



The Digital Economy Act 2010

July 2010

In a nutshell, the Digital Economy Act 2010 (the "Act")...

- addresses a range of areas within the digital and communications industry, a sector which accounts for around 8% of GDP;
- includes:
 - controversial provisions aimed at tackling online infringement of copyright;
 - changes to the functions of OFCOM by amending the Communications Act 2003;
 - provisions covering public service television and radio broadcasting;
 - provisions dealing with access to the electromagnetic spectrum which will enable the reallocation of spectrum currently used by mobile phone operators to improve the availability of next generation, high speed mobile broadband services;
- is made up of 48 sections and 2 schedules, the majority of which came into force on 12 June 2010.

How was the Act passed so quickly?

Various proposals about digital media were set out in the *Digital Britain* White Paper published in June 2009 and a Bill was introduced to Parliament. The Bill was heavily criticised by opposition parties and interest groups but made its way through Parliament at the end of the Government's term via the Parliamentary "wash-up" process (which is used to rush legislation through prior to the calling of a General Election). The Act received Royal Assent on 8 April 2010 and despite criticism and opposition to its provisions by both the Conservatives and the Liberal Democrats before the election, the Coalition has not stepped in to make any changes and the majority of its provisions have now come into force.

Why have some provisions been deemed controversial?

The Act was rushed through and, critics argue, it became law without adequate debate and proper Parliamentary scrutiny. Whilst it aims to solve online piracy and to bolster the UK's creative sector, it has been criticised for going too far to satisfy the demands of the copyright lobby. In particular, it has attracted controversy for introducing a range of powerful technical sanctions; avoiding the issue of orphan works (which were dropped during the wash-up procedure); and for being so broad that it has potentially wide ranging implications not only for businesses but also for individuals.

Recent new efforts to repeal certain sections of the Act have also failed to gain momentum. An Early Day Motion ("EDM") has been put forward by a Liberal Democrat MP calling for the repeal of certain sections relating to online copyright infringement. EDMs rarely get a full debate in Parliament so are used to publicise an opinion or criticism, but this motion has been signed by less than 5% of MPs and it seems will go no further.

Online Copyright Infringement

The Act addresses issues of illegal downloading through the implementation of various measures, for example, by:

- requiring Internet Service Providers ("ISPs") to notify subscribers of reports received from copyright owners that subscribers have infringed their copyright;
- requiring ISPs to further provide copyright infringement lists to copyright owners for subscribers about whom copyright infringement reports ("CIRs") exceed a certain threshold number;
- giving the Secretary of State the ability to make an order imposing a technical obligation on ISPs to take a range

of technical measures against subscribers who have surpassed the threshold number of CIRs, including:

- limiting the capacity or speed of a subscriber's broadband connection;
 - preventing (or limiting) a subscriber from using the ISP's network to access certain material;
 - suspending a subscriber's broadband connection; and/or
 - limiting a subscriber's service in any way;
- imposing penalties (up to a maximum of £250,000) on ISPs for contravention of their initial obligations, or failure to impose technical measures. ISPs, as well as the copyright owners and subscribers, may be asked to contribute to the cost of enforcing a copyright provision; and
 - permitting the Secretary of State (by regulations) to grant the courts power to order blocking injunctions against specific websites.

Blocking injunctions

Blocking injunctions could be sought against an internet location which is being used in connection with an activity that infringes copyright. The power will only be available where:

- the use of the internet for activities that infringe copyright is having a serious adverse effect on businesses or consumers;
- making the regulations is a proportionate way to address that effect; and
- making the regulations would not prejudice national security or the prevention or detection of crime.

It is uncertain how this power will be used and it is certainly wide enough to catch individuals (especially those in shared households) as well as businesses. It is unclear what will happen to those such as local councils or internet cafes who deliberately leave their networks open because they want to provide shared access to the internet.

Appeals

An appeals procedure (to an independent body) is also inserted into the Communications Act 2003 and is available for subscribers accused of copyright infringement. This process

(within section 13 of the Act) was inserted by a House of Lords amendment. Subscribers will be able to appeal on grounds that:

- the apparent infringement, alleged by the copyright owner is not, in fact, an infringement;
- the copyright infringement report does not relate to the subscriber's IP address at the relevant time; or
- the copyright owner, or the ISP failed to comply with the regulatory codes.

Conclusion

OFCOM is currently consulting on a draft code of practice about ISPs' obligations under the Act. The consultation closes on 30 July and interested parties are invited to comment by that date.

The Act contains powerful technical sanctions and has potentially wide ranging implications. Critics fear that it may have large repercussions for consumers, civil liberties, freedom of information and access to the internet. There is no doubt that it is not as forward looking as the *Digital Britain* white paper so it is unlikely that the debate on copyright in the digital age will end here.

If you would like further information on any of the issues raised please contact:



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