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Review

Commercial & Dispute Resolution



The Digital Economy Bill: Fit For Purpose?

This week's Financial Times (13 January) published an article focusing on the government's apparent "climb down" on one of the most controversial aspects of the Digital Economy Bill. This relates to the ability of the government to use secondary legislation to introduce new powers to stop copyright infringements as technology develops. In fact, the government did not concede as much ground as the headlines state so it is worth being reminded of what is in the Bill.

ONLINE COPYRIGHT INFRINGEMENT

Clause 17

The government's climb down concerns the now notorious clause 17. Clause 17 gives the Secretary of State for Business Innovation and Skills broad powers to amend aspects of the Copyright, Designs and Patents Act 1988 (CDPA) "*for the purpose of preventing or reducing the infringement of copyright by means of the Internet if it appears to the Secretary of State appropriate to do so having regard to the technological developments that have occurred or are likely to occur*".

The one digital economy issue that has exercised the government more than any other is how to tackle the problem of online copyright infringement, specifically the unauthorised sharing and downloading of music, films and games via peer-to-peer (P2P) networks. The government is particularly concerned that over time Internet users will find new ways and new technologies to share and download copyright material which do not amount to copyright infringement under the CDPA as currently drafted. It wants to be able to move quickly to scoop these practises into the remit of the CDPA as technology develops. Clause 17 gives the Secretary of State power to do this using secondary legislation (a ministerial order) which need only be reviewed summarily by Parliament bypassing the detailed scrutiny that primary legislation would have.

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Although the power to adapt the CDPA to keep pace with new technology seems sensible, there has been widespread concern that the powers given to the Secretary of State go further than is required. For example, he or she may use them to go beyond what is necessary to catch uses of new technology, introducing new rights for copyright owners, for example, or cutting safeguards for those accused of online infringement by introducing a fast track trial procedure. Arguably these are matters on which Parliament, and not a government minister alone, should legislate.

Faced with tough opposition on clause 17, last night Lord Mandelson announced a number of concessions on its wording. These would seek to narrow the powers so that amendments to the CDPA could only be proposed where their purpose is to prevent "*any infringement of copyright by means of the Internet [and the Secretary of State is] satisfied that (a) the infringement is having a serious adverse effect on businesses or consumers, and (b) making the amendment is a proportionate way to address that effect.*" He further proposes a new "super-affirmative" process which aims to ensure that any secondary legislation receives a proper airing in both Houses of Parliament.

Initial Obligations

Separately, the Bill introduces a new procedure to be followed by Internet Service Providers (ISPs) and copyright owners in cases of suspected online copyright infringement.

A copyright owner may report an infringement of their copyright to an ISP by submitting a 'copyright infringement report' (CIR). The CIR must include evidence of the infringement and the IP address of the subscriber concerned. The ISP is then obliged to notify the subscriber that a CIR has been filed about them. This notification must, amongst other things, contain details of the alleged infringement and advice on how to legally download copyright works. The purpose of the CIR is to let subscribers know that the copyright owner is 'on to them', to deter them from continuing to illegally download.

ISPs will be required to keep a record of all CIRs and, in certain circumstances, provide a 'copyright infringement list' (CIL) to a copyright owner. This list will indicate how many of the copyright owner's CIRs are about any one particular subscriber. So, the copyright owner will be able to see that of the 136 CIRs it has filed, 100 relate to subscriber X. The purpose of the CIL is to help copyright owners identify serious repeat infringers against whom they may want to take legal action. It is intended to help target legal action effectively making it a more attractive option for copyright owners. The ISP will not include any of the subscriber's personal details in the CIL, allaying fears about possible breaches of data protection and privacy laws. If the copyright owner does want to commence legal proceedings against a subscriber identified on a CIL, it must first obtain a court order (a *Norwich Pharmacal* order) compelling the ISP to disclose that subscriber's personal details.

The duties to notify subscribers about CIRs and to provide CILs are referred to as the 'Initial Obligations'. They will be underpinned by an industry code of practice to be developed by relevant stakeholders (ISPs, copyright owners and consumers) or, in default, made by OFCOM. OFCOM will be required to monitor the Initial Obligations and report to the government every three months on whether they are successfully reducing the level of online copyright infringement.

