

# Client Alert.

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April 20, 2010

## UK steps towards “Digital Britain” with the introduction of the Digital Economy Act 2010

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One of the key goals of the Labour government in power in the UK for the last 13 years has been to create “Digital Britain”. The aim has been to position the UK as a global technology leader and to promote both a regulatory framework and a digital economy attractive for technology investment.

On 8 April 2010, with a general election now only weeks away, as almost the last act of a departing Parliament, the government’s Digital Economy Act 2010 became law. The Act – depending on your perspective, either the culmination of 13 years’ work or something squeezed through as part of a Parliamentary wash-up – could have been either a landmark or a lame duck.

In this article, we describe how some key Digital Britain proposals have been implemented in the Digital Economy Act 2010.

### WHAT IS “DIGITAL BRITAIN”?

In October 2008, after a decade during which some felt that the UK government had failed to respond promptly and in a coordinated fashion to the advent of online trading, websites, 3G networks, broadband, etc., the government launched an initiative called “Digital Britain”. The aim of Digital Britain was to survey and analyse the current state of the UK’s digital communication infrastructure and economy, and to ascertain what the UK needed to do in order to retain a competitive edge in those areas. This initiative culminated in the “Digital Britain – Final Report”, which was published in June 2009 (the “**Digital Britain Report**”).

The Digital Britain Report addresses a broad range of issues relating to the state of the UK’s digital economy and the communications infrastructure that underpins it. We have previously provided an overview of the key proposals outlined in the Digital Britain Report that are likely to be of interest to businesses in the technology sector, which is available [here](#).

### WHAT DOES THE DIGITAL ECONOMY ACT 2010 DO?

The Digital Economy Act 2010 (the “**Act**”) implements many of the recommendations set out in the Digital Britain Report that require legislation. These legislative steps are important to technology sector businesses. However, many observers feel that the Act is as notable for what it omits as for what it contains.

Certain sectors of the digital economy are directly affected: broadcasting and videogame production, for example. Organizations owning copyright works and media content will also feel that there is some benefit in the new (although possibly laborious) regime to deal with online copyright infringement, involving both imposing greater penalties and working with internet service providers to combat pirates. Furthermore, all businesses will need to be vigilant as to

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employee activity. OFCOM<sup>1</sup> has indicated that businesses who share a public IP address across their internal users will be liable for illegal activity perpetrated through the use of their network by their internal users.

Therefore, all organisations need to bear in mind that, should an organisation's network be used to download infringing materials, that organisation itself will be exposed to the risk of sanctions, which in theory could ultimately lead to the organisation having its internet connection terminated by its ISP. In light of this, organisations will need to take greater responsibility for how their networks are used, which includes ensuring that they are properly secured against unauthorised use and also revisiting the applicable acceptable use policies and checking the way in which such policies are enforced.

There is disappointment for anyone hoping for a meaningful commitment to upgrading the UK's mobile communications infrastructure. The hope had been that the UK could invest in high-speed mobile broadband and other technology infrastructure. However, these proposals proved just too expensive and too controversial.

## BACKGROUND

Originally introduced as the Digital Economy Bill (the "**Bill**") in the House of Lords in November 2009, the Bill formally became an Act on 8 April 2010 after receiving Royal Assent.

The Act introduces various amendments to existing laws, some with potentially far-reaching consequences. The key existing laws that are affected by the Act include, amongst others, the Video Recordings Act 1984, the Copyright, Designs and Patents Act 1988, the Broadcasting Act 1990, the Wireless Telegraphy Act 2006, and importantly, the Communications Act 2003 ("**CA 2003**").

Subject to certain exceptions, most of the Act's provisions will come into force on 9 June 2010. However, there are a handful of provisions that came into force when the Act was passed (*i.e.*, they are already in force), and there are also a number of provisions that do not come into force until further notice. The Act applies across England, Wales, Scotland and Northern Ireland. Certain provisions of the Act could also be extended to apply to the Channel Islands and/or the Isle of Man.

## WHICH OF THE KEY PROPOSALS OF THE DIGITAL BRITAIN REPORT DOES THE DIGITAL ECONOMY ACT 2010 IMPLEMENT?

Of the numerous recommendations contained in the Digital Britain Report, those that are likely to be of interest to businesses in the technology sector and are now implemented by the Act, are outlined below.<sup>2</sup>

- **Proposals to make OFCOM responsible for: (a) encouraging investment in communications infrastructure; and (b) alerting the UK government of material and sudden change affecting the communications infrastructure, and assessing the UK's communications infrastructure every two years.**

This proposal is now partly implemented by Section 1 of the Act, which amends CA 2003. These provisions essentially oblige OFCOM to keep an eye on a much broader range of media and network-related matters.

