Vol. 716
No. 27

Monday
18 January 2010

PARLIAMENTARY DEBATES
(HANSARD)

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House of Lords

Monday, 18 January 2010.

2.30 pm

Prayers—read by the Lord Bishop of Southwark.

Bank of England

Question

2.36 pm

Asked By ***Lord Barnett***

To ask Her Majesty's Government what plans they have to amend the Bank of England Act 1998.

The Financial Services Secretary to the Treasury (Lord Myners): We have no plans to amend the Bank of England Act.

Lord Barnett: I am not too surprised. Does my noble friend accept that at the moment an unelected Governor of the Bank of England seems to have more economic powers than not only the unelected House here but the elected House down the corridor? Does he also agree that even an unamended Act means that the Bank's so-called independence is a myth in the sense that the governor is supposed to take account of the Government's economic policy, but does not seem to do so very often? It is now more important than ever, given that he has taken even greater powers, in relation to quantitative easing, for example. Can the Minister assure us that he will not end that sooner than the Government want? Is he having serious discussions with him on the matter?

Lord Myners: My Lords, we have regular discourse with the Governor of the Bank of England, including at the new Council for Financial Stability, which had its first meeting in shadow form last week. The governor and the Monetary Policy Committee have steered a very sound course through the economic difficulties, not only reducing interest rates to provide a strong monetary stimulus but also addressing the quantity of money in the economy through quantitative easing. The judgment on when is the right time to begin to increase the cost of money and reduce the supply of money through withdrawing quantitative easing is a matter for the Monetary Policy Committee. We allow it to do so in respect of the independence that we granted the Bank of England in respect of monetary policy, which it has handled with considerable aplomb.

Lord Lamont of Lerwick: My Lords, does the Minister recall that when the Bank of England was made independent the inflation target for the bank was redefined and based on a narrow, consumer price definition of inflation that excluded housing costs and that, at the same time, the monitoring ranges for the growth of money were abolished from the remit of the bank? Is it not clear that this aspect ought to be reconsidered? While I would not say that this is the sole cause of our present predicament, is it not clear that monetary policy, both here and in the United States, was too loose for too long and created a situation in which it was almost impossible, through leverage, for banks not to make huge amounts of money?

Lord Myners: The targeting of inflation at 2 per cent per annum has been consistent since the Bank of England was given its independence, but the definition of inflation was adjusted to come into line with the definition used elsewhere in Europe. It has been notoriously difficult to capture the cost of housing in inflation. Indeed, some would argue that it is an asset price rather than an expenditure price and therefore should not be in that definition. However, Eurostat is currently reviewing the matter, and no doubt when it has replied we will reflect on the implications for RPI targeting. Monetary authorities throughout the world now generally acknowledge that, when targeting cost inflation, they failed to address correctly the impact of asset inflation as a consequence of monetary policy being easier than it should have been. That applies, as I said, to monetary authorities throughout the world, including the United States of America and Europe.

Lord Newby: My Lords, does the Minister agree that, in view of the Bank's existing wide range of powers, it would be a serious mistake to confuse the role of the Bank by giving it additional powers to regulate the financial services sector as a whole, from the largest bank to the smallest building society?

Lord Myners: It would be a massive distraction, and totally unsuited to the culture and resourcing of the Bank of England, to conflate financial regulation with monetary policy, overall financial regulation and stability. It would create an even more powerful institution than the one described by my noble friend Lord Barnett, disrupt existing processes and place financial stability at risk, when we need to focus on rebuilding confidence and strengthening the financial system in the way that we have done so successfully over the past 12 months.

Lord Forsyth of Drumlean: My Lords, does not the noble Lord, Lord Barnett, have historical precedent on his side? When we have had quantitative easing in the past, additional measures have been put into place to ensure proper parliamentary scrutiny: the best example being the Bullion Committee in the 19th century. Exactly how much in mark-to-market terms has now been lost as a result of the Bank of England's quantitative easing activities in the market?

Lord Myners: I find it somewhat extraordinary that those on the opposition Benches should ask about mark to market, given the general criticism that mark to market as a methodology was one of the things that contributed to the procyclicality that has so badly affected the economy over the past three or four years. It is absolutely critical to isolate the impact of quantitative easing from simple reference to mark to market and to see its beneficial effect on creating and protecting jobs. The noble Lord asks a question that fails to grasp the core issue, but the answer is about £3 billion.

Lord Peston: My Lords, is my noble friend aware how puzzled one is about the criticism of the Monetary Policy Committee? One of the present Government's greatest achievements was setting up the Monetary

[LORD PESTON]
Policy Committee, the purpose of which was to take monetary policy out of politics and to let the job be done on a proper economic basis. We have succeeded in doing that, and one is very puzzled by this constant carping, especially from the Official Opposition, about the whole operation of the Monetary Policy Committee.

Lord Myners: I can only echo what my noble friend has said and what I said in response to my noble friend Lord Barnett's supplementary question. The Monetary Policy Committee has undoubtedly been a great success and we want to keep it independent. I was horrified to read in the *Times* on Saturday that the opposition party is apparently contemplating a change in the governor to find someone politically more acceptable. That sort of interference would do so much damage to the British economy and the British financial system. I hope that someone from the opposition Benches will rebut the story in the *Times*.

Libya: Human Rights

Question

2.44 pm

Asked By ***Lord Lester of Herne Hill***

To ask Her Majesty's Government whether, following the Human Rights Watch report published on 12 December 2009, they will seek information from the government of Libya about (a) the whereabouts of Jaballa Hamed Matar, and (b) the circumstances in which Hamed Said Khanfoor and others have been detained since March 1990 and their expected dates of release.

The Minister of State, Foreign and Commonwealth Office (Baroness Kinnock of Holyhead): My Lords, last week, the Foreign Secretary issued a statement expressing support for the efforts of Hisham Matar to ascertain the whereabouts of his father. The Foreign Secretary said:

"Hisham and his family need to know the truth now".

Our embassy in Tripoli has raised this with the Libyans and has asked them to investigate further. We take all allegations of human rights abuses seriously and have urged the Libyan Government to address the specific cases highlighted in the Human Rights Watch report, which include that of Mr Hamed Said Khanfoor.

Lord Lester of Herne Hill: My Lords, I am grateful for that welcome reply from the Minister, which I am sure will be greeted with great gratitude by Hisham and his family, who will no doubt wish to come and discuss the matter. Will the Minister give an assurance that no EU framework agreement will be entered into with Libya until it can be demonstrated that Libya, which has made only small progress so far in human rights, will comply fully with its international human rights obligations?

Baroness Kinnock of Holyhead: I thank the noble Lord for making that important point. The UK is a strong supporter of the EU's attempts to negotiate with Libya the framework agreement to which the noble Lord alluded, which in our view will provide a platform for dialogue and co-operation on areas including human rights and fundamental freedoms. Establishing a human rights dialogue is a key part of the ongoing negotiations for that framework agreement between the European Union and Libya. The last round of negotiations took place in Tripoli in December and another round is due to take place in Brussels in March. We support a rapid conclusion to the negotiations in 2010, but within the parameters that the noble Lord has described.

Baroness Kennedy of The Shaws: My Lords, I, too, welcome the Minister's response in relation to Jaballa Matar, but I would be grateful for a response in relation to Izzat al-Megaryef and Mansur al-Kikhya, dissidents who have also disappeared. I would also be grateful if the Minister could tell us whether the Government have sought an investigation into the massacre that took place in Abu Salim prison in 1996, when 1,200 political prisoners were slaughtered. The recent report from Human Rights Watch has raised the fact that, despite the warmth of our relationship with Libya since 2003, when it came in from the cold, there continue to be the stifling of free speech, reports of journalists being arrested when they are simply reporting human rights abuses and reports of Jamal al-Haji, a political and human rights activist, being rearrested. There are also concerns about the incarceration of children with adults. To what extent are the Government muting criticism of human rights abuses in Libya to establish trade relations, particularly on oil?

Baroness Kinnock of Holyhead: My noble friend asks for information on two people about whom I do not have clear information, although we have been following closely the cases of Jaballa Matar, Hamed Khanfoor and Mahmoud Boushima. Our embassy is monitoring the situation on all those people and the circumstances of their detention. We remain concerned by many aspects of the human rights situation in Libya. Reports continue to draw attention to the restrictions on freedom of expression. Libya's media are one of the least free in the world. Our concerns include freedom of assembly, political prisoners, arbitrary detention, the mistreatment of migrants and the death penalty. I can reassure my noble friend that we are rigorous in our approaches in Tripoli and the assurances that we seek from the authorities on these matters. While we remain concerned and raise our concerns about many aspects of human rights in Libya, we refute the suggestion that business interests motivate our actions.

Baroness D'Souza: My Lords, could the Minister confirm when the case of Jaballa Matar last came up in direct discussions between the UK and Libyan Governments?

Baroness Kinnock of Holyhead: In fact I can tell the noble Baroness that the last discussions on Jaballa Matar's case took place this weekend. We have of course responded quickly and sympathetically to the situation of his son and family, who for 20 years have not known his whereabouts.

Lord Hunt of Wirral: Would the Minister answer this simple question: does she agree that the EU/Libya framework agreement must be based on meaningful progress in the areas of political and human rights reform? If she does, can we just hear an affirmative answer? Will she go on to say what action the Government themselves are taking to encourage this?

Baroness Kinnock of Holyhead: The answer is yes. As the noble Lord might expect, the action that we are taking is to work closely with European Union negotiators to ensure that the objectives that we and others have in relation to Libya are fulfilled.

Lord Avebury: My Lords, we, too, are grateful to the Foreign Secretary for his statement on Jaballa Matar, which has been published on the FCO website. Could the Foreign Secretary now publish a complete list of all the individual representations that have been made to the Libyan Government together with the text of any replies that have been received? Will the Foreign Office also consult our partners in the European Union so that a consolidated list of the human rights violations that we have taken up with the Libyan Government can be put together for presentation to the universal periodic review of Libya next year?

Baroness Kinnock of Holyhead: My Lords, I take note of all those points and will respond to them appropriately.

Lord Foulkes of Cumnock: Would my noble friend care to contrast the repressive action of the Libyan Government with that of the Scottish Government six months ago when they released the mass murderer al-Megrahi on the basis that he had only three months to live?

Baroness Kinnock of Holyhead: My noble friend has raised the issue of Mr al-Megrahi. On 12 October, the Foreign Secretary's Statement to the UK Parliament clearly set out the Government's position on the release of al-Megrahi. We were scrupulously clear in all our contacts with the United States and Libyan Governments about the fact that, under the devolution arrangements in place within the United Kingdom, this was exclusively a matter for Scottish Ministers in the Scottish judicial system.

EU: Free Trade Agreements

Question

2.52 pm

Asked By ***Viscount Montgomery of Alamein***

To ask Her Majesty's Government whether they support the proposed free trade agreements being negotiated by Peru and Colombia with the European Union.

The First Secretary of State, Secretary of State for Business, Innovation and Skills and Lord President of the Council (Lord Mandelson): My Lords, the Government support the free trade agreements being negotiated between the EU and Peru and Colombia. They help to open markets comprehensively, tackling a wide variety of barriers to trade beyond tariffs at the border. We believe that they are an important tool to support economic growth in developed and developing countries. They also help to promote core EU values in partner countries such as sustainability and the protection of human rights.

Viscount Montgomery of Alamein: My Lords, that is extremely welcome news, but given the noble Lord's wide experience of these matters in Brussels in his previous occupation, can he say when he thinks that these agreements will be concluded? Obviously the sooner they are, the sooner that benefits will start to accrue in connection with investment and job creation.

Lord Mandelson: My Lords, my personal experience extends to the fact that I originally obtained the mandate and launched the negotiations for this free trade agreement. I am afraid that these agreements always take longer than was originally hoped. The central problem in this negotiation is that originally it was conducted on a region-to-region basis with all four members of the Andean community. However, Bolivia and Ecuador subsequently decided to come out of the negotiations. I hope that they can now make definitive progress. The next round starts in Lima either today or tomorrow, almost as we speak, and the European Union hopes to complete the full negotiation in the first half of this year.

Baroness Hooper: My Lords, is the noble Lord aware that we debated bilateral EU trade agreements in this House during the last Spanish presidency in 2002? Can the noble Lord give us a feel for how existing bilateral agreements are working, perhaps starting with Mexico and of course including Brazil and Chile, before we embark on the next round of negotiations?

Lord Mandelson: My Lords, I could go on an extended tour of Latin America. The EU's free-trade agreement with Mexico is working well but needs to be extended and deepened to embrace services trade; and with Chile it is working exceedingly well in all areas of trade. We do not have a bilateral agreement with Brazil. We have an outstanding negotiation between the EU and the Mercosur countries, which include Brazil, but that is being held up by the delays in the multilateral negotiations in the Doha round. My preference would be to see the EU-Mercosur negotiations restarted because to wait for the completion of the Doha round would be a little long.

Lord Grenfell: My Lords, obviously this free-trade agreement will deliver benefits to Peru and Colombia. My noble friend the Secretary of State alluded briefly to human rights: what importance, if any, should we attach to the fact that the European Federation of Public Service Unions and the European Trade Union Confederation have given solid backing to Colombia's unions in their call for the negotiations to be suspended or blocked until they are assured that the human rights abuses, which they claim are often directed at them, have been stopped? Is there a case that they should be suspended until we hear the results of the investigation which is being carried out into Colombia's human rights record under the current GSP Plus of the European Union; or is it the case that the social

[LORD GRENFELL]
development chapter which is being negotiated within the free-trade agreement is deemed sufficient to reassure the unions that Colombia's human rights—and theirs in particular—will be respected?

Lord Mandelson: My Lords, the Government are certainly not indifferent to any human rights questions arising in any Latin American country, including Colombia which has a long track record of civil violence, including killings. This is perhaps unsurprising when a portion of the country is in the control of the terrorist guerrilla organisation FARC. Most objective observers will note the democratic progress that has been made in Colombia under President Uribe's leadership and will welcome the growing stabilisation of the country and the decline in killings. However, that is not a reason for us to be anything other than entirely vigilant of what is going on and entirely supportive of those who are trying to combat these killings.

Baroness Garden of Frognal: My Lords—

Lord Hunt of Wirral: My Lords—

Lord Hunt of Kings Heath: My Lords, we must let the Liberal Democrats in.

Baroness Garden of Frognal: My Lords, the Secretary of State mentioned the withdrawal of Bolivia and Ecuador from previous negotiations. In the light of his earlier comments about how helpful these free-trade agreements should be, what encouragement is being given to those countries to resume negotiations?

Lord Mandelson: My Lords, Ecuador is an observer of the negotiations and does not participate in them. Bolivia is a further step away from being an observer. This is very much a matter for the countries and the Governments concerned. It is not for us to put pressure on anyone who does not want to enter into a free-trade agreement with the European Union. I hope that, upon the satisfactory conclusion of an agreement with Colombia and Peru, the terms are such that it will be open to either Ecuador or Bolivia, or both, to join the agreement in due course.

Lord Hunt of Wirral: Will the First Secretary of State accept that on these Benches we strongly support the work of the European Union in negotiating this mutually beneficial trade deal with Peru and Colombia? However, can he explain how the human rights suspension clause will work in practice? Can he give an update on the strong chapter on sustainable development that we all would like to see?

Lord Mandelson: Once the agreement is negotiated, and assuming that it contains a clause pertaining to human rights which all the participant countries can invoke, it is up to either side if they are so minded, having entered—I hope—into a proper discussion about the questions beforehand, in extremis and as a last resort, to suspend the agreement. However, it is open to either side to do that, not just the EU.

Lord Pearson of Rannoch: My Lords—

Lord Hunt of Kings Heath: My Lords, I am sorry, but we really must move on.

Health: Dementia

Question

3 pm

Asked By ***Lord Ashley of Stoke***

To ask Her Majesty's Government when they last reviewed the financing of services for those with dementia.

Baroness Thornton: My Lords, as with all government funding, the financing of services for people with dementia was last reviewed as part of the spending review period which ends in 2010-11. Future funding for services for dementia after 2011 will be determined as part of the next spending review, being decided now.

Lord Ashley of Stoke: I thank my noble friend for that reply. Is she aware that after last week's report by the National Audit Office there are grave doubts about dementia services? It is questionable whether they are receiving either the cash or the priority that they should have. Will my noble friend look at that for me? Will she give a categoric answer, because, so far, the answers have been quite vague?

Is my noble friend aware that dementia causes great distress to no fewer than 700,000 people as well as their families and costs the nation £17 billion a year? Will she look at the matter urgently? Some people who suffer from it are blind and deaf and have no understanding. Their lives are diminished savagely by the disease. It needs urgent attention from the Government.

Baroness Thornton: My noble friend points to why this Government regard dementia as a priority. We are in the first year of a five-year plan which aims to transform dementia services across the country. My noble friend referred to the National Audit Office's report published last week. We are studying it with great interest and take it very seriously; it is high on our agenda. We will respond more substantively to the National Audit Office's findings at the Public Accounts Committee hearing scheduled for 25 January. Without wishing to pre-empt our evidence to that committee, I can say that we have been engaged in a range of activities to support the delivery of the dementia strategy and are seeing some progress even though we are in the first year. For example, we have appointed a team of deputy regional directors with backgrounds in health and social care to provide local leadership alongside the SHAs for implementing the strategy.

Baroness Gardner of Parkes: Does the financing of care for people with dementia include respite care for those people who carry a great burden in caring for them?

Baroness Thornton: In addition to the £8.6 billion that is given to PCTs every year for all their services, we have for the past two years added an extra £150 million specifically directed at developing their dementia services. However, the caring responsibilities are also covered by the additional funding that we give for carers. I know that respite care is covered under one or other of those headings.

Baroness Murphy: What outcome measures will the Government adopt to monitor whether money given to primary care trusts and local authorities is wisely spent?

Baroness Thornton: We regard that as a very important part of the strategy. The £150 million that is available this year and next is not ring-fenced but will go to PCTs in the same way as the rest of their funding. We know that it is very important that we set up structures to monitor that, which indeed we have done. I expect that I shall be reporting to the House at some point in the future on exactly how effective that has been.

Lord Addington: My Lords, will the Minister give us some idea about how this fits into other NHS priorities, as something like one-quarter of people in long-term stay in hospital tend to have dementia, or something related to it? How does this fit into the priority plans, and how do those plans all tie in together? If one scheme has pressure on it this week, another one will have it next week. How do the two fit together?

Baroness Thornton: I think that the noble Lord is asking me how we deal with people with dementia, both in care and in hospital. The first points of our strategy are about keeping people out of hospital—that is the first thing—with early diagnosis, support for families and keeping people in their homes. Another major part of the strategy is to ensure that those who deliver services and care for people with dementia, both in social care and in hospitals, have the training that they need to ensure that they can recognise dementia and treat it in an appropriate way.

Baroness Jay of Paddington: My Lords, can my noble friend reassure me that any extra resources that are available in this area partly go to the issue of early diagnosis, because it seems clear from a lot of the work that is being done at the moment that better and earlier diagnosis leads to a great reduction of the burden, both on the patient and the carer? I declare an interest as a patron of the Alzheimer's Research Trust.

Baroness Thornton: I recognise that this is the part of the Question that I dealt with before Christmas. It is quite right that the National Alzheimer's Society in its very important work is concerned is concerned about keeping people out of hospital and shortening their stay when they are in hospital. It is very important that we achieve both those objectives for people with dementia.

Baroness Howe of Idlicote: My Lords, apart from having an earlier diagnosis, which is clearly a very important message to come out of the report, can the Minister assure us that a lot of attention will be given to evening up the amount of resources and help that are available across the country? In other words, there should be no postcode lottery.

Baroness Thornton: As ever, it is a matter of finding a balance between the right kind of independence at local level for decisions to be taken that reflect local needs and ensuring that the standards that we all want to see enforced for the care of people with dementia are there. That is partly addressed by the national strategy, so the noble Baroness is quite correct.

Representation of the People (Northern Ireland) (Amendment) Regulations 2010

State Pension Credit (Disclosure of Information) (Electricity Suppliers) Regulations 2010

Criminal Justice Act 2003 (Mandatory Life Sentence, Determination of Minimum Term) Order 2010

Local Government (Wales) Measure 2009 (Consequential Modifications) Order 2010

National Assembly for Wales (Legislative Competence) (Environment) Order 2010

Motion to Refer to Grand Committee

3.07 pm

Moved By ***Baroness Royall of Blaisdon***

That the draft orders and regulations be referred to a Grand Committee.

Motion agreed.

Business

3.07 pm

Lord Bassam of Brighton: My Lords, it may be helpful to the House if I say a few words about today's business. The next business will be the Second Reading of the Video Recordings Bill; we will then take Committee stage of the Bill as last business tonight. The deadline for tabling amendments to appear on the Marshalled List will be 6 pm; after that deadline has passed, a message will be displayed on the annunciator showing the expected start time for Committee stage of the Video Recordings Bill. It may also be helpful to say that, although no dinner-break business is scheduled this evening, it is expected that the Committee stage of the Digital Economy Bill will be adjourned at the usual time of around 7.30 pm for around 30 minutes. I trust that these arrangements are agreeable to the House.

Video Recordings Bill

Second Reading

3.08 pm

Moved By ***Lord Davies of Oldham***

That the Bill be read a second time.

Lord Davies of Oldham: My Lords, the Video Recordings Bill is a short Bill with a single, but important, purpose. It is designed solely to repeal and revive the provisions of the Video Recordings Act 1984, including the offences under the Act. The 1984 Act established a system of age classification for video works, administered by the British Board of Film Classification together with a regime of criminal offences and penalties.

[Lord Davies of Oldham]

As I explained in my business statement to this House last week, this Bill is the first to be introduced with the intention of fast-tracking it since the Constitution Committee published its report on *Fast-track Legislation: Constitutional Implications and Safeguards.* Also in my statement, I gave a full explanation of our reasons for seeking to use the fast-track process, which are set out more fully in the Explanatory Notes. However, I know that many in the House are concerned by the constitutional implications of fast-track legislation. To help to allay those concerns, and for the benefit of those noble Lords who were not able to be present last week, it would be helpful for me to briefly restate our reasons for taking this approach.

Unfortunately, the offences under the 1984 Act were made unenforceable because of a failure to notify the offences and other provisions of the 1984 Act in draft to the European Commission in accordance with the technical standards directive. This failure to notify was discovered only in August last year in the course of preparing the draft Digital Economy Bill, to which we will be returning in Committee later today.

Until the provisions of the 1984 Act are made enforceable, no new prosecutions can be made under the Act. This means that publishers of video games and DVDs can distribute their goods free of classification requirements, and retailers can sell or supply classified and unclassified material, including explicit pornography, to any person regardless of age, with limited statutory powers to stop or prosecute them.

This is not a theoretical concern. While many suppliers, to their great credit, are continuing to act responsibly, some are not. A briefing paper on the Bill produced jointly by the British Board of Film Classification and the Local Authorities Co-ordinators of Regulatory Services, which I am sure many members of this House will have seen, lists a series of infringements of the VRA's provisions taking place across the whole country. I will not repeat them here, but suffice it to say that this is a real problem and unscrupulous suppliers across the whole country are taking advantage of the unenforceability of the Act. The Government are therefore seeking to fast-track the Video Recordings Bill in order to restore the protection afforded to the public under the 1984 Video Recordings Act as soon as possible.

The Bill consists of only two clauses and one schedule. Clause 1 repeals the provisions of the 1984 Act and immediately revives them. Clause 2 relates only to the Short Title, commencement and extent of the Bill. The Schedule to the Bill sets out transitional provisions to ensure that the repeal and revival of the provisions of the 1984 Act do not change their effect. The Bill does not introduce any new provisions or offences into the 1984 Act; the 1984 Act is simply revived without any substantive changes.

On the issue of repealing and reviving the Act, I know that there is a great deal of interest in the question of whether past convictions under the 1984 Act will stand. I am pleased to reassure noble Lords that, as I understand it, these convictions continue to stand unless and until they are formally set aside by the court. The normal time limit for making an appeal is 21 days from the magistrates' court and 28 days from the Crown Court. Where the normal time for appeal has expired, the Crown Prosecution Service has advised prosecutors to oppose applications for extensions of time and permission to appeal against conviction.

My understanding is that the court is likely to give permission to appeal out of time in these cases only in exceptional circumstances, as it will look beyond technicalities and consider whether there has been any substantial injustice. As such, the court would be unlikely to grant permission to appeal out of time where the conviction was obtained following a full court process.

I am also aware that the fact that the 1984 Act is currently unenforceable due to a failure to notify in draft under the technical standards directive has caused concern that other legislation might be affected in a similar manner. Once again, I am pleased to reassure the House that the Government are not aware of any other UK legislation that is currently unenforceable because of a failure to notify its provisions in draft under the technical standards directive. Furthermore, to make absolutely sure, the Permanent Secretaries of the Cabinet Office and the Department for Business, Innovation and Skills have written jointly to colleagues in other departments to bring this matter to their attention. They have stressed the need to check current compliance with the directive and have provided help and guidance on how to do that.

The House may also ask whether the Video Recordings Act is still relevant in an age when films and video recordings can be downloaded from the internet at the click of a button and are available to view in the home, with no censorship or control over inappropriate content. The internet, of course, raises important questions about how to control inappropriate content and the Government have some concerns in this area. That is why we followed Professor Tanya Byron's recommendation and established the UK Council for Child Internet Safety.

None the less, it is important to realise that the market for boxed videos and video games is still considerable and is likely to continue to be so for some time to come. When the Video Recordings Act was passed in 1984 there were 4 million video recorders in the United Kingdom. In 2008, according to the British Video Association, there were 55 million DVD players in the UK. The total market of DVDs, Blu-ray DVDs and videos sold in 2008 in the UK was worth £2.3 billion. That is a large industry and there continues to be a large market for buying a physical product containing video recordings and video games. Indeed, senior executives in three of the major electronics companies—Sony, Nintendo and Microsoft—have gone on record recently as saying that the technology is such that it will be some time yet before the digitally distributed product will overtake sales of the boxed product.

Noble Lords may also ask whether it is necessary to repeal and revive the 1984 Act against such a tight timescale, given that there is other legislation which can be used to prosecute those supplying obscene material, particularly to young people. While there are some limited legal protections afforded by the Obscene Publications Act 1959, which can be applied to video

recordings, the threshold for the commission of an offence under that Act is very high. As a consequence, there is a considerable gap between the protections provided by the classification regime under the 1984 Act and what might fall foul of the Obscene Publications Act.

There is another important facet of the Video Recordings Act which is missed by focusing on legal sanctions. It is true that the Act stops the circulation of the worst kind of material by ensuring that it will not receive a classification and by making it an offence to supply unclassified video works. However, the vast majority of DVDs and videos on sale do not contain material which is unacceptable. A majority, of course, contain material which attracts an age classification. It is these age classifications which are used by consumers, particularly parents, to help them make purchasing choices about the suitability of the content of such products for their children. Independent research conducted on behalf of the British Board of Film Classification shows that 71 per cent of adults make use of the classification rating of films to guide their purchasing decisions at least some of the time.

The briefing document on the Video Recordings Bill, which I referred to a moment ago and which is jointly produced by the BBFC and LACORS, contains the worrying information that submissions to the BBFC in November last year are down, year on year, by 38 per cent since the problem with the Video Recordings Act came to light. Thus, there is a compelling case for the Government to take action as quickly as possible to close this legal loophole. Indeed, all the key stakeholders representing those who manufacture and supply videos and DVDs, and those who enforce the regulations on video classification, have endorsed the need to close the legal loophole which currently exists by making the 1984 Act enforceable as soon as possible.

In concluding, I will also touch on the issue of video games and how this Bill interacts with the Digital Economy Bill, which is currently before the House. In line with the recommendations made by Professor Tanya Byron in her report *Safer Children in a Digital World*, we plan to amend the Video Recordings Act 1984 as part of the Digital Economy Bill. Our amendments will introduce a new system of classification for video games using the Enhanced Pan-European Games Information system and will appoint a new statutory body, the Video Standards Council, to undertake the role of classifying games. We cannot bring these changes into force, however, until the Video Recordings Act has first been repealed and then revived by this Bill. I know that a number of noble Lords feel strongly about the need for an improved approach to classifying video games. In furtherance of that objective I urge all those who take this view to support the passage of this Bill to ensure that this can subsequently happen in the Digital Economy Bill.

Thus, in summary, the Video Recordings Bill does not introduce any new provisions or offences into the 1984 Act. It simply restores a system of classification that has been in operation for the past 25 years and which has worked to stop the circulation of the worst kind of video material. It is a system that is well understood and liked by a clear majority of the public and the industry. Indeed, the latest survey carried out on behalf of the BBFC shows that those surveyed agreed 99 per cent of the time with the classifications set by the BBFC.

The Bill is essential to ensure proper protection of the public from the inappropriate supply of violent and sexual video material by making the offences under the Video Recordings Act 1984 enforceable. As soon as the Bill has received Royal Assent, we will issue a press release announcing that fact and ensure that all the key stakeholder bodies are aware so that they are able to notify their members that the Act is enforceable once again.

I am sure noble Lords will share the Government's desire that these public protections be reinstated as soon as possible. Accordingly, I beg to move.

3.21 pm

Lord Luke: My Lords, we on these Benches are most grateful for the opportunity to put on record our absolute support for the speedy passage and implementation of the Video Recordings Bill. I underline the fact that we endorse the purpose and intentions of this Bill. It is most regrettable that there has been uncertainty in criminal proceedings, and so we look forward to reinstating the legislation in the proper manner.

As we are all now aware, this Bill was a Private Member's Bill which unfortunately did not complete due process. Regrettably, the new procedure was not recognised in time for this Bill and consequently the Act is not currently enforceable. The mistake was first noticed when preparations were made for the current Digital Economy Bill, which, as the noble Lord has mentioned, has amendments to the Video Recordings Act within its scope. The result has been that publishers of videos, DVDs, X-rated and R18-rated video games can distribute their wares without any classification. Moreover, it means that no further prosecutions can be made.

According to the British Board of Film Classification, many responsible members of the home entertainment industry have continued to submit their works to the BBFC to be classified. However, as the Minister said, submissions were 11 per cent down in September 2009, 20 per cent down in October 2009 and 38 per cent down in the first half of November 2009. Can the Minister inform the House of any updated figures since that time? We can see, therefore, that it is vital to ensure that this legislation is once again active and enforceable.

Perhaps the Minister can provide the House with more details about the possible consequences and effects of the discovery that the Act is not enforceable. Can he, for instance, inform us what the status will be of those with previous convictions under this piece of legislation? The Minister said that those who are outside the timeframe of 21 days for appeal would be unlikely to be successful if they now tried to appeal. However, might there be a case for saying that those people may not try to appeal against their conviction, but may try to set aside the Act altogether?

At present, as we know, no new prosecutions can be made under the Act as it stands, and those who make an appeal within the allowed timeframe cannot be opposed by the courts. Can the Minister inform the

[LORD LUKE]

House precisely when that began? Can the Government estimate how many people should have been prosecuted during that time, but were not? Has any research been undertaken as to how much compensation, if any, might be demanded and possibly awarded as a result of convictions made under this legislation?

We look forward to ensuring that the legislation is re-enacted in its proper form as soon as possible to ensure the protection of consumers and to empower law enforcement agencies to implement its provisions. I wonder whether the Minister could inform us when the Cabinet Office will have completed its audits of all Acts passed into law since 1984 in terms of their compliance with the European technical standards directive. It would be useful to know whether there were any such similar problems in other pieces of legislation and indeed whether any other member countries of the EU have encountered similar problems.

Finally, we welcome the recommendations from the Constitution Committee, which were published in its report of 7 July 2009, *Fast-track legislation: Constitutional Implications and Safeguards*. The Government published their response on 7 December 2009 and agreed to implement the recommendations. This Bill is the first to be subject to these new procedures and has, I believe, shown the value of these proportionate and sensible proposals, provided that fast-track legislation is used only when appropriate and necessary.

One of the recommendations was that,

"the Minister responsible for the Bill should be required to make an oral statement to the House of Lords outlining the case for fast-tracking".

Thus, on 7 January, we had the benefit of an explanation by the noble Lord, Lord Davies, of the special procedure and the reasons for it.

A further recommendation was that,

"the details contained in the oral statement should also be set out in a written memorandum included in the Explanatory Notes".

As noble Lords will be aware, the Explanatory Notes do indeed contain these seven helpful questions and answers which provide reassurance that fast-tracking is necessary in this instance and that due attention has been paid to proper scrutiny.

We therefore thank the noble Lord, Lord Davies, for his explanation both of the Bill and of the new procedures. We look forward to reinstating the Video Recordings Act in an enforceable manner which will leave no uncertainty in criminal proceedings.

3.28 pm

Lord Clement-Jones: My Lords, I thank the Minister for his comprehensive introduction of the Bill. We all have the same purpose today. As a result of the then Government failing to notify the European Commission of certain technical aspects—the classification and labelling requirements—of the Video Recordings Act 1984, we now know that the Act is void—I assume we can use that word—in respect of those technical aspects.

The Act is important protective legislation which has always had the support of these Benches. It sets the basis for the classification of video recordings, it makes provision to prevent the sale of inappropriate material to children and it counters the ability of people to sell counterfeit video recordings, principally DVDs. We on these Benches have made it clear that we support steps to ensure that the legislation gets back on to the statute book as soon as possible. We agree that the key conditions for fast-tracking as laid down by the Constitution Committee of this House have been met.

However, despite what I am sure is both novel and impeccable drafting by parliamentary counsel, a number of issues arise from the fact that these provisions of the original Act are void. There is the important issue of previous prosecutions of people under the Video Recordings Act. The Minister has given us some reassurance, but how retroactive is the Bill in its impact on the 1984 Act? The Minister claims that convictions will stand, but surely that is true only if appeals are out of time—which is what I took from what he said. However, this may not be a matter of appeal. If the provisions are void, surely somebody can go to court and seek a declaration that the original prosecutions were void and that no appeal is necessary. I hope the Minister will deal with this matter. If the Act was never validly enforced then surely the prosecutions brought under it are void.

