

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN:

**The Queen
On the application of
BRITISH TELECOMMUNICATIONS PLC
TALKTALK TELECOM GROUP PLC**

Claimants

-and-

THE SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS

Defendant

**SKELETON ARGUMENT ON BEHALF OF CONSUMER FOCUS
AND ARTICLE 19**

1. INTRODUCTION

1. This case involves a challenge brought by two telecommunications companies to sections 3 to 18 of the Digital Economy Act 2010 (“the contested provisions”), which concern the online infringement of copyright.
2. Consumer Focus and Article 19, the Global Campaign for Free Expression, intervene to make submissions about the potential impact of the “contested provisions” on the right to freedom of expression. Consumer Focus and Article 19 were granted permission to intervene in these proceedings by the order of Mrs Justice Davies on 28 February 2011, such permission being limited to filing and serving evidence in a witness statement (see the witness statement of Saskia Walzel) and written submissions limited to 15 pages. Throughout this document references to e.g. “SW/1” are references to exhibits to Saskia Walzel’s witness statement.

2. CONSUMER FOCUS AND ARTICLE 19

3. Consumer Focus (“CF”) is the National Consumer Council in England, Wales and Scotland, with a statutory duty for post in Northern Ireland. It was established by the Consumers Estate Agents and Redress Act 2007 and is a designated consumer body under the Enterprise Act 2002. CF is funded through a levy on energy companies and Royal Mail in relation to its statutory duties concerning energy and post, and receives funding from the Department for Business, Innovation and Skills (BIS) for work on other consumer issues.
4. CF is tasked with representing the interests of consumers, particularly vulnerable and low income consumers, and has a statutory duty to advise the Government and regulators on consumer matters.
5. CF has been actively working on issues relating to copyright enforcement and peer-to-peer file-sharing since 2008 at UK and EU level. It has responded to all consultations leading up to the drafting of the Digital Economy Bill, was closely involved in the passage of the Bill through Parliament and is engaging with BIS and OFCOM on the implementation of the Digital Economy Act.
6. ARTICLE 19, the Global Campaign for Free Expression, is an international human rights organization focused on protecting and promoting the right to freedom of expression. ARTICLE 19 is a registered UK charity (No. 32741) with headquarters in London, and field offices in Kenya, Senegal, Bangladesh, Mexico and Brazil.
7. ARTICLE 19 frequently submits written comments/amicus curiae to international and regional courts as well as to courts in national jurisdictions in cases that raise issues touching on the international guarantee of freedom of expression. It is widely considered as a leading expert globally on the issue.
8. ARTICLE 19 has undertaken extensive analytical and advocacy work concerning international human rights standards on applying free expression to information and communications technologies in its offices around the world.

3. APPLICABLE LAW

3A. The right to freedom of expression

9. Freedom of expression is a fundamental common law right. Even before the coming into force of the Human Rights Act 1998, the right to freedom of expression had attained the status of a constitutional right with high normative force (*Reynolds v Times Newspapers* [2001] 2 AC 127, 207G-H per Lord Steyn).

10. The right to freedom of expression has been described as “the primary right in a democracy; without it an effective rule of law is not possible” (*R v Home Secretary ex parte Simms* [2000] 2 AC 155 (“*Simms*”), 125G, per Lord Steyn). In *Simms*, Lord Steyn explained the importance of freedom of expression as follows (p.126F-G):

“Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J. (echoing John Stuart Mill), “the best test of truth is the power of the thought to get itself accepted in the competition of the market:” *Abrams v. United States* (1919) 250 U.S. 616 , 630, *per* Holmes J. (dissenting). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country: see Stone, Seidman, Sunstein and Tushnet, *Constitutional Law*, 3rd ed. (1996), pp. 1078-1086 .”

11. The common law right is now buttressed by Article 10 of the European Convention of Human Rights (“ECHR”), incorporated into domestic law by the Human Rights Act 1998 (“HRA”). Under the Human Rights Act the court must, when interpreting Convention rights, take into account the jurisprudence of the European Court of Human Rights (s2(1)), read and give effect to primary legislation in a way which is compatible with human rights (s.3) and make a declaration of incompatibility where it is satisfied that a given provision is incompatible with a Convention right.

