

This is the accepted manuscript of an article published by Taylor & Francis in *International Review of Law, Computers and Technology* on 10 January 2014.

The version of record [Romero-Moreno, F. (2014) Incompatibility of the Digital Economy Act 2010 subscriber appeal process provisions with Article 6 of the ECHR', *International Review of Law, Computers & Technology*, 28(1): 81-97, first published on line January 10, 2014] is available online via doi:

<http://dx.doi.org/10.1080/13600869.2013.869912>

**Title of the paper:** Incompatibility of the Digital Economy Act 2010  
Subscriber Appeal Process Provisions with Article 6 of the ECHR

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**Abstract**

Through case-law research, this paper critically assesses the compatibility of the Digital Economy Act 2010 (DEA) subscriber appeal process provisions (Section 13 of the DEA) with Article 6 of the European Convention on Human Rights (ECHR). Drawing on the European Court of Human Rights (ECtHR) case-law, Ofcom's Initial Obligations Code (the Code), and the DEA judicial review decision, namely, *BT PLC and Talk Talk PLC v Secretary of State for Business Innovation and Skills and others*, this paper focuses on the three Strasbourg Court principles of equality of arms, admissibility of evidence, and presumption of innocence in an effort to determine whether Section 13 of the

DEA infringe them, and whether this constitutes a breach of a subscriber's right to a fair trial under Article 6 ECHR. The paper examines these three ECtHR principles. It contrasts such principles with the Code's provisions, and considers the compatibility of Section 13 of the DEA with Article 6 ECHR. It concludes that the DEA subscriber appeal process provisions do indeed infringe these principles, thus constituting a violation of subscribers' right to a fair trial. It also recommends that the UK government start taking seriously human rights in general, and Article 6 ECHR in particular.

**Keywords:** Digital Economy Act 2010; Article 6 ECHR: right to a fair trial; copyright; file-sharing

**Paper:**

**INCOMPATIBILITY OF THE DIGITAL ECONOMY ACT 2010 SUBSCRIBER APPEAL PROCESS PROVISIONS WITH ARTICLE 6 OF THE ECHR**

**Introduction**

The Digital Economy Act (DEA) imposes two initial obligations on Internet Service Providers (ISPs): first, to notify subscribers of their alleged illegal file-sharing based on evidence collected by investigatory agents' monitoring software and recorded in Copyright Infringement Reports (CIRs); and, second, to retain Copyright Infringement Lists (CILs) of alleged repeat infringers, thus allowing rightholders to take targeted legal action.<sup>1</sup> Additionally, the DEA provides for further technical obligations. These require ISPs to implement technical measures (e.g., broadband throttling, blocking access and temporary suspension) against certain infringers.<sup>2</sup>

The DEA process can be divided into four steps: (i) an infringement is detected; (ii) the ISP notifies the subscriber; (iii) after paying a £20 fee, the subscriber can rely on four grounds to appeal each warning letter and each CIR included in the warning letter; and, (iv) the appeals body resolves the appeal.<sup>3</sup> Article 6(1) of the European Convention on Human Rights (ECHR) states that ‘in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing’.<sup>4</sup> This Article is equally applicable to civil and criminal proceedings. However, Article 6(2) (presumption of innocence) and (3) (criminal charges) only apply to criminal proceedings. Both terms: ‘civil rights and obligations’ and ‘criminal charges’, are autonomous; i.e., the European Court of Human Rights (ECtHR) will determine into which of these terms proceedings fall.<sup>5</sup>

For the civil head of Article 6 of the ECHR to apply there must be a ‘dispute’ over a ‘right’ or ‘obligation’.<sup>6</sup> The DEA states that a copyright infringement dispute is a dispute between rightholders and ISPs concerning an obligation or Ofcom’s Initial Obligations Code (the Code).<sup>7</sup> Furthermore, that ‘right’ must be based on domestic legislation,<sup>8</sup> namely, Sections 7(9)<sup>9</sup> and 12(4)<sup>10</sup> of the DEA. Finally, that right or obligation must be ‘civil’ in nature,<sup>11</sup> such as the right to compensation<sup>12</sup> (Section 13(7)(b)<sup>13</sup> of the DEA). If all these conditions are met, the civil head of Article 6 applies.

In *Engel and others v the Netherlands*, the ECtHR employed a three-step test for assessing the applicability of the criminal head of Article 6 of the ECHR.<sup>14</sup> This involves the non-cumulative presence of any of the three following elements:<sup>15</sup> first, classification of an alleged offence in the national legislation as penal; second, nature of the offence; and third, nature and degree of severity of the sanction.<sup>16</sup> The Code indicates that CILs allow rightholders to target ‘any litigation’ against alleged repeat infringers.<sup>17</sup> Thus, this would also cover

criminal cases. Accordingly, the criminal head of Article 6 also applies. A number of specific elements of Article 6 ECHR have emerged from the Strasbourg Court's case-law, such as, procedural equality, an adversarial process, disclosure of evidence, a reasoned decision, appearance in person, and effective participation.<sup>18</sup> Given that the DEA grounds of appeal are relevant to equality of arms,<sup>19</sup> admissibility of evidence<sup>20</sup> and presumption of innocence,<sup>21</sup> this paper will focus on these three ECtHR principles in an effort to determine whether the subscriber appeal process provisions (Section 13 of the DEA) infringe them, and whether this constitutes a breach of a subscriber's right to a fair trial under Article 6 of the Convention. As will be shown through case-law research, Section 13 of the DEA could certainly contravene these principles, thus constituting a violation of subscribers' Article 6 ECHR rights. The paper is divided into 3 sections, which examine each of the ECtHR principles in turn. The paper concludes that under Article 6 of the ECHR, the DEA subscriber appeal process provisions do indeed infringe these principles, thus constituting a violation of subscribers' right to a fair trial.

### **ECtHR principle of equality of arms**

The Strasbourg Court's case-law has confirmed that the principle of equality of arms is an element of the wider notion of a fair trial within the meaning of Article 6(1) of the ECHR. The ECtHR has noted that this principle requires there to be a fair balance between claimants and defendants, that is to say, each participant must be provided with a reasonable opportunity to argue their case under conditions which do not put them at a substantial disadvantage vis-à-vis their adversary.<sup>22</sup> In other words, it essentially requires procedural equality before the law between all parties.<sup>23</sup> As will be discussed, the equality of arms rule is based on a consideration of three fundamental principles, namely:

equipment equality, rule equality and outcome equality.<sup>24</sup> Section 13 of the DEA allows a subscriber to appeal on the following grounds:

- (a) the alleged contravention to which a CIR relates was not a contravention of copyright;
- (b) the CIR was not associated with the subscriber's IP address at the time of the alleged contravention;
- (c) the alleged contravention to which the CIR relates was not made by the subscriber, and that he took 'reasonable steps' to prevent others contravening copyright through the connection; or
- (d) either a rightholder or an ISP contravened the Code.<sup>25</sup>

Although omitted from the Code, the UK government considers that 'reasonable steps' may include: (i) using Wi-Fi passwords; (ii) imposing controls on routers and browsers; (iii) installing parental control software; (iv) blocking websites by genre; (v) blocking P2P traffic; (vi) blocking website addresses; and (vii) using proxy servers.<sup>26</sup>

