



# Digital Economy Act 2010

## 2010 CHAPTER 24

### *Online infringement of copyright*

#### **3 Obligation to notify subscribers of reported infringements**

After section 124 of the Communications Act 2003 insert—

*“Online infringement of copyright: obligations of internet service providers*

#### **124A Obligation to notify subscribers of copyright infringement reports**

- (1) This section applies if it appears to a copyright owner that—
  - (a) a subscriber to an internet access service has infringed the owner's copyright by means of the service; or
  - (b) a subscriber to an internet access service has allowed another person to use the service, and that other person has infringed the owner's copyright by means of the service.
- (2) The owner may make a copyright infringement report to the internet service provider who provided the internet access service if a code in force under section 124C or 124D (an “initial obligations code”) allows the owner to do so.
- (3) A “copyright infringement report” is a report that—
  - (a) states that there appears to have been an infringement of the owner's copyright;
  - (b) includes a description of the apparent infringement;
  - (c) includes evidence of the apparent infringement that shows the subscriber's IP address and the time at which the evidence was gathered;
  - (d) is sent to the internet service provider within the period of 1 month beginning with the day on which the evidence was gathered; and
  - (e) complies with any other requirement of the initial obligations code.

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- (4) An internet service provider who receives a copyright infringement report must notify the subscriber of the report if the initial obligations code requires the provider to do so.
- (5) A notification under subsection (4) must be sent to the subscriber within the period of 1 month beginning with the day on which the provider receives the report.
- (6) A notification under subsection (4) must include—
  - (a) a statement that the notification is sent under this section in response to a copyright infringement report;
  - (b) the name of the copyright owner who made the report;
  - (c) a description of the apparent infringement;
  - (d) evidence of the apparent infringement that shows the subscriber's IP address and the time at which the evidence was gathered;
  - (e) information about subscriber appeals and the grounds on which they may be made;
  - (f) information about copyright and its purpose;
  - (g) advice, or information enabling the subscriber to obtain advice, about how to obtain lawful access to copyright works;
  - (h) advice, or information enabling the subscriber to obtain advice, about steps that a subscriber can take to protect an internet access service from unauthorised use; and
  - (i) anything else that the initial obligations code requires the notification to include.
- (7) For the purposes of subsection (6)(h) the internet service provider must take into account the suitability of different protection for subscribers in different circumstances.
- (8) The things that may be required under subsection (6)(i), whether in general or in a particular case, include in particular—
  - (a) a statement that information about the apparent infringement may be kept by the internet service provider;
  - (b) a statement that the copyright owner may require the provider to disclose which copyright infringement reports made by the owner to the provider relate to the subscriber;
  - (c) a statement that, following such a disclosure, the copyright owner may apply to a court to learn the subscriber's identity and may bring proceedings against the subscriber for copyright infringement; and
  - (d) where the requirement for the provider to send the notification arises partly because of a report that has already been the subject of a notification under subsection (4), a statement that the number of copyright infringement reports relating to the subscriber may be taken into account for the purposes of any technical measures.
- (9) In this section “notify”, in relation to a subscriber, means send a notification to the electronic or postal address held by the internet service provider for the subscriber (and sections 394 to 396 do not apply).”

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#### **4 Obligation to provide infringement lists to copyright owners**

After section 124A of the Communications Act 2003 insert—

##### **“124B Obligation to provide copyright infringement lists to copyright owners**

- (1) An internet service provider must provide a copyright owner with a copyright infringement list for a period if—
  - (a) the owner requests the list for that period; and
  - (b) an initial obligations code requires the internet service provider to provide it.
- (2) A “copyright infringement list” is a list that—
  - (a) sets out, in relation to each relevant subscriber, which of the copyright infringement reports made by the owner to the provider relate to the subscriber, but
  - (b) does not enable any subscriber to be identified.
- (3) A subscriber is a “relevant subscriber” in relation to a copyright owner and an internet service provider if copyright infringement reports made by the owner to the provider in relation to the subscriber have reached the threshold set in the initial obligations code.”

