



**Liberty's Second Reading Briefing on
the Digital Economy Bill in the House
of Lords**

November 2009

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Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

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Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

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Introduction

1. The Digital Economy Bill makes provision for reform of the law relating to the communications sector. It was preceded by the Digital Britain White Paper *Digital Britain: Final Report* which was published in June 2009 and it seeks to implement those White Paper recommendations that require legislation. Liberty is not concerned with much of this Bill. We do however have significant concerns over the approach taken in this Bill to online infringement of copyright. This is dealt with in clauses 4 – 16 and it is these clauses to which this briefing relates.

2. Illegal file-sharing, appropriate sanctions and internet access raise several human rights issues including the right to receive and impart information (protected by Article 10 of the *Human Rights Act 1998* (HRA)¹; the right to fair trial (protected by Article 6 of the HRA)² and the right to protection of property (Article 1 of the First Protocol).³

3. Compliance with human rights obligations, in particular the requirement of proportionality, demands the adoption of the least intrusive method for achieving a legitimate aim where rights are engaged. This Bill proposes two models for achieving the legitimate aim of identifying and bringing to justice those committing illegal acts. The first sets up a mechanism intended to allow copyright owners the ability to ascertain which subscribers they have suspected of infringing copyright on more than one occasion. The second model provides the ability for the Secretary of State to impose technical sanctions on subscribers – those either suspected of breaching copyright or for any other consideration. The first model is evidently less intrusive than the second. However while the Bill's clauses seem to imply that the second model will only be adopted if the first model does not succeed in reducing illegal file-sharing nothing in the Bill requires the first model to be tried and tested before the second model is adopted. As we detail below this runs wholly counter to a human rights compliant approach.

¹ Article 10 of the *European Convention of Human Rights* as incorporated by the HRA.

² Article 6 of the *European Convention of Human Rights* as incorporated by the HRA.

³ Article 1 of the First Protocol of the *European Convention of Human Rights* as incorporated by the HRA.

Online infringement of copyright – legislative model 1

4. Clauses 4 – 16 of the Bill seek to insert new clauses 124A to 124M in the *Communications Act 2003*. These clauses would create a number of new mechanisms for the imposition of penalties on internet users. The Bill essentially creates two penalties models; ostensibly for dealing with future copyright infringement in the fields of music, film and games. However as drafted, and as we describe below, the clauses go much further.

5. Clauses 4 – 9 cover the first stage of the new proposed approach and the obligations imposed here are termed 'initial obligations'. Clause 4 creates a mechanism to allow a copyright owner to make a copyright infringement report (CIR) to an internet service provider (ISP) if it appears to a copyright owner that a subscriber to an internet access service has infringed the owner's copyright or a subscriber has allowed another person to use the service and that person has infringed copyright by means of the service. Copyright owners and indeed the private investigation agencies that they hire, are already able to go on-line to find which IP addresses are accessing material to which they hold the copyright. The copyright owner is, however, not able to match this information to information about the broadband subscriber to whom the IP address was allocated at that time. That information is held by ISPs. Under clause 4 a CIR can only be made if a code (provided for and governed by clauses 6 - 8) allows the owner to do so. Under clause 4(3) a CIR is a report that: states that there appears to have been an infringement of an owner's copyright; includes a description of the apparent infringement; includes evidence of the apparent infringement that includes the subscriber's IP address and the time at which the evidence was gathered and complies with any of the initial obligations provided for in the code.

6. Under this scheme several obligations are imposed on ISPs by virtue of the CIRs issued by copyright owners. The first obligation is governed by clause 4(4) and requires that an ISP who receives a CIR must notify the relevant subscriber about the report.⁴ Clause 4(5) and (6) provide the information that must or may be included in the ISPs notification to subscribers.⁵

⁴ The requirement to notify the relevant subscriber is to be governed by the 'initial obligations code' provided for in clauses 6 – 8.