<sup>1</sup> The Office of Communications, the independent regulator and competition authority for the UK's communications industries. OFCOM's responsibilities currently cover television, radio, telecommunications, and wireless communications services.

<sup>2</sup> Other issues that the Digital Britain Report addressed, such as the way in which contents for public broadcasting service are developed, are also addressed in part by the Act. For example, the Act outlines various amendments to CA 2003 in respect of the functions of Channel 4 Television Corporation, as well as amendments to the Broadcasting Act 1990 in respect of licensing of independent television services. However, these reforms are beyond the scope of this article and not addressed herein.

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Under the amended CA 2003, OFCOM is obliged to produce reports on various matters relating to the UK's electronic communications networks, ranging from the types of networks provided in the UK and geographic coverage of the different networks, to the preparations made by network providers for emergencies, and the standard of the different networks and how they compare to other networks provided in other countries, particularly in respect of coverage and capacity. Such reporting obligation also extends not just to the networks themselves, but also network services such as mobile telephony service and broadband services. The first such report must be produced within 12 months, and thereafter a report is required every 3 years.

OFCOM will also be obliged to produce reports on matters relating to internet domain names, such as the allocation and registration of domain names and the misuse of domain names. This report, however, has no regular schedule attached to it and OFCOM will be obliged to produce the report only as and when requested by the UK government.

The Act also modifies an existing duty of OFCOM and clarifies the wide scope of OFCOM's reach. Currently, OFCOM is obliged to conduct a regular review of the "*the extent to which the public service broadcasters have... provided relevant television services which... fulfil the purposes of public service television broadcasting in the United Kingdom*" and to produce a report based on such review "*with a view to strengthening the quality of public service television broadcasting in the United Kingdom.*" The Act extends the scope of this reporting obligation to include the review of not just TV broadcasting but "media services" in general, which is defined to include TV and radio services, on-demand programme services, and "*other services provided by means of the internet where there is a person who exercises editorial control over the material included in the service.*"

- **A proposal to upgrade the UK's radio broadcasting services from FM to DAB and from MW to FM by the end of 2015.**

This proposal is now implemented in part by Section 30 of the Act, which amends the Broadcasting Act 1990. This amendment gives the UK government the power to require OFCOM to nominate a date for digital switchover. However, the amendment falls short of specifying an actual date for the digital switchover.

Therefore, although 2015 remains the official target for the switchover, some might see Section 30 of the Act as an admission on the part of the UK that it is not confident that this target will be met. Nevertheless, users and producers of radios would be best advised to bear in mind that, after the switchover, analogue radios will only be able to receive community channels and car radios will require converters.

- **A proposal to make OFCOM responsible for taking steps to reduce copyright infringement by imposing certain specific conditions on ISPs and by giving enforcement powers to OFCOM.**

This proposal has now been implemented by Sections 3 to 18 of the Act, which insert into CA 2003 several new provisions that create a new regime to regulate online copyright infringement (the "**Regime**"). The Regime is based on two key obligations imposed on ISPs. These obligations, which are referred to as the "Initial Obligations", can be summarised as follows:

1. If a copyright owner (say, a film studio or a record company) suspects that a subscriber to an internet access service is infringing copyright whilst using that internet access, or has allowed his or her internet connection to be used by someone else to commit copyright infringement (e.g., by downloading unlicensed copies of music in MP3 format or films as DIVX/AVI format), then the copyright owner can file

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a copyright infringement report with the relevant ISP. The copyright infringement report must notify the ISP of the fact that “*there appears to have been an infringement of the owner’s copyright*”, including a description of the alleged infringement and evidence such as IP address, and date/time.

2. Once it receives a copyright infringement notice, the ISP must notify the relevant subscriber within 1 month, if the relevant conditions are met. The subscriber notice must include specific information, including a statement that the notice is sent in response to a copyright infringement report and the name of the copyright owner who made the report, a description of the apparent infringement and relevant evidence (*i.e.*, IP address and date/time), as well as information regarding any rights of appeal the subscriber may have.
3. The ISP is also obliged, if requested to do so by a copyright owner, to provide the copyright owner with a copyright infringement list, which sets out “*in relation to each relevant subscriber, which of the copyright infringement reports made by the owner to the provider relate to the subscriber*”.

The Act only provides a broad outline of the Regime. For example, the precise circumstance in which a copyright infringement notice can be served on individual subscribers is not clear and, similarly, it is not clear how appeals by subscribers will work in practice.