#### **5 Approval of code about the initial obligations**

After section 124B of the Communications Act 2003 insert—

##### **“124C Approval of code about the initial obligations**

- (1) The obligations of internet service providers under sections 124A and 124B are the “initial obligations”.
- (2) If it appears to OFCOM—
  - (a) that a code has been made by any person for the purpose of regulating the initial obligations; and
  - (b) that it would be appropriate for them to approve the code for that purpose,they may by order approve it, with effect from the date given in the order.
- (3) The provision that may be contained in a code and approved under this section includes provision that—
  - (a) specifies conditions that must be met for rights and obligations under the copyright infringement provisions or the code to apply in a particular case;
  - (b) requires copyright owners or internet service providers to provide any information or assistance that is reasonably required to determine whether a condition under paragraph (a) is met.
- (4) The provision mentioned in subsection (3)(a) may, in particular, specify that a right or obligation does not apply in relation to a copyright owner unless the owner has made arrangements with an internet service provider regarding—

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- (a) the number of copyright infringement reports that the owner may make to the provider within a particular period; and
  - (b) payment in advance of a contribution towards meeting costs incurred by the provider.
- (5) The provision mentioned in subsection (3)(a) may also, in particular, provide that—
  - (a) except as provided by the code, rights and obligations do not apply in relation to an internet service provider unless the number of copyright infringement reports the provider receives within a particular period reaches a threshold set in the code; and
  - (b) if the threshold is reached, rights or obligations apply with effect from the date when it is reached or from a later time.
- (6) OFCOM must not approve a code under this section unless satisfied that it meets the criteria set out in section 124E.
- (7) Not more than one approved code may have effect at a time.
- (8) OFCOM must keep an approved code under review.
- (9) OFCOM may by order, at any time, for the purpose mentioned in subsection (2) —
  - (a) approve modifications that have been made to an approved code; or
  - (b) withdraw their approval from an approved code,
 with effect from the date given in the order, and must do so if the code ceases to meet the criteria set out in section 124E.
- (10) The consent of the Secretary of State is required for the approval of a code or the modification of an approved code.
- (11) An order made by OFCOM under this section approving a code or modification must set out the code or modification.
- (12) Section 403 applies to the power of OFCOM to make an order under this section.
- (13) A statutory instrument containing an order made by OFCOM under this section is subject to annulment in pursuance of a resolution of either House of Parliament.”

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

After section 124C of the Communications Act 2003 insert—

### “124D Initial obligations code by OFCOM in the absence of an approved code

- (1) For any period when sections 124A and 124B are in force but for which there is no approved initial obligations code under section 124C, OFCOM must by order make a code for the purpose of regulating the initial obligations.
- (2) OFCOM may but need not make a code under subsection (1) for a time before the end of—

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- (a) the period of six months beginning with the day on which sections 124A and 124B come into force, or
  - (b) such longer period as the Secretary of State may specify by notice to OFCOM.
- (3) The Secretary of State may give a notice under subsection (2)(b) only if it appears to the Secretary of State that it is not practicable for OFCOM to make a code with effect from the end of the period mentioned in subsection (2)(a) or any longer period for the time being specified under subsection (2)(b).
- (4) A code under this section may do any of the things mentioned in section 124C(3) to (5).
- (5) A code under this section may also—
  - (a) confer jurisdiction with respect to any matter (other than jurisdiction to determine appeals by subscribers) on OFCOM themselves;
  - (b) provide for OFCOM, in exercising such jurisdiction, to make awards of compensation, to direct the reimbursement of costs, or to do both;
  - (c) provide for OFCOM to enforce, or to participate in the enforcement of, any awards or directions made under the code;
  - (d) make other provision for the enforcement of such awards and directions;
  - (e) establish a body corporate, with the capacity to make its own rules and establish its own procedures, for the purpose of determining subscriber appeals;
  - (f) provide for a person with the function of determining subscriber appeals to enforce, or to participate in the enforcement of, any awards or directions made by the person;
  - (g) make other provision for the enforcement of such awards and directions; and
  - (h) make other provision for the purpose of regulating the initial obligations.
- (6) OFCOM must not make a code under this section unless they are satisfied that it meets the criteria set out in section 124E.
- (7) OFCOM must—
  - (a) keep a code under this section under review; and
  - (b) by order make any amendment of it that is necessary to ensure that while it is in force it continues to meet the criteria set out in section 124E.
- (8) The consent of the Secretary of State is required for the making or amendment by OFCOM of a code under this section.
- (9) Section 403 applies to the power of OFCOM to make an order under this section.
- (10) A statutory instrument containing an order made by OFCOM under this section is subject to annulment in pursuance of a resolution of either House of Parliament.”

