[GB] Court Rejects Challenge to Legislation to Combat Online Copyright Infringement

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The UK High Court has rejected a challenge to provisions of the Digital Economy Act 2010 designed to limit file-sharing in breach of copyright law. They provide that internet service providers must notify subscribers if their internet protocol addresses are reported by copyright owners as being used to infringe copyright, must keep track of the number of reports about each subscriber and must compile on an anonymous basis a list of those reported on. After obtaining a court order to obtain personal details, copyright owners will be able to take action against those on the list. These provisions will not become effective until after the communications regulator Ofcom has published a Code dealing with points of detail. The challenge was brought by British Telecommunications and TalkTalk, two internet service providers; no fewer than 12 other parties took part in the litigation, including organisations concerned with copyright protection and with freedom of speech.

The claimants alleged that the provisions of the statute were in breach of European Union law on four different grounds; all the allegations were rejected by the court. Thus there was no breach of the Technical Standards Directive requiring notification of standards to the European Commission as the statutory provisions were contingent and did not come into operation until the Code was enacted; as a result, they had no legal effect for individuals on their own. There was no breach of the various articles of the e-Commerce Directive, as they did not impose on the service provider liability for information transmitted, did not require active monitoring of information transmitted and did not fall within the “coordinated field” where restrictions on freedom to provide information society services are prohibited. Nor was there any breach of the Data Protection and Privacy and Electronic Communications Directives given that any processing of personal data would be done for the establishment of legal claims and promoting the right to property. There was no breach of the electronic communications Authorisation Directive, as it did not require that all sector-specific rules had to be contained in a general authorisation, and the provisions did not limit the immunities the Directive conferred.

The statutory provisions were also challenged as a disproportionate restriction of the free movement of services, of the right to privacy and of the right to free expression. Several grounds were put forward to support this claim, and all were

rejected by the Court. It held that this was an area where substantial weight should be attached to the balance struck by the primary decision-maker, Parliament. It had addressed a major problem of social and economic policy where important and conflicting interests are at play and a lengthy process of consultation had been undertaken; the Court was not the appropriate forum for assessing the complex economic arguments put forward by each side.

The claimants were successful on one minor issue. The Court held that an Order currently before Parliament allocating the costs of the administration of the provisions breached the Authorisation Directive through requiring copyright owners to reimburse part of the costs of internet service providers; these were not "administrative costs" permitted by the Directive. Nor were the costs of appeals such "administrative costs".

R (on the Application of British Telecommunications plc and TalkTalk Telecom Group plc) v The Secretary of State for Business, Innovation and Skills [2011] EWHC 1021 (Admin), 20 April 2011

http://www.bailii.org/ew/cases/EWHC/Admin/2011/1021.html