We have all had the very useful LACORS and BBFC briefing. Many retailers and producers have sensibly continued to behave as if the 1984 Act were still in force. However, we understand from the briefing that the number of submissions for classification has fallen dramatically. The noble Lord, Lord Luke, and the Minister referred to the reduction of 11 per cent, bearing in mind that for most of the year it was assumed that the 1984 Act was in force. By October the figure was down by 20 per cent, and for the first half of November it was down by 38 per cent, as the Minister mentioned.

Again according to the brief from the BBFC and LACORS, a number of councils and their trading standards officers are being pursued through the courts for carrying out what they thought in good faith were statutory obligations under the Video Recordings Act. In hindsight, they were wrong. If the VRA was not in force and they were seeking to prosecute people for breaches of a non-existent Act, one can understand why those people might be aggrieved and seek redress. What assistance are the Government providing to local authorities in that position?

As the briefing also points out, breaches of the Act have been taking place in a growing number of places around the country. The BBFC and LACORS are particularly concerned about the sale of inappropriate material to underage young people in the interregnum period. They cite many examples. In Cheltenham, law enforcement officers have been unable to pursue a newsagent selling R18 and unrated porn DVDs that are displayed above an ice-cream cabinet. In Manchester, trading standards officers have dropped three VRA cases involving 3,000 videos. In Powys, trading standards officers are unable to pursue seven cases of underage video games sales; and in Brent, trading standards officers are unable to prosecute three high street stores for selling age-restricted video games to children. Have all these retailers got away with it, or will they be prosecuted?

Where prosecutions have been dropped, has the department considered whether prosecutions would be possible under the Obscene Publications Act 1959, which in certain circumstances could be used in respect of the sale of material to underage people? The 1959 Act proscribes the distribution, circulation, sale, giving or loan of obscene material. I recognise that it is not an ideal piece of legislation—that is why the 1984 Act was put into effect. However, if the retailers are going to get away scot free, what consideration are the Government giving to using other forms of legislation?

The Government are right to get the Bill on to the statute book as quickly as possible, in order to return the protection that the VRA brings and to enable the BBFC and local authorities to continue their important work. However, important issues have been created, which I have highlighted and which I hope the Minister will address. We will debate amendments to the VRA during our consideration of the Digital Economy Bill, but let us first get the Act back on to the statute book.

3.34 pm

Lord Pannick: My Lords, in welcoming this very unusual Bill, I should like to mention three matters.

The first is to add my thanks to the Government for accepting and for implementing—the second does not necessarily follow from the first—the recommendations made by your Lordships' Select Committee on the Constitution, of which I am a member, on the procedure to be adopted in relation to fast-track legislation. As the Minister has said, this is the first such Bill to be presented to the House since our report, and I join other noble Lords in welcoming the fact that the Government have, in both the *Explanatory Notes* to the Bill and the Oral Statement made by the Minister immediately after the Bill's First Reading, fully set out the reasons for fast-tracking the legislation. I am sure that this practice is of considerable assistance to the House and provides a model for the future.

My second point is to draw attention to the expression of regret in paragraph 3 of the Constitution Committee's report on the Bill that the 1984 Act has been rendered unenforceable, as the Minister accepted, by reason of the failure to notify its provisions to the European Commission under the technical standards directive. The consequence, as the noble Lord acknowledged, is that criminal prosecutions cannot currently be brought under the Act against those who sell video games and DVDs which have no classification certificate, or for selling such material in breach of the classification certificate—for example, where it restricts sale to children or allows sale to adults only in licensed sex shops. A number of prosecutions have accordingly been abandoned, and appeals in time have not been resisted.

I was pleased to hear the Minister reassure the House that the Government are satisfied that no other Acts of Parliament have been enacted in breach of the requirements of this directive, but can he say a little more about what procedures the Government have put in place to ensure that there are no such omissions in future in relation to either primary or, indeed, secondary legislation? The same problem could well arise in relation to secondary legislation.

Thirdly, I seek information from the Minister about the consequences of the enactment of the Bill later this week—as I am sure that it will be enacted. As your Lordships' House has heard, the 1984 Act is currently unenforceable. People are not being prosecuted. Can the Minister help on whether, after it is enacted later this week, the schedule to the Bill is intended to affect whether people may be prosecuted next week, under the revived 1984 Act, for alleged offences which were committed last week? That is a vital matter which needs to be addressed. It is inevitable that that question will arise. Prosecutors will inevitably have to consider next week whether they may bring prosecutions against persons for the publication of material which occurred last week or last month. It would be very helpful if the Minister could tell noble Lords whether the Government's position is that the Bill is intended to allow such prosecutions after Royal Assent; whether it is intended not to allow such prosecutions; or whether, as may be the case, it is neutral on this question—that is, it does not address the matter and leaves the courts to decide this question in accordance with whatever the general principles may be. I should be very grateful if the Minister could address that.

I have another, similar question. The Minister rightly pointed out that since 1984 a large number of people have been prosecuted and convicted under the 1984 Act. In many of those cases, the convicted persons also brought appeals, which were dismissed, yet they were prosecuted and convicted under a statute which at the time of their conviction was unenforceable, as we all agree. The question then inevitably arises of whether such persons can now have those convictions set aside as not being in accordance with the law. I declare an interest in respect of this matter because I have represented clients who, despite my best efforts, have been convicted under the 1984 Act. Indeed, I now represent one such client who is seeking to set aside the conviction on precisely this basis, having appealed in time but unsuccessfully.

Can the Minister assist on whether anything in the Bill—in particular, the schedule—is intended by the Government to address the rights and wrongs of this issue, whatever they may be? I say nothing about the merits of the issue, but is the Bill intended to say anything about the validity of those previous convictions or is the Government's position, as I think it is from what the Minister said earlier, that this matter will have to be addressed by the courts by reference to general principles, whatever they may be, and that the Bill is not saying anything on this subject? I emphasise that I am not asking the Minister for his views, interesting though of course they would be, on how the courts should address these problems—that is, the prosecution next week of alleged offences committed last week and the setting aside of previous convictions. I am simply asking him to confirm that the Government are not seeking to address either of those issues in this legislation. Subject to those points, I very much welcome the Bill.

3.43 pm

Lord McIntosh of Haringey: My Lords, I am not breaking any rules by intervening in the gap but I am certainly breaking the conventions of the House, and I

[LORD MCINTOSH OF HARINGEY]
apologise for that. I was not able to be here for the beginning of this debate or to hear the Minister on this subject. However, I remember the passage of the Video Recordings Act 1984 because Douglas Houghton and Hugh Jenkins—Lord Houghton of Sowerby and Lord Jenkins of Putney—and I carried on a three-man fight against that nasty little piece of legislation until the early hours of the morning. I remember calling a Division once and counting the House out at quarter past one in the morning. I do not suppose that we could do that sort of thing nowadays in the tamed House that we now have.

The Video Recordings Act was nasty; it was introduced as a Private Member's Bill by Lord Nugent of Guildford. In effect, it applied the rules of a public cinema or public display to people's video recordings in their own homes. In other words, it created censorship in individuals' homes where no censorship had existed before, and it made a difference between what you have on your video recording machine and what is on your bookshelves. Douglas Houghton, Hugh Jenkins, and I thought that that was deplorable and I still think that it is utterly deplorable.

It was characteristic that at the time the British Board of Film Censors, which was a classification body, was renamed the British Board of Film Classification, which became a censorship body. George Orwell would have been proud. I see that the Long Title talks only about repealing and reviving provisions, and I am sure that any substantive amendments to the original Act would not be accepted by the Table. I regret that very much. I am pleased that the Act has been out of operation for a time, and I wish that it were not being revived now.

3.46 pm

Lord Davies of Oldham: My Lords, I am grateful to all noble Lords who put their names down and who spoke constructively about the Bill. I note my noble friend's perspective on the Video Recordings Act.

Lord McIntosh of Haringey: It was not constructive.

Lord Davies of Oldham: Indeed, it was clearly very different from the tenor of the rest of the debate, but I shall address my remarks to my noble friend in due course. I am grateful to noble Lords who have addressed a number of pertinent questions, to whom I shall do my best to respond. In broad terms, I welcome the Bill as important and urgent, given the discovery that the Act under which prosecutions have been brought and which has been in force since 1984, is legislatively defective for the reasons I outlined in my opening speech.

The noble Lord, Lord Luke, asked a number of important questions. First, I reassure him that of course the moment that the problem with the Act was identified, urgent action was taken in relation to the Act, and, as I said, all departments were contacted to do a serious trawl on legislation to ensure that no other action, which would be remiss and have such serious consequences, had occurred. When departments do so much work in preparing legislation, obtaining the consent of both Houses, and then have due regard to how it is enacted, they take very seriously the point that legislation for which they were responsible may be flawed. I can give the House the assurance that this is a one-off, and I can tell the noble Lord, Lord Luke, that it is not a question of any particular procedures.

The procedures and nature of the work in departments are proof against mistakes of this kind. That is reflected in the fact that this is the first legislation that we have had to address in these terms. It raises all the issues of the fast-track procedure and engages the interest of the Constitution Committee, as the noble Lord, Lord Pannick, indicated. No department will be anything other than utterly scrupulous about its checks regarding legislation. A Minister would not be asked to stand before either House if we were not confident that this is the only case—important though the case is. We have given the fullest explanation that we can of how the error occurred.

The noble Lord, Lord Luke, asked a number of important questions. His most important question was that reinforced by the noble Lord, Lord Pannick. I want to put this on record again. He asked: what is the status of previous prosecutions? Previous prosecutions will stand unless and until set aside by the courts. This is an area untested by the courts, but we believe that the courts will set aside convictions only in exceptional cases, when they identify a substantial injustice. That is unlikely to be the case where convictions have been secured after a full court process, given the confidence that we all have in the way in which the courts conduct the business of due process. So we have reassurance on that front.

The noble Lord, Lord Clement-Jones, asked about the difficulties facing local authorities, particularly regarding claims for compensation. Local authorities will have to deal with that themselves, but we will be providing advice and guidance for them as required, because we appreciate that they have been placed in this position through no obvious fault of their own.

We are concerned about the point rightly raised by the noble Lord, Lord Pannick, about where the prosecuting authorities now stand and the issue of retrospection and where we all are with regard to the Bill. We considered retrospection at some length with the prosecuting authorities, but it was not considered appropriate in these circumstances. Retrospective criminal offences should be introduced only in truly exceptional circumstances, and the Government's view is that the use of the fast-track legislation route in these circumstances—where the legislation has been rendered unenforceable by a failure to notify the Commission in draft—is necessary to restore the public protection contained in primary legislation as quickly as possible. All that rather precludes the use of retrospection. The inclusion of such retrospective concepts in the Act would have weakened the justification for the fast-track approach. Given the contributions of other noble Lords, I am confident that the case has been made that the prime issue must be to correct the position as rapidly as possible through the fast-track procedure.

The noble Lord, Lord Clement-Jones, also asked whether the legislation is void. It is not void, but, as the noble Lord is all too well aware, the problem is that it was not notified to the Commission. The Bill repeals and revives the Act, and follows the previous procedure of omissions being corrected by notification, rendering

it enforceable from when it becomes an Act. Effectively, we are in the most appropriate way making up for the error of the past and getting this law enforceable as soon as we can.

Lord Skelmersdale: I apologise for not having intervened earlier, although I have listened to the entire debate. As I understand it, the reason for notification to the Commission is to give time for other countries to comment on legislation. However, this legislation appears to waive that procedure, in that it is intended to come into operation immediately after it has been passed by both Houses. Can the Minister send me a letter to explain this?

Lord Davies of Oldham: My Lords, I will gladly do that. That point about the implications for our partners in the European Community and the timescale for notification, which was the error, has not been raised by any other noble Lord. The noble Lord will appreciate that the error is 25 years old and, therefore, if they were to object to this legislation, they would be objecting to something that the European Community has been obliged to live with for the past 25 years. The concept of notification is to see whether it is a restraint upon freedom of trade. Twenty-five years having passed probably suggests that it is unlikely to be a major issue. I am grateful to the noble Lord for having identified an issue that we have not considered in the course of these deliberations.

Lord Clement-Jones: I apologise for intervening again. The Minister was pretty clear about the non-retrospective effect of the Bill on the Act. Therefore, the answer to the question I asked about whether the examples in Cheltenham, Powys and so on have got away with it is, presumably, yes.

Lord Davies of Oldham: I am not in a position to comment on every instance. The noble Lord will fully appreciate the basis on which we are enacting this fast-track legislation. The courts still potentially have a role to play because of the timing of cases, but I have indicated our expectation of the likely judgments. The noble Lord raised compensation and local authorities. We do not keep data on how many prosecutions have been dropped. There were 111 ongoing cases in September 2009. They all had to be dropped because the law was not valid. We are not keeping a regular audit on this. We found out about this situation in August because the three-month notification period finished in September, and that is why we collected those figures. I am not able to identify the issues in the court cases involved.

In response to the comments made by the noble Lord, Lord Pannick, I can identify the principles on which we expect the courts to proceed. They will not reopen cases for compensation in circumstances where they conducted their proceedings entirely fairly and reached their judgments in accordance with that. This short interim period between when the Act was found to be invalid and when we obtain Royal Assent presents some difficulties on which we are not able to be definitive. We can, however, identify the principles on which action is taken.

The noble Lord, Lord Luke, asked whether there is an audit of the procedure by which the departments are alerted to this. The answer is no; the departments' concern about the issues is as good as, if not better than, any formal audit.

I can add to the points that I made to the noble Lord, Lord Skelmersdale. I have had a note to the effect that we notified the European Commission between 15 September and 15 December. That is why it has taken some time since we discovered the problem and brought it to Parliament. We did not identify the issue until then: hence the difficulty in acting.

I am aware that this is a difficult situation that rightly prompted questions in some detail as well as questions about process. We are grateful to the Constitution Committee for having considered these matters, and we very much bear in mind its pertinent points, the most important of which the noble Lord, Lord Pannick, reinforced to a degree today.

I hope the House will feel that the Government have acted in the most able way they could to deal with what is undoubtedly a most unfortunate but, so far as we can identify, unique occurrence.

Bill read a second time and committed to a Committee of the Whole House.

Digital Economy Bill [HL]

Committee (3rd Day)

4.02 pm

Clause 4 : Obligation to notify subscribers of reported infringements

Amendment 59

Moved by ***Lord Clement-Jones***

59: Clause 4, page 6, line 27, at end insert—

"(4A) An internet service provider may recover costs, reasonably incurred in sending a notification report under this section, from the copyright owner.

(4B) A copyright owner may dispute the charge levied by the internet service provider under this section by appeal to OFCOM on the grounds that the charge does not represent costs reasonably incurred in sending the notification."

Lord Clement-Jones: My Lords, just in case anyone is confused, I have agreed to move the amendments in the name of my noble friend Lady Miller of Chilthorne Domer today; sadly, she cannot be with us. We on these Benches very much think that the amendments should be considered.

In moving Amendment 59, I shall also speak to Amendment 77. The amendments are the first of a series with which we will deal today that relate to costs. As the Minister knows, there is considerable discussion about this aspect. Indeed, I see that the Government, in anticipation of today's debate, have published a draft online infringement of copyright order, dealing with initial obligations and sharing of costs. That is extremely timely.

The big issue is the allocation of costs between internet service providers and the copyright holders. I have not had a great deal of time to look over the draft order. Although the Government have further work to do with consultants on the methodology for splitting

[Lord Clement-Jones]
costs and so on—I hope that the Minister will give us an idea of the process involved—they seem to be allocating costs 75 per cent one way and 25 per cent the other. Many in the ISP community might think that that is rather an unfair allocation. I will be interested to hear what the Minister has to say about that. If I were to put words into the mouths of the ISPs, I think that they would say that the copyright owners will largely be the ones to benefit from these processes and so the ISPs should bear a lower cost—or at least only half the cost—compared with the copyright owners. I am sure that we shall be batting these concepts back and forth. We have our own Front Bench amendments to come, when my noble friend Lord Razzall or I will make the case at rather greater length. In the mean time, I beg to move.

Lord De Mauley: My Lords, this is the first of many groups dealing with the knotty question of the division of costs. The amendments in this group look at the costs of sending out the notification letters and compiling the copyright infringements lists, which is a good place to start. However, the question at the moment is left open. As the noble Lord, Lord Clement-Jones, mentioned, this morning the Government brought out a draft statutory instrument on the division of costs to tackle that issue. From my initial study, it appears to apportion 75 per cent of the costs of Clauses 4 and 5 to copyright holders and 25 per cent to ISPs. The costs of Ofcom's administration and the appeal tribunal are similarly divided. That is a considerable shift from the Government's original thought of dividing most costs 50:50.

One area in which the draft SI has not helped us is in giving more information on the estimates of what the costs actually will be. Currently, we have available several different estimates—the Government's impact assessment, which is soon to be supplemented by another report on costs, as well as numerous external industry-commissioned reports, some of which are still coming. Perhaps the Minister will enlighten us as to when the department will be able to produce more accurate figures for us to work with, or will the Government leave even that work to Ofcom for resolution after Royal Assent?

This draft SI raises a number of other questions. Having different fixed sums in respect of different categories of ISPs is an interesting concept, which merits further scrutiny, as does paragraph (5) of Article 4, which sets out what costs cannot be included in the sum for division. However, with such a short time to absorb this document, perhaps we could await the Minister's response to these amendments. Fortunately, a few more opportunities are coming up to debate the appropriate division of costs later in Committee. The debate on this group of amendments, as well as the draft SI, will do much to inform them.

Lord Davies of Oldham: My Lords, I very much agree with the closing remarks made by the noble Lord, Lord De Mauley. The issue of costs applies to later amendments, too, so I would not want us to be too hung up on the ratios at this stage. That is why I will ask the noble Lord, Lord Clement-Jones, to withdraw his amendment. However, I am grateful to him and the noble Baroness, Lady Miller, who tabled the amendment, for raising this issue. It will be appreciated by the Committee that we are not talking about an exact science with regard to the allocation of costs. A great deal of consultation and more work have to be done on this. We will be able to debate these issues further on subsequent occasions.

As the Committee will appreciate, both noble Lords made reference to the fact that we have made available a draft statutory instrument under Clause 15, which we hope will give a sense of how we consider the contributions from copyright owners to the costs of ISPs, as well as the other costs arising from Clauses 4 to 16, might be calculated. We will have plenty of time to discuss these issues later.

The noble Lords pressed me on when we will reach a position. We will need to consult in preparation for the statutory instrument, which needs to be delivered in the spring, so we have work to do. Noble Lords have rightly seen from the draft that it is our view that the majority of the costs should be borne by copyright holders. Our working assumption in the draft is that copyright holders should meet 75 per cent of the costs and others should meet 25 per cent.

As I say, this working assumption is the basis on which we can take the issue further. A number of amendments are already tabled for later in the Bill and it is clear that there are areas in which the issue of costs needs to be debated further. I hope that in our response noble Lords will see that we are seeking to advance the debate, but we have not reached a final position yet. The debates that are bound to obtain later in Committee will develop the issue further. On that basis and with those assurances, I hope that the noble Lord will feel able to withdraw his amendment.

Lord Clement-Jones: My Lords, I thank the Minister for that response and I thank both him and the noble Lord, Lord De Mauley, for correcting me: it is the other way around—25 per cent for the ISPs and 75 per cent for copyright holders. That is certainly something that the ISPs will be more content with and I suspect that, in all justice, it is what the copyright holders will agree to in the end. I note that the percentages are in square brackets, so I assume that the Government will take a view on the final figures when they have looked more closely at the expected costs and then go nap on the split of the percentages.

The remaining issue is how comprehensive the order will be. I note that it just talks about the initial obligations, so I assume—perhaps the Minister will nod his assent—that a new, more appropriate order will be passed as and when any technical measures are taken. There will need to be a technical obligations code governed by a new order on the costs appropriate for enforcing, if you like, the technical obligation. That new raft of proposals will come into effect only after an Ofcom report and when the technical provisions come into effect.

Lord Davies of Oldham: My Lords, it has been suggested that my physical nod of the head was not overt enough, so I am saying yes to the noble Lord's question.

Lord Clement-Jones: I thank the Minister. Clearly he needs to develop a more assertive nod of his head. However, that is very helpful. When we examine the terms of the order, we need to make sure that both we and the industry believe that it is sufficiently comprehensive to cover pretty much most of the expected costs. I assume that the consultants will also take a view on whether this is a reasonably comprehensive list of the anticipated costs. On the assumption that that is correct, and without the Minister's nod, I beg leave to withdraw the amendment.

Amendment 59 withdrawn.

Amendment 60

Moved by ***Lord Lucas***

60: Clause 4, page 6, line 30, after "a" insert "named"

Lord Lucas: My Lords, in moving Amendment 60 I shall speak also to Amendments 61 and 62. Amendment 63 appears to have fallen into this group from elsewhere and I am not sure whether the noble Lord will choose to reply to it.

These amendments serve to open discussion on this subsection, which concerns the notification that is to be sent from an internet provider to its subscribers. This is an enormously important document. The Government are setting out to persuade some 7 million of our citizens to mend their ways with the hope, presumably, that something close to 90 per cent will eventually do so. The document, one that a very large number of people will receive, needs to be carefully crafted. It should be nothing like those sent out by the BBC when you are suspected of not paying your licence fee. That is because, by and large, people know that they are supposed to pay the licence fee. They may have a good reason for not doing so, but they know that they are supposed to pay it.

This document will be sent to a lot of people who do not know that the infringement is happening, because someone else in their household is doing it, or, if they do know, they will think that it is the ordinary way of the internet: everyone has been getting away with it, so why not? This is the beginning of a process of education, so the document needs to be full and should not leave a lot of stones unturned. In particular, it should say who the copyright owner is and it should be fulsome in its description of the infringement and the evidence for it. People will need to know what they are suspected of doing, under what circumstances and what the evidence is.

The noble Lord was fulsome in his criticism of the activities of certain firms of solicitors who at the moment claim to know about copyright infringement as a result of downloading. Their letters are threatening in tone and extremely short on detail. This letter must be nothing like that; it must be supportive and encouraging and contain all the information, or a reference to it, that the person accused of the infringement needs to know. If the letter comes as a bit of a shock, that person must at least find that all the help that they need is there. I beg to move.

4.15 pm

Lord De Mauley: My Lords, these are useful amendments designed to ascertain the level of detail required in a notification from an internet service provider to a subscriber. It is important that the level of evidence is as detailed as possible and that the subscriber is given a full description of his apparent infringement. Without complete and detailed information, it may be difficult for the subscriber to identify exactly who is responsible for the copyright infringement or to establish whether an error has been made or an appeal is appropriate. We hope that the Minister can assure the Committee that these notifications will contain everything that a subscriber will need to make an appeal. It would be useful, at least, if the Minister could confirm whether a subscriber will be sent the copyright infringement report that has been made against him.

The Earl of Erroll: My Lords, I support these amendments. We heard earlier in Committee about bullying tactics being used already in certain jurisdictions in order to get people to pay up. If the matter is couched in vague terms, that makes bullying tactics easy, so the more detail there is the better. In that way we should avoid misuse of these powers.

The Parliamentary Under-Secretary of State, Department for Business, Innovation and Skills (Lord Young of Norwood Green): My Lords, the purpose of Amendment 60 is to require that the notification sent to subscribers should specify the name of the copyright owner making the allegation. I understand the thinking behind the amendment as there is some justification in ensuring maximum transparency at this stage and a subscriber alleged to be infringing copyright on-line is entitled to know the details of the allegation being made against them.

However, the existing test provides that transparency without needing to specify that it relates to a named copyright owner. The code provides the flexibility and ability to ensure that the information subscribers need is included. Clause 8 states that the code must set out, "requirements as to the form, contents and means of the notification in each case".

The key information for a subscriber is to know why they are in receipt of such a notice, what it relates to and the evidence supporting the allegation of copyright infringement, all of which is already required.

The purpose of Amendments 61 and 62 is to require that a notification sent to a subscriber should contain, on the one hand, a "full" and, on the other, a "detailed" description of the alleged infringement rather than only a "description" of it. While I sympathise with the wish to ensure that those in receipt of such notifications get the full picture, I do not believe that either of these amendments is necessary. It would challenge most of us to explain, in ways that hold water legally, the difference between a "description", a "full description" and a "detailed description" and I do not see any advantage in passing on that conundrum to those who will be responsible for writing the notifications. I cannot readily see what criteria will be employed to decide whether a description was full or detailed enough, and the existing text is fit for purpose.

[Lord Young of Norwood Green]

I wholeheartedly concur with the concerns of the noble Lords, Lord Lucas and Lord De Mauley, and the noble Earl, Lord Erroll. We are aiming for transparency and to ensure that people fully understand at this stage the nature of the allegation, the copyright infringement and so on. However, these matters will be dealt with fully in the code. I stress that both copyright owners and internet service providers will have to comply with the initial obligations code. The noble Earl, Lord Erroll, was concerned about bullying. They will not be able to get away with some vague allegation; it will have to be nailed down and comply with the initial obligations code. The contents of the code are dealt with in Clause 8. It will have to include provision about the standard of evidence of infringement needed for the copyright infringement report. An internet service provider cannot be required in fairness to give more information about an apparent copyright infringement than is given to them by the copyright owner. The code will include provision as regards the contents of the subsequent notification by the internet service provider to the subscriber.

The final amendment in the group, Amendment 63, would not change the elements that must be included in a notification to a subscriber, merely the way in which those requirements are expressed in the Bill. I must admit that it is unclear what is intended by the amendment.

I offer the assurance that we concur with the concerns expressed about the importance of getting the first notification right. The noble Lord, Lord Lucas, assumed that any advertising campaign would be aimed at some 7 million people; I think that that is a worst-case-scenario prediction. We have said all along that we are trying to change behaviour. Many people will not necessarily know—I must admit that, until I checked with certain younger members of my household, I was not sure of the precise situation—but I think that people will become more aware.

A copyright infringement requirement may not necessarily be clear to a subscriber, which is why the Bill specifies what information they need. Our intention is to meet the concerns expressed by noble Lords and to have notification that is transparent and fit for purpose, making absolutely clear the substance of the allegation, the proof of the apparent copyright infringement and the measures that individuals can take to protect themselves in cases where the infringement may have been committed by somebody piggybacking on their broadband connection. The purpose of the initial notification is not to be in any way bullying; it is about being helpful to people, and attempting to change behaviour. I think that people will in many cases respond to that, although I accept that the proof of the pudding will be in the eating. With those explicit assurances in relation to what the code will contain—we have sent out an initial draft; there will be more to come as a result of consultation—I hope that the noble Lord will not press his amendments.

The Earl of Erroll: It may be helpful to the Minister to point out that Amendment 63 should perhaps have been grouped with Amendment 64, because if you leave out lines 35 and 36, you need to put the "and" at the end of the previous line. I suspect that it has just been misgrouped.

Lord Lucas: Which I suspect is my fault. I am sorry for leaving the Minister with that conundrum.

I entirely accept what he said, although I am puzzled—perhaps I misunderstood him—that he is resisting the first amendment in the group, that the copyright owner should be "named". It is an important part of the allegation of trespass that one should know that the person alleging the trespass owns the copyright that they claim you have infringed. To be told that you have trespassed on copyright, but not to be told whose copyright, it is leaves you with an incomplete ability to defend yourself. I am therefore surprised that the noble Lord thinks that my first amendment should be resisted. Perhaps I can leave him to think more on that and, for the moment, I beg leave to withdraw it.

Amendment 60 withdrawn.

Amendments 61 to 63 not moved.

Amendment 64

Moved by ***Lord Razzall***

64: Clause 4, page 6, leave out lines 35 and 36

Lord Razzall: This is a relatively small amendment to Clause 4, which deals with the insertion of a new clause in the Communications Act 2003 on the notifications that must be given by copyright owners to the ISP and by the ISP in response to the copyright infringement report. Subsection (5) of new Clause 124A contains the detail of what needs to go into that notification. Subsection (5)(f), which is set out in lines 35 and 36, is probably inappropriate in the notification by the ISP. An alleged infringement will have occurred either through the use of someone's personal computer, or other form of computer or through the use or exercise of a subscription under mobile broadband networks. Paragraphs (a) to (e) and paragraph (g) would apply to all forms of infringement, whatever mechanism was used, but paragraph (f) would not apply to all forms and would only seem to apply if the infringement was by the use of wi-fi technology. The amendment suggests that paragraph (f) should be deleted and would fit better within the code.

Lord De Mauley: My Lords, I shall just speak on the amendment to put on record once again the concern that we share with the noble Lord, Lord Razzall, that a subscriber may not have sufficient protection from action being taken against him as a result of copyright infringement taking place on his internet account by an unauthorised user who has hijacked it. Providing advice on how to protect a network after an allegation has been made is a crucial part of stopping such hijacking.

Lord Lucas: My Lords, I am not sure that I agree with the noble Lord, Lord Razzall, on this issue. I think that we probably need rather more here. I had some very helpful discussions with the Bill team on some technical aspects of the Bill, for which I thank the Minister. Clearly, with wireless access, giving people a primer on how to get basic protection on their wi-fi

is going to be important. Most of us just buy a router and plug the thing in and do not want to get involved with what is going on in the middle of it. To follow on from something that the noble Lord said on the last day in Committee, if we are to implement something like voluntary blocking of peer-to-peer sites to ensure that your own internet network cannot infringe, some quite sophisticated instructions will be needed, simply put, on how to get that blocking up into the router. It is not much good if it is just in the computer and the other person doing the infringement is some other member of the family sitting on a wireless network. That will take some doing and will take some sponsorship by the Government or Ofcom of one or more commercially available but relatively cheap programmes to make this something that is simple and easy for the customer. It will be quite a delicate thing to do.

My own view is that we should not ask ordinary customers to do something that would take them more than an hour or so in order to get their system secure. Setting wi-fi to WPA2 is easy enough, but instituting the sort of blocking that the noble Lord referred to is more complicated. We will also need the industry—I cannot imagine the Government doing it—to volunteer a selection of names of sites that might be blocked; you cannot expect the individual consumer to select these sites. So there is a lot to go in here.

It is important that this is brought out and detailed at an early stage, and that some real thought goes into making it easy for consumers to make their wi-fi net secure, not just against people who are raiding it from outside. It is all very dramatic and doubtless some people are doing so, but it is not exactly a vast proportion of the population that goes around sitting in cars using other people's wi-fi networks; there are many more consumers who have the rest of their family spread out around the house doing goodness knows what. People are going to need help to secure the wi-fi network against that sort of activity, to ensure that illegal activity is not happening on their network.

Something else that the Government are apparently contemplating, which I approve of, is a service whereby people could have their own computer checked to demonstrate that it had not been used to download illegal material, as a quick and convenient means of defence. I presume that this would be done remotely, with people allowing some government-authorised contractor to have remote access to their hard disc and run a checking programme, at the end of which they would say, "Tick. This computer has not been used for that purpose and the necessary protections have been installed on it". All this needs to be set out clearly and in detail right at the beginning.

I am content with the Government's drafting at the moment, but I suspect that when we have been through this part of the Bill and I have been properly instructed by the Ministers about exactly what is happening, I may come back on Report saying, "Can we have a bit extra here?".

The Earl of Erroll: My Lords, I would like to add to what the noble Lord, Lord Lucas, has said. I agree with him that these lines should not be deleted; indeed, they should probably be somewhat added to.

The Minister sent a helpful little note around on some of the things that we have already debated. On the page headed,

"What might such reasonable steps be in practice?",

it says, and this amplifies the point made by the noble Lord, Lord Lucas,

"Within a household the information and options to impose controls over what can be accessed are built into the routers and the browsers. This means that it is possible to impose those controls in relation to a number of different computers",

and so on. I have a certain amount of technical knowledge, but I do not know how I would set up my router to prevent access to certain types of material—to certain specific websites, maybe, but those websites may be harbouring both copyright and non-copyright material, and it is the copyright material that we are trying to legislate for, not the access to websites. The browsers reside on each individual computer so those are not available centrally. The point made by the noble Lord, Lord Lucas—that if these people are connecting over wi-fi you cannot do anything about it—is still valid, despite that note. I am grateful for the note, though; much of it was extremely helpful.

This needs to be explored more deeply. The whole issue of advice on how to protect is essential. As I said at a previous stage, certain senior members of the Government—I do not mean this politically; I simply mean members of the Executive—would do well to be taught how to protect their networks, because I know they are unprotected.

Lord Davies of Oldham: My Lords, I think I am grateful for those last two contributions. I am certainly grateful to the noble Lord, Lord Lucas, because he identified the fact that we may need more rather than less. Accepting the amendment and taking out this opportunity for advice would therefore be a mistake. I think I am also grateful to the noble Earl, Lord Erroll. I think he is indicating that more information may be needed. Certainly, it may be necessary for us to act in those terms in due course. It would not be helpful if we accepted the amendment, which would preclude these aspects.

The question of websites is fairly straightforward. The main operating systems such as Windows also come with parental controls. They allow websites to be blocked by genre and can filter access to websites by other criteria. This aspect is straightforward. I recognise that the noble Earl, Lord Erroll, is identifying additional dimensions beyond those on which we need to think further. What I want to say to the noble Lord, Lord Razzall, and the noble Lord, Lord De Mauley, who gave him some support, is that we think it is necessary to retain the clause as it is. Many people do not realise that there are simple steps that can be taken to make it difficult for all but the determined and technically capable to use, for instance, a wireless connectionwithout permission. We will need to make sure that they know that. To remove this part from the clause would be a detrimental step.

