The Digital Economy Act in the dock: a proportionate ruling?

The High Court of Justice, Queen's Bench division, Administrative Court, 23-28 March 2011, British Telecommunications plc (BT) and TalkTalk Telecom plc v the Secretary of State for Business, Innovation and Skills (BIS) and others Case No: CO/7354/2010. The case was heard by Mr Justice Kenneth Parker.

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Abstract: The UK's Digital Economy Act 2010 contains measures to enforce copyright on the Internet, specifically a two-tiered form of a graduated response. The Act was challenged in the High Court by two of the UK's biggest Internet Service Providers (ISP), who obtained a Judicial Review of the copyright enforcement provisions. This paper is an overview of the case, based on the hearing of March 2011 and the ensuing judgement. It focuses on the two most hotly contested grounds for the challenge, namely an alleged failure to notify the European Commission under the Technical Standards Directive, and the proportionality or otherwise of the contested provisions. It observes how the judgement accepted the defence argumentation of the government and the copyright owners as interested parties, and how the ISPs appeared to be put on the back foot.

Keywords: Digital Economy Act, Judicial Review, copyright enforcement, copyright infringement, BT, Talk Talk,

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A. Introduction

1 This case concerns a Judicial Review of a British law and as such it is unusual, if not the first of its kind. The interest in the case is that it addresses the controversial Digital Economy Act 2010, sections 3-18 (the contested provisions). These sections provide for copyright enforcement measures applied to the Internet. In a nutshell, two British providers of Internet access services – BT and TalkTalk were challenging the decision of the government to impose obligations on them for the benefit of third parties in another industry, namely those organisations with an interest in protecting their copyright. The nature of those obligations was that they were asked to send notifications to their subscribers, based on allegations of copyright infringement supplied by the copyright owners, to hold data on repeat notices and ultimately to impose sanctions using traffic management techniques. The obligation regarding technical sanctions created a form of graduated response or '3-strikes' measures. BT and TalkTalk obtained permission to proceed with the Judicial Review in November 2010[1], and the hearing was on 23-28 March 2011.

2 BT and Talk Talk set out five grounds on which they challenged the Act[2]. These were:

3 *Ground one* – failure to notify the European Commission. It was argued that the copyright enforcement provisions in Sections 3-18 of the Digital Economy Act constitute a technical regulation, and should

have been notified to the European Commission as required by the Technical Standards Directive [3]. On that basis, the copyright enforcement provisions would be unenforceable.

4 *Ground two* – incompatibility with the E-Commerce directive[4], Article 12 'mere conduit', and Article 15 'No general obligation to monitor'.

5 *Ground three* – they were being asked to retain, process and disclose personal data and traffic data incompatibility in a manner incompatible with the E-privacy directive[5]

6 *Ground four* – the contested provisions were disproportionate in their impact on Internet service providers and their subscribers.

7 *Ground five* – incompatibility with the Authorisation directive[6], in respect of the costs which they were being asked to contribute for the implementation of the contested provisions.

8 BT and TalkTalk sought a quashing order for the contested provisions, or declaratory relief that the provisions were unlawful.[7] They were unsuccessful on all grounds, except for the removal of a liability for administrative costs incurred by Ofcom[8], under Ground Five.[9]

9 This review of the case will concentrate on Grounds One and Four, which were the most hotly disputed and most heavily argued. They were also the issues on which BT and TalkTalk should have had the strongest case. However, they did not succeed and the review will outline the arguments put forward for the claimant and the defendants, and in the judgement.

10 One slightly odd aspect of the case is that the defendant 'Secretary of State' was of a different party and government from the one that brought in the Act. The defendant was the current Conservative-Liberal Democrat coalition government. The Act had been passed through the legislature by the previous Labour government, and received Royal Assent on 10 April 2010. The manner of its passing through the Westminster Parliament, in particular through the House of Commons, is the subject of controversy, although that is outside the scope of this case review.

11 The 'others' in the case, were 10 organisations representing the music and film industries. They were led by the BPI (British Recorded Music Industry) and the Motion Picture Association, with legal representation provided by the law firm Wiggin LLP. In addition, there were the British Video Association, Film Distributors' Association, Football Association Premier League, and the Producers Alliance for Cinema and Television (PACT) . These organisations were joined by four trade unions - Broadcasting Entertainment Cinematograph and Theatre Union (BECTU), the Musicians' Union, Equity and Unite.

