



Digital Economy Act 2010: copyright

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Section Home Affairs

The [Digital Economy Act 2010](#) received Royal Assent at the very end of the last Parliament. Sections 3 to 18 of the Act cover online infringement of copyright. Several provisions have proved controversial and have not yet been implemented.

Section 17 grants the Secretary of State a power to bring in regulations for the blocking of infringing websites. The present Government has indicated that it does not intend to use this power. Copyright owners have brought successful court actions against infringing websites under existing laws.

The Government is proceeding with implementation of an “initial obligations code” (allowed for under section 11 of the Act). Under the proposed system, an internet service provider would send a warning letter to a customer detected downloading copyright material for free from the internet. If the infringing activity continued, two follow-up letters would be sent. Once the third letter was dispatched, the customer’s download history could be released to the owners of the copyrighted material, enabling legal action to be initiated against the infringer. However, the copyright owner would first have to gain a court order to determine the identity of the file sharer, as the download history provided would be anonymised. Customers thus accused would be able to file an appeal for £20, which would be refunded if the appeal were successful.

The proposed notification system has survived the challenge of a judicial review instigated by BT and TalkTalk. Ofcom has conducted public consultations on the draft code and on the allocation of costs for administering the regime. On current plans and subject to parliamentary approval, the first customer notification letters would be sent in late 2015.

The Act also envisaged further measures which might be taken against infringers such as blocking their internet access or temporarily suspending their accounts. Such measures could only be considered after the Code has been in force for at least 12 months, and would require further legislation and approval by Parliament

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1 The Digital Economy Act 2010

The *Digital Economy Bill 2009-10*, a Bill introduced towards the end of the last Parliament, received the Royal Assent on 8 April 2010.

Following amendments in the House of Commons committee stage, the Act no longer includes provisions in relation to extending copyright licensing. Among other things this would have facilitated the exploitation of “orphan works”, something photography groups had opposed. (Similar measures were later revived and incorporated into the *Enterprise and Regulatory Reform Act 2013*.)

Measures to tackle internet piracy survived the “wash-up” process at the end of the last Parliament: sections 3-18 of the Act cover online infringement of copyright.

Following amendments in the House of Commons committee stage, any secondary legislation to do with section 10 (Obligations to limit internet access) would be subject to a superaffirmative procedure which means the relevant statutory instrument would be consulted upon and could only come into force if both Houses of Parliament approved it. Furthermore, no order may be made under this section for at least a year – this being the period during which “initial obligations” (a warning system backed up with the potential for court action) would be given a chance to work.

Section 10 inserts a new section (124H) into the *Communications Act 2003* which states that the secondary legislation may specify the criteria for [the Internet Service Provider] taking the technical measure concerned against a subscriber. The secondary legislation could also specify the steps to be taken as part of the measure and when they are to be taken. The technical obligations would further be regulated by an Ofcom code (section 11). Section 12 contains the criteria that the code must meet (to Ofcom’s satisfaction) – these include provision for subscriber appeals. Details about these are in turn described in section 13: subscribers would be able to appeal to an independent person (yet to be specified) and make a further appeal to a First-tier Tribunal.

One clause (Preventing access to specified online locations for the prevention of online copyright infringement) was removed in the House of Commons committee stage. It was replaced by two new clauses, now sections 17 and 18 of the Act:

- “Power to make provision about injunctions preventing access to locations on the internet”
- “Consultation and Parliamentary scrutiny”

In brief the effect of these sections is to replace the website blocking provisions of the original clause¹ by a power to bring in regulations for website blocking – subject to a superaffirmative procedure.

The Secretary of State could make the relevant regulations – but only a court could order the blocking of a website once (if ever) such regulations provide for this.

Finally, the Bill as first introduced into the House of Lords contained a controversial clause² (Power to amend copyright provisions). This would have given the Secretary of State wide powers to amend copyright legislation by statutory instrument. The clause was amended, and finally removed, before the Bill entered the Commons.