Technical Obligations

If OFCOM concludes that the Initial Obligations are not reducing online copyright infringement, the Secretary of State may introduce secondary legislation requiring ISPs to impose 'technical measures' on subscribers that repeatedly download illegal material. This could include bandwidth capping, making it more difficult to file-share, or the complete suspension of a broadband connection (effectively 'cutting the subscriber off'). Subscribers will have a right of appeal to a 'First-Tier Tribunal'. Failure by an ISP to comply with these 'Technical Obligations', and/or the Initial Obligations, will lead to a fine of up to £250,000. Last night in Parliament, an amendment was tabled to reduce this sum to £10,000.

Comment

The Technical Obligations have been criticised as draconian and for failing to build in adequate safeguards for subscribers. For example, to what standard will copyright owners have to prove copyright infringement before a subscriber is cut off? They are likely to have a lower evidential burden than would be required in copyright infringement proceedings before a court.

The imposition of technical measures appears to fall foul of new laws recently approved at EU level (the 'Telecoms Package') which requires Internet access to be restricted or denied only after a 'fair and impartial' hearing. It remains to be seen whether the proposed 'First-Tier Tribunals' will provide this. The government has pre-empted this criticism and published a statement confirming that it considers the technical measures to be compatible with the Telecoms Package.

In some cases, technical measures would not target the true illegal downloader. For example, the Bill as drafted would allow an entire household to be disconnected from the Internet if just one member of it had illegally downloaded material. A subscriber who failed to secure their Wi-Fi connection would risk being cut off if it was hijacked and used by someone else to illegally download. Providers of public Wi-Fi hotspots (Starbucks, for example) would receive warning letters and face disconnection if users of their network accessed file sharing sites.

INTERNET DOMAIN NAME REGISTRIES

The domain name system is the addressing system for the Internet. Domain names are allocated to end users by registries, the largest in the UK being Nominet, the body responsible for administering the .uk country code Top Level Domain (CCTLD).

The government has included provisions in the Bill which are a direct response to (1) recent disruptions at board level within Nominet which called into question the ability of domain name registries to self-regulate effectively; and (2) reported abuses of the .uk CCTLD including cybersquatting (registering and occupying a domain name that might reasonably belong to somebody else in the hope of making a profit by selling that address) and drop-catching (waiting for the ownership of a domain name to expire and quickly re-registering it). The government's concern is that poor self regulation by the domain name industry and domain name abuses might prevent the Internet economy functioning efficiently and damage the UK's reputation as a safe and secure platform for e-commerce. Consequently, the Bill gives the government power in certain

A serious relevant failure at a domain name registry may attract government intervention

circumstances to intervene in the operation of domain name registries established within the UK.

Intervention for 'serious relevant failure'

Where there has been a 'serious relevant failure' in relation to a UK domain name registry the Secretary of State may initially serve a notice on the registry requiring it to take remedial action. If it fails to do so, the Secretary of State may appoint a manager to take over the running of the registry or apply for a court order altering the registry's legal constitution. The registry may appeal to the Competition Appeal Tribunal and ultimately to the Court of Appeal.

A serious relevant failure is one where the registry, its end users or registrars (agents of end-users) have been engaging in practises which are unfair or which involve the misuse of domain names or where the registry's arrangements for dealing with complaints are inadequate. The failure will be serious where "*it has or is likely to adversely affect the reputation or availability of electronic communications networks or services in the UK or the interest of consumers or the public in the UK*". What is 'unfair', 'misuse' or 'inadequate' will be set out in secondary legislation.

Comment

Strong measures may be taken against a registry where the objection is to the actions of end users or registrars, over whom a registry has limited control. Registries will want to review their contractual arrangements with end users and registrars to ensure that they are contractually required not to behave unfairly or misuse a domain name. Whether this will be sufficient for a registry to avoid sanctions remains to be seen. Registries will also need to review the adequacy of their complaints procedures.

FROM BILL TO ACT?

This article reviews some of the key provisions in the current version of the Bill published on 19 November 2009. Amendments are being tabled daily and if the Bill makes it onto the statute books before the next general election (there may not be sufficient Parliamentary time) it is likely to be in a substantially amended form.

FURTHER INFORMATION

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