The Code had previously established that subscribers could appeal on 'any other ground' to show the non-exhaustive character of the listed grounds of appeal.<sup>27</sup> However, rightholders objected that the grounds of appeal should only be included in the DEA and not on 'any other ground'; on the instruction of the UK government, Ofcom removed such grounds.<sup>28</sup> Moreover, Ofcom also eliminated the previous DEA requirement that it should take into consideration the subscribers' technical knowledge and their ability to control access to the internet connection.<sup>29</sup>

Ofcom also amended the provision about oral hearings, as it believed that this issue was better addressed within the procedural rules of the appeals body.<sup>30</sup> However, Ofcom has stressed that due to costs, it would not expect the appeals

body's procedural rules to require an oral hearing.<sup>31</sup> In this context, two points are worth remembering: first, the Code indicates that the adoption of a Technical Obligations Code by the Secretary of State, including 'a right of appeal' to the First-tier Tribunal, namely, a judicial body, would require further secondary legislation;<sup>32</sup> second, section 13(10)(a) of the DEA states that the Technical Obligations Code must allow a decision of a subscriber appeal to be appealed to the First-tier Tribunal, on various grounds including 'an error of fact, wrong in law or unreasonable'.<sup>33</sup>

Interestingly, the impact of Section 13 of the DEA was expressly addressed in the DEA judicial review decision of *BT PLC and Talk Talk PLC v Secretary of State for Business Innovation and Skills and others*.<sup>34</sup> Parker J observed that the DEA's 'chilling' effect potentially arose because the subscriber was not necessarily the copyright offender, yet it was the subscriber who was exposed to any CIR or CIL.<sup>35</sup> He noted that it was easy to understand that, for instance, Wi-Fi providers, such as libraries and cybercafes, would wish to avoid the danger of receiving CIRs, of being a potential target for litigation and of having to prove that they had taken reasonable steps to prevent infringement.<sup>36</sup> He explained that some businesses and public intermediaries offered 'open' Wi-Fi access to their customers.<sup>37</sup> Moreover, the High Court elaborated that subscribers might take preventive measures that indeed exceeded what was necessary to exonerate them from liability.<sup>38</sup> However, as will be discussed, the Court appears to have omitted potentially relevant legal information, i.e., Article 6 ECHR.

Shipman argues that the assessment of procedural inequality is a matter of degree, i.e., the test is whether the parties suffer a substantial disadvantage vis-à-vis their opponents and, if so, the trial was unfair and there is no cause for assessing the justifiability, or else, of the state rejection.<sup>39</sup> As she recognizes, this means that claimants and defendants must be equally equipped and

procedural rules should be enforced in an even-handed way.<sup>40</sup> This concept of equality of arms is based on three fundamental principles:

- equipage equality: a real fight between equally-armed adversaries;<sup>41</sup>
- rule equality: a commitment to give opponents similar procedural opportunities;<sup>42</sup> and,
- outcome equality: cases with similar facts should achieve similar results.<sup>43</sup>

It will now be considered how the Code could infringe the ECtHR's principle of equality of arms under Article 6(1) of the ECHR.

In terms of the first principle: equipage equality, in *Dombo Beheer BV v the Netherlands*, the ECtHR observed that under Article 6(1) ECHR, each participant must be afforded a reasonable opportunity to argue their case under conditions which did not put them at a substantial disadvantage vis-à-vis their adversary.<sup>44</sup> As noted above, the Code states that CILs allow rightholders to target 'any litigation' (e.g., *Norwich Pharmacal*<sup>45</sup> orders) against alleged repeat infringers.<sup>46</sup> To put it differently, it seems arguable that it gives them the opportunity to obtain a court order for disclosure; argue their case not only in civil, but also criminal proceedings; and also take advantage of technical measures. However, Ofcom removed the requirement that the appeals body should bear in mind the subscribers' technical knowledge and their ability to control access to the connection<sup>47</sup> but, strikingly, also the possibility to appeal on 'any other ground'.<sup>48</sup> Worryingly, this is at odds with the Advocate General's (AG) opinion in *Promusicae v Telefonica de Espana SAU* (see paragraphs [114], [115]).<sup>49</sup> The problem is made even worse by the fact that, unlike Section 13 of the DEA, a scheme such as the US Copyright Alert System offers subscribers more opportunities to prepare their defence and challenge CIRs on the following grounds:



- (i) misidentification of account<sup>50</sup>
- (ii) unauthorized use of account<sup>51</sup>
- (iii) authorization<sup>52</sup>
- (iv) fair use<sup>53</sup>
- (v) misidentification of file<sup>54</sup>
- (vi) work published before 1923<sup>55</sup>

Thus, since rightholders and subscribers are not equally-armed adversaries, a possible objection might be that Section 13 could infringe the ECtHR's principle of equality of arms under Article 6(1) ECHR.

With regard to the second principle: rule equality, in *Pelladoah v the Netherlands*, the ECtHR noted that the principle of equality of arms contained within Article 6 ECHR also required that the defendant's arguments be heard as much as possible together with those of the claimants.<sup>56</sup> This was supported by the ECtHR in *Ekbatani v Sweden* when it found that where the appeal court had to decide the guilt or innocence of an accused, an oral hearing was indeed necessary.<sup>57</sup> This can be contrasted with Ofcom's statement that, in practice, it would not expect the appeals body's procedural rules to require an oral hearing.<sup>58</sup> It is worth noting that the Explanatory Notes indicate that if technical obligations are adopted, the person hearing subscriber appeals can validate, invalidate or change the introduction of a technical measure.<sup>59</sup> Moreover, as discussed earlier, the Code states that the adoption of a Technical Obligations Code by the Secretary of State, including 'a right of appeal' to the First-tier Tribunal, namely, a judicial body, would require further secondary legislation.<sup>60</sup> To further exacerbate the problem, Section 13(10)(a) of the DEA adds that the Technical Obligations Code must allow appeals to the First-tier Tribunal on various grounds including 'an error of fact, wrong in law or unreasonable'.<sup>61</sup> Therefore, given that under the Initial Obligations Code, in contrast to the

Technical Obligations Code, the First-tier Tribunal (that is to say, a judicial body) is not required to decide subscribers' guilt or innocence, a case can be made that Section 13 of the DEA could infringe the ECtHR's principle of equality of arms under Article 6(1) ECHR.

As to the third principle: outcome equality, in *Borgers v Belgium*, the Strasbourg Court mentioned that the simple appearance of inequality in the accused's rights sufficed to violate Article 6(1) of the Convention.<sup>62</sup> As discussed above, one of the grounds of appeal is that the contravention was not made by the subscriber and that he took 'reasonable steps' to prevent it.<sup>63</sup> Although strangely omitted from the Code, such 'reasonable steps' include using Wi-Fi passwords.<sup>64</sup> It is true that, like the wording of Section 13 of the DEA, in *Promusicae v Telefonica de Espana SAU* the AG recognized that it did not necessarily follow from the fact that copyright had been violated under an IP address, that such actions were performed by the subscriber. Other individuals could have used the PC or connection, even without his knowledge (e.g., due to inadequate wireless security or hacked networks).<sup>65</sup> However, it can be contended that, under the DEA, cases with similar facts will never achieve similar results. This is all the more so because in *Golden Eye (International) Limited and others v Telefonica UK Limited* Arnold J highlighted that even if investigatory agents' monitoring software worked properly and the ISP accurately detected the subscriber, it was not possible to compute an overall expected rate of mistaken detection.<sup>66</sup> More alarmingly, however, he found that 'all that can be said with certainty is that there will be an unknown percentage of errors'.<sup>67</sup> Thus, since cases with similar facts are unlikely to achieve similar results, it is debatable whether Section 13 could contravene the ECtHR's principle of equality of arms under Article 6(1) ECHR.

