



Competition Law Association

British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

www.competitionlawassociation.org.uk

Liability of ISPs and Online Market Places for Conduct of their Users

Tuesday 12 April 2011

Christopher Stothers and Daphne Yao

Daphne Yao, Associate Counsel at Virgin Media, provided the Competition Law Association with a very clear yet insightful review of the Digital Economy Act (DEA), and the broader “piracy debate”, from the perspective of an Internet Service Provider (ISP).

She began by explaining the background of the DEA in the Memorandum of Understanding dated 24 July 2008, entered into by the British Phonographic Industry (BPI), the Motion Picture Association (MPA), the big six ISPs and the government. That set in place a pilot campaign under which ISPs would write warning letters to their subscribers who were unlawfully sharing copyright material (<http://www.berr.gov.uk/files/file47139.pdf>, Annex D).

The Digital Britain Report in June 2009 (<http://www.official-documents.gov.uk/document/cm76/7650/7650.pdf>) then led to the Digital Economy Bill, which was adopted on 8 April 2010 during the “wash-up” of the previous government amidst fierce lobbying (<http://www.legislation.gov.uk/ukpga/2010/24/contents>).

Daphne identified three limbs to the DEA:

1. Initial obligations - requiring letter writing campaigns (ss3-8)
2. Technical measures - potentially suspending or restricting access of users (ss9-15)
3. Site blocking - potentially blocking entire sites (ss17-18)

However, she explained that the rapid enactment of the DEA meant that implementation was not a simple matter, and since its entry into force there had been a lot of work behind the scenes by industry and government. Ofcom had drafted and consulted on an initial obligations code (<http://stakeholders.ofcom.org.uk/consultations/copyright-infringement/>). The Department for Business, Innovation & Skills had consulted on who should bear the costs of enforcement (<http://www.bis.gov.uk/Consultations/online-infringement-of-copyright>), with the result that it should be split 75/25 between content owners/ISPs but much of the detail still being discussed. Another key open issue is the extent to which the requirements should apply beyond the big six ISPs, and in particular how they should apply to hotels, cafes, B&B's and others offering internet access to their users.

Moreover, two ISPs (BT and TalkTalk) had successfully launched a judicial review of the DEA itself, which has effectively delayed implementation (<http://www.btplc.com/News/Articles/Showarticle.cfm?ArticleID=98284B3F-B538-4A54-A44F-6B496AF1F11F>). Permission was granted on 11 November 2010 and the case was heard 23-28 March 2011. Judgment is awaited.

At the same time, this issue has been the subject of detailed stakeholder dialogues at an EU level (for instance, in the consultation on the e-Commerce Directive - http://ec.europa.eu/internal_market/consultations/2010/e-commerce_en.htm).



Competition Law Association

British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

www.competitionlawassociation.org.uk

Turning to the policy, Daphne explained that there seemed to be three views on the extent to which ISPs should take responsibility for addressing piracy:

Those in favour of broad responsibility, who argue:

- Negative impact of piracy on content industry, which ISPs are best placed to address.
- Existing measures available (injunctive relief and Norwich Pharmacal orders) are costly, time-consuming and have limited effect.

Those against broad responsibility, who argue:

- Incompatible of a broad burden with the e-Commerce directive
- Financial burden on ISPs plus detrimental knock-on effects for customers.

Those in the middle, who suggest:

- We should recognise the seriousness of online piracy, and that ISPs have a limited role to play; but measures must be proportionate and any share of costs must be fair.
- Any measures must not detract from the focus on working together with the content industry to create new, transformative commercial models.

The meeting then turned to the draft UK national report on the intellectual property question for the LIDC Congress in Oxford on 22-24 September 2011 (<http://www.ligue.org/>), which asks the broader issue:

To what extent should online intermediaries (such as ISPs and operators of online marketplaces) be responsible for controlling or forbidding unfair competitive practices (such as sale of infringing products) on their systems?

The vigorous discussion was led by the national reporter, Christopher Stothers, with extensive participation from those attending including the international reporter, Trevor Cook. The UK report will now be finalised on the basis of the discussion and provided to Trevor.