2 Implementation of the anti-piracy measures

2.1 Website blocking

The current Government has not made regulations on website blocking. The former Culture Secretary asked Ofcom to review the potential efficacy and practicability of the website-blocking provisions in the 2010 Act. Ofcom's report is available online.³ Responding to the Ofcom report, the Government stated that:

We will not bring forward site blocking regulations under the DEA at this time. We will do more work on what other measures can be pursued to tackle online copyright infringement.⁴

Since the Act became law, copyright holders have found that existing laws enable them to take blocking action against piracy sites: a court ruling in 2012 forced ISPs to block access to Newzbin2 and The Pirate Bay;⁵ another High Court ruling in 2013 ordered the UK's six biggest internet service providers to prevent their customers from visiting Kickass Torrents, H33T and Fenopy.⁶

Speaking to the BBC in August 2011, the Business Secretary, Vince Cable, appeared to suggest that the Newzbin2 case had opened up other legal avenues:

"We've discovered that the drafting of the original laws, which took place a year or so ago, were [sic] not tight.

"There are test cases being fought in the courts, so we're looking at other ways of achieving the same objective, the blocking objective to protect intellectual property in those cases, but in a way that's legally sound."⁷

2.2 Warnings to suspected infringers

Under section 124D of the *Communications Act 2003* (as inserted by the *Digital Economy Act 2010*), Ofcom has a duty to make a code for the purpose of regulating the initial obligations of internet service providers (ISPs) to send notifications and provide copyright infringement lists to copyright owners on request.

¹ Clause 18 Bill 89 2009-10

² Clause 17 HL Bill 1 2009-10

³ Ofcom, "[Site blocking](#)" to reduce online copyright infringement: a review of sections 17 and 18 of the *Digital Economy Act*, 27 May 2010

⁴ DCMS, *Next steps for implementation of the Digital Economy Act*, August 2011, p3

⁵ "The Pirate Bay must be blocked by UK ISPs, court rules", *BBC News*, 30 April 2012

⁶ "Court orders access ban on music and film piracy sites", *Financial Times*, 1 March 2013

⁷ "[Government drops website blocking](#)", *BBC News*, 3 August 2011

In June 2012 Ofcom published a draft code for consultation that would require large ISPs to inform customers of allegations that their internet connection has been used to infringe copyright.⁸

When notifying customers of reported infringements, ISPs must explain the steps subscribers can take to protect their networks from being used to infringe copyright and tell them where they can go to find licensed content on the internet.

Copyright owners are expected to invest in awareness campaigns to help educate consumers about the impact of copyright infringement and further to develop attractive online services to offer their content. Ofcom will report regularly to the Government on the effectiveness of both the code and these broader initiatives from copyright owners.

The code will initially cover ISPs with more than 400,000 broadband-enabled fixed lines – currently BT, Everything Everywhere, O2, Sky, TalkTalk Group and Virgin Media. Together these providers account for more than 93% of the retail broadband market in the UK.

The draft code requires ISPs to send letters to customers, at least a month apart, informing them when their account is connected to reports of suspected online copyright infringement.

If a customer receives three letters or more within a 12-month period, anonymous information may be provided on request to copyright owners showing them which infringement reports are linked to that customer's account. The copyright owner may then seek a court order requiring the ISP to reveal the identity of the customer, with a view to taking legal action for infringement under the *Copyright, Designs and Patent Act 1988*.

Copyright owners can already seek such court orders under existing law, but the Code is designed to enable them to focus legal action on the most persistent alleged infringers.

Customers would have the right to challenge any allegation of infringement through an independent appeals body. Ofcom will appoint this body and require it to establish transparent, accessible appeal procedures. Copyright owners will need Ofcom approval of their procedures for gathering evidence of infringement before they can be used under the scheme.