We have had an interesting little debate with some contrary opinions, but I hope the Committee will appreciate that the Government are, for the best of reasons, eager to retain the clause as it is, so that we can meet these issues with regard to advice as ably as the industry can.

Lord Razzall: My Lords, I am intrigued that what seemed to be a relatively straightforward drafting amendment has provoked such an extensive debate. Clearly, having lunch with the Bill team ought to be recommended for anybody participating in this debate. I am sorry that I have not yet had the opportunity to do so.

The point that I was trying to make, which is very straightforward, is that a lot more advice is required for anybody who is subject to a copyright infringement report. I am surprised that the noble Lord, Lord Lucas, does not support me in this. I do not know why one particular type of advice—that is, on what to do in relation to those networks that use wireless telegraphy—should be singled out and put into the text of the Bill. Clearly, the code will need to deal with all sorts of issues that the subscriber to whom an alleged infringement report is sent has to deal with. Why are we singling out advice regarding wireless telegraphy? The only point I was making is that that seems inappropriate and it would be better to put this advice and the requirement for the advice in the code, including all the extensive detail that no doubt the noble Lord, Lord Lucas, and the noble Earl, Lord Erroll, in their lunches with the Bill team, will be able to devise to ensure that the appropriate advice is given to the potential infringer. That is all I was saying. I am happy to withdraw the amendment.

Amendment 64 withdrawn.

Amendment 65

Moved by ***Lord Lucas***

65: Clause 4, page 6, line 36, after "telegraphy;" insert—

"( ) full details of a subscriber's right to appeal, and of where information on how to appeal may be found;

( ) advice on the possible consequences of continued infringement;"

Lord Lucas: This is a fairly self-explanatory amendment, suggesting that a couple of things might usefully be added here. These are details of the right to appeal, to make it clear that there is a route on from here for someone who thinks that they are being wrongly accused, and advice on possible consequences so that they know where that road might lead.

I say to the noble Lord, Lord Razzall, that any time he wants to come to the staff canteen with me, he is very welcome to do so. I beg to move.

Lord Whitty: My Lords, I broadly support these amendments. In discussing notification procedures that may eventually lead to sanctions, it seems to me that at the very least we should inform the accused person about the right of appeal and, perhaps even more importantly in terms of determining their future action, the possible consequences of continued infringement. I forgot to declare that I am chair of Consumer Focus. I hope that runs through all my interventions today, lest I forget to do so again. This seems to me a fairly straightforward measure. The Government would allay some anxieties were they to accept the amendment of the noble Lord, Lord Lucas.

Lord De Mauley: My Lords, our Amendment 66 has a very similar effect to my noble friend's Amendment 65 in that it ensures that the subscriber is made aware of the possibility that, should he continue to carry out illegal peer-to-peer file-sharing, he may face technical measures at a future date.

We all hope that the initial obligations process will be enough to deter the vast majority of those who undertake illegal peer-to-peer file-sharing. We agree that receipt of a letter outlining the unlawful activities that have been taking place on one's internet account should be sufficient to make most people desist from doing so. Indeed, numerous polls suggest that such a warning would be enough to make a significant number of people stop this unlawful activity. However, there is a danger that some may well decide that such a warning is simply an empty threat. It is worth noting that many final reminder notices for utility bills, for instance, include the possibility of court action if the customer continues to default on payment. Such a warning acts as a significant incentive for the consumer to pay up. Clear notification that technical measures may well be used in future would act as a similar deterrent to alleged copyright infringers. Such a warning would increase the chances that someone would cease illegal peer-to-peer file-sharing activities and would, we hope, mean that fewer cases would actually result in technical measures being used. The Government may well think that such warnings would be included under "(g) anything else", but it would be helpful if the Minister could confirm this or inform us otherwise.

As regards Amendment 70 of the noble Lord, Lord Razzall, I entirely agree that the notification letter should include information about how the subscriber should proceed if he believes that the ISP or the rights holder has made a mistake in identifying either his IP address or his account. May I also ask the Minister what measures there will be for errors to be ironed out quickly and cheaply? We have later amendments looming that relate to appeals. I am sure everyone here would agree that easily correctable errors should be sorted out long before it gets to that level, and that no allegation of guilt should remain attached to a subscriber who is simply the victim of mistaken identity.

Lord Clement-Jones: I should like to speak to Amendment 70. We support the principle of the other amendments in this grouping. It is very important that the notification under Clause 4 includes those matters which will guarantee the rights of the subscriber in these circumstances. We believe that advice about how to respond to the notification, if a subscriber believes it to be based on an error of fact, wrong in law or unreasonable, should certainly be included in the notification. Noble Lords have phrased this in different ways in their amendments but that seems to us to encapsulate the essence of the matter. We believe that, for the sake of natural justice, and for the sake of the subscriber—the subscriber can be an individual or an educational or cultural institution—served with a copyright infringement notice by the relevant ISP, it should give advice about how to contest the notification. That seems to be axiomatic. Even if the Government cannot accept these amendments, I very much hope that they will formulate something which responds to this group.

The Earl of Erroll: My Lords, I agree with everything that has been said so far. I have added my name to Amendment 66, but I should also have added it to Amendment 65 as the two amendments are slightly parallel. I certainly think that information on instituting a right of appeal has to be there up front. I hit this recently on a parking infringement in Milton Keynes where they offer you a 50 per cent discount if you pay within two weeks. It mentions appeal but does not tell you how to do it. It then turns out they will tell you only once your discount period has expired. This is in order to bully you into paying up front without going to appeal, because otherwise it will cost you more. Hiding these things would be counterproductive and is not good for the citizen. The right of appeal has to be there. Therefore, I should like to add my name to the amendment proposed by the noble Lord, Lord Lucas, on that.

Regarding this part of the Bill, the Minister has repeatedly said, "We hope that we don't have to go as far as technical measures; that is the 'in extremis' position. We have to get this solved by the early letters". You have to make the stick apparent; otherwise people are not going to pay any attention to those letters. That is why I added my name to Amendment 66.

4.45 pm

Lord Young of Norwood Green: I will take Amendments 65 and 70 together, since they propose similar changes to the Bill.

The purpose of these amendments is to add further required information to notifications sent to subscribers if they have been alleged to be infringing copyright online. This further information would be how the subscriber can respond to receiving such a notification of an alleged infringement and how they can appeal if they believe the notification to be based on an error of fact or law, or is unreasonable, and the potential consequences of continued infringement.

Noble Lords will have seen from the draft outline initial obligations code that we have provided that it is intended specifically to address this point as one of the points that a notification would cover. However, I would make a strong plea for some flexibility here. In particular, it seems to me that we would be very well advised to give as much encouragement as we can to the initial communication on this being couched in terms of friendly advice. Most people will not need much persuading to swap infringing behaviour for legitimate activity, and there is much to be said for maintaining good relations with them while making sure that they get the information that is needed.

Of course, as the legislation requires that an appeals process should be set up, it would not be conceivable that in practice notifications would not contain information on how to appeal. I reassure noble Lords that that will be part of the notification. I stress the importance of getting that first notification right. We are about persuasion and getting people to recognise that they can deal with this, and we do not want to err too much on the side of the stick being applied at this stage. An appeal process is obviously essential. Internet service providers will certainly not want to clog up their response centres with people trying to get information about notifications when there is a simple way of channelling them to where the information is.

The information about consequences is also provided for in the amendment, but I do not think that it should be mandatory. There may well be value in including such information and making it plain in a second or subsequent notification but, as I say, there may also be value in keeping the first notification friendly, and I see no reason for blocking off that possible flexibility. It does not take away the importance of the right of appeal. The possibility of including such information is therefore already in the Bill, and I urge the noble Lord to withdraw the amendment.

Amendment 66, tabled by the noble Lords, Lord Howard and Lord De Mauley, and the noble Earl, Lord Erroll, would require notifications sent to subscribers to include information about the possible imposition of technical measures. For reasons that I have outlined in relation to the other amendments in this group, it may not always be appropriate to include such information. This is, after all, relating to the notifications to be sent as part of the initial obligations, when technical measures will not be in force, and which we hope will not in fact be needed. There have been a couple of analogies, one of which was parking fines, which is not appropriate. We are not going to hide anything and we are not seeking to fine people when we send the first letter.

I preferred the analogy by the noble Lord, Lord De Mauley. If it got to the final demand, in red, which he rightly said rather like hanging tended to concentrate people's minds wonderfully, of course it might well be appropriate at that stage to include the technical measures. We are saying that a lot of this needs to be clearly defined in the code. As such, it may be something that the code decides would be appropriate for a subsequent letter but not for the initial notification, where it is to be expected that the tone will be more courteous and the emphasis more on preventing such a thing happening again and indeed on assisting subscribers in ensuring, if it was something that was done without their knowledge, that it would not happen again. They may be individual subscribers or, as the noble Lord, Lord Clement-Jones, said, communal subscribers. We issued a paper on measures that could be taken by community subscribers. I do not know whether noble Lords have had a chance to digest it. We hope that it provides helpful information.

Lord Clement-Jones: My Lords, the Minister talked about the guidance document. Even if the Government do not accept the amendment, there is a good case for tightening the wording of the accompanying guidance on the way that the letters are sent out. The Minister made the point that it may be only on the second or third letter that it would be appropriate to inform a subscriber about the rights of appeal; but this document does not make that clear. It could be tightened. The key sentence currently runs:

"A further area that the code may address would be advice or information about a subscriber"—

I assume that a word is missing and that it should be "how a subscriber"—

"could respond or appeal to a notification letter".

That is not as tight as it could be.

Lord Young of Norwood Green: My apologies—I thought that I had made it abundantly clear. We are appealing for flexibility, including the ability to provide people with the right of appeal. After all, a letter may have been sent to them in error. We are not arguing about that in the first letter. My comments on technical measures related to the first letter. We believe that these things are appropriate to the code. We believe that we have got it right in the Bill, but I was trying to give an explicit assurance about the right of appeal.

I will finish my comments on Amendment 66. The technical measures may be something that the code decides would be appropriate for a subsequent letter, but not for the initial notification, where it is expected that the tone will be more courteous and the emphasis more on preventing such a thing happening again. It is right to provide a degree of flexibility here, as the current text allows. I reiterate the assurance about the importance of the right of appeal—let there be no doubt about that. I see why noble Lords have suggested including this information in the Bill, but we do not think that this is necessary and believe that it is more appropriate in the code. In the light of the assurances that I have given, I invite the noble Lord to withdraw his amendment.

Lord Lucas: My Lords, this is one of those occasions when the Government are bound to be right. If we think that this should not be in the Bill but in the code, the Government are right; and if we think that this should be in the Bill but not in the code, the Government are right. One has to bow to their superior wisdom. I beg leave to withdraw the amendment.

Amendment 65 withdrawn.

Amendment 66 not moved.

Amendment 67

Moved by ***Lord De Mauley***

67: Clause 4, page 6, line 36, at end insert—

"( ) information about the protection of electronic communications networks from malware;"

Lord De Mauley: My Lords, the Bill as currently drafted would allow a great deal of useful consumer information to be included in the notification that an internet service provider sends to its subscriber. This includes information on how to obtain legal access to copyright works and how to protect oneself against wireless hijacking of an internet account. This seems to be a good opportunity also to include information on another major problem and irritant of electronic communications—malware. That is what Amendment 67 seeks to do.

As noble Lords will be aware, malware is malicious software designed to load itself into a system without the owner's knowledge. We have already discussed the likelihood that illegal copyright infringement could be committed unwittingly by a subscriber whose computer has been taken over by a virus. Such viruses are frequently very sophisticated, and difficult and expensive to get rid of. There are also many different anti-malware packages sold or given away that add to the confusion of a subscriber who might not be very up-to-date in such matters. Informing subscribers of reputable programs to protect their computers, or ways in which they can check to see if their computers have been infected, would be helpful in preventing genuine copyright infringers from continuing to act while protecting innocent subscribers. I beg to move.

Lord Whitty: My Lords, I support the principle of the amendment. We have spent a lot of time discussing what a subscriber would be expected to do to provide a reasonable defence when it was not him, but someone else, who committed a violation. Regardless of whether the amendment is in this form of words, it is important that somewhere in the Bill there should be a requirement that the subscriber should be told in the initial contact what they need to do to protect their equipment from misuse. The Minister provided us with a draft of the code and, in a letter, with some useful information. However, the code does not address the issue of what a subscriber would reasonably be expected to have done. Advice in the initial letter is therefore important. I hope the Government will at least take that on board.

The Earl of Erroll: My Lords, the noble Lord, Lord Whitty, has put it excellently.

Lord Clement-Jones: My Lords, having heard the arguments, I, too, support the amendment. It seems rather similar in intent to provisions that the Bill already contains and that the Minister so carefully justified earlier in terms of advice about protection of electronic communications networks that use wireless telegraphy. This amendment is of equal importance in those circumstances, and there is therefore a very good case for its inclusion.

Lord Young of Norwood Green: My Lords, I thank the noble Lords for tabling this amendment. The effect of the amendment would be to require notifications sent to subscribers to include information about the protection of electronic communications networks from malware. I understand and sympathise with the reasons why they have tabled the amendment. With such malware it is possible for others to hijack connections for malicious purposes and for the subscribers to be ignorant that it has happened. Receiving a notification about something which, on the face of it, had nothing to do with the subscriber may cause confusion and doubt, and the possibility that such an infringement may have happened via the subscriber's connection without their knowledge will need to be taken into account.

However, while agreeing with the principle of the amendment, I think that such an addition is unnecessary. The notification will already be required under new Section (5)(f) to offer advice about protecting the home network of subscribers and I see that as very much incorporating advice about the sort of threats that this amendment is addressing. We believe that we have this covered. We are again providing an explicit assurance that in the initial letter we will need to offer people advice to enable them to protect their networks. That will definitely be done—I do not think that I can

make that more explicit—and it will be covered in the code. As both these points are adequately covered by the existing text, and given my explanation, I hope the noble Lord will feel able to withdraw the amendment.

Lord De Mauley: My Lords, I am grateful to the noble Lord, Lord Whitty, the noble Earl, Lord Errol, and the noble Lord, Lord Clement-Jones. I entirely agree with the noble Lord, Lord Whitty, that it is not the wording that matters, it is the issue. I am grateful to the Minister for his helpful response. I will look again at the extract which he quoted. For today, I beg leave to withdraw the amendment.

Amendment 67 withdrawn.

Amendment 68 had been retabled as Amendment 70A.

Amendment 69

Moved by ***Lord Lucas***

69: Clause 4, page 6, leave out lines 37 and 38

Lord Lucas: My Lords, in moving Amendment 69, I shall speak also to Amendment 70A. These amendments have an entirely helpful intent. At the moment this new subsection ends with paragraph (g). So the provision states:

"A notification under subsection (4) must include … anything else that the initial obligations code requires it to include".

Amendment 70A would have the effect of broadening that. It states that the notification,

"must comply with any other requirement of the initial obligations code".

I think that there are things that should be required in relation to this notification and not just things that should be in it. For example, the tone of the notification, the quality of the information provided and requirements concerning the extent of the obligations placed on a subscriber in terms of updating their network and taking protective measures are quite hard to fit under the notion of "including" things in the notification. Therefore, my wording here simply broadens the Government's ability to add in things under the general heading of this paragraph. I beg to move.

5 pm

Lord Faulkner of Worcester: My Lords, the amendments in the name of the noble Lord, Lord Lucas, are designed to change the way in which the requirements for notifications to subscribers are expressed in the Bill.

The amendments are not in any way objectionable, and I certainly accept the noble Lord's assurance that they are intended to be helpful, but we do not think that they are necessary. They do not change at all what the notifications to subscribers must contain but they look to express them in a way that reduces the number of subsections from seven to six. Amendment 69 changes the focus of the final paragraph of new subsection (5) in Clause 4 from requiring a notification to include anything else required by the code to requiring it to comply with other requirements of the code. This proposed wording mirrors that in subsection (2), which relates to copyright infringement reports.

I understand the point here but we do not think that the amendment is necessary. New subsection (4) in Clause 4 requires a notification to be sent if the code requires it—that is, when it should be sent. This should be read in conjunction with new subsection (7) in the clause, which sets out how a notification is to be sent. This will ensure that a notification complies with any provisions in the code relating to timing and delivery. New subsection (5) requires a notification to include anything that the code requires in relation to content.

I cannot think what other sorts of provisions the noble Lord thinks the code might contain about the notification that sit outside timing, delivery and content. That being so, I think that the Bill as drafted covers his concern and I hope that he will feel able to withdraw the amendment.

Lord Lucas: My Lords, I shall retire defeated. I only point out to the noble Lord that the content of his lunch today was not necessarily the same as its quality. If one were to restrict a description of his lunch to the content, it might not cover every possible aspect of it. However, I beg leave to withdraw the amendment.

Amendment 69 withdrawn.

Amendments 70 and 70A not moved.

Amendment 71

Moved by ***Lord Whitty***

71: Clause 4, page 7, leave out lines 7 to 9

Lord Whitty: My Lords, I have no doubt that the Government will consider that I am becoming very suspicious of them in my opposition to new Section 124A(6)(d) in Clause 4. However, there is a difference between new subsection (5) and new subsection (6). If the Government were to accept the very sensible amendment of the noble Lord, Lord Lucas, who has suddenly disappeared, which proposes that the very first letter should refer to the possible consequences of infringement, then that would appear in every letter. As I said earlier, it is only right that the subscriber should know the consequences.

However, the paragraph that my amendment proposes to leave out refers to the number and nature of copyright infringements. That suggests to me—admittedly, with a suspicious mind—that the notification will be tailored to the individual; in other words, it will refer to the fact that there have been several such infringements already and that the nature of those infringements will be known to the copyright holder or ISP. None of those will have been tested. I might be putting too heavy an interpretation on subsection (6)(d), but it seems to slip stealthily between stages 1 and 2 of the enforcement process. Had the Government been minded to accept the earlier amendment tabled by the noble Lord, Lord Lucas, the proposal would not be here in this ambitious sense. My central point is that it implies knowledge, and therefore evidence that has not had the opportunity of being challenged. I beg to move.

The Earl of Erroll: I now understand exactly why the noble Lord, Lord Whitty, has proposed the amendment, and I agree that it would have been better to adopt the earlier amendments of the noble Lord, Lord Lucas. There is one other point regarding the number and nature of the copyright infringement reports which will be used to try to terrify the person—they should say how long they will be kept. That should be linked to a period of time. Ten infringements committed over 20 years is not the same offence as 10 infringements committed daily. It should state in subsection (6)(a) or (d)—I am not sure which—how long the reports will be kept.

Lord De Mauley: The noble Lord's amendment raises for the first time the issue of when a technical measure will be imposed. We will of course go into this question in detail later, but for now, I shall simply take the opportunity to ask the Minister two preliminary questions. We have already discussed the usefulness of detailing the possibility of imposing technical measures at a later date, but when will this paragraph be used? Does the Minister envisage it being included in the first approved code, or will the code be adjusted if, in the future, provisions for the imposition of technical measures are set up by the Secretary of State?

Lord Young of Norwood Green: Proposed new Section 124A(5) sets out what information a notification to a subscriber must contain and allows for further requirements to be introduced by the initial obligations code. Subsection (6) then sets out some of the things that the initial obligations code may require the notification to include. The noble Lord, Lord Whitty, has rightly spotted that subsection (6)(d) envisages that the initial obligations code might require notifications to issue a warning to subscribers that the number of infringements registered against their internet account may be taken into account for the purposes of technical measures.

Obviously, when the initial obligations come into force there will be no technical measures. We will come on to that later in the detailed consideration of the Bill, but we hope that the initial obligations will be so successful in reducing online copyright infringement that there is no need to move to technical measures. But we cannot be sure about that, which is why the Bill provides for technical measures should they be necessary.

We need to remember that the contents of the notifications to subscribers are controlled only by the initial obligations code. Consequently, in the event that technical measures were to be introduced, the initial obligations code would need to be revised to require the notifications then being issued to include appropriate information to subscribers about technical measures, and in particular to help subscribers take action to stop infringing copyright so that they do not become subject to technical measures.

While I agree that no notification should refer to technical measures unless or until such measures are in place, I do not believe that subsection (6)(d) would do that, and I think that it does provide an important part of the structure, should technical measures be introduced. We understand that the noble Earl, Lord Erroll, is concerned about the period. That will be covered in proposed new Section 124E(1)(d). The noble Lord, Lord De Mauley, asked when it would be used. In the initial code it applies to all notifications, and it may be used in a second or later notification. In the light of that explanation, I invite the noble Lord to withdraw the amendment.

Lord Whitty: My noble friend has underlined my point: what needs to be in the statement under subsection (5) applies whether or not we are into technical measures. There are legal consequences if you infringe copyright at present; someone could take you to court over it. That implies that technical measures are already involved. My noble friend seemed to suggest that the issues raised by the noble Earl, Lord Errol, could be delayed until we come to later clauses, starting with Clause 11, which covers the transfer from stage 1 to stage 2. Surely the first reference to technical measures should wait until we reach that stage. I am still not clear whether this would be a requirement set by the code for everyone, or whether it could be included in letters to particular persons. If it is the latter, that is where my suspicion arises, because it would then require the writer of the letter to have apparent evidence, which has not been subject to challenge.

I ask the Government to think about those consequences, and perhaps we can put all the issues that relate to the transfer from stage 1 to stage 2 all in one place. For the moment, I beg leave to withdraw the amendment.

Amendment 71 withdrawn.

Amendment 72

Moved by ***Lord Whitty***

72: Clause 4, page 7, line 11, leave out "electronic or"

Lord Whitty: My Lords, this is a practical amendment, which would delete the words "electronic or" before "postal address". I would be equally happy if it read, "electronic and postal address". This goes back to the issue of who is the subscriber. There is no use trying to notify the subscriber only electronically if it is not the subscriber who is using the equipment. In many cases, in a family, it will be the subscriber's children or friends of their children; where the employer is the subscriber, it could be a business colleague, or it could be a student in a library, involving all the issues that we discussed in our previous day in Committee. It therefore seems sensible that we should require that the notification is sent to the postal address of the subscriber, where the subscriber himself is more likely to receive it, and it not be deleted by someone who happens to be using the apparatus. That is intended to be helpful to the Government. As I said, either form of words would be acceptable to me. I beg to move.

The Earl of Erroll: My Lords, I just wanted to use this as an opportunity to raise another point. When I read the amendment, I was thinking about how the notifications will be issued. One problem that has become apparent recently—first with the loss of the HMRC disks and then when banks find that your credit card is being defrauded and they ring up to say, "Can you identify yourself? Give me your date of birth", and so on—is the opportunity for phishing. Often, criminals use the fact that they know that

subscribers are going to receive such notifications to purport to be the people sending them out and then to ask for various details that they can use for nefarious purposes. The code should also include a requirement on those sending out the letters to put in place some form of security system whereby a subscriber can check that it is a genuine notification, not one just purporting to be so. That is a whole area about which all these industries have been very lax so far, because there is no huge pressure on them to do anything about it. This might be a good opportunity to get them to pay more attention to it.

Lord De Mauley: My Lords, I am sure that we all agree that it is important that internet subscribers receive notice of an alleged infringement as soon as is practically possible. It is important that a subscriber cannot easily use the excuse that they did not receive an initial notification if they subsequently have technical measures imposed on them or a court action is pursued against them. I agree with the noble Lord, Lord Whitty, that sending notifications by e-mail may in many cases not reach the responsible person. The account may be unchecked, the e-mail may be diverted to spam, and so on. However, it is also important to keep the cost of the notification letters down to a sensible level and to provide ISPs with the flexibility to have contact with their customers in the most effective way. For that reason, we do not entirely support the noble Lord's suggestion of always notifying by post. Instead, we think use should be made of the internet service provider's knowledge of its customer. Our amendment would ensure that the internet service provider makes use of the address, electronic or postal, that it knows its customer uses; namely, that to which it sends a bill. This way, it can be sure that the subscriber, rather than a guest issuer, will receive the notification and that the person who might be liable for penalties will receive all initial warnings.

5.15 pm

Lord Young of Norwood Green: I will take Amendments 72 and 73 together since they require internet service providers to send notifications of alleged infringement to the billing address held by the internet service provider for the subscriber which, in practice, is likely in many cases to have the same effect as the amendment tabled by my noble friend Lord Whitty, which specifies that the notification be sent to the postal address.

I understand the intention behind this amendment. It is important that these notifications should be delivered in such a way that subscribers will receive and be aware of them. It is arguable that delivery to a postal address is the logical conclusion and more likely to result in the notification being seen promptly than delivery to an electronic address that may be little used or where the notification could be deleted.

However, as the noble Lord, Lord De Mauley, said, it is also important that these notifications can be processed and delivered in the most cost-effective way and, in some cases, e-mail will be the most effective, as well as cost-effective, route. I would not want to mandate physical delivery, since in certain circumstances that might not work; for example, for mobile networks with pay-as-you-go customers who do not have a physical address.

These are matters that can safely be left to Ofcom and the code to determine in detail. For example, it might be agreed that the final letter before a subscriber is included on a copyright infringement list should be sent by both electronic and postal means, possibly via recorded delivery. That is the sort of detail it would be unrealistic to try to stipulate in the Bill, but is a good example of how the added flexibility of the code can be left to ensure that a fair and effective regime is adopted.

I share the concern of my noble friend Lord Whitty, but we want to make sure that people are aware of what has happened. In many cases—it may be even in most cases—that will be by means of a letter but, for the reasons I have given, we do not want to rule out some flexibility in relation to electronic communication. In the light of that explanation, I hope my noble friend will withdraw the amendment.

Lord Whitty: I clearly failed to appeal to my noble friend in his other responsibility as Minister for the Post Office. In cases where an electronic address that is used by more than one person is unreliable, while I am quite happy, at this stage, to say this should be flexible and left to the code, a bit of guidance for the code drafters would be helpful. If we are not prepared to stipulate postal delivery, then the amendment tabled by the noble Lord, Lord De Mauley, which refers to the billing address, would be appropriate because it would mean that, in most cases, the notification would get to the subscriber rather than to someone who is using a different part of the apparatus to get into the system. I shall withdraw the amendment at this stage, but either the Minister or Ofcom will have to face up to this issue at some point. I beg leave to withdraw the amendment.

Amendment 72 withdrawn.

Amendment 73 not moved.

Amendment 74

Moved by ***Lord De Mauley***

74: Clause 4, page 7, line 13, at end insert—

"( ) Receipt of a copyright infringement report, the compliance with the obligations set out in this Act, the initial obligations code or the technical obligations code shall not be deemed to convey actual knowledge of unlawful activity for the purposes of the Electronic Commerce (EC Directive) Regulations 2002 or otherwise and shall not prejudice the internet service provider's ability to avail itself of the defences set out therein."

Lord De Mauley: We touched upon this issue in an earlier debate on the legal protections that internet service providers need when responding to a copyright infringement report. It is important that ISPs have the confidence to start the process detailed in the Bill without any risk that such measures will result in legal action from their subscribers.

The amendment would take this issue one step further. An ISP needs to be reassured that taking the actions that are proscribed under the Bill will not convey actual knowledge of any unlawful activity. It is clear that ISPs have a role to play in tackling internet

[LORD DE MAULEY]
piracy and in other far more important areas such as child protection and measures to tackle internet pornography. However, it is important to recognise that unless ISPs are given the type of protection that the amendment would provide, they might in some cases end up being actively deterred from helping to tackle illegal peer-to-peer file-sharing.

If notifying an alleged copyright infringer can be taken as evidence of knowledge of unlawful activity, this may open up ISPs to legal action. If so, ISPs simply will not give notice of infringements, and will therefore be between a rock and a hard place because they will have either failed in their duty to send notification or, if they have sent notification, prejudiced their defence of no knowledge. There is a danger that, unless ISPs have this assurance, the whole process which the Government are trying to establish will simply fail to function. I beg to move.

Lord Razzall: My Lords, I support the amendment, which is also in my name and that of my noble friend Lord Clement-Jones. This goes to the essence of the way in which the internet works. For those of us who are libelled, slandered or defamed from time to time over the internet, it is a matter of deep regret that we cannot pursue the relevant ISP in that regard, but we recognise that it is fundamental to the dissemination of the internet that the ISP acts simply as a conduit for the information that is being provided. Therefore, it is vital that nothing in the Bill disrupts the ISP's position. As the noble Lord, Lord De Mauley, says, if it did, no ISP would accept that anything that passes through its medium infringes copyright.

I suspect that the only comment the Minister can make is that the amendment is unnecessary because nothing in the Bill takes away these defences. If he is going to say that, I urge him to think again because this is a very important point for the ISPs, and I see no reason why the amendment cannot be made to the Bill. It would not damage it.

The Earl of Erroll: My Lords, this is extremely important. What is very often termed the mere conduit protection for ISPs and for people with things such as proxy servers is core to allowing internet traffic to proceed unhindered across the internet. We interfere with that at our peril. We should also think ahead to some of the powers which we are giving the Secretary of State later on in the Bill to alter various Acts and to introduce different technical measures, some of which may require the ISP to interfere with the traffic in a way that would be a breach of some of these other Acts. I am not sure that this has been thought through terribly carefully. We could end up inadvertently painting ourselves into a corner, and the UK could become a difficult place in which to do business.

Lord Young of Norwood Green: My Lords, the amendment seeks to preserve the position of internet service providers as "mere conduits", in the terms of the electronic commerce directive, which makes it clear that where a service provider simply acts as a carrier of information they cannot be held responsible for the content of the information they carry.

Let me make it abundantly clear for the record that it is no part of our intention here to deprive ISPs of their "mere conduit" status. It seems to me entirely right that mere conduits cannot be expected to be responsible for all the content carried over their networks. However, I would caution your Lordships that this House cannot make legislation that dictates the interpretation of European legislation. I fear therefore that this amendment, although I support its aims, would not in fact achieve any practical result.

Our belief is that what is proposed in this Bill will not prejudice the position of the ISPs under the electronic commerce regulations for two reasons. First, all it does is provide a formalised process to enable copyright owners to provide information that they already can, and sometimes do, provide to ISPs, so there is no real change here. Secondly, when they receive copyright infringement reports, ISPs will be acting as mere conduits under the e-commerce directive and, as such, the test for determining liability is not actual knowledge. Therefore, the amendment is unnecessary in practical terms to achieve the effect that noble Lords have in mind, nor would it be capable of achieving the desired aim were it to be agreed.

I take the point made by the noble Earl, Lord Erroll, in relation to the powers of the Secretary of State, but we believe that everything we put into legislation takes into account the legal position of internet service providers. We understand the concern expressed by the noble Lord, Lord De Mauley, about putting ISPs in an illegal position. Clearly, that would be counterproductive, to say the least. But, having checked out the legal position for the reasons I have given, I hope that the noble Lord will feel reassured and able to withdraw the amendment.

Lord De Mauley: My Lords, I am very grateful to the noble Lord, Lord Razzall, and the noble Earl, Lord Erroll, for their support. As the noble Lord, Lord Razzall, says, the ISP is simply a conduit. I am grateful to the Minister for his response, which is rather as the noble Lord, Lord Razzall, anticipated. I am sure that we will all need to give this some more thought. For today, I beg leave to withdraw the amendment.

Amendment 74 withdrawn.

Amendment 74A

Moved by ***Lord Clement-Jones***

74A: Clause 4, page 7, line 13, at end insert—

"( ) In this section "copyright owner" means someone who is established in the UK and whose primary business is the exploitation of UK copyright works in the UK and does not appear to have become a copyright owner or to have become authorised to act on the copyright owner's behalf for the purpose of pursuing infringement claims against subscribers."

Lord Clement-Jones: My Lords, Amendment 74A would ensure that only those copyright owners who were involved in genuine and substantive copyright business in the UK could benefit from the provisions of this Bill. One of the Government's stated purposes for this legislation is to assist growth and investment in

jobs in the UK by owners of UK copyright works—that is, increasing the contribution to the UK's economy by the UK's creative industries. The use of the legislation to further other interests will not contribute to or achieve this, but it will increase the numbers of notifications that UK internet service providers will be required to handle, so raising those providers' costs. It will also stimulate the proliferation of scams likely to cause harm and distress to UK consumers and citizens and it will create a hub for online infringement claims to be brought in the UK akin to the so-called defamation tourism claims made in the UK, which the Government recognise should be tackled and deterred.

The purpose behind this amendment is to rule out claims from companies that take up UK rights for the sole purpose of pursuing claims against alleged infringers of the copyright material involved. A number of such companies operate in the UK. Members on these Benches and, I believe, other noble Lords have received details of hardship cases of families being pursued by some of these companies and law firms acting for them. Their mode of operation is to pursue alleged infringers, having first obtained their details from the ISPs used by the consumers. They are able to obtain the details by means of what are known as Norwich Pharmacal orders, whereby a court order requires a respondent—for example, an ISP—to disclose certain documents or information to the applicant, or the company making the claim.

A Norwich Pharmacal order should be granted only where necessary in the interests of justice. Once the order has required the disclosure of the name and address of the alleged infringer, the claimant writes to them demanding upwards of £500 or threatening to sue. As I am sure many noble Lords will attest, this is becoming big business and does nothing to protect the proper and legitimate rights of copyright owners in the UK. This amendment is designed to prevent that. I beg to move.

5.30 pm

Lord Maxton: My Lords, I confess to considerable ignorance of the copyright laws, but a basic problem with the whole copyright business is that copyright is, in the main, about the use of something in a particular country, whereas the internet is international and therefore spreads across the world. There are differences in copyright law between, for instance, the United States of America and us, along with other parts of Europe. I do not know what difference that makes in relation to the Bill, but it is possible that it does.

The Beatles were the most popular British band ever, but I gather that their copyright is now held by interests in the United States. Does that make any difference to the way in which Beatles music can be downloaded by individuals in this country? I hope that the Minister will take the opportunity to make clear the differences between the two countries and how they might affect the operation of this Bill.