⁵ An ISP's notification to an internet subscriber must include: a statement that it is being sent in response to a CIR; a description of the apparent infringement; evidence of the apparent infringement; information about copyright and its purpose; advice about how to obtain lawful

7. Clause 5 creates a second obligation on ISPs requiring them to provide copyright owners with a 'copyright infringement list' for certain subscribers when requested by an ISP (and when the 'initial obligations code' requires). A copyright infringement list (CIL) is a list that sets out which of the CIRs made by a copyright owner relate to a relevant subscriber but will not identify the subscriber. A CIL can be made about a subscriber if the requesting copyright owner has made one or more infringement reports about the subscriber and the number of reports has reached: *'the threshold (if any) set in the initial obligations code'*. The Explanatory Notes state that the thinking behind the mechanism is that as things stand a copyright owner has no way of knowing which subscribers habitually infringe copyright. This is because the majority of internet subscribers do not have 'static' or in other words fixed IP addresses. Instead most have a 'dynamic' IP address that is automatically changed by the subscribers ISP every few weeks and which may also change in the event of a power cut etc. The notes imply that as a result of frequently changing IP addresses copyright owners are reluctant to enforce their property rights. They are unable to ascertain which subscribers are regular copyright infringers and so the financial cost of seeking a legal remedy may not be justified by what may be minimal losses sustained as a result of a subscriber's suspected copyright infringement. The notes state that providing access to information about which subscribers have been made subject to more than one CIR by an owner will enable copyright owners to decide which subscribers they wish to enforce their property rights against. Under the mechanism proposed in clause 5 a copyright owner would not be granted access to personal information about a subscriber through a CIL. This information could only be granted by a court after an application for a Norwich Pharmacal order – an order which requires a respondent to disclose certain information or documents. As proposed, once a copyright owner is provided with a CIL for a particular subscriber the copyright owner is able to apply to the civil court for access to the personal information necessary to commence civil proceedings.

access to copyright works; advice about the protection of electronic communications networks that use wireless telegraphy; and anything else as required by the initial obligations code. A notification may include: statements that information about the apparent infringement may be kept by the ISP; that the copyright owner may require the provider to disclose which CIRs made by the owner relate to the subscriber; that following such a disclosure the copyright owner may apply to a court to learn the subscriber's identity and may bring proceedings against the subscriber for copyright infringement; the number and nature of CIRs relating to the subscriber that may be taken into account for the purposes of any technical measures.

Code of Initial Obligations

8. Clauses 6 – 8 make provision for the creation of the ‘initial obligations code’. The obligations for ISPs created under clauses 4 and 5 would not have effect until a code under these clauses is in force. Clause 6 provides that OFCOM may approve an ‘initial obligations’ code if it appears that such a code has been made by any person and only if they see it as appropriate to approve the code. Clause 7 provides for OFCOM to create its own code.

9. Clause 8 provides for the content of an initial obligations code. This code would be hugely significant, fleshing out the operation of the obligations created under clauses 4 and 5 and entirely underpinning the regulation of the first model. Among other things the code would: make provision about how ISPs are to keep information about subscribers; limit the time for which they may keep that information; include requirements regarding the standard of, and means of obtaining, evidence of suspected infringement for inclusion in a CIR; cover requirements concerning enforcement and appeals by subscribers. As noted at paragraph 5 above, the code could also specify the relevant threshold for when an ISP would be under an obligation to provide a copyright owner with a CIL on a particular subscriber. It is difficult to see why matters of such significance have been left to a code. This is especially so given the vagueness of clauses 6 and 7 in providing for a code to be drawn up. At the very least, and given the potential ramifications of CIRs, matters such as the subscriber appeals process and the threshold for the triggering of CIL obligations should be set out on the face of the Bill.

