

# IS THE DIGITAL ECONOMY ACT 2010 THE MOST EFFECTIVE AND PROPORTIONATE WAY TO REDUCE ONLINE PIRACY?

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On 28 October 2009, the then Business Secretary, Lord Mandelson announced to the Digital Creative Industries Conference that the government would seek to implement legislation to restrict and prohibit online piracy before the upcoming general election. He stated, “it must become clear that the days of consequence-free widespread online infringement are over...the British Government’s view is that taking people’s work without due payment is wrong and that, as an economy based on creativity, we cannot sit back and do nothing.” Lord Mandelson made clear that any legislative strategy pursued would be a, “proportionate measure that will give people ample awareness and opportunity to stop breaking the rules” but that “the threat for persistent individuals is, and has to be, real, or no effective deterrent to breaking the law will be in place.”<sup>2</sup>

This article argues that the statutory provisions of the Digital Economy Act 2010 (the *DEA 2010* or the *Act*) are neither proportionate nor effective. A natural conflict of interest arises between rights holders who are understandably keen to prevent the further spread of illegal file-sharing and to protect their revenue streams, and the internet service providers (*ISPs*) who are equally reluctant to enforce third party rights against their own customers and to bear the costs of protecting the intellectual property rights of others.<sup>3</sup> It will be argued here that the legislation cannot be viewed as a panacea to the threat posed by unlawful peer-to-peer file sharing in a digital age and that significant amendment is urgently required in order to ensure its effectiveness and legitimacy.

The DEA 2010 received royal assent on 8 April 2010 during the ‘wash-up’ period whereby an outgoing government fast-tracks legislation through parliament before an election. The aim of the new legislation was to introduce a new model for the protection of copyright that took into account the challenge presented by online file sharing and the inability of existing legislation to combat this. Recent estimates by the UK government suggest that the annual loss to the creative industries caused by illegal file sharing reached £400m in 2010. The new regime was not just considered necessary for economic reasons. It was also feared that to allow an entire generation to grow up in the belief that those who help themselves to third party creative work

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<sup>2</sup> Mark Sweeney writing in *The Guardian*, 28 October 2009.

<sup>3</sup> Sujoy Bhatia, *Ashurst Communications Newsletter*, January 2009.

online without paying for it will never incur any sanction would undermine the entire intellectual property system.<sup>4</sup>

The legislative regime which existed prior to the DEA 2010 was ill-suited to tackling internet piracy. Whilst the Copyright, Designs and Patents Act 1988 does contain provisions dealing with civil and criminal penalties for infringement, no provision is made for the prevention of online file sharing where infringers are innumerable and often anonymous. Prior to April 2010, the government had allowed rights holders and ISPs to work together to arrive at an industry led solution. This approach envisaged a collaborative and co-regulatory result with rights holders and ISPs working together to prevent copyright infringement. In July 2008 a voluntary memorandum of understanding was agreed between the BPI (the British Phonographic Industry, the lobby group for the British recording industry), the government, the six biggest ISPs, and the Motion Picture Association. The memorandum imposed joint commitments on ISPs and rights holders. Rights holders were to ensure a wide range of content was commercially available to consumers whilst ISPs agreed to embark upon a programme of informing customers of the consequences of illegal file sharing. In July 2008, the Department for Business, Enterprise and Regulatory Reform published a consultation paper in which it confirmed that the preferred approach to tackling online piracy was a light-touch policy reflected in the memorandum.<sup>5</sup> As late as June 2009, Lord Carter's *Digital Britain* report drew up a framework for potential future legislation which endorsed a light touch, co-regulatory approach<sup>6</sup>. The regime envisaged under the report was criticised as weak by music industry spokesmen. Geoff Taylor, Chief Executive of the BPI, described the report's failure to implement more effective measures to prevent illegal file sharing as 'digital dithering'.<sup>7</sup> Both the British music industry and the government considered further legislation necessary in order to adequately combat online copyright infringement.

The Digital Economy Bill was widely criticised by political commentators in the months prior to its enactment for not having been given the consideration and critical analysis it was due. More than 20,000 people sent letters to MPs in an effort to stop the Bill being rushed onto the statute book via the 'wash up' mechanism. The inclusion of the Bill as part of this procedure was considered by some to be an abuse of the constitutional convention that only moderate or uncontroversial legislation be enacted in this way. The speed at which the Bill became law is

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<sup>4</sup> Jonathan Cornthwaite, *The Digital Economy Act 2010 – The Turning of the Tide?* Corporate Briefing, July 2010, p. 4.

