

ARTICLE: Employers have much to be wary about with the Digital Economy Act 2010

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With its highly controversial provisions on copyright infringement, the Digital Economy Act (DEA) is an unwelcome legacy of the Labour government and there are high hopes that it will make it onto the list of acts which the new government intends to repeal. In the meantime, Ofcom were due to publish and consult on a draft code last month. With this in mind, there are some key issues which all businesses – not just those in the IT industry – should be bearing in mind.

The Digital Economy Bill which preceded the DEA received a mixed reception when it was published. It was dubbed by some as the “Mandybill” because of the suspected involvement of the former Business Secretary in some of its more controversial provisions. It hastily became law during the “wash up” period, traditionally the time after a general election is announced before Parliament is dissolved. The “wash up” is used to enact bills which are unopposed, so many commentators, academics and businessmen were surprised and outraged when the Digital Economy Bill was pushed through during this period.

The provisions of the DEA which cause the most consternation are those relating to copyright infringement. The DEA enables copyright owners to contact an internet service provider (ISP) if they believe their copyright has been infringed by a person or business using the ISP’s service (a “subscriber”). The ISP must then send the subscriber a warning notice which will include details of the infringement as well guidance on copyright law in general. If the ISP receives a certain number infringement reports about a particular subscriber (the threshold to be set by the Ofcom code) the then ISP may in future be required to inflict certain sanctions, from limiting the subscriber’s access to the internet to cutting them off completely.

At the time when the Bill was being debated, there was much concern as to the wider effects on the business community. The Conservative MP for Maldon, John Whittingdale commented that: “It cannot be right for us to cut off the whole of Starbucks just because one person went in for a cup of coffee and illegally shared files”. In the nature of many politicians, this could be excused as hyperbole, especially given that a threshold needs to be reached before such sanctions occur. Nevertheless, there could be some unexpected and serious consequences for businesses.

Since there is no certainty as to what the threshold might be, there could be particular difficulties for larger organisations. If one employee finds a popular album or movie on an illegal file-sharing network and sends it to some of his colleagues, who then send it onto to their friends in other offices, there is the potential that the threshold could be reached relatively swiftly. Given that it could take up to two months from the first infringement to the subscriber hearing about it from the ISP, an employer might find itself facing a sanction without having been previously aware that there had been infringement on such a large scale.

Undoubtedly any internet policy an employer has in place will specify that accessing or downloading illegal material could lead to disciplinary sanctions against the employee involved. But in the situation above, how should the employer go about disciplining its staff? Should the employee who initially found the website be the only one disciplined, or all those who accessed and downloaded the material? To discipline them all could involve substantial

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costs and management time. Yet to discipline only some of them could lead to claims of inconsistency and victimisation.

It is also unclear how much information will be provided by the ISP as part of the warning notice and many are concerned that ISPs will be cutting off access to the internet on the basis of only allegations of infringement rather than hard evidence. Certainly, when the Joint Committee on Human Rights examined the matter, it felt that the right to privacy or freedom of expression might be breached, but concluded that it was just too difficult to tell on the information available in the DEA alone.

An employer is obliged to conduct a reasonable investigation before disciplining an employee – a task that could be made that much harder where the details of the misconduct is potentially minimal and provided by a third party. For businesses with their own IT department, it may be relatively simply to verify the ISP's information; for smaller companies without such resources, there could be extra cost involved.

An appeal process will be available so that subscribers may appeal warning notices. However, it would be up to the subscriber to bear the costs of such an appeal initially, only receiving costs if the appeal was determined in its favour. Employers might be reluctant to incur such a financial burden in the current economic climate, but what if an employee is facing a severe sanction (such as dismissal) and wishes to challenge the warning notice? Might an employer be obliged to appeal to comply with its obligation of a reasonable investigation? Employers could face a difficult choice – disciplining or dismissing an employee on the basis of the warning notice and running the risk of a claim from the employee, or alternatively bearing the costs and inconvenience of an appeal under the DEA.

And it's not just in relation to its employees that an employer might face a claim. Under the DEA a copyright owner can take action not only against the person who has infringed copyright law, but also where "a subscriber to an internet access service has allowed another person to use the service, and that other person has infringed the owner's copyright by means of the service". There is the defence available (under the appeal process) that "the subscriber took reasonable steps to prevent other persons infringing copyright by means of the internet access service". Under the DEA, there is the potential for employers to face action from copyright owners because of an employee's infringement.

Pre-election, the Conservatives seemed set to keep the Bill but fix any problems with it; the Liberal Democrats believed that it should be scrapped. Certainly many in the IT industry would be keen to see these provisions repealed. Andrew Cormack, the Chief Regulatory Adviser at JANET(UK) commented: "The Act stretches a simple residential model of the Internet to cover all networks in the UK, with unexpected consequences for businesses and other organisations". It remains to be seen what will happen in the future, but all employers would be wise to keep their eye on this controversial piece of legislation. Whatever clarity is obtained with the anticipated (albeit delayed) Ofcom code and whether or not the law is changed yet again, employers should be thinking about reviewing their current internet policies and making staff aware of their rights and obligations under such policies.

If you would like further information on employment law issues within your workplace, please contact Lucy Bond at lbond@davidsonlarge.com.

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