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The Digital Economy Act 2010 – Implications for UK Colleges and Universities

Please Note: This guidance is for information only and is not intended to replace legal advice when faced with a risk decision.

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Key Points

- The Digital Economy Act 2010 places new legal obligations on internet service providers to monitor and report on online copyright infringing behaviour and new sanctions for online copyright infringement.
- How institutions are classified under the three defined roles set out in the Act will decide the practical implications of the Act and these legal roles will be set out in the code of practice currently being developed by Ofcom.
- The draft Ofcom code initially puts this obligation on the seven largest domestic ISPs which does not include colleges and universities, but the scope of the code may be extended in the future.

1 What is the Digital Economy Act 2010?

The Digital Economy Act 2010 (DEA 2010) was passed by Parliament in April 2010. Its phased coming-into-force places obligations on those providing internet access services to tackle online copyright infringement, such as illegal peer-to-peer sharing and illegal downloading of copyright material. This will mark wide-ranging reform in the media industry, with the Department of Business, Innovation and Skills (DBIS) stating 'the ultimate aim of the legislation is to shift people's behaviour from the unlawful to the legal'. The new copyright infringement provisions are set out in sections 3 to 16 of the Act, which insert new sections (12A-N) into the Communications Act 2003.

The DEA 2010 confers a duty on Ofcom, the independent regulator for the UK communication industries, to create a code of practice detailing how the different legal duties set out in the Act will be implemented. At the end of May 2010, Ofcom published the first draft code for consultation, finishing at the end of July 2010. This is the first of three consultations, and covers the initial obligations to be set out in the code. The second consultation paper will look at the actual enforcement of the code, and the third will look at cost implications for enforcement of the code.

2 How does the DEA 2010 change the current legal position?

The Copyright, Designs and Patents Act 1988 allows copyright holders to pursue copyright infringement through civil action, and that applies equally to online and digital-based infringement as any other form of infringement. Copyright holders may identify offenders through forensic online analysis, such as the tracing of infringing IP addresses. These are the unique identifier codes for each internet connection in an 'internet access service' or network. The copyright holder can then apply for a court order to require the ISP to supply customer information relating to that IP, and then use that information to demand damages and/or pursue court action. There may be difficulties obtaining the customer details, however, where there has been illegal use of a connection or a connection has been hijacked. There have also been errors in ISPs' records connecting IP addresses to customer details, leading to misidentification.

The new law places obligations on ISPs to monitor and report on IP addresses copyright holders allege to be infringing copyright. In the event of infringement being found, the ISP must also enforce sanctions against the alleged infringer connected with that IP address. Copyright holders will still be able to take action as before, but the measures taken by the ISPs are intended to be much more effective. The Act provides for an appeals process for those who face sanctions.

3 What are the key issues for colleges and universities?

Ofcom is planning to restrict the scope of the initial code to the seven largest domestic ISPs. This means BT, TalkTalk, Virgin Media, Sky, Orange, O2 and Post Office will be covered by the code initially. These ISPs provide internet connections to over 96% of the market and based on evidence Ofcom has received from copyright owners, the vast majority of alleged infringement is amongst subscribers of those ISPs. However, Ofcom proposes to regularly review evidence of online copyright infringement across all service providers and to extend the scope of the code if appropriate, and it is possible that

colleges and universities are included in future. In addition, the suggestion in the Ofcom draft code that application is restricted to certain ISPs is likely to be the subject of legal challenge by those ISPs.

If the draft code is accepted, this will give colleges and universities breathing room in the short term, and allow them to learn from the early application of the Act's provisions. However, in the longer term, the question will remain as to how institutions are defined under the Act, and thus the determination of the duties falling upon them.

4 What does each defined role mean for colleges and universities?

The application of the Act is based on three definitions; 'ISP'; 'subscriber' and 'communication provider', each with its own implications. The roles are not mutually exclusive – institutions could be held to be acting in all three capacities simultaneously, or any combination of them.

4.1 'Internet service provider' (ISP)

An Internet service provider (ISP) means the provider of an 'internet access service'. An internet access service is an electronic communications service that:

- a) is provided to a subscriber
- b) consists entirely or mainly of the provisions of access to the internet
- c) includes the allocation of an IP address or addresses to a subscriber to enable access

The new obligations for ISPs include monitoring IP addresses, reporting to copyright holders, notifying account holders of allegations and enforcing sanctions for apparent infringers. If ISPs do not comply with these new obligations they can face a £250,000 fine.

Notification and reporting

ISPs will have to notify subscribers where copyright holders make an allegation concerning infringement in relation to the subscriber's IP address. Copyright holders will have to provide evidence of the infringement in the form of a 'copyright infringement report'. The ISP is obliged to report back to the copyright owner as to whether the evidence matches with the subscriber account in question. However, the ISP will not identify the subscriber to the copyright holder – a court order will be needed before the ISP can release that information.