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## 7 Contents of initial obligations code

After section 124D of the Communications Act 2003 insert—

### “124E Contents of initial obligations code

- (1) The criteria referred to in sections 124C(6) and 124D(6) are—
  - (a) that the code makes the required provision about copyright infringement reports (see subsection (2));
  - (b) that it makes the required provision about the notification of subscribers (see subsections (3) and (4));
  - (c) that it sets the threshold applying for the purposes of determining who is a relevant subscriber within the meaning of section 124B(3) (see subsections (5) and (6));
  - (d) that it makes provision about how internet service providers are to keep information about subscribers;
  - (e) that it limits the time for which they may keep that information;
  - (f) that it makes any provision about contributions towards meeting costs that is required to be included by an order under section 124M;
  - (g) that the requirements concerning administration and enforcement are met in relation to the code (see subsections (7) and (8));
  - (h) that the requirements concerning subscriber appeals are met in relation to the code (see section 124K);
  - (i) that the provisions of the code are objectively justifiable in relation to the matters to which it relates;
  - (j) that those provisions are not such as to discriminate unduly against particular persons or against a particular description of persons;
  - (k) that those provisions are proportionate to what they are intended to achieve; and
  - (l) that, in relation to what those provisions are intended to achieve, they are transparent.
- (2) The required provision about copyright infringement reports is provision that specifies—
  - (a) requirements as to the means of obtaining evidence of infringement of copyright for inclusion in a report;
  - (b) the standard of evidence that must be included; and
  - (c) the required form of the report.
- (3) The required provision about the notification of subscribers is provision that specifies, in relation to a subscriber in relation to whom an internet service provider receives one or more copyright infringement reports—
  - (a) requirements as to the means by which the provider identifies the subscriber;
  - (b) which of the reports the provider must notify the subscriber of; and
  - (c) requirements as to the form, contents and means of the notification in each case.
- (4) The provision mentioned in subsection (3) must not permit any copyright infringement report received by an internet service provider more than 12

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months before the date of a notification of a subscriber to be taken into account for the purposes of the notification.

- (5) The threshold applying in accordance with subsection (1)(c) may, subject to subsection (6), be set by reference to any matter, including in particular one or more of—
  - (a) the number of copyright infringement reports;
  - (b) the time within which the reports are made; and
  - (c) the time of the apparent infringements to which they relate.
- (6) The threshold applying in accordance with subsection (1)(c) must operate in such a way that a copyright infringement report received by an internet service provider more than 12 months before a particular date does not affect whether the threshold is met on that date; and a copyright infringement list provided under section 124B must not take into account any such report.
- (7) The requirements concerning administration and enforcement are—
  - (a) that OFCOM have, under the code, the functions of administering and enforcing it, including the function of resolving owner-provider disputes;
  - (b) that there are adequate arrangements under the code for OFCOM to obtain any information or assistance from internet service providers or copyright owners that OFCOM reasonably require for the purposes of administering and enforcing the code; and
  - (c) that there are adequate arrangements under the code for the costs incurred by OFCOM in administering and enforcing the code to be met by internet service providers and copyright owners.
- (8) The provision mentioned in subsection (7) may include, in particular—
  - (a) provision for the payment, to a person specified in the code, of a penalty not exceeding the maximum penalty for the time being specified in section 124L(2);
  - (b) provision requiring a copyright owner to indemnify an internet service provider for any loss or damage resulting from the owner's failure to comply with the code or the copyright infringement provisions.
- (9) In this section “owner-provider dispute” means a dispute that—
  - (a) is between persons who are copyright owners or internet service providers; and
  - (b) relates to an act or omission in relation to an initial obligation or an initial obligations code.”

## 8 Progress reports

After section 124E of the Communications Act 2003 insert—

### “124F Progress reports

- (1) OFCOM must prepare the following reports for the Secretary of State about the infringement of copyright by subscribers to internet access services.
- (2) OFCOM must prepare a full report for—

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- (a) the period of 12 months beginning with the first day on which there is an initial obligations code in force; and
  - (b) each successive period of 12 months.
- (3) OFCOM must prepare an interim report for—
  - (a) the period of 3 months beginning with the first day on which there is an initial obligations code in force; and
  - (b) each successive period of 3 months, other than one ending at the same time as a period of 12 months under subsection (2).

But this is subject to any direction by the Secretary of State under subsection (4).
- (4) The Secretary of State may direct that subsection (3) no longer applies, with effect from the date given in the direction.
- (5) A full report under this section must include—
  - (a) an assessment of the current level of subscribers' use of internet access services to infringe copyright;
  - (b) a description of the steps taken by copyright owners to enable subscribers to obtain lawful access to copyright works;
  - (c) a description of the steps taken by copyright owners to inform, and change the attitude of, members of the public in relation to the infringement of copyright;
  - (d) an assessment of the extent of the steps mentioned in paragraphs (b) and (c);
  - (e) an assessment of the extent to which copyright owners have made copyright infringement reports;
  - (f) an assessment of the extent to which they have brought legal proceedings against subscribers in relation to whom such reports have been made;
  - (g) an assessment of the extent to which any such proceedings have been against subscribers in relation to whom a substantial number of reports have been made; and
  - (h) anything else that the Secretary of State directs OFCOM to include in the report.
- (6) An interim report under this section must include—
  - (a) the assessments mentioned in subsection (5)(a), (e) and (f); and
  - (b) anything else that the Secretary of State directs OFCOM to include in the report.
- (7) OFCOM must send a report prepared under this section to the Secretary of State as soon as practicable after the end of the period for which it is prepared.
- (8) OFCOM must publish every full report under this section—
  - (a) as soon as practicable after they send it to the Secretary of State, and
  - (b) in such manner as they consider appropriate for bringing it to the attention of persons who, in their opinion, are likely to have an interest in it.