## **ECtHR principle of admissibility of evidence**

The Strasbourg Court has recognised that whilst Article 6 of the ECHR guarantees the right to a fair trial, it does not specify any requirements for the admissibility of evidence per se, which is an issue for regulation under domestic law. The ECtHR has explained that it was not its task to decide, in principle, whether specific types of evidence such as illegally acquired evidence, might be admissible; or, indeed, whether the claimant is culpable or not. It stated that the question was whether the proceedings as a whole, including the way in which the information was acquired was fair.<sup>68</sup> In *Schenk v Switzerland*,<sup>69</sup> the Court set out some guiding principles to determine whether the overall trial was fair. Section 13 of the DEA does not satisfy the principles set out in *Schenk v Switzerland*.<sup>70</sup> With that in mind, this Section will argue that it violates the ECtHR's principle of admissibility of evidence and it will do this by referring to the Code and *BT Plc and Talk Talk Telecom Group Plc v Secretary of State for Culture, Olympics, Media and Sport and others*.<sup>71</sup>

To begin with, in terms of ensuring the reliability of rightholders evidence-gathering techniques, it has to be mentioned that the Code states that a rightholder might just send a CIR if it has collected information which provides 'reasonable grounds to believe' that either a subscriber has contravened the holder's copyright, or the subscriber has allowed another individual to do so and such an individual has contravened the holder's copyright.<sup>72</sup>

However, when considering the compatibility of Section 13 with the ECtHR's principle of admissibility of evidence under Article 6(1) of the Convention, it is important to point out that the Code refers to the following DEA conditions:

- the subscriber must be able to appeal on the grounds that the apparent contravention with which a CIR is associated is not a contravention of copyright; and,

- the appeals body has to decide an appeal in favour of the subscriber if the rightholder is unable to demonstrate that there had been a contravention of copyright.<sup>73</sup>

In order to assess and authorize the rightholders' data collection techniques, Ofcom proposes to promote the creation of an evidence-gathering technical standard.<sup>74</sup> In particular, Ofcom expects that the introduction of this standard would address concerns raised by the Motion Picture Association (MPA), which expressed a desire to see other rightholders adopt information-gathering methods 'as robust as their own'.<sup>75</sup> However, when considering whether Section 13 of the DEA could infringe the ECtHR's principle of admissibility of evidence, the key point to remember is that some stakeholders propose that an accreditation system introduces a 'rebuttable presumption' on appeal, that the rightholders evidence is accurate.<sup>76</sup> Thus, the Code explains that it is possible that this presumption will evolve over time if there are a number of cases from the appeals body establishing that evidence collected according to the approved methodologies 'discharges the burden of proof' on rightholders in an appeal.<sup>77</sup>

Another relevant point which deserves attention is that following an instruction from the UK government, Ofcom removed the requirement for rightholders and ISPs to provide a statement demonstrating how their systems and procedures complied with the Data Protection Act 1998 (DPA).<sup>78</sup> Although left unmentioned in the Code, it has to be noted that Article 8(1) of Directive 95/46/EC as a general rule prohibits the processing of sensitive personal data.<sup>79</sup> However, in assessing the compatibility of Section 13 with the ECtHR's principle of admissibility of evidence, the important thing to understand is that the above is not applicable where the processing is necessary for the establishment, exercise, or defence of legal claims, as set out in Article 8(2)(e).<sup>80</sup> In the UK, the corresponding exemption is contained within DPA

Schedule 3, paragraph 6(c). It prohibits such processing unless it is necessary for the purposes of establishing, exercising or defending legal rights.<sup>81</sup>

Notably, the scope of Directive 95/46/EC was expressly considered in the DEA judicial review appeal decision of *BT Plc and Talk Talk Telecom Group Plc v Secretary of State for Culture, Olympics, Media and Sport and others*.<sup>82</sup> The Court of Appeal agreed with Parker J that the processing of ‘personal’ and ‘special data’ by rightholders fell within the exception in Article 8(2)(e).<sup>83</sup> The Court observed that ‘that would appear to be the precise purpose of the ... DEA: the copyright owner will be able, through ... the DEA, to establish not only that there has been an infringement but also who is responsible for the infringement’.<sup>84</sup> It elaborated that ‘the processing is plainly necessary for the establishment, exercise or defence of legal claims even if the beneficial consequence of the sending of a notification ... will be that in the majority of cases the infringing activity ceases and no further action is required’.<sup>85</sup> However, a different conclusion could be drawn from the European Data Protection Supervisor’s (EDPS) opinion.

In *Schenk v Switzerland*,<sup>86</sup> the ECtHR set out some guiding principles that could be used to determine whether under Article 6(1) of the Convention the overall trial could be considered to be fair. The ECtHR applied the same principles in *Peck and JH v the United Kingdom*<sup>87</sup> and *Khan v the United Kingdom*<sup>88</sup>. These principles were: the rights of the defence cannot be disregarded;<sup>89</sup> the defence must have the opportunity to challenge the authenticity of the evidence;<sup>90</sup> and there cannot be just one source of evidence on which the conviction is based.<sup>91</sup> It is worth noting, however, that the failure of one principle does not necessarily mean that there is an automatic violation of Article 6(1); the question is whether the proceedings are fair as a whole.

In terms of the first principle: the rights of the defence cannot be disregarded,<sup>92</sup> Ofcom eliminated the need under the DEA for rightholders to provide a statement demonstrating how their systems and procedures complied with the DPA.<sup>93</sup> However, one can argue that this is a rather alarming decision as the EDPS recognizes that, taken together, both Article 6(c) and Article 8 of Directive 95/46/EC require that investigatory agents' monitoring of software processing of subscribers' IP addresses be restricted to what is 'adequate, relevant and not excessive'.<sup>94</sup> Strikingly, at odds with *BT Plc and Talk Talk Telecom Group Plc v Secretary of State for Culture, Olympics, Media and Sport and others* above, the EDPS notes that subscriber IP address processing can only be performed in the context of 'specific', existing or future court proceedings to establish, pursue, or defend legal claims.<sup>95</sup> This is a view shared by Kokott in her discussion of *Promusicae v Telefonica de Espana SAU*<sup>96</sup>. The AG corroborated that the foreseeability requirement found specific expression in data protection law in the principle of purpose limitation, i.e., Article 6(1)(b) of Directive 95/46/EC. Accordingly, as she emphasized, pursuant to that principle, subscribers' IP addresses should only be collected 'for specified, explicit and legitimate purposes'.<sup>97</sup> Thus, since Section 13 of the DEA does not require that subscriber IP address processing be only conducted in specific, existing or future court proceedings, it might be objected that this could infringe the ECtHR's principle of admissibility of evidence under Article 6(1) ECHR.