12 Although they were technically there just as 'interested parties', it was observable[10] that their argumentation influenced the outcome of the case. Their submission to the court was a defence of Act and the copyright enforcement measures, and it arguably functioned to support the government's position. It may be relevant to note that the BPI and the Motion Picture Association had actively lobbied for the Act under the previous government.

B. Background

13 Sections 3-16 of the Digital Economy Act 2010 amend the Communications Act 2003, Section 124. They therefore amend telecommunications law for the purpose of enforcing copyright[11].

14 Importantly for the Judicial Review, the Digital Economy Act copyright enforcement provisions actually set up a two-part structure. The first part provides for the notice-sending and the compilation of the list of subscribers to whom repeat notices have been sent. This is the Copyright Infringement List (CIL) also sometimes referred to as the repeat infringers list, and it would be a form of blacklist of subscribers alleged to have infringed copyright via the Internet connection more than once. The rights-holders would be entitled to see names from the list, for the purpose of taking those individuals to court on ground of copyright infringement. These were the 'Initial Obligations' under the Act.[12]

15 The second part creates a by-pass of the court process. The Internet service providers would be asked to impose sanctions directly against their own subscribers, on the basis of the copyright infringement list. The rights-holders would determine which individuals on the list were to be sanctioned. The proposed measures include throttling or reducing the speed of access to a point where downloading or file-sharing becomes impossible, and cutting off the access for a 'temporary' period which is undefined in the Act. These were the Obligations to Limit Internet Access,[13] frequently referred to as 'technical measures'.

16 An appeals process was to be set up to handle subscribers who disputed the allegations against them. This process was to be set up and overseen by Ofcom.

17 Another important feature of the contested provisions for the Judicial Review is that they fall short of some critical specifications. For example, they do not say how many notices are required in order for a subscriber to be placed on the blacklist. They do not specify exactly which technical measures are to be applied under particular circumstances. Those ele-

ments and others would be specified by two Codes of Practice, which would be drawn up under the auspices of the regulator, Ofcom. The Codes of Practice would go before Parliament as Secondary legislation, and in particular, the code implementing technical measures could be subject to further consultation and Parliamentary scrutiny.

18 Regarding costs, the proposal was that the rights-holders should pay 75 per cent, and the ISPs 25 per cent, of all costs. The judgement on Ground five relieves the ISPs of paying any costs towards Ofcom's expenses, including its own costs for administering the measures, and the costs of setting up and running the appeals process.

I. Ground 1 – technical regulations

19 At issue with Ground 1 was whether or not the contested provisions should have been notified to the European Commission, and more specifically, at what point they should have been notified. Should they be notified before implementing secondary legislation is in place or not? The government had not done so before the Act was put before Parliament, nor had it done so by the time of the hearing, which was almost one year on from the passing of the law. Given the structure of the Digital Economy Act, which was reliant on the Codes of Practice to implement the provisions, the point turned on whether or not the Act had to be notified before the Initial Obligations Code was in place.

20 The core of the argument put forward by the claimants, BT and TalkTalk, was that the Digital Economy Act 2010 established a number of obligations on Internet Service Providers, which would affect the technical operation of their business. As such, there was a requirement to notify them to the European Commission. As the contested provisions had not been notified, the law would be unenforceable.

21 The claimants argued that the contested provisions were prescriptive. This is reflected in the language of the text which says that ISPs 'must', for example, take specified actions upon receipt of the allegations from copyright owners[14] (called copyright infringement reports in the Act). The copyright owners are under no such obligation – they 'may' make the reports to the ISPs.

22 The claimants argued that the prescribed obligations were clear in their effect and that they were capable of being applied by the regulator, Ofcom, with immediate effect and subject to financial penalties.[15] There is no room for the specification to be withdrawn, unless the Act were to be repealed, and therefore it is irreversible. [16] In other words, if it were shown that less restrictive measures could be effective, there is no possibility under the Act for such measures to be introduced.[17]

23 The claimants further argued that the Act must be viewed as a consolidated two-tier approach, since the Obligations to limit Internet access build on the specification that is set out in the Initial Obligations. The second tier cannot operate without the first tier being in place.[18]

24 The government, as the defendant, put forward the argument that the provisions were empty, not prescriptive and merely enabling.[19] At the hearing, the government Counsel, Mr Eadie, described the contested provisions as "a series of highly flexible provisions identifying subject matter areas that need to be covered. They simply do not descend into any sort of detailed regulation". Mr Eadie argued that it followed that the contested provisions had, at the time of the hearing, no legal effect. They would not have legal effect until the Codes of Practice were in place, because one would not know the specifics until the Codes had been finally agreed. As such, the defendant suggested, the law did not yet need to be notified to the European Commission.

