

DIGITAL ECONOMY ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Topic 1: OFCOM reports

Section 1: OFCOM reports on infrastructure, internet domain names etc.

22. This section inserts three new sections into the Communications Act 2003 (“the 2003 Act”) which require OFCOM to report to the Secretary of State on the state of the UK’s communications infrastructure and services.
23. New section 134A requires OFCOM to produce an initial report in the first year after the provision comes into force, followed by subsequent reports at three-yearly intervals. It also requires that, should OFCOM become aware of a marked change which has a significant impact on business or the public in any of the reporting areas, and which they consider should be brought to the attention of the Secretary of State, they should write a further report. OFCOM must publish each report under new section 134A as soon as practicable after they send it to the Secretary of State.
24. New section 134B sets out in detail the subject matter to be covered by the reports on infrastructure. The initial report and the three-yearly reports will consist of a survey of:
 - The different types of electronic communications network and service in the UK;
 - Geographic and population coverage of those networks and services;
 - Downtime, and measures in place to maintain or improve availability;
 - Emergency planning; and
 - A comparison between UK networks and services and equivalent networks and services provided in a range of other countries.
25. Additionally, in relation to UK networks, the reports will cover infrastructure sharing (for example, where two or more mobile operators pool their network of masts and both offer services across them), capacity (the amount of data that networks and parts of networks are able to carry and the rate at which they can carry it) and wholesale arrangements (the extent to which one operator can buy capacity on another operator’s network and then sell it on to retail customers). In relation to services, they will also cover the use of the electromagnetic spectrum.
26. New section 134C of the 2003 Act requires OFCOM to report on matters specified by the Secretary of State relating to internet domain names when requested to do so. These matters might include the management and distribution of internet domain names by registries and the misuse of domain names or the use of unfair practices by registries, end-users of domain names or their agents (known as registrars).
27. The reporting duty would, for example, enable the Secretary of State to ask OFCOM to report on the activities of internet domain registries based in the UK (and their registrars and end-users) in circumstances where the Secretary of State believes that

the operation of those registries (or the activities of their registrars or end users) could adversely affect, or has already adversely affected, the reputation or operation of the UK's internet economy and/or the interests of consumers or the public in the UK. OFCOM are required to publish these reports.

28. Section 135 of the 2003 Act is amended to enable OFCOM to use their existing information gathering powers to require communications providers and others to supply the information which they will need to write their reports. Those powers are subject to the restrictions in section 137 of that Act on the imposition of information requirements, which means, in particular, that a demand for information must be proportionate to the use to which the information is to be put. Penalties for contravention of the information requirements may be imposed under section 139 of the 2003 Act.

Section 2: OFCOM reports on media content

29. Section 264 of the 2003 Act requires OFCOM to report at least every five years on the fulfilment of the public service remit for television by public service broadcasters, namely television services provided by the British Broadcasting Corporation ("BBC"), Channel 4, Sianel Pedwar Cymru ("S4C"), Channel 3 services, Channel 5 and the public teletext service. The public service remit involves the provision of a balanced diversity of high quality content, which meets the needs and interests of different audiences in the United Kingdom. Paragraphs (b) to (j) of section 264(6) of the 2003 Act provide detailed public service objectives underpinning this remit. According to these objectives, examples of public service media content would include content that reflects, supports and stimulates cultural activity in the United Kingdom, and content that facilitates fair and well informed debates on news and current affairs.
30. This section extends the scope of OFCOM's reviewing and reporting obligations beyond television. Under new section 264A of the 2003 Act, OFCOM will be required to consider the wider delivery of public service media content on other platforms, such as the internet and on-demand programme services, and review the extent to which such content contributes towards the fulfilment of the public service objectives defined in section 264(6)(b) to (j).

Topic 2: Online infringement of copyright

Background

31. The Act includes provision concerned with online infringement of copyright. This is particularly, but not exclusively, in response to infringement of copyright in the fields of music, film and games. The Act inserts new sections 124A to 124N in the Communications Act 2003 ("the 2003 Act"), which, once a supporting code approved or made by OFCOM has been put in place, impose obligations on internet service providers ("ISPs") who meet the criteria set out in the code. The obligations require ISPs to:
 - Notify their subscribers if the internet protocol ("IP") addresses associated with them are reported by copyright owners as being used to infringe copyright; and
 - Keep track of the number of reports about each subscriber and, on request by a copyright owner, compile on an anonymous basis a list of those subscribers who are reported on by the copyright owner above a threshold set in the initial obligations code ("relevant subscribers"). After obtaining a court order to obtain personal details, copyright owners will be able to take action against those included in the list.
32. The obligations will be underpinned by a code approved by OFCOM or, if no industry code is approved, made by OFCOM. The code will set out in detail how the obligations must be met.

33. In case the initial obligations prove insufficient to reduce significantly the level of online infringement of copyright, the provisions also grant the Secretary of State a power to impose further obligations (“technical obligations”) on ISPs. These would be imposed on the basis of reports from OFCOM and any other matter that appears to the Secretary of State to be relevant no sooner than 12 months after an initial obligations code enters into force, and would require ISPs to take measures to limit internet access to certain subscribers. Technical measures could only be used against subscribers who met the threshold for inclusion in a copyright infringement list under the initial obligations. Technical measures would be likely to include bandwidth capping or shaping that would make it difficult for subscribers to continue file-sharing, but other measures may also be considered. If appropriate, temporary suspension of broadband connections could be considered.
34. OFCOM would be subject to an obligation to prepare a code setting out the procedural mechanisms to give effect to the technical obligations of ISPs. The technical measures were described more fully in the consultation document issued on 16 June 2009, as supplemented by the government statement published on 25 August 2009¹.
35. To safeguard the interests of consumers, the provisions also require appeals processes to be set up as part of the underpinning codes. These include the right to appeal decisions of ISPs to impose technical measures. Appeals are required to be to a person independent of OFCOM, with a further right of appeal to the First-tier Tribunal in the case of technical obligations. No technical measure can be imposed if an appeal is in the process of being considered.
36. The provisions also set out how the costs of operating such a system may be shared. Funding from cost apportionment will enable an underpinning code to be developed by interested parties.
37. To illustrate how the provisions might work in practice, possible processes of notification and court action are outlined below:
- Copyright owners identify cases of infringement and send details including IP addresses to ISPs;
 - The ISPs verify that the evidence received meets the required standard, and link the infringement to subscriber accounts;
 - The ISPs send letters to subscribers identified as apparently infringing copyright. They keep track of how often each subscriber is identified;
 - If asked to do so by a relevant copyright owner, ISPs supply a copyright infringement list showing, for each relevant subscriber, which of the copyright owner’s reports relate to that subscriber. The list does not reveal any subscriber’s identity;
 - Copyright owners use the list as the basis for a “Norwich Pharmacal”² court order to obtain the names and addresses of some or all of those on the list. At no point are individuals’ names or addresses passed from the ISP to a copyright owner without a court order;
 - Copyright owners send “final warning” letters direct to infringers asking them to stop online copyright infringement and giving them a clear warning of likely court action if the warning is ignored; and
 - Copyright owners take court action against those who ignore the final warning.

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

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

38. The intention is that copyright owners would be held to the same standards of evidence of copyright infringement as for the initial obligations, and that the procedure for reporting infringement of copyright would be the same as well.
39. [Sections 17](#) and [18](#) enable regulations to be made about the granting by a court of injunctions against service providers to block access to websites that are, or are likely to be, used to infringe copyright.