'Technical measures'

If required, ISPs may have to enforce 'technical measures'. These are technical penalties, of increasing inconvenience to the subscriber, designed to deter further copyright infringement. These will do one or more of the following; 'limits the speed or other capacity of the service provided to a subscriber; prevents a subscriber from using the service to gain access to particular material, or limits such use; suspends the service provided to a subscriber; limits the service provided to a subscriber in another way'.

'Three strikes'

This type of graduated response scheme has become known informally as the 'three strikes' rule. The Ofcom code sets out a three-stage notification process for informing subscribers of infringements. It proposes that subscribers who have received three notifications within a year may be included in the

copyright infringement list requested by a copyright owner. ISPs will have to record the number of notifications sent to their subscribers and maintain an anonymised list of alleged serial copyright infringers. Copyright holders can then request information on this list and pursue a court order to identify serial infringers and take legal action against them.

What does this mean?

If the scope of the code is widened to include colleges and universities as ISPs, they will have to fulfil the new legal duties required in providing an internet access service to its staff and students. This will involve:

- the introduction of new monitoring processes and responding to copyright infringement reports
- the administration of the notification process for subscribers
- the potential provision of an appeals process for penalised subscribers (as outlined in the Ofcom code)
- ensuring appropriate liaison and record-keeping in relation to these duties

These new processes will have resource implications for institutions.

The wider implications could be far greater. If an allegation of copyright infringement is made against a student or member of staff, the institution may be required to impose sanctions on that person's internet account, reducing access or even disconnecting the user. This could have serious implications for the provision of online teaching and learning, as well as introducing possible new disciplinary measures. It may also require the institution to make time-consuming investigations, as not all file sharing activity is illegal or unlicensed – institutions may decide, for example, to record where legitimate (non-infringing) file sharing is being used or encouraged.

Institutions may also consider outsourcing internet service provision external providers, which would reduce the administrative burden on the institution itself but could have alternative cost, control and flexibility implications. However, this will not resolve issues arising from the effects of the technical measures on online teaching, learning and administration.

4.2 Subscriber

A subscriber, in relation to an internet access service means a person who:

- a) receives the services under an agreement between the person and the provider of the service and
- b) does not receive it as a communications provider

Under this definition, 'agreement' can be interpreted more broadly than a 'contract', so this could include an 'acceptable terms of use' policy for college or university internet services or could even be implicit. A subscriber is liable for copyright infringement under the Act and will be subject to the new sanctions. The subscriber will also be liable for allowing another person to infringe copyright using the subscriber's connection, and for not taking adequate measure to protect an IP address from external threats which then allow others to use that connection illegally.

What does this mean?

If colleges and universities are defined as subscribers to an internet access service then they will be liable for any infringing acts that occur via their allocated IP addresses. The immediate implications this may involve could be ensuring 'file sharing' sites encouraging illegal peer-to-peer activity are unable to be accessed in the institutions network; the 'acceptable terms of use' policy may have to be tightened; possible greater monitoring of file sharing activity in the network and IT security measures may also need to be heightened.

The wider implications also mean that institutions subject to technical measures could face limited or even disconnected internet access due to infringements by students, staff or visitors. The Act does not specify how long a temporary suspension may last, whether the ban may be indefinite or whether subscribers banned from one ISP can access alternative services. The imposition of technical measures against an institution could seriously impact its online services in relation to teaching and learning, and administration. A formal two stage appeal process will be available to penalised subscribers, and this process will be set out in the Ofcom code.

4.3 Communications provider

A communications provider is defined in the Communications Act 2003 (ss.32(4) and 405) as: 'A person who provides an electronic communications network or an electronic communications service; including its establishment, maintenance or operation.'

A communication provider is not defined in the DEA 2010 but is described as a person or organisation which:

- a) provides communications which do not need to be public communications
- b) is not a subscriber
- c) is not an ISP
- d) does not allocate IP addresses to subscribers.

If colleges and universities are classified as communication providers, they will be exempt from the majority of the Act's provisions.

5 What about JANET?

JANET is the private network connecting the majority of mainstream UK colleges, universities and schools to the internet and to each other. The relationship between JANET and colleges, universities and schools is complex, involving regional sub-network operators and frequently the allocation of IP addresses. How JANET is categorised under the Ofcom code will in turn determine how institutions are classified: JANET could be considered an ISP with colleges and universities as subscribers, or JANET could be acting as a communications provider and institutions may be regarded as the ISP. DBIS have stated that JANET is not required to operate to a standard model, and thus the categorisation might change depending on the particular configuration of services offered through time. The Ofcom code proposes that in the future thresholds of copyright infringing activity will be introduced as set out in the DEA, in order to avoid burden in the face of low levels of infringing activity. The

implementation of that provision will mean that if JANET, colleges and universities keep levels of illegal file sharing below the threshold, they escape some of the burdens of the Act.

