



THORNTONS AND THE CREATIVE INDUSTRIES

Our expertise includes:

- Sponsorship Agreements
- Music Recording/Publishing Agreements
- Collaboration Agreements – public and private sector
- Software Development Agreements
- Digital Copyright and Clearances
- Trade Mark Registration/Trade Mark Agreements
- Public Sector IP Commercialisation
- IP Licensing Agreements



THORNTONS
giving you more

The Digital Economy Act 2010

One of the last pieces of legislation to make it through the pre-election “wash-up” was the Digital Economy Bill. While many of the more controversial aspects have been removed such as provisions which would have allowed the Secretary of State to create a licensing body to licence Orphan Works, a number of important changes were made. This article provides a general overview of the provisions remaining and now forming the Digital Economy Act 2010 (“the Act”).

Ofcom Duties

The Act amends the Communications Act 2003 by imposing new duties on Ofcom with particular regard to its reporting obligations e.g. Ofcom must now report on UK communications infrastructure and fulfilment of the public service remit for television by public service broadcasters such as the BBC. If requested Ofcom also has to report on domain names to the Secretary of State e.g. the misuse of domain names.

Online Infringement of Copyright

- Provisions have been inserted to reduce online copyright infringement, however secondary legislation is required before these provisions become enforceable.
- If secondary legislation is passed, ISP’s would be obliged to actively assist a complainant on receipt of what will be known as a Copyright Infringement Report (“CIR”) i.e. a report alleging one of the ISP’s subscribers is infringing the complainant’s copyright. On receipt of a CIR, the ISP is to identify the alleged infringer, most likely by their IP address, and inform him or her of the CIR.
- The ISP must keep a record (i.e. a copyright infringement list) of how often each subscriber is identified.

- If requested by a copyright owner, an ISP would be obliged to supply relevant parts of its 'copyright infringement list' showing whom the complainer's CIRs relate to – the list would not reveal any subscriber's identity. This would help a complainer obtain a court action to force the ISP to disclose the personal details of the subscriber, and if necessary, to raise a court action for copyright infringement.
- The obligations based on ISPs noted above are the 'initial obligations'. If these initial obligations prove insufficient to significantly reduce the levels of online copyright infringement, the Secretary of State shall have the power to impose further technical obligations on ISPs to force them to take certain technical steps against the most serious infringers. This could include ordering ISPs to limit internet access of a subscriber. This is of concern to businesses such as hotels that offer internet access to its customers but because of a few customers, could have to remove access from everyone. Such businesses may also struggle to deploy resources to monitor and manage internet users.
- If ISPs fail to carry out the 'initial obligations', further technical obligations or fail to assist Ofcom where appropriate, a maximum penalty of £250,000 can be imposed – this can be increased by the Secretary of State.
- The Secretary of State also has powers to introduce regulations to allow courts to grant orders to close down websites.

Domain Names

- The Secretary of State shall have power to intervene in the operation of domain name registries where acts adversely affect or are like to adversely affect: (a) the reputation or availability of electronic communications in the UK; and/or (b) interests of consumers or members of the UK public.
- The Secretary of State may exercise these powers where there is evidence of unfair practices (e.g. cyber squatting, drop catching) or misuse of domain names by registries, registrars and/or end – users (e.g. registering intentionally misleading domain names). Alternatively, these powers may be exercised where registries have failed adequately to deal with complaints.
- In practice the Secretary of State will notify the domain name registry of any 'failure' and will give them a reasonable opportunity to make representations regarding the failure. If the domain name registry fails to remedy the failure to the satisfaction of the Secretary of State, the Secretary of State has certain powers available to it. Firstly it can appoint a manager to the relevant registry for the purposes of remedying the failure. Secondly, the Secretary of State can apply to the court for an order to either (i) make alterations to the registry's constitution; and (ii) preventing the registry from making alterations to its constitution without leave of the court, but only in so far as necessary to correct the failure. It is understood that the Secretary of State will utilise these powers in the most serious cases only.