<sup>5</sup> *Ibid.*

<sup>6</sup> Department for Business, Innovation and Skills and Department for Culture Media and Sport, *Digital Britain, Building Britain's Future*, Final Report (June 2009).

<sup>7</sup> Emma Barnett writing in *The Telegraph*, 16 June 2009.

reflected in the fact that only 5 per cent of parliamentary MPs debated it. The Bill was eventually passed with a majority vote of 189 to 47.<sup>8</sup> MPs such as Tom Watson and John Grogan argued that insufficient scrutiny had been given to the act and many sections of the press commented that the general parliamentary disinterest in the DEA 2010 was surprising given the significance and potential implications of its provisions.

Sections 3 to 18 of the DEA 2010 set out the relevant online copyright infringement provisions. They represent an important milestone in copyright law as, rather than encouraging ISPs and rights holders to realise a cooperative industry-led solution, statutory obligations have been imposed on ISPs directly. At first glance, these new provisions appear to restrict the ability of file sharers to infringe copyright owners' rights. However, when the specific provisions are analysed and applied to factual scenarios and commercial realities, serious questions arise as to how the legislation can be enforced and whether it is compatible with European legislation.

Sections 3 to 8 require ISPs to notify their subscribers if the subscribers' IP addresses have been identified by copyright owners under a 'Copyright Infringement Report' as ones which have been used to infringe copyright. ISPs are also obliged to provide lists of copyright infringements to copyright owners on an anonymous basis where one subscriber has exceeded a certain level of copyright violations. Section 3 of the DEA 2010 inserts section 124A into the Communications Act 2003 which stipulates that an obligation to notify subscribers of copyright infringement reports will fall upon an ISP where:

*(a) a subscriber to an internet access service has infringed the owner's copyright by means of the service; or*

*(b) a subscriber to an internet service has allowed another person to use the service, and that other person has infringed the owner's copyright by means of the service.*

Section 4 of the DEA 2010 provides that ISPs will be under an obligation to provide infringement lists to copyright owners if:

*(a) The owner requests a list for that period; and*

*(b) the initial obligations code requires the internet service provider to provide it.*

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<sup>8</sup> *IT Law Today* April 2010 p.7.

Under the Draft Initial Obligations Code an ISP is a qualifying ISP where it is a fixed ISP and it provides internet access to more than 400,000 subscribers.

It is hard to see how this notification obligation will significantly reduce the level of illegal file sharing in the UK. The notification process is lengthy and rights holders continue to face delays in obtaining the information they require. The *OFCOM* Draft Initial Obligations Code states that in order for a rights holder to enact the notification process it must have provided estimates of the Copyright Infringement Reports it intends to make two months prior to the beginning of the notification period.<sup>9</sup> The ISPs will then have an additional month in which to notify the subscriber under s.3(5) DEA 2010.

Section 3(6) DEA 2010 details what information must be contained in an ISP notification. It is contemplated that such notifications will include information about what copyright is and its purpose, advice and information about how to obtain lawful access to copyright works, and advice on how a subscriber can take measures to protect their internet access service from unauthorised use. The specific details of what to include within a notification points to a central weakness of the statutory notification process; namely that the vast majority of professional file-sharers are well aware that they are in breach of copyright and that their activities are illegal. In framing the notification procedure around current, conventional methods of accessing the internet, the DEA 2010 targets the wrong type of internet user. The notification provisions will affect all mainstream internet users but statistics provided by the Consumer Focus organisation suggest that only 4.6 per cent of the UK population have shared music files. Far fewer have shared other forms of copyrighted material<sup>10</sup>. Moreover, legislating with reference to technology existing at a fixed point in time ignores the fact that rights holders are engaged in a technological arms race with illegal file sharers. Hardened copyright infringers will quickly develop methods of illegal file sharing which do not bring them within the scope of this legislation.