Potential problems with model 1

10. As we detail below model 1 is hugely preferable to the second model proposed under clauses 11-14 of this Bill. That is not to say however that model 1 (as described above) is not without its problems and difficulties. In addition to the lack of detail in clauses 4 and 5 and amount of regulation left to the initial obligations code it is unclear whether the Government has considered the very likely practical problems that may arise. Under clause 4 CIRs will be made where a copyright owner suspects that a subscriber has infringed the owner’s copyright or allowed another person to use the service and that person has infringed the owner’s copyright. In a world where every internet user had their own internet subscription and where internet users could

not piggyback on others subscriptions this model would be relatively straightforward. Each CIR could be linked to an individual internet user and it would then turn on the facts and evidence as to whether an infringement had taken place. This is of course not how internet access and internet use works in 2009. Rather internet use is largely collectivist in nature with entire families, businesses and communities sharing an IP address not to mention the existence of internet cafes and the provision of wi-fi in so many public spaces. All of this necessarily means that identifying an individual copyright infringer is far from straightforward. This said, model 1 allows only for legal action to be initiated against suspected copyright infringers and not for any kind of automatic sanction. Model 1 also makes provision to allow for subscriber appeals against CIRs. As noted above the model would be hugely improved if this appeals mechanism was set out on the face of the Bill.

Paving the way for the second model

11. Clauses 9 and 10 pave the way for the second approach that the Government is seeking to legislate for in this Bill. Clause 9 places an obligation on the regulator, OFCOM, to prepare reports (full reports every 12 months from the initial obligations code coming into force and interim reports every three months after the code comes into force) to be sent to the Secretary of State about the infringement of copyright by subscribers to internet services. The full reports must contain among other things an assessment of levels of copyright infringement, a description of steps taken by copyright owners to enable subscribers to obtain lawful access to copyrighted material as well as assessments of the extent to which CIRs have been made and legal proceedings brought. Clause 10 provides that the Secretary of State may direct OFCOM to assess whether one or more technical obligations should be imposed on ISPs, take steps to prepare for the obligations and provide a report on the assessment or steps to the Secretary of State. It seems clear from these clauses and indeed those that follow that the Government has hastily pre-judged the impact that the first model might have on copyright infringement.

Online infringement of copyright – model 2

12. Clause 11 creates a second and concurrent model for imposing penalties on internet service subscribers. The implication appears to be that should the first model prove unsuccessful in reducing copyright infringement the Secretary of State will then activate the second model through an order-making power. Clause 11 provides that

“the Secretary of State may at any time by order impose a technical obligation on internet service providers if the Secretary of State considers it appropriate in view of – (a) an assessment carried out or steps taken by OFCOM under section 124G; or (b) any other consideration”. An order made under clause 11 must specify the date from which the technical obligation is to have effect or provide for it to be specified. It may also specify the criteria for taking the technical measure concerned against the subscriber and the steps to be taken as part of the measure. Clauses 12 and 13 provide for a code concerning the clause 11 obligations to limit internet access. The code on technical obligations is to be drawn up by OFCOM with the Secretary of State’s approval. It will include among other things provision relating to enforcement and the handling of subscriber appeals.

13. In creating such an order-making power the Government is proposing that in dealing with suspected copyright infringement (or indeed as we outline below in dealing with any particular type of internet use) ordinary criminal or civil procedures will be bypassed replaced instead with an administrative process laden with executive involvement and devoid in the first instance of due process safeguards. This proposal continues two disturbing trends enthusiastically adopted by this Government over recent years. The first is the attempt to sidestep traditional criminal or civil law standards and procedures in favour of administrative systems controlled by the executive which undermine rights and erode procedural fairness. At its very worst this corrosive model has allowed for indefinite house arrest for those suspected of involvement in terrorism under the control order regime. The second trend is the penchant for leaving that which should properly be dealt with on the face of primary legislation to secondary legislation in the form of regulations or Orders which do not attract sufficient levels of parliamentary scrutiny.

14. The sanction proposed under model 2 is severe. The explanatory notes state that orders by the Secretary of State under clause 11 *“would require ISPs to take measures to limit internet access to certain subscribers”* and *“would be likely to include bandwidth capping or shaping that would make it difficult for subscribers to continue file-sharing but other measures may also be considered. If appropriate temporary suspension of broadband connections could be considered”*. These technical measures implemented at the Secretary of State’s behest may therefore include disconnection.