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- (9) OFCOM may exclude information from a report when it is published under subsection (8) if they consider that it is information that they could refuse to disclose in response to a request under the Freedom of Information Act 2000.”

## **9 Obligations to limit internet access: assessment and preparation**

After section 124F of the Communications Act 2003 insert—

### **“124G Obligations to limit internet access: assessment and preparation**

- (1) The Secretary of State may direct OFCOM to—
- (a) assess whether one or more technical obligations should be imposed on internet service providers;
  - (b) take steps to prepare for the obligations;
  - (c) provide a report on the assessment or steps to the Secretary of State.
- (2) A “technical obligation”, in relation to an internet service provider, is an obligation for the provider to take a technical measure against some or all relevant subscribers to its service for the purpose of preventing or reducing infringement of copyright by means of the internet.
- (3) A “technical measure” is a measure that—
- (a) limits the speed or other capacity of the service provided to a subscriber;
  - (b) prevents a subscriber from using the service to gain access to particular material, or limits such use;
  - (c) suspends the service provided to a subscriber; or
  - (d) limits the service provided to a subscriber in another way.
- (4) A subscriber to an internet access service is “relevant” if the subscriber is a relevant subscriber, within the meaning of section 124B(3), in relation to the provider of the service and one or more copyright owners.
- (5) The assessment and steps that the Secretary of State may direct OFCOM to carry out or take under subsection (1) include, in particular—
- (a) consultation of copyright owners, internet service providers, subscribers or any other person;
  - (b) an assessment of the likely efficacy of a technical measure in relation to a particular type of internet access service; and
  - (c) steps to prepare a proposed technical obligations code.
- (6) Internet service providers and copyright owners must give OFCOM any assistance that OFCOM reasonably require for the purposes of complying with any direction under this section.
- (7) The Secretary of State must lay before Parliament any direction under this section.
- (8) OFCOM must publish every report under this section—
- (a) as soon as practicable after they send it to the Secretary of State, and

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- (b) in such manner as they consider appropriate for bringing it to the attention of persons who, in their opinion, are likely to have an interest in it.

- (9) OFCOM may exclude information from a report when it is published under subsection (8) if they consider that it is information that they could refuse to disclose in response to a request under the Freedom of Information Act 2000.”

## 10 **Obligations to limit internet access**

After section 124G of the Communications Act 2003 insert—

### **“124H Obligations to limit internet access**

- (1) The Secretary of State may by order impose a technical obligation on internet service providers if—
  - (a) OFCOM have assessed whether one or more technical obligations should be imposed on internet service providers; and
  - (b) taking into account that assessment, reports prepared by OFCOM under section 124F, and any other matter that appears to the Secretary of State to be relevant, the Secretary of State considers it appropriate to make the order.
- (2) No order may be made under this section within the period of 12 months beginning with the first day on which there is an initial obligations code in force.
- (3) An order under this section must specify the date from which the technical obligation is to have effect, or provide for it to be specified.
- (4) The order may also specify—
  - (a) the criteria for taking the technical measure concerned against a subscriber;
  - (b) the steps to be taken as part of the measure and when they are to be taken.
- (5) No order is to be made under this section unless—
  - (a) the Secretary of State has complied with subsections (6) to (10), and
  - (b) a draft of the order has been laid before Parliament and approved by a resolution of each House.
- (6) If the Secretary of State proposes to make an order under this section, the Secretary of State must lay before Parliament a document that—
  - (a) explains the proposal, and
  - (b) sets it out in the form of a draft order.
- (7) During the period of 60 days beginning with the day on which the document was laid under subsection (6) (“the 60-day period”), the Secretary of State may not lay before Parliament a draft order to give effect to the proposal (with or without modifications).
- (8) In preparing a draft order under this section to give effect to the proposal, the Secretary of State must have regard to any of the following that are made with regard to the draft order during the 60-day period—

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- (a) any representations, and
  - (b) any recommendations of a committee of either House of Parliament charged with reporting on the draft order.
- (9) When laying before Parliament a draft order to give effect to the proposal (with or without modifications), the Secretary of State must also lay a document that explains any changes made to the proposal contained in the document laid before Parliament under subsection (6).
- (10) In calculating the 60-day period, no account is to be taken of any time during which Parliament is dissolved or prorogued or during which either House is adjourned for more than 4 days.”