The 2012 version of the draft code incorporates a number of revisions made in the light of an earlier consultation.⁹ The key proposals remain unchanged.¹⁰

Following the consultation and possible further review by the European Commission, expectation was for the draft Code to be laid in Parliament towards the end of 2012. ISPs would then prepare to meet their obligations and Ofcom would appoint an appeals body. As at June 2012, Ofcom expected the first customer notification letters to be sent in early 2014.¹¹ However, the implementing legislation has been delayed and the Government now says that warning letters will not go out earlier than the latter half of 2015.¹²

⁸ Ofcom, [Online infringement of copyright and the Digital Economy Act 2010: notice of Ofcom's proposal to make by order a code for regulating the initial obligations: interim statement and notice of a proposal to make an order](#), 26 June 2012. The consultation closed on 26 July 2012.

⁹ Ofcom, [Online infringement of copyright and the Digital Economy Act 2010: draft initial obligations code: consultation](#), 28 May 2010. This consultation ran from 28 May to 30 July 2010.

¹⁰ The amendments are summarised on pp3-6 of the 2012 consultation document.

¹¹ Ofcom news release, [New measures to protect online copyright and inform consumers](#), 26 June 2012

¹² "UK piracy warning letters delayed until 2015", *BBC News – Technology*, 6 June 2013

A separate consultation on the allocation of costs for policing the code ran from 26 June to 18 September 2012.¹³ It proposed that internet users would have the right to appeal against a report of their alleged infringement at a cost of £20, which will be refunded if their appeal is successful. It is envisaged that copyright owners should bear all of the costs incurred by Ofcom, the majority of costs incurred by the appeals body, and 75% of the costs efficiently and reasonably incurred by qualifying ISPs in carrying out their obligations.

The copyright infringement notification system which the *Digital Economy Act* is introducing has survived the challenge of a judicial review instigated by BT and TalkTalk. These two ISPs had claimed that the measures in the Act were not compliant with EU law and were not proportionate. In March 2012 the companies lost a final legal challenge to force a judicial review of the Act, when their opposition was rejected by the Court of Appeal.¹⁴ In a parliamentary answer the then Culture Secretary cited this case as the reason for delay in implementing the anti-piracy measures in the Act:

Chi Onwurah: To ask the Secretary of State for Culture, Olympics, Media and Sport pursuant to the answer of 31 October 2011, *Official Report*, column 480W, on Digital Economy Act 2010, whether he has laid before the House the statutory instruments referred to. [104991]

Mr Jeremy Hunt: Unfortunately the planned introduction of the statutory instruments described in the answer of 31 October 2011, *Official Report*, column 480W, has been delayed due to the need to take into account the Court of Appeal judgment on the application by BT and TalkTalk for a judicial review of the online infringement of copyright provisions in the Digital Economy Act 2010, delivered on 6 March this year. Although the Government won convincingly, the sole point where we were ruled against—the financial responsibility for appeal case fees—has meant that we need to amend the sharing of costs statutory instrument and Ofcom need to make consequential amendments to the Initial Obligations Code. Both instruments are currently in the process of being considered by the relevant committees within Government, and we hope to be in a position to lay the sharing of costs statutory instrument before both Houses in June. At the same time Ofcom hope to be able to publish the Initial Obligations Code for a period of consultation as required by section 403 of the Communications Act 2003. This will then need to be notified to the European Commission under the terms of the Technical Standards Directive with an expectation that the code will be laid before both Houses by the end of this year.¹⁵

Creative industries minister Ed Vaizey welcomed these developments, saying “We are putting in place a system to educate people about copyright to ensure they know what legitimate content is and where to find it. The *Digital Economy Act* is an important part of protecting our creative industries against unlawful activity.” However, Jim Killock, executive director of the Open Rights Group, argued that the draft code was flawed and potentially left libraries, hotels and bars that offer the internet to customers over wi-fi open to accusations of

¹³ Ofcom, *Online infringement of copyright: implementation of the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012: consultation*, 26 June 2012

¹⁴ “BT and TalkTalk lose file-sharing appeal”, *BBC News*, 6 March 2012

¹⁵ [HC Deb 23 April 2012 c571W](#)

piracy. He suggested that “some people will almost certainly end up in court having done nothing wrong.”¹⁶