Channel 4 Television Corporation

- Channel 4's functions have been extended in relation to media content. For example, Channel 4 will be required to participate in making content that appeals to a culturally diverse society and broadcast such content on a range of different platforms. This content will include news, content for older children and young adults and feature films.
- Channel 4 must also support new talent and innovation, debate, promote alternative views and inspire change in people's lives.
- Channel 4 is to report on the discharge of its obligations under the Act, in consultation with Ofcom.
- Ofcom is to have enforcement powers to oblige Channel 4 to take such steps to remedy any failure Channel 4 has in meeting its obligations under this Act. In a worst case scenario, Ofcom has the power to vary Channel 4's licence.

Independent Television Services

- The Act updates the statutory framework for Channel 3 and Channel 5 licences so as to introduce more flexibility in the licence processes for these commercially funded public service television broadcasters. For example, at the moment Ofcom is required to structure the Channel 3 licence map on a regional basis but is not allowed to construct a licence area to represent e.g. the whole of Scotland. The Act removes these restrictions and gives Ofcom much more flexibility over the areas that these licences can relate to.

Independent Radio Services

- The Act provides the necessary regulatory framework to facilitate the delivery of a digital switchover of radio services to Digital Audio Broadcasting by amending the Broadcasting Act 1990.
- The Secretary of State can nominate a date for digital switchover.
- It also enables Ofcom the necessary powers to give the switchover effect e.g. the power to terminate analogue licences in advance of the relevant date without the licence holder's consent.

Regulation of Television and Radio Services

- The Act provides greater flexibility and allows the Secretary of State to alter the conditions of public service provisions that Ofcom must include in certain licences; the Secretary of State can change the conditions back at a later date. The Secretary of State can only make these alterations by approval of Parliament.

Access to electromagnetic spectrum

- The Act enhances Ofcom's powers to enable it to enforce licences and impose fines on mobile operators that breach their licences.

Video Recordings

- The Act expands the range of video games that are to be held as exempt under the Video Recording Act 1984 to include video games that are deemed suitable for viewing by persons aged 12 and under.
- The existing rules for video games will continue to apply in that games that are designed to inform, educate or instruct or those based on sport, religion or music will also be exempt from classification except where they contain gross violence or any other matters set out in the Video Recordings Act 1984.

Copyright and Performer's rights: Licensing and penalties

- The maximum fine that may be imposed for criminal infringement of copyright and making, importing, distributing or making available an illicit recording under sections 107 and 198 of the Copyright, Designs and Patents Act 1988 has been stipulated as £50,000.

Public Lending Right

- The Act amends the Public Lending Right Act 1979 and the Copyright Designs and Patents Act 1988 by: (a) extending eligibility for public lending right (PLR) payments to authors of audio-books and e-books as opposed to just books in paper format; (b) extending PLR to producers and narrators of books that are recorded as sound recordings; and (c) protecting public libraries who lend the books from liability for breach of copyright or breach of rights in performances.
- The Act will not extend PLR to works that do not consist mainly of written or spoken word or still pictures e.g. films, music and computer games.

Conclusion

Overall, the Digital Economy Act 2010 will update the law in areas spanning the internet, television, radio, telecommunications and certainly in the area of copyright infringement it represents a serious attempt to address the issues raised by copyright owners in relation to, for example, peer to peer file sharing. To what extent the Act will have an impact in practical terms and the objectives set out in the Digital Britain Consultation Paper is yet to be seen. The controversy which surrounded its debate and passage certainly suggests expectations are mixed.

Do you want to know more?

Lesley Larg - llarg@thorntons-law.co.uk

Liam McMonagle - lmcmonagle@thorntons-law.co.uk

Claire Thompson - cthompson@thorntons-law.co.uk

Loretta Maxfield - lmxfield@thorntons-law.co.uk

Whitehall House, 33 Yeaman Shore, Dundee DD1 4BJ

Tel 01382 229111

www.thorntons-law.co.uk



THORNTONS
giving you more