Subscribers who routinely engage in internet piracy and undertake illegal file sharing on an industrial scale are unlikely to take heed of notifications sent from their internet service provider. Indeed, the notification process may inadvertently assist professional internet pirates as it will alert them to the fact that their activities are being monitored and may prompt them to file share illegally via a different IP address. This will mean that a rights holder will have to

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<sup>9</sup> Clause 3.5, *Online Infringement of Copyright and the Digital Economy Act 2010, Draft Initial Obligations Code*, 28 May 2010.

<sup>10</sup> *A critique of the Digital Economy Act from a 'subscriber point of view'*, Consumer Focus Group. See <http://www.consumerfocus.org.uk/files/2010/12/A-critique-of-the-Digital-Economy-Act-from-a-subscriber-view-point-June-2010.pdf>.

initiate the notification process all over again by submitting a new copyright infringement report to the ISP which identifies the changed IP address<sup>11</sup>.

Section 3(3) DEA 2010 states that the Copyright Infringement Report required to be issued by rights holders must provide evidence to the ISP that an infringement of their rights has occurred and that the infringement can be traced to a specific IP address. This is a highly inaccurate method of combating internet piracy. Commonly, internet pirates will not have an internet account in their own name and will use fraudulent details. Alternatively, they will hack into other IP address holders' accounts and hijack that address for the purpose of illegal file sharing. Increasingly peer-to-peer file sharing occurs via a proxy server or a virtual private network.

Equally unclear is how the notification procedure outlined in the DEA 2010 will apply to Wi-Fi networks. The OFCOM Draft Initial Obligations Code states that:

*Operators of Wi-Fi networks would fall within the definition of internet service provider where the service is provided by means of an agreement with the subscriber, even where this is oral or implicit.*

*Where a Wi-Fi network is provided in conjunction with other goods or services to a customer, such as a coffee shop or hotel, our presumption is that the provider is within the definition of internet service provider.<sup>12</sup>*

The increasing availability of Wi-Fi internet connection, whereby a retail premises offers its customers online access, presents copyright infringers with another method of preserving their anonymity. The current application of the notification procedure would render Wi-Fi providers liable to provide copyright infringement lists to rights holders under section 4 DEA 2010. This obligation does not seem to take into account the fact that it is practically impossible for a Wi-Fi provider to document and record the personal details of each and every temporary subscriber who takes advantage of the wireless internet access. Indeed, to require providers of Wi-Fi to keep such records would negate all the commercial advantages of offering such a service in the first place. The effect of the notification procedure on Wi-Fi providers appears to be directly contrary to the aim of Lord Carter's *Digital Britain* report. One of the technological fields which the report anticipated would benefit from the forthcoming legislation was "wireless infrastructures based around universal coverage of 3G

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<sup>11</sup> Section 124A(3)(c) DEA 2010.

<sup>12</sup> Section 3.22 and 3.23, *Online Infringement of Copyright and the Digital Economy Act 2010, Draft Initial Obligations Code*, 28 May 2010.

and next generation mobile services.<sup>13</sup> As they stand, the notification provisions of the DEA 2010 have the opposite effect and amount to a constructive prohibition on the lawful establishment of Wi-Fi networks<sup>14</sup>. If the future Digital Britain is intended to be an environment in which it is possible to move around whilst seamlessly enjoying internet connection, it seems counter-productive to implement legislation which introduces a risk to businesses which are based around providing an open internet service<sup>15</sup>.

In so far as the notification procedures do amount to an effective deterrent, the leading ISPs have suggested that they will be at a commercial disadvantage as a result. Under the Draft Initial Obligations Code and the DEA 2010, only fixed line internet service providers with over 400,000 internet subscribers will be caught by the legislation. For internet subscribers who wish to avoid detection under the DEA 2010's notification provisions, changing their subscription to a smaller ISP is a simple and obvious method of avoiding detection. Consequently, the leading UK ISPs have claimed that these provisions have an inadvertently anti-competitive effect as customers are encouraged to terminate their subscriptions in favour of smaller operators.

