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Subject: Digital Economy Bill Weekly Update 11 March 2010

Dear All

The prospects for a Digital Economy Bill which delivers meaningful action for rightsholders sit between good and middling this week. That is to say, the Bill as a whole should still make it to the statute book, but the clause on non P2P infringement is imperilled by security forces concerns.

The final Report Stage debate passed uneventfully and all eyes are now turned to the Third Reading debate in the House of Lords on Monday 15th. This is likely to be the last occasion on which detailed amendments can be made to the Bill. The Liberal Democrats are taking advantage of the opportunity by tabling further changes to Clause 18 (the introduction of a new Clause 14 on Subscriber Appeals has shifted the old clause 17 to 18). The "section 97b" approach remains at the heart of Clause 18 but – as reported yesterday – the Lib Dems are looking to remove the biggest cause of concern with the clause, by removing the assumption of costs being awarded against ISPs. Their amendment is likely to be passed as it will have Conservative support, we are told. (Some of the amendments I distributed yesterday were ruled out of order by the Public Bill office, on the grounds that they were introducing too dramatic a change. The amendments as officially tabled this morning are listed below.)

There has been a meeting between No 10 officials and BIS special advisers today to discuss the way forward on Clause 18. I am told that "discussions continue" but that the "security services concerns are not being met". Nor is this likely to change even with a possible Conservative amendment which aims to build in consideration of national security concerns to the Court's deliberations. The debate has been given an extra twist

with a *Talk Talk* sponsored survey today, which says that 71% of 18 – 34 year olds would continue to infringe copyright, in spite of the Bill provisions, and would use “undetectable methods” to do so. Whether MI5 helped pay for the survey is not clear, but the results helpfully play into their court. Both Opposition parties now strongly believe that come the wash-up the Government will pull Clause 18, citing these concerns. It is sadly ironic that the campaign for the Bill which has drawn support from Steven Garrett, the creative force behind the BBC series “Spooks”, should find itself partially thwarted by their real-life equivalents. Ironical too, that the champions of freedom of information, the Open Rights Group, are lined up alongside those champions of non-free information, the security services.

Beyond this outstanding issue of nonP2P, there is a tangible sense of “settled will” about the other provisions in the Bill. It is hard to find anyone, including within the ISP community, who does not believe that the Initial Obligations – and the prospect of Technical Obligations – are coming into law. Meeting with ISPs, Sky and Virgin this week, the BPI, MPA and Alliance Against IP Theft made good progress in discussing some of the operational detail around the Code. Whilst nothing is being set down in stone at this stage, the broad parameters of how the Code might work are being agreed upon. The consumer group Which? is also informally contributing to our thoughts. At Ofcom’s request, we are meeting next week to discuss progress to date with them.

The provisions on **Costs** will be determined following a consultation on the Statutory Instrument. Officials are no further forward with this than last week, and still claim that the aim is publication “before Easter” but that the reality may be different. We are preparing the case for a fairer distribution than 75/25 in anticipation of this.

As for the House of Commons – which will be sent the Bill next week – there is a strange sense of detachment. MPs with whom we spoke back in Autumn are already resigned to the fact

that they will have minimum input into the provisions from this point on, given the lack of time for detailed scrutiny. One leading backbencher has told us that there is "little point in meeting, since the Bill will be determined at wash-up". That said, John Whittingdale – an inveterate "timing sceptic" (i.e. he's for the Bill but doesn't think it will get through in time) has said this week that he still thinks it could be lost if enough MPs protest at not having the opportunity to scrutinise it. Whilst true in constitutional theory terms, the hard politics of the situation makes it seem unlikely. And inveterate opponents like Derek Wyatt and Tom Watson continue to blog and tweet with critical comments, but there is not the sense of a groundswell of massive opposition to the Bill. Come the week of Second Reading (29th March) the main political focus is likely to be on the Finance Bill – the Budget having been announced on the 24th.

Activity next week includes:

- BPI debating with ORG at a meeting of IP lawyers in the City, Monday 15 March
- Concurrently, Panorama on BBC 1, 8.30pm will be broadcasting "Are the Net Police Coming for You?" featuring interviews with Geoff, Feargal, Scouting for Girls, Billy Bragg and Sway.
- Launch of the TERA Report, "The importance of saving jobs in the EU's Creative Industries", Wednesday 18th March.
- Meeting with Ofcom to discuss the Initial Obligations Code, 18th March.

Kind regards

Richard

Clause 18
LORD CLEMENT-JONES

LORD RAZZALL

Page 22, line 16, at end insert -

"(1A) The copyright owner applying for an injunction under subsection (1) shall first have given notice to the service provider in accordance with subsections (1B) to (1F)

(1B) The notice must be in writing, deliverable electronically, contain the name, registered address and contact details of the copyright owner claiming infringement, and prove, by digital signature or otherwise, that it comes from the said copyright owner,

(1C) The notice must be addressed to the address or agent designated by the service provider for the receipt of such requests,

(1D) the copyrighted work of the owner claimed to have been infringed must be stated, or, if multiple copyrighted works at a single online location are covered by a single notification, a representative list given of such works at that site,

(1E) Information must be included reasonably sufficient to permit the service provider to locate the online location to be blocked,

(1F) The copyright owner must also take reasonable steps to deliver a copy of the notice to the operator of the online location."

• Clause 18

LORD CLEMENT-JONES

LORD RAZZALL

Page 23, line 4, at end insert -

(4A) Where a service provider has blocked access to an online location in response to a notice under subsection (1A) -

(a) any person aggrieved may apply to the court on notice to the copyright owner and service provider to require the service provider to remove or vary the nature of the block; and

(b) on an application made under paragraph (a), the court must order that the block be removed if it considers that it would not have made such an order, had an application been made under subsection (1).

(4B) Where a court makes an order under subsection (4A)(a), it may also on request make an order if it sees fit requiring the copyright owner to imburse any loss or damages, including costs and legal fees, incurred by

the applicant in (4A)(a), or by the service provider, as the result of the service being asked to blocking the online location by the copyright owner".

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