As far as the second principle outlined in *Schenk v Switzerland* is concerned, the ECtHR elaborated that Mr Schenk was also given the opportunity to challenge the authenticity of the evidence.<sup>98</sup> As discussed before, the Code indicates that in order to challenge the CIR's authenticity, the subscriber must be able to appeal on the grounds that the supposed contravention was not a contravention of copyright.<sup>99</sup> Problematically, however, the Code completely fails to address, much less acknowledge, that in assessing whether there was a copyright

violation, subscribers should certainly be entitled to rely on fair dealing and public domain defences to challenge the CIRs' authenticity, that is to say, the Copyright, Designs and Patents Act 1988 (CDPA). This can be exemplified by file-sharing cases of non-commercial research, private study, criticism, review or reporting of current events.<sup>100</sup> As noted earlier, under the US Copyright Alert System, subscribers are entitled to fair use and work published before 1923 defences to challenge the authenticity of CIRs.<sup>101</sup> Indeed, it is worth stressing that in *Scarlet Extended SA v SABAM* and *SABAM v Netlog NV* the Court of Justice of the European Union (CJEU) held that whether a P2P communication was legitimate also depended on its impact on exceptions to copyright, public domain content and free material.<sup>102</sup> Therefore, as Section 13 does not give subscribers the opportunity to rely on fair dealing and public domain defences to challenge the CIRs' authenticity, it is debatable whether it could infringe the ECtHR's principle of admissibility of evidence under Article 6(1) ECHR.

The third principle found in *Schenk v Switzerland* asserted that a phone conversation recording should not be the only evidence upon which a conviction could be based.<sup>103</sup> As outlined above, the Code states that the evidence-gathering technical standard would help rightholders to adopt information-gathering methods 'as robust as' those used by the MPA.<sup>104</sup> However, a counter-argument could run that even MPA evidence is not strong enough. Although left unmentioned in the Code, the agent who investigates copyright infringement claims on the MPA's behalf is MarkMonitor/DtecNet. In November 2012, Friedberg reviewed MarkMonitor evidence and found that in order to perform the verification process for music (unlike films), MarkMonitor employed digital fingerprint-based technology to detect the first example of an identified title, and match each following edition of such title by hash value.<sup>105</sup> The use of such technology is certainly objectionable when considering Clayton's revelation that automated content recognition services

(e.g., Audible Magic’s fingerprinting technology) can make patently wrong decisions, as recently happened with the blocking of streamed video of the Hugo Awards.<sup>106</sup> Indeed, this finding is entirely consistent with *L’Oréal SA and others v eBay International AG and others* where the CJEU confirmed that ‘notifications of allegedly illegal activities or information may turn out to be insufficiently precise or inadequately substantiated’.<sup>107</sup> As discussed before, the Code envisages the disturbing prospect of adopting a presumption of accuracy of CIRs in the future.<sup>108</sup> Thus, as MarkMonitor CIRs would be the only evidence on which subscriber sanctions were based, again arguably, under Article 6(1) ECHR, Section 13 could contravene the ECtHR’s principle of admissibility of evidence.

### **ECtHR principle of presumption of innocence**

The last issue to be addressed in this paper is whether Section 13 of the DEA could violate the Strasbourg Court’s principle of presumption of innocence. Article 6(2) of the Convention states that everyone charged with a penal offence must be presumed innocent until proven culpable according to law. The Court’s case-law has noted that this requires, among other things, that when performing their obligations, the courts should not begin with the preconceived opinion that the defendant has committed the alleged wrongdoing, i.e., the burden of proof lies with the prosecution and the accused has the benefit of doubt.<sup>109</sup> In *Salabiaku v France*, the ECtHR explained that, in principle, under the ECHR the burden of proof could shift to the accused. However, it set forth a three-pronged test to determine the compatibility of these reverse onus provisions with the Convention.<sup>110</sup> Thus, in Section III it will be argued that under Article 6(2) ECHR, Section 13 could contravene the ECtHR’s principle of presumption of innocence as it fails to satisfy the three-pronged test found in *Salabiaku v France*.<sup>111</sup> This will be done by considering the Code and *BT PLC and Talk Talk PLC v Secretary of State for Business Innovation and Skills and others*.<sup>112</sup>



The Code states that ISPs have called for greater clarity about the DEA subscriber appeal process provisions.<sup>113</sup> For example, BT argues that, as there needs to be an initial finding that can be appealed, ‘subscriber appeals’ are adjudications and not appeals, i.e., allegations by rightholders against subscribers.<sup>114</sup> Similarly, BT, TalkTalk, Telefonica O2 and ISPA have claimed that the onus should be on rightholders to demonstrate that the subscriber themselves contravened copyright, and not on subscribers.<sup>115</sup> However, what is relevant to the ECtHR’s principle of presumption of innocence is Ofcom’s conclusion. Notably it is at odds with the ISPs above; the Code stresses that the DEA is ‘clear’ that the burden of proof lies with both the rightholder and ISP to prove that a copyright contravention occurred and that it related to the subscriber’s IP address.<sup>116</sup>

The Code indicates that a rightholder may only send a CIR if it has collected information which provides ‘reasonable grounds to believe’ that:

- a subscriber has contravened the holder’s copyright; or,
- the subscriber has allowed another individual to do so and such individual has contravened the holder’s copyright.<sup>117</sup>

However, importantly, Ofcom notes that it cannot require a higher standard of proof since, under the DEA, the right of a rightholder to submit a CIR is triggered if it ‘appears to a copyright owner’ that a copyright contravention took place.<sup>118</sup> It adds that the UK government’s intention was that a rightholder would not need to establish ‘definitively’ that online copyright infringement occurred before sending a CIR.<sup>119</sup>

The Code also states that, on receipt of a CIR from a rightholder, the ISP must identify the subscriber to which the IP address detailed in the CIR related to at the time of the alleged contravention.<sup>120</sup> Accordingly, to ensure that the

procedure of linking IP addresses to subscribers is robust and accurate, the Code explains that ISPs should, before sending their first warning letter, give Ofcom a quality assurance report.<sup>121</sup> Of particular relevance here is that, reacting to users' concerns, the Code states that Ofcom suggests sponsoring the development of an IP address matching standard by an independent body.<sup>122</sup> However, in assessing the compatibility of Section 13 of the DEA with the ECtHR's principle of presumption of innocence, the key thing to remember is that Ofcom concludes that 'this standard would not be mandatory'.<sup>123</sup>

Interestingly, the DEA's burden of proof was explicitly considered in the DEA judicial review decision in *BT PLC and Talk Talk PLC v Secretary of State for Business Innovation and Skills and others*.<sup>124</sup> Parker J noted that the ISPs claim that subscribers could see themselves exposed to CIRs or CILs, even if they were not the offender, unless they could demonstrate that they had taken 'reasonable measures' to prevent it.<sup>125</sup> He observed that such a burden was likely to prevent subscribers from permitting others (e.g., within the same household) to access the PC or the web.<sup>126</sup> However, he explained that this was 'not an unreasonable burden' to put on subscribers if it encouraged stronger copyright protection.<sup>127</sup> Furthermore, he elaborated that the rightholder, following a *Norwich Pharmacal*<sup>128</sup> order, must show that the subscriber had 'authorised' the contravention which is a relatively high standard in civil litigations.<sup>129</sup> However, as will be seen, Parker J's reliance on individual inferences instead of evidence, namely, the ECtHR's case-law, may have led to an oversimplification.