Aside from the detrimental commercial effects of the notification provisions of the DEA 2010 many of the qualifying ISPs have objected strongly to the costs sharing provisions which have been proposed under the Online Infringement of Copyright Initial Obligations (Cost Sharing) Consultation Paper.<sup>16</sup> Section 5.10 of the Consultation Paper states that the government's "working assumption" is that the costs of implementing the notification obligations are to be shared between ISPs and rights holders with ISPs bearing a 25 per cent share of the costs incurred. This represents a marked departure from the usual regulatory principle that the beneficiary of measures implemented pursuant to regulatory legislation is required to pay the costs of implementation. In their response to the Draft Initial Obligations code, the UK trade association for the IT, Telecomms and Electronics Industries stated that this principle is adhered to where an internet service provider is required to assist in law enforcement activities. As enforcing copyright is effectively a law enforcement activity it would seem

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<sup>13</sup> Department for Business, Innovation and Skills and Department for Culture Media and Sport, *Digital Britain, Building Britain's Future*, Final Report (June 2009).

<sup>14</sup> L Edwards, *Mandy and Me: Some Thoughts on the Digital Economy Bill*, (2009) 6:3 *SCRIPTed* 534.

<sup>15</sup> Intellect Response to the Online Infringement of Copyright and the Digital Economy Act 2010, Draft Initial Obligations Code. See <http://stakeholders.ofcom.org.uk/binaries/consultations/copyright-infringement/responses/Intellect.pdf>.

<sup>16</sup> Section 5.10, Online Infringement of Copyright Initial Obligations (Cost Sharing) Consultation Paper. See <http://www.bis.gov.uk/assets/biscore/business-sectors/docs/10-915-consultation-online-infringement-of-copyright>.

logical that the same “beneficiary pays” principle should apply.<sup>17</sup> The impact assessment produced for the Digital Economy Bill estimated benefits to copyright owners as a result of recovered displaced sales at £200m per year.<sup>18</sup> Given the beneficial impact of the measures, ISPs have reasonably argued that it is entirely disproportionate to allocate 25 per cent of the costs to service providers. In addition to these costs, s.14 DEA 2010 states that ISPs will be liable to pay a penalty charge of £250,000 if they fail to comply with their obligations under the Act. Given the difficulties of identifying infringers and the high level of copyright infringement reports which ISPs are likely to receive, this provision imposes an onerous administrative burden on ISPs and threatens them with a disproportionate sanction.

Perhaps the most controversial provision of the DEA 2010 is section 17. Section 17 allows the Secretary of State to make provision by regulations for applications to a court for a blocking injunction in respect of an internet location which the court is satisfied has been, or is being, used in connection with an activity that infringes copyright. Section 17 DEA 2010 provides that:

*(1) The Secretary of State may by regulations make provision about the granting by a court of a blocking injunction in respect of a location 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.*

*(2) “Blocking Injunction” means an injunction that requires a service provider to prevent its service being used to gain access to the location.*

This power is subject to various safeguards which require a high level of infringement and an adverse effect to a business before such an order is capable of being made. Section 17(3) DEA 2010 requires that the Secretary of State may only make such provision where it is proportionate to do so and he is convinced that the activities in question will have a “serious adverse effect on businesses or consumers”. Section 17(4) DEA 2010 prevents a court from granting the injunction unless a substantial amount of material is being obtained or made available by the infringement.

Nevertheless, this power is unlikely to act as a deterrent to professional peer-to-peer file sharers as the copyright owners still bear the legal costs of an application to court for a

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<sup>17</sup> Intellect Response to the Online Infringement of Copyright and the Digital Economy Act 2010, Draft Initial Obligations Code. See <http://stakeholders.ofcom.org.uk/binaries/consultations/copyright-infringement/responses/Intellect.pdf>

<sup>18</sup> *Ibid*, Section 5.7.

blocking injunction. Even if the rights owners successfully obtain the details of a subscriber, the courts are likely to tread very carefully in view of the controversial and draconian nature of the provision. As well as causing delay and increasing costs, rights holders are faced with the real possibility that a blocking injunction will not be granted at all.

During the debate at the Digital Economy Bill's third reading, the Liberal Democrats raised concerns that the website blocking provisions contained in section 17 DEA 2010 penalised sites that facilitate access or that are "used for or in connection with an activity that infringes copyright", saying that this was too wide-ranging and that search engines and other internet services could fall within the scope of the anti-file sharing provisions. This drafting of section 17 DEA 2010 appears to have an illogical and arbitrary effect in that it potentially catches websites which offer connections to file sharing sites. A literal reading of section 17 would suggest that, in theory, websites and search engines like *Yahoo* and *Google* would fall under the remit of the legislation and could be liable to have their internet connections blocked. An innumerable number of ordinary websites which contain links to file sharing sites would also fall within the ambit of this provision.