## **11 Code by OFCOM about obligations to limit internet access**

After section 124H of the Communications Act 2003 insert—

### **“124I Code by OFCOM about obligations to limit internet access**

- (1) For any period during which there are one or more technical obligations in force under section 124H, OFCOM must by order make a technical obligations code for the purpose of regulating those obligations.
- (2) The code may be made separately from, or in combination with, any initial obligations code under section 124D.
- (3) A code under this section may—
  - (a) do any of the things mentioned in section 124C(3) to (5) or section 124D(5)(a) to (g); and
  - (b) make other provision for the purpose of regulating the technical obligations.
- (4) OFCOM must not make a code under this section unless they are satisfied that it meets the criteria set out in section 124J.
- (5) OFCOM must—
  - (a) keep a code under this section under review; and
  - (b) by order make any amendment of it that is necessary to ensure that while it is in force it continues to meet the criteria set out in section 124J.
- (6) The consent of the Secretary of State is required for the making or amendment by OFCOM of a code under this section.
- (7) Section 403 applies to the power of OFCOM to make an order under this section.
- (8) A statutory instrument containing an order made by OFCOM under this section is subject to annulment in pursuance of a resolution of either House of Parliament.”

## **12 Contents of code about obligations to limit internet access**

After section 124I of the Communications Act 2003 insert—

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**“124J Contents of code about obligations to limit internet access**

- (1) The criteria referred to in section 124I(4) are—
  - (a) that the requirements concerning enforcement and related matters are met in relation to the code (see subsections (2) and (3));
  - (b) that the requirements concerning subscriber appeals are met in relation to the code (see section 124K);
  - (c) that it makes any provision about contributions towards meeting costs that is required to be included by an order under section 124M;
  - (d) that it makes any other provision that the Secretary of State requires it to make;
  - (e) that the provisions of the code are objectively justifiable in relation to the matters to which it relates;
  - (f) that those provisions are not such as to discriminate unduly against particular persons or against a particular description of persons;
  - (g) that those provisions are proportionate to what they are intended to achieve; and
  - (h) that, in relation to what those provisions are intended to achieve, they are transparent.
- (2) The requirements concerning enforcement and related matters are—
  - (a) that OFCOM have, under the code, the functions of administering and enforcing it, including the function of resolving owner-provider disputes;
  - (b) that there are adequate arrangements under the code for OFCOM to obtain any information or assistance from internet service providers or copyright owners that OFCOM reasonably require for the purposes of administering and enforcing the code; and
  - (c) that there are adequate arrangements under the code for the costs incurred by OFCOM in administering and enforcing the code to be met by internet service providers and copyright owners.
- (3) The provision made concerning enforcement and related matters may also (unless the Secretary of State requires otherwise) include, in particular—
  - (a) provision for the payment, to a person specified in the code, of a penalty not exceeding the maximum penalty for the time being specified in section 124L(2);
  - (b) provision requiring a copyright owner to indemnify an internet service provider for any loss or damage resulting from the owner's infringement or error in relation to the code or the copyright infringement provisions.
- (4) In this section “owner-provider dispute” means a dispute that—
  - (a) is between persons who are copyright owners or internet service providers; and
  - (b) relates to an act or omission in relation to a technical obligation or a technical obligations code.”

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## **13 Subscriber appeals**

After section 124J of the Communications Act 2003 insert—

### **“124K Subscriber appeals**

- (1) The requirements concerning subscriber appeals are—
  - (a) for the purposes of section 124E(1)(h), the requirements of subsections (2) to (8); and
  - (b) for the purposes of section 124J(1)(b), the requirements of subsections (2) to (11).
- (2) The requirements of this subsection are—
  - (a) that the code confers on subscribers the right to bring a subscriber appeal and, in the case of a technical obligations code, a further right of appeal to the First-tier Tribunal;
  - (b) that there is a person who, under the code, has the function of determining subscriber appeals;
  - (c) that that person is for practical purposes independent (so far as determining subscriber appeals is concerned) of internet service providers, copyright owners and OFCOM; and
  - (d) that there are adequate arrangements under the code for the costs incurred by that person in determining subscriber appeals to be met by internet service providers, copyright owners and the subscriber concerned.
- (3) The code must provide for the grounds of appeal (so far as an appeal relates to, or to anything done by reference to, a copyright infringement report) to include the following—
  - (a) that the apparent infringement to which the report relates was not an infringement of copyright;
  - (b) that the report does not relate to the subscriber's IP address at the time of the apparent infringement.
- (4) The code must provide for the grounds of appeal to include contravention by the copyright owner or internet service provider of the code or of an obligation regulated by the code.
- (5) The code must provide that an appeal on any grounds must be determined in favour of the subscriber unless the copyright owner or internet service provider shows that, as respects any copyright infringement report to which the appeal relates or by reference to which anything to which the appeal relates was done (or, if there is more than one such report, as respects each of them)—
  - (a) the apparent infringement was an infringement of copyright, and
  - (b) the report relates to the subscriber's IP address at the time of that infringement.
- (6) The code must provide that, where a ground mentioned in subsection (3) is relied on, the appeal must be determined in favour of the subscriber if the subscriber shows that—
  - (a) the act constituting the apparent infringement to which the report relates was not done by the subscriber, and