Loveless points out that the leading Strasbourg Court judgement on reverse onus provisions is *Salabiaku v France*.<sup>130</sup> Here, the Court noted that the Convention did not preclude presumptions of fact or law. However, regarding criminal law, it employed a three-pronged test to determine the compatibility of

these provisions with Article 6(2) ECHR.<sup>131</sup> Specifically, it required member states to: remain within reasonable limits; take into consideration the importance of what was at risk; and, protect the rights of the accused.<sup>132</sup> As discussed earlier, the Code indicates that CILs allow rightholders to target ‘any litigation’ against alleged repeat infringers.<sup>133</sup> Thus, despite Parker J’s finding above, this would also cover criminal cases.

In applying the test’s first prong, the ECtHR initially observed that for reverse onus provisions to be compatible with Article 6(2) of the ECHR, member states must remain within reasonable limits.<sup>134</sup> As outlined above, the Code indicates that the evidence collected by investigatory agents’ monitoring software must provide reasonable grounds to believe that a subscriber infringed copyright or that he allowed another individual to do so.<sup>135</sup> However, it is concerning that the AG in *Promusicae v Telefonica de Espana SAU* cautioned that, unlike ‘state authorities’, i.e., the courts or the data protection supervisory authorities, rightholders should never be allowed to use ‘unlimited’ infringement detection methods.<sup>136</sup> Indeed, this is fully in accordance with the EDPS’s opinion which remarks that monitoring is particularly invasive of users’ privacy rights when it is not limited in scope, in time and in respect of individuals affected.<sup>137</sup> Specifically, the EDPS understands that under Article 8 of Directive 95/46/EC, monitoring can only be conducted in the context of specific, existing or future court proceedings.<sup>138</sup> He adds that random monitoring concerning not-for-profit, minor, small-scale infringement is disproportionate and violates Article 8 ECHR.<sup>139</sup> Interestingly, Friedberg’s report reveals that MarkMonitor’s DtecNet software not only provides ‘continuous and consistent scanning’,<sup>140</sup> but also that it creates a log of every user sharing or downloading the material.<sup>141</sup> Thus, since MarkMonitor is neither limited in scope (e.g., specific, existing or future court proceedings); nor in time (e.g., at certain times of the day); nor in the number of

monitored users (e.g., only commercial scale infringers) common sense dictates that Section 13 could infringe the ECtHR's principle of presumption of innocence under Article 6(2) ECHR.

In applying the second prong of the test, the ECtHR noted that for reverse onus clauses to comply with Article 6(2) ECHR, member states also had to take into account the importance of what was at stake.<sup>142</sup> As discussed before, Ofcom states that it cannot require a higher standard of proof since the right of a rightholder to submit a CIR is triggered if it 'appears' that copyright infringement took place.<sup>143</sup> However, one could refute this by saying that the DEA standard is set below accepted levels. Crucially, in *Bonnier Audio and others AB v Perfect Communication Sweden AB*, the CJEU held that, in striking a fair balance between copyright enforcement and subscribers' right to personal data protection, 'clear evidence' of infringement was vital.<sup>144</sup> Moreover, the problem is exacerbated by the fact that the Code once more completely overlooks the fact that considerable care needs to be taken with rightholder monitoring. This is all the more so because the EDPS emphasizes that the 'unnoticed' monitoring by investigatory agents would impact on millions of subscribers and 'all' users, regardless of whether they are under suspicion.<sup>145</sup> In this context, in *S and Marper v the United Kingdom* the ECtHR found that 'the risk of stigmatisation' was particularly concerning; in other words, that individuals who had not been charged with any crime and were entitled to be presumed innocent, were being treated in the same way as convicted individuals.<sup>146</sup> Therefore, since Section 13 of the DEA puts subscribers at serious risk of stigmatisation, it is arguable that it could infringe the ECtHR's principle of presumption of innocence under Article 6(2) ECHR.

With regard to the third prong of the test, the Strasbourg Court elaborated that for reverse onus provisions to be compliant with Article 6(2) of the Convention,

member states also had to protect the rights of the defence.<sup>147</sup> As noted above, the Code underlines that the IP address matching standard ‘would not be mandatory’.<sup>148</sup> Arguably, however, it should be. Clayton warns that, in order to prevent problems during the process of linking IP addresses to subscribers, ISPs also need to be careful with the technical details<sup>149</sup> (see *Golden Eye (International) Limited and others v Telefonica UK Limited* [103]<sup>150</sup>). He explains that if an incorrect timestamp is utilized, even one that is only several seconds out, then a wrong IP matching might be performed of the previous or next subscriber that is dynamically assigned the specific IP address.<sup>151</sup> Indeed, this is exactly what happened in *EMI Records (Ireland) Ltd and others v the Data Protection Commissioner*.<sup>152</sup> Charleton J observed that in October 2010, all clocks across Europe were moved back one hour for winter, however, when Eircom, Ireland’s largest ISP, disregarded the time change, mistaken notifications were sent to 391 innocent subscribers.<sup>153</sup> If one were to apply the daylight saving time issue to the six ISPs covered by the Code,<sup>154</sup> this could become a huge problem since in the UK it is estimated that there are approximately 6.5 million file-sharers.<sup>155</sup> Thus, given that Section 13 of the DEA fails to safeguard the right of subscribers to be presumed innocent, a case can be made that it could contravene the ECtHR’s principle of presumption of innocence under Article 6(2) ECHR.

### **Concluding remarks**

Through case-law research, this paper has examined the compatibility of the DEA subscriber appeal process provisions (Section 13 of the DEA) with Article 6 ECHR. In terms of Article 6 of the Convention the most important and original contribution of this paper is that Section 13 could infringe the ECtHR’s principles of equality of arms, admissibility of evidence and presumption of innocence, thus constituting a violation of subscribers’ right to a fair trial.

Therefore, given the UK government's blatant disregard for human rights in general, and Article 6 of the ECHR in particular, it should not surprise anyone that Ofcom itself has warned that there is potential for collective action to boycott the DEA process.<sup>156</sup> Ofcom recognizes that a malicious campaign of collective appeals could potentially defeat the appeals system. In fact, as Ofcom notes, if a pressure group effectively convinced subscribers to appeal every warning, it remains unclear whether the appeals body could handle the volume.<sup>157</sup> Perhaps, the time has come for the UK government to start taking human rights seriously. In my opinion, this situation is indeed alarming because violating minimum standards of protection guaranteed by the Convention in the name of fighting online copyright infringement due to unlawful peer-to-peer file-sharing is becoming common. Ultimately, unless something is done, and done fast, it could become so widely accepted that sadly it might not matter anymore. At that point, as Liberty anticipates, the enactment of pieces of legislation such as the DEA will mean that traditional civil or criminal law processes are sidestepped and replaced with administrative regulation controlled by the government that lacks procedural fairness.<sup>158</sup> Even if the issue of subscribers' rights being violated under Article 6 of the ECHR is set aside, the question remains as to whether implementation of Section 13 of the DEA is really worth the cost. Ofcom has stated that if at least three million CIRs are submitted by rightholders to ISPs in the first year, generating one million warning letters to subscribers, and if only 2.5% of the CIRs and warning letters are appealed at an average processing cost of £400 each, then the annual cost of the appeals process could easily exceed £40 million.<sup>159</sup> As Ofcom indicates, it would constitute by far the greatest cost element of enforcing the DEA's online copyright infringement provisions.<sup>160</sup> In practice, if the UK government began taking the Convention seriously, Section 13 would also begin complying with EU law, namely, Article 1(3)a of Directive 2002/21/EC. This requires that measures taken by member states concerning subscribers' access to, or use of,