25 The interested parties submitted in support of the government's argument, that the "correct test " is not whether the contested provisions contain an obligation, but one of "current legal effect." [20]

26 During the hearing, the judge, Mr Justice Parker, probed the notion of prescriptive versus enabling provisions. Speaking to Antony White QC, counsel for BT and TalkTalk, he explored a view that the contested provisions were "somewhere in the middle".

> *"You can see conceptually, I would have thought, that in a pure enabling law, principles are just laid down and then, let's say, by secondary legislation the actual regime was brought into force, and there would be no dispute, then, that that was anything other than a pure enabling law. Then, at the other extreme, you would have a case where, let's say, legislation is not to be brought into effect until a statutory instrument sets the date, and then you in a case like that, could argue strongly. That is such a formal step that it must be regarded as notifiable Here I think it's common ground you are somewhere in the middle".*[21]

27 The claimants highlighted that whilst, for example, the Act did not set the threshold which would define a 'repeat infringer', it did indicate that there would be a threshold, and there were indications in the pre-legislative documents that it could be set at 'three' copyright infringement reports.

28 The defendant argued that the government intended to notify the Act when the Codes of Practice were in place, and that the Codes were necessary for the European Commission and other Member States to understand correctly what the Act would do[22].

29 The judgement concluded that the Initial Obligations were not merely enabling legislation and that they did constitute a technical regulation. The issue was whether or not they were sufficiently precise as to be enforceable and to have legal effect[23]. On this point, the judgement came down in favour of the government and against the claimants. It stated that the contested provisions were not legally enforceable unless and until a Code of Practice was in place. The ISPs were under no liability, and not required to take any actions under the Act, until the Codes were in place. The Codes of Practice would determine the substantive content of the obligations.

30 The purpose of the notification to the European Commission was to "prevent technical regulations from being enacted and being enforceable against individuals before the Commission and other Member States have had an opportunity to comment upon the proposed regulation."[24] Hence, the judge came to the final conclusion that this purpose was 'not impeded' by the decision to wait until the Code of Practice is in place and he dismissed the claimant's case on Ground.

31 In effect, BT and TalkTalk had been forced into a corner at this early stage. If the Initial Obligations Code did not have legal effect, then it followed that the Code to Limit Internet Access, that brought in technical sanctions against the ISPs' subscribers, also did not have legal effect. This line of argument enabled the discussion of technical measures – which created the greater controversy - to be kept to a minimum. The argumentation at the hearing focussed on the Initial Obligations Code, on the basis that it was necessary to persuade the judge on this point, before one could move on to the second Code to Limit Internet Access. One could extrapolate that this was unhelpful to the claimant's case, since a stronger argument could have been made against the Act with the technical measures included.

II. Ground 4 – proportionality

32 In arguing their case for ground 4, that the Digital Economy Act would have a disproportionate effect on ISPs and on consumers, the claimants presented a case based on a balancing of the freedom to provide services versus copyright, as a property right. They chiefly relied on an economic analysis in expert reports submitted as written evidence.[25]

33 The claimants were trying to show that the government had been unrealistic in its targets for the public benefits to be created by the Digital Economy Act, and that those targets were 'fundamentally flawed'.[26] Moreover, it was claimed that the government had failed to correctly calculate the implementation costs, for example failing to include costs for the appeals process[27]. The objectives were set too high, and a significant cost burden would be placed on the ISP industry for measures which had a high chance of failure.