Section 3: Obligation to notify subscribers of reported infringements

40. This section inserts section 124A of the 2003 Act, which obliges ISPs to notify subscribers of copyright infringement reports (“CIRs”) received about them from copyright owners. It describes what CIRs and notifications to subscribers must contain, the procedures that copyright owners must comply with when making CIRs, and the procedures that ISPs must follow when sending subscriber notifications.
41. Copyright owners are currently able to go online, look for material to which they hold the copyright and identify unauthorised sources for that material. They can then seek to download a copy of that material and in doing so capture information about the source including the IP address along with a date and time stamp. However, they do not have the ability to match this information to the broadband subscriber to whom that IP address was allocated at that precise time. This information is only held by the subscriber’s ISP. Therefore, the copyright owner relies on the ISP’s ability to match the IP address to the name and address of the subscriber concerned.
42. However, the ISP is unable to pass this information on to the copyright owner without a court order. To do so would breach data protection and privacy law. To help ensure that the subscriber is made aware that their account appears to have been used to breach copyright, section 124A imposes an initial obligation on the ISP, in relevant cases, to notify the subscriber if the ISP receives a CIR from a copyright owner. There are maximum time limits of one month between when an infringement is detected and a CIR sent to an ISP, and between when a CIR is received and when a notification is sent to the subscriber.
43. The notification from the ISP must inform the subscriber that the account appears to have been used to infringe copyright, give the name of the copyright owner who has provided the report, provide evidence of the apparent infringement, direct the consumer towards legal sources of content, include information about subscriber appeals and the grounds on which they may be made, and provide other information. It also requires ISPs to make available advice on protecting internet access services from unauthorised use, taking into account that different protection will be suitable for different subscribers such as, for example, domestic subscribers, libraries, and small and medium business. The code may require the notification to include other material as well, such as a statement that information about the apparent infringement may be kept and disclosed to the copyright owner in certain circumstances. Further apparent infringements using the subscriber’s account may result in additional notifications.

Section 4: Obligation to provide infringement lists to copyright owners

44. ISPs have to keep a record of the number of CIRs linked to each subscriber along with a record of which copyright owner sent the report. Under section 124B of the 2003 Act, inserted by section 4, an ISP may be required to provide a copyright owner with relevant parts of those records on request (“copyright infringement lists”), but in an anonymised form so as to ensure compliance with data protection legislation. The code must set the threshold for determining who is a relevant subscriber who may be the subject of a copyright infringement list that the ISP provides to a copyright owner. The threshold may be set by reference to any matter, including the number of CIRs made (see section 7).

45. A CIR represents a single breach of copyright at a moment in time. Up until now, a copyright owner has had no way of knowing whether the subscriber behind that breach habitually infringes copyright online or whether the breach represents a curious individual trying file-sharing for the first and only time. Because of this, the high costs involved in legal action have deterred copyright owners from enforcing their rights. By allowing copyright owners to target only the most serious repeat infringers, copyright infringement lists provided by ISPs are intended to make legal action a more attractive and effective tool for copyright owners to use in respect of their copyright.
46. The lists will be made available to copyright owners on request in an anonymised form. For example, while a list might (for example) identify subscriber 936 as being linked to the most CIRs, it would not include any personal information about subscriber 936. In order to get this personal data, the copyright owner would need a court order. However, the list would allow the copyright owner to identify subscriber 936 as someone against whom legal action may be appropriate.

Section 5: Approval of code about the initial obligations

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

53. Before approving a code, OFCOM must carry out consultation. Under section 124C of the 2003 Act and section 124E of that Act (which is inserted by section 7), OFCOM would also need to satisfy themselves that the code was objectively justifiable, proportionate and transparent.

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

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

Section 7: Contents of the initial obligations code

55. **Section 7** inserts new section 124E in the 2003 Act. This sets out what the code underpinning the initial obligations (whether an industry code or OFCOM's own code) must contain. The reason for including the underpinning material in a code, rather than directly in the 2003 Act, is that it is likely to be detailed and to have to be adapted and refined over time.
56. The code must set out the process by which the initial obligations will operate and the procedures that copyright owners and ISPs must follow in relation to them. It must set out the criteria, evidence and standards of evidence required in a CIR and the required format and content of a notification letter sent to a subscriber. It must not permit any CIR more than 12 months old to be taken into account for the purposes of a notification.
57. The code must also set the threshold applying for the purposes of determining who is a "relevant subscriber" under section 124B (and may therefore be the subject of a copyright infringement list). CIRs which are more than 12 months old must not be taken into account to determine whether the threshold is met and a copyright infringement list under section 124B must not take into account any such CIR.
58. The code must also provide for OFCOM to administer the code and to enforce it in the event of a failure to comply with the code, and it must meet the requirements concerning subscriber appeals (as set out in new section 124K of the 2003 Act, inserted by section 13).

Section 8: Progress reports

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

of State to take into account when taking decisions about whether to impose additional obligations on ISPs.

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

61. New section 124G of the 2003 Act, inserted by section 9, confers a power on the Secretary of State to direct OFCOM to assess whether ISPs should be obliged to take technical measures against certain subscribers, or direct OFCOM to take steps to prepare for technical obligations. In particular, OFCOM may be required to carry out a consultation or assess the likely efficacy of different kinds of technical measure, and to report back to the Secretary of State. Technology used for the purposes of online infringement of copyright is changing fast and it is not possible at the time of enactment to know which technical measures would be effective. OFCOM must publish their reports under this section but may exclude information they consider they could refuse to disclose under the Freedom of Information Act 2000.
62. The government's aim is for the initial obligations in new sections 124A and 124B to significantly reduce online infringement of copyright. However, in case the initial obligations prove not as effective as expected, new section 124H gives the Secretary of State the power to introduce further obligations, should that prove appropriate.
63. If technical obligations are imposed, OFCOM is required to set out supporting provision in a technical obligations code under section 124I (which is inserted by section 11).

Section 10: Obligations to limit internet access

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

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

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

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

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

Section 13: Subscriber appeals

71. **Section 13** inserts new section 124K in the 2003 Act. Section 124K sets out how the mechanism for subscriber appeals is to work. It requires that the initial obligations code and any technical obligations code provide a route for appeals and sets out grounds for appeal. It also requires that the codes must provide for an appeal to succeed unless the copyright owner or ISP shows, in relation to each relevant CIR, that there has been an infringement of copyright and that this has been correctly linked to the subscriber's internet account. A subscriber appeal must also succeed where the subscriber shows that the infringement was not carried out by the subscriber and that the subscriber had taken reasonable steps to prevent an infringement.
72. Where an appeal is successful, the codes must allow compensation to be paid to the subscriber and also any reasonable costs.
73. In the event of technical measures being introduced, the person hearing subscriber appeals must be able to confirm, overturn or modify the imposition of a technical measure, including in cases where the appeal is unsuccessful but there are exceptional circumstances. The code must also provide for an appeal from the first appeal body's decision to the First-tier Tribunal.
74. Finally, the code must ensure that no technical measure is imposed until the appeals process has been exhausted, or the subscriber has decided not to proceed further with an appeal, or the time limit for appeals has expired.

Section 14: Enforcement of obligations

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

Section 15: Sharing of costs

77. The initial obligations and any later technical obligations will give rise to costs. These will include the cost to ISPs of processing copyright infringement reports and issuing subscriber notifications, the costs to ISPs associated with the imposition of any technical measures, OFCOM's costs in approving or preparing the codes, the cost of enforcing them, and the funding of any subscriber appeals to an independent appeals body or the First-tier Tribunal.

78. New section 124M of the 2003 Act, inserted by section 15, confers a power on the Secretary of State to specify by order provision which must be included in the codes and which sets out how costs are to be apportioned between copyright owners, ISPs and, in the case of subscriber appeals, the subscriber concerned. The order must be approved by both Houses of Parliament. The costs are those incurred under the copyright infringement provisions. The purpose of the section is to help ensure that the parties carry out their obligations in an efficient and effective manner and that both ISPs and copyright owners have economic incentives to take action through commercial agreements to reduce online infringement of copyright.
79. The government believes that most of the costs of subscriber appeals to an independent person determining appeals or to the First-tier Tribunal should be funded by industry, so that a subscriber does not face significant costs in making an appeal.