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- (b) the subscriber took reasonable steps to prevent other persons infringing copyright by means of the internet access service.
- (7) The powers of the person determining subscriber appeals must include power—
  - (a) to secure so far as practicable that a subscriber is not prejudiced for the purposes of the copyright infringement provisions by an act or omission in respect of which an appeal is determined in favour of the subscriber;
  - (b) to make an award of compensation to be paid by a copyright owner or internet service provider to a subscriber affected by such an act or omission; and
  - (c) where the appeal is determined in favour of the subscriber, to direct the copyright owner or internet service provider to reimburse the reasonable costs of the subscriber.
- (8) The code must provide that the power to direct the reimbursement of costs under subsection (7)(c) is to be exercised to award reasonable costs to a subscriber whose appeal is successful, unless the person deciding the appeal is satisfied that it would be unjust to give such a direction having regard to all the circumstances including the conduct of the parties before and during the proceedings.
- (9) In the case of a technical obligations code, the powers of the person determining subscriber appeals must include power—
  - (a) on an appeal in relation to a technical measure or proposed technical measure—
    - (i) to confirm the measure;
    - (ii) to require the measure not to be taken or to be withdrawn;
    - (iii) to substitute any other technical measure that the internet service provider has power to take;
  - (b) to exercise the power mentioned in paragraph (a)(ii) or (iii) where an appeal is not upheld but the person determining it is satisfied that there are exceptional circumstances that justify the exercise of the power;
  - (c) to take any steps that OFCOM could take in relation to the act or omission giving rise to the technical measure; and
  - (d) to remit the decision whether to confirm the technical measure, or any matter relating to that decision, to OFCOM.
- (10) In the case of a technical obligations code, the code must make provision—
  - (a) enabling a determination of a subscriber appeal to be appealed to the First-tier Tribunal, including on grounds that it was based on an error of fact, wrong in law or unreasonable;
  - (b) giving the First-tier Tribunal, in relation to an appeal to it, the powers mentioned in subsections (7) and (9); and
  - (c) in relation to recovery of costs awarded by the Tribunal.
- (11) In the case of a technical obligations code, the code must include provision to secure that a technical measure is not taken against a subscriber until—
  - (a) the period for bringing a subscriber appeal, or any further appeal to the First-tier Tribunal, in relation to the proposed measure has ended (or the subscriber has waived the right to appeal); and

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- (b) any such subscriber appeal or further appeal has been determined, abandoned or otherwise disposed of.”

## **14 Enforcement of obligations**

After section 124K of the Communications Act 2003 insert—

### **“124L Enforcement of obligations**

- (1) Sections 94 to 96 apply in relation to a contravention of an initial obligation or a technical obligation, or a contravention of an obligation under section 124G(6), as they apply in relation to a contravention of a condition set out under section 45.
- (2) The amount of the penalty imposed under section 96 as applied by this section is to be such amount not exceeding £250,000 as OFCOM determine to be—
  - (a) appropriate; and
  - (b) proportionate to the contravention in respect of which it is imposed.
- (3) In making that determination OFCOM must have regard to—
  - (a) any representations made to them by the internet service provider or copyright owner on whom the penalty is imposed;
  - (b) any steps taken by the provider or owner towards complying with the obligations contraventions of which have been notified to the provider or owner under section 94 (as applied); and
  - (c) any steps taken by the provider or owner for remedying the consequences of those contraventions.
- (4) The Secretary of State may by order amend this section so as to substitute a different maximum penalty for the maximum penalty for the time being specified in subsection (2).
- (5) No order is to be made containing provision authorised by subsection (4) unless a draft of the order has been laid before Parliament and approved by a resolution of each House.”