The Earl of Erroll: My Lords, this amendment is very pertinent, particularly as we are trying to allocate cost sharing as well. It is ridiculous that a UK-based ISP should have to bear 25 per cent of the costs, with no benefit at all, to help to finance the claim of a foreign rights holder, who bears the other 75 per cent. We will be transferring money from UK ISPs to foreign corporations and rights holders, which is not fair. If necessary, we should make allowances for that under the cost-sharing terms. Rights holders must be UK resident, domiciled, tax payers et cetera, in line with various other things.

A second point referred to by the noble Lord, Lord Maxton, arises concerning differences in the terms of copyright. One of the reasons why the Bill will be difficult to enforce is the Berne convention, to which many countries are signed up and under which we all acknowledge and respect different copyrights from other territories. The challenge comes when someone downloads something over here from a server that is physically resident in a different copyright jurisdiction, but one that is a signatory to the Berne convention, and it just so happens that neither the method of downloading nor the material downloaded is unlawful under that jurisdiction's copyright but it is in the UK. I can see some complicated tangles occurring, but this amendment could sort it out so that at least that level of complication does not arise, thus making one part of the Bill workable. However, I think that it will be quite difficult to make the Bill as a whole work at all.

Lord Lucas: My Lords, when we last discussed this matter, the Ministers involved fulminated against the activities of certain law firms and what they have been doing to tens of thousands of citizens, but I did not hear any proposals for what would be done about it. I hope that, even if Ministers disagree with the amendment tabled by the noble Lord, Lord Razzall, they will tell us about their own solutions.

Lord De Mauley: My Lords, we agree that the definition of "copyright owner", while generally understood in other pieces of legislation, leads to some confusion when looking at these provisions. The first major question is responsibility. What sort of organisation will take on the responsibility for identifying possible copyright breaches and issuing infringement reports to ISPs? This is not just of concern to ISPs, although, as we have discussed, they must be able to rely on the accuracy and legitimacy of the reports arriving at their door; it is also important to copyright holders that their interests both as individuals and as a group are being attended to. The subscriber might also have some concern if it appeared that a separate organisation had been established in order to process infringement reports and lists. Data protection concerns become paramount, as does the possibility of a level of read-across between copyright owners that was not originally intended.

I share with the noble Lord, Lord Maxton, an interest in the international element of the amendment. How does the Minister expect these provisions to operate in the international context? Many of the copyright holders will be from other countries, perhaps primarily the United States. How will compliance with the code, and indeed the extraction of costs, be enforced?

Lord Young of Norwood Green: My Lords, we discussed last week the legitimate concerns held by many over the practice by some legal firms of pursuing subscribers.

[Lord Young of Norwood Green]
I will be charitable and say that they do this overenthusiastically, which is my attempt at understatement. But we need to make a clear distinction here. Copyright owners try to avoid taking people to court for copyright breaches. Employing solicitors or other agents and attempting to settle out of court via a cash settlement is entirely legitimate and reasonable, provided that the circumstances and the means used are also legitimate and reasonable. What is not acceptable is where the evidence supporting such an alleged infringement is weak or not able to be scrutinised and where the language and tone are hostile and threatening.

However, trying to restrict who may take action under these provisions to a person who is established in the UK and whose primary business is the exploitation of UK copyright works, or indeed any attempt to limit who has the right to sue to a copyright owner with links to the UK, may breach the Agreement on Trade-Related Aspects of Intellectual Property Rights, or TRIPS as it is known in the trade. Such a provision would also appear to conflict with the prohibition on discrimination on the grounds of nationality in EU law and potentially with the EU directive on the enforcement of intellectual property rights.

We should remember that we are talking about copyright protection and not about the reform of the whole civil justice system. Nor are we able to amend international agreements. Copyright owners using our proposed measures will still be able to seek out-of-court settlements, but that will be only after the subscriber has received a number of warnings about their apparent infringing behaviour and after the copyright owner has obtained a court order to require the internet service provider to release the subscriber's personal details. I remind noble Lords that, in the procedure that we are suggesting, notification of infringement will have to be supported by validated evidence and strict procedures will be determined under the code. In future, that might influence the courts in relation to accepting evidence that is not so soundly based.

I have tried to explain the situation in relation to international copyright. I have some sympathy with the point made about the nature of the activities of some legal firms, but we do not believe that we can deal with that in this legislation for the reasons that I have outlined. The noble Lord, Lord De Mauley, I think, used the word "fulminated". We share his concerns and believe that the procedures that we have outlined, with the criterion rules on the validated evidence that people will need to provide under our code, will be a good influence and may eventually drive out the worst excesses. While I understand the concerns expressed, we are doing everything that we can and we do not believe that the solution proposed in the amendment would solve the problem. For those reasons, I invite the noble Lord to withdraw the amendment.

Lord Clement-Jones: My Lords, I thank the Minister for that reply. This is another way of coming at the problem that was dealt with in the amendment moved earlier in our proceedings by my noble friend Lord Razzall. It tries to insist that copyright owners first undertake the notification process under this Bill rather than go through the courts. It is precisely the act of going through the courts that has produced some of the hardship cases that the noble Lord, Lord Lucas, mentioned; he gave the figure of some 10,000. That is a matter of concern to us and I am interested that the Minister picked up on it.

I thank all noble Lords who have taken part in the debate. Clearly this is a shared issue, but it goes even wider than we have described; the noble Lord, Lord De Mauley, was specific on this. The question is: how can you fix liability effectively unless you have a UK copyright owner vehicle? How can you insist that a copyright owner observes the code unless you have a UK vehicle to which liability can be attached? As they say, some of my best friends are copyright owners, but we are trying to prevent the rogues from operating in such circumstances.

The Minister has thrown the equivalent of the book at me—certainly the international trade book—in terms of TRIPS, prohibition on discrimination and so on, and I am sure that he is well advised from the trade law angle. However, there must be a way of preventing some of these international organisations from operating in an irresponsible fashion. I do not believe that the elements that the Minister has described—TRIPS or a prohibition on discrimination—necessarily allow unfettered behaviour by these organisations. Of course we must observe our free trade obligations—we on these Benches defer to no one in our support of free trade. However, just as environmental and quality conditions are imposed in trade, so we must expect international organisations to operate responsibly. If that means establishing a vehicle in the UK, that is not unreasonable. Indeed, it would be a benefit for the purposes of the Bill more broadly and would fix responsibility on a clearly defined UK vehicle.

I am not yet satisfied with what the Minister has said. However, whether through Amendment 129, which is yet to come from the noble Lord, Lord Lucas, through this amendment or through the previous amendment, tabled by my noble friend Lord Razzall, we have to try to find a solution to these issues, otherwise injustice will continue. Although I shall withdraw the amendment, we will take this matter further on a future occasion. I beg leave to withdraw the amendment.

Amendment 74A withdrawn.

Clause 4 agreed.

5.45 pm

Amendment 75

Moved by ***Lord Lucas***

75: After Clause 4, insert the following new Clause—

"Obligation to block access to a website

After section 124A of the Communications Act 2003 insert—

"124AA Obligation to block access to a website

(1) This section applies if it appears to a copyright owner that a website is infringing his copyright for gain.

(2) The owner may seek a declaration from a court that it is satisfied, on the evidence available, that such an infringement is taking place, and that notice of the infringement has been given and has not resulted in the infringement ceasing.

(3) An internet service provider shall, on the presentation of the declaration, block access to the website from its services.""

Lord Lucas: My Lords, not for the first time, Clause 4 has proved difficult to get rid of and I am glad that we have gone past that and on to an amendment which I hope the Minister will not take too literally. The amendment seeks to tackle the general question of how, under the regime proposed by the Government, or some extension of it, we are to deal with infringement by means of websites.

This has two aspects, one of which was referred to gently at Second Reading. That aspect is the evolution of infringement from peer to peer to using cyberlockers, I think they are called. There was also the impromptu speech of the noble Lord, Lord Triesman, a couple of days ago on the problems faced by football authorities, which is largely a question of a streaming video from identifiable sites. These are not really tackled by the peer-to-peer clauses as they are at the moment and the amendment proposes a means of dealing with identified websites.

From what the Government have said, they need something like this to deal with the peer-to-peer problem. Subscribers, particularly those who have wireless networks or other networks to which adults other than themselves have access, will need some method, through their routers or whatever other kit they are using, of blocking access to peer-to-peer networks. Otherwise, as the responsible person under the Bill, there will be nothing they can do to prevent other people on the network infringing copyright and there will be nothing they can do to discover whether those other people have infringed copyright because there is nothing in the Bill which gives the copyright owner or the subscriber the necessary rights of access to the other computers on the network.

Unless we give the subscriber power to deal with illegal file sharing, he will be between a rock and a hard place. He will be prosecuted because file sharing has taken place via his network and he will have no powers to deal with that fact other than to cease his internet connection or not allow other people onto it. We have to live in the real world. People need to operate via networks and shared access. We have to live with that and provide a way for copyright to survive in that environment rather than pretending that we can shift the whole electronic environment of the country merely to appease the music industry. It is not that important. The music industry has to move with the times; the times do not have to stand still for the music industry.

We need a way of enabling individuals to block access to offending sites. Clearly an IP provider cannot decide which sites should be blocked; it has no resources to make such investigations. I suspect that the Government would not wish to publish a list of sites which are to be blocked, and so it comes down to the industry. Many of us have our e-mails blocked from time to time when we find ourselves on people's blacklists, although the noble Lord, Lord Maxton, has always behaved himself. I find myself on blacklists quite frequently. I write nice letters to whoever it is who has put me on them and a day or two later I am off. It is an accepted feature of the internet having to protect itself that you will find yourself in that kind of trouble from time to time and, as long as there are efficient appeal mechanisms, you will get off.

Someone will have to run a black list, as it were—a list of peer-to-peer sites and a list of sites known to be involved with copyright infringement in other ways—so that individuals who wish to protect themselves against actions under the Bill are able to do so. The amendment proposes one way in which such a list might be compiled. It requires evidence to be produced in front of a court and is a relatively formal way of doing things. It may be that an informal way is best but we need to address the problem somehow. I beg to move.

Lord Maxton: My Lords, my problem is often the other way round: I am told about websites that I have no wish to know about. This is done mainly through e-mails which say, "Click on this and you will go into such and such a website". I have not been blocked from using them.

I am glad the noble Lord, Lord Lucas, said that we should not take the amendment too literally because, given the way that it reads at the present time, he is absolutely right. In his speech he made reference to file-sharing websites and so on, but the proposed clause does not refer to them. In fact, it could apply to any website that uses any piece of material for which it perhaps has not obtained permission or should have obtained permission and did not. It might even refer to one of the football clubs of the noble Lord, Lord Triesman, playing music over its loudspeakers for the crowd at the ground which is picked up on the internet. When it goes out on the internet, is it a breach of copyright? I do not know. As the amendment is worded at the present time, it does not serve the purpose.

I assume that by "gain" the noble Lord means financial gain. There are other ways in which people can make gain from using non-copyright material. He is right that, as the proposed new clause is worded, it does not make a lot of sense.

The Earl of Erroll: My Lords, this is a useful amendment from the point of view of discussing the issue. I agree with the noble Lords, Lord Lucas and Lord Maxton, that the proposed new clause would not be satisfactory in its current form, but were the Government to think along these lines, which I could envisage them quite easily doing, particularly when they get around to trying to amend the Copyright, Designs and Patents Act under Clause 17, there are certain points to take into consideration before we start blocking access to websites. These points have arisen elsewhere, because action is taken against websites used for the purpose of phishing; in other words, trying to get to your security details in order to misuse them. Very often, part of a perfectly good website is hijacked. Several government websites are known to have hosted phishing pages because people have hacked in and popped their own thing into a sub-page on the government site. It can happen to anyone's website: various large commercial organisations have had it. When the blocking occurs, you cannot block to a sub-page level; you would end up blocking the whole website. You might suddenly find the DWP website, for example, being knocked out, which would be quite interesting. From that point of view, therefore, the website owner must be warned before such action takes place. Some precautions need to be taken.

[The Earl of Erroll]

The Bill does not distinguish between any forms of copyright; it applies to all copyright, including written copyright. It is mostly music, film and games software that we have been talking about, but the provisions could be used equally well against any written copyright infringement. We should be very careful that we do not inadvertently put in the Bill—we should probably bear it in mind as we look at other clauses—something which someone could use to their own gain in order to try to inhibit someone else's ability to do business because of written copyright issues. I should think that a lot of websites abuse written copyright in some way or another.

A website that everyone knows has copyright infringements all over it is YouTube, which fulfils a huge public function and should not be removed. However, a clause such as this might be used to close down something like that, which would not be in the public interest. The amendment therefore raises a lot of useful considerations in case the Government decide to go down this route.

Lord De Mauley: My Lords, my noble friend has proposed a new clause which, in some ways, is a forerunner to the debates which we shall have on Clause 17. He is, of course, quite right: peer-to peer file-sharing is only one of the ways in which copyrighted material is currently infringed. Streaming pirated material is a growing area of copyright infringement. I am sure that there are other ways of stealing material, of some of which your Lordships will be aware and some of which may already be being used but are presently not widely known about. Use of these is likely to continue to grow, especially as the speed of broadband connections grows.

There is, of course, a precedent for my noble friend's suggestion of blocking access to sites proven to be breaking the law. Legislation has, for example, been enacted to block access to sites which show child pornography. However, it appears from conversations with officials that the situations are different in more ways than just the seriousness of the offence. There is, for example, the necessity of complying with the EU directive on e-commerce. I hope that when the Minister responds to my noble friend's amendment, he will be able to give us a comprehensive breakdown of the difficulties that may arise when legislating to block access to a site proven to be providing illegal material.

Lord Young of Norwood Green: My Lords, the purpose of this amendment is to add a further obligation on internet service providers to block access to a website. This would be done on the basis of a declaration by a court obtained by a copyright owner that infringement was taking place for gain on a previously warned website and that such infringement continued after the warning. An internet service provider would be required to block access to such a site on presentation of the court declaration by the copyright owner.

I understand the motive behind the amendment and the concern expressed by various copyright owners about the threat posed to them by sites offering services such as cyberlockers or streaming. I do not doubt that such sites may be used for the illicit sharing of copyright material and that this has potential to damage copyright owners' interests. However, it would not be a desirable amendment to accept.

First, the amendment would change the focus of the legislation from targeting measures against specific infringers to including network-level measures. These inevitably attract controversy and concern. One reason for this is that network measures such as blocking are blunt instruments. Many websites used for infringing activity will almost certainly be used for entirely legitimate purposes as well—cyberlockers could, for instance, be used for storing photographs. Blocking access to them may prevent infringing behaviour, but it would also block entirely lawful activity, and people so blocked would be entitled to be aggrieved. That is part of the concern expressed by the noble Earl, Lord Erroll.

Secondly, copyright owners can already obtain from the courts an injunction preventing copyright infringement by a website if they have evidence of such infringement. There is no need for any further power for copyright owners to take court action. The difference is that this amendment seeks to put the responsibility for enforcing copyright on an ISP rather than relying on the existing powers of the courts directly to order injunctive relief against the actual infringers.

Finally, there is a serious practical point to be borne in mind. Were the new obligation to be accepted, it would almost certainly be notifiable to the European Commission under the technical standards directive, which, as noble Lords will know, requires that such a measure affecting the operation of internet service providers is notified while in near-final form but is capable of amendment. It also specifies a minimum three-month standstill period while member states and the Commission have the opportunity to consider and comment—a delightful thought. To state the obvious, we do not have three months available within the current Session.

I have tried to address the concerns expressed by the noble Lord. We do not believe that his proposal is the right vehicle or that it is legally feasible or technically desirable because of its unintended consequences for perfectly legal operations. In the light of that explanation, I hope that the noble Lord will feel able to withdraw the amendment.

Lord Lucas: My Lords, I thank the Minister for that reply. He has not addressed my wider concerns, but we shall come back to them on plenty of other occasions when discussion centres on the question of how somebody who has not downloaded any copyright material but who is presented with evidence that it has happened over a network for which he is responsible takes action to prevent infringement in future.

Lord Young of Norwood Green: We have endeavoured already to give details of how communal networks can be protected. I do not know whether the noble Lord has had an opportunity to look at that. If we need to go into further detail, we shall do so, but we believe that it is technically feasible. I did not want to go into the detail again.

Lord Lucas: My Lords, as I said, we will come back to it. I beg leave to withdraw the amendment.

Amendment 75 withdrawn.

Clause 5 : Obligation to provide infringement lists to copyright owners

Amendment 76

Moved by ***Lord Razzall***

76: Clause 5, page 7, line 22, at end insert "; and

( ) the internet service provider has received fifty or more copyright infringement reports about the relevant subscriber from the copyright owner for that period"

Lord Razzall: My Lords, I shall speak also to Amendment 85, in the name of my noble friend Lady Miller, who unfortunately cannot be here today. We come back to the fundamental issue that we discussed at Second Reading and in the various quasi-Second Reading speeches that started off this Committee several days ago: how we find the right balance between the belief of the individual that they can access the internet primarily for free against the rights of the copyright owners, who believe that the use of their copyright without penalty constitutes at best theft and at worst something that requires them to receive compensation.

There is common ground among all participants in this debate, including Her Majesty's Government, that these provisions are intended to attack only serious infringers; they are not intended to attack somebody who does a one-off download, either in ignorance or for whatever purpose. They are intended only to attack serious infringers. We think that as a matter of policy it should be for Parliament to determine what constitutes a serious infringer rather than, as the Government propose, that it should be left for Ofcom and the code. There are all sorts of technical issues that Ofcom will need to take into account, which cannot be in the Bill—but we see no reason why what is thought to constitute serious copyright infringement in these circumstances cannot be in the Bill.

6 pm

We have suggested that the minimum threshold should be 50 copyright infringement reports; we take that figure from the Explanatory Notes that the Government have circulated with the Bill, where it is suggested that the code will contain a threshold such as 50 reports. If that is the case in the Explanatory Notes, and if the Government have gone that far, we see no reason why at this stage that threshold cannot be put into the Bill. That is the purpose of Amendment 76. My noble friend Lady Miller may not be quite as liberal as my noble friend Lord Clement-Jones and me and has suggested only 10—and I know that she will enjoy reading that statement when she reads *Hansard*.

This is obviously a probing amendment. The principle that we seek to establish is that a number of infringements should be enshrined in the Bill and not in the code. After all, when the code comes back to your Lordships' House for approval, we will be able only to accept or reject it. If we disagree with the definition in the code of a regular infringer, we will have to throw out the whole code because we cannot amend it, which would be daft. It would be much more sensible to put it in the Bill. I beg to move.

Lord De Mauley: My Lords, the noble Lord, Lord Razzall, raises interesting questions about the use to which the copyright infringement lists will eventually be put. We originally understood that their purpose was to help rights holders to overcome the obstacles standing in the way of suing successfully copyright infringers through the civil courts. Proof that a single subscriber was knowingly infringing after being sent numerous warnings that such infringement was illegal would surely help, as would being able to identify the subscribers with large numbers of infringements against them. However, it is not obvious from the draft that this is a clear purpose of the legislation and the relationship between the lists, the letters and the reports are more confused when we turn to the fact sheet that we have been sent.

As I understand it, the Government are considering three notification letters to be an adequate warning—one after the first infringement report against a subscriber, one after a further 10 infringements or a period of time, and the third and final warning letter after the 30th. I assume that the Government intend the requirement in subsection (1)(b) of the proposed new section to be a reference to three letters being sent. Will the Minister confirm that? Furthermore, will the list provided to a certain owner be composed of reports made by that same owner against the subscriber? Is that correct? How will this work if infringement reports are to be made by a trade body or collecting society? Will this body be able to apply for a list only on behalf of one owner, or will it be able to act as one body, able to demand lists of all reports made on behalf of all copyright owners for whom it is acting?

If there is a specific threshold in the Bill, there must have to be some provision for flexibility. It appears that currently the process for identifying copyright breaches is expensive and therefore is not used to catch all instances of copyright infringement. This is, I am sure, likely to change, especially if these provisions create a market for the development of cheap and effective software that does a better job. There is therefore a strong possibility that a threshold which is based on current effectiveness would be out of date in a relatively short period of time.

Lord Whitty: I support the principle of a threshold, but whether it is appropriate to state the threshold here or at the point when we seriously consider the technical measures in the Bill, I am not entirely clear. In neither place at present is there a clear threshold, yet the principle, as the noble Lord, Lord Razzall, said, of introducing this legislation, is to deter or punish serial infringers. Some of the calculations in the fact sheets and impact assessments that the Government have provided must imply some level of intervention before they can make the calculation of how much it will cost and what the return to the rights holders would be, and so forth. Indeed, there is a reference, which the noble Lord, Lord Razzall, mentioned, to a threshold of 50. I am not sure whether that 50 relates to a first letter or a technical measures letter—that is, the third letter. Either way, the acceptability of the approach would be much easier for the Government if they indicated that we were talking about multiple infractions.

[LORD WHITTY]

The Government should take away the amendment and consider where it would be most appropriate to put it. There may be two different levels in the end, but it is important that the primary legislation indicates broadly the level at which the follow-through sanctions apply. If it does not, everybody will believe that such sanctions could arise with casual downloading or uploading that may not be authorised by the subscriber. If the Government accepted a threshold for the beginning of the process and of the technical measures, a lot of those concerns would be reduced if not entirely allayed. The concept of a threshold is an important one, which the Government should take seriously.

The Earl of Erroll: My Lords, I support the principle of the amendment. It is much safer to do this at a parliamentary level, where we can take into account larger considerations, than having some official put under a lot of pressure behind the scenes to adopt a harsher or less harsh regime as time goes on. Under the amendment, you could have a less harsh regime, which is fine. In deciding on a number, we have to remember that a subscriber does not mean one end-user; a subscriber could have four, five or six children or a flat full of 10 students—it could be anything. So 50 downloads could be five downloads over 10 people, which is not very much. It hardly hits the music industry very hard at all. In fact, it is considerably less than people used to put on to Phillips cassettes when they taped Radio Luxembourg and other radio shows a long time ago, which did not bankrupt the industry. So we should set it at a level that avoids having thousands of letters flying around the place and which shows that we are chasing only the serious ones, not the casual person who infringes only occasionally.

Lord Lucas: My Lords, this is a problem that we have visited before. As the noble Earl was saying, the trouble is not that downloading is not being monitored, but what is made available for upload. The average child, uploading a reasonably extensive music library, could find that they had 1,000 infringements instantly, if that is where the copyright owners happen to turn their attention, because it will all be done in an automated fashion.

There really is not a figure that one can put on the level of infringements. That will not be a safeguard for people at all. The safeguards will have to be entirely in terms of timescale to ensure that after the first alleged infringement, there has been a process of notification; that when the time for that is complete and there has been another infringement, maybe there will be another, more severe notification; and then, after the timescale for that, there has been a third infringement. You could run things out in that direction.

I agree that there ought to be a de minimis element—one infringement does not count—but, given the nature of the enforcement that we are looking at, I think there will always be multiple infringements, and if the copyright owners are interested in going after someone then they will always be in a position to do so. Perhaps it is fair that they should be able to pursue someone after just one infringement; suppose someone is making available for upload £10,000-worth of industrial software. One such infringement should be enough.

This is going be a difficult process to quantify. We need safeguards built into the Bill in some way, and they should be in terms of timescale.

Lord Whitty: My Lords, the point that the noble Lord, Lord Lucas, made at the end underlines my earlier intervention on the previous day that the sanction process was defined originally in terms of peer-to-peer file-sharing but the Government have extended it to copyright violations of all sorts. A single violation of some forms of copyright violation might well require this kind of intervention, but not run-of-the-mill peer-to-peer file-sharing.

Lord Davies of Oldham: My Lords, if I may say so to my noble friend Lord Whitty, we are not discussing "run of the mill"; as the noble Lord, Lord Razzall, indicated in his opening remarks, we are concerned about multiple infringements, which is a serious issue. The problem, as the noble Lord, Lord Lucas, aptly identified—in fact, he summed it up rather better than I am likely to—is how one quantifies the seriousness of the infringement. The noble Lord, Lord Razzall, suggested that the trouble with the concept of the threshold is that there is a question about whether it should mean the number of times or the number of infringements, but, as the noble Lord, Lord Lucas, indicated, once might be enough if substantial sums of money were involved.

The Government's conclusion about these amendments is that they have provoked an interesting debate, and one that will exercise our minds continually throughout the Bill, but the amendments themselves will not do. Surely it is better that we recognise the range of potential infringements that would be serious, and that we have sufficient flexibility to be able to cover all infringements when they are serious, whether they are quantifiable in terms of one, two, 50 or several thousand.

The Government's argument is straightforward: it is best left to the code to provide, effectively, room for horses for courses with regard to the nature of infringement, rather than trying to put figures in the primary legislation when on all sides we are wrestling to identify what those figures would be. Certainly the figures that the noble Lord, Lord Razzall, was identifying will not do.

I ask the noble Lord to accept that he has identified an important issue. We all appreciate the fact that we are concerned not about casual infringement but serious infringement. That may be a question of infringement over time, infringement that is hugely costly or infringement that occurred on many occasions by large numbers of people, but it is better that these issues are identified in the code than that we attempt to put figures into primary legislation. That is why I hope he will feel able to withdraw his amendment.

6.15 pm

The Earl of Erroll: I notice that in the same proposed new section, subsection (3)(b) says,

"the number of the reports has reached the threshold (if any) set in the initial obligations code",

so the Government will be setting a threshold. They say that it is not Parliament's business to decide that threshold, so do they think it is better done by someone

in a back room just taking a figure out of the air, or something like that? Maybe by the next stage the Minister could indicate exactly how these thresholds will be determined, if Parliament is not felt to be equipped to do this itself.

Lord Davies of Oldham: As I have sought to indicate, and as has been reflected in the contributions to this debate, there is a considerable range of issues, so in a sense the concept of the threshold has a range to it. I am seeking to avoid, in primary legislation, figures that would seek to determine the threshold that would have no viability with regard to certain infringements. Within the framework of the code, we can take account of the nature of potential infringements and have the flexibility that is necessary to successfully limit the infringements in their variety, which have been exposed in this debate.

Lord Razzall: My Lords, in due course I will withdraw the amendment, but I am puzzled by paragraph 48 on page nine of the Explanatory Notes. If the Government's position were as the Minister has just explained it, the paragraph would have said, "The intention is for the code to set out what constitutes a serious repeat infringer, taking into account all the relevant factors, such as those explained by the noble Lord, Lord Lucas, the noble Earl, Lord Erroll, and the noble Lord, Lord Razzall". It does not say that; instead, it says:

"The intention is for the code to set out a threshold number of CIRs, for example 50".

If the Government's thinking has moved on from when the Explanatory Notes were written—that is, the Government are now saying that it will be not just a number but something much more complicated—then when they come back on Report they need to explain exactly how they envisage that the Explanatory Notes will be altered to reflect what the Government want.

The important point here is that we believe, and this is intrinsic—in fact it is explicit, never mind intrinsic—in what other noble Lords who have participated have said, that whatever decision or recommendation the Government are coming to about how to define a serial infringer should be in the Bill. It should not be left, as the noble Earl, Lord Erroll, said, to people—he might even have said "bureaucrats"—in a dark room coming up with a decision or recommendation that none of us will have an opportunity to comment on.

This is an important point, and I commend the Minister to look at *Hansard* and take the advice of his noble friend Lord Whitty to take it away, think about it and perhaps come back on Report with something on which we can all agree. In the mean time, I am happy—no, I am prepared—to beg leave to withdraw the amendment.

Amendment 76 withdrawn.

Amendment 77 not moved.

Amendment 78

Moved by ***Lord Clement-Jones***

78: Clause 5, page 7, line 24, leave out "in relation to each relevant subscriber"

Lord Clement-Jones: My Lords, Amendments 78 and 79 need not detain the House for long. This is all in the interests of elegance of language in Clause 5. The amendments propose to leave out,

"in relation to each relevant subscriber".

New Clause 124B(2)(a) would be much better without those words and with the word "a" substituted for "the" in the third line of that subsection. That wording would still reach the same intent. I beg to move.

Lord De Mauley: My Lords, I share the concerns of the noble Lord, Lord Clement-Jones, about the drafting of this subsection. It is not clear exactly what is intended. We foresee that, as drafted, this clause could have curious unintended consequences. For example, last week we discussed Amendment 43—which is essentially to decide who is to blame when a subscriber's account is used by a third party. The Minister was not very receptive to absolving subscribers from blame or responsibility if someone unknown to the subscriber was using his service provider. As presently drafted, this clause could create a subscribers' blacklist which would follow the individual even if that person was innocent of any infringement.

Our Amendments 83 and 114 in this group attempt to ensure that any list refers only to a particular subscriber to a particular service. I very much hope the Minister will be able to tell the Committee whether, if a person has stopped subscribing to a service and signed up with another ISP, or even if he returns to the same ISP at a later date, the list will start from scratch. Or will it be carried over? Similarly, if a person has two accounts with an ISP—perhaps a domestic one and another at work—will they be linked through this list? If these provisions allow for a blacklist to be created of people who have previously infringed copyright, and if an infringement list were to follow the subscriber around, would there not be data protection ramifications? Should there be provision for a method of appeal to avoid people being blacklisted for life?

Lord Young of Norwood Green: My Lords, I will speak first to Amendments 78 and 79, since they address the same issue. Subsection (2) in Clause 5 requires the ISPs to be able to compile lists in relation to any "relevant subscriber" that identify all the copyright infringement reports relating to particular subscriber accounts, without identifying the subscriber in any way. The Bill then defines a relevant subscriber as a repeat infringer who has reached any threshold for receipt of copyright infringement reports that might be set by the initial obligations code.

These amendments, however, appear to remove the concept of a relevant subscriber, which would require all subscribers to appear on the copyright infringement lists. What is important is that copyright owners should be able to identify the worst infringements to enable them to target legal action against those subscribers who systematically—and, I emphasise, despite many warnings—continue to infringe copyright. I do not believe that the amendment as proposed would improve the operation of the copyright infringement list. In light of that explanation, I invite the noble Lords not to press the amendments.

[Lord Young of Norwood Green]

I turn to Amendment 83. The Bill's definition of which subscribers should be included on the copyright infringement list refers to the number of infringement reports in relation to the subscriber. The amendment would change the wording so that we were looking at the number of infringement reports in relation to the subscriber's account. There is a serious point here, which we have discussed before. All the infringement reports generated as a result of this legislation will identify accounts, not individuals. It is not possible to associate an infringement with a specific person for the reason that has previously been identified—for example, where two or more people share an internet connection, or even a computer, within a house. However, while the amendment accurately reflects the nature of the copyright infringement reports, it would not make any difference to the meaning of the legislation. Therefore, in the interests of making progress, I again invite the noble Lord not to press the amendment.

Indeed, I make a similar point about Amendment 114. The effect of this amendment, tabled by the noble Lords, Lord Howard of Rising and Lord De Mauley, would not alter the effect of the existing text, It would simply state that the subscriber identified by the internet service provider is a subscriber to an internet service. I suggest that there is no need for such an amendment; it is perfectly clear within the existing text that the subscriber is somebody who thereby receives an internet service. Of course, "subscriber" is defined, in relation to an internet access service, within Clause 16 as a person who,

"receives the service under an agreement between the person and the provider of the service".

Again, since the meaning is entirely clear without the additional language proposed in the amendment, I invite the noble Lords to withdraw this amendment.

In answer to the question asked by the noble Lord, Lord De Mauley, about whether there will be an infringers' blacklist, we have no plans to establish a blacklist of subscribers who have infringed in such a way that the subscribers would have their data passed from one ISP to another—or, indeed, to anyone else. We are trying to link the subscriber to that particular account, rather than a range of accounts.

Lord Clement-Jones: My Lords, I thank the Minister for that response. He has very helpfully described the workings of new Section 124B and added considerable clarification. I beg leave to withdraw the amendment.

Amendment 78 withdrawn.

Amendment 79 not moved.

Amendment 80

Moved by ***Lord Razzall***

80: Clause 5, page 7, line 27, leave out "enable" and insert "identify the name or address of"

Lord Razzall: My Lords, in moving Amendment 80, I will speak also to Amendment 81, which is grouped with it. This is, in reality, a drafting amendment; I do not think that anything here is a matter of principle. We are looking at Clause 5 and the addition of proposed new Section 124B to the Communications Act 2003. In subsection (2)(b) we find that the ISP has to provide a copyright infringement list that,

"does not enable any subscriber to be identified".

That seems something of a legislative oxymoron, because the whole point of this clause is that the subscriber will in due course be capable of being identified. Indeed, paragraphs 49 and 50 of the Explanatory Notes explain how subscriber 936 is being linked to most CIRs although no personal information about subscriber 936 would be included. It states that,

"to get this personal data, the copyright owner would need a court order".

It seems that the clause intends that it should not be possible to identify the name and address of the subscriber from the copyright infringement list. Clearly, we cannot simply say that it should not enable any subscriber to be identified when, both in relation to the Explanatory Notes and in due course, the whole point of a copyright infringement list, if the procedures are followed, is that the subscriber will be identified. Otherwise, how can the penalties which will be set out in the code be attached to a subscriber whose identity is unknown? I beg to move.

The Earl of Erroll: My Lords, I am afraid that I disagree with this amendment. The whole point at this stage is that the subscriber should not be identified. It is the Norwich Pharmacal order from the court that enables the subscriber to be identified. It is at that point—going back, again, to the ISP—that the ISP can reveal information that enables the subscriber to be identified. As I understand the Bill, at this point the purpose of the list is purely to enable the rights holder to realise that someone is breaching copyright, and breaching it sufficiently often that they want to proceed and take the trouble of taking out a Norwich Pharmacal order.