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

80. **Section 17** provides a power for the Secretary of State to bring forward regulations about the granting by courts of injunctions requiring service providers to block access to sites, for the purpose of preventing online infringement of copyright. “Service provider” has the same meaning as in section 97A of the Copyright, Designs and Patents Act 1988 (“the 1988 Act”). A service provider is anyone providing an information society service. An information society service is broadly defined as any service normally provided for remuneration at a distance by means of electronic equipment for the processing (including digital compression) and storage of data and at the request of a recipient of the service (see section 97A(3) of the 1988 Act and regulation 2 of the [Electronic Commerce \(EC Directive\) Regulations 2002 \(S.I. 2002/2013\)](#)). Examples of these include internet service providers, and providers of websites, such as internet storage facilities.
81. Before making such regulations the Secretary of State must be satisfied that online copyright infringement is having a serious adverse effect on businesses or consumers and that making regulations would be a proportionate way to address that effect (see *subsection (3)*). The Secretary of State may not make regulations if to do so would prejudice national security or the detection or prevention of crime.
82. The regulations have to provide that a court may only grant an injunction if the internet location is, or is likely to be, used to host or access a substantial amount of material in infringement of copyright.
83. The regulations have to provide that a court should take into account the extent to which the operator of the site and the service provider have taken steps to prevent infringement of copyright in the material. The regulations must require the court to consider the extent to which the copyright owner had made efforts to facilitate legal access to content. They must also require the court to consider the effect on legitimate uses or users of the online location and the importance of freedom of expression.
84. The regulations must require the court to take into account any representations by a Minister of the Crown.
85. The regulations must require the service provider and operators of the location in question to be given notice of an application for an injunction. They may also provide that a court should not make a cost order against a service provider.
86. The regulations must be made by statutory instrument in accordance with the procedure in sections 17(11) and 18. The instrument must be approved by both Houses of Parliament.

Section 18 Consultation and Parliamentary scrutiny

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

Topic 3: Powers in relation to internet domain names

Background

88. The Act gives powers to the Secretary of State to intervene in the operation of domain name registries. Such registries allocate internet domain names to end users. Internet domain names (such as www.google.co.uk) underpin the addressing system for the internet.
89. The Act confers powers exercisable in circumstances where there has been misuse of domain names, or the use of unfair practices by registries, registrars and end-users of domain names, or where registries have failed adequately to deal with complaints. The powers are only exercisable where those failures have adversely affected or are likely adversely to affect (a) the reputation or availability of electronic communications services or networks in the UK and/or (b) the interests of consumers or members of the public in the UK. The provisions only affect registries which take the form of companies formed and registered under the Companies Act 2006 or limited liability partnerships.
90. The powers are only exercisable in relation to top and second level internet domain name registries (which respectively hold the registers of second and third level internet domains) where the domain is UK-related (see the definitions of "relevant register of internet domain names" and "UK related" in new section 124O(7) and (8)). An example of a top level domain registry is one which registers second level domain names ending in .uk, and an example of a second level domain registry is one which registers third level domain names ending in .co.uk.
91. The powers allow the Secretary of State to appoint a manager of a registry or to apply to court to intervene in relation to a registry's constitution in order to secure that the registry remedies specified serious failures.

Section 19: Powers in relation to internet domain registries

92. This section amends the Communications Act 2003 ("the 2003 Act") by inserting a new section 124O. The section applies where the Secretary of State wishes to use the new powers set out in sections 20 and 21 and is satisfied that there has been a serious failure of a registry because:
- The registry itself, its end-users (that is, owners of or applicants for domain names) or registrars (that is, agents of end-users) have been engaging in practices prescribed in regulations made by the Secretary of State which are unfair or which involve the misuse of internet domain names; or
 - The registry's arrangements for dealing with complaints in connection with domain names do not comply with requirements prescribed in regulations made by the Secretary of State.

93. Possible examples of unfair practices would be cyber-squatting (that is, registering domain names which are of economic value to other people and then charging those people high prices to buy them or use them for their own purposes); drop-catching (that is, waiting until the expiry date for an existing registered domain name, snatching it and then charging the previous owner to buy it back); or pressure sales tactics.
94. Possible examples of the misuse of internet domain names would be registering intentionally misleading domain names, perhaps using them for phishing (a form of internet fraud); distributing malware or spyware, which are computer viruses; spamming; intentionally misleading the public into believing there is a connection between the domain name owner and other organisations (or that another organisation owns or authorises the use of the domain name).
95. The Secretary of State is required to consult before making regulations prescribing the unfair practices and misuse of domain names or the requirements in relation to arrangements for dealing with complaints.
96. The section provides that such a failure will be serious where it has 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.
97. Where the section applies, the Secretary of State must notify the registry specifying the failure and a period within which the registry may make representations to the Secretary of State. In practice, the Secretary of State may (if he considers it appropriate in the circumstances) require OFCOM to prepare a report on the allocation, registration and/or misuse of internet domain names by UK-based registries under section 134C (inserted by section 1(1)) before exercising his powers.

Section 20: Appointment of manager of internet domain registry

98. This section amends the 2003 Act by inserting new sections 124P and 124Q. If the Secretary of State has served a notice under new section 124O, the period allowed for making representations has expired and the Secretary of State is satisfied that the registry has not taken appropriate steps to remedy the failure or its consequences, 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.
99. New section 124Q makes provision about the powers and functions of the manager so appointed. In particular, the Secretary of State may provide for the manager to take over any or all specified functions of the directors in order to ensure that the registry remedies the failure, and may also prevent the registry's directors from carrying out those functions (*subsection (2)*). The Secretary of State may also provide for the remuneration of the manager, which may be payable by the registry itself (*subsection (3)*). In order to ensure that this power does not affect the rights of third parties or the insolvency process, section 124P(4) provides that the appointment does not affect the rights of any third party to appoint a receiver or manager, or the rights of any receiver or manager appointed by a third party. For similar reasons, section 124P(6) provides that if certain office holders under insolvency legislation are appointed in respect of the registry, the Secretary of State must discharge the order appointing a manager. The Secretary of State must also keep the order under review and discharge it if appropriate, for example if the registry has remedied the failure (section 124P(5)). The order has a time limit of two years but the Secretary of State can, if necessary, make a further order in the same or similar terms.
100. Subsections 124Q(5) to (7) allow the Secretary of State to seek directions from a court in connection with the manager's functions. This might be done in order to counter obstruction of the manager by a registry or its officers, since disobeying the court's directions would amount to contempt.

101. Section 124Q(8) applies all the provisions to limited liability partnerships as if the references to a director were to a member of the limited liability partnership.
102. Subsection (2) of section 20 inserts a reference to an order under section 124P into section 192(1)(d) of the 2003 Act. The effect of this is that the registry has a right of appeal on both the facts and the law to the Competition Appeal Tribunal (and thence to the Court of Appeal on a point of law) in respect of a decision to appoint a manager.

Section 21: Application to court to alter constitution of internet domain registry

103. This section amends the 2003 Act by inserting a new section 124R. This gives the Secretary of State the power to apply to the court for an order to alter the constitution of a registry and to limit the registry's ability to amend its constitution itself without the leave of the court. The provision only applies where the Secretary of State has served a notice under new section 124O, the period allowed for making representations has expired and the Secretary of State is satisfied that the registry has not taken the appropriate steps to remedy the failure. The court may only make an order if the court considers it is appropriate in order to secure that the registry remedies the failure specified in the section 124O notification.
104. Section 124R(5) provides that, in the case of a company, the constitution means the articles of association, and in the case of a limited liability partnership, it means the limited liability partnership agreement (as defined).
105. The Secretary of State may exercise his power under this section to apply to court to alter the constitution and the power under new section 124P to appoint a manager concurrently (if he considers it appropriate).

Topic 4: Channel 4 Television Corporation

Background

106. The Channel 4 Television Corporation's ("C4C") existing primary functions currently relate only to the Channel 4 television channel. Taking into account the growth of digital media, the Act introduces provisions that extend the functions of C4C in relation to media content. The Act achieves this by introducing new C4C functions via a new section 198A of the Communications Act 2003 ("the 2003 Act").