Such details will become clear only once a code describing how the Initial Obligations will be regulated is developed and implemented (the “**Code**”). The Code can be developed by third parties (*e.g.*, ISPs themselves) and approved by OFCOM (provided that it meets certain requirements). In the absence of a suitable Code which OFCOM can approve, OFCOM is obliged to develop the Code itself.

The Act contains high-level descriptions of what the Code must contain, but this is still very much lacking in detail. So, much of the attention of rights groups, the media, entertainment and software industries, and the ISPs, will no doubt be focused on the development of the Code, as the Act provides for potentially draconian sanctions for online copyright infringement. Under the Regime, the UK government can make an order to require ISPs to “*take a technical measure against some or all relevant subscribers to its service for the purpose of preventing or reducing infringement of copyright by means of the internet*”, and here, “technical measure” includes not only the reduction/limitation in connection speed/capacity and prevention of access to specific URLs, but also a suspension of internet access service.

It will be of some concern that OFCOM has indicated that businesses who share a public IP address across their internal users will be liable for illegal activity perpetrated through the use of their network by their internal users; if this approach is to be followed, then where a network is used to download infringing material, the owner of that network will be exposed to the risk of sanctions, including having its internet connection terminated by its ISP.

In light of the harshness of the potential sanctions, there are number of safeguards in place:

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- Before it can make such an order, the UK government has to: (i) direct OFCOM to conduct an assessment of whether or not ISPs should be required to take such technical measures; and (ii) take the OFCOM's assessment into account.<sup>3</sup>
- Before the UK government can give such a direction to OFCOM, the proposed direction has to be laid before the Parliament.
- Before any such order can be issued, the order not only has to be laid before Parliament, but also has to be "approved by a resolution of each House".<sup>4</sup>
- The Code made by OFCOM in respect of how such sanctions should be regulated is "subject to annulment in pursuance of a resolution of either House of Parliament".<sup>5</sup>

Aside from these sanctions which specifically relate to the limitation or suspension of a subscriber's internet connection, contravention of Initial Obligations and other related obligations introduced by the Act will be subject to the general enforcement provisions of CA 2003. Thus, under the relevant provisions of CA 2003, an ISP who breaches such obligations could be subject to enforcement notification, which OFCOM can enforce by imposing a fine not exceeding £250,000 and by obtaining a court order for injunction and specific performance.

Separately from the general enforcement provisions of CA 2003, the Act also enables the UK government to obtain a court order for "a blocking injunction in respect of a location on the internet which the court is satisfied has been, is being or is likely to be used for or in connection with an activity that infringes copyright". However, this power can be exercised only if:

- the online infringement in question is "having a serious adverse effect on businesses or consumers";
- it "is a proportionate way to address that effect"; and
- it "would not prejudice national security or the prevention or detection of crime".

Thus, websites that illegally make available copyrighted materials for download, or facilitate such download (e.g., by facilitating P2P file sharing of unlicensed music, movies, and video games), could potentially be forced to shut down.

- **A proposal to introduce a statutory maximum fine of £50,000 that can be imposed by the magistrates' courts for copyright infringement and other IP-related offences.**

This proposal has now been implemented by Section 42 of the Act, which amends the Copyright, Designs and Patents Act 1988 ("**CDPA 1988**"). Under CDPA 1988, certain acts of copyright infringement constitute criminal offence. These include, amongst others, the following:

- making for sale or hire, selling, importing, distributing, etc., an article which is "an infringing copy of a copyright work" (i.e., counterfeit goods) without the licence of the copyright owner, whilst knowing or having a reason to believe that doing so constitutes copyright infringement;

<sup>3</sup> The UK government's power to give such direction is reinforced by a specific obligation imposed on ISPs (as well as copyright owners) to "give OFCOM any assistance that OFCOM reasonably require for the purposes of complying with any direction under this section."

<sup>4</sup> See Section 124H(5) of CA 2003, as amended by the Act.

<sup>5</sup> See Section 124I(8) of CA 2003, as amended by the Act.

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- communicating copyrighted materials to the public whilst knowing or having a reason to believe that copyright is infringed; and
- making for sale or hire, selling, importing, distributing, etc., a recording without the consent of the original performer (and also in certain circumstances other relevant rights holder such as a record company) whilst knowing or having a reason to believe that copyright is infringed.

For all of these offences, in serious cases of infringement, an offender can be punished by a long-term prison sentence and/or a potentially unlimited fine; but prior to the introduction of the Act, in relatively minor cases infringement, offenders only faced the prospect of short-term imprisonment and/or a fine capped at £5,000. The Act raises the maximum level of fines that can be imposed in such minor cases of copyright infringement from £5,000 to £50,000.