internet facilities should be imposed only if they are ‘appropriate, proportionate and necessary’, and their implementation is subject to minimum procedural safeguards in accordance with the ECHR and basic EU law principles, including due respect for the right to privacy and the principle of presumption of innocence.<sup>161</sup> As Liberty stresses, the DEA appears to be persisting with two alarming tendencies started by the executive. Liberty notes that the first is the endeavour to bypass the ordinary rules of civil and criminal practice in favour of administrative regulation controlled by the government, which - as this paper has demonstrated - violates fundamental rights and undermines due process. The second is the decision to leave what needs to be properly addressed through primary legislation to secondary legislation, by amending orders which fail to attract the expected level of parliamentary scrutiny.<sup>162</sup> At a time when Parker J himself, in the DEA judicial review decision, recognized that 30.1 million adults use the internet daily to learn, send and receive emails, seek employment, use online banking, order goods and services, find all sorts of information, and entertain themselves;<sup>163</sup> it may seem irrational to give power to the private sector to control subscribers’ internet connections. However, in my view, the existing situation could deteriorate further if under Article 6 of the Convention, the DEA subscriber appeal process provisions also violated the right to a fair trial.

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<sup>1</sup> Ofcom, ‘Online Infringement of Copyright and the Digital Economy Act 2010 – Notice of Ofcom’s proposal to make by order a code for regulating the initial obligations’ <http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf>, p. 2 (accessed 15 September, 2013).

<sup>2</sup> *Ibid.*, 7.

- <sup>3</sup> Ofcom, ‘Digital Economy Act Online Copyright Infringement Appeals Process - Options for Reducing Costs’ [http://www.culture.gov.uk/images/publications/Ofcom-appeals\\_cost\\_advice\\_with\\_redactions.pdf](http://www.culture.gov.uk/images/publications/Ofcom-appeals_cost_advice_with_redactions.pdf), p. 8 (accessed 15 September, 2013).
- <sup>4</sup> European Convention on Human Rights 1950 Article 6.
- <sup>5</sup> INTERIGHTS. 2009. *Right to A Fair Trial under the European Convention on Human Rights (Article 6)*, 2. London: INTERIGHTS.
- <sup>6</sup> *Bentham v the Netherlands* (App no 8848/80) (1985) 8 EHRR 1 [32].
- <sup>7</sup> See Sections 7(9) and 12(4) of the DEA.
- <sup>8</sup> *Roche v the United Kingdom* (App no 32555/96) (2006) 42 EHRR 30 [117].
- <sup>9</sup> ‘in this section “owner-provider dispute” means a dispute that— (a) is between persons who are copyright owners or internet service providers; and (b) relates to an act or omission in relation to an initial obligation or an initial obligations code’ see Section 7(9) of the DEA.
- <sup>10</sup> ‘in this section “owner-provider dispute” means a dispute that— (a) is between persons who are copyright owners or internet service providers; and (b) relates to an act or omission in relation to a technical obligation or a technical obligations code’ see Section 12(4) of the DEA.
- <sup>11</sup> *Ringeisen v Austria* (App no 2614/65) (1971) 1 EHRR 455 [117].
- <sup>12</sup> *Baraona v Portugal* (App no 10092/82) (1987) ECHR 13 [44]; *Zimmermann and Steiner v Switzerland* (App no 8737/79) (1983) 6 EHRR 17 [22].
- <sup>13</sup> ‘where the appeal is determined in favour of the subscriber, to direct the copyright owner or internet service provider to reimburse the reasonable costs of the subscriber’ see Section 13(7)(b) of the DEA.
- <sup>14</sup> *Engel and others v the Netherlands* (App no 5100/71, 5101/71, 5102/71, 5354/72, 5370/72) (1976) 1 EHRR 647.
- <sup>15</sup> Vitkauskas Grigoriy Dikov, D. 2012. *Protecting the right to a fair trial under the European Convention on Human Rights*, 16. Council of Europe.
- <sup>16</sup> *Engel and others v the Netherlands* (App no 5100/71, 5101/71, 5102/71, 5354/72, 5370/72) (1976) 1 EHRR 647 [82].
- <sup>17</sup> Ofcom, ‘Online Infringement of Copyright and the Digital Economy Act 2010 – Notice of Ofcom’s proposal to make by order a code for regulating the initial obligations’ <http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf>, p. 62 (accessed 15 September, 2013).
- <sup>18</sup> Ovey, C and White, R. 2006. *The European Convention on Human Rights*, 176-180. Oxford: Oxford University Press.
- <sup>19</sup> *Dombo Beheer BV v The Netherlands* (App no 14448/88) (1993) 18 EHRR 213 [33]; *Ankerl v Switzerland* (App no 17748/91) (1996) ECHR 45 [38]; *Bulut v Austria* (App no 17358/90) (1996) ECHR 10 [47]; *Niderost-Huber v Switzerland* (App no 18990/91) (1997) ECHR [23].
- <sup>20</sup> *Schenk v Switzerland* (App no 10862/84) (1988) 13 EHRR 242 [46]; *Peck and JH v United Kingdom* (App no 44787/98) (2001) 46 EHRR 51 [76]; *Khan v United Kingdom* (App no 35394/97) (2000) ECHR 2000-V [34].
- <sup>21</sup> *Barberà, Messegue and Jabardo v Spain* (App no 10590/83) (1988) 11 EHRR 360 [77].
- <sup>22</sup> *Dombo Beheer BV v The Netherlands* (App no 14448/88) (1993) 18 EHRR 213 [33]; *Ankerl v Switzerland* (App no 17748/91) (1996) ECHR 45 [38]; *Bulut v Austria* (App no 17358/90) (1996) ECHR 10 [47]; *Niderost-Huber v Switzerland* (App no 18990/91) (1997) ECHR [23].
- <sup>23</sup> *Neumeister v Austria* (App no 1936/63) (1968) 1 EHRR 191 [22].
- <sup>24</sup> Rubenstein, W. 2002. The Concept of Equality in Civil Procedure. *Cardozo L Rev* 23: 4.
- <sup>25</sup> The Digital Economy Act 2010 Section 13, see in particular, Section 13 3(a), Section 13 3(b), Section 13 6(a), Section 13 6(b); see also Electronic Communications - The Online Infringement of Copyright (Initial Obligations Code) Order 20XX Section 25.
- <sup>26</sup> BIS, ‘Digital Economy Bill Online Infringement of Copyright: Detail Regarding Clauses 4-16’ (January 2010) <http://www.bis.gov.uk/assets/BISCore/corporate/docs/digital-britain/factsheets/Online-infringement-Copyright-clauses-4-16.pdf>, p. 5-6 (accessed 15 September, 2013).
- <sup>27</sup> Ofcom, ‘Online Infringement of Copyright and the Digital Economy Act 2010 – Notice of Ofcom’s proposal to make by order a code for regulating the initial obligations’ <http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf>, p. 74 (accessed 15 September, 2013).
- <sup>28</sup> *Ibid.*, 71 and 74.
- <sup>29</sup> *Ibid.*, 75.
- <sup>30</sup> *Ibid.*
- <sup>31</sup> *Ibid.*
- <sup>32</sup> *Ibid.*, 7.
- <sup>33</sup> Digital Economy Act 2010 Section 13(10)(a).
- <sup>34</sup> *BT PLC and Talk Talk PLC v Secretary of State for Business Innovation and Skills and others* [2011] EWHC 1021 (Admin).
- <sup>35</sup> *Ibid.*, [235].
- <sup>36</sup> *Ibid.*
- <sup>37</sup> *Ibid.*
- <sup>38</sup> *Ibid.*
- <sup>39</sup> Shipman, S. 2006. *Sill & Morris v United Kingdom: legal aid in the European Court of Human Rights. Civil Justice Quarterly* 10.
- <sup>40</sup> *Ibid.*
- <sup>41</sup> Rubenstein, W. 2002. The Concept of Equality in Civil Procedure. *Cardozo L Rev* 23: 4.
- <sup>42</sup> *Ibid.*, 26.
- <sup>43</sup> *Ibid.*, 39.
- <sup>44</sup> *Dombo Beheer BV v The Netherlands* (App no 14448/88) (1993) 18 EHRR 213 [33].
- <sup>45</sup> *Norwich Pharmacal Co v Customs and Exercise Commissioners* [1974] AC 133.