Section 22: Functions of C4C in relation to media content

107. New section 198A requires C4C to participate in the making of a broad range of high-quality content that appeals to the tastes and interests of a culturally diverse society, and broadcast or distribute such content on a range of different delivery platforms. This content must include news and current affairs, content for older children and young adults and feature films. C4C will also be required to participate in the making of high quality films. To "participate" in this way includes investing in or otherwise procuring content. For the avoidance of doubt, these new duties on C4C to make content do not disapply the condition in Channel 4's regulatory regime, referred to in section 295 of the 2003 Act, requiring C4C not to be involved, except to such extent as OFCOM may allow, in the making of programmes to be broadcast on Channel 4.
108. The new section also makes provision as to the wider aims C4C must pursue in performing their duties, drawing on the core public purposes that C4C identified in their March 2008 report *Next on 4*³. C4C must support new talent and innovation, support and stimulate well-informed debate (including by providing access to information and views from around the world), promote alternative views and perspectives and help to inspire change in people's lives.

3 Available at: http://www.channel4.com/about4/next_on4.html

109. New section 198A also requires C4C, in the performance of their duties, to have regard to the desirability of:
- Working with cultural organisations;
 - Encouraging innovation in methods of content delivery; and
 - Promoting access to and awareness of services provided in digital form.

Section 23: Monitoring and enforcing C4C's media content duties

110. This section contains provision for monitoring and enforcing the delivery of C4C's new functions, through new sections 198B, 198C and 198D of the 2003 Act. This complements, and is in part modelled on, the existing accountability framework for the delivery of the public service remit of the Channel 4 licensed public service television channel, under section 266 of the 2003 Act.
111. New section 198B requires C4C to prepare, every year, a statement of media content policy, setting out how C4C propose to discharge their functions in the coming year. The statement must also report on their performance against the proposals contained in the previous year's statement.
112. In preparing this statement, C4C will be obliged to have regard to guidance issued by OFCOM and also to consult OFCOM. It will be open to C4C to produce the statement of media content policy either as a separate document or as part of a single document in combination with the statement of programme policy which it is required to provide in relation to the Channel 4 service.
113. OFCOM will be required to keep their guidance under review and revise it as they think fit.
114. New section 198C gives OFCOM a new obligation to review and report on the performance of C4C's new duties, which may well include the making and broadcasting of programmes on television, at the same time as their reviews of the fulfilment of the public service remit under section 264 of the 2003 Act.
115. New section 198D introduces enforcement powers for OFCOM in relation to the fulfilment by C4C of their new functions. It creates a new power of direction for OFCOM in the event that C4C fail to perform their new duties under new section 198A or to prepare or publish a statement of media content policy. The new section gives OFCOM the power to direct C4C to revise their latest statement of media content policy, to take such steps to remedy the failure as OFCOM may prescribe in the direction, or both. OFCOM must include in any direction a reasonable timetable for complying with it and state the factors OFCOM will take into account in determining whether or not a failure has been remedied. OFCOM must consult C4C before issuing such a direction. By virtue of sections 41(1) and (6) of the Broadcasting Act 1990, OFCOM have the power to impose a financial penalty on C4C for a failure to comply with a direction given by OFCOM under section 198D.
116. This section introduces, by means of a new section 271A of the 2003 Act, an additional power for OFCOM exercisable in the event that C4C fail to comply with a direction relating to a failure to perform one or more duties under section 198A. OFCOM must be satisfied that C4C are still failing to perform the relevant duty or duties and, if OFCOM are satisfied that it is reasonable and proportionate to the seriousness of the failure, they have the power to vary the licence under which the Channel 4 television service is licensed. OFCOM may vary the licence by making or adding such conditions to the licence as they consider appropriate to remedy C4C's failure to perform the relevant new duties under section 198A. If, subsequently, OFCOM conclude that any of the new conditions are no longer required, they may vary the licence again, from such time as they determine. OFCOM must consult C4C before exercising the power to make or add conditions to the Channel 4 licence.

Topic 5: Independent television services

Background

117. In the *Digital Britain: Final Report*, the government accepted OFCOM's analysis that the value of the existing commercially-owned public service broadcasting Channel 3 licences will decline further between now and the completion of digital switchover and that the regulatory obligations attached to the licences will therefore require further review over the period. Sections 24 to 30 make amendments to provisions contained in the Broadcasting Act 1990 ("the 1990 Act") and the Communications Act 2003 ("the 2003 Act") in order to introduce additional flexibility into the licence processes for the commercially funded public service television broadcasters.

Section 24: Determination of Channel 3 licence areas

118. Section 14(2) of the 1990 Act requires OFCOM to structure the Channel 3 licence map on a regional basis. However, section 14(7) of the 1990 Act provides a caveat preventing OFCOM from constructing a licence area from either the whole of England or the whole of Scotland.
119. This section repeals section 14(7) of the 1990 Act to remove that restriction. At the same time, it inserts new section 14(7A), which provides that there must always be at least one licence area wholly contained within Scotland. Section 287 of the 2003 Act will still allow OFCOM to insert conditions in a licence to require the holder of a nationwide licence to provide regional programmes.
120. This section also inserts a new section 216A in the 2003 Act, allowing OFCOM to renew Channel 3 licences for a larger or smaller area than the area to which they relate before renewal. However, this power can only be exercised with the consent of the existing licence holders for the areas concerned.
121. As a consequence of new section 216A, the section amends section 216 to give OFCOM the power not to renew a licence if the area to which it relates is or will be covered entirely by another Channel 3 licence or licences which OFCOM have renewed or propose to renew.

Section 25: Initial expiry date for Channel 3 and 5 and public teletext licences

122. Section 224(2) of the 2003 Act provides the Secretary of State with the power, by order, to postpone the initial expiry date of licences to provide Channel 3 services, the licence to provide Channel 5, and the licence to provide the public teletext service. This section amends section 224(2) to provide that different initial expiry dates may be set for those three different types of licence.
123. Section 224(3) of the 2003 Act currently prevents the Secretary of State from exercising the power to postpone the initial expiry date if digital switchover is set to occur before 1 July 2013. The section repeals section 224(3) and therefore gives the Secretary of State more flexibility to extend the duration of licences where appropriate.

Section 27: Report by OFCOM on public teletext service

124. Section 218(1) of the 2003 Act currently places a duty on OFCOM to do all they can to secure the provision of a national teletext service.
125. [Section 27](#) inserts a new section 218A into the 2003 Act that places a duty on OFCOM to prepare a report on the viability of the public teletext service. The section stipulates the assessments that OFCOM must include in the report. OFCOM must submit this report to the Secretary of State, and prepare and submit further reports when asked to do so by the Secretary of State. OFCOM must publish each report as soon as practicable after submitting it to the Secretary of State.

Section 28: Power to remove OFCOM's duty to secure provision of public teletext service

126. Section 28 will remove OFCOM's duty to do all that they can to licence someone to provide the public teletext service and replace it with a power to do so.
127. This change will come into force on a day appointed by the Secretary of State by means of a statutory instrument, which must be approved by Parliament before it can take effect. The Secretary of State may only make this order if he is satisfied that it would be in the public interest, and that either condition A or B stipulated in section 28 has been met. Condition A is that the Secretary of State has laid before Parliament a report prepared by OFCOM under section 218A of the 2003 Act (inserted by section 27) on the viability of continuing the provision of the public teletext service. Condition B is that OFCOM, after inviting applications for the licence to provide the public teletext service, receives no applications by the closing date or considers that it could not award the licence to any of the applicants.

Section 29: Broadcasting of programmes in Gaelic

128. This section repeals section 184 of the 1990 Act, which contains requirements for certain Channel 3 licensees in Scotland (currently Grampian TV and Scottish TV, also known as Scottish Television or "STV") to show Gaelic language programmes.
129. The repeal of section 184 will be commenced by order (see section 47(3)). A fixed date for commencement has not been set because, at present, not all viewers are able to access Gaelic language television other than through STV. However, it is anticipated that, post switchover, more Gaelic television will be available to more viewers on other platforms. The effect of that development might be that it would no longer be necessary to impose Gaelic language broadcasting requirements on Channel 3 licence holders (although they may choose to broadcast in Gaelic).