12. Article 10 ECHR provides as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

13. The right to freedom of expression under Article 10(1) ECHR is of very wide application. First, it is a right enjoyed by “everyone”, including both natural persons and legal persons such as corporations. Secondly, it includes communications of any kind, including spoken or written words, film, video, sound recordings, pictures and images. Thirdly, the content of the expression falling within the scope of Article 10 is extremely wide, including not only political expression, artistic expression and commercial expression but any form of information and ideas. The only speech which would appear not to be afforded any protection under Article 10 is hate speech, by virtue of Article 17 ECHR.
14. The Article 10 right to freedom of expression involves two distinct rights: a right freely to impart information and ideas and a right freely to receive information and ideas (*Sunday Times v UK (No 1)* (1979) 2 EHRR 245, paras 65-66). It therefore includes both the right of the person freely to communicate information to a willing recipient and the right of the recipient to receive it.

3B. Restrictions on freedom of expression

15. Under Article 10(2), however, there are a number of prescribed restrictions on freedom of expression in respect of which the European Court of Human Rights has established a number of fundamental principles. In summary, freedom of expression is one of the essential foundations of a democratic society and one of the basic conditions for its progress and for individual self-fulfilment. Any restriction on this right must therefore be “prescribed by law”, serve a legitimate aim, be necessary in a democratic society in terms of corresponding to a “pressing social need” and be proportionate to the legitimate aim pursued. Exceptions to freedom of expression must be narrowly interpreted and convincingly established on the evidence, while national authorities must adduce relevant and sufficient reasons to support them (*Sunday Times v UK (No 2)* (1991) 14 EHRR 16 (“the Spycatcher case”), para 50).
16. As Lord Nicholls succinctly put it in *Reynolds v Times Newspapers* [2001] 2 AC 127 at p.1203B, “To be justified, any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved.”
17. One of the legitimate aims on the basis of which freedom of expression may be restricted under Article 10(2) includes “the rights of others”. Actions to defend

copyright from infringement qualify as “the rights of others” (*Chappell v The United Kingdom* [1989] 10461/83 ECHR 4 at para. 51) and more generally intellectual property, including copyright, enjoys protection under Article 1 of Protocol 1 of the ECHR, that is the right of “Every natural or legal person is entitled to the peaceful enjoyment of his possessions” (*Anheuser Busch Inc v Portugal* [2007] 73049/01 ECHR 40 at para.47).

18. The ECHR mandates the balanced protection of the interests which underlie the protection of copyright and that of freedom of expression. Private law remedies already exist at common law to protect the rights of copyright owners and EU law neither mandates nor prohibits conditions limiting end-users’ access to, and/or use of, communication services and applications to protect the rights of copyright owners (see Article 1(3) of Directive 2002/22/EC as amended by Directive 2009/136/EC). Article 1(3a) of Directive 2002/21/EC as amended by Directive 2009/140/EC states that any measures regarding end-users’ access to, or use of, electronic communications networks liable to restrict fundamental rights or freedoms may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and their implementation shall be subject to adequate procedural safeguards in conformity with the ECHR. The crucial question for the court in the present context is therefore whether the contested provisions, designed to protect the rights of copyright owners, strike the right balance between these competing interests and meet the requirements of legal certainty, necessity and proportionality.

3C. The principle of legal certainty

19. Any restriction on freedom of expression under Article 10(2) must be “prescribed by law”. This expression, or its close equivalent “in accordance with the law”, is common to all of the qualified rights under the ECHR (Articles 8 - 11) and is the subject of a considerable body of Strasbourg jurisprudence. It refers not merely to existence of a proper legal basis for any restriction on a Convention right under domestic law but also to the quality of that law, which must be formulated with sufficient precision so as to be reasonably certain and foreseeable, enabling a person affected by the law to regulate his conduct and providing adequate safeguards against abuse (*Sunday Times v UK (No 1)* (1991) 14 EHRR 16, para 49).
20. As Lord Bingham observed in *R(Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148) (at para 34), the requirement that any interference with a Convention right must be “in

accordance with the law” is “intended to ensure that any interference is not random and arbitrary but governed by clear pre-existing rules, and that the circumstances and procedures adopted are predictable and foreseeable by those to whom they are applied.”