15. Article 10 of the HRA, the right to freedom of expression, includes within its definition the freedom to receive and impart information and ideas. This right is, of course, not absolute and can be limited to an extent shown to be necessary and proportionate in achieving a legitimate aim, for example protecting the rights of others. While the Government's professed aim of protecting copyright is indeed legitimate, it is doubtful that this second model is a proportionate means of achieving that aim. Proportionality demands that in pursuing policies that interfere with rights, the least intrusive method of securing a policy objective is used. The automatic sanction of disconnection and other potential technical measures are by their very nature highly intrusive. The level of interference with the right to receive and impart information and ideas is made only more acute by the fact that we are in an age where people increasingly rely on the internet to allow them to gain access to information and provide information to others. That this Bill seeks to create two possible models for addressing copyright infringement – one that includes an automatic sanction and one which provides a mechanism to allow copyright owners to pursue suspected infringers in the court room - serves only to highlight the disproportionate nature of this second model.

16. What's more, automatic disconnection is likely to be largely indiscriminate in its application. As mentioned above in relation to model 1, evidence of suspected infringement will not amount to evidence of a specific suspected infringer rather an account holder whose internet subscription may have been used by another to infringe copyright. Deciphering whether or not an account holder or another is the suspected infringer is certainly not possible at the stage at which technical measures would be imposed under this model. The likelihood is therefore that many who have not themselves infringed copyright will be subjected to the automatic sanctions including disconnection. Additionally, and also mentioned above in relation to model 1, internet use is often collectivist in nature. Whole households, workplaces, or communities can access the internet using one IP address. An automatic sanction of disconnection on suspicion of copyright infringement will therefore have a far wider impact than simply cutting internet access for a suspected infringer. Those who use the same connection will also have their right to receive and impart information and ideas unjustifiably interfered with.

17. Putting aside direct executive interference, the unwise order-making model and the automatic and severe sanction; Liberty believes that the wording of the power would need significant amendment. As it stands the order-making power is

shockingly broad in its framing. While the explanatory notes state that the Government intends for technical measures only to be applied against copyright infringers,⁶ as currently drafted the clause allows the Secretary of State, by order, to impose a technical obligation on ISPs to apply technical measures against any internet subscriber for *any* reason. The power could not be framed any more widely than its current form. The order-making power will at best allow the Secretary of State to order that those suspected of copyright infringements have technical measures applied and at worst it will allow the Secretary of State to order any subscriber or category of subscriber to have technical measures applied for whatever reason. In principle, as drafted, the Secretary of State could require that ISPs cut off those using (or allowing others to use) the internet to access particular websites or services regardless of whether or not any copyright is infringed. The Secretary of State could for example order that those accessing websites that fit a particular criteria be cut off – for example political or religious websites considered to be extreme. It takes little imagination to envisage where such a power could lead. What has been described as a power to cut off illegal file-sharers is in fact better described as a power to cut off internet access for whomever the Secretary of State sees fit.

Conclusion

18. Model 1 is an easily more proportionate approach to addressing copyright infringement than model 2 which may well breach Article 10 of the HRA (free expression). A potential problem with both models is the difficulty in the first instance of knowing who precisely is suspected of infringing copyright given the way in which internet connections are shared and the fact that an infringer may infringe copyright while piggybacking on another's internet subscription. While these factors may cause significant practical problems for the operation of the first model, importantly the first model does not seek to impose a severe sanction summarily. This is sought under the second model which proposes automatic cut off for those account holders who meet any such criteria as set by the Secretary of State. In principle, a sanction of such severity should not be imposed summarily. This is especially so where the criteria for imposing such a sanction is without limits and where sanctions are likely to undermine the rights of many non-infringing internet users.

⁶ At paragraph 67 of the Explanatory Notes: "*the government envisages that the criteria for taking a technical measure against a particular subscriber would be the same as the criteria used to determine whether the subscriber's alleged infringement are included in a copyright infringement list under the initial obligations*".

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