Topic 6: Independent radio services

Background

130. The Act provides for the regulatory framework necessary to facilitate the delivery of a digital switchover of radio services to Digital Audio Broadcasting (DAB), referred to in the *Digital Britain: Final Report* as a "Digital Radio Upgrade". In particular, the provisions give powers to the Secretary of State to nominate a date for digital switchover and ensure that OFCOM have sufficient powers to provide for an orderly changeover on that date, particularly powers to:
- Terminate relevant analogue licences by the nominated date for digital switchover without the licence holders' consent, subject to a minimum notice period of 2 years;
 - Renew national and local analogue radio licences for up to a further 7 years so long as licence holders also provide content in a digital service via a multiplex⁴;
 - Allow approved local licences to be renewed by the nomination of a national DAB service, providing that the analogue and digital services share at least 80% of their content; and
 - Allow for variation of the frequency or coverage area of a multiplex licence, with the aim of improving the coverage of DAB.
131. The Act reduces regulatory burdens by enabling local stations to share premises and administrative costs within an area approved by OFCOM.

⁴ A multiplex consists of a number of digital services, such as radio stations, bundled together and transmitted digitally on a single frequency in a given transmission area.

Section 30: Digital switchover

132. **Section 30** allows the Secretary of State to give notice to OFCOM of a date by which digital switchover must occur for services specified in the notice. In making a decision to nominate a switchover date, the Secretary of State must take account of any reports by the BBC and OFCOM about the future of analogue broadcasting.
133. The date for digital switchover is the date after which it will no longer be appropriate for the service in question to be broadcast in analogue form.
134. The Secretary of State may nominate different switchover dates for different types of radio services and may withdraw a nomination of a switchover date.
135. After a switchover date has been set, OFCOM are required to vary the licence periods of all licences for the services specified by the Secretary of State so that they end on or before that date. However, OFCOM cannot shorten the duration of a licence so that it would end less than 2 years from the date on which OFCOM give notice of the variation, unless the licence-holder consents.
136. OFCOM may not vary a licence period so that it ends after the switchover date.

Section 31: Renewal of national radio licences

137. **Section 31** allows the further renewal of national analogue licences for a period of up to seven years. All of these licences have already been granted a renewal of 12 years under the powers in section 103A of the Broadcasting Act 1990 (“the 1990 Act”).
138. The procedure to be adopted for licence renewals under the new section 103B of the 1990 Act is that set out in subsections (2) to (9), (11) and (12) of section 103A of that Act. However, within these subsections, the provisions which refer to a situation where a digital service is not yet on-air do not apply. This is because an applicant for a renewal under section 103B will already be providing a national digital simulcast service under the conditions of the previous renewal.
139. OFCOM must include a condition in renewed licences requiring licence holders to do all they can to provide a digital simulcast of their radio service throughout the renewal period.
140. An application for renewal must be made no later than three months before the relevant date, as defined in the existing section 103A(11) of the 1990 Act. Normally, OFCOM must determine the relevant date at least one year in advance. Section 31(3) allows OFCOM to set a relevant date of less than one year after the date of determination where they consider that the relevant date falls no more than 15 months after the day on which section 31 comes into force. However, OFCOM must determine the relevant date as soon as practicable following commencement of section 31.

Section 32: Renewal and variation of local radio licences

141. **Section 32** allows OFCOM to renew a local analogue licence for a period of up to seven years, provided it has already been renewed under section 104A of the 1990 Act or is granted on or after the date on which section 32 comes into force.
142. The procedure to be adopted for licence renewals under the new section 104AA is that set out in subsections (3) to (12), (13) and (14) of section 104A of the 1990 Act.
143. Under current renewal conditions, the applicant for renewal of a local licence must nominate a local digital sound programme service and a local DAB multiplex. Sections 104AA and 104AB make provision for holders of local licences to make a “national nomination”, that is, to nominate a national digital sound programme service and a national DAB multiplex. The power to make a national nomination is restricted to licences which are defined as an “approved licence”. It will be for OFCOM to determine, following consultation, whether a particular licence is approved for this

purpose. The consultation requirement may be satisfied by OFCOM publishing a document before section 32 comes into force.

144. A national nomination must be made in the application for renewal or before OFCOM consider the application, and it may only be made where OFCOM are satisfied that the national digital sound programme service will include at least 80% of the content included in the service provided under the approved licence.
145. Section 104AB(4) requires that, if a licence holder is to make an application under section 104AC in relation to other approved licences, such licences must be specified in the national nomination.
146. The new section 104AC relates to a situation where an approved licence which has not yet been renewed under new section 104AA is specified in a national nomination made under new section 104AB(4) in connection with the renewal of another licence. It allows OFCOM to vary the approved licence, at the request of the licence-holder, by replacing the “local digital services condition” with a “national digital services condition”.
147. A local digital services condition is a condition that OFCOM are currently required to include in renewed licences as a result of section 104A(12) of the 1990 Act, and by which a licence holder is required to do all the licence holder can to ensure that a local digital sound programme service is broadcast on a local radio multiplex service. The purpose of allowing such a condition to be replaced with a national digital services condition is so that holders of approved licences that have not yet been renewed under section 104AA but that wish to provide a digital service on a national multiplex, rather than on a local multiplex, are not, as a result, in breach of their local digital services condition.
148. Before OFCOM vary a licence under this provision, they must be satisfied that the national digital sound programme service will include at least 80% of the content included in the service provided under the licence that is the subject of an application for variation.
149. An application for renewal of a licence under section 104AA must be made no later than three months before the relevant date, as defined in the existing section 104A(13)(c) of the 1990 Act. Normally, OFCOM must determine the relevant date at least one year in advance. Section 32(3) allows OFCOM to set a relevant date of less than one year after the date of determination where they consider that the relevant date falls no more than 15 months after the day on which section 32 comes into force. However, OFCOM must determine the relevant date as soon as practicable following commencement of section 32.

Section 33: Variation of licence period following renewal

150. This section adds section 105A to the 1990 Act and allows the Secretary of State to reduce the duration of a licence renewed under section 103B or 104AA. This power only applies where the Secretary of State has not nominated a digital switchover date or has withdrawn a digital switchover date without nominating a further date.
151. The Secretary of State may give notice to OFCOM of a termination date, specifying the services affected. Different termination dates may be given for different services, but the termination date cannot be before 31 December 2015.
152. OFCOM are required to reduce the duration of a renewed licence so that it ends on or before the termination date set by the Secretary of State, but OFCOM cannot give less than two years’ notice of termination of the licence, unless the licence-holder consents.
153. OFCOM cannot vary the licence period under this section so that the licence expires after the termination date set by the Secretary of State.

154. The Secretary of State must consider, before 31 December 2013, whether to exercise the powers contained in section 105A.

Section 34: Content and character of local sound broadcasting services

155. This section allows OFCOM to amend the conditions of a local licence to allow local programming to be made outside of the licensed area and gives greater discretion to OFCOM to determine the appropriate level of locally-made content.
156. OFCOM may agree to a departure from the character of a service provided under a local licence if programmes will continue to be made within an area approved by them. OFCOM must consult prior to approving an area or withdrawing their approval. The consultation requirement can be satisfied by OFCOM publishing a document before section 34 comes into force.

Section 35: Radio multiplex services: frequency and licensed area

157. This section inserts section 54A into the Broadcasting Act 1996 (“the 1996 Act”). It allows OFCOM to vary a national radio multiplex licence by extending the area in which the licensed service is required to be available. It also allows OFCOM to vary the frequency, or extend or reduce the licensed area, of a local radio multiplex licence.
158. It is up to the holder of a licence to apply to OFCOM for approval of a variation. In so doing, the licence holder must submit a technical plan which indicates the proposed coverage area, the timetable and the technical means for implementing the change. OFCOM must consult on the proposal before granting the application. In the case of an application to vary a local radio multiplex licence, OFCOM may only grant approval if they consider that the variation will not unacceptably narrow the range of local DAB programmes in the area for which the local radio multiplex is provided.