3D. The chilling effect

21. The term “chilling effect” was coined in the United States in litigation relating to the exercise of First Amendment freedoms, where it was used to describe the negative impact on freedom of expression of overbroad and/or vague laws. The central problem identified in that body of case law is the chilling effect of such laws on freedom of expression created by the threat of sanctions, whose effects tend to be felt far beyond the specific mischief they seek to prevent by deterring people from exercising their legitimate free speech rights, to the detriment of society as a whole (see e.g. *Dombrowski v Pfister* (1965) 380 US 479, per Brennan J at 487-489).
22. The concept of a chilling effect on free speech is now very well-developed in European and UK jurisprudence and has been invoked in a very wide variety of different contexts.
23. In Strasbourg, for example, the European Court of Human Rights has found violations of Article 10 in the following situations (given by way of example):
 - (1) The rigid application of competition laws prohibiting advertising against a veterinary surgeon, who had made critical comments about out-of hours services in a newspaper, threatened to deter other professionals from speaking out on matters of public concern (*Bartold v Germany* (1985) 7 EHRR 383, para 58);
 - (2) A private prosecution for criminal defamation against a journalist reporting on a political scandal involving a leading politician threatened to deter other journalists from reporting matters of legitimate public concern (*Lingens v Austria* (1986) 8 EHRR 103, para 44);
 - (3) Punishing a journalist for racist remarks made by interviewees in a television programme would deter other journalists from reporting on matters of important public concern through the carrying out of interviews (*Jersild v Denmark* (1994) 19 EHRR 1, para 44).

(4) Forcing journalists to disclose their sources had a chilling effect on freedom of expression by deterring people from giving information to journalists (*Goodwin v UK* (1996) 22 EHRR 123).

(5) A defamation action brought by McDonalds against two impecunious activists threatened to have a chilling effect on others who might wish to circulate information and ideas about powerful corporate entities (*Steel & Morris v United Kingdom* (2005) 41 EHRR 22).

24. In domestic jurisprudence, the concept of a chilling effect on freedom of expression has profoundly influenced the development of the law in a number of significant areas (again by way of example):

(1) Governmental bodies such as local authorities do not have standing to bring claims for defamation because of the chilling effect this would have upon the reporting of political issues (*Derbyshire County Council v Times Newspapers* [1992] QB 770);

(2) Excessive compensatory awards in defamation cases and exemplary damages had a chilling effect on freedom of expression, resulting in the issuing of judicial guidelines on quantum in defamation cases (*John v MGN Ltd* [1997] 1 QB 429);

(3) The blanket ban on interviews with prisoners was held to be incompatible with freedom of expression because of the chilling effect it would have on the ability of prisoners to draw public attention to alleged miscarriages of justice (*R v Home Secretary, ex parte Simms* [2000] 2 AC 115).

(4) Concern about the chilling effect of costs arising from conditional fee agreements in defamation cases led the court to identify measures to impose advance cap costs in libel cases (*King v Telegraph Group* [2005] 1 WLR 2282).

(5) The rule in *Bonnard v Perryman* limiting the circumstances in which injunctive relief could be obtained against the media in defamation cases was affirmed post-HRA because of the chilling effect of interim injunctions on the media (*Greene v Associated Newspapers* [2005] QB 972).

25. Section 12(4) of the Human Rights Act 1998 requires the courts to have “particular regard to the importance of the Convention right to freedom of expression.” As set out at paragraph 18 above, restrictions on the right to freedom of expression must satisfy the principles of legal certainty and proportionality. British courts have recognised that these principles apply when interpreting and applying legislative restrictions (*R v Secretary of State for the Home Department, ex parte Simms* [2000]

2 AC 115 (HL)); and restrictions imposed by the common law (of libel) (*Derbyshire County Council v Times Newspapers* [1993] AC 534 (HL); *Reynolds v Times Newspapers* [2001] 2 AC 127 (HL), and by equity (protecting private information) (*Re S (A Child)(Identification: Restrictions on Publication* [2005] 1 AC 593).

4. SUBMISSIONS

26. The purpose of the DEA is to address the problem of online copyright infringement, particularly the phenomenon of peer-to-peer file-sharing. That specific problem is but one aspect of a much broader societal phenomenon, which is the increasingly indispensable role of the internet as a means for accessing e.g. goods and services, news and current affairs, education, jobs, housing and government services including advisory and support services, such as public health and employment advice provided on the NHS and JobCentre Plus website. The increasing importance of public service provision online is amplified by recent Cabinet Office announcements that many public services will increasingly in future be provided as online-only services, or “digital by default”. The internet also plays a key role in facilitating democratic participation, playing a central part in modern election campaigns and a means by which citizens can engage with the political process through e.g. contacting their MP, responding to Government consultations and participating in online debates.
27. In its report *Internet Access 2010*¹ the Office of National Statistics reveals that 73% of households in the UK now have internet access and that 30.1 million adults used the internet every day or nearly every day in the 12 months under review. Some 17.4 million adults used the internet to watch television or listen to the radio, while 31 million people bought or ordered goods or services online. The rapid growth in demand for internet services is illustrated by the fact that since 2006 an extra 5 million households now have internet access. Some 90% of individuals with internet access had used it to send/receive email, 54% had used the internet for online banking, 39% used it to seek health-related information, 35% used it the purpose of learning, and 26% used the internet to look for a job, or send a job application. Internet access is also part of official Government policy concerning “digital inclusion”, where increasing internet access in disadvantaged communities is seen as an important part of combating social and economic exclusion.