- **A package of proposals to enhance online security.**

These proposals largely failed to materialise. One proposal of interest which did make it into the Act is the regulation of video games. The Act achieves this by introducing into the Video Recordings Act 1984 a new regulatory regime for “*video games and other video works*”, which will be overseen by a dedicated video games authority.

While video games are currently classified by both PEGI<sup>6</sup> and BBFC,<sup>7</sup> the Act effectively makes PEGI the sole classification system for video games. This is because, once the video games authority is appointed, the UK government intends that the video games authority will use the PEGI system for classifying video games, although the BBFC system will continue to apply to other video works.<sup>8</sup> The Act also imposes stricter controls on video games by extending regulation to games which contain violence to humans or animals, encouragement of criminality, sexual messages, swearing, offence, drug use, or encouragement of alcohol or tobacco use.

- **Support for the continuation of IGF for a further five-year term as an independent platform for discussion of internet-related issues, and support for the continuation of ICANN as the organisation responsible for the domain name system.**

These proposals are not replicated in the Act. The Act does, however, insert into CA 2003 a new provision which enables the UK government to intervene and take over the control of a domain name registry by appointing its own manager to oversee the affairs of the domain name registry in question where “*a serious relevant failure in relation to a qualifying internet domain registry is taking place or has taken place*”.

Serious relevant failure means an act or omission by the relevant domain name registry, or any of its registrars or end-users, which is “*unfair or involve the misuse of internet domain names*” and “*adversely affected or is likely adversely to affect (a) the reputation or availability of electronic communications networks or electronic communications services provided in the United Kingdom or a part of the United Kingdom, or (b) the interests of*”

<sup>6</sup> PEGI stands for Pan European Game Information. It is an age-rating system specifically developed for video games. Originally launched in 2003, it is used in most European countries and is supported by major industry participants such as Sony, Microsoft, and Nintendo. See <http://www.pegi.info/> for further information.

<sup>7</sup> BBFC stands for British Board of Film Classification, the independent regulator of film and video industries in the UK. BBFC, amongst other things, provide age-ratings to movies and videos.

<sup>8</sup> See the “Designated Authorities – Allocating Works Between BBFC and the VSC: Factsheet”, February 2010, available on the website of the Department for Business Innovation & Skills at <http://interactive.bis.gov.uk/digitalbritain/wp-content/uploads/2010/03/DEB-Factsheet-Video-Games-BBFC-VSO.doc>.

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*consumers or members of the public in the United Kingdom or a part of the United Kingdom”.*

This provision effectively imposes an extra layer of regulation over the affairs of Nominet UK and other organisations involved in the management/maintenance of the registers of second and/or third level domains within the “.uk” top level domains. The registration and use of domain names in general is currently not formally regulated, and the measures introduced by the Act, which effectively seek to stamp out practices such as domain name squatting and copyright infringements/passing-offs committed through the use of domain names, is likely to increase the pressure on Nominet UK to increase its scrutiny and proactively regulate the use of “.uk” domain names.

## WHICH OF THE KEY PROPOSALS OF THE DIGITAL BRITAIN REPORT ARE NOT ADDRESSED BY THE DIGITAL ECONOMY ACT 2010?

- **A proposal to enable regulated, commercial exploitation of those works the copyright-owner of which cannot be identified or found (“Orphan Works”).**

This proposal was originally included in the draft Bill. However, it was vigorously opposed, particularly by photographers, and was ultimately dropped during committee stage debate.

- **A proposal to deliver at least 90% coverage of next-generation fibre-optics-based broadband for homes and businesses by 2017.**

It was intended that a £0.50 a month levy on all copper lines, to be introduced under the Finance Bill, would fund the widespread introduction of next-generation broadband. However, this levy was dropped from the Finance Bill following strong opposition from the Conservative Party and a key House of Commons scrutiny committee.<sup>9</sup>

- **A commitment to make high-speed broadband at 2Mbps per second universally available in the UK by 2012 (“Universal Services Commitment”), and a proposal to promote transition to the next generation of high-speed mobile broadband and universal 3G coverage by modernising the mobile communications infrastructure.**

These proposals are not directly dealt with by the Act. However, the Act does address the spectrum access issue in part by amending the Wireless Telegraphy Act 2006 to revise the existing licensing regime. OFCOM has already commenced a number of public consultations in this area. Therefore, whilst the Act itself does not immediately address Universal Services Commitment, these proposals might well be eventually addressed in the future by a separate amendment to CA 2003, or possibly by separate legislation.<sup>10</sup>

- **A proposal to set up a number of “Digital Testbeds” that function as a forum to develop and facilitate trials of end-to-end online products and services.**

<sup>9</sup> Note that if the Conservative party wins the UK general election in May 2010, it is likely that the direct burden of the so-called broadband tax will shift from subscribers to service providers. See p24 of “*Invitation to join the Government of Britain – The Conservative Manifesto 2010*”, where the Conservative party states as follows: “*We will scrap Labour’s phone tax and instead require BT and other infrastructure providers to allow the use of their assets to deliver superfast broadband across the country. If necessary, we will consider using the part of the licence fee that is supporting the digital switchover to fund broadband in areas that the market alone will not reach*”.