Section 36: Renewal of radio multiplex licences

159. **Section 36** contains a power to amend Part 2 of the 1996 Act (and, in particular, section 58) by regulations for the purpose of making further provision about the renewal of radio multiplex licences. In particular, regulations made under this power may make provision about the circumstances in which OFCOM may renew a licence, the period of such renewal, the information that OFCOM may require from an applicant, the requirements that an applicant must meet, the grounds for refusal of an application, payments to be made and further conditions that may be included in a renewed licence.
160. The power, which is exercisable until 31 December 2015, is subject to the affirmative procedure, requiring approval by both Houses of Parliament.

Topic 7: Regulation of television and radio services

Section 37: Application of regulatory regimes to broadcasters

161. Section 263(4) of the Communications Act 2003 (“the 2003 Act”) gives the Secretary of State the power to cease to include certain obligations in the licence of any service. However, this power does not include any flexibility to remove obligations for a limited period or to reintroduce those if it is appropriate so to do.
162. **Section 37** amends section 263(4) to allow greater flexibility in response to market changes. It provides for the Secretary of State to alter the conditions of public service provision that OFCOM must include in television and radio broadcasting licences, and then to change the conditions back at a later date. The Secretary of State may only make these alterations by affirmative order, which would require approval by Parliament before it could take effect.

Topic 8: Access to electromagnetic spectrum

Background

163. Availability of next generation mobile broadband services requires the availability of spectrum. There are suitable blocks of spectrum either ready for allocation, or about to become available, namely spectrum at 2.6 Gigahertz (GHz) and 800 Megahertz (MHz) otherwise known as the Digital Dividend, available as a result of digital switchover. Attempts by OFCOM to bring this spectrum to market have, however, been subject to delay due to issues around spectrum used for delivery of second generation (2G) mobile services.
164. These issues are complex and revolve around the change of use of spectrum at 900MHz and 1800MHz, known as spectrum liberalisation. To date, the use of 900MHz spectrum has been constrained to providing second generation (2G) mobile services because of the terms of Directive [87/372/EEC](#) (on the frequency bands to be reserved for the co-ordinated introduction of public pan-European cellular digital land-based mobile communications). This Directive has now been amended by Directive [2009/114/EC](#) to allow these spectrum holdings to be used for Universal Mobile Telecommunications Systems (UMTS, a third generation (3G) mobile technology). The UK is required to implement this change by May 2010. The revised Directive requires Member States to look at whether competitive distortion results from these changes. OFCOM's view was that there was an issue and they proposed the reallocation of some spectrum. But OFCOM have been unable to agree with operators how this will be achieved. In parallel, the UK also has to implement a Radio Spectrum Committee Decision that allows the use of 1800MHz spectrum for UMTS.
165. With little certainty on when this would be resolved, the government announced in the *Digital Britain: Interim Report*⁵ that it was seeking a solution, either through a voluntary industry consensus or an imposed government solution. An Independent Spectrum Broker was appointed to take this work forward.
166. The Independent Spectrum Broker's initial set of proposals were published on 13 May⁶, and the government responded to these in the *Digital Britain: Final Report*⁷. Although the government stated that it was minded to implement the proposals, further work by the Independent Spectrum Broker was required. This work has now been completed, following extensive engagement with the mobile operators and other interested parties.
167. It has become clearer during the latter phase of the Independent Spectrum Broker's work that certain aspects of the Wireless Telegraphy Act 2006 ("the 2006 Act") would need amending to implement some of the recommendations of the Independent Spectrum Broker.
168. The proposals put forward by the Independent Spectrum Broker require the application in certain cases of annual licence fees, including what is known as Administered Incentive Pricing, to spectrum that has been auctioned, including spectrum that has been relinquished by operators to conform to the spectrum caps referred to below and spectrum authorised for use by 3G licences extended from a fixed term to an indefinite term.
169. Under the proposals put forward by the Independent Spectrum Broker, a set of temporary spectrum caps will be put in place during the auction and for a limited period after to prevent any one person holding more than a specified amount of spectrum. Operators may therefore be in a position of having to relinquish spectrum in order to comply with these caps and the relinquished spectrum will be auctioned.

⁵ http://www.culture.gov.uk/what_we_do/broadcasting/5944.aspx

⁶ http://www.culture.gov.uk/reference_library/publications/6147.aspx

⁷ http://www.culture.gov.uk/what_we_do/broadcasting/6216.aspx

170. Where operators are required to relinquish spectrum in order to comply with temporary spectrum caps, time limits will be set for that release of spectrum within the wireless telegraphy licence conditions. It is important that this release happens in the timeframe set out to ensure effective competition is maintained. Licensees will also be subject to certain retail service and wholesale access obligations, in order to widen access to the spectrum. OFCOM's existing powers to revoke or prosecute for breach of a wireless telegraphy licence condition may be disproportionate or insufficiently flexible to enforce the conditions which are proposed pursuant to a direction under section 5 of the 2006 Act to allow the timely reform of the spectrum.

Section 38: Payment for licences

171. *Subsections (1) to (3)* of this section allow OFCOM to make regulations under section 12(1)(b) of the 2006 Act which apply charges payable during the term of the licence to specified cases of wireless telegraphy licences allocated by auction. Section 12(5) of the 2006 Act, which includes power to impose charges payable during the term of the licence, does not apply to a licence allocated through auction.
172. *Subsections (4) to (7)* of this section allow OFCOM, with the consent of the Secretary of State, to make regulations under section 14(1) of the 2006 Act which will permit or require licences to which the regulations apply to provide for payments between operators in relation to licences auctioned under section 14 of the 2006 Act.
173. Under existing legislation, payments for spectrum at auction are made to OFCOM who must pay them into the Consolidated Fund. Under the Independent Spectrum Broker's proposals, the proceeds from any 2.1GHz relinquished spectrum should go back to the operator who relinquished it, on the basis that they bought this at auction in 2000. There will also be additional payments between operators arising from the auction of other relinquished spectrum.

Section 39: Enforcement of licence terms etc

174. This section inserts a new section 43A into the 2006 Act giving OFCOM power to impose financial penalties for contravention of certain licence provisions, terms or limitations to which section 43A applies by virtue of a licence provision. A provision applying section 43A can only be included in a licence if it appears to OFCOM that a direction given by the Secretary of State under section 5 of the 2006 Act requires OFCOM to include a particular provision, term or limitation in the licence.
175. Under the current legislation, OFCOM's powers in respect of breaches of wireless telegraphy licences are limited to prosecution where such breach amounts to an offence under Chapter 1 of Part 2 of the 2006 Act or to revocation of the licence.
176. OFCOM has power under sections 42 to 44 of the 2006 Act to impose financial penalties for contraventions of the terms, provisions or limitations of a general multiplex licence.
177. This section also amends section 400 of the Communications Act 2003, to ensure that financial penalties imposed by OFCOM under new section 43A are dealt with in a consistent manner to other similar penalties paid to OFCOM. Section 400 of the Communications Act 2003 requires the money received from certain penalties and charges imposed by OFCOM to be paid into the Consolidated Fund.

Topic 9: Video recordings

Background

178. The Video Recordings Act 1984 ("the 1984 Act") makes it an offence to supply a video recording, such as a DVD, containing a video work, such as a film or video game, unless the video work has been submitted to an authority designated by the Secretary of State for classification as to its suitability to be viewed by persons of particular ages and

the DVD is supplied in accordance with the classification certificate. The Secretary of State has designated principal office holders in the British Board of Film Classification (BBFC) for this purpose.

