

# Focus on the Digital Economy Bill

**Consumer Focus is the statutory consumer champion for England, Wales, Scotland and (for postal consumers) Northern Ireland. We operate across the whole of the economy, persuading businesses, public services and policy makers to put consumers at the heart of what they do. We have been working on copyright related issues for many years through our predecessor organisation the National Consumer Council.**

The Digital Economy Bill makes provision for reform of the law relating to the communications sector. The Bill aims to implement the recommendations made in the Digital Britain White Paper published in June 2009. Consumer Focus' concerns are mainly in relation to the provisions on online copyright infringement, Clauses 4 to 18 of the Bill. Clauses 4 to 17 will be amended into the Communications Act 2003 and Clause 18 into the Copyright, Designs and Patent Act 1988.

Digital technologies mean that for the first time in history consumers can infringe copyright on a significant scale. Copyright infringement through peer-to-peer (p2p) filesharing should not be condoned, but an enforcement-focused approach is treating the symptoms, not the cause. Currently the market does not meet consumers' needs and expectations in the digital world and the only effective solution to online copyright infringement is new business models that meet consumers' clearly expressed demand for digital services.

**Consumer Focus is greatly concerned about the provisions for technical measures in the Bill, Clauses 10 to 13, the appeals process through which subscribers can appeal against copyright infringement notices issued by rights owners, Clause 14, and the so called website blocking amendment 120A, now Clause 18.**

To date it is not clear how these provisions will comply with EU law and the Human Rights Act. Furthermore the provisions have not been subject to a proper economic impact assessment as defined by the [Cabinet Office Guidelines](#). Hence the Government risks implementing legislation with a significant, but as yet unknown cost to the economy. This is symptomatic of a Bill that has been rushed through Parliament and is unlikely to realize the potential of Digital Britain. The technical measures and web-blocking provisions would have greatly benefited from pre-legislative scrutiny, and while some significant amendments have been made in the House of Lords, the provisions need full debate and scrutiny in the House of Commons.

## **Consumer Focus recommends Government:**

- undertakes an economic impact assessment on the technical measures and web-blocking provisions in advance of a 2<sup>nd</sup> reading of the Bill. The economic impact assessment should be the basis for discussion in the House of Commons, allowing MPs to assess whether the provisions are workable and in the interest of the British public and economy
- fully discusses and scrutinises the technical measures and web-blocking provisions in House of Commons Committee and Report. If this is not possible due to the imminent general election the provisions should be removed from the Bill, to be scrutinised by a new parliament

**Economic impact assessments:** Both impact assessments published when the Bill entered the Lords and Commons have serious shortcomings. The impact on businesses, other than ISPs and mobile phone providers, the public sector or non-profits has not been assessed, despite these organisations having a key role in providing internet access. Concerns raised by, among others, the British Hospitality Association, the Federation of Small Businesses, and the Museums, Libraries and Archives Council have to date been ignored.

Furthermore Consumer Focus is concerned that the baseline data for online copyright infringement comes from two trade associations who have lobbied for technical measures, namely the BPI and IFPI, as well as a promotional survey that was undertaken in January 2008, rather than a credible and independent source.

**Clauses 10 to 13 – technical measures:** Consumer Focus has grave concerns about the excessive power given to the Secretary of State in Clause 11, namely to impose by order a technical obligation on ISPs and determine the ‘criteria for taking the technical measures concerned against a subscriber’. Copyright infringement, online or offline, is currently dealt with by the courts and it is inappropriate to allow the Secretary of State to determine the criteria based on which technical enforcement measures, such as disconnection, should be applied against citizens.

The internet is now used to deliver key public and private services cost effectively, and is an important vehicle for individuals to exercise their right to freedom of expression, which includes the right to receive and impart information. Entire households, businesses and public institutions will be subjected to technical measures and Consumer Focus is greatly concerned that the economic and social impact of technical measures, which are defined in Clause 10, has not been fully considered. The economic and social impact of technical measures renders the punishment disproportionate to the offence committed, which is civil copyright infringement.

**Clause 14 – subscriber appeal:** Consumer Focus has serious concerns in relation to the subscriber appeal provisions. In particular, we remain unconvinced that providing for an administrative body, set up by Ofcom with the power to decide whether a subscriber has infringed copyright and to impose technical measures against subscribers, complies with Directive 2009/140/EC, also known as the Telecoms Package, amendment 138. Consumer Focus does not believe that forcing subscribers to prove their innocence through an expensive appeals process, in order to avoid being disconnected from the internet for copyright infringement, complies with the right to due process, that is the presumption of innocence and a fair trial, as enshrined in the Human Rights Act.

In relation to Clause 4, 124A (8)(d), the Government has clarified that any ‘copyright infringement report’ made against subscribers can be used as the basis of imposing a technical sanction against them. This means that subscribers have to appeal from day one against any notifications they receive, if they want to avoid being subject to technical measures. But when appealing to the administrative body set up by Ofcom, and subsequently a First Tier Tribunal, subscribers will have no right to legal aid. Given the highly complicated and technical nature of the evidence advanced against them, as well as the difficulty in proving WiFi hijacking or unauthorised access by a third party, it will almost certainly be necessary that consumers take advice before appealing.

**Clause 18 – website blocking:** This Clause, formally amendment 120A as tabled by Lord Clement Jones and Lord Howard of Rising, was voted into the Bill at Report. The Clause has a number of serious flaws, including non-compliance with the EU technical Standards Directive and the E-Commerce Directive. In particular, the process that it sets up would allow rights holders to force UK ISPs to block access to websites anywhere in the world on the basis of minimal evidence, and require ISPs to appeal the block at their own cost. Among others it would require UK courts to decide ‘whether a substantial proportion of the content accessible at or via each specified online location infringes copyright’ and ‘any issues of national security raised by the Secretary of State’. The provision is unworkable, not least because copyright law differs from country to country. Clause 18 would make the UK an unattractive business location for online service providers and ISPs, and is likely to lead to a situation similar to what has been termed ‘libel tourism’.