Equally, the DEA 2010 contains a very wide definition of "internet service provider". This is defined as "any person providing a service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services." As discussed above, this would appear to include commercial premises which offer Wi-Fi connection, and consequently all coffee shops, internet cafés and libraries offering these services would be liable to make the notifications and reports to rights holders as prescribed under the DEA 2010. Under section 17, such retailers offering a Wi-Fi service may find that, through no deliberate act of their own, their internet access is blocked.

The responses to *OFCOM's* Draft Initial Obligations Code offer an insight into how the notification procedure under the DEA 2010 may impose a disproportionate burden on certain institutions, ISPs and subscribers. The formal response of Universities UK to the Code referenced the requirement under s.7 of DEA 2010 that the Code's provisions be "proportionate to what they are intended to achieve"<sup>19</sup>. The response pointed out to *OFCOM* that if universities offering internet access are deemed to be ISPs, UK universities will be exposed to substantial additional costs or even reduced or suspended internet access with severe consequences for the quality of education enjoyed by university students. This is in spite of the fact that levels of copyright infringement within universities are negligible with

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<sup>19</sup> s.7 Digital Economy Act 2010.

only 200 infringement notices received a year when universities provide for a total network of over 50,000 users<sup>20</sup>.

The Universities UK response also highlighted the potential ambiguity of whether institutions like universities would be classed as service providers or subscribers under the Act. Most UK universities both receive internet access and provide internet access to their staff and students. In the event that universities are classed as subscribers, universities would find it extremely difficult to provide internet access to staff and students as it would be almost impossible to identify individual users where an allegation of copyright infringement occurs.<sup>21</sup> The potential for institutions operating dually as both ISP and subscriber presents problems for rights holders as much as they do for the institutions themselves.

The notification procedure assumes that rights holders will be able to clearly identify internet service providers when issuing them with a copyright infringement notice. However, in the scenario that copyright infringement occurs on a university campus, the rights holders will not know whether to address the infringement report to the university itself as service provider or to the internet service provider to which the university is a subscriber. The OFCOM Draft Initial Obligations code makes clear that invalid Copyright Infringement Reports may be rejected if insufficient or inaccurate details identifying subscribers or ISPs are provided.<sup>22</sup> Consequently, rights holders will be left uncertain as to whether they have validly enacted the notification procedure. The ambiguous and uncertain application of the DEA 2010 to specific institutions which both provide and receive internet access reflects the speed with which it was enacted and the deficiency of the critical analysis and political debate to which it was subjected.

The broad application of the online copyright provisions in the DEA 2010 may prove to be counter-productive if the courts adopt a restrictive approach in granting orders or find the provisions to be incompatible with EU law. Under Article 8(1) of the Technical Standards Directive<sup>23</sup>, the UK is obliged to communicate to the EU Commission that it intends to implement legislation which, “prohibits the provision or use of [internet] service, or

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<sup>20</sup> Online infringement of copyright and the Digital Economy Act: Draft Initial obligations code – Universities UK’s response. See [http://stakeholders.ofcom.org.uk/binaries/consultations/copyright-infringement/responses/University\\_UK.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/copyright-infringement/responses/University_UK.pdf)

<sup>21</sup> Online infringement of copyright and the Digital Economy Act: Draft Initial obligations code – Universities UK’s response. See [http://stakeholders.ofcom.org.uk/binaries/consultations/copyright-infringement/responses/University\\_UK.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/copyright-infringement/responses/University_UK.pdf)

<sup>22</sup> Section 5.3, *Online Infringement of Copyright and the Digital Economy Act 2010, Draft Initial Obligations Code*, 28 May 2010.