34 In particular, the claimants were critical of the government's Impact Assessment, which accompanied the Digital Economy Act 2010. The government's target was a 70 per cent reduction in copyright infringement due to peer-to-peer file-sharing. This was based on survey data provided to the government by the rights-holders, stating that 7 out of 10 file-sharers would stop downloading copyrighted material if they were sent a notice by their ISP. It was pointed out by Mr White, for the claimants, that this was the sole source of the data supporting the government's objective.[28] One of the expert reports stated:

> *"even without knowledge of the subsequent edition of the Digital Entertainment Survey, the claim that 70 per cent of those who engage in illegal downloading would stop completely and forever as a result of receiving a notification from their ISP is straining credulity. I would like to think that such an assumption – which is crucial for the entire analysis – should have been considered very carefully, and should have been subject to some sense checks."*[29]

35 In fact, the government's own evidence to the hearing stated that no checks of the methodology behind the survey had been carried out, nor had the government commissioned its own evidence to cross-check it. However, this evidence was not directly challenged by the claimants.

36 The claimants went into more detail of the government's figures, including an assumption that 70 per cent of people ceasing to file-share equated to a 55 per cent overall reduction in file-sharing, and a figure of £400 million per annum for music sales currently displaced by peer-to-peer file-sharing. This was the government's assessment of the scale of the problem and the intended benefit of the legislation was to 'recover' those displaced sales for the music industry.

37 The claimants put up an argument that it was incorrect to assume that all copyright infringement was occurring via peer-to-peer file-sharing networks, since these reflected less than 40 per cent of all traffic on the ISP networks. The displacement of sales could not be attributed to peer-to-peer alone, and it was therefore fallacious to assume such a benefit would be achieved solely by targeting peer-to-peer.[30] On that basis, the contested provisions were a disproportionate response to the problem and a disproportionate burden on the ISPs.

38 The claimants' final argument was that the contested provisions would create a chilling effect, which would have negative economic consequences.[31] However, this argument was rebutted, and eventually turned around into one that supported the government and the interested parties, on the basis that any

economic negatives for 'infringers' were not worthy of consideration.

39 Overall, the judge was not happy at being presented with such a large volume of complex economic analysis[32] and it proved to be less helpful to the claimants than it might have been. He rejected the notion that the proportionality assessment should be judged on economic criteria alone and dismissed the claimants' extensive analysis as "a general utilitarian calculus"[33]. He also rejected the balancing proposition which the claimants presented, namely the right to free trade versus copyright as a property right.

40 The defendant (the government) and the interested parties put forward an alternative line of argument which the judge preferred. The defendant proposed that the two relevant questions in determining proportionality were "is it a legitimate aim?" and "is this type of legislation an appropriate response?" It was argued that the Digital Economy Act measures were more proportionate than the current system which relies on a preliminary action to obtain the contact data for Internet users whose IP addresses have been identified on file-sharing networks, in order to take court action against those users. It was suggested that the contested measures, which would draw a distinction between repeat infringers and one-offs, and would send warning notices to Internet subscribers, were a fair response[34] to the problem of peer-to-peer file-sharing .

The government's points were reprised and expanded by the counsel for the interested parties, Mr Saini. In summary, the interested parties - the copyright owners - submitted after both claimants and defendant had completed their submissions. They demolished a number of the points raised by the claimants over the course of the hearing. They began with the balance proposed by the claimants – freedom to provide services versus copyright as a property right, and the judge confirmed that this was 'a case of conflicting rights'.[35] Then they took the judge through the rationale supporting the contested measures, rebutting the claimant's criticisms of the 70 per cent figure, and explaining the government's justification for relying on it[36]. Finally, they invited the judge to consider the balance between the rights of copyright owners to protect their property versus the rights of the alleged infringers to enjoy 'the fruits of their unlawful behaviour[37]':

"That is effectively a shorthand for the point which was debated between my Lord and Mr White, which is that there is a cost here, because consumers who are already infringing copyright are going to suffer a disbenefit because they're going to have to stop infringing copyright."

41 Mr Justice Parker responded that "the government would be holding itself up to ridicule if it took into account the consumer welfare of infringers".[38]

42 The judgement dismissed all of the claimants' economic criticisms. In summary, the judgement did not agree with the claimants' assertion that the government should provide substantiated figures in its impact assessment. Instead, the judgement stated that legislation could go ahead on the basis that it would in general terms, make an impact.

43 The judgement stated that it was not sufficient to show that there were errors in the impact assessment. It determined that the correct approach in a case where it is inherently difficult to quantify the costs, benefits and outcomes would be for the legislator to "identify and take account of the important benefits and their broad measure".