If we do not go through the courts in order to find the subscriber's identity, I suspect that we will be in breach of the EU directives. Certainly, I would be very much against it because we need to enhance privacy on the internet, which is one of the reasons why I was thinking about how long this information is kept. The noble Lord, Lord De Mauley, raised the point that under the Data Protection Act, some of this information should be destroyed at regular intervals to ensure people's privacy.

6.30 pm

Lord Young of Norwood Green: My Lords, subsection (2) in Clause 5 requires the ISPs to compile lists, in relation to any relevant subscriber, which identify all the copyright infringement reports relating to particular subscriber accounts without actually identifying the subscriber in any way.

These amendments seek to ensure that the name and address of a subscriber cannot be identified from the copyright infringement lists. I fully support that aim. However, I believe that the formulation in the Bill as drafted is, in fact, stronger in this regard than the proposed amendment. It is an absolute requirement that the information on the list should not enable the subscriber to be identified. The amendment, on the

other hand, would restrict the requirement not to identify the name and address of the subscriber, and that leaves open the possibility that some other form of identification—the job title and company, for example—could be provided.

On this occasion, I concur with the analysis offered by the noble Earl, Lord Erroll. With that explanation, I invite the noble Lord to withdraw the amendment.

Lord Razzall: I understand the point about the Data Protection Act, which is why it is essential that a clause in this form exists. As the Minister rightly indicated, the intention of my amendment is to make clear that the name and address of the subscriber should not be disclosed. However, as subscribers are clearly being identified, if only by a number, it seems linguistic nonsense to say they are not. I have no doubt that the Minister and his officials will think about this. In the mean time, I am happy to withdraw the amendment.

Amendment 80 withdrawn.

Amendments 81 to 83 not moved.

Amendment 84

Moved by ***Lord Razzall***

84: Clause 5, page 7, line 32, leave out "(if any)"

Lord Razzall: I wish to speak briefly to Amendments 84 and 107. Amendment 84 is a very straightforward amendment. It suggests that the words "if any" should be left out at line 32, page 7, on the grounds that it will be—I think that it already is—the clear wish of Parliament that a threshold should be set out in the initial obligations code. Regardless of whether it is a code from the industry or from Ofcom, there must be a threshold. The insertion of the words "if any" seems to suggest that there may not be a threshold. Therefore, I propose that those words should be deleted.

Amendment 107 goes over the ground that we discussed under a previous amendment. Therefore, I shall move it formally when we come to it. In the mean time, I beg to move Amendment 84.

Lord Young of Norwood Green: My Lords, I want to say something helpful. Frighteningly, I suggest that we are prepared to accept this amendment. The purpose of the amendment is to require that the initial obligations code contains a threshold over which relevant subscribers could be added to a copyright infringer list. Generally speaking, I have taken the view that where there is scope to provide flexibility without disadvantaging any of the parties then we should take it. However, underlying that is the necessity that this should be, and be seen to be, fair to subscribers, the majority of whom, after all, do not infringe copyright online. It is reasonable that those who are so identified should have the certainty that they will not find themselves on the copyright infringers list if they ensure that they take steps to avoid doing so, which logically means that there must be a threshold which subscribers can ensure they do not go over. All this suggests that I see real merit in this suggestion, and we would therefore like to accept this amendment.

Amendment 107 suggests essentially a consequential change to the requirements for the contents of the code. This amendment seems essentially reasonable, but we will need to think about the precise wording required. Consequently, I suggest that we take this one away and consider it further. On that basis, I hope the noble Lord will feel able to withdraw Amendment 107.

The Earl of Erroll: I do not want to be difficult because I entirely agree with the noble Lord, but in the light of the previous debate, when we discussed what the threshold would be, it transpired that it might be too complicated to have a single threshold to cover all circumstances. Therefore, the Minister may want to look at the measure in the light of giving more flexibility than would be permitted by a single number of reports. You might want a different number of reports for different types of infringement. I am thinking of the comments made by the noble Lord, Lord Lucas.

Lord Razzall: I am very grateful to the noble Lord for agreeing to Amendment 84. As regards Amendment 107, I had assumed that what the noble Earl has said would be the case, and that the Minister would look at this in the context of the remarks made in the previous debate.

Amendment 84 agreed.

Amendment 85 not moved.

Clause 5, as amended, agreed.

Clause 6 : Approval of code about the initial obligations

Amendment 85A

Moved by ***Lord Davies of Oldham***

85A: Clause 6, page 7, line 44, leave out from "may" to end of line and insert "by order approve it, with effect from the date given in the order."

Lord Davies of Oldham: My Lords, I beg to move Amendment 85A and speak to the three other government amendments in this group. The purpose of the amendments is to put into effect one of the recommendations of the Delegated Powers and Regulatory Reform Committee in its second report published on 17 December 2009.

The report noted that the procedure for the approval of the code is different according to whether Ofcom approves a code made by somebody else or makes one itself. Since the effect on copyright owners, internet service providers and subscribers is not materially different whether the code is merely approved by Ofcom or is actually made by Ofcom, the Delegated Powers and Regulatory Reform Committee considered that the negative procedure should apply when a code is approved by Ofcom, just as it does when a code is made by Ofcom.

We have looked at this issue further and we regard this as unassailable logic. At the moment Ofcom has to give notice of an approval or withdrawal of approval

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in relation to the code and the notice has to be published in a manner that Ofcom considers appropriate to bring it to the attention of those likely to be affected. Any notice along with the approved code or any approved modifications have to be laid before Parliament.

The effect of the amendments would be to provide that when the code is in a form that is satisfactory to both Ofcom and the Secretary of State, Ofcom must make an order containing the code in that form. Any approved modifications would have to be contained in an order, and if Ofcom wished to withdraw its approval for the approved code it would have to revoke the order. The order would be subject to the negative procedure and Section 403 of the Communications Act 2003 would apply to the power of Ofcom to make an order, which would mean that Ofcom would have to consult for at least a month before making the order, as it has to if it makes the code itself under Clause 7.

The amendments ensure that the code for the initial obligations, which is crucial to the practical day-to-day management of the process, will be subject to equivalent levels of consultation and parliamentary oversight whether—as I hope will be the case—they are produced by industry and others and approved by Ofcom, or whether Ofcom itself feels it necessary to make a code. I hope there is general agreement that this is a sensible amendment which meets the recommendation of the Delegated Powers and Regulatory Reform Committee. I beg to move.

Lord Howard of Rising: My Lords, we on these Benches are very glad to see these amendments, even if they were tabled rather late. As noble Lords know, Cabinet Office guidelines say that government amendments should be tabled a week before they are to be debated. I dare say that the Christmas holidays interfered as much with the Government's timing in tabling amendments as they did with the timing of everyone else involved with the Bill. The Delegated Powers and Regulatory Reform Committee's advice is, as is so often the case, well worth listening to. It is good to see that the Minister has followed best practice in seeking to ensure that the powers of the Executive get the proper level of scrutiny from Parliament.

Lord Davies of Oldham: I am grateful to the noble Lord for that comment. He will have noticed that the second report of the Delegated Powers and Regulatory Reform Committee was published on 17 December 2009, and it therefore produced a little difficulty as regards the speed with which we were able to table amendments.

Amendment 85A agreed.

Amendment 86

Moved by ***Lord Clement-Jones***

86: Clause 6, page 8, line 1, leave out "may" and insert "must"

Lord Clement-Jones: In moving Amendment 86, I shall speak also to Amendments 87, 92, 92A and 197. These cover two rather different bits of ground and probably should have been degrouped, but I will deal with them as a whole.

We had some debate last week that included the discussion about wi-fi networks, communal networks and so on, and in a sense this is a second bite of the cherry to try to get further clarification, particularly in the light of the useful note circulated by the Minister, headed "Online infringement of copyright: detail regarding Clauses 4 to 16". There is still some doubt, and it would be useful to have the Minister underline some of the issues in the note. It is about the question whether an intermediary organisation that provides network access to users or employs other to do so, such as a library, university or school, should in terms of the Bill be classified as an internet service provider, subscriber or communications provider.

If a library or educational establishment is a communications provider, its activities would be exempt from the Bill. If not, various libraries—clearly this is important to libraries—would seek amendments, assuming that a library or educational establishment is a subscriber. In the note, it seems fairly clear that they will be regarded as a subscriber and will receive notifications if their internet service IP address is identified as a source of apparent infringements. There is obviously a chance that a library or other subscriber, as the note says, might in due course be subject to either a civil action by copyright owners or technical measures, should they be introduced.

It seems to me that the Government are providing clarity but sadly it looks as though libraries are going to fall on the wrong side of the line. Can the Government give any comfort to libraries in these circumstances? The only comfort that the Government appear to give under this document is that they can install the appropriate software. If one goes further down into the document, it talks about what reasonable steps might be in practice, and that seems to be what the Government are suggesting. It seems to me that there are powerful reasons why libraries should not fall in this way in the Bill. I accept that the Government have given clarity, but at the same time that clarity has been very unhelpful to a particular sector. I would be very interested to hear what the Minister has to say in that respect.

6.45 pm

On Amendment 92A, there is an issue about thresholds, not so much for the individual subscriber but for the internet service provider. I hope that the Minister has a dual briefing, and I apologise that two rather unrelated subjects are in the same group. If the Minister looks at the amendment, which proposes to leave out lines 22 to 24 on page 8, he will see that it is in relation to internet service providers, and we are trying to provide a different kind of threshold.

Many internet service providers strongly support the inclusion of a minimum threshold, but there is a problem with the Bill as drafted. Under Clause 6, proposed new Section 124C(5)(b) of the Communications Act, the requirement to comply applies retrospectively to a time before the threshold is reached. That is both unreasonable and unworkable. In particular, in order to ensure their compliance this would effectively require

operators to implement the necessary IP system and process changes in anticipation of reaching the threshold, regardless of any actual or potential misuse of online content by their owners.

The Bill should indicate the level of threshold and should indicate that there must be a significant level of unlawful activity occurring on a network—this is a very good attempt to provide something specific—such as 25 per cent of traffic handled by an ISP, before the threshold is reached. Below such a threshold, the requirement to implement such systems will imply a disproportionate burden on ISPs, since surely the Bill must recognise that the Government's proposals will not eradicate all file-sharing and should focus on those areas where most harm occurs. Six ISPs account for 90 per cent of all internet traffic. The focus on eradicating all file-sharing would penalise all ISPs and avoid the equally if not more important issue of introducing currently absent incentives to provide consumer education about legitimate alternatives.

In any event, the requirements should disapply if the number of notifications made by copyright owners to an ISP dropped back below the threshold. There are operational and maintenance costs as well as capital costs of complying with the requirements. This will also ensure that there are incentives on the copyright owners to act proportionately and develop new legal offerings and undertake consumer education. I beg to move.

Lord De Mauley: We now turn to the threshold that applies to the obligations code. This threshold is even more important than the one we debated a couple of groups ago, to which the Minister agreed, since it governs how many ISPs these provisions will fall on. The threshold that is eventually decided on needs to be clear and proportionate and should represent a sensible division between ISPs which have, knowingly or unknowingly, become major carriers of unlawful material and those who have nothing to do with the entire business.

The Government's insistence that there will be some cost involved for ISPs which fall above the threshold makes it all the more important to ensure that a small ISP which is not involved in any meaningful peer-to-peer infringement is exempt from the code. The burden of complying, for such a small potential effect on illegal file-sharing, would simply not be proportionate or justifiable.

This matter is further complicated by the new information that different provision as to costs might be made for different types of ISP. Will this distinction be replicated for thresholds? Will the Minister give us more information about the types of classes that different ISPs will fall into? This relates to Amendments 87 and 197, tabled by the noble Lord, Lord Clement-Jones. We have recently been given more helpful information about the type of organisation that might be classed as a communications provider, and the steps that the Minister expects it to take to restrict peer-to-peer sharing. The note builds on the unsatisfactory and surprising response of the Minister to the amendment of the noble Baroness, Lady Miller, on communal networks. All his suggested measures to block file-sharing sites, ban particular protocols and limit the amount of band width would have an impact on legitimate users, as well as being difficult to keep up-to-date and effective against copyright infringement.

This might be a good moment to remind the Minister that file sharing is not illegal, and nor are the necessary protocols to make it possible; and that band width, even for uploading purposes late at night, is often useful for many reasons other than copyright infringement. Expecting institutions founded in many cases on the principle of open access to information to restrict, monitor and police what could be thousands of users of a network to such an extent is surely not feasible. The Minister's disregard of the value to certain institutions of maintaining an unrestricted online connection was surprising and unappreciative of the needs of many legitimate users of the internet.

The Earl of Erroll: My Lords, I will make a couple of points. In the first amendment of the group, we are trying to change "may" to "must". That is absolutely right. Parliament's job is to set the rules under which the Executive can make statutory instruments. If we only put "may", that may not happen, and we have not done our job properly. If we feel that something should be done, we should put the word "must".

The rest of the comments are apposite and relevant to the business of large organisations where a few people may be breaching copyright. To penalise the whole organisation for ever would be neither cost effective nor a good use of resources.

Lord Whitty: My Lords, the first batch of amendments relates to schools, libraries and so on. The Government really must think about this. When I read the further information provided by the Minister—I am afraid that I do not have it to hand—my hopes were raised that the Government would regard them in a different way from other subscribers. However, as the noble Lord, Lord Clement-Jones, said, they have fallen on the wrong side of the Government's dividing line.

This goes absolutely in the opposite direction to what we understood to be the aim of the Digital Britain strategy, which is to widen access and flexibility of use to a range of people, particularly the young, who will use libraries, educational establishments, cultural institutions and other non-profit making organisations in order to advance not only their knowledge, learning and information, but also their electronic and digital skills. It is counterproductive to regard the institutions in the same light as an individual or a commercial operation. Some commercial operators ought to be seen in this light as well, but let us confine ourselves to schools, libraries and educational institutions. The Government must find a better way of exempting them from at least some of the provisions and strictures about what they will be expected to provide to block illegal file sharing, which would have an effect on the range of access that the users of that particular institution would be able to attain in a perfectly legitimate way.

This is not a coach and horses. It is a very serious dimension of the Government's intention to widen access and flexibility with regard to digital services. They are going in the wrong direction.

Lord Young of Norwood Green: My Lords, Amendment 86 would make the provisions of subsection (3) a requirement rather than an option. These provisions specify conditions that must be met for the obligations to apply in a particular case, and require copyright owners and internet service providers to provide any information or assistance reasonably required to determine whether such conditions had been met. We would be well advised to retain the flexibility that is provided by the existing text. It is important that the possibility is there to specify conditions for particular cases, and to ensure that the resources and information are provided to make that happen. There is little merit in requiring that to be provided in the code.

Amendments 92 and 92A would require Ofcom to measure and verify that an internet service provider's network is consistently and significantly used to infringe copyright, as well as exceeding the threshold, before the obligations apply. Amendment 92A goes into more detail, specifying that 25 per cent of an internet service provider's traffic should be accounted for by illegal downloads, as audited by Ofcom, and taking into account legitimate file sharing.

This is not a practical idea. It is one that would prove immensely difficult to put into practice. It would not be possible for Ofcom to measure such infringement levels, apart from by counting the number of copyright infringement reports generated by a particular network. Again, that is no more than the threshold already provides. We would not favour Ofcom being empowered to measure activity on a network through intrusive techniques, as is implied by Amendment 92A—the only way in which it could otherwise be done. The only way in which unlawful and lawful traffic can be differentiated using the same file-sharing technology is by going in and checking—I understand that the technical term is "deep-packet inspection". Not only might that raise issues under European legislation, it is also very expensive. It would not be justifiable to interfere with the legitimate operation of a network when there is a reasonable alternative on offer in the shape of the number of copyright infringement reports generated. However, if the idea is for the overall peer-to-peer traffic to be measured and then multiplied by a fraction assumed to represent unlawful as against lawful traffic in the stream, this would be a crude measure, and less reliable than the alternative provided. I will pass over the difficulty of agreeing what the multiplier should be, since it seems self-evident.

The amendments do not add anything to the existing text, apart from a measuring role for Ofcom that it is not empowered to undertake, or would undertake through the evaluation of information that will in any case be generated and used to judge whether a network is above or below the threshold set for application of the initial obligations. I therefore invite noble Lords not to press their amendment.

Although Amendments 87 and 197 span two different clauses, it makes sense to take them together since they are designed to differentiate the treatment of non-individual subscribers such as libraries, communal networks, schools and universities from the way that the obligations will address individual subscribers' alleged infringement of copyright. I will endeavour to reassure the noble Lord, Lord Clement-Jones, and my noble friend Lord Whitty, that of course we want to maintain access and encourage legitimate usage; but we cannot give a carte blanche to these institutions to take no precautions and allow wholesale illegal activities. We must find a balance involving responsible and reasonable measures for these institutions and communal providers to undertake. We have tried to be helpful and provide further detailed information, which has been acknowledged. Perhaps we can improve on that.

Noble Lords are seeking special treatment for libraries or cultural and educational establishments that are subscribers and which operate a network for the benefit of their customers or students; and indeed to exclude them altogether from the technical obligations code. That would not be a great improvement when it comes to the problems that I outlined during the debate last Tuesday on a similar amendment tabled by the noble Baroness, Lady Miller. It is not clear what is meant by "reasonable rights and obligations" for inclusion in the initial obligations code. Nor is the case strong that they should expect preferential treatment. As I have said, we do not want to encourage the use of such public institutions to infringe, with little or no consequence, other peoples' copyright, particularly when measures can be taken to prevent such infringement. In any case, why should such institutions be less stringently treated than commercial entities offering a network?

7 pm

In the same vein, I am not convinced that we need to exclude such public bodies from the provisions of the technical obligations code. The question may be asked as to whether we really want to see the connection of the British Library, or any library, suspended. The answer of course is no, and it is not remotely conceivable that any appeals body would confirm such a penalty so long as they could demonstrate that they were taking effective and reasonable measures to ensure that their network was not being habitually used for infringement. It is right that they should be expected to take such measures. For example, students using their university's network have to recognise that they must abide by the conditions of use for it. That is one side of the bargain—the rights and responsibilities. Communal subscribers also have responsibilities. We believe that we can help them take measures that would largely prevent illegal infringements.

We wrote to noble Lords involved in the debate last Tuesday to set out precisely how we think these provisions should apply in respect of, for example, libraries and educational institutions, and the steps that they can take to ensure that copyright infringement does not occur on their networks. As long as these institutions will be taking, and are seen to be taking, these measures, I reassure noble Lords that there is very little chance whatever that they will be disconnected or have their bandwidth reduced. We cannot somehow just indicate to people: "Well, if you operate on these networks, you can do anything you like". There are other things that could be accessed on those networks which none of us in this Committee would think was reasonable.

I hope that the information provided in that letter will have helped to reassure noble Lords that we are not putting libraries or other institutions in a position

whereby they will be helpless victims of, on the one hand, infringing customers and, on the other, draconian provisions. As long as libraries and education institutions offering these sorts of internet access points take—I stress this—sensible measures to prevent infringement of copyright, they will not be impacted by the Bill at all. This is, after all, what we are asking individual subscribers to do. We will be writing to them in the same way, saying: "There would appear to be an infringement and here are the measures that you can take to prevent that". We will be saying exactly the same thing to communal providers. As long as they take the sensible measures to prevent infringement of copyright, they will not be impacted by the Bill.

Given those explicit assurances, I invite the noble Lord to withdraw the amendment.

The Earl of Erroll: When the Minister uses words such as "sensible" and "reasonable", does that take into account the possible cost of such measures? The cost could be high because of, for example, the need to employ extra people. Educational establishments are very much strapped for cash.

Lord Young of Norwood Green: I shall not go into the detail now. By sensible and reasonable measures, we mean software procedures and so on. I would not wish to say from this position exactly how we would define "sensible" and "reasonable" but, having looked at the problems, we do not believe that the cost impact should be too high. We will take that away, but I doubt very much that it would be necessary to recruit extra staff to deal with the situation. Whatever the situation is, we are saying, "If there are two decisions, can we absolve these institutions from any responsibility whatever?". I hope that no one would say yes to that. If the answer is that the institutions must have a responsibility, we need to be clear about what we would regard as sensible and reasonable measures and make sure that we are providing those institutions with the appropriate technical advice to achieve those measures.

Lord Lucas: Does the noble Lord not agree that this vagueness as to what will suffice as reasonable measures will have to disappear by the time that the Bill becomes an Act? We will be asking individuals to take measures that they will reasonably expect to protect them from prosecution, should evidence be adduced against them. That must be absolute. Ofcom will have to specify a list of measures that an individual can take. If an individual has taken them, they should be free from prosecution. Does the noble Lord not agree that we have to be clear about this, presumably through Ofcom? To leave individuals in a state where they are not absolutely sure what they have to do will be immensely unfair and cause a lot of heartache and difficulty. That has been demonstrated by the current misbehaviour. Being accused of something that you find hard to defend is extremely wearing on people at the other end. I am sure that the noble Lord will have received as many e-mails as I have from people who are distressed as a result of what is being done to them. We must provide clarity and certainty. If we provide it for individuals, it is there for libraries, too. I entirely agree with the noble Lord—I cannot see why libraries should be exempt. After all, they are unlikely to be hosting this stuff on their own networks. The problem relates only to people plugging their computers into wireless networks; libraries will anyway have to be careful about that sort of thing, because of all the problems with viruses that that brings.

Lord Clement-Jones: I assume that the Minister is treating that as a rhetorical statement. I confess to being somewhat disappointed by his response to the amendments on communal networks for libraries, educational establishments and so on. Clearly his glass is half full. He sees these regulations and the way in which the Bill will operate in a broadly beneficial light. However, there are great fears among educational establishments and libraries that it will be difficult to comply with these provisions and that they will be very difficult to police. The guidance given may be somewhat blithe in assuming that it will be straightforward for the institutions to comply. I fear that the Bill tilts too far in that direction. The noble Lord, Lord Whitty, put it very well: the Bill is tilting too far against them by including them in this category. I do not know whether it is special treatment or not, but perhaps educational establishments and libraries should fall into a different category for the purposes of the Bill. I do not know whether that is giving them special treatment; others will fall into that category, too.

Lord Young of Norwood Green: Is the noble Lord saying that we should absolve these institutions from any responsibility whatever for the behaviour of people who use their networks? That point must be addressed. We believe that we can assist them in the process to ensure that they are not given unreasonable responsibilities. I invite the noble Lord to comment on that.

Lord Clement-Jones: I shall comment on that. It will be difficult for these institutions to comply with the need to provide access that is as broad as possible to sources of knowledge on the internet while at the same time policing what is going on in their systems. The two could be fundamentally incompatible. This is the worry: libraries and universities are places of education and knowledge that may well want to provide unrestricted access to the internet and they do not want to turn themselves into policemen in these circumstances. That is not absolving them of all responsibility, but we may need to put them in a different category for the purposes of compliance with the Bill. They are non-commercial operations with a clear academic and knowledge purpose and so are rather different from most of those with whom we are dealing. I thought that the Minister put it rather well. As regards this set of provisions, my glass is half full. He said that the institutions would not become helpless victims on the one hand or have draconian conditions imposed on them on the other. By using those phrases, the Minister has almost outlined the problems.

Lord Puttnam: I speak as the chancellor of the Open University. I absolutely see both sides of this argument but I want to put another point to the noble Lord, Lord Clement-Jones. It is incumbent on all institutions to seek responsibility from those who take advantage of those institutions. For an institution to

[LORD PUTTNAM]
wash its hands of the matter, or to put it in the too-complicated or too-difficult drawer, is in itself somewhat irresponsible. Therefore, although I have no desire whatever to add to the complexity and problems of running, for example, the Open University, I absolutely accept that, as an institution, we have an overwhelming responsibility to drive home to those who use our services the notion of social responsibility.

Lord Clement-Jones: My Lords, the noble Lord has hit it on the head. The purpose of these institutions is to be educational, not to act as a policeman. I entirely accept the imposition of an obligation on academic institutions to do precisely that; I am sure that it would be wholly beneficial. One of the key problems is that it is precisely this age group that does not recognise the need to respect copyright and the rights of creative owners. It is a kind of social issue and it implies that a level of education is needed, although not the more draconian aspects that the Minister has outlined. However, I recognise that the Minister is not particularly sympathetic to that. Clearly we need to take the matter away and, in conjunction with some of these institutions, think about how we can improve on this amendment, which the Minister did not find to his liking.

The second set of amendments was intended to try to limit the liability of certain ISPs in these circumstances. The Bill refers to the threshold being based on the number of notifications received, but that is not a very accurate method of measuring illegal file-sharing and it is extremely subjective. It does not measure how many megabytes of information are downloaded, for example. The amendments are an attempt to be rather more precise. The number of notifications is simply a measurement of how effectively and how frequently the copyright owner undertakes fishing on file-sharing in relation to which ISPs may choose to send notifications and there is a risk that certain ISPs could be targeted in order to achieve the threshold.

Those are the dangers of not having a specific threshold of the type that I have tried to set out in the amendment. We shall carry on with that endeavour because I believe that the copyright infringement report, the CIR, is a very blunt instrument to use in these circumstances. I have no doubt that we shall continue this debate but, in the mean time, I beg leave to withdraw the amendment.

Amendment 86 withdrawn.

Amendment 87 not moved.

Amendment 88

Moved by ***Lord Razzall***

88: Clause 6, page 8, line 16, leave out "of a contribution towards" and insert "for"

Lord Razzall: My Lords, I shall speak also to Amendments 90 and 91, which are grouped with Amendment 88. This is a very short point. When we tabled these amendments, we had not had the benefit of seeing the draft proposals regarding costs, and it may well be that things have moved on. The amendments may well now be slightly superfluous and at some stage we may discuss whether the figure of 75 per cent is going to be within the Government's proposals. However, the amendments were intended to be of a probing nature to endeavour to draw out from the Government how they thought the costs would be dealt with between the ISPs and the copyright holders. I look forward to what the Minister has to say but, as I said, it may well be that things have moved on since we have seen the draft proposals.

The Lord Speaker (Baroness Hayman): I have to inform the Committee that, if this amendment is agreed to, I cannot call Amendment 89 by reason of pre-emption.

7.15 pm

Lord De Mauley: My Lords, we had a probing amendment in this group designed to allow for a debate on costs, but it has been superseded by the far more detailed amendments that we are now debating.

Costs are of course among the most controversial of the issues that have arisen out of these provisions and this single area has probably caused the biggest outcry from various groups of stakeholders. It is understandable why that should be: the estimates of the cost of implementation that are being thrown around are in some cases huge—certainly enough to place a significant burden on almost all companies, let alone on a small private business on which, in these difficult times, this sort of imposition might well make the difference between viability and failure.

We accept that some flexibility in the Bill is appropriate but, although we acknowledge the publication of the SI and the Minister's explanation in the context of the group containing Amendment 59, which we debated earlier, we hope that he will be able to expand on what his noble friend said to give your Lordships comfort that the whole business will not result in more costs being forced on consumers than is absolutely necessary within the bounds of efficiency and fairness.

Lord Davies of Oldham: My Lords, I am grateful to the noble Lord, Lord Razzall, for moving the amendment in the terms that he did. We are concerned to move the debate on. As the noble Lord, Lord De Mauley, identified, the Government agree that copyright owners, as the main beneficiaries of the legislation, should pay the bulk of the costs. The draft SI that we have made available sets out our working assumption that copyright owners should meet some 75 per cent of the costs, with ISPs meeting the remaining 25 per cent. We are not wedded to these numbers and plan to consult on the whole of the draft statutory instrument, but they give a clear indication of our thinking, as I mentioned earlier.

We believe that this approach is right because it will give both sides the right incentives to keep the costs down and the processes efficient, as well as encouraging both sides to continue to look for commercial solutions to the copyright infringement problem. I believe that the Bill already provides a mechanism for that. The draft SI begins to show which costs will be included and sets out the need for an audit of those costs. Therefore, we are making progress towards identifying these issues.

Amendment 108, however, looks at a different aspect of the costs and seeks to ensure that subscribers do not incur any costs in meeting their obligations under Clause 4. I assume that this refers to the costs involved in appealing against copyright infringement reports or in being included within a copyright infringement report list. Although I appreciate the wish to ensure that there is no disincentive to use the appeals mechanism, I do not think that we want to circumscribe too much how the code will deal with this aspect. I would not expect the appeals process to be expensive, but there may be merit in a low fee for accessing the mechanism, which would be refundable if the appeal was successful. I do not see it as something that should be constrained on the face of the Bill, nor do I think that this is an extravagant cost, but we usually seek to deter superficial and unnecessary appeals against decisions, and a small cost for accessing the mechanism seems to us to be entirely reasonable.

We had a debate on the whole issue of costs earlier today and I gave an indication of the Government's thinking in relation to both the earlier amendments and these. I hope that the noble Lord will feel able to withdraw his amendment.

Lord Razzall: I thank the Minister for that reply. Before withdrawing the amendment, I shall take up his comments on Amendment 108. Given the significant debate that we keep having, quite rightly, about the natural justice elements of these proposals to ensure that the individual has the appropriate opportunities to go through all the relevant appeal procedures before being turned off, it is important that, before the Bill becomes law, the Government give a clear indication of the sort of fee arrangements that they will recommend in relation to that appeal mechanism. It is one thing if it is £10, but it is another thing if it is a maximum of £1,000. It is important that the Minister is prepared to do that—not today, but before the Bill leaves your Lordships' House. I beg leave to withdraw the amendment.

Amendment 88 withdrawn.

Amendments 89 to 92A not moved.

Amendment 93

Moved by ***Lord Razzall***

93: Clause 6, page 8, leave out lines 25 and 26

Lord Razzall: I shall also speak to Amendment 93A, but will not move it at this stage. I always get confused when there is an "A" in an amendment.

This is an important issue. The amendments are clearly probing, and to some extent if Amendment 93 were accepted, the argument for Amendment 93A would become less significant. The Government have to face the issue of mobile broadband networks because if we consider the structure of the industry, we see that currently more than 90 per cent of internet traffic is with six ISPs which would not be affected particularly by the amendments. The remainder of the internet traffic is with mobile broadband operators and clearly the amount of infringement is less than with the six major ISPs, by definition, as they have less than 10 per cent of the market among them.

However, the retrospective nature of this provision hits a mobile broadband operator much more acutely than it hits the other ISPs because of the technical difficulties that the mobile operator will have retrospectively to capture the necessary data. Our starting point is with Amendment 93 to remove the retrospective nature of these provisions entirely, and if that is not acceptable, the alternative is Amendment 93A, which would provide for a different measure of calculation of infringements. Clearly, the Government will not accept these amendments today but they have to think carefully about what protections they can give to the mobile phone operators, particularly in light of the costs to those operators of having to comply. I beg to move.

The Lord Speaker: If Amendment 93 is agreed to I cannot call Amendment 93A by reason of pre-emption.

Lord Howard of Rising: The clause provides for retrospective legislation. The noble Lord, Lord Razzall, is right to have concerns about it, which we on these Benches share.

At the very best of times, retrospective legislation is something to be wary about. I do not think that this is one of those occasions when it is justifiable. I have several questions about what this new paragraph will require an internet service provider to do. Are ISPs to send notifications to people who have been identified as having been infringers before the Bill becomes law? That would be both difficult and unreasonable. Another area that needs clarification is infringements before the code has been properly finalised. Being imposed retrospectively imposes a much higher level of costs. I am not certain that Her Majesty's Government have properly considered that.

It is feasible to start matching subscriber accounts to IP addresses once that requirement is known—from the date the Bill is enacted or from the moment when the threshold is reached. But it would not be reasonable to expect the costs of setting up the necessary computer programs and systems to be gone into until such time as it is definitely required. To have to trawl back through possibly inadequate records to find matches that relate to an infringement some time in the past may not be possible and, even if it were possible, would almost certainly involve completely disproportionate costs. These costs would apply to everybody, not just the types of providers to which the noble Lord referred earlier.

As I said, I have my doubts that the problems, and potential problems, have been thoroughly thought through. The outline code that we have been sent suggests that the Government are now thinking about a period of grace. I very much look forward to hearing from the Minister whether that period of grace will allow some of the difficulties I have just mentioned to be addressed by the ISPs so that it gives them the opportunity to install the necessary systems and so on to enable them to carry out the function if asked to do so. It does not seem right not only that quite so many details have been left to the code but that the Government have given so little thought to their implementation before coming to the House with the Bill.

The Earl of Erroll: I support the amendments. We cannot start doing this retrospectively as it could

[The Earl of Erroll]
cause chaos. If it cannot be complied with, what would be the penalties? Amendment 93A would be a much better amendment. One thing I like about that amendment is that if the Bill is working, one does not have to worry any more and one can stop doing anything under the code. That is a good thing as it would reduce costs. At the end of the day, costs are always passed on to the ordinary citizen. As a Scotsman, I do not like paying more money than I have to. The better the Bill works so that the provision does not need to be used, the better.

7.30 pm

Lord Davies of Oldham: I am grateful to noble Lords who have spoken in the debate and I appreciate the concern about the potential retrospective duty. That issue was raised at Second Reading and I appreciate the concern about internet service providers being suddenly landed with an obligation to send out hundreds or thousands of notifications relating to information passed on to them months previously and for which they are not prepared. Until the end of the qualifying period, they cannot ensure whether they will be subject to the obligations—a point reinforced by the noble Lord, Lord Howard.

Amendment 93A provides for ISPs to have sufficient time to prepare and equip themselves to meet the obligations as well as allowing them to drop out of the obligations if the level of illegal downloads on the networks drops below the threshold set for six months. Those are perfectly reasonable points, but against that must be set the resource that will have been committed by copyright owners to generate the notifications during that period. There seems to be little point in such effort if it is essentially to be wasted. It would not be sensible to generate such effort and expenditure for it to lead to nothing more than a starting point, which would be the effect of the amendments. The example that we suggested in the Explanatory Notes of a three-month initial period may be too long. In establishing who is subject to the obligations, one month may be more appropriate. The Government are thinking along those lines. That would have the advantage of ensuring that the system is up and running in good time, giving all parties earlier certainty as to whether they are in or out, and ensuring that notifications sent with respect to the initial period are current and reasonable in number.