179. Certain types of video works are exempted (see section 2 of the 1984 Act). They include video works that, taken as a whole, are designed to inform, educate or instruct, or that are concerned with sport, religion or music, provided that they do not contain the particularly objectionable content described in section 2(2) and (3), which includes sexual activity and gross violence. For example, a music video is not exempted from the classification requirement if it contains depictions of gross violence, human sexual activity or if it is likely, to any significant extent, to stimulate or encourage human sexual activity.
180. Most video games are currently exempted from the 1984 Act, unless they contain content such as sexual activity, gross violence or other matters of concern listed in section 2(2) and (3) of the Act. The BBFC classify video games which contain any film material, because the film material is not usually exempt from the requirements of the 1984 Act, even when it is contained in an exempt game. Additionally, on a voluntary basis, the video games industry submits to the BBFC games which they believe are likely to be classified as 18+.
181. Video games which are currently exempted under the 1984 Act are usually classified on a voluntary basis by the Pan-European Games Information (PEGI) system. PEGI classifications of 12 and over are administered throughout Europe by a UK body, the Video Standards Council (VSC).
182. The provisions that make changes to the Video Recordings Act 1984 concerning the classification of video games were notified in draft to the European Commission under the provisions of the Technical Standards Directive.⁸

Section 40: Classification of video games etc

183. The Act extends the statutory classification requirement to video games that are only suitable for viewing by persons aged 12 years and above (see new subsection (1A) of section 2 of the 1984 Act). This extension of the classification requirement to a wider age bracket for video games implements Professor Tanya Byron's recommendation set out in her independent review entitled *Safer Children in a Digital World*⁹ and it follows in the wake of a UK-wide public consultation on the future structure of the video game classification system.
184. **Section 40** sets out the conditions that must be satisfied for the game to be an exempted work under the 1984 Act. The existing statutory exemptions for video games will continue to apply. So those games that, taken as a whole, are designed to inform, educate or instruct, and those concerned with sport, religion or music, will not be required to be classified, provided that they do not depict human sexual activity, gross violence or any of the other matters set out in section 2(2) and (3) of the 1984 Act.
185. A video game will also be exempted if it satisfies one or more the conditions set out in new section 2A. The first condition is that the game does not contain anything listed in section 2A(2)(a) to (h). The second condition is that the designated authority (or a person nominated by it) has confirmed in writing that the game is suitable for viewing by persons under the age of 12. The criteria listed in section 2A(2)(a) to (h) are based on the criteria used by the PEGI¹⁰ system to determine whether a video game is only suitable for those aged 12 years and above. They include depictions of violence against

⁸ Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ L24, 21.7.1998, p37) (as amended by Directives 98/48/EC and 2006/96/EC).

⁹ <http://www.dcsf.gov.uk/byronreview>

¹⁰ PEGI age related logos, content descriptors and the guidelines for completing the ratings questionnaire can be downloaded from the opening page of VSC website <http://www.videostandards.org.uk>.

human or animal characters, depictions of activity involving illegal drugs, swearing and offensive language. Depictions of violence against human or animal characters would not meet the criteria if the character was of a rudimentary form, such as a simple stick character.

186. The Secretary of State will have power to amend the criteria set out in section 2A(2)(a) to (h) by regulations, which must be approved by both Houses of Parliament. This will enable the criteria to be updated, if necessary, in the future, subject to Parliamentary scrutiny. The Secretary of State will also have power, by regulations subject to approval by Parliament, to add or remove further criteria for exempted video games.
187. **Section 40** confers a new power on the Secretary of State to amend section 2 of the 1984 Act by adding, amending or removing cases in which video works are not exempted works for the purposes of the Act (see new subsection (4) of section 2 of the 1984 Act). The power is exercisable by regulations, which must be approved by both Houses of Parliament.
188. Section 3 of the 1984 Act sets out the circumstances in which a supply of a video recording is an exempted supply, even if the film or game contained in the video recording is not exempted. The Act amends that section to secure that the supply of video games by means of amusement arcade machines is exempted (see new subsections (8A) and (8B)), unless the game includes any of the matters mentioned in section 2(2) and (3) of the 1984 Act. It also confers on the Secretary of State a new power to amend section 3 of the 1984 Act, by regulations subject to parliamentary approval, by adding, varying or removing exempted supplies under the Act.

Section 41: Designated authority for video games

189. This section inserts a new section 4ZA into the 1984 Act and allows the Secretary of State to designate two different authorities under section 4 of the Act. So, a person (or persons) may be designated to make arrangements with respect to video games (“the video games authority”) and a different person or persons may be designated for making arrangements in respect of other video works (“the video works authority”).
190. Some mechanism is thought to be necessary to enable the designated authorities, where appropriate, to transfer work between them. New section 4ZB provides that where two authorities are designated under section 4, responsibility for classifying a class of video games may be allocated by the video games authority to the video works authority. This will allow the video games authority to allocate to the other authority responsibility for video games that are considered to be suitable only for supply in licensed sex shops. It also provides that the video games authority may allocate responsibility in relation to video games when they are supplied in a particular type of video recording – for example, responsibility might be transferred for video games that are supplied on the same disc as a film or within the same boxed set as a film. An example would be the basic games found on Blu-Ray discs. Once an allocation is made, the video works authority has responsibility for making arrangements in respect to the allocated works.
191. An allocation must be made by notice and may only be made with the consent of the video works authority. It may only be withdrawn by notice and with consent. When making or withdrawing an allocation, the video games authority must have regard to any guidance issued by the Secretary of State.
192. Any question as to which authority is responsible for making arrangements with respect to a class of video games may be determined conclusively by the video games authority. New section 4ZA(2) provides that references in the 1984 Act to the designated authority in relation to a particular video work will be to the authority designated to be responsible for making arrangements in relation to the video work, taking account of any allocation made by the video works authority under new section 4ZB.

193. New section 4ZC relates to video works that are found within video games, for example, a film which can be viewed as part of the process of playing a game. Where the video work already has a classification certificate issued by the video works authority, it enables the video games authority to take account of that certificate. For video works that have not already received a classification certificate, it enables the video games authority to make arrangements to obtain and have regard to any subsequent determination made by the video works authority as to the suitability of all or part of the video work included in a video game. The video games authority must consult the video works authority with respect to the appropriateness of the arrangements that it makes for taking account of such matters. It must also have regard to any guidance issued by the Secretary of State.

Schedule 1: Classification of video games etc – supplementary provision

194. **Schedule 1** makes further amendments of the 1984 Act.
195. Section 4 of the 1984 Act makes provision about the arrangements to be made by the designated authority. Sections 4(1)(b)(i) and (ii) and 7 are to be amended to clarify that the arrangements may include provision for the revocation of classification certificates.
196. A new subsection (1C) is inserted into section 4 so that arrangements made under this section may require a person seeking a classification certificate for a video work to agree to comply with a code of practice, such as the PEGI¹¹ code of practice. That code includes provision relating to the labelling of video recordings.
197. A new subsection (3A) is inserted into section 4 to ensure that, prior to making any designation under section 4, the Secretary of State must satisfy himself that adequate arrangements will be made for taking account of public opinion in the United Kingdom. This means that the designated authority must have an effective system to gauge public opinion and take account of it.
198. **Section 4(5)** currently requires the Secretary of State to approve tariffs for fees to be charged by the designated authority in connection with the classification of video works. The Act amends this so that the designated authority simply has to consult the Secretary of State about the fees that it proposes to charge.
199. A new subsection (6A) is inserted into section 4 to ensure that the designated authority complies with any guidance issued by the Secretary of State relating to arrangements made under that section. For example, the Secretary of State may provide guidance on administrative matters such as how records of classification certificates are to be kept and how appeal arrangements may be set up. New subsection (6B) makes it clear that the Secretary of State's guidance is not to extend to the criteria to be taken into account in making individual classification decisions. Section 4A of the 1984 Act sets out the criteria to which special regard is to be given by the designated authority when making such decisions.
200. New section 7A of the 1984 Act provides that classification certificates may be issued so as to have effect only for the purposes of a particular video recording. This enables video works to be classified by reference to the recording in which they are to be published. For example, a video game may be classified for the purposes only of its supply for use on a particular platform, such as Nintendo or Xbox. Section 7A(2) provides that, in such a case, the classification certificate can only be relied on for the supply of the video work for use on that platform and not for its supply more generally.
201. The offences set out in the 1984 Act at sections 11 (supplying a video recording of classified work in breach of classification), 13 (supplying a video recording not complying with requirements as to labels, etc) and 14 (supplying a video recording containing false information as to classification) are amended to provide that an offence

¹¹ <http://www.videostandards.org.uk>

is not committed where the video work concerned is an exempted work or the defendant believed on reasonable grounds that the video work was an exempted work. For example, the defendant might believe, on reasonable grounds, that a video game has not been classified because it is suitable for viewing by persons aged under 12, having regard to the criteria set out in new section 2A(2)(a) to (h).

