information is in such a manner to ensure privacy is appropriately protected. Disclosure of customer details should only be allowed if the right holders agree not to use the information inappropriately for instance to scaremonger or threaten customers.

There are also significant concerns that personal information of innocent internet users could be required to be handed over to rights holders, given the ease with which people can piggyback other peoples’ subscriptions or the fact that people share IP addresses. Internet cafes and the provision of wi-fi in public spaces also make it extremely difficult to identifying an individual copyright infringer. The model would be significantly improved if the provision to allow for subscriber appeals against CIRs was set out on the face of the Bill.

### **Right to freedom of expression**

Clause 11 creates a second model for imposing penalties on internet service subscribers, and TalkTalk have very serious concerns about the proposed legislation. The implication appears to be that should the first model prove unsuccessful in reducing copyright infringement the Secretary of State will then activate the second model through an order-making power. Clauses 12 and 13 provide for a code concerning the clause 11 obligations to limit internet access.

In creating such an order-making power the Government is proposing that in dealing with suspected copyright infringement, ordinary civil procedures will be bypassed and replaced with an administrative process currently lacking in due process safeguards. The sanction proposed under this second model is severe, and arguably excessive and disproportionate. Orders by the Secretary of State under clause 11 would require ISPs to take measures to limit internet access to certain subscribers and “*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*”. These technical measures may therefore include disconnection, which could be argued to be bordering on the deprivation of a human right.

Article 10 of the HRA, the right to freedom of expression, includes within its definition the freedom to receive and impart information and ideas. This right can of course be limited to an extent shown to be necessary and proportionate in achieving a legitimate aim, such as protecting the rights of others. However it is questionable whether the proposal to cut off internet

connection is a proportionate means of achieving that aim, particularly at a time when people are increasingly more dependent on the internet to allow them to access and share information. The Digital Britain Report, for example, notes that the internet is becoming an increasingly essential part of life.

Crucially the decision to disconnect an internet user would again be subject to unreliable evidence that is unable to identify the individual, susceptible to error due to wi-fi hijacking for example. The likelihood is therefore that many who have not themselves infringed copyright will be subjected to the automatic sanctions including disconnection. Additionally, households and work places will often access the internet using one IP address, meaning that it would not just be the suspected infringer who would have their right to receive and impart information disrupted. Such a technical measure is clearly intrusive, and it should be made clear in the Digital Economy Bill that it can only be used as a last resort, once it has been tested that the first model has not been successful.

### **Right to fair trial**

One serious concern is around the lack of sufficient due judicial process. At the moment the Bill defines a process of appeals with no presumption of innocence. This process will be applied irrespective of the sanction or evidence. Natural justice dictates that the accused must have the opportunity / right to (before any sanction is imposed) a prior hearing decided upon by an independent third party where they are assumed innocent and the onus is on the 'prosecution' to prove guilt. In the particular case of disconnection – which is a severe punishment the need for a prior hearing based on an innocence presumption is unquestionably essential (irrespective of whether it is notionally considered a 'civil offence' or not).

We think that proposals are inconsistent with intent of the new 'Internet Freedom' clause and probably the letter of the clause as well. The text itself says "... *measures may only be taken with due respect for the principle of presumption of innocence and the right to privacy. A prior fair and impartial procedure shall be guaranteed*". Mme Reding said yesterday "*Effective and timely judicial review is as much guaranteed as a prior, fair and impartial procedure, the presumption of innocence and the right to privacy.*" We simply cannot see how any fair reading of this clause could not sensibly conclude that in the case of disconnection a prior hearing based on an innocence presumption is required.

### **Proportionality**

Alongside these concerns is a more general concern about the lack of proportionality in that, where citizen rights are threatened, proportionality requires that the least intrusive means is used to address a problem. The concern with s11 is that the way the reserve powers are cast means that there is no requirement to ensure that the most proportionate route is used or even attempted.

### **Conclusion**

As we detail below the first model is preferable to the second model proposed under clauses 11-14 of this Bill from the point of view of human rights. That is not to say however that it is not without its problems and difficulties as set out above. A fundamental problem with the whole approach to dealing with illegal file-sharing in the Digital Economy Bill is the difficulty in identifying the actual copyright infringer.



However, the first model is clearly a more proportionate approach than the second, which could lead to disconnection and could breach the right to freedom of expression. TalkTalk argue that no technical measure, such as disconnection, should be imposed on an individual without proper and fair due process including a starting presumption of innocence, the need for the rightsholders to prove 'guilt' and a process for ensuring that any sanction is proportionate to the particular circumstances. It is morally and legally wrong to impose sanctions without ex ante due process particularly given the unreliability of the evidence used as the basis of the allegations, and the fact that the human rights of many innocent internet users could be detrimentally affected.

January 2010

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