I understand the wish to give internet service providers time to get up to speed once they are identified as being subject to the obligations. I suggest that such practical detail is best left to the code. It may be worth citing the passage in the outline code that specifically recognises that point. I think that it may go some way towards allaying the anxieties. Paragraph (b) states:

> "Period of grace for ISPs to comply once in scope ... The code might consider whether once an ISP becomes in scope they should be allowed a period of grace before the obligations bite. For some ISPs there may be real unforeseen technical issues which require time to resolve".

I understand the thinking behind the idea of internet service providers being removed from the obligations if they can show that the level of infringement on their networks is below the threshold for six months, but, in practice, that will not be of any real benefit to them, as the bulk of any cost will be incurred at the beginning, and the ongoing costs will be relatively small. The main costs will have already been incurred. In any case, they will almost certainly need to remain in readiness in case they again rise above the threshold. If internet service providers work to ensure that the level of infringement is low, they will have a correspondingly low number of copyright infringement reports relating to their subscribers.

In short, I understand the concern behind the amendments and I have some sympathy with them. I believe that sufficient flexibility and pragmatism is built into the system that the Bill will set up. I referred to the code, which indicates that the amendments are not needed. The Government are fully seized of the strength of the arguments put by noble Lords and we are already establishing a system that is sufficiently flexible and workable. I hope that, on that basis, the noble Lord will feel able to withdraw the amendment.

Lord Howard of Rising: Before the noble Lord rises to withdraw, or not, his amendment, the Minister cited a time period of three months and one of one month. From where did the Minister get the figure of one month? Would that be adequate time for internet service providers to set up their system? It seems to me to be quite a short period to get a system properly set up, running and tested. We all—not least the Government—have seen how difficult it is sometimes to introduce systems that work from day one, or even to get them introduced at all. You have only to think about organisations such as the National Health Service to realise the sort of problems that can arise. The Minister said that he thought that the amendment was unnecessary. One thing that is unnecessary is the element of retrospective legislation. As I said, it is unattractive at the best of times. Whatever merits there may be to the Minister's answers, that is an ultimate stumbling block.

Lord Davies of Oldham: As I sought to explain, we first thought about three months; we are now considering whether one month would be more appropriate. I was trying to share the concern of the noble Lord, Lord Razzall, reinforced by the noble Lord, Lord Howard, about retrospection, because I recognise that it is an important issue. That does not mean to say that I necessarily accept the terms of the argument. I sought to identify how we have made arrangements to take account of that issue without thinking that the amendments advance the cause. The reason that I referred to the term "retrospective" is, first, because the issues were forcefully advanced in speeches at Second Reading; and secondly, as the noble Lord, Lord Howard, said, the word "retrospective" is pretty significant in legislation.

We do not think that the provision is retrospective. The clause provides that copyright infringement reports received by an ISP during a period defined in the code will need to be acted on by the ISP, once it passes a certain threshold set out in the code. There is nothing retrospective about that; it is ongoing, because it is a question of the threshold being reached; but it is not retrospective. I hope that noble Lords will accept that the Government listened to the Second Reading speeches, knew that this issue was of some concern, and have

done considerable work on it. We are seeking to create a framework that will work and is acceptable. It would not be improved by accepting the amendment. On that basis, I hope that the noble Lord, Lord Razzall, will feel able safely to withdraw his amendment.

Lord Razzall: This issue can be debated at two levels. It can be debated at the level that I started with, and on which the noble Lord, Lord Howard of Rising, picked up, which is that we do not like the retrospective nature of the provision, because legislation should not be retrospective unless there are overwhelming reasons. I do not agree the Minister that this not retrospective. The Bill states that if,

"the threshold is reached, rights or obligations apply in relation to a time before it was reached",

So someone who thought that they were acting perfectly innocently—the internet service provider—and who did not perceive that there were any significant infringements suddenly, because the threshold is reached, has to go back and produce figures for a period before it arrived at that point. That is clearly retrospective.

At the second level—as so often with this Bill—the devil is in the detail. The detail is particularly for mobile telephone operators. It is a significant task and, as the noble Lord, Lord Howard of Rising, said, often an impossible task for them to capture the detail to comply with the obligation set out in subsection (5)(b). The Minister did not quite go as far as to say that the Government had an open mind on the issues, but he suggested that they were thinking about them. I urge him and his officials to hold further consultation with those ISPs most affected before the Bill is finally put to bed. This is a major issue not only of principle but of detail. Of course, in the mean time, I am happy to—no, I am prepared to—withdraw the amendment.

Amendment 93 withdrawn.

Amendment 93A not moved.

Lord Young of Norwood Green: My Lords, this may be a convenient moment for the Committee to adjourn. I suggest that the Committee stage begin again at 8.10 pm.

House resumed. Committee to begin again not before 8.10 pm.

7.40 pm

Sitting suspended.

Digital Economy Bill [HL]

Committee (3rd Day) (Continued)

8.10 pm

Amendment 94

Moved by ***Lord Clement-Jones***

94: Clause 6, page 8, line 28, at end insert "and that internet service providers and copyright owners have consulted formally with consumer representatives"

Lord Clement-Jones: After that generous break, I am sure that we are all refreshed and raring to go for the next two hours. I shall speak also to Amendment 100 as these amendments relate to the same matter. It is important to ensure that any code drawn up by the industry, ISPs, copyright owners and other stakeholders is drawn up in consultation with consumer representatives. The essence of these amendments is to seek reassurance from the Government that any industry code approved by Ofcom has been subject to consultation with relevant consumer representatives, organisations and so on. I hope and think this would help to ensure that the code is consumer-friendly, which I am sure is the Government's intention. I beg to move.

Lord Howard of Rising: Before speaking to this amendment, I declare an interest. I had planned to declare it when we got to the relevant part of the Bill, which I believe to be Clause 42. I am the literary executor of a literary estate and, as such, have an interest in certain copyright matters.

I am under the impression that under the existing provisions of the Communications Act 2003, Ofcom must consult on virtually everything it does. Can the Minister reassure the Committee that those provisions will extend to these clauses after the Bill is given Royal Assent and that those parts of the Communications Act that make Ofcom consult will not find that they have been left behind.

Lord Davies of Oldham: I am grateful to the noble Lord, Lord Clement-Jones, and to the noble Lord, Lord Howard, who has effectively taken 50 per cent of the reply that I was intending to give to this amendment.

I can see why the amendment has been put forward. It is clearly important that the views of consumers are taken into account when the initial obligations code is formulated. Under subsections (11) and (12) of new Section 124C, Ofcom will be obliged to consult on any initial obligations code before approving it. As the noble Lord, Lord Howard, has astutely identified, the Communications Act already obtains in this respect. Under Section 403 of that Act, which is applied by subsection (8) of new Section 124D to an order by Ofcom making a code, Ofcom is in any case bound to consult formally with representatives of affected persons. I hope the noble Lord, Lord Clement-Jones, will appreciate that we have belt and braces with regard to consultation as far as Ofcom is concerned in this respect and that he can safely withdraw his amendment.

Lord Clement-Jones: I thank the Minister for what is probably the most reassuring response to date. It is very helpful and demonstrates that my probing amendment has been entirely successful. I beg leave to withdraw the amendment.

Amendment 94 withdrawn.

Amendment 95

Moved by ***Lord Howard of Rising***

95: Clause 6, page 8, leave out line 29

Lord Howard of Rising: This is a probing amendment to see whether Her Majesty's Government have thought through the impact that the introduction of one new obligations code may have on existing commercial

[Lord Howard of Rising]
transactions between internet service providers and rights holders. If an internet service provider and a rights holder have come to a commercial arrangement to tackle illegal peer-to-peer file-sharing with which both parties are content, will that arrangement have to be torn up if it does not meet the standards set within the code? If that has to happen, what would be the situation if they were not able to come to a new agreement that satisfied the code? They might even find themselves going to court to clarify matters. Surely private commercial arrangements should be encouraged as a way of dealing with this sort of problem. Government action that might impede making such arrangements is very undesirable. Quite apart from the practical difficulties that I have highlighted, which might arise, there is also the situation where a single company is both the rights holder and an internet service provider. Will it have to make reports, notifications and lists in the same way?

I can see the attractions of a single universal code—there are obvious advantages—but it would seem difficult to draft such a code that would apply to all situations without finding that problems had been created en route. We are back to the old law of unintended consequences. I look forward to hearing from the Minister that these things have been thought through and of how they are to be dealt with. I beg to move.

The Parliamentary Under-Secretary of State, Department for Business, Innovation and Skills (Lord Young of Norwood Green): My Lords, the amendment tabled by the noble Lords, Lord Howard of Rising and Lord De Mauley, would allow more than one approved code on the initial obligations to be in effect at any one time. This would not be beneficial to any of the parties. It is important for everyone to know to which code they are operating at any time, and having more than one could lead to confusion and unnecessary duplication of effort.

If the noble Lords are thinking of the situation in which technical measures may have been required, it is already possible under new Section 1241(2) in Clause 12 to introduce a single new or amended code to cover both the initial obligations and the technical measures. The line which the noble Lords propose to delete refers to the initial obligations code.

Having said that, I congratulate the noble Lord, Lord Howard, on going in a totally different direction that is not covered by my speaking note: the commercial arrangements between a rights holder and an ISP. I hope the Box will confirm that stakeholders will be involved in the creation of the code. I am getting an affirming nod, which is always comforting when I think that I am winging it.

Lord Howard of Rising: Would it help the Minister if I interrupted him for a moment?

Lord Young of Norwood Green: The offer is appreciated. Thank you.

The key answer to the noble Lord's question is that we need to involve stakeholders in the creation of the code. I take his point; I was not aware of a scenario in which the rights holder could also be an internet service provider, but now he mentions it I concede that it is a possibility. It is not a good idea to have more than code; there should be one code. If and when we introduce the technical measures, we want them to be incorporated into an amended code. I assure the noble Lord that stakeholders will be involved in the compilation of the code. These are the kinds of issues that need to be addressed.

With that explanation and assurance, I hope that the noble Lord will feel confident about withdrawing the amendment.

Lord Howard of Rising: I thank the Minister for his remarks. As I said, I can see the advantages of one code, which he explained so eloquently even though he had to go out on a limb. He did not address how he would deal with agreements that have been made before the code comes in and which then break the code: in other words, where two parties make an agreement between themselves which the code, when it comes along, makes invalid. As he has said, he has not come across the idea that you can be both an ISP and a rights holder. Perhaps at some future time he can cover these two eventualities in writing. Either of them could create difficulties and I am sure that they could be cleared up now if they were addressed. I beg leave to withdraw the amendment.

Amendment 95 withdrawn.

Amendments 95A and 95B

Moved by ***Lord Young of Norwood Green***

95A: Clause 6, page 8, line 31, after "may" insert "by order"

95B: Clause 6, page 8, line 36, leave out "approval or withdrawal" and insert "order"

Amendments 95A and 95B agreed.

Amendment 96

Moved by ***Lord Clement-Jones***

96: Clause 6, page 8, leave out lines 38 and 39

Lord Clement-Jones: Amendment 96 seeks to remove the requirement for Ofcom's approval of a code, or a modification to an approved code, to be overseen by the Secretary of State. Surely Ofcom should be empowered to fulfil its duties under the Bill without being second-guessed by the Secretary of State. Clause 6 is similar in intent to Section 121 of the Communications Act, on the approval of a code for a premium rate, which includes no similar provision for the Secretary of State to approve the code. Surely it is unnecessary and overbureaucratic, and will serve no relevant purpose, to have such a power in the Bill. I beg to move.

Lord Young of Norwood Green: My Lords, Clause 6(10) requires the consent of the Secretary of State to the approval by Ofcom of any code about the initial obligations or any modification of such a code. This amendment would remove that requirement. I note,

for completeness, that Clause 7 also requires the consent of the Secretary of State if Ofcom is to make or amend a code. This amendment would not affect that provision.

The code that Ofcom will be approving or making will form the framework by which the obligations in this section of the Bill come to life. In particular, the code will contain the provisions that are required by any order made under Clause 15 in relation to costs. Many of the issues dealt with in the code will be controversial, not least the detail of how the cost-sharing provisions are translated into practical arrangements. It seems appropriate that the Secretary of State should have some element of oversight to ensure that the code deals appropriately with these issues. We do not see this as an unnecessary intervention. We see it as an appropriate and reasonable oversight, which is not peculiar to this legislation. In the light of that explanation, I hope that the noble Lord will feel able to withdraw the amendment.

Lord Clement-Jones: My Lords, I thank the Minister for his response, although I thought that it was a fairly limp reply and not wholly convincing. If given half the chance, I am sure that he could do better than that. Clearly, there are precedents where the Secretary of State has not had that power and where Ofcom purely has had the power. Is it not time that the Secretary of State should not have to look over the shoulder of Ofcom all the time? Is this not an example where that should be the case? We will obviously consider that extensive response in the fullness of time. But given the need to press on with further business, I beg leave to withdraw the amendment.

Amendment 96 withdrawn.

Amendment 96A

Moved by ***Lord Young of Norwood Green***

96A: Clause 6, page 8, line 40, leave out from beginning to end of line 3 on page 9 and insert—

"( ) An order made by OFCOM under this section approving a code or modification must set out the code or modification.

( ) Section 403 applies to the power of OFCOM to make an order under this section.

( ) A statutory instrument containing an order made by OFCOM under this section is subject to annulment in pursuance of a resolution of either House of Parliament.""

Amendment 96A agreed.

Clause 6, as amended, agreed.

Clause 7 : Initial obligations code by OFCOM in the absence of an approved code

Amendment 97

Moved by ***Lord Howard of Rising***

97: Clause 7, page 9, leave out lines 8 to 14 and insert—

"( ) OFCOM must by order make a code for the purpose of regulating the initial obligations if—

(a) it appears that no code will be approved under section 124C within six months of section 124A and 124B coming into force; or

(b) OFCOM has withdrawn their approval of a code under section 124C."

Lord Howard of Rising: My Lords, Amendment 97 seeks to provide a six-month window of opportunity for rights holders and internet service providers to come up with their own initial obligations code before Ofcom moves in and enforces one on them. As I have previously indicated, we believe that a code is more likely to have widespread support and confidence if it is negotiated between the industries themselves. Ofcom should impose a code only as a matter of last resort. It is infinitely preferable for people to do it themselves and probably more likely to work.

However, we recognise that voluntary agreements in the past have taken a lot of time to be agreed. In some cases, discussions have come to an impasse as those involved have failed to come to a mutually satisfactory agreement. As such, the threat of an Ofcom imposed code that would come into force if industry had not agreed one within six months should be retained. I am sure that that would act as a considerable spur to the industry to sort things out for itself without having to involve anyone else. I beg to move.

Lord Young of Norwood Green: My Lords, Clause 7(1) and (2) requires Ofcom to make a code by order if it has not been able to approve an industry code within six months of new Sections 124A and 124B of the Communications Act 2003 coming into force. Subsection (2) also allows Ofcom to make a code by order before that six-month period has passed. This amendment would remove that time constraint on Ofcom. It would also require Ofcom to believe that no code would be in place, either because there was no code to approve or because Ofcom had revoked such an approval.

My concern about this amendment is that it risks losing the urgency that I think we all see here. It is important that we should move forward as quickly as we can to introduce these initial obligations and start having an impact on online copyright infringement. It seems to me, therefore, that it is important that we should put pressure on the industry and Ofcom to get a code in place, and action under the code, as soon as possible. I believe that it is important to set Ofcom a clear goal as to when it needs to ensure that a code is in place. However, noble Lords will see from the Marshalled List that we in government have become aware of a potential issue in relation to timing and that we are bringing forth our own amendment to allow for the deadline to be changed should it be necessary for circumstances outside Ofcom's control. However, I do not think that it would be sensible simply to remove the deadline, as this amendment would do. In the light of that explanation, I hope that the noble Lord will withdraw the amendment.

Lord Howard of Rising: I thank the Minister for his remarks. Urgency is good, and dealing with issues promptly and efficiently is nothing but a good thing. However, too much haste can lead to mistakes and, indeed, some would argue that this Bill is an example of that. Some of the points we have been discussing in Committee are the result of drafting which has been done in too much of a hurry. But that having been said, I beg leave to withdraw the amendment.

Amendment 97 withdrawn.

Amendment 98

Moved by ***Lord Faulkner of Worcester***

98: Clause 7, page 9, leave out lines 12 to 14 and insert—

"(2) OFCOM may but need not make a code under subsection (1) for a time before the end of—

(a) the period of six months beginning with the day on which sections 124A and 124B come into force, or

(b) such longer period as the Secretary of State may specify by notice to OFCOM.

(2A) The Secretary of State may give notice under subsection (2)(b) only if it appears to the Secretary of State that it is not practicable for OFCOM to make a code with effect from the end of the period mentioned in subsection (2)(a) or any longer period for the time being specified under subsection (2)(b)."

Lord Faulkner of Worcester: My Lords, I am proposing this amendment to Clause 7 to make a necessary change to the Bill, and it follows what my noble friend Lord Young has said on the previous amendment. New Section 124D as drafted has the effect of requiring Ofcom to have either approved or made by order a code covering the initial obligations code within six months of new Sections 124A and 124B coming into force. Those sections are introduced by Clauses 4 and 5 which, like the majority of the clauses in the Bill, come into force two months after Royal Assent. In other words, Ofcom will have to approve or make an initial code no later than eight months after the Digital Economy Bill receives Royal Assent.

We put this deadline into the Bill because we believe it is important that the initial obligations on online copyright infringement should take effect as soon as possible. However, there is no doubt that this is a challenging timescale for the development, consultation on and approval of a code. It is all the more challenging because a code under new Sections 124C or 124D would require notification to the European Commission under the technical standards directive. This will require at the least that the code be notified in a near final form to the European Commission three months before it can be formally approved or made by order by Ofcom. However, since we published the Bill, it has been brought to our attention that the standstill period under the technical standards directive could, under certain circumstances, be as long as 12 months. While we do not expect this to be the case, and clearly we hope that it will not, it is not something over which either Ofcom or the UK Government have any control. Failure to comply properly with the technical standards directive in the making of the code would mean that the code itself, and therefore the related obligations in this Bill, could not be enforced. That is not a risk that it would be sensible to run.

I have no desire to relax the pressure on both industry and Ofcom to get a code in place and action under the code as soon as possible. I am therefore not proposing a simple extension to the deadline, but instead a power for the Secretary of State to extend that deadline should it appear to him that it is not practicable for Ofcom to make a code that takes effect within the existing deadline. I believe that this treads a path between taking account of the constraints of the technical standards directive while continuing to make it clear that we want to see the quickest possible progress on getting an initial obligations code in place. I beg to move.

Lord Clement-Jones: My Lords, I must admit that I am sceptical about the Minister's case for this amendment. He said that it was necessary, but this has been framed in a very broad way indeed. Having taken part in the Second Reading of the new Video Recording Bill today, we all have a healthy regard for the powers of the European Commission in respect of technical measures and so on, and of course this will qualify under them. But that is not how the amendment has been framed. Some believe that we are being marched up to the top of the hill—whether the noble Lord, Lord Mandelson, is the Grand Old Duke of York, I do not know—and it looks like we are being marched down again. We feel that there is some impetus and real steam behind the timetable, but in a sense that particular balloon is now being deflated. I think that the Minister really has to do better than that in framing this amendment.

It looks like we will be working at the speed of the slowest in the convoy. This is an invitation, quite frankly, to all the recalcitrant stakeholders, whoever they may be, to go more slowly, knowing that if it looks as though they are not going to hit the deadline the Secretary of State has the power to delay matters. The Minister will be aware that there is great unhappiness, particularly among the copyright community, BPI and others, about the implications of this extension. Everyone would be a lot happier if this was a specific exception and it was clear that there was going to be a problem with the European Commission. However, there is no reason to frame this amendment in such wide terms.

Lord Howard of Rising: My Lords, I support the remarks of the noble Lord, Lord Clement-Jones. The government amendment is interesting. I sympathise with the Government's explanation. Many of the provisions in the Bill are the result of drafting a document in a rush to meet a timetable, as I commented when speaking to the previous amendment. It is clear to all of us how much better the Bill could have been if time had been made so that a little more thought could have been applied in the first place.

These provisions have been discussed for a long time and, once the Bill is made law, the uncertainties that we have debated over the past few days will be hanging over the industry's head until the code is agreed. Now we have all the further uncertainties added by European law. This cannot be right when trying to introduce legislation on a difficult and fast-moving industry. We understand the need for codes but to leave the industry not knowing where it stands and what it can or cannot do, cannot be right. How long a delay would the Minister consider acceptable? Is the eight months he mentioned satisfactory? I am not clear how long a period the Government are thinking of. What steps will they take if Ofcom is unable to resolve any insurmountable difficulties or disagreements?

We may also have to add another 12 months of potential European legislation on top. I agree that, in practical terms, it is unlikely to be 12 months but, nevertheless, if you are planning a business and how to run it, it is difficult to know what to do when you are faced with that kind of uncertainty for that length of time.

Lord Faulkner of Worcester: My Lords, I understand completely the points that both noble Lords are making. This is not, in any sense, an attempt to say to the industry, the stakeholders and Ofcom that the pressure is off; it is not that kind of assertion. We are simply saying that it is possible that the technical services directive could lead to a delay and, if that were to happen, it would not be possible for the code to be ratified. There is no proposal on the table in respect of a delay from the Council of Ministers but we cannot rule out absolutely the possibility that such a proposal could be made within eight months of the Bill becoming an Act. We are committed to the code coming in on the original timetable; it is simply the fact that the longer timescale may be required by European factors that cause us to propose the amendment. I hope the Committee will agree to it.

Amendment 98 agreed.

Amendment 99

Moved by ***Lord Howard of Rising***

99: Clause 7, page 9, leave out lines 17 to 34

Lord Howard of Rising: My Lords, Amendments 99 and 117 are probing amendments to explore the new body and its responsibilities. The material that we have recently been given appears to confirm that the new body is still unconfirmed—if my English is not too upside down. It is possible that all functions will remain within Ofcom. Can the Minister confirm that this will be the case?

What advantages does the Minister see the new body having over leaving all functions in-house? If Ofcom decides to outsource its responsibilities, will it fund the body itself or will it apply to the Government for new funds to pay for it? What circumstances could lead to more than one new body being needed? This Government have a record of creating quangos and a seemingly unabated appetite for more. It would therefore be nice to know more about it.

If a body is created, is it to have solely an administrative function? Clause 8 suggests that its role could be much larger and involve a quasi-judicial role in resolving copyright disputes. If this is the case, what interaction will the body have with the tribunal system that will be established under later clauses? I hope the Minister will take this opportunity to give us a great deal more detail about this new body, which may or may not come to life. I beg to move.

Lord Young of Norwood Green: My Lords, the effect of Amendment 99, tabled by the noble Lords, Lord Howard of Rising and Lord De Mauley, would be to remove subsection (4) in Clause 7, which allows certain things in relation to the administration and enforcement of the code. I do not think that this would be helpful.

While I accept that noble Lords are keen to avoid the setting up of new bodies—as are we all; we certainly do not want to create any more quangos, despite such a harsh accusation about our predilection in this matter—and are equally keen to avoid Ofcom having new powers, the fact remains that someone must be responsible for administering and enforcing the code.

The options listed in subsection (4) allow for that to be done in-house by Ofcom, or by some other person or body. That seems pretty much to cover the possible options without in any way prejudging the outcome. Removing these options—and they are options, not requirements—would not help the delivery of effective regulation of the obligations. It may be more cost-effective to have a separate body do it. We are not making up our minds at this stage and we certainly do not want another quango created. With those reassurances, I invite the noble Lords to withdraw their amendment.

I turn to Amendment 117. New subsection (4)(a) in Clause 8 requires the initial obligations code to ensure that Ofcom or another person has the functions of administering and enforcing the code, including resolving "copyright infringement disputes". The proposed amendment would remove the last role, leaving the code with no dispute resolution mechanism.

It might be helpful if I set out what we envisage this dispute resolution role comprising. First, there may be some confusion over the terminology. The term that we have used here is "copyright infringement dispute", but it is further defined in new subsection (6) in Clause 8 to mean a dispute,

"between one or more copyright owners, internet service providers or subscribers [that] relates to an act or omission in relation to an initial obligation or the initial obligations code".

We are not trying here to introduce some new form of copyright adjudicator. The dispute resolution role would be applied only in relation to disputes about compliance with the initial obligation and the initial obligations code, with no wider remit.

Secondly, this is separate from the appeals process. The dispute resolution might apply if, for instance, an internet service provider were to feel that a copyright owner were not complying with their responsibilities under the code in relation to notification of the copyright infringement report volumes or the payment of the copyright infringement report fees. These are issues that would not be susceptible to being handled through the appeals process, but which require a process for resolution. The role is therefore an essential one and it is right that the code should be required to provide for it. In the light of the explanation, I invite the noble Lord to withdraw the amendment.

8.45 pm

Baroness Buscombe: From listening to the Minister respond to my noble friend's concerns about the possibility of this body in Clause 7, it sounds as if he had almost lost the will to live. He does not want Ofcom to have more powers, and he does not want to set up a quango—so what is the point of new subsection (4) in Clause 7? Why do we need to establish another body or body corporate? We know that it is highly unlikely to be more cost-effective to set up another body. Is the Minister saying that he would prefer that Ofcom were to undertake these responsibilities? Who will it be left to to decide that there should be another body corporate? The whole thing seems to have been introduced into the Bill without much aforethought—hence the Minister's notes sound less than convincing. Given that the Government have concerns about having more quangos and want to be an effective Government and so on,

[Baroness Buscombe]
why are we now talking about other bodies that may come into fruition? It is all so fluffy and ill thought-through, if I may say so.

Lord Young of Norwood Green: My Lords, the noble Baroness is being harsh. No, I have not lost the will to live. Fancy being deprived of the sheer pleasure of listening to the noble Baroness enunciating my poor performance in these areas, or the ineffectiveness of the superb briefing notes supplied by my superb Bill team. But to treat the matter seriously, let us not elevate this more than it should be. We are introducing some flexibility, which may be more appropriate as we are trying to determine the best solution. If it proves to be that the most effective solution is for Ofcom to do it, we will not oppose that in any way. I am pleased to see that a member of the Opposition, whose stance is normally to be highly critical of Ofcom and accuse it of having far too many powers, should insist that it retains this particular one. We believe that this is a flexibility that is reasonable in the circumstances. If Ofcom proves to be the right body to do it, we would not oppose that—it is merely about flexibility.

Baroness Buscombe: I am grateful to the Minister for allowing me to intervene again briefly. What is being proposed here is extraordinarily wide-ranging; it is almost terrifying in its proportion. New subsection (4) establishes,

"one or more bodies corporate with the capacity to make their own rules and establish their own procedures … determine the jurisdiction of a body established by the code or, for the purposes of the code, of any other person".

I have never before heard such a wide-ranging power being proposed in a Bill. I say that as a lawyer—and perhaps that means that I will be overcautious, but this is truly extraordinary. Perhaps this could be thought through with some care, in discussion with other Front Benches, between now and Report. The possibility is really quite disproportionate to the powers that we hope will be granted to such bodies corporate.

Lord Clement-Jones: My Lords, to add to the Minister's will to live, I wondered whether this issue had some relation to that mythical beast, the Digital Rights Agency, which we saw heralded but that never actually appeared. I do not know if this is at all relevant to that. We on these Benches thought it was an unnecessary body, but maybe it is one of the unnecessary bodies that is being envisaged in this part of the Bill.

Lord Young of Norwood Green: While I am on this collective life-support machine, we will take this one away to ensure that we reassure the noble Baroness that that is not the aim or intention of this clause. With that assurance, I hope that the noble Lord feels able to withdraw his amendment.

Lord Howard of Rising: My Lords, I am grateful to my noble friend Lady Buscombe for her relevant and pertinent remarks, although I am now rather worried about the Minister's health. He seems to be looking all right; I just hope he will make it through the rest of this evening—perhaps even for the rest of the debate. It looks as if we have a long hard road ahead in this Committee, and I would hate to think that he would not make it.

I am glad to hear the reluctance from the Benches opposite to create new bodies and quangos. I am sorry that the Minister thought my remark unfair, but he must admit that quite a few have been created in the past few years.

I do not see how removing the option to have various other bodies would be more effective. Surely the most effective method of doing something is to use the body—in this case, Ofcom—that already has the expertise to carry out the job and already has an overhead, offices and everything that is required to do this, rather than to set up any new body, or bodies, as my noble friend Lady Buscombe pointed out.

The explanation that the Minister gave has not really answered this point. He commented that the remit would be limited, but frankly that is even less reason to set up a new body. I do not know if he would care to comment on that before I withdraw the amendment.

Lord Young of Norwood Green: My Lords, I gave an assurance that we would take this away to see whether we are creating anything that is unnecessary. We believe that we are not, but we will look at the point that the noble Baroness, Lady Buscombe, made about extensive and unnecessary powers. With that assurance, I hope that the noble Lord will feel able to withdraw his amendment.

Lord Howard of Rising: I thank the Minister for his remarks and for his agreement to go and have another look. I beg leave to withdraw the amendment.

Amendment 99 withdrawn.

Amendment 100 not moved.

Clause 7, as amended, agreed.

Clause 8 : Contents of initial obligations code

Amendment 101

Moved by ***Lord Howard of Rising***

101: Clause 8, page 10, line 14, at end insert "to 1 year or less"

Lord Howard of Rising: My Lords, Amendment 101 is a probing amendment. It is to discuss the value of establishing a time limit on how long information about subscribers may be kept. I have suggested that there is no reason to hold such information for one year. According to some, this is far too short, given the length of time a civil case takes to move to a resolution. I am more than willing to hear what sort of time would be more appropriate. As the Minister is aware, there are statutory requirements for corporate bodies to retain documentation, and I do not know whether or not keeping this sort of information would come under that. The Government have already indicated that the initial obligations code should include details of this type. What sort of time period is the Minister thinking of? I cannot see any reason why this sort of detail should not be placed in the Bill. I beg to move.

Lord Young of Norwood Green: My Lords, the effect of the amendment tabled by the noble Lords, Lord Howard of Rising and Lord De Mauley, would be to expand the existing subsection (1)(d) in Clause 8 so that, rather than it being a general requirement for the code to limit the time for which internet service providers keep information, this would be capped by a maximum timescale of one year or less. It is important to remember the nature of the code. The idea and expectation is that this should be drafted by industry, taking into account the concerns and interests of consumers. I stress that; sometimes we lose sight of that important safeguard. This is the real involvement of stakeholders. As such, we would expect it to be a pragmatic document, with fairness as well as effectiveness at its core. It is right that there should be a considerable degree of flexibility in what it says and how it works.

Against that, I understand the thinking behind the amendment and the sensitivity over personal information being held for longer than absolutely necessary. It is, in practice, difficult to think of circumstances in which it would be necessary to keep such information for longer than a year. Indeed, there might be something to be said for a shorter period. I am also aware of concerns raised by the consumer magazine *Which?* about legal action taken on behalf of some copyright owners which could be left hanging for years. It is a fine balance between giving certainty on the period for which information can be kept and allowing those drafting the code sufficient flexibility. Noble Lords will see that this is an issue that the outline of the initial obligations code clearly recognises as one that the code will need to address.

On balance, it is reasonable to leave this as a matter on which we can trust the code to agree a pragmatic solution. Taking into account that, as I said, the stakeholders—both industry and consumer representatives—will be involved in the formation of the code, I hope that, with that assurance, the noble Lord will feel capable of withdrawing the amendment.

Lord Howard of Rising: I thank the Minister for his comments. I do not know what he will think if industry drafts something which is unsatisfactory. It is not always clear that those involved in commerce—this is, after all, a form of commerce—are very good at considering their customers. That is not really their job; it is for the Government to set the parameters within which industry must work. In this case, it would be feasible for the Government to look at some form of time constraint, even if it is not the year that I have suggested. I hope the Minister will look at this before we come to it again. In the mean time, I beg leave to withdraw the amendment.

Amendment 101 withdrawn.

Amendment 102 had been withdrawn from the Marshalled List.

Amendment 103 not moved.

9 pm

Amendment 104

Moved by ***Lord Lucas***

104: Clause 8, page 10, line 17, at end insert—

"( ) that it makes proper provision for rights of appeal by subscribers concerning notifications (see subsection (1A));"

Lord Lucas: My Lords, I shall speak also to Amendment 109. With rights of appeal, we come to a very important part of the Bill. It seems absolutely clear that where an ordinary person gets caught up in the provisions of the Bill, they will be confused and uncertain. In many cases they will feel that what they have done is not wrong; that they are being chased unnecessarily; that they do not have the information that they require to state their case properly; and that they are faced with a series of technical allegations that they may find difficult to relate to what they have done.

Therefore, we need to be clear, ideally in the Bill, about the rights which somebody who faces accusation under this Bill has by way of clearing their name. Certainly, I would very much like to understand what the Government's proposals are for the timescales involved in this. When we were talking about earlier amendments, we came to the conclusion that this was the only thing on which we could pin the system down and that the question of the number of accusations which had been made was going to be pretty variable and really depended on whether this was a particular person on whom the copyright owners had chosen to light. So the comfort that a citizen has that they will be dealt with properly very much depends on the timescales. When they receive a notification, how long have they got to appeal? How long will the appeal process take? Are we looking at a double-decker appeal; that is, after the first notice and appealing it, is there then, as the noble Lord hinted earlier, a second, tougher letter and an appeal on that before we get to the point when a person's details are actually given to the copyright owners? What exact timescale and process are the Government proposing for this?

