

DIGITAL ECONOMY ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Topic 2: Online infringement of copyright

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.

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

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.