<sup>23</sup> Directive 98/34/EC OJ [1998] L No 204, 21.7.98, p.37.

establishment as an [internet] service provider<sup>24</sup>, or which contains provisions which affect an ISP, its services or the receipt of those services<sup>25</sup> and to explain why the regulation is necessary. Section 17 DEA 2010 would *prima facie* appear to fall within the scope of the Technical Standards Directive. Where relevant regulations are proposed by a Member State, the EU Commission must be given sufficient time to consider the Member State's proposal and the opportunity to propose amended legislation which is less restrictive.<sup>26</sup> The case of *CIA Security International*<sup>27</sup> established that the consequence of failing to notify the Commission in accordance with the directive is that the proposed legislation is unenforceable. It is reasonable to conclude that, as the DEA 2010 has not yet been notified to the Commission, the UK courts will be reluctant to enforce its provisions.

Further, the provisions of the DEA 2010 requiring ISPs to pass on subscriber information to copyright owners would appear to run counter to European jurisprudence. Both copyright owners and ISPs will process personal data in the course of sending copyright infringement reports and lists. In the case of *Productores de Música de España (Promusicae) v Telefónica de España SAU*,<sup>28</sup> the ECJ held that ISPs were not under an obligation to make mandatory disclosures of subscribers' personal data where they were suspected of illegal file sharing. The ECJ was reluctant to impose general and wide ranging obligations upon ISPs and made clear that Article 5 of the EU Commission's Directive on Privacy and Electronic Communications<sup>29</sup> enshrined the principle of confidentiality in relation to personal data. Article 5 requires that Member States prohibit listening, tapping, storage or other kinds of interception an individual's personal communications or data. The ECJ ruled that Article 8(1) Enforcement of Intellectual Property Rights Directive<sup>30</sup> allowed judicial authorities to request confidential information about an alleged infringement of copyright to be made available, but this did not entitle member states to provide for the mandatory disclosure of such information under anti-file sharing legislation<sup>31</sup>.

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<sup>24</sup> *Ibid*, Article 1(11).

<sup>25</sup> *Ibid*, Article 1(5).

<sup>26</sup> *Liga Portuguesa de Futebol Profissional v Derpartemento de Jogos* [2010] 1 CMLR 1, per Advocate General Bot.

<sup>27</sup> *CIA Security International* [1996] ECR I-2201, ECJ. It was held that the notification requirement contained in Articles 8 and 9 of the predecessor to the Technical Standards Directive (Directive 83/189) were sufficiently precise and relevant legislation which has not been notified cannot be enforced and the national courts must decline to apply it.

<sup>28</sup> *Productores de Música de España (Promusicae) v Telefónica de España SAU* (2008) All ER (EC) 809.

<sup>29</sup> Directive 2002/58/EC OJ [2002] L No. 201 p.37.

<sup>30</sup> Directive 2004/48/EC OJ [2004] L No 157, 30.4.2004.

<sup>31</sup> *Productores de Música de España (Promusicae) v Telefónica de España SAU* (2008) All ER (EC) 809.

Under the E-Commerce Directive<sup>32</sup>, the liability of ISPs for illegal file sharing is limited where they are considered to act as a “mere conduit” or intermediary<sup>33</sup>. Where an ISP has no control over the information which is passed to subscribers and its actions are merely “technical, automatic and passive” they can incur no liability<sup>34</sup>. This would arise where an ISP merely facilitates the transmission of information through the internet which is their core function. The directive’s exclusion of an ISP’s liability in these circumstances would seem to conflict with s.17 DEA 2010 which states that a blocking injunction can be sought in relation to an internet subscription that is “used for or in connection with an activity that infringes copyright”. This section appears to directly conflict with the E-Commerce Directive.

It can also be argued that the copyright provisions of the DEA 2010 run contrary to general principles of European Union law. Article 56 of the Treaty of the Functioning of the European Union<sup>35</sup> (*TFEU*) requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services.<sup>36</sup> The case of *Mazzoleni v Inter Surveillance Assistance SARL*<sup>37</sup> established that the application of a Member State’s legislation to cross-border ISPs is liable to prohibit or impede services if it involves expenses and additional administrative and economic burdens. This provision may apply to the DEA 2010 where ISPs incorporated in EU Member States other than the UK become subject to the Act’s notifications provisions. The proposed cost sharing provisions under the DEA 2010 envisage the ISPs bearing 25 per cent of the costs of implementing the copyright provisions. As ISPs are likely to be reluctant to pass on these costs to their subscribing customers and risk endangering their client relationships, it is highly likely that the DEA 2010 cost provisions would incur ISPs additional expense and thus infringe Article 56 TFEU.