Will an appeal process be free to the subscriber, or will he have to pay to go through this process? In other words, will it be a friendly, supportive process where he will feel that he does not need to have legal advice? Will there be limitations on the grounds of appeal? That is a feature of the traffic tribunal, for instance, where there are five stated grounds of appeal. That means that in many cases the tribunal has no ability to exercise common sense, as one of our colleagues on the Liberal Democrat Benches found out a year or so ago. Will there be a definite defence for those subscribers who have done all that they reasonably ought to do—to my mind, "reasonably" for an ordinary individual means something like an hour's work, but what does it mean to the Government—or that they reasonably should do to make sure that they were in a position to prevent the offence complained of; in other words, that their defences had been overwhelmed and they should not be blamed for it? The reasonableness of what we are letting potentially hundreds of thousands of our citizens in for depends on the process of appeal. We have discussed how the accusation and the letters are going to work, and I think that I have a reasonable grasp of that, but I do not have a grasp at all of the quality of the appeal process. I should be very grateful for the Minister's help with that. I beg to move.

Lord Clement-Jones: My Lords, I speak to Amendment 106. It is worth celebrating that, unlike the English cricket team, we have scored rather more runs tonight than we originally anticipated. We may make rather better progress in the next hour or so than we have of late.

Unlike the measure proposed by the noble Lord, Lord Lucas, this amendment does not so much deal with the substance of the appeal process but the information and advice surrounding it. The intention of Amendment 106 is to ensure that subscribers are able to get information and advice about copyright law and online infringement as well as about the provisions of the Act. It is of paramount importance that whatever changes are brought about by this Bill, they should be implemented only in an environment of extensive public education and information about online copyright. That is a pledge that the Government have given and is something on which I think noble Lords on all Benches agree.

It is clear that many consumers are unaware of the implications of copyright law and may also be unaware of the impact of the Bill. The amendment seeks therefore to ensure that the notification scheme includes provision for consumers to get independent information and advice. We envisage this being delivered by methods such as information on the internet, e-mail, leaflets and perhaps a telephone advice line. There are all sorts of ways in which this education and information can be imparted. That is an essential part of the Bill. We all agree that it is not purely about enforcement but a lot is about culture change. That is what the amendment seeks to do.

Lord Howard of Rising: My Lords, I thank my noble friend Lord Lucas for his amendments, not only for raising the point about information and getting that into the right hands, as the noble Lord, Lord Clement-Jones, mentioned, but for raising the question of the sort of appeals system that would be established under the provisions.

There is so little information available about the sort of process that is envisaged that it is hard to know where to start. I agree, of course, with my noble friend. The appeal should cover the whole scope of the initial obligations code. Much as a notification letter might be considered only as a warning, it is nevertheless the first of three steps towards further action that would potentially end up in court. A subscriber should not be taken down that path if there is no good reason for that to happen.

There can be no justification for any cost falling on a subscriber if he has a successful appeal. If someone has done nothing wrong, yet still receives a notification letter, it is not his fault; it is the fault of the rights holder or the internet service providers, which have failed to correctly identify the infringement. I very much hope that the code will be sufficient to stop such errors occurring, but provision should certainly be made just in case. Mistakes arise—they happen—and it would be quite wrong for legislation such as we are debating this evening not to provide for a remedy in the event of innocent people being accused of misdoings.

Lord Young of Norwood Green: My Lords, I will start with Amendments 104 and 109. The purpose of the amendments is to add a further criterion to the list for the initial obligations code to ensure that proper provision is made for rights of appeal by subscribers concerning notifications and to set out in more detail what that should be.

I agree with the noble Lord that protecting the legitimate interests of consumers and providing a clear route of appeal for subscribers who feel that they have been wrongly identified is important and must form an integral part of the system. However, I suggest that this is already properly provided for in the existing text and that therefore the amendment is not needed. Requirement for a person to have responsibility for subscriber appeals is clearly set out in the same clause, at proposed new subsection (4)(c), and is not in need of any further explanation in the Bill. The requirement will have to be reflected in the code, which will include ensuring that subscribers are aware of their rights as well as their responsibilities at every stage of the process.

The point was made by the noble Lord, Lord Howard, when he said that the first letter should still have the right of appeal. I absolutely agree with that, because it could be a totally fallacious allegation or there could have been an error and it is appropriate that the subscriber should have the opportunity of correcting that. I shall come on to the question of cost later.

It is also essential that we do not attempt to micromanage everything in this process and that we give clear general direction and leave the interested parties under the aegis of Ofcom to work out the details. When we talked about consultation on the construction of the code, the noble Lord, Lord Howard, expressed concern about industry not getting involved. I gave him an assurance that it was "stakeholders", not "stakeholder", and that there would be consumer representation as well. I hope that, under the aegis of Ofcom, we will get the balance right in the code.

The way in which Amendment 109 specifies how the appeal process would work sets too many precise requirements and leaves too little room for legitimate manoeuvre. I will give an example. It may be appropriate for a small fee to be payable, refundable if the appeal succeeds. As the noble Lord, Lord Howard, pointed out, you should not be punished for lodging a successful appeal. This would deter mischievous appeals intended simply to delay the process. I am not saying that this is the way in which an appeal system should operate; I just give one example of something that might be considered, which is the payment of a small fee that would not be a deterrent and would be refunded if the individual were successful in the appeal. That would conform with natural justice. I make the plea that we should allow room for the details to be sorted out by the people concerned, including Ofcom, who have a duty to look at consumers' interests.

I will move on to Amendment 106, which was tabled by the noble Lords, Lord Razzall and Lord Clement-Jones. Providing information on reducing online infringement of copyright, and on how the Bill is intended to work, would not be of great value to

subscribers. Therefore, that is not worth adding. However, the point that the noble Lord made about information, advice and guidance being available to people is a very good one. I will take it away and come back to him on what we are doing. If we are talking seriously about changing behaviours, which is our first approach, that should be part of the educative process. The Bill already provides that the notifications sent will include information about copyright and its purposes and advice about how to obtain lawful access to copyright works. It is difficult to see what more might be needed. As long as the subscriber has the proper information to know where they stand and what they can do about it, there is little virtue in cluttering things up with a description of the whole process.

I return once again to the concern expressed by the noble Lord, Lord Lucas, about appeal timing. Details of appeal timing are in the code. Areas of appeal are dealt with in subsection (6). We expect that a subscriber could appeal at any point in the process. In practice, they might be more likely to appeal if they were put on the copyright infringement list, but they might, as the noble Lord, Lord Howard, pointed out, appeal when they received the first letter if they felt that they had been incorrectly identified. I understand that point.

The question was raised about whether taking all the appropriate measures that we have advised is a reasonable defence. In our view, it would be a reasonable defence. If the letter tells you, either as an individual or as a communal subscriber, the ways in which you can prevent these infringements from taking place and you undertake all those measures, yet an ingenious hacker finds another way of circumventing them, that is an indication of somebody having taken all reasonable measures and it would be a right and proper defence. In the light of the explanations that I have given, I hope that noble Lords will not press their amendments.

9.15 pm

Lord Lucas: My Lords, I will not harry the Minister at this time of night if he is willing to write to me later, but I really want to know what we are in for when it comes to timescales. The notice arrives at the ISP. The criteria for sending a letter are triggered. What are the timescales from then on? How long does the subscriber have to appeal, if they are going to appeal? How long before a second infringement counts as a second infringement, rather than just a continuation of the first? If the subscriber appeals, how long will that process be likely to last? While the subscriber is appealing, are they exempt from the triggering of a second letter, or will that process run concurrently? I understood from what the noble Lord said that there would be a gentle first letter and a heavier second letter and that, if there was a third infringement, the subscriber would be chucked to the wolves. Is that the correct interpretation?

The timescale—the time given for education, the process by which education takes place and how appeals fit into all this—is the one thing in this Bill that we can batten on to in making sure that what we are doing is reasonable, so far as the citizen is concerned. We are starting out with 7 million citizens, or thereabouts, who are not following the law that we would wish them to follow. I do not believe that either party wants a substantial number of those people to end up in the civil justice system as it is experienced at present by people who fall foul of the BPI. Some of those people, who have done nothing more than make stuff available for upload, are three years into the civil justice system without knowing what their fate will be. That is not fun for a young person. It is happening on a small scale, but it gives you an idea of the BPI's policy on these things. It does not let go. It pursues hard.

One can expect this policy to be followed as regards people who will get caught up in the process as a result of the Bill. If that becomes a substantial number of people, first, the civil justice system will not appreciate it, but, secondly, there will be stories in the newspapers and on "Your and Yours" every other week about people caught doing something that people regard as possibly on the fringes of legality but entirely ordinary.

We have a big education programme ahead of us. We want to succeed in that. The timescale that this process works on—the time that we give ourselves to educate people and the processes that they go through to gather awareness before we pitch them into the civil justice system—is immensely important. I know that this is not the final version, but I should very much like to hear the Government's thinking on it.

Lord Young of Norwood Green: As I am sure the noble Lord knows, we are not proposing to pitch anyone into the civil justice system—far from it. As he himself identified, there would be a cautionary first letter, a second letter and then possibly technical measures, which still would not pitch people into the civil justice system. I want to reassure the noble Lord and be helpful. We shall see whether we can put some more flesh on the bones of this issue. A lot of it is appropriate to the code, in whose compilation stakeholders will be involved, as I indicated. However, we shall see whether we can put more flesh on this procedure. I understand the desire to understand the process. If we can help, we will endeavour to do that, because it will be beneficial to the Committee and to the House as a whole.

Lord Lucas: My Lords, I am grateful and I beg leave to withdraw the amendment.

Amendment 104 withdrawn.

Amendment 105 not moved.

Amendment 105A

Moved by ***Lord Clement-Jones***

105A: Clause 8, page 10, line 24, at end insert—

"( ) that any criteria must be fully consistent with Ofcom's duties in sections 3 and 4 of the Communications Act 2003;"

Lord Clement-Jones: My Lords, I am afraid that we are back into relatively technical territory here. The purpose of this amendment is to clarify the relationship between Ofcom's established duties under the Communications Act and the proposed new functions.

Ofcom's current powers and functions under the Communications Act flow from the general duties set out in Sections 3 and 4 of that Act. The proposals in the Bill do not indicate under what duty or duties in the current Communications Act Ofcom would carry

[Lord Clement-Jones]
out the functions proposed under the Bill. The proposals are a fundamental departure from Ofcom's current role in relation to the regulation of communications matters and the furthering of the interests of citizens and consumers in relation to such matters. The proposal is for them to be treated as part of the regulation of premium rate services when there is no basis for doing so. It is therefore necessary to clarify how Ofcom's new role is justified, how that role will sit with Ofcom's current role and pre-existing duties, and to frame underpinning legislation on a proper basis. In particular, clarity is needed on what the provisions of the code are intended to achieve and how objective justification, discrimination and proportionality of the provisions of a code are to be determined. I beg to move.

Lord Davies of Oldham: My Lords, I am concerned that the noble Lord still has anxieties about what he referred to as technical aspects of the Bill. I do not think that the amendment is needed. Ofcom is being given the role of regulator for these provisions and, as such, it will have either approved the code or written it, or perhaps, as is more likely, it will be a combination of the two, where it will utilise what industry can agree on and fill in the gaps where agreement does not exist.

One of the main reasons why Ofcom was such an obvious candidate for the role of regulator was its remit under the Communications Act 2003. The key passages of that Act are right at the beginning of the part dealing with general duties. I know that the noble Lord is very familiar with the Communications Act, so I hope that he will accept these comments in the spirit in which they are intended and for the record.

Section 3(1) of the Act reads:

"It shall be the principal duty of OFCOM, in carrying out their functions … to further the interests of citizens in relation to communications matters; and … to further the interests of consumers in relevant markets, where appropriate by promoting competition".

Just as pertinent is subsection (3):

"In performing their duties under subsection (1), OFCOM must have regard, in all cases, to … the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and … any other principles appearing to OFCOM to represent the best regulatory practice".

It was this obligation to look to the interests of citizens and consumers and the commitment to best regulatory practice that made Ofcom the obvious choice, quite apart from its expertise in this area. I hope we can all agree that this is the right decision and that there is no need to spell it out again in the Bill.

Ofcom is the regulator and, as part of its constitution, it must operate in accordance with its duties as set down in the 2003 Act. There is no point in amending this Bill to say so because it is already stated in the Communications Act. As it will be responsible for approving or making the code, it will perforce have to do so in the light of its duties, as I have identified. I hope that the noble Lord will appreciate that his anxieties are not well founded because Ofcom, in delivering the code, is bound to work within the framework of the very principles that he is putting forward. Therefore, I hope that he will withdraw the amendment.

Lord Clement-Jones: My Lords, I thank the Minister for his reply, which I thought was splendidly circular in nature: it said that Ofcom is the regulator and therefore it will be regulated. On examining the language of Section 3, I agree with some of those who briefed me that it is somewhat straining to cover the duties of Ofcom under this Bill. I will certainly take away what the Minister said and look at the Communications Act again. It is not clear that the Bill and duties of Ofcom under it are entirely covered by the overarching duties of Ofcom under Section 3. I hear what the Minister says about duties to the consumer and so on, and accept the second limb, but the first limb is a lot more tenuous. I will be reading the Minister's remarks with close attention in *Hansard*. In the mean time, I beg leave to withdraw the amendment.

Amendment 105A withdrawn.

Amendments 106 to 111A not moved.

Amendment 112

Moved by ***Lord Clement-Jones***

112: Clause 8, page 10, line 35, at end insert "which shall be no more than three months"

Lord Clement-Jones: We want to ensure that the Bill sets out the time limit for making a copyright infringement report, and we suggest three months. There is some sort of Sword of Damocles hanging over a subscriber, and it is important that there should be a time limit within which a copyright owner is required to act. We seek reassurance as part of the purposes behind the amendment that a subscriber will receive a copyright infringement notice—a CIR—in a timely fashion. We suggest setting that at three months. We are concerned that subscribers may not otherwise receive a CIR until many months after the alleged infringement, by which time it may be much more difficult for them to challenge it. That would be unfair and a denial of natural justice. I beg to move.

Lord De Mauley: The noble Lord raises an interesting question on how far into the future a subscriber should be held to account for past infringements. I agree with him that there are many benefits in keeping the period from detection to notification as short as possible. It is fairly clear that if a subscriber has not received a notification letter for his first detected infringement, he will not take steps to stop future infringement or prevent others from infringing on his account. How could he? It is surely axiomatic that there is a high risk that he will continue to have infringement reports laid against his account and might become liable for a second or third letter, or future action before he even receives the first letter. Indeed, he may very well never receive it.

That is both unfair and ineffective, and the code should seek to prevent such a situation developing. I would go further than the noble Lord, Lord Clement-Jones, and suggest that not only is the time between detection and the infringement report important, so is the time between detection and any consequent notification letter. A letter is likely to have far more impact on a subscriber if it relates to a recent infringement, and the impression that one can breach copyright with

immunity is likely to be dispelled that much more quickly. It is also true that if a letter is received long after the event it will surely be interpreted as an indication that the sender is not serious.

Lord Mackay of Clashfern: It seems to me to be fair that if an infringement report is to have consequences, it should be issued within a reasonable time. I do not know the circumstances that would suggest three months exactly, but looking at the matter generally, three months seems a reasonable period. It is also important to take into account the circumstances in which the infringement happened. I imagine that circumstances in this area change and may change quickly. It may be very difficult for a subscriber to bring back to his mind exactly what were the circumstances if he is caused to wait a long time before an effective infringement report is sent to him.

Lord Young of Norwood Green: My Lords, this is another case where we need to balance a proper concern with the position of a subscriber with the need to keep flexibility where there is not good cause to stipulate otherwise. On the face of it, this is a reasonable limit to set on the time period between an alleged infringement taking place and the receipt of a notification by the internet service provider. As I listened to the noble Lord, Lord Clement Jones, I could not help reflecting that justice delayed is justice denied.

It would certainly not be desirable for copyright infringement reports to refer to events a long time in the past, when it might be significantly more difficult for subscribers to recall the circumstances—as the noble and learned Lord, Lord Mackay, said—and, if appropriate, form a defence. However, we should not accept the amendment, and I will explain why, although I absolutely concur with the principle. We need to be aware of the law of unintended consequences. Almost inevitably, if we set three months in the Bill, that will be adopted as the default period, rather than the limit that it is intended to be.

We are right to leave that open in the expectation that the period between alleged infringement and the report being sent to the internet service provider should be a matter of days, rather than months. There might be exceptional circumstances—please do not overreact, I say that there might; it would have to be demonstrated—where it is justified that the time between an incident and the report is greater than three months, but, boy, that would have to be justified and demonstrated in the face of any appeal by a subscriber. We certainly take the view that notifications should not be delayed, but we do not want a default position of three months to be established, because that could be counterproductive.

On balance, the better path is to trust the code—I do not want to go over again how the code is to be formulated, because we are familiar with that now—to deliver a fair and pragmatic approach to the time limit requirement. We take into account the point made by the noble Lord, Lord De Mauley, that if we leave it too long, the system comes into disrepute, and the other point made about natural justice. Let us trust to the code to deliver a fair and pragmatic approach to the time limit requirement. Accordingly, in the light of the assurances and explanation that I have given, I hope that the noble Lord will feel able to withdraw the amendment.

Lord Mackay of Clashfern: Perhaps it is worth the Minister's while considering whether, if it is generally speaking possible to do it in days, we should have a short period as the primary period, with the possibility of extension up to, let us say, three months. I understand that if we say that it is three months, everyone will say, "We do not need to do anything about it for three months". That is a natural human reaction. On the other hand, if we say, "You have to issue the report in 10 days", or something like that, and in exceptional circumstances that could be extended, but in no case for longer than three months, that would seem to me to embrace the spirit of what the Minister said in his reply.

Lord Young of Norwood Green: We will take that point into account—it is a sensible suggestion—but I return to my previous point. We believe that this is a matter for the code. The point made by the noble and learned Lord, Lord Mackay, is probably a sensible one to be embraced in the code. I am not sure that we should state three months, but that solution injects the right sense of urgency and makes the point that an inordinate delay would not be tolerated.

Lord Clement-Jones: My Lords, it is always good to have a former Lord Chancellor enter the lists on your behalf. I thank the noble and learned Lord, Lord Mackay, because I thought that he phrased it exactly right. I know that if he suggests something, it is robust in technical legal terms. I am sure that that is the case. I also thank the noble Lord, Lord De Mauley, for the scenarios that he rightly raised in respect of possible delay not only to the initial notification but to subsequent notifications.

The Minister initially appeared sympathetic and raised our hopes, only to dash them halfway through his speech, which was very sad. He has again demonstrated that he is a glass-half-full person. He is optimistic about the way the code will operate, but he is probably surrounded by rather more pessimism than he would like. "Trust the code" was his watchword, but the fact is that if the code is going to be created by different stakeholders, it will be like having a bunch of ferrets in a sack. Most of us, the glass-half-empty gang, if you like, believe that Ofcom will have to impose a code upon stakeholders, rather than that the stakeholders will voluntarily come to the table. I think this is one of the areas that we might well want to come back to on Report, as it is very important consumer protection. We need to have some certainty about the limit beyond which consumers should not be concerned about the possibility of copyright holders coming back to them.

I understand what the Minister had to say about three months being treated as the norm, but the noble and learned Lord, Lord Mackay, dealt with that very effectively, and I hope he comes in on my future amendments. In the mean time, I beg leave to withdraw the amendment.

Amendment 112 withdrawn.

Amendment 113

Moved by ***Lord Clement-Jones***

113: Clause 8, page 10, line 35, at end insert—

"( ) a requirement that reports are to be considered as sensitive personal data within the meaning of section 2 of the Data Protection Act 1998; and

( ) a requirement that reports are not exempt from disclosure under section 7 of the Data Protection Act 1998"

Lord Clement-Jones: I suspect that the Committee will find my stream of amendments somewhat wearisome, but this is the final one in this run. The batting average is pretty low at the moment, so I will try to improve on it in terms of the ministerial responses rather than the speed at which the amendments are going forward.

The effect of this amendment is to provide minimum data protection requirements in respect of the code governing copyright infringement reports. Under Section 2(g) of the Data Protection Act 1998, any accusation that a person has committed an offence is sensitive personal data. This amendment makes it clear that those provisions apply. In that respect, it is a probing amendment. I beg to move.

Lord Howard of Rising: I think the noble Lord, Lord Clement-Jones, underestimates himself. His amendments are always worth consideration even if, on occasion, we must agree to differ. He has managed to bring in some very distinguished support for his amendments this evening. I hope the Minister will be able to reassure the Committee that almost every record held against a subscriber in these provisions will fall under the Data Protection Act. The possibility of an internet service provider or a rights holder passing to an unrelated third party information about what infringements it has detected could lead to worrying breaches of privacy. One example is that without the protection of the Data Protection Act, blacklisting would be made much more possible. Internet service providers might decide that a subscriber should not be able to take out a new subscription on account of his past behaviour, without really knowing whether the accusation was justified.

Lord Young of Norwood Green: I thank the noble Lord, Lord Clement-Jones. He has brought a new dimension to streaming that I had not anticipated.

The amendment would treat a copyright infringement report as sensitive personal data under the Data Protection Act 1998, and would require ISPs to be obliged to disclose a copyright infringement report on a subscriber on application by the subscriber.

On the first part of the proposal, the data that are currently defined as sensitive personal data under the Data Protection Act cover issues such as race, political or religious views, mental and physical health matters, sex and criminal offences, and criminal offence proceedings. It is difficult to see how a copyright infringement notice might fit into this category of data: some of the content might, but not the actual copyright infringement notice itself. A CIR provides evidence of an apparent infringement of copyright that for the most part is a civil matter.

It is difficult to see how the internet account of a particular subscriber could be any more of a sensitive, personal matter than, for example, a parking ticket for parking in a disabled bay a car that is registered to an individual. I assume that the intention behind the amendment is to constrain what can be done with a copyright infringement report once it has been matched to an individual subscriber. Existing data protection legislation provides sufficient protection. I stress that a copyright owner will be able to access the name and address of the subscriber only by asking a court to require the ISP to provide that information. Both ISPs and copyright owners will have to comply fully with any obligations and duties that apply under the Data Protection Act in respect of information that is part of or associated with a copyright infringement report.

On the second part of the amendment, the whole purpose of the CIR is to trigger a notification to the subscriber that is likely to contain all relevant information in the copyright infringement report: that is, evidence of the copyright infringement, including the material copied, the time and date on which it took place, and the IP address identified. In the case of someone who continues to infringe copyright, CIRs are likely to reach the ISP that do not result in an immediate notification to the subscriber. In all cases, however, a certain number of CIRs will trigger a further notification letter—we are now talking about thresholds, to which we said we would return—that will tell the subscriber how many CIRs on his account have been received and the apparent infringements to which they relate.

Under the Data Protection Act, a subscriber will be able to make a request to an ISP to see the personal data which it holds on that subscriber. This includes any CIRs on that person. There are certain circumstances under the Data Protection Act in which an exemption applies and the disclosure of personal data is not required. However, the exemptions are very limited and may not apply in the case of the CIR. I can see no good reason for treating the personal data in the CIR any differently from other types of personal data. The Data Protection Act is a complex regime, and it would be neither appropriate nor necessary to amend the regime in respect of these reports.

I have given a detailed explanation. I must say that I tend to err on the side of believing that the glass is half full, but I do not go to the Panglossian extreme of believing that all is for the best in this best-of-all-possible worlds, although I hope it is.

Lord Clement-Jones: My Lords, I thank the Minister for that absolutely splendid response on the Data Protection Act. I do not propose to answer at this very moment, but I will have teams of data protection lawyers running through his response, which was absolutely fascinating. At this time of the evening, we need not pick over the Data Protection Act too closely. I confess that I am not sure whether he is correct, but we shall see. In the mean time, I beg leave to withdraw the amendment.

Amendment 113 withdrawn.

Amendments 114 to 115 not moved.

Amendment 116

Moved by ***Lord Razzall***

116: Clause 8, page 10, line 45, at end insert "; and

( ) requirements on the time limit for notifying subscribers which must be no more than one month"

Lord Razzall: My Lords, Amendment 116 relates to a very straightforward point. I hope that I do not require the help of the noble Lord, Lord Whitty, to persuade the Government to accept the amendment, because it is so obvious that we need to protect the subscribers.

This part of the Bill is about trying to get the right balance between the interests of those who believe that downloading on the internet should be their inalienable right and those who believe that those who take copyright material are stealing it. Finding the balance between those positions is what this section is about. This straightforward amendment proposes that there should be a time limit for a subscriber to be notified of a CIR. This amendment suggests one month. We believe that that should be in the Bill because we are concerned that subscribers may not otherwise receive a notification until many months after the alleged infringement, by which time it would be very difficult for them to challenge. I hope that at this late stage the Government will accept this amendment with ease. I beg to move.

9.45 pm

Lord Howard of Rising: My Lords, we on these Benches entirely agree with the noble Lord on the need to send the notification letter as soon as possible after the relevant infringement report has been made, which, as we have said, should be sent equally soon after the alleged infringement. I am uncertain about the specification of one month as a time limit, especially because of the possibility that a second or third notification will not be sent out until a certain level of continuing breaches has occurred, which may be some time after the first breach. However, an expected turnaround time would be very helpful. I am interested to hear what sort of timetable the Minister expects the internet service providers to follow.

Lord Young of Norwood Green: My Lords, the amendment would set a clear time limit of a month for how long an internet service provider has from receiving a properly presented copyright infringement report from a copyright owner to when a notification is sent to the subscriber alleged to have been infringing online if the copyright infringement report is one of those for which the code requires a notification to be generated.

The glass is still half full, but I have a good deal of sympathy with the thought behind this amendment. This is an area where speed is important and it is not reasonable to expect people to remember the circumstances around what they were doing online weeks or months in the past. We explored that area in our debate on the previous amendment. However, this is not something which we need to specify in the Bill and it might prove to be counterproductive to do so. Once a period is specified in legislation, inevitably that would be the said period. It would become the default period despite the intention and the wording making it clear that it should represent the outer limit.

This is not a risk that we should take. I anticipate that the norm between the receipt of a copyright infringement report and a notification being sent, if appropriate, will be a matter of days. If the process is fully automated—it is our view that that will happen—we may be in the realm of minutes. I would much prefer to leave the details and the essential safety nets to the code, and not take the risk of inadvertently introducing a potential drag into the system. Obviously, I note the arguments that were made. We still believe that it is proper to the code, but we will look at whether there might be some helpful parameters. On the basis of that explanation, I hope that the noble Lord will feel able to withdraw the amendment.

Lord Razzall: My Lords, I thank the Minister for that response. I suspect that this is the last amendment tonight and it is probably a good one to end on. It encapsulates the difference that has arisen on several amendments between the two Opposition parties and the Government in that where there are issues of the fundamental protection of individuals' rights, we are looking to have protections put in the Bill. I would not go so far as to say that the Minister's glass is always half full because occasionally it is half empty. Indeed, at times it is completely empty.

Noble Lords: Oh!

Lord Razzall: I shall withdraw that. There is a fundamental difference here, and when we get to the Report stage we will want to look at the individual amendments we have moved where we feel that issues of principle arose that the Government actually agree with, so there is no disagreement between us. The only issue is whether these should be left, as the noble Earl, Lord Erroll, described them, to the bureaucrats in Whitehall. He did not say Room 101 because he does not know his Orwell, but that is what he meant. We will go through the Bill and we might even talk to the Tory Opposition about whether we can agree with them what should be put in. It is interesting that there is no disagreement between any of us, only where these issues should be enshrined—whether in the code or in the Bill. In the mean time, I am happy to withdraw the amendment.

Amendment 116 withdrawn.

House resumed.

Video Recordings Bill

Committee and Report

9.52 pm

The House resolved itself into Committee on the Bill. No amendments had been tabled. Report received.

House adjourned at 9.53 pm.

Written Statements

Monday 18 January 2010

Argentina: Legislation
Statement

The Minister of State, Foreign and Commonwealth Office (Baroness Kinnock of Holyhead): My honourable friend the Minister for Europe (Chris Bryant) has made the following Written Ministerial Statement.

The UK firmly rejects the enactment and promulgation, on 9 December 2009, of Argentine law 26.552 and thus the additional paragraph in Article 1 of Argentine law 23.775 in so far as it purports to include within a province of Argentina areas which comprise the Falkland Islands, South Georgia and the South Sandwich Islands and the British Antarctic Territory.

The UK has no doubt about its sovereignty over the Falkland Islands, South Georgia and the South Sandwich Islands and the surrounding maritime areas. The UK also has no doubt about its sovereignty over the British Antarctic Territory (south of latitude 60°S and bounded by longitudes 20°W and 80°W).

The Foreign and Commonwealth Office has delivered a note verbale to the Argentine Charge d'Affaires in London outlining the UK's rejection.

Employment: Access to Professions
Statement

The Parliamentary Under-Secretary of State, Department for Business, Innovation and Skills (Lord Young of Norwood Green): My right honourable friend the Minister for Business Innovation and Skills (Pat McFadden) has today made the following Statement.

I have today laid before Parliament the Command Paper *Unleashing Aspiration*—the Government response to the final report of the Panel on Fair Access to the Professions. This responds to the report of the same name led by the right honourable Member for Darlington, published on 21 July 2009.

Social mobility lies at the heart of this Government's social policies. That is why, in our White Paper *New Opportunities—Fair Chances for the Future* (Cmd. 7533) last year, we set out our commitment to give everyone a fair chance to get ahead and it was following the publication of that paper that my right honourable friend the Member for Darlington was commissioned by the Prime Minister to write his report.

The fair access to the professions report has already had a profound impact on the policies of this Government since their publication: *Quality, Choice and Aspiration*, the information advice and guidance strategy launched by my right honourable friend the Secretary of State for Children, School and Families is making it easier for young people and their parents to access high-quality advice and guidance about education and careers. Today we will set out a guarantee, building from the *New Opportunities* White Paper, for up to 130,000 of the brightest young people from low-income backgrounds to benefit from a structured package of support towards higher education from 2012.

In *Higher Ambitions*, the higher education framework, we made it clear to universities that social mobility must remain at the heart of their mission. We accepted the panel's recommendation on asking universities to take into account the context of educational achievement when assessing admissions. Lord Browne is leading an independent review of higher education funding and student finance to ensure the system caters for full and part-time students and finance is not a barrier to accessing higher education.

EU: Agriculture and Fisheries Council
Statement

The Parliamentary Under-Secretary of State, Department for Environment, Food and Rural Affairs (Lord Davies of Oldham): My right honourable friend the Secretary of State for Environment, Food and Rural Affairs (Hilary Benn) has made the following Written Ministerial Statement.

My honourable friend the Minister for Food, Farming and Environment (Jim Fitzpatrick) will be representing the United Kingdom at the Agriculture and Fisheries Council in Brussels on 18 January. No Ministers from the devolved Administrations are scheduled to attend.

This will be the first Agriculture and Fisheries Council under the Spanish presidency, and it will outline its work programme on agriculture and fisheries dossiers. Discussions will also take place on two substantive items—the Commission communication *A Better Functioning Food Supply Chain in Europe* and the Italian state aid request for the purchase of agriculture land.

Under any other business, a Bulgarian request for state aid for producers of raw tobacco has been tabled.

Health: Thalidomide
Statement

Baroness Thornton: My right honourable friend the Minister of State, Department of Health (Mike O'Brien), made the following Oral Statement on 14 January.

With permission, Mr Speaker, I wish to make a Statement about help for thalidomide survivors. Between 1958 and 1961, the drug thalidomide was used by expectant mothers to control the symptoms of morning sickness. Tragically, this led to many babies being born with often severe physical disabilities. There are currently 466 thalidomiders, as they refer to themselves, who are beneficiaries of the Thalidomide Trust. The Government wish to express their deep sympathy for the injury and suffering endured by all those affected. I will say more about that in a moment.

I am pleased to report that the Government will now fund a £20 million, three-year pilot scheme to help meet the health needs of thalidomide survivors in a more personalised way. Funding has been found from existing departmental central contingency budgets. The scheme will be operated by the Thalidomide

Trust, which will use its considerable expertise and knowledge of its members' needs to distribute money to survivors. They, in turn, will invest the money in adaptations and other preventive measures that are likely to reduce long-term demands on the NHS.

In recent months, I have met the national advisory council of the Thalidomide Trust on a number of occasions, and it impressed on me its concerns about the continuing and increasing health needs of thalidomiders as they approach older age. This additional funding will help to meet their complex and highly specialised needs, and to reduce further degeneration in their health.

There will be clear principles for the use of the money. It will be used to explore how the health needs of thalidomide survivors can best be met in the longer term. It will also be used to look at the effectiveness of the scheme and how this approach of working through an expert national body might be applied to other small groups of geographically dispersed patients with specialised needs. The evaluation will be focused on thalidomide survivors in England. However, as the Thalidomide Trust has discretion in how it uses its funding, we expect that survivors living outside England will also benefit.

It is important to acknowledge that this announcement builds on work done with thalidomiders in past decades by Lord Morris of Manchester and by Lord Ashley of Stoke. Lord Morris, appointed as the first Minister for Disabled People in 1974, made Distillers, the then owners of the thalidomide drug, establish a trust fund for affected children. Lord Ashley has tirelessly campaigned for greater recognition of the effects of the drug and the needs of thalidomiders, which has also led to improvements in drug safety. The work of Harold Evans and the *Sunday Times* should also be acknowledged, as should the campaigning by a number of current Members of this House.

While the Government are taking positive steps to help thalidomide survivors, the contribution of the Thalidomide Trust to supporting survivors and their families cannot be overstated. I would also like to take this opportunity to pay tribute to the work of the trust, its officers and, in particular, to the members of the national advisory council, which has worked tirelessly to champion the cause of thalidomiders.