## **15 Sharing of costs**

After section 124L of the Communications Act 2003 insert—

### **“124M Sharing of costs**

- (1) The Secretary of State may by order specify provision that must be included in an initial obligations code or a technical obligations code about payment of contributions towards costs incurred under the copyright infringement provisions.
- (2) Any provision specified under subsection (1) must relate to payment of contributions by one or more of the following only—
  - (a) copyright owners;
  - (b) internet service providers;

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- (c) in relation to a subscriber appeal or a further appeal by a subscriber to the First-tier Tribunal, the subscriber.
- (3) Provision specified under subsection (1) may relate to, in particular—
  - (a) payment by a copyright owner of a contribution towards the costs that an internet service provider incurs;
  - (b) payment by a copyright owner or internet service provider of a contribution towards the costs that OFCOM incur.
- (4) Provision specified under subsection (1) may include, in particular—
  - (a) provision about costs incurred before the provision is included in an initial obligations code or a technical obligations code;
  - (b) provision for payment in advance of expected costs (and for reimbursement of overpayments where the costs incurred are less than expected);
  - (c) provision about how costs, expected costs or contributions must be calculated;
  - (d) other provision about when and how contributions must be paid.
- (5) No order is to be made under this section unless a draft of the order has been laid before Parliament and approved by a resolution of each House.”

## 16 Interpretation and consequential provision

- (1) After section 124M of the Communications Act 2003 insert—

### “124N Interpretation

In sections 124A to 124M and this section—

“apparent infringement”, in relation to a copyright infringement report, means the infringement of copyright that the report states appears to have taken place;

“copyright infringement list” has the meaning given in section 124B(2);

“copyright infringement provisions” means sections 124A to 124M and this section;

“copyright infringement report” has the meaning given in section 124A(3);

“copyright owner” means—

- (a) a copyright owner within the meaning of Part 1 of the Copyright, Designs and Patents Act 1988 (see section 173 of that Act); or
- (b) someone authorised by that person to act on the person's behalf;

“copyright work” has the same meaning as in Part 1 of the Copyright, Designs and Patents Act 1988 (see section 1(2) of that Act);

“initial obligations” has the meaning given in section 124C(1);

“initial obligations code” has the meaning given in section 124A(2);

“internet access service” means an electronic communications service that—

- (a) is provided to a subscriber;



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(b) consists entirely or mainly of the provision of access to the internet; and

(c) includes the allocation of an IP address or IP addresses to the subscriber to enable that access;

“internet service provider” means a person who provides an internet access service;

“IP address” means an internet protocol address;

“subscriber”, in relation to an internet access service, means a person who—

(a) receives the service under an agreement between the person and the provider of the service; and

(b) does not receive it as a communications provider;

“subscriber appeal” means—

(a) in relation to an initial obligations code, an appeal by a subscriber on grounds specified in the code in relation to—

(i) the making of a copyright infringement report;

(ii) notification under section 124A(4);

(iii) the inclusion or proposed inclusion of an entry in a copyright infringement list; or

(iv) any other act or omission in relation to an initial obligation or an initial obligations code;

(b) in relation to a technical obligations code, an appeal by a subscriber on grounds specified in the code in relation to—

(i) the proposed taking of a technical measure; or

(ii) any other act or omission in relation to a technical obligation or a technical obligations code;

“technical measure” has the meaning given in section 124G(3);

“technical obligation” has the meaning given in section 124G(2);

“technical obligations code” means a code in force under section 124I.”

(2) In section 135(3) of that Act (information required for purposes of Chapter 1 functions), after paragraph (i) insert—

“(ia) preparing a report under section 124F;

(ib) carrying out an assessment, taking steps or providing a report under section 124G;”.

(3) In Schedule 8 to that Act (decisions not subject to appeal to the Competition Appeal Tribunal), after paragraph 9 insert—

“9A A decision relating to any of sections 124A to 124N or to anything done under them.”

#### Commencement Information

**II** S. 16 wholly in force at 8.6.2010; s. 16(1) in force at Royal Assent and s. 16(2)(3) in force at 8.6.2010  
see s. 47(1)(2)(a)

*Status: Point in time view as at 08/06/2010.**Changes to legislation: There are currently no known outstanding effects for the Digital Economy Act 2010, Cross Heading: Online infringement of copyright. (See end of Document for details)***17 Power to make provision about injunctions preventing access to locations on the internet**

