

# DIGITAL ECONOMY ACT 2010

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *Topic 2: Online infringement of copyright*

##### *Background*

31. The Act includes provision concerned with online infringement of copyright. This is particularly, but not exclusively, in response to infringement of copyright in the fields of music, film and games. The Act inserts new sections 124A to 124N in the Communications Act 2003 (“the 2003 Act”), which, once a supporting code approved or made by OFCOM has been put in place, impose obligations on internet service providers (“ISPs”) who meet the criteria set out in the code. The obligations require ISPs to:
  - Notify their subscribers if the internet protocol (“IP”) addresses associated with them are reported by copyright owners as being used to infringe copyright; and
  - Keep track of the number of reports about each subscriber and, on request by a copyright owner, compile on an anonymous basis a list of those subscribers who are reported on by the copyright owner above a threshold set in the initial obligations code (“relevant subscribers”). After obtaining a court order to obtain personal details, copyright owners will be able to take action against those included in the list.
32. The obligations will be underpinned by a code approved by OFCOM or, if no industry code is approved, made by OFCOM. The code will set out in detail how the obligations must be met.
33. In case the initial obligations prove insufficient to reduce significantly the level of online infringement of copyright, the provisions also grant the Secretary of State a power to impose further obligations (“technical obligations”) on ISPs. These would be imposed on the basis of reports from OFCOM and any other matter that appears to the Secretary of State to be relevant no sooner than 12 months after an initial obligations code enters into force, and would require ISPs to take measures to limit internet access to certain subscribers. Technical measures could only be used against subscribers who met the threshold for inclusion in a copyright infringement list under the initial obligations. Technical measures would be likely to include bandwidth capping or shaping that would make it difficult for subscribers to continue file-sharing, but other measures may also be considered. If appropriate, temporary suspension of broadband connections could be considered.
34. OFCOM would be subject to an obligation to prepare a code setting out the procedural mechanisms to give effect to the technical obligations of ISPs. The technical measures were described more fully in the consultation document issued on 16 June 2009, as supplemented by the government statement published on 25 August 2009<sup>1</sup>.

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

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

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

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<sup>2</sup> 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.