

Digital Britain

The Digital Economy Act was rushed through at the close of the last parliament under a storm of controversy. Pierre-André Dubois and Shannon Yavorsky spell out the main provisions of the Act for business

THE DIGITAL Economy Act, which ushers the UK into the digital age, received Royal Assent on 8 April 2010. The Act introduces many measures contained in the *Digital Britain* White Paper report, which set out the government's vision for Britain's digital future. The Act, which has been the subject of much controversy, in particular over provisions relating to illegal file sharers, extends to many areas of digital life.

The impact of the Act on consumers has been widely discussed, particularly in relation to copyright infringement, but less often commented upon and no less important is the impact of the Act on businesses. To the extent relevant to them, businesses need to be aware of the new legislation and implement procedures to mitigate the risks they face as a result of the new rules.

The Government's plans for Britain's digital future, as set out in *Digital Britain: Final Report* included, amongst other things, a universal service commitment

for 2Mbs broadband by 2012, public support for the "network of tomorrow," so that consumers in the so-called final third who will not be reached by the market will be able to enjoy next generation broadband, and enhanced powers for Ofcom to secure a significant reduction in unlawful file sharing. The Act implements many of the measures set out in *Digital Britain* and in particular contains provisions in relation to online

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copyright infringement, public service broadcasting and content, network infrastructure and digital safety. The Act covers eleven topics, which overlap in practice, and comprises six main areas that encompass the scope of the Act. Businesses would be well advised to be aware of the main features of the legislation and consider how such provisions could either assist them or create new risks of which they need to be aware.

Ofcom

The Act gives Ofcom new powers and duties. Chief among these is a new requirement for Ofcom to report to the Secretary of State on the United Kingdom’s communications infrastructure every three years. Ofcom must also report on domain names when asked to do so and on media content at least every five years. Ofcom’s initial report on infrastructure is due within a year and every three years thereafter. The report will contain a review of the types of communications networks and services available, coverage of such networks and services, downtime, and measures in place to maintain or improve availability. It will also cover emergency planning and a comparison between networks >>

Feature

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» and services available in the UK and their equivalents in other countries.

It would be in the best interests of a business to read such reports once they have been published in order to compare Ofcom’s findings with the business’s own networks and services. By doing so, businesses will be able to determine whether they are making use of the networks and services available to them, whether network coverage extends to their operations and to discover what similar networks and services may exist in a range of other countries. This possibly invaluable information could allow businesses to audit in-house communications infrastructure by comparing what infrastructure a business is currently using with what Ofcom has found in its report. It should also be noted that Ofcom must write a further report if it becomes aware of a marked change that has a significant impact on business in any of the reporting areas. Businesses would be wise to ensure that they read any such reports published by Ofcom since they are likely to be directly affected by any issue set out therein.

Copyright

The Act includes various provisions regarding online copyright infringement. These provisions relate to copyright in various fields including music, film and games. The provisions impose obligations on internet service providers (ISPs) to notify their subscribers if the internet protocol addresses associated with them

are reported by copyright owners as being used to infringe copyright. They must also keep track of the number of reports about each subscriber and, on request by a copyright owner, compile on an anonymous basis a list of those subscribers who are reported on by the copyright owner.

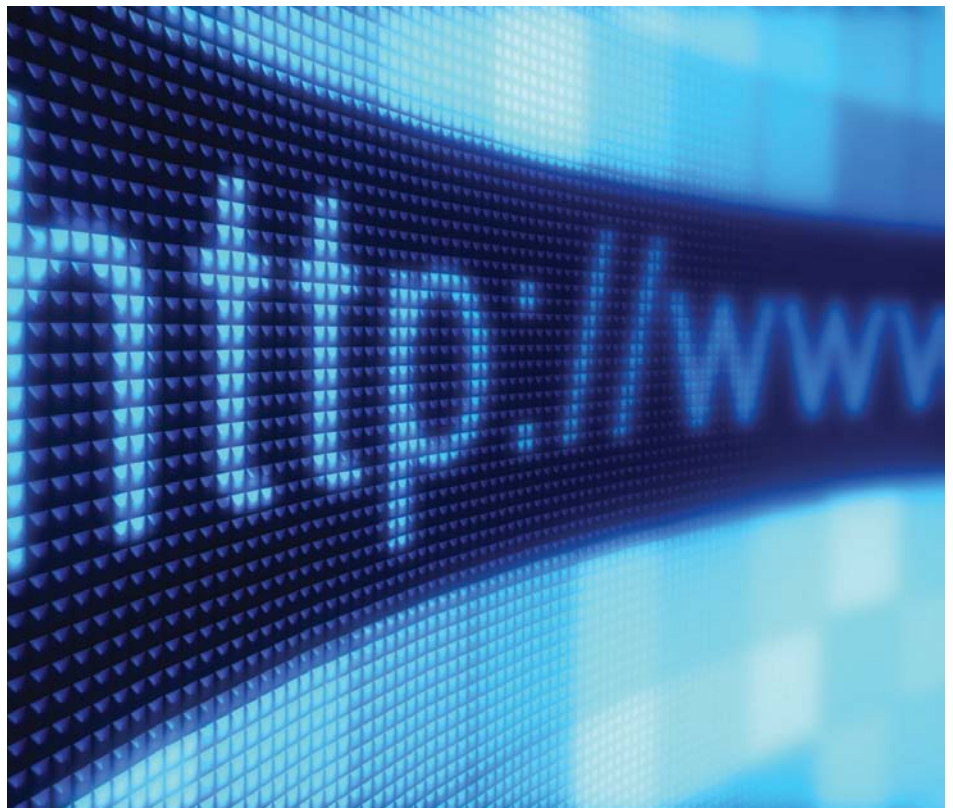
The copyright owner will be tasked with obtaining a court order to obtain the personal details of the subscribers, but will then be able to take action against those on the list. These provisions will have an obvious effect on ISPs who have obligations to copyright owners but will also affect businesses that own copyright. The new law has been criticized by ISPs (in particular BT and TalkTalk) who are reported to be applying to the High Court for a declaratory judgment as to whether the new law is legal. The main complaint from ISPs is that they do not wish to become internet police and have highlighted the fact that they are “mere conduits” for information, according to European law. On the other hand, the