¹ Exhibit “SW/2”.

28. The use of the internet by both individuals and organisations engages their right to freedom of expression; the right both to receive and to impart information and ideas. This was expressly recognised by the European Parliament in its Directive 2009/140/EC providing for a common regulatory framework for electronic communications networks, the preamble of which recognises that the internet is “essential for education and for the practical exercise of freedom of expression” (recital 4). The directive amends Directive 2002/21/EC to the effect that measures taken by Member States regarding end-user access to, or use of, the internet must respect human rights and may only be imposed if they are appropriate, necessary and proportionate within a democratic society (new Article 1(3a)). As the internet has become one of the primary means for communication in the modern world, it is self-evident that any measure which could deter or inhibit internet usage requires the most careful scrutiny, particularly in terms of its proportionality. It is submitted that the DEA is a prime example of a measure which would deter or inhibit internet use in ways that go far beyond the aim of preventing online copyright infringement.
29. The DEA marks a radical departure from the way in which copyright law has hitherto been protected in this jurisdiction. In summary, the Copyright, Designs and Patents Act 1988 (“the 1998 Act”) already provides a mechanism for copyright owners to bring civil proceedings against online infringers of their copyright, enabling them to obtain injunctive relief, damages and an account of profits against them. Under the 1988 Act copyright owners bear the burden of proving that a defendant has infringed their copyright or authorised third parties to do so. Section 16 of the 1998 Act establishes civil liability if a person “without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright”. The 1988 Act also provides for a range of criminal offences against persons who are both commercially and knowingly involved in copyright infringement.
30. Under copyright law an individual is not liable for the infringement committed by other persons, unless he has authorised that infringement. In this context, where a third party uses the internet connection of a subscriber to infringe copyright without the subscribers knowledge or consent, the subscriber will not be liable for that copyright infringement, because they have not authorised it: *CBS v Amstrad* [1988] AC 1013 (per Lord Templeman at p.1058 E-H); *Media CAT v A* [2010] EWPC 17 (per HHJ Birss QC, paras 6, 27-30).

31. Under the DEA, however, both individuals and organisations who subscribe to internet services will be liable to be included on a copyright infringement list (“CIL”) if an IP address associated with them has been connected to an apparent infringement. Inclusion on a CIL is a precursor to enforcement action at the instance of their internet service provider (as opposed to a court of law), who may be required to impose technical measures including suspending internet access altogether. The circumstances in which a subscriber may be included in a CIL and the grounds of appeal against such inclusion are therefore of central importance.
32. A subscriber may in some instances be a single individual who has a contract with an internet service provider and who is the only person to use that internet connection. But in many other instances, this will not reflect the reality of internet use and the critical question, in relation to subscribers, is the position of an individual or undertaking which both receives internet access as an end-user, and also makes it available to others. In a family household, there will typically be one subscriber but a number of different users in the household; the mother may be the subscriber, but the users may be the father, children and other relatives and on occasions their friends as well. In a shared flat one of the tenants will frequently be the subscriber, with other tenants using their own computers to access the internet connection. Landlords may be the subscriber of an internet connection which is used by the tenants. Internet connections are now frequently provided through wireless routers, which can be accessed by several computers and devices at the same time, hence the subscriber will frequently not have any physical control over the computers used to access the internet.
33. Furthermore, a significant number of consumers, businesses and public intermediaries leave their WiFi connection open (i.e. no password protection), to allow others free access to the internet. This is called “open WiFi”. If a subscriber in a residential household maintains an open Wifi their internet connection can be used by persons in their household as well as persons unknown to them in the surrounding area. Some public intermediaries and businesses also provide open WiFi to their customers; for example the Cardiff Central Library and the Apple Store in Regent Street both provide open WiFi.
34. For public intermediaries, such as libraries and universities, the essentially bipartite relationship envisaged under the Act between a commercial ISP and an individual or household does not reflect the reality of how they provide internet access. As the