- (1) The Secretary of State may by regulations make provision about the granting by a court of a blocking injunction in respect of a location on the internet which the court is satisfied has been, is being or is likely to be used for or in connection with an activity that infringes copyright.
- (2) “Blocking injunction” means an injunction that requires a service provider to prevent its service being used to gain access to the location.
- (3) The Secretary of State may not make regulations under this section unless satisfied that—
  - (a) the use of the internet for activities that infringe copyright is having a serious adverse effect on businesses or consumers,
  - (b) making the regulations is a proportionate way to address that effect, and
  - (c) making the regulations would not prejudice national security or the prevention or detection of crime.
- (4) The regulations must provide that a court may not grant an injunction unless satisfied that the location is—
  - (a) a location from which a substantial amount of material has been, is being or is likely to be obtained in infringement of copyright,
  - (b) a location at which a substantial amount of material has been, is being or is likely to be made available in infringement of copyright, or
  - (c) a location which has been, is being or is likely to be used to facilitate access to a location within paragraph (a) or (b).
- (5) The regulations must provide that, in determining whether to grant an injunction, the court must take account of—
  - (a) any evidence presented of steps taken by the service provider, or by an operator of the location, to prevent infringement of copyright in the qualifying material,
  - (b) any evidence presented of steps taken by the copyright owner, or by a licensee of copyright in the qualifying material, to facilitate lawful access to the qualifying material,
  - (c) any representations made by a Minister of the Crown,
  - (d) whether the injunction would be likely to have a disproportionate effect on any person's legitimate interests, and
  - (e) the importance of freedom of expression.
- (6) The regulations must provide that a court may not grant an injunction unless notice of the application for the injunction has been given, in such form and by such means as is specified in the regulations, to—
  - (a) the service provider, and
  - (b) operators of the location.
- (7) The regulations may, in particular—
  - (a) make provision about when a location is, or is not, to be treated as being used to facilitate access to another location,
  - (b) provide that notice of an application for an injunction may be given to operators of a location by being published in accordance with the regulations,

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- (c) provide that a court may not make an order for costs against the service provider,
  - (d) make different provision for different purposes, and
  - (e) make incidental, supplementary, consequential, transitional, transitory or saving provision.
- (8) The regulations may—
  - (a) modify Chapter 6 of Part 1 of the Copyright, Designs and Patents Act 1988, and
  - (b) make consequential provision modifying Acts and subordinate legislation.
- (9) Regulations under this section may not include provision in respect of proceedings before a court in England and Wales without the consent of the Lord Chancellor.
- (10) Regulations under this section must be made by statutory instrument.
- (11) A statutory instrument containing regulations under this section may not be made unless—
  - (a) the Secretary of State has complied with section 18, and
  - (b) a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.
- (12) In this section—
  - “copyright owner” has the same meaning as in Part 1 of the Copyright, Designs and Patents Act 1988;
  - “Minister of the Crown” has the same meaning as in the Ministers of the Crown Act 1975;
  - “modify” includes amend, repeal or revoke;
  - “operator”, in relation to a location on the internet, means a person who has editorial control over material available at the location;
  - “qualifying material”, in relation to an injunction, means the material taken into account by the court for the purposes of provision made under subsection (4);
  - “service provider” has the same meaning as in section 97A of the Copyright, Designs and Patents Act 1988;
  - “subordinate legislation” has the same meaning as in the Interpretation Act 1978.
- (13) In the application of this section to Scotland—
  - “costs” means expenses;
  - “injunction” means interdict.

## **18 Consultation and Parliamentary scrutiny**

- (1) Before making regulations under section 17 the Secretary of State must consult—
  - (a) the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland,
  - (b) the persons that the Secretary of State thinks likely to be affected by the regulations (or persons who represent such persons), and
  - (c) such other persons as the Secretary of State thinks fit.

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- (2) If, following the consultation under subsection (1), the Secretary of State proposes to make regulations under section 17, the Secretary of State must lay before Parliament a document that—
  - (a) explains the proposal and sets it out in the form of draft regulations,
  - (b) explains the reasons why the Secretary of State is satisfied in relation to the matters listed in section 17(3)(a) to (c), and
  - (c) contains a summary of any representations made during the consultation under subsection (1).
- (3) During the period of 60 days beginning with the day on which the document was laid under subsection (2) (“the 60-day period”), the Secretary of State may not lay before Parliament a draft statutory instrument containing regulations to give effect to the proposal (with or without modifications).
- (4) In preparing draft regulations under section 17 to give effect to the proposal, the Secretary of State must have regard to any of the following that are made with regard to the draft regulations during the 60-day period—
  - (a) any representations, and
  - (b) any recommendations of a committee of either House of Parliament charged with reporting on the draft regulations.
- (5) When laying before Parliament a draft statutory instrument containing regulations to give effect to the proposal (with or without modifications), the Secretary of State must also lay a document that explains any changes made to the proposal contained in the document laid before Parliament under subsection (2).
- (6) In calculating the 60-day period, no account is to be taken of any time during which Parliament is dissolved or prorogued or during which either House is adjourned for more than 4 days.

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