44 The judgement declared that "Parliament" was entitled to decide on the basis that there would be a 'significant reduction' in file-sharing, citing the case of Sinclair Collis Limited v Secretary of State for Health[39] :

"a decision to legislate may be proportionate even though cost/benefit analysis produces a negative money balance; or a variant of that, that a decision to legislate may be proportionate provided that the legislator identifies and takes account of the important detriments and their broad measure. "

On this basis, the claimants' case for a proportionality challenge was dismissed:

"in the context of a proportionality challenge, the relevant issue is not whether the figure of 70 per cent in the impact assessment was robust, but whether Parliament was entitled to proceed on the basis that a carefully worded letter from the subscriber's ISP, drawing the subscriber's attention to the fact that the unlawful file sharing had been detected, and that persistent infringement could lead to unpleasant legal sanctions, would have a strong and immediate impact on unlawful P2P file sharing."[40]

C. Observations

45 It should have been the government (Secretary of State) who shouldered the burden of proof in this case, and who put forward the evidence to justify the contested measures.[41] However, as a general observation, it seemed that it was the claimants who had to justify their challenge, and who were on the back foot.

46 It does seem that if the claimants had been able to establish that the case concerned the contested provisions as a whole, incorporating the two-tier process in its entirety, then they would have been able to mount a stronger challenge to the contested provisions. Notably, they could have presented the judge with a different balance, namely balancing the right to protect copyright against the interference with the individual's right to due process. This is a politically more potent argument[42]. However, as they were pressed to stick just to the Initial Obligations Code, making that argument would have been more difficult.

47 The judgement accepted the arguments of the government and the interested parties on both of the grounds considered here. However, it would seem that a way was found to fit the judgement to the case.

48 On Ground one, there appears to be a fairly thin line between what should be notified and what may wait until secondary legislation is in place. If one compares the Digital Economy Act with the French Creation and Internet law, or the Spanish *Ley Sinde*, it would seem that there is little difference in the level of specification in any of these three laws. Yet, two were remitted to the European Commission prior to any secondary or implementing legislation, and one was not.

49 On Ground four, it could be observed that a piece of case law had been found to get the government off the hook. The economic figures in the government's Impact Assessment do merit investigation. It is correct that the 70 per cent figure used to set the targets for the contested provisions was sourced from one market research survey, supplied by the copyright owners[43], which was contradicted by a follow-up survey[44] a year later. The methodology for both surveys was not examined nor made public, and it is somewhat concerning that the government did not have access to methodological information, as stated in the written evidence to the review.[45] It would seem to invalidate the concept of an Impact Assessment, if the quality of the data used to determine the assessment is subsequently irrelevant. The notion of an Impact Assessment is further invalidated if the legislator is entitled to make decisions based on a general assumption supplied by the industry, which has the greatest interest in having the legislation on the Statute – which is the implication of this judgement.

50 Addendum: The judgment was upheld on appeal, with one small additional concession to the appellants relating to costs.[46] The appeal ruling agreed that BT and TalkTalk should not have to contribute to the case fees for subscriber appeals, since case fees would be 'administrative charges' within the context of the Authorisation directive, and therefore unlawful.

1 Administrative Court , 2010b. The High Court of Justice, Queen's Bench division, Administrative Court, Case No: CO/7354/2010, Notification of the judge's decision with attached reasons, 11.11.2010.

2 Administrative Court , 2010a. *Claimants' Statement of Facts and Grounds. Prepared by Antony White QC and Keiron Beal, 5 July 2010,S.10.* In the High Court of Justice, Administrative Court, Claim number CO7354/2010. British Telecommunications plc (BT) and TalkTalk Telecom plc v the Secretary of State for Business, Innovation and Skills (BIS).

3 1998/34/EC of 22 June 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, and as amended by Directive 1998/48/EC of 20 July 1998.

4 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)

5 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector. Amended by 2009/136/EC

6 2002/20/EC, of 7 March 2002, on the authorisation of electronic communications networks and services. Amended by 2009/140/EC .

7 Administrative Court, 2010a, as above, S.11.

8 Ofcom is the UK regulator for telecommunications. In respect of the Digital Economy Act, it has been given responsibility for facilitating and overseeing the copyright enforcement measures. However, in this context, it is important to note that Ofcom will not be a 'Hadopi'. It will not have any active role in forwarding notices or applying sanctions.