provisions are welcomed by businesses that own copyright since they will now have an enhanced ability to track down persistent copyright infringers.

Domain names

The Act gives powers to the Secretary of State to intervene in the operation of domain name registries where there has been misuse of domain names, or the use of unfair practices by registries, registrar and end-users of domain names, or where registries have failed to deal with complaints. The powers are only exercisable in relation to second and top-level domain name registries where the domain is UK related (*i.e.*, co.uk domain names).

Examples of misuse of a domain name would be registering intentionally misleading domain names and then using them for phishing, distributing malware or spyware and spamming. Examples of unfair practices would be cyber-squatting, drop-catching – the practice of waiting until a domain name expires then buying it and charging



the owner to buy it back – or applying pressure sales tactics. The powers enable the Secretary of State to appoint a manager of a registry, or to apply to court to intervene in relation to a registry’s constitution in order to secure that the registry remedies particular failures. Businesses will be happy to hear that the Secretary of State has the power to intervene in such cases and to remedy specific serious failures, particularly if the business owner has been plagued by, for example, cyber-squatters or spam. As drop-catching has become a fairly common practice, the Act may help in protecting businesses against this practice.

Broadcasting

The Act extends the scope of Channel 4’s remit beyond television to the provision of content on a range of delivery platforms to take account of the growth of digital media. The Act also makes provision for the digital switchover of radio broadcasting. It enables Ofcom to terminate analogue

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licences for independent radio services on two years’ notice and impose a requirement that any extension of an analogue licence must be coupled with a requirement that the licence holder also provides some digital content.

These provisions will have an obvious effect on radio stations, which must ensure that their services are up-to-date. The provisions will also have an effect on businesses that have outdated radio equipment – older radios are unequipped to handle digital content and businesses must upgrade their equipment to be able to receive digital radio content.

Electromagnetic spectrum

The availability of next generation mobile broadband services requires the availability of spectrum. Attempts by Ofcom to bring suitable blocks of spectrum to the market have been delayed as a result of issues around spectrum used for delivery of second-generation mobile services.

To date, Ofcom has been unable to reach a consensus with mobile phone operators about the reallocation of spectrum. In the *Digital Britain: Interim Report*, the Government announced that it was seeking a solution to this issue. An Independent Spectrum Broker was appointed and his recommendations were published in *Digital Britain: Final Report* and involved temporarily capping the amount of spectrum that any one operator could hold, thereby forcing operators to relinquish some of their holding which would free up some spectrum for allocation at auction.

Any business that holds spectrum (so mainly mobile phone operators) or seeks to offer next generation mobile broadband services (again, mainly mobile phone operators) will be interested to hear about the Government’s plans in this regard. Although mobile phone operators may be disappointed to relinquish valuable spectrum, the ability to offer next generation mobile broadband services may make up for it. Further, businesses will be pleased to learn

that as a result of these plans, next generation mobile broadband services may become more widely available.

Video games

Provision in the Act sets out plans for a new system of video games classification incorporating the newly enhanced PEGI (Pan-European Game Information) system. The new rules seek to provide a more meaningful and effective classification system that affords better protection for children.

Offences relating to the new provisions include supply a video recording of classified work in breach of classification and supplying a video recording containing false information as to classification. These provisions will affect retailers who sell video games – once classification certificates have been issued, retailers will have to ensure that their products comply with the legislation, which could mean ensuring that existing stock is reviewed and if necessary, new labeling is applied.

Major rights holders, including any business that is a rights holder, have warmly welcomed the Act as it paves the way for increased protection for their rights. The British Phonography Industry has described the Act as “an important milestone towards a sustainable future for British music in the digital age”.

However, for others, and in particular ISPs, there are concerns that the law has not received enough debate and was rushed through Parliament. In the main, the Act should be welcomed by other businesses since it, amongst other things, provides more information, in the form of Ofcom reports, about the prevailing digital landscape, a greater ability to track down illegal file sharers, enhanced protection from rogue domain name registries and it may make next generation mobile broadband more widely available. ●

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