Importantly, let me make the following Statement on behalf of the Government, as I know that many thalidomiders have waited a long time for it; it has been agreed with the national advisory council. The Government wish to express their sincere regret and deep sympathy for the injury and suffering endured by all those affected when expectant mothers took the thalidomide drug between 1958 and 1961. We acknowledge both the physical hardship and the emotional difficulties that have faced the children affected and their families as a result of this drug and the challenges that many continue to endure, often on a daily basis. In the light of what happened, a complete review of the machinery for marketing, testing and regulating drugs was initiated, including the enactment of the Medicines Act 1968, which introduced further testing for medicines prior to licensing to ensure that they met acceptable standards of safety and efficacy.

Written Answers

Monday 18 January 2010

Armed Forces: Aircraft

Question

Asked by ***Lord Tebbit***

To ask Her Majesty's Government how many Royal Air Force transport and tanker aircraft are (a) more than 40 years old, (b) between 30 and 40 years old, (c) between 20 and 30 years old, (d) between 10 and 20 years old, and (e) less than 10 years old. [HL931]

The Minister for International Defence and Security (Baroness Taylor of Bolton): The Royal Air Force transport fleet comprises C-17, Hercules C-130J/K, Tristar, VC-10, HS 125, BAe 146 and Augusta A109E aircraft. The air refuelling aircraft are Tristar and VC-10.

The age of these aircraft are listed in the following table:

Age of Aircraft	*Numbers of Aircraft*
More than 40 years old	28
Between 30 and 40 years old	10
Between 20 and 30 years old	8
Between 10 and 20 years old	24
Less than 10 years old	9

First deliveries of the transport aircraft A400M are expected to commence in 2014. The Future Strategic Tanker Aircraft will be introduced to service in 2011.

Armed Forces: Costs

Question

Asked by ***Lord Marlesford***

To ask Her Majesty's Government further to the Written Answer by Baroness Taylor of Bolton on 5 January (*WA 4*) on the costs of United Kingdom military operations in certain countries, whether they will adjust the figures to include the cost of military equipment, military personnel pay, estate works and maintenance, and information technology and communications. [HL1155]

The Minister for International Defence and Security (Baroness Taylor of Bolton): The original Question asks for the cost to public funds for "operations" in Iraq, Afghanistan, Cyprus, Northern Ireland, Germany, and the Falkland Islands in each of the past five years.

In strict terms, during that period, only forces in Iraq and Afghanistan have been engaged in military "operations" for which the net additional costs are met by the reserve. The other countries, with the exception of Cyprus, have standing forces, and our activities there paid for from the core defence budget. Cyprus has a combination of forces for which we receive payment for peacekeeping duties by the United Nations and other UK standing forces.

The MoD's core budget is separated into eight top level budget holders (TLBs) each responsible for delivering individual military objectives. Within these TLBs the budget is not routinely allocated in terms of regions but in terms of categories of expenditure. The level of detailed breakdown requested could only be provided at disproportionate cost.

Art Galleries: Grants

Question

Asked by ***Lord Fearn***

To ask Her Majesty's Government what grant was given to art galleries in London in 2007 and 2008; and how it was divided. [HL657]

Lord Davies of Oldham: The grant in aid (GIA) allocations to sponsored art galleries in London for financial years 2007-08 and 2008-09 and Department for Culture, Media and Sport/Wolfson 2007-08 Museums and Galleries Improvement Fund grants are shown in the table.

£000's

	2007-08		*2008-09*
Gallery	*GIA*	*Additional Wolfson Funding* [1]	*GIA*
Tate [2]	38,818	0	49,556
National Gallery	25,597	100	26,369
National Portrait Gallery	7,038	122	7,693
The Courtauld Institute of Art (University of London)	n/a	40	n/a

[1] Many institutions who have received grants from the DCMS/Wolfson Museums and Galleries Improvement Fund hold both museum and art gallery collections within a single institutional entity. It is not possible to disaggregate the funding that is received solely by the art galleries within these institutions. Hence the data in the table relates solely to galleries that hold art collections only. Grants awarded by the DCMS/Wolfson Museums and Galleries Improvement Fund comprise 50 per cent funding from DCMS and 50 per cent from the Wolfson Foundation.

[2] The figures for Tate include Tate Modern and Tate Britain, as well as central organisational functions including conservation, marketing, press and publicity and acquisitions.

Arts Council England also spent £17,407,757 on Visual Arts in Greater London in 2007-08 and £17,165,430 in 2008-09. This includes areas such as architecture, artist development, moving image, crafts, learning and education, live art, new media, photography and public art, in addition to physical art gallery space.

Channel Tunnel

Question

Asked by ***Lord Dykes***

To ask Her Majesty's Government what plans they have to widen the access by other rail freight operators to the Channel Tunnel, in agreement with the existing operators and the Government of France. [HL1195]

The Secretary of State for Transport (Lord Adonis): We created open access for UK freight paths through the Channel Tunnel at the end of 2006 and Eurotunnel has since agreed lower rates for rail freight. These initiatives have delivered results in the form of an increase in the number of rail freight services through the Channel Tunnel, some of which are operated by new open access operators.

Civil Service

Question

Asked by ***Lord Bradshaw***

To ask Her Majesty's Government further to the Written Answer by Lord Adonis on 16 December 2009 (*WA 233*), how many civil servants were seconded to the private sector in the transport industries during 2008 and 2009. [HL1166]

The Secretary of State for Transport (Lord Adonis): In instances where there are five or fewer occurrences, it is Department for Transport policy not to release information on grounds of confidentiality

Crime: Homicide

Question

Asked by ***Lord Tebbit***

To ask Her Majesty's Government how many people have died since 1963 at the hands of persons previously convicted of homicide. [HL930]

The Parliamentary Under-Secretary of State, Home Office (Lord West of Spithead): Between 1963 and 2007-08 a total of 131 persons in England and Wales are known to have been killed by persons who had been previously convicted of homicide.

As with previous Answers, the figure excludes persons who have been killed by those who may have been convicted outside England and Wales (for whom there is incomplete information), and persons who have been killed by those not previously convicted of homicide by reason of their mental state.

Crown Dependencies: Defence Costs

Question

Asked by ***Lord Wallace of Saltaire***

To ask Her Majesty's Government what recent discussions they have held with the Government of Guernsey about the voluntary contribution Guernsey may make to the costs of United Kingdom defence. [HL984]

The Minister for International Defence and Security (Baroness Taylor of Bolton): None.

Driving: Licences

Question

Asked by ***Lord Lucas***

To ask Her Majesty's Government when they will undertake a consultation on the effects of Commission Directive 2009/113/EC on the eligibility criteria for a United Kingdom driving licence. [HL1175]

The Secretary of State for Transport (Lord Adonis): My department is considering the requirements and expects to consult on changes to the minimum medical standards as early as practical.

Embryology

Question

Asked by ***Lord Alton of Liverpool***

To ask Her Majesty's Government further to the Written Answer by Baroness Thornton on 16 December 2009 (*WA 236–7*), what were the differences between the Hampton Implementation Review of the Human Fertilisation and Embryology Authority as originally drafted and the text subsequently made available on the Department for Business, Innovation and Skills website; and whether they will place a copy of the first draft in the Library of the House. [HL1274]

The Minister of State, Department for Business, Innovation and Skills and Ministry of Defence (Lord Drayson): The Hampton Implementation Review of the Human Fertilisation and Embryology Authority (HFEA) forms part of a series of reviews of the work of 36 national regulators against the principles of good regulatory and enforcement practice first set out in the Hampton report, *Reducing Administrative Burdens: effective inspection and enforcement* (2005). The reviews are based on a range of evidence, including interviews with regulator staff and stakeholders. Their findings reflect the views of a team consisting of peer reviewers drawn from other regulators and better regulation executive officials.

The HFEA report was published on 3 December 2009. Drafts of the reports, and commentary upon them, are not published. However, full guidance on the process underlying the reviews is available at: http://www.berr.gov.uk/files/file48275.pdf.

Fluoridation

Questions

Asked by ***Earl Baldwin of Bewdley***

To ask Her Majesty's Government in the context of their overview of the current state of the scientific evidence worldwide for and against the fluoridation of water supplies, what are the journal and date of publication of the study by Professor Chester Douglass foreshadowed by that author in a letter in *Cancer Causes Journal* in 2006 (17:481–482) adduced in South Central Strategic Health Authority's 2008

public consultation document on water fluoridation (reference 13) as evidence for the view that no link was found between fluoride levels and osteosarcoma. [HL1250]

To ask Her Majesty's Government whether the larger study referred to by Professor Chester Douglass in a letter in *Cancer Causes Journal* in 2006 (17:481–482) worked on the same sets of data as the study in the same journal by Elise Bassin whose "exploratory analysis found an association between fluoride exposure during childhood and the incidence of osteosarcoma among males but not consistently among females" (17:421–428); whether the two studies contained subjects in common; and whether the subjects in the two studies were recruited over overlapping time periods. [HL1251]

Baroness Thornton: We understand that Elise Bassin's analysis was of subjects included in a longitudinal study led by Professor Chester Douglass. The report of the study has not been published yet, but an analysis conducted in 2007 by the West Midlands Cancer Intelligence Unit found that the incidence of osteosarcoma in the West Midlands, in which over 5 million people drink fluoridated water, is low with no statistically significant difference in rates for fluoridated and non-fluoridated parts of the region.

Government Departments: Bonuses

Question

Asked by ***Baroness Northover***

To ask Her Majesty's Government for each of the last three years for which figures are available, how many people were eligible for performance bonuses and special bonuses in the Attorney-General's Office and its agencies, by Civil Service band; how many people received each type of bonus, by Civil Service band; what the average payment was for each type of bonus, by Civil Service band; and what the maximum payment was for each type of bonus, by Civil Service band. [HL46]

The Attorney-General (Baroness Scotland of Asthal): Non-consolidated performance payments are an integral element of the reward package for staff. These payments are used to drive high performance and form part of the pay award for members of staff who demonstrate exceptional performance—for example, by exceeding targets set or meeting challenging objectives. They have to be re-earned each year and do not add to future pay bill costs—for example, pensions. A close and effective link between pay and performance and increased use of variable pay is a key element of the reward arrangements for the Civil Service and the Senior Civil Service (SCS) in particular.

Reward arrangements, including the criteria for non-consolidated performance pay, below the SCS, are delegated to individual departments and agencies. For the SCS, departments and agencies are responsible for their own reward arrangements within a framework set by Cabinet Office. The percentage of the pay bill set aside for performance-related awards for the SCS is based on recommendations from the independent Senior Salaries Review Body.

Tables covering the specific information requested have been deposited in the Library of the House. These tables give details of the number people who were eligible for and received a non-consolidated variable pay awards, and the average and maximum payment for a non-consolidated variable pay award, by civil service band, for the three most recent performance years for which the relevant payments have been published in the department's accounts.

Government: Office Equipment

Questions

Asked by ***Lord Bates***

To ask Her Majesty's Government further to the Written Answer by the Parliamentary Under-Secretary of State for Communities and Local Government, Barbara Follett, on 9 December 2009 (*Official Report*, Commons, col. 390W), what was the average purchase price, excluding value added tax, of a 500-sheet ream of white A4 80 gsm photocopier paper paid by the Ministry of Defence and each of its agencies in the latest period for which figures are available. [HL993]

The Minister for International Defence and Security (Baroness Taylor of Bolton): The average purchase price, excluding VAT, paid by the Ministry of Defence and each of its agencies for a 500-sheet ream of white A4 80 gsm photocopier paper since 1 October 2009 is £1.73.

Asked by ***Lord Bates***

To ask Her Majesty's Government further to the Written Answer by the Parliamentary Under-Secretary of State for Communities and Local Government, Barbara Follett, on 9 December 2009 (*Official Report*, Commons, col. 390W), what was the average purchase price, excluding value added tax, of a 500-sheet ream of white A4 80 gsm photocopier paper paid by the Department for Work and Pensions in the latest period for which figures are available. [HL1118]

The Parliamentary Under-Secretary of State, Department for Communities and Local Government & Department for Work and Pensions (Lord McKenzie of Luton): For the period May 2008 to December 2009 the average purchase price, excluding value added tax, of a 500-sheet ream of white A4 80gsm photocopier paper used by this department is £1.73.

Houses of Parliament: State Opening

Questions

Asked by ***Lord Berkeley***

To ask Her Majesty's Government what was the cost to (a) the Ministry of Defence, and (b) the police, of the State Opening of Parliament on 18 November. [HL579]

The Minister for International Defence and Security (Baroness Taylor of Bolton): For the MoD, the estimated additional cost was about £10,000. This represents expenditure on transport. We have not calculated the cost of the support given by military personnel as they are paid on a daily basis irrespective of their duties.

For the Metropolitan Police, the estimated additional cost of the policing operation was £85,000. This includes expenditure on air support, transportation, catering, the erection of barriers and road signs and overtime.

Asked by ***Lord Wallace of Saltaire***

To ask Her Majesty's Government what is the cost of removing and replacing the steel barriers in Old Palace Yard in order to allow access for the Sovereign's procession at the State Opening of Parliament. [HL982]

The Chairman of Committees (Lord Brabazon of Tara): The complete cost of the removal and reinstatement of the Corus barriers, and associated actions, for the 2009 State Opening of Parliament was £92,271. This included: the closure of the road (erection of diversion signs, early warning notices etc); the removal, storage and reinstatement of all barriers and railings in front of the Palace from St Stephen's Entrance to Black Rod's Entrance; the removal, storage and reinstatement of the Corus barriers; and the installation and removal of the temporary security boom gates and blockers, as well as their removal and reinstatement for the early morning rehearsal and for the State Opening itself.

Asked by ***Lord Wallace of Saltaire***

To ask Her Majesty's Government whether they have consulted the appropriate local authorities on the impact on traffic flows in Westminster and Lambeth of closing Old Palace Yard for the State Opening of Parliament. [HL983]

The Chairman of Committees: In order to close the roads for the State Opening of Parliament, the police make an application to Westminster City Council. It is for the council to consider the impact of the closure when making its decision.

Housing: Funding

Questions

Asked by ***Lord Greaves***

To ask Her Majesty's Government whether they will fund the Housing Market Renewal Pathfinder projects for the remainder of the 15-year investment period announced when the projects were set up in 2003. [HL1041]

To ask Her Majesty's Government whether the annual funding of the Housing Market Renewal Pathfinder projects will increase in future; and how much funding they expect to provide for each of those projects in their remaining years. [HL1042]

The Parliamentary Under-Secretary of State, Department for Communities and Local Government & Department for Work and Pensions (Lord McKenzie of Luton): Housing Market Renewal was established as a long-term programme, although it is too early to confirm future levels of funding for the programme beyond the current Comprehensive Spending Review period. Full HMR Pathfinder allocations for 2010-11 were announced in December last year.

Housing: Letting Agents

Question

Asked by ***Lord Greaves***

To ask Her Majesty's Government whether they are a considering a comprehensive scheme for the registration of letting agents of residential property in England and Wales. [HL1110]

The Parliamentary Under-Secretary of State, Department for Communities and Local Government & Department for Work and Pensions (Lord McKenzie of Luton): We consulted over the summer on our response to the independent review of the private rented sector carried out by Julie Rugg and David Rhodes of the Centre for Housing Policy at the University of York. This included proposals for the regulation of letting agents. We have been considering the consultation responses received and plan to publish the results shortly.

Please note however that these matters are devolved for Wales.

Housing: Private Landlords

Question

Asked by ***Lord Greaves***

To ask Her Majesty's Government whether they are considering a comprehensive scheme for the registration of private landlords of residential property in England and Wales. [HL1109]

The Parliamentary Under-Secretary of State, Department for Communities and Local Government & Department for Work and Pensions (Lord McKenzie of Luton): We consulted over the summer on our response to the independent review of the private rented sector carried out by Julie Rugg and David Rhodes of the Centre for Housing Policy at the University of York. This included proposals for a national register of private landlords. We have been considering the consultation responses received and plan to publish the results shortly.

Please note however that these matters are devolved for Wales.

Immigration: Tinsley House

Questions

Asked by ***Baroness Stern***

To ask Her Majesty's Government what action they have taken in response to the report of unprofessional conduct by some overseas escort contractors noted by HM Chief Inspector of Prisons in her report on Tinsley House immigration removal centre. [HL1122]

The Parliamentary Under-Secretary of State, Home Office (Lord West of Spithead): The UK Border Agency has been working with its escorting contractor G4S to address the concerns raised by HM Chief Inspector of Prisons (HMCIP).

A reminder has been issued to all G4S overseas escorts of the availability of the telephone interpreting service and of the need to use it with any detainees identified as having difficulties in communication. This will be reinforced in operational briefings given to staff on charter flights and the level of use of the interpreting service will be monitored.

While escort staff always try to help detainees with their concerns and will endeavour to put them at their ease, this should never extend to providing false assurances. All overseas escorts have been reminded of this in operational briefings. Any reports of escorts offering inappropriate advice or assurances will be investigated thoroughly.

On the occasion of the charter observed by HMCIP, with the large number of detainees and the short timescale, some overseas escort staff omitted to introduce and identify themselves to some of the detainees. Escort staff are expected to carry ID at all times and are obliged to identify and introduce themselves to detainees when requested. This omission has been followed-up with by a reminder to escort staff of the need for an introduction and identification on all moves, including charter flights.

Asked by ***Baroness Stern***

To ask Her Majesty's Government how many single women are held at Tinsley House immigration removal centre; and what changes they have brought in since HM Chief Inspector of Prisons noted that "the small number of single women felt intimidated and rarely left their rooms". [HL1123]

Lord West of Spithead: Tinsley House immigration removal centre can accommodate five single women at any one time, providing a place of detention close to Gatwick Airport. Following the HMCIP report, G4S in conjunction with the UK Border Agency has arranged for an officer to check on all women at various times of the day to ensure their welfare needs are met and to address any particular concerns. Arrangements in place for them to eat separately from the men if they so wish, and to access activities such as the gym alone.

We have also limited the length of stay to 72 hours, after which they are transferred to Yarl's Wood, the main centre for women.

Asked by ***Baroness Stern***

To ask Her Majesty's Government in light of the conclusion by HM Chief Inspector of Prisons in her report on Tinsley House immigration removal centre that apparently unnecessary force had been used on children when removing a family, whether new instructions have been issued on the use of force on children. [HL1124]

Lord West of Spithead: New instructions have not yet been issued, but staff at Tinsley House were reminded of the need to obtain prior authority in advance following the incident reported in the HM Chief Inspector of Prison's report.

Asked by ***Baroness Stern***

To ask Her Majesty's Government whether child protection arrangements have been developed at Tinsley House immigration removal centre. [HL1126]

Lord West of Spithead: All staff who work at Tinsley House immigration removal centre are vetted by the UK Border Agency to ascertain their suitability to work with children.

Officers also receive child protection training. However, the current package is currently being developed further in conjunction with West Sussex Children's Services.

Local Authorities

Questions

Asked by ***Lord Greaves***

To ask Her Majesty's Government whether "double devolution" of power from central government to local government to local people remains part of their policy programme; and, if so, what steps they are taking to promote it. [HL1043]

The Parliamentary Under-Secretary of State, Department for Communities and Local Government & Department for Work and Pensions (Lord McKenzie of Luton): Since 1997, local authorities have gained significant powers, responsibilities and financial freedoms from central government to enable further devolution of decision-making to local communities. Actions we have taken to date include: increased financial freedom and stability to local government through the first ever three-year finance settlement, reduced ring-fencing, and devolved powers to local authorities, enabling them to create parish councils, make and enforce certain bylaws and increasing their choice in democratic processes such as electoral schemes and leadership style. We have promoted the transfer of assets from local government to local people where these could be better run for community benefits. We have also recently passed legislation that will give citizens greater power to hold local authorities to account and influence local services. This includes the extension of scrutiny arrangements, enabling local people, through their councillors, to influence decisions which affect their day to day lives and give them more say over what their council is doing for them.

This Government's recent public consultation, *Strengthening Local Democracy*, on which we will respond in due course, affirms our commitment to principles of devolution. In addition, *Putting the Front-line first: Smarter Government* published on 9 December sets out how we will meet new challenges and deliver better public services for lower costs by: driving up standards through strengthening the roles of citizens and civic society; freeing up public services by recasting the relationship between the centre and the front-line and streamlining central government, saving money through sharper delivery. These actions all demonstrate our continuing commitment to devolution.

Asked by ***Lord Greaves***

To ask Her Majesty's Government whether they have set an upper limit on (a) geographical size, or (b) population, before a local authority ceases to be "local"; and, if so, what those limits are. [HL1044]

Lord McKenzie of Luton: We have no such parameters, as is illustrated by the fact that the size of principal local authorities' ranges from West Somerset with a population of around 35,500, to the City of Birmingham, with a population of just over 1 million.

Asked by ***Lord Greaves***

To ask Her Majesty's Government which public services provided under statute by local authorities they do not consider to be "core services" which should be protected from spending cuts. [HL1111]

Lord McKenzie of Luton: Local authorities are independent bodies responsible for the decisions they make on spending priorities to meet their statutory commitments. Councils have benefited from significant investment since 1997 with a 39 per cent real terms increase in government grant in the first 10 years, and an additional £8.6 billion over the period covered by the current spending review (2008-09 to 2010-11). We want to see local government at the heart of initiatives to provide innovative and better value public services. Councils have a good record on delivering the efficiency gains necessary to provide effective local services. We expect them to make £5.5 billion available over the three years up to 2011 through efficiencies which can be reinvested in local services or used to keep council tax levels down.

Local Government: Services

Question

Asked by ***Lord Greaves***

To ask Her Majesty's Government what assessment they have made of the findings of the Total Place pilots that 5 per cent of spending on public services is discretionary spending by local authorities; whether that proportion will be increased; and, if so, by how much. [HL1113]

The Parliamentary Under-Secretary of State, Department for Communities and Local Government & Department for Work and Pensions (Lord McKenzie of Luton): The Total Place initiative is currently ongoing and the pilots have yet to provide their final reports. Once received, the department will work with a range of other departments to consider the issues raised in those reports.

Mountain Rescue

Question

Asked by ***Lord Greaves***

To ask Her Majesty's Government whether they will compensate the mountain rescue teams which have supported local authorities during recent extreme weather conditions, including floods, snow and cold conditions, in a similar manner to the Bellwin scheme for compensating local authorities. [HL1108]

The Parliamentary Under-Secretary of State, Department for Communities and Local Government & Department for Work and Pensions (Lord McKenzie of Luton): As my noble friend Lord Faulkner of Worcester said in the House on 6 January 2010, support for mountain rescue teams is a matter for the police authority and chief constable concerned as they have responsibility for co-ordinating inland search and rescue operations. Between them, police forces contribute almost £100,000 annually in direct support and additional amounts by way of support in kind. However, in recognition of concerns expressed by the Mountain Rescue Council about such matters, the Parliamentary Under-Secretary of State for Transport, the honourable Member for Gillingham, has offered to facilitate a meeting with Lord Dubs, interested parties and relevant government departments. As my noble friend also said, the efforts of those who give their time to the mountain rescue service during severe weather events of the kind we are experiencing merit only the highest praise and appreciation.

NHS: Purchasing

Questions

Asked by ***Earl Howe***

To ask Her Majesty's Government how best practice for procurement is encouraged in the National Health Service. [HL1203]

Baroness Thornton: Guidance to primary care trusts (PCTs) on the procurement of health services is maintained under the PCT Procurement Guide and is supported by the role of regional Commercial Support Units in adopting best practice, for example, in realising opportunities for collaborative working.

A copy of the PCT Procurement Guide (May 2008) has been placed in the Library.

This document is also available on the department's corporate website, via the following link at www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_084857.pdf

Asked by ***Earl Howe***

To ask Her Majesty's Government what is the annual total level of NHS spending on medical supplies and equipment. [HL1204]

Baroness Thornton: Annual total revenue expenditure on clinical supplies and services, as recorded in the National Health Service audited summarisation schedules, was £4,922,822,000 in 2008-09, which is the latest period for which audited figures are available.

Revenue expenditure on clinical supplies and services is taken to include drugs, dressings, medical and surgical equipment, x-ray equipment and supplies, laboratory equipment, appliances (eg, artificial limbs and wheelchair hardware) and the maintenance of

equipment. The department does not collect information that allows capital expenditure on medical equipment to be disaggregated from total capital expenditure.

Asked by ***Earl Howe***

To ask Her Majesty's Government what is the planned expenditure on NHS medical supplies and equipment in each year from 2011 to 2014. [HL1205]

Baroness Thornton: The Pre-Budget Report announced that spending on front-line health will increase in line with inflation in 2011-12 and 2012-13. Funding for 2013-14 has not been announced. Planning at the level of detail of medical supplies and equipment is a matter for the National Health Service locally and not the department.

Asked by ***Earl Howe***

To ask Her Majesty's Government how the DHL contract for supply and delivery of NHS medical supplies and equipment is being evaluated. [HL1206]

Baroness Thornton: The department signed a 10-year master services agreement with Exel Europe Ltd (part of the DHL group) on 4 September 2006 for the provision of procurement and supply chain services. Exel trades under the name of National Health Service Supply Chain (NHS SC).

The operating and financial performance of NHS SC is reviewed regularly by a joint board, comprising representatives from the department, NHS SC and NHS Business Services Authority.

Two annual customer satisfaction surveys have been undertaken since the contract started—one is led by the department, the other by NHS SC.

In addition, the department has commissioned a detailed qualitative customer survey, which gives NHS SC's customers the opportunity to comment on the organisation's performance.

Schedule 23 of the master services agreement sets out the key performance indicators and post-transition key performance indicators. The post-transition phase began in August 2007.

A copy of Schedule 23 of the master services agreement has been placed in the Library.

Olympic Games 2012: Northern Ireland

Question

Asked by ***Lord Laird***

To ask Her Majesty's Government what objectives they have for the legacy of the 2012 London Olympic Games for Northern Ireland. [HL905]

Lord Davies of Oldham: The Government's legacy ambitions for the UK, including Northern Ireland, are: to make the UK a world-leading sporting nation; to transform the heart of East London; to inspire a generation of young people; to make the Olympic Park a blueprint for sustainable living; and to demonstrate that the UK is a creative, inclusive and welcoming place to live in, visit and for business. And in December 2009 I announced a sixth promise: that London 2012 will help transform the opportunities for disabled people.

The Government and the London Organising Committee of the Olympic Games and Paralympic Games established the Nations and Regions Group to ensure UK-wide engagement and to maximise the legacy of London 2012. This group works directly with representatives from each of the Nations and English regions to maximise the sporting, commercial, cultural and other benefits of the 2012 Games.

Specific examples of the Games' legacy in Northern Ireland include:

the 10-year Strategy for Sport in Northern Ireland to increase the number of Northern Irish participants at London 2012 and future Games;

a culture and arts programme, contributing fully to the Cultural Olympiad;

the Northern Ireland Connections Programme, funded by Legacy Trust UK, consisting of six projects to encourage partnership working between the arts and sports sectors; and

approximately 1,000 Northern Ireland companies have registered on Competefor—the London 2012 electronic business database—with nine companies securing Olympic-related contracts at an estimated value of £60 million.

Passports

Question

Asked by ***Lord Marlesford***

To ask Her Majesty's Government whether they have in place arrangements to enable them to exchange with the authorities of the United States and member states of the European Union details of passports held by British passport holders. [HL1157]

The Parliamentary Under-Secretary of State, Home Office (Lord West of Spithead): The Identity and Passport Service (IPS) does not routinely provide details of valid UK passports to border control and law enforcement authorities in the United States or the European Union.

IPS does, however, have arrangements in place to provide details of both fraudulently obtained genuine UK passports and processed reports of lost and stolen UK Passports to Interpol, border control and law enforcement authorities in the United States and the UK Border Agency. This information helps to support the prevention and detection of crime and remove lost, stolen and fraudulently obtained genuine UK passports from circulation.

Public Bodies

Question

Asked by ***Lord Tebbit***

To ask Her Majesty's Government whether they make appointments to public bodies only on the basis of merit and capacity. [HL1028]

The Chancellor of the Duchy of Lancaster (Baroness Royall of Blaisdon): The Independent Commissioner for Public Appointments requires all appointments to posts within her remit to be made on merit following an open and transparent selection process.

Roads: Advertising Hoardings

Question

Asked by ***Lord Lloyd-Webber***

To ask Her Majesty's Government what planning permissions for advertising hoardings and product showrooms beside major roads were granted in 2009; and whether the potential distractions caused by advertising hoardings and showrooms are taken into account in such cases. [HL1067]

The Parliamentary Under-Secretary of State, Department for Communities and Local Government & Department for Work and Pensions (Lord McKenzie of Luton): The information requested is not collected centrally. Local planning authorities are required to exercise their powers under the Town and Country Planning (Control of Advertisements) (England) Regulations 2007 with regard to, among other things, amenity and public safety. This is set out in regulation 3. Factors relevant to public safety include the safety of persons using any highway; whether the advertisement is likely to obscure, or hinder the ready interpretation of, any traffic sign; or whether the display of the advertisement is likely to hinder the operation of any device for measuring the speed of any vehicle. These principles are reflected in the standard conditions in Schedule 2 to the regulations.

Highway safety would also be a material consideration in the determination of planning permissions.

Roads: Verges and Waysides

Question

Asked by ***Lord Greaves***

To ask Her Majesty's Government what guidance they provide to the Highways Agency and local authorities on the maintenance of highway verges and waysides for (a) use by people walking and riding horses, (b) conservation of flora and wildlife, and (c) environmental amenity. [HL1112]

The Secretary of State for Transport (Lord Adonis): Highway authorities in England have a duty, under Section 41 of the Highways Act 1980, to maintain the roads in their charge. This duty includes maintenance of verges, where these form part of the highway.

The Highways Agency provides guidance to its managing agents on the maintenance of highway verges and waysides in the Design Manual for Roads and Bridges that specifically covers conservation of flora and wildlife; in the Network Management Manual in relation to people using these areas for walking and riding horses; and in the Routine and Winter Service Code for other amenity aspects. All the Highways Agency's guidance describes management requirements and techniques for maintenance for application across a range of situations on the trunk road network.

It is for local authorities to decide on their maintenance strategy for verges. The Department for Transport has not issued specific guidance on this topic (although local authorities may follow the Highways Agency's guidance where appropriate). However, the department endorses the UK Roads Liaison Group's code of practice, "Well-maintained Highways" (available from the House Libraries or from www.ukroadsliaisongroup.org), which provides advice to authorities on highway maintenance management. It encourages authorities to consider the entire range of road users, including pedestrians and horse riders, and it contains guidance on nature conservation and biodiversity and environmental management. Natural England also provides guidance on the management of quiet lanes and greenways, where a greater emphasis on the needs of pedestrians and horse riders may be appropriate.

Somalia: Pirates

Question

Asked by ***Lord Tebbit***

To ask Her Majesty's Government further to the Written Answer by Baroness Taylor of Bolton on 5 January (*WA 80*), under what legal powers the Royal Navy seized arms, fuel, skiffs, ladders and hooks from foreign nationals upon the high seas. [HL1027]

The Minister for International Defence and Security (Baroness Taylor of Bolton): The Royal Navy has seized equipment and weapons from suspected pirates in accordance with the United Nations Convention on the Law of the Sea (UNCLOS) Article 105.

Transport: Heavy Goods Vehicles

Question

Asked by ***Lord Steel of Aikwood***

To ask Her Majesty's Government what is their stance on the proposal that the European Commission may increase the size of heavy goods vehicles permitted on trunk roads. [HL1186]

The Secretary of State for Transport (Lord Adonis): The Government's clear understanding is that the European Commission has no current intention to bring forward any proposal which, if agreed by member states, would impose a significant increase in vehicle weights and dimensions.

UK Border Agency: Staff

Questions

Asked by ***Lord Wallace of Saltaire***

To ask Her Majesty's Government whether the authority and operations of the UK Border Agency extend to the Crown dependencies. [HL1091]

The Parliamentary Under-Secretary of State, Home Office (Lord West of Spithead): The Crown dependencies have their own customs and immigration authorities, who are accountable to their respective Governments. The UK Border Agency [UKBA] works closely with immigration authorities in all the islands, to ensure the security of our borders.

The Crown dependencies carry out the same level of immigration control as the United Kingdom and receive training from UKBA, in frontline immigration operations. The islands have their own immigration rules, which closely follow those in force in the UK, and their staff have access to UKBA instructions, guidance and watchlists.

United Kingdom immigration legislation may be extended to any of the islands by order in council (subject to exceptions and adaptations) following consultation with the islands and with the islands' consent.

Asked by ***Lord Wallace of Saltaire***

To ask Her Majesty's Government how many United Kingdom-based UK Border Agency staff work outside the United Kingdom; and in which countries. [HL1092]

Lord West of Spithead: The number of United Kingdom based UK Border Agency staff working outside the United Kingdom and in which countries they are posted is shown in the attached table. The figures are as at December 2009(1).

Countries (2)	*United Kingdom based UK Border Agency staff working outside the UK*
France	965
India	76
Nigeria	68
United Arab Emirates	43
Belgium	36
China	39
South Africa	25
Philippines	23
Russian Federation	21
Ghana	23
Pakistan	17
Bangladesh	12
Jamaica	10
Kenya	10
Turkey	10
Egypt	8
Thailand	8
Poland	6
Total of employees in countries with 5 or fewer posted UK staff (3).	101
Total	1,501

(1) Border Force staff as at 31.12.09, International Group Staff as at 22.01.2009.

(2) Countries with more than five posted UK staff.

(3) Total representation in countries with five or fewer posted UK staff. The numbers in these individual countries are withheld for data protection and security reasons.

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