- <sup>46</sup> Ofcom, ‘Online Infringement of Copyright and the Digital Economy Act 2010 – Notice of Ofcom’s proposal to make by order a code for regulating the initial obligations’ <http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf>, p. 62 (accessed 15 September, 2013).
- <sup>47</sup> *Ibid.*, 75.
- <sup>48</sup> *Ibid.*, 74.
- <sup>49</sup> Advocate General’s Opinion in Case 275/06 *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* [2008] ECR I-271 [AG 114], [AG 115].
- <sup>50</sup> ‘that the ISP account has been incorrectly identified as one through which acts of alleged copyright infringement have occurred’ see Memorandum of Understanding of 6 July 6 2011 p. 26.
- <sup>51</sup> ‘that the alleged activity was the result of the unauthorized use of the subscriber’s account of which the subscriber was unaware and that the subscriber could not reasonably have prevented’ *Ibid.*
- <sup>52</sup> ‘that the use of the work made by the subscriber was authorized by its copyright owner’ *Ibid.*
- <sup>53</sup> ‘that the subscriber’s reproducing the copyrighted work(s) and distributing it/them over a P2P network is defensible as a fair use’ *Ibid.*
- <sup>54</sup> ‘that the file in question does not consist primarily of the alleged copyrighted work at issue’ *Ibid.*
- <sup>55</sup> ‘that the alleged copyrighted work was published prior to 1923’ *Ibid.*
- <sup>56</sup> *Pelladoah v the Netherlands* (App no 16737/90) (1994) 19 EHRR 81[34].
- <sup>57</sup> *Ekbatani v Sweden* (App no 10563/83) (1988) 13 EHRR 504 [32]; see also Mole, N and Harby, C. 2006. *The right to a fair trial a guide to the implementation of Article 6 of the European Convention on Human Rights*, 21. Council of Europe.
- <sup>58</sup> Ofcom, ‘Online Infringement of Copyright and the Digital Economy Act 2010 – Notice of Ofcom’s proposal to make by order a code for regulating the initial obligations’ <http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf>, p. 75 (accessed 2 June, 2013).
- <sup>59</sup> Digital Economy Act 2010 c. 24 Explanatory Note [73].
- <sup>60</sup> Ofcom, ‘Online Infringement of Copyright and the Digital Economy Act 2010 – Notice of Ofcom’s proposal to make by order a code for regulating the initial obligations’ <http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf>, p. 7 (accessed 15 September, 2013).
- <sup>61</sup> Digital Economy Act 2010 Section 13(10)(a).
- <sup>62</sup> *Borgers v Belgium* (App no 12005/86) (1991) 15 EHRR 92 [29].
- <sup>63</sup> Digital Economy Act 2010 Section 13, see in particular Section 13 6(a) and Section 13 6(b); see also Electronic Communications - The Online Infringement of Copyright (Initial Obligations Code) Order 20XX Section 25.
- <sup>64</sup> BIS, ‘Digital Economy Bill Online Infringement of Copyright: Detail Regarding Clauses 4-16’ (January 2010) <http://www.bis.gov.uk/assets/BISCore/corporate/docs/digital-britain/factsheets/Online-infringement-Copyright-clauses-4-16.pdf>, p. 5-6 (accessed 15 September, 2013).
- <sup>65</sup> Advocate General’s Opinion in Case 275/06 *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* [2008] ECR I-271 [AG 115].
- <sup>66</sup> *Golden Eye (International) Limited and others v Telefonica UK Limited* [2012] EWHC 723 (Ch) [103].
- <sup>67</sup> *Ibid.*
- <sup>68</sup> *Schenk v Switzerland* (App no 10862/84) (1988) 13 EHRR 242 [46]; *Peck and JH v United Kingdom* (App no 44787/98) (2001) 46 EHRR 51 [76]; *Khan v United Kingdom* (App no 35394/97) (2000) ECHR 2000-V [34].
- <sup>69</sup> *Schenk v Switzerland* (App no 10862/84) (1988) 13 EHRR 242.
- <sup>70</sup> *Ibid.*, [47].
- <sup>71</sup> *BT Plc and Talk Talk Telecom Group Plc v Secretary of State for Culture, Olympics, Media and Sport and others* [2012] EWCA Civ 232 Case No: C1/2011/1437.
- <sup>72</sup> Ofcom, ‘Online Infringement of Copyright and the Digital Economy Act 2010 – Notice of Ofcom’s proposal to make by order a code for regulating the initial obligations’ <http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf>, p. 44 (accessed 15 September, 2013).
- <sup>73</sup> *Ibid.*, 45.
- <sup>74</sup> *Ibid.*, 46.
- <sup>75</sup> *Ibid.*
- <sup>76</sup> *Ibid.*
- <sup>77</sup> *Ibid.*
- <sup>78</sup> *Ibid.*
- <sup>79</sup> Directive 95/46 on the protection of individuals with regard to the processing of personal data [1995] OJ L281/31 Article 8(1).
- <sup>80</sup> *Ibid.*, Article 8(2)(e).
- <sup>81</sup> Data Protection Act 1998, Schedule 3 paragraph 6(c).
- <sup>82</sup> *BT Plc and Talk Talk Telecom Group Plc v Secretary of State for Culture, Olympics, Media and Sport and others* [2012] EWCA Civ 232 Case No: C1/2011/1437.
- <sup>83</sup> *Ibid.*, [75].
- <sup>84</sup> *Ibid.*
- <sup>85</sup> *Ibid.*, [77].
- <sup>86</sup> *Schenk v Switzerland* (App no 10862/84) (1988) 13 EHRR 242.
- <sup>87</sup> *Peck and JH v the United Kingdom* (App no 44787/98) (2001) 46 EHRR 51.
- <sup>88</sup> *Khan v the United Kingdom* (App no 35394/97) (2000) ECHR 2000-V.