202. The offences under the 1984 Act relate to the supply, or possession for the purpose of supply, of a video recording that contains a video work. Section 22(2) of the 1984 Act provides that a video recording contains a video work if it contains information by means of which all or part of the video work can be produced. There is an exception to this: if a video work contains an extract of another video work (for example, a film that includes an extract from another film), the extract is not part of the work of which it is an extract but a part of the video work which contains the extract; and hence the video recording contains that video work including the extract. An increasing variety of video recordings are available, some of which contain a mixture of films and video games. New subsection (2A) of section 22 provides a power for the Secretary of State to make provision about the circumstances in which a video recording does or does not contain a video work for the purposes of the 1984 Act. This allows provision to be made to take account of new formats, such as where a video game contains a whole film within it or a film contains a game within it.

Topic 10: Copyright and performers' property rights: penalties

Section 42: Increase of penalties relating to infringing articles or illicit recordings

203. The Gowers Review of intellectual property¹² recommended that the penalties under section 107 of the Copyright, Designs and Patents Act 1988 ("the 1988 Act") for online copyright infringement should be matched with those that apply for physical infringement, by increasing the maximum prison sentence. Section 107 of the 1988 Act currently restricts fines awarded on summary conviction for criminal infringement of copyright under section 107(4)(a) and 107(4A)(a) to the statutory maximum, which is £5,000 in England and Wales and £10,000 in Scotland. The section increases the maximum fine that may be imposed for these offences to £50,000. It also increases the maximum fine on summary conviction for making, importing, distributing or making available an illicit recording under section 198(5) or 198(5A) from the statutory maximum to £50,000.

Topic 11: Public lending right

Background

204. **Section 43** amends the Public Lending Right Act 1979 ("the 1979 Act") and the Copyright, Designs and Patents Act 1988 ("the 1988 Act") to reflect the changing nature of book publishing and the increasing demand for the loan of books from public libraries in formats other than print. It does this by:
- Extending eligibility for public lending right ("PLR") payments, to cover authors of audio-books and e-books;
 - Extending PLR to cover producers and narrators of books that are recorded as sound recordings; and
 - Protecting public libraries who lend the books from liability for breach of copyright or breach of rights in performances.
205. The section does not extend PLR to works that are available for loan from public libraries but that do not consist mainly of written or spoken words or still pictures. For

example, films, music recordings and computer games are not covered. Neither does the section extend PLR to digital files downloaded outside library premises.

206. Since its introduction in 1979, PLR has compensated authors for the potential loss in sales resulting from their works being freely available to borrow from public libraries. Under the current PLR scheme established by virtue of the 1979 Act translators, editors, compilers and illustrators are included (along with writers) in the definition of ‘author’ and so are eligible for PLR payments. PLR is now recognised by European legislation (Directive [2006/115/EC](#) on rental right and lending right) as reflecting and protecting the exclusive lending and rental rights of holders of rights in print books.
207. Authors, performers and producers of non-print books, such as audio-books and e-books, have rights conferred on them under the 1988 Act allowing them (or anyone to whom they have assigned their rights) to authorise or prohibit the lending of their work by public libraries. The law required libraries to enter into individual contractual and financial arrangements with those rights holders for the lending of non-print books.
208. It is the view of government that this requirement could have had an impact on the willingness of libraries to lend audio and e-books. It could also have resulted in libraries lending works in breach of the rights of authors and other rights holders. Section 43 is designed to help simplify the current system of payment to rights holders, give a wider range of rights holders’ protection under the PLR scheme, and support innovation in publishing and the creative industries. The government hopes that it will also increase non-print lending by encouraging authors to enter the non-print market.

Section 43: Public lending right

209. This section amends the definition of “book” in the Public Lending Right Act 1979. The 1979 Act pre-dated the advent of most audio and e-books and consequently use of the word “books” within it was interpreted as being limited to books in printed format. This section extends the definition to works that are recorded as sound recordings, and works recorded electronically, so long as they consist mainly of written or spoken words or still pictures. As is already the case for printed books, it is intended that the PLR payment scheme established under the 1979 Act will not cover audio and e-books whose author is described as other than a natural person, or that are musical scores, Crown copyright publications, newspapers, journals or periodicals, or that are not offered for sale to the public or do not have an international standard book number (“ISBN”).
210. [Section 43](#) also amends the definitions of “lent out”, “loan” and “borrowed” in the 1979 Act with the aim of capturing almost all cases in which a public library makes a book (whether in print or audio or e-book form) available to a member of the public for use away from the library for a limited period of time. The exception is where the book is communicated by means of electronic transmission to a place other than the library, for example where the library makes digital files available for remote downloading. In practice this exception is likely to apply to e-books for which a licensing agreement exists between the library and author or publisher under which incremental payment is made based on usage, rather than on individual units purchased on a once-and-for-all basis. The section does not limit a library’s ability to make concurrent loans of an electronic work, provided that they have the appropriate permission to do so.
211. [Section 43](#) amends the definition of “author” in the 1979 Act. Producers and narrators of audio-books and of e-books recorded as sound recordings play a role in making works in audio formats new and unique creations, not just different formats of the same printed volume. Like authors, producers and narrators are conferred with lending rights under the 1988 Act: copyright in the case of producers and performers’ rights in the case of narrators. This section extends eligibility for PLR to those additional categories of rights holder.
212. PLR as extended by section 43 continues to be available to all rights holders primarily resident within the European Economic Area (EEA). The section also preserves the

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

lending rights of non-EEA rights holders under the 1988 Act so that they remain able to license or assign their rights to public libraries (and other persons) independently.

213. [Section 43](#) makes consequential amendments of the 1988 Act to reflect the extended definitions of “book”, “author” and “lent out” in the 1979 Act. The amendments reduce the scope of copyright and rights in performances under the 1988 Act. This is to protect public libraries from liability under that Act when they lend works that are eligible for PLR. As a result of the changes, libraries will generally no longer need to make agreements with authors before lending out their e-books and audio-books.

General sections

Section 44: Power to make consequential provision etc.

214. This section gives the Secretary of State the power to make incidental, supplementary, consequential, transitional, transitory or saving provision in connection with the amendments to various enactments made by the Act. Certain necessary consequential amendments have already been identified and are included in the Act. This power allows any further amendments to be made, where necessary, in order to give proper effect to the provisions made by the Act.

Section 45: Repeals

215. This section introduces Schedule 2 which contains repeals of provisions of the [Public Lending Right Act 1979 \(c.10\)](#), [Video Recordings Act 1984 \(c.39\)](#), [Broadcasting Act 1990 \(c.42\)](#) and [Communications Act 2003 \(c.21\)](#).

Section 46: Extent

216. This section provides that the Act extends to England and Wales, Scotland and Northern Ireland. Subsections (2) and (3) provide that any amendments made by this Act to the Acts listed in subsection (2) may be extended to any of the Channel Islands or the Isle of Man under relevant extending powers in those Acts. Subsection (4) permits amendments made by this Act to Part 1 of the Copyright, Designs and Patents Act 1988 to be extended to any British overseas territory under section 157(2) of that Act.