British Library has pointed out in its evidence to OFCOM, “Schools and public libraries for example may or may not know who accessed the internet at a particular point in time, they may assign a single IP address to a whole building or swathe of computer banks, and who in the network hierarchy subscribes to broadband access contractually will vary from institution to institution and local authority to local authority. Much of the problem with stretching the Act beyond a commercial ISP / individual customer relationship comes from the fact that the definitions and concepts in the Act do not countenance the complexity of the user / intermediary / upstream provider relationship.”²

35. Unlike under existing copyright law, subscribers will be liable under the DEA for inclusion on a CIL for “apparent infringements” of copyright carried out by third parties even if the infringement was made without their knowledge or authorisation. The subscriber’s appeal against inclusion on a CIL in such circumstances requires the subscriber to establish that the infringement was not carried out by the subscriber and that the subscriber had taken reasonable steps to prevent it: see s.124K(6). The burden of proof has been reversed, with the copyright owner now absolved of proving an infringement by a given person (as they would have to do under the 1988 Act) but able to rely on the fact that a link has been made between an apparent infringement and an IP address.
36. If the IP address and subscriber can be linked, the subscriber is then called upon to prove a negative – namely that he did not carry out the apparent copyright infringement. It is notoriously difficult for any person to prove a negative and the situation of subscribers whose internet access has been used by third parties is no exception. Short of providing definitive proof that the subscriber has not used his internet connection at the material time it is very difficult to see how this burden could be discharged. The third party, whether a person using a subscriber’s open WiFi without his knowledge, a teenage son engaging in peer-to-peer file-sharing in his bedroom or a student using the campus computer, is hardly likely to volunteer his involvement in the apparent infringement to the subscriber.
37. As the British Library has stated, “In the short term we are very concerned that as from 2011 such bodies [as themselves] will be viewed by ISPs and copyright holders as subscribers. This will mean that public intermediaries will be subject to copyright

² Exhibit “SW/3”, General Comments, page 2, para 1.

infringement reports, the appeals process and at some point in the future potentially “technical measures”. Given that the appeals process requires proof that an IP address is that of the accused subscriber we believe it will be far easier to prove a particular computer owned by a public intermediary equated to the infringing IP address, rather than pursuing the individual concerned. Clearly the costly pursuit of intermediaries being held responsible for the activities of their users is a grave concern and a situation we are very keen to avoid.”³

38. But even if the subscriber was able to discharge the burden of proof by showing that he did not carry out the infringement himself, this is not sufficient; he must also show that he took “reasonable measures” to prevent it: see s.124K(6). The term “reasonable measures” under s. 124K(6) is therefore of crucial importance under the DEA, as it is potentially determinative of which subscribers will find themselves included on copyright infringement lists and hence relevant subscribers for the purpose of technical measures. But “reasonable measures” is nowhere defined in the Act, not even by reference to any factors that a court should take into account when making that judgment. Neither is the term “reasonable measures” defined by OFCOM in the Draft Initial Obligations Code.
39. It is submitted that the absence of any definition of “reasonable measures” results in a lack of legal certainty – the procedures that have been adopted are not predictable and foreseeable by those to whom they are applied. The Act provides for two types of appeals: an appeal to an appeals body for inclusion on a CIL and an appeal to an appeals body, and thereafter to a First-tier Tribunal, in cases involving technical measures. But the Act gives no indication at all as to the factors that the appeals body and/or the First-tier Tribunal would take into account when determining what a “reasonable measure” might be for the purpose of appeals against inclusion on a copyright infringement list or in respect of technical measures being imposed on the subscriber, including the suspension of internet access. Hence the contested provisions render the circumstances under which individuals and organisations will incur liability under the Act highly uncertain. Subscribers providing internet access to other individuals in their household or those in the immediate surroundings through Open WiFi do not know how to regulate their conduct so as to protect themselves against potential liability and technical measures.

³ Exhibit “SW/3”, General Comments, page 3, para 7.