<sup>10</sup> See for example the current open OFCOM Consultations “*Digital dividend: 600 MHz band and geographic interleaved spectrum – Consultation on potential uses*” (opened on 18 February 2010), “*Review of the wholesale broadband access markets – Consultation on market definition, market power determinations and remedies*” (opened on 23 March 2010), and “*Review of the wholesale local access market Consultation on market definition, market power determinations and remedies*” (opened on 23 March 2010).

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This proposal is not directly addressed by the Act. However, the Technology Strategy Board (“**TSB**”), an executive non-departmental public body established by the UK Government in 2007 and sponsored by the UK’s Department for Business, Innovation and Skills (BIS), has allocated £10 million to develop digital testbeds as part of the Digital Britain strategy. The TSB has stated that it anticipates that its Digital Testbed Programme will go live in the second half of 2010. In addition, the TSB has also allocated £18 million to be invested in collaborative digital research and trials to create technologies, services and operating models which may be tested on the Digital Testbed.<sup>11</sup>

- **A package of measures to secure the UK’s position as a leader in animation, CGI, electronic games, and other interactive digital media applications.**

These provisions are not addressed by the Act. While the Digital Britain Report stated that the UK government was committed to assessing whether a tax relief to promote the UK interactive digital media industry was feasible, the findings of any such assessment are yet to be published. Similarly, the proposal for a “Usability Centre for Video Games” set out in the Digital Britain Report is yet to materialise.

## CONCLUSION

The single most important aspect of the Digital Economy Act 2010 is, without doubt, the regulation of the online infringement of copyright. The amendments to CA 2003 introduced by the Act are particularly favourable to copyright holders, who in the past were usually prevented from taking meaningful action against infringers due to the complicated process necessary initially to ascertain the identity of the infringer, and the lack of appropriate, cost-effective remedies.

ISPs are only usually willing to provide their customer’s details once directed to do so by a court order. The Regime simplifies matters for copyright holders, requiring ISPs to take action on behalf of copyright holders. It is the ability of the ISP effectively to penalise subscribers on behalf of copyright holders which will be of particular interest to the music, film, video games, and other industries that rely heavily on IP assets.<sup>12</sup> This, however, will be a great cause of concern for the ISPs and their individual subscribers.

Nevertheless, it will be of some comfort that, whilst the relevant provisions of the Act come into force on 9 June 2010, the Regime itself will need secondary legislation in order to become effective. Furthermore, the forthcoming UK general election in May 2010 adds another layer of uncertainty; for example, whilst the Labour party has pledged that it will “*update the intellectual property framework that is crucial to the creative industries – and take further action to tackle online piracy*”,<sup>13</sup> the Conservative party has not made any such pledge.<sup>14</sup>

Thus, like the rest of the proposals originally set out in the Digital Britain Report and those proposals which are implemented by the Act, the fate of the Regime remains unclear, at least until after the UK general election. That said, the possibility remains that an organisation could be liable in the event that its network is used to download content in breach

<sup>11</sup> See the press release by the Technology Strategy Board, “£18m for digital research and trials that will help transform the online economy”, dated 30 March 2010 at <http://www.innovateuk.org/>.

<sup>12</sup> It should be noted that several large ISPs have already indicated that they would be unwilling to impose sanctions on their customers even if they were directed to do so.

<sup>13</sup> See p7:6 of “*Labour Party Manifesto 2010 – a future fair for all*”.

<sup>14</sup> See “*Invitation to join the Government of Britain – The Conservative Manifesto 2010*” in general. Apart from a pledge that it will create “*an attractive tax environment for intellectual property*” (see p19 of the manifesto), the Conservative party falls short of making any form of pledge in respect of copyright infringement or reform of intellectual property law.

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of copyright, and therefore organisations would be best advised in the meantime to ensure that:

- their networks are secure, to prevent the networks being used for illegal purposes;
- the applicable acceptable use policies for the organisations' network and IT systems are revisited to ensure that they are sufficiently "tight" and enforceable; and
- all their employees and other internal users are made fully aware of the applicable acceptable use policies.

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