6 Implementation timeline for the Act

The DEA 2010 was passed as law in the UK on 12 April 2010, however it is estimated that the practical implications will not be felt for at least two years. The table below outlines the earliest possible timeline for implementation of the Act. The Ofcom codes will also need to be cleared with the European Commission to ensure they are compatible with existing directives and agreements.

Earliest possible timeline for implementation of DEA 2010

Date	Action	Practical implication
12 April 2010	DEA gets Royal Assent	DEA now law in the UK
May 2010	Parliament convenes following general election	Implementation on hold until after this time
28 May 2010	Ofcom consultation period begins	Stakeholders invite to comment on the first draft code of practice
8 June 2010	DEA commencement date	DEA comes into force
30 July 2010	First consultation period ends	Further consultation periods are scheduled while the final draft code is drawn up
Approx 6 month period	Ofcom develop code of practice for ISPs and Copyright holders	The Act requires the code to be implemented no later than 8 months from Royal Assent including approval from the EC
8 January 2011	Earliest date code is likely to be enforced	Notification of 'Copyright Infringement Reports' (CIRs) for IP addresses from copyright owners will be sent out to subscribers by ISPs
12 month period	1 year monitoring period from enforcement of code	Numbers of CIRs will be monitored by Ofcom for any decrease in copyright infringing behaviour
Early 2012	Secretary of State can order 'technical measures' to be drawn up by Ofcom	These have to drawn up and then pass a vote in the House of Commons and House of Lords before coming into force
2012	Technical measures may come into force	CIRs will continue to monitored
Mid to late 2012	Technical measures may be enforced	Repeat offenders with multiple CIRs will have their broadband capacity limited, limits to internet services and possibly suspension of services introduced
Mid to late 2012	Appeals process will be available	Two tier appeals process for those facing technical measures will be available, direct to the ISP and to an independent appeals body

7 Summary

The initial Ofcom code intends the new legal duties and measures set out in the DEA to only include the seven biggest domestic ISPs and their customers. This means that colleges and universities at present do not appear to be within the scope of the Act. However, this approach may be subject to legal challenge by the ‘early imposition’ ISPs.

Although the practical consequences of the initial code will not be reached for at least two years, if high enough levels of copyright infringement are shown to occur through the medium of college and university internet services, institutions may be designated ISPs subject to the Act and code.

The classification of institutions under the Act’s terms will determine the practical effects of the legislation. If defined as an ISP, provision will need to be made to monitor and report on IP addresses, and to enforce sanctions against copyright infringers. If defined as subscribers, institutions may be liable for the alleged copyright infringing behaviour of staff and students, and face technical measures relating to internet access. Communication providers are mostly exempt from the Act. JANET’s relationship with institutions in the provision of internet services will also need to be taken into consideration, if and when colleges and universities are brought within the scope of the Ofcom code’s implementation in the future.

8 Further Information

- The Digital Economy Act 2010 (full text)
<http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=3699621>
- ‘Online Infringement OF Copyright: Libraries, Universities And Wi-Fi Providers’
DBIS discussion paper (February 2010)
<http://interactive.bis.gov.uk/digitalbritain/wp-content/uploads/2010/02/Example-infringement-notifications.pdf>
- Ofcom consultation:
<http://www.ofcom.org.uk/consult/condocs/copyright-infringement/condoc.pdf>
- JANET blog on DEA and Ofcom code
<http://webmedia.company.ja.net/edlabblogs/regulatory-developments/2010/05/28/ofcom-code-consultation/>

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The screenshot shows the JISC Legal website interface. At the top, there is a navigation bar with links for Home, My Role, Legal Areas, Themes, Contact Us, and About Us. A dropdown menu for 'Legal Areas' is open, listing categories such as Copyright / IPR, Data Protection, Freedom of Information, Human Rights, e-Commerce, Accessibility Law, Defamation, Harassment, Computer Misuse, Terrorism, Interception and Monitoring, Hosting Liability, Employment Law, and Health and Safety. Below the navigation, there are several content sections: 'News' with articles like 'JISC Podcast on the JISC Legal's Kirsty Mc...', 'Umbrella' Data Protection...', 'Government Commits to New Libel Bill', and 'Facebook's Privacy Under German Investigation'; 'Events' with 'JISC Legal @ JISC Innovation Forum 2010' and 'JISC Legal @ UKOER 2010, London'; and 'Guidance' with 'e-Safety Background Video for England'. On the right side, there is a search bar, 'Resources & Tools' (including FAQs, Law Watch, Multimedia, Newsletter), 'Projects' (including Open Educational Resources, Transfer and Use of Bibliographic Records, Consent Management), and 'Enquiries'.

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