40. Another area of legal uncertainty of particular concern to public intermediaries and those providing open WiFi is the question of whether they meet the definition of “internet service provider” or of “subscriber” under s.124N of the Act. The material definitions are as follows:

“**internet service provider**” means a person who provides an internet access service;

“**internet access service**” means an electronic communications service that—

- (a) is provided to a subscriber;
- (b) consists entirely or mainly of the provision of access to the internet; and
- (c) includes the allocation of an IP address or IP addresses to the subscriber to enable that access;

“**subscriber**”, in relation to an internet access service, means a person who—

- (a) receives the service under an agreement between the person and the provider of the service; and
- (b) does not receive it as a communications provider;”

41. In the simple model of an individual subscriber with a static IP address who has contracted for services from a commercial internet service provider these definitions give rise to little difficulty. But in the case of a public intermediary, such as a library or a university, these definitions are highly problematic, as it would seem that they could qualify as both internet service providers and subscribers under the above definitions, as they are both providers of internet access services to third parties and recipients of such services under their contracts with commercial internet service providers. If public service intermediaries were to be defined as subscriber or ISPs, with all the obligations that follow under the Act, the costs implications would be highly significant, all the more so at a time of public spending cuts.⁴
42. In the absence of legal certainty in respect of the definition of ISP and its application to public service intermediaries under the Act it was left to OFCOM to provide some clarity to these definitions so that the position of public service intermediaries was clear. OFCOM’s pragmatic solution in the Draft Initial Obligations Code was that the Code should apply in the first instance only to ISPs with more than 400,000 subscribers. If this position is maintained and public service intermediaries are classified as ISPs for the purpose of the Act, it would appear that most public service intermediaries will not be classed as qualifying ISPs under the Act initially. However, OFCOM has stated that it will review on a regular basis whether to extend coverage of the Code, so the legal uncertainty would persist.
43. The consequence of these developments is again clear spelt out in the submissions of the British Library to OFCOM, “We are very concerned that there is a high risk that

⁴ Exhibit “SW/3”, General Comments page 2, para 3.

public intermediaries like libraries, universities, local authorities, museums and schools will incur significant and disproportionate costs in “second guessing” what obligations and responsibilities will be required of them. Having spoken to public library employees many are concerned that in a period of fiscal restraint the confusion created by the Act may lead some local authorities to evaluate the pros and cons of continuing to offer internet services to their users. Clearly any decision to withdraw services would have grave implications for the local community as well as the government’s digital inclusion agenda.”⁵

44. For the avoidance of any doubt it is not contended on behalf of Consumer Focus and Article 19 that the right to freedom of expression entitles internet users to infringe copyright online. The concern of Consumer Focus and Article 19 is the proportionality of the contested provisions, because ultimately if technical measures such as restricting or suspending internet access are imposed, their impact is not limited to the legitimate aim of preventing online copyright infringement; in reality such measures will impact on the internet access of individuals and households generally, including access to all the vital services which the internet provides. It is striking that even in the criminal law context, where the courts have been empowered to impose orders limiting internet access against convicted sex offenders, the courts have shied away from imposing sanctions that suspend internet access altogether.⁶
45. In summary, it is submitted that the contested provisions are a disproportionate response to the specific problem of online copyright infringement. Shifting the burden to subscribers to prove that the act constituting the apparent infringement was not done by the subscriber and that they took reasonable measures to prevent other persons infringing copyright by mean of their internet connection, particularly in circumstances where there is no definition of reasonable measures at all, is disproportionate and creates legal uncertainty. It means that subscribers whose internet connection has been used by other persons to infringe copyright without their knowledge or authorisation lack clear and adequate safeguards to prevent themselves from being labelled as infringers and are unable to regulate their conduct so as to protect themselves against potential liability and technical measures.
46. Bringing public service intermediaries within the scope of the DEA is itself disproportionate. There is no evidence that there are significant levels of copyright

⁵ Exhibit “SW/3”, Specific Comments, page 3, para 2.

⁶ Exhibit “SW/4”.

infringement across public intermediary networks; on the contrary, what evidence is available suggests that there is minimal copyright infringement on such networks.⁷ The problem is compounded by the legal uncertainties surrounding the definitions of ISP and subscribers in this context, as well as the uncertainties over what constitutes “reasonable measures”.

47. The term chilling effect describes the harm done to freedom of expression by the threat that sanctions will be imposed under overbroad or uncertain laws. It is submitted that the contested provisions do have the potential to impact on internet access and use far beyond the legitimate objective of penalising copyright infringement through peer-to-peer file-sharing, as they provide insufficient safeguards for individuals and organisations who may become liable under the Act for the acts of third parties which did they not authorise or condone. In these circumstances, the risk of incurring liability under the contested provisions has a real potential to chill internet usage by individuals and households, as well as the provision of internet access by public service intermediaries in the future.

GUY VASSALL-ADAMS

Doughty Street Chambers

10 March 2011

⁷ See e.g. Exhibits “SW/6” and “SW/7”.