9 Administrative Court , 2011. *.Approved Judgement*, S.265. The High Court of Justice, Queen's Bench division, Administrative Court, 23-28 March 2011, British Telecommunications plc (BT) and TalkTalk Telecom plc v the Secretary of State for Business, Innovation and Skills (BIS) and others, Case No: CO/7354/2010,

10 The author attended the court hearing on Days 1,2 and 3 and was able to personally observe the dynamics of the various parties. This case review is based on notes from the case, and transcripts of the hearing to which the author has had access, as well as the documents cited.

11 For more detail on the Digital Economy Act and how it amends telecoms law, see Monica Horten, 2011a, Copyright At A Policy Cross-Roads – Online Enforcement, The Telecoms Package And The Digital Economy Act in 'Net Neutrality and other challenges for the future of the Internet, Proceedings of the 7th International conference on Internet, law and politics, Universitat Oberta de Catalunya, Barcelona, 11-12 July 2011.

12 Digital Economy Act, 2010, Articles 3-7 Initial Obligations

13 Digital Economy Act, 2010, Articles 8-12 *Obligations to Limit Internet Access*

14 Digital Economy Act, 2010, Article 3, Obligation to notify subscribers of reported infringements.

15 Administrative Court, 2010a, as above, S.93

16 Administrative Court, 2010a, as above, S.103.

17 Administrative Court, 2010a, as above, S.96.

18 Administrative Court, 2010a, as above, S.77.

19 Author's notes from the hearing, day 3, Mr Eadie making the submission for the Secretary of State.

20 Author's reading of court transcript, Day 4.

21 Author's notes from the hearing, day 1, Mr Justice Parker, hearing Mr Antony White QC for BT and TalkTalk

22 Author's notes from the hearing, day 2, Mr Eadie making the submission for the Secretary of State

23 Administrative Court, 2011, S.80.

24 Administrative Court, 2011, S.88.

25 Expert report prepared by Professors Mansell and Steinmueller: Administrative Court , 2011, S.232 and Administrative Court, 2010a, S.4; and expert report by Dr Koboldt: Administrative Court , 2011, S.248-261.

26 Administrative Court, 2010a, as above, S.207

27 Author's note taken at the hearing, Day 2, checked against transcript. Mr White, discussing costs which had been left out of the government's account, cited subscriber appeals.

28 Author's note taken at the hearing. Mr White's point is substantiated by the Digital Economy Act 2010 Impact Assessment,

page 70, which states that: "Results from the Digital Entertainment Survey (2008) indicate that 70% of copyright infringers would stop downloading digital products if they received a call or letter from their ISP. The policy objective is to achieve this reduction within 2 years."

29 Administrative Court, 2011, S.255. Citation is from the report by Dr Koboldt.

30 Administrative Court, 2011, S.251 and author's notes from the hearing.

31 Based in part on an intervention by Consumer Focus and Article 19.

32 Administrative Court, 2011, S.242. He complained that the claimants had submitted four expert reports running to 220 pages, whereas the interested parties had submitted a modest 50 pages of expert evidence.

33 Author's notes from the hearing, Day 2, the claimants' submissions and Day 4, the interested parties' submission.

34 Author's notes from the hearing, Day 3.

35 Author's reading of court transcript, Day 4.

36 This is in spite of it having been contradicted by a figure in the subsequent 2009 survey Administrative Court , 2011, S.254.

37 Administrative Court, 2011, S.249

38 Author's reading of court transcript, Day 4.

39 Administrative Court, 2011, S.244. Sinclair Collis Limited v Secretary of State for Health [2010] EWHC 3112 (Admin)

40 Administrative Court, 2011, S.256

41 Author's notes from the hearing, Day 1.

42 Monica Horten, 2011b, The Copyright Enforcement Enigma – Internet Politics and the Telecoms Package – see chapter 12.

43 The figure was sourced from the Digital Entertainment Survey 2008, which is sponsored by Wiggin LLP (Administrative Court , 2011, S.29 and S.254).

44 The follow-up survey was the Digital Entertainment Survey 2009.

45 Rachel Clark, of BIS, in written evidence, as cited in Administrative Court , 2011, S.252.

46 In the Court of Appeal from the High Court of Justice, Queen's Bench Division, Administrative Court, Case No: C1/2011/1437, 6 March 2012. Appeal heard by Lady Justice Arden, Lord Justice Richards and Lord Justice Patten/.