The draft Sharing of Costs order¹⁷ was considered by the Secondary Legislation Scrutiny Committee in the Lords, which concluded that

The House may wish to press the Minister in debate for greater reassurance about whether this scheme will function effectively; and we draw the Order to the attention of the House on the grounds that it may imperfectly achieve its policy objective.¹⁸

In its submission to the Lords Committee, Consumer Focus expressed its concern that “a £20 appeals fee will prevent low income consumers, be they benefit recipients or minimum-wage workers, from bringing legitimate appeals against notifications that copyright owners suspect that their internet connection has been used for copyright infringement.”¹⁹

In February 2013 the Government withdrew the cost-sharing Order, citing the need to make “technical changes”.²⁰ A legal commentator at law firm Pinsent Masons suggests that one possible reason for delay is that

the Treasury has raised concerns that requiring ISPs to bear their share of costs in complying with the regime would amount to levying a tax on the providers, which is something it said it would need to sanction.²¹

It is expected that Ofcom will re-consult on the draft Order once it has been amended by Government.

A parliamentary question in March 2013 asked about the effects of delayed implementation:

Dr Thérèse Coffey: To ask the Secretary of State for Culture, Media and Sport what assessment she has made of effects of the delay of the implementation of the Digital Economy Act 2010 on investment in UK content businesses. [144863]

Mr Vaizey: The Government is aware that copyright owners have asserted that the cost to investment in UK content businesses resulting from the delayed implementation of the Digital Economy Act 2010 (DEA) is significant. The Government has not undertaken its own assessment.

The Government is committed to implementing the online infringement of copyright provisions of the DEA but it is important to take time to ensure it is implemented properly. Meanwhile, we continue to work with industry and the enforcement authorities in areas such as payment facilitation and online advertising in order to make online piracy less profitable for sites which exploit copyright infringement for criminal advantage. I am pleased to see that the UK’s creative industries continue to thrive in a challenging environment, and that globally recorded music has turned the corner, with

¹⁶ “Ofcom outlines new anti-piracy rules”, *Guardian*, 26 June 2012. Ofcom’s draft Code envisages that subscribers should take “reasonable steps” to prevent copyright infringement via the subscriber’s internet access. Respondents to the consultation pressed for clarification on what this meant. For discussion of this point and other aspects of the Code see Luke Anthony, “DEA Initial Obligations Code – second time lucky?”, *Entertainment Law Review* 23(8), 2012, 238-41

¹⁷ Draft *Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012* (laid 26 June 2012). See also the *Impact Assessment* accompanying the Order.

¹⁸ *Secondary Legislation Scrutiny Committee (HL), Seventh Report*, para 37

¹⁹ Consumer Focus, *Submission to the Secondary Legislation Scrutiny Committee on the Digital Economy cost sharing order*, July 2012, p3

²⁰ “UK piracy warning letters delayed until 2015”, *BBC News – Technology*, 6 June 2013

²¹ “Ofcom anti-piracy code delayed until 2015”, *out-law.com*, 10 June 2013

the International Federation of the Phonographic Industry (IFPI) reporting growth in recorded music sales in 2012, the first time sales have grown since 1999.²²

2.3 Further measures

Section 10 of the *Digital Economy Act* created an enabling power for further measures which the Secretary of State might consider to help reduce online copyright infringement. These would require ISPs to take steps (such as internet bandwidth reduction, blocking internet access or temporarily suspending accounts) against relevant subscribers in certain circumstances. However, those measures could only be considered after the Code has been in force for at least 12 months, and would require further legislation and approval by Parliament. They would also require Ofcom to establish a further independent appeals process with judicial oversight. These measures did not form part of the 2012 consultations.²³

²² [HC Deb 22 March 2013 c862W](#)

²³ Ofcom, *Online infringement of copyright and the Digital Economy Act 2010: notice of Ofcom's proposal to make by order a code for regulating the initial obligations: interim statement and notice of a proposal to make an order*, 26 June 2012, para 10.10 (p87)