A ruling is yet to be made by a UK court or the ECJ on the compatibility of the DEA 2010 and European legislation, but *BT* and *Talk Talk* have already commenced judicial review proceedings in the High Court. The review has been requested on the basis that the UK government did not consult the UK’s leading ISPs and that the DEA 2010’s copyright

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<sup>32</sup> Directive 2000/31/EC OJ [2000] L No. 178, 17.7.2000.

<sup>33</sup> *Ibid*, Article 12(1).

<sup>34</sup> *Google France SARL v Louis Vuitton Malletier SA* [2010] ECR I-000, ECJ at 110.

<sup>35</sup> *The Treaty of the Functioning of the European Union* 2010/C 83/01.

<sup>36</sup> *Liga Portuguesa de Futebol Profissional v Departamento de Jogos* [2010] 1 CMLR 1.

<sup>37</sup> *Mazzoleni v Inter Surveillance Assistance SARL* [2001] ECR I-2189 at Para 24.

provisions are incompatible with EU law. The ISPs are seeking a declaration that the Act should be overturned and that its provisions are declared to be unenforceable by a UK court. Recent statements from the Coalition Government have illustrated that it recognises that section 17 may prove incompatible with EU law and unworkable in practice. On 1 February 2011, the Culture Secretary, Jeremy Hunt confirmed that this provision in the Digital Economy Act would be reviewed and stated that, "I have no problem with the principle of blocking websites used exclusively for facilitating illegal downloading of content. But it is not clear whether the site blocking provisions in the Act could work in practice."<sup>38</sup> In light of these developments it would appear that significant and substantial amendment, or even repeal, of the DEA 2010 may be imminent.

On August 25 2009, an article in *The Guardian* newspaper considered the draft Digital Economy Bill. It noted that the driving force behind the bill's rapid progress through the Houses of Parliament, Lord Mandelson, had recently dined with David Geffen, the founder of Asylum Records and co-owner of DreamWorks Studios, at a villa owned by the Rothschild banking dynasty whilst on holiday in Corfu.<sup>39</sup> Spokesmen for the Department of Business, Innovation and Skills were quick to deny that this meeting had any influence on the draft Digital Economy Bill. Nevertheless, opponents of the bill seized upon this meeting as evidence of the fact that the media industries exerted an undue influence over the legislative process in the UK.<sup>40</sup>

This article has argued that the controversial circumstances in which the DEA 2010 was enacted goes some way to explain why it is likely to prove an ineffective and disproportionate legislative measure. It could be argued that even if the DEA 2010 contained a reasonable and measured response to online piracy which targeted the minority who facilitate illegal peer to peer file sharing, the manner of its enactment would still render it highly controversial in the eyes of many political commentators and constitutional lawyers. The fact that the DEA 2010's copyright infringement provisions are not reasonable, measured, or targeted fatally undermines the legislation<sup>41</sup>. The Act's credibility is further weakened by the fact that its provisions directly conflict with EU law and may well be declared unenforceable by the UK courts.

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<sup>38</sup> See <http://www.bbc.co.uk/news/technology-12334075>.

<sup>39</sup> Richard Wray, *The Guardian* 25 August 2009.

See: <http://www.guardian.co.uk/technology/2009/aug/25/mandelson-web-cutoff-plan-attacked>

<sup>40</sup> Benhamin Farrand, *The Digital Economy Act 2010 – A cause for celebration, or a cause for concern?* European Intellectual Property Review, 2010 p. 540.

<sup>41</sup> *Ibid.*

The *Digital Britain* report made clear that dealing with online piracy in the UK was its immediate priority. However, the report also stated that its overriding objective was to ensure that the British economy was at the forefront of digital innovation and was best placed to take advantage of technological advancement.<sup>42</sup> It is submitted that by implementing a highly contentious, unwieldy and impractical regime of copyright protection, the UK parliament has imposed punitive and unfair sanctions on an innocent majority for the offences of a criminal minority who remain largely unaffected by the DEA 2010.

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<sup>42</sup> Department for Business, Innovation and Skills and Department for Culture Media and Sport, *Digital Britain, Building Britain's Future*, Final Report (June 2009).