- <sup>89</sup> *Schenk v Switzerland* (App no 10862/84) (1988) 13 EHRR 242 [47]; *Peck and JH v the United Kingdom* (App no 44787/98) (2001) 46 EHRR 51 [77], [78]; *Khan v the United Kingdom* (App no 35394/97) (2000) ECHR 2000-V [35], [36].
- <sup>90</sup> *Schenk v Switzerland* (App no 10862/84) (1988) 13 EHRR 242 [47]; *Peck and JH v the United Kingdom* (App no 44787/98) (2001) 46 EHRR 51 [77], [79]; *Khan v the United Kingdom* (App no 35394/97) (2000) ECHR 2000-V [35].
- <sup>91</sup> *Schenk v Switzerland* (App no 10862/84) (1988) 13 EHRR 242 [48]; *Peck and JH v the United Kingdom* (App no 44787/98) (2001) 46 EHRR 51 [77], [79]; *Khan v the United Kingdom* (App no 35394/97) (2000) ECHR 2000-V [35], [37].
- <sup>92</sup> *Schenk v Switzerland* (App no 10862/84) (1988) 13 EHRR 242 [47].
- <sup>93</sup> Ofcom, 'Online Infringement of Copyright and the Digital Economy Act 2010 – Notice of Ofcom's proposal to make by order a code for regulating the initial obligations' <http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf>, p. 46 (accessed 15 September, 2013).
- <sup>94</sup> European Data Protection Supervisor, 'EDPS response to the Commission's Consultation on its Report on the application of IPRED' (8 April 2011) [http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Comments/2011/11-04-2011\\_IPRED\\_EN.pdf](http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Comments/2011/11-04-2011_IPRED_EN.pdf), p. 3 (accessed 2 June, 2013).
- <sup>95</sup> *Ibid.*
- <sup>96</sup> Advocate General's Opinion in Case 275/06 *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* [2008] ECR I-271.
- <sup>97</sup> *Ibid.*, [AG 53].
- <sup>98</sup> *Schenk v Switzerland* (App no 10862/84) (1988) 13 EHRR 242 [47].
- <sup>99</sup> Ofcom, 'Online Infringement of Copyright and the Digital Economy Act 2010 – Notice of Ofcom's proposal to make by order a code for regulating the initial obligations' <http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf>, p. 45 (accessed 15 September, 2013); see also the Digital Economy Act 2010 Section 13(3)(a); Electronic Communications - The Online Infringement of Copyright (Initial Obligations Code) Order 20XX Section 25.
- <sup>100</sup> See Sections 29, 30 and 178 of the Copyright, Design and Patents Act 1988.
- <sup>101</sup> Memorandum of Understanding of 6 July 6 2011 p. 26.
- <sup>102</sup> Case 70-10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2012] ECDR 4 [52]; see also case 360-10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] ECR I-0000 [50]; for an in depth-analysis of these cases see Romero Moreno, F. 2013. Unblocking the Digital Economy Act 2010; human rights issues in the UK. *Intl Rev of L Computers & Technology* 27: 18-45.
- <sup>103</sup> *Schenk v Switzerland* (App no 10862/84) (1988) 13 EHRR 242 [48].
- <sup>104</sup> Ofcom, 'Online Infringement of Copyright and the Digital Economy Act 2010 – Notice of Ofcom's proposal to make by order a code for regulating the initial obligations' <http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf>, p. 46 (accessed 15 September, 2013).
- <sup>105</sup> Stroz Friedberg, 'Independent Expert Assessment of MarkMonitor Antipiracy Methodologies' (1 November 2012) p. 5.
- <sup>106</sup> Statement by Dr Richard Clayton (Personal correspondence 2 October 2012) <http://www.openrightsgroup.org/assets/files/pdfs/02102012%20Ltr%20to%20Consumer%20Focus.pdf>, p. 2 (accessed 2 June, 2013).
- <sup>107</sup> Case 324/09 *L'Oréal SA and others v eBay International AG and others* [2011] ECR I-0000 [122].
- <sup>108</sup> Ofcom, 'Online Infringement of Copyright and the Digital Economy Act 2010 – Notice of Ofcom's proposal to make by order a code for regulating the initial obligations' <http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf>, p. 46 (accessed 15 September, 2013).
- <sup>109</sup> *Barberà, Mességué and Jabardo v Spain* (App no 10590/83) (1988) 11 EHRR 360 [77].
- <sup>110</sup> *Salabiaku v France* (App no 10519/83) (1988) 13 EHRR 379 [28].
- <sup>111</sup> *Ibid.*
- <sup>112</sup> *BT PLC and Talk Talk PLC v Secretary of State for Business Innovation and Skills and others* [2011] EWHC 1021 (Admin).
- <sup>113</sup> Ofcom, 'Online Infringement of Copyright and the Digital Economy Act 2010 – Notice of Ofcom's proposal to make by order a code for regulating the initial obligations' <http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf>, p. 68 (accessed 15 September, 2013).
- <sup>114</sup> *Ibid.*
- <sup>115</sup> *Ibid.*, 69.
- <sup>116</sup> *Ibid.*, 75.
- <sup>117</sup> *Ibid.*, 44.
- <sup>118</sup> *Ibid.*
- <sup>119</sup> *Ibid.*, 45; though not mentioned in the Code, an important thing to note here is that this standard is certainly lower than the civil standard of proof 'on the balance of probabilities' and the criminal standard of proof 'beyond a reasonable doubt'.
- <sup>120</sup> *Ibid.*, 51.
- <sup>121</sup> *Ibid.*, 53.
- <sup>122</sup> *Ibid.*
- <sup>123</sup> *Ibid.*
- <sup>124</sup> *BT PLC and Talk Talk PLC v Secretary of State for Business Innovation and Skills and others* [2011] EWHC 1021 (Admin).
- <sup>125</sup> *Ibid.*, [238].
- <sup>126</sup> *Ibid.*
- <sup>127</sup> *Ibid.*
- <sup>128</sup> *Norwich Pharmacal Co v Customs and Exercise Commissioners* [1974] AC 133.
- <sup>129</sup> *BT PLC and Talk Talk PLC v Secretary of State for Business Innovation and Skills and others* [2011] EWHC 1021 (Admin) [238].

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- <sup>130</sup> Loveless, J. 2012. *Criminal Law Text, Cases and Materials*, 194. Oxford: Oxford University Press.
- <sup>131</sup> *Salabiaku v France* (App no 10519/83) (1988) 13 EHRR 379 [28].
- <sup>132</sup> *Ibid.*
- <sup>133</sup> Ofcom, ‘Online Infringement of Copyright and the Digital Economy Act 2010 – Notice of Ofcom’s proposal to make by order a code for regulating the initial obligations’ <http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf>, p. 62 (accessed 15 September, 2013).
- <sup>134</sup> *Salabiaku v France* (App no 10519/83) (1988) 13 EHRR 379 [28].
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