

## **HIGH COURT UPHOLDS DIGITAL ECONOMY ACT TO PROTECT CONSUMERS AND WORKERS IN THE CREATIVE INDUSTRIES**

***Measures are vital to secure the future growth of the creative sector and 1.8m jobs***

**London – 6 March 2012:** The Court of Appeal Judges today handed down their judgment on the Judicial Review of the Digital Economy Act, following two failed appeal attempts by BT and TalkTalk to appeal an earlier decision.

The creative industries 'interested parties' which has supported the Government throughout the Judicial Review process are again calling on BT/TalkTalk to now put the litigation behind them and join the creative sector and the Government in implementing the Digital Economy Act.

Commenting on today's High Court ruling on the Digital Economy Act (DEA) Judicial Review appeal, **John McVay, Chief Executive of PACT and spokesperson for the Creative Industries 'interested parties'** said:

"We always believed that the Judicial Review was misconceived. Rather than needlessly spending more time and money on further legal challenges, BT and TalkTalk now need to focus on working with rightsholders and the Government in implementing the DEA with immediate effect. Today's news that BT and TalkTalk are actively encouraging people to take up internet packages to make it easier to access large amounts of infringing material demonstrates that naked self interest is driving a total abdication of responsibility in dealing with illegal filesharing. This is an attitude that needs to change for the sake of the millions of people in the creative industries whose livelihoods are put at risk from continued high levels of online infringement."

The decision was welcomed across the creative sector:

**Christine Payne, General Secretary of Equity**, said:

"Once again the Court is on the side of the almost two million workers in the creative industries whose livelihoods are put at risk because creative content is stolen on a daily basis. Once again a Judge has made it extremely clear that the Digital Economy Act is a fair, focused, proportionate and efficient system for consumers and the creative industry. Rather than individuals being hauled into court, the DEA makes it possible to conduct a mass consumer education programme. BT and TalkTalk need to stop fighting and start obeying the law."

**Geoff Taylor, BPI Chief Executive** added:

"The courts have confirmed, once again, that the Digital Economy Act is legal, proportionate and fair and can now be implemented. The ISPs' failed legal challenge has meant another year of harm to British musicians and creators from illegal filesharing. The ISPs now need to work constructively with Government and rightsholders to implement the Act."

**President of the Film Distributors' Association, Lord Puttnam CBE** said:

“Hopefully this brings to an end a long chapter of uncertainty, and the DEA can now help in implementing a mass consumer education programme so that people, especially young people, can come to appreciate the damage piracy inflicts on the whole of the creative community.”

**Lavinia Carey, Director General of the British Video Association** commented:

“The British Video Association, whose members are blighted by the endemic use of unlawful P2P file-sharing to avoid paying for video content, is delighted that the Government can now press on with implementation of the 2010 Digital Economy Act. The DEA offers a fair, proportionate and entirely reasonable way to help promote a change in behaviour.

“Several other countries are adopting this measure and it would be bad for Britain’s creative industries to be left behind more forward thinking nations who are supporting their creative economies at this difficult time of transition towards increased digital consumption during this period of recession.”

### **Notes for Editors:**

#### **What has happened so far?**

- Following the Judicial Review hearing held at the end of March (23, 24, 25 and 28 March), Mr Justice Parker [ruled](#) on 20<sup>th</sup> 2011 April that the Act was a proportionate response to a serious problem.
- In total, the Digital Economy Act was challenged on five separate grounds by BT and TalkTalk but they lost on 93% of their case. The Judge dismissed all challenges to the Digital Economy Act provisions made by the ISPs, except for a relatively narrow finding relating to the draft Costs Order – which has now been amended.
- In his ruling Mr Justice Parker stated, “...*from the point of view of both copyright owner and subscriber, the DEA represents a more efficient, focussed and fair system than the current arrangements.*” (para 224) and “*the fact remains that as an objective matter the contested provisions are not shown to be disproportionate.*” (para 225)
- BT and TalkTalk were subsequently refused permission to appeal on all five grounds by the Judge. In the High Court Order, Justice Parker stated, “*In my view the Initial Obligations represent a moderate and proportionate Parliamentary response to the relevant economic issue.*”
- Following this BT and TalkTalk sought permission to appeal from the Court of Appeal in writing, but were again refused. The Judge, Sir Richard Buxton, stated that the Digital Economy Act “*is a moderate and proportionate parliamentary response to a serious economic issue*”.
- The ISPs then re-applied to the Court of Appeal for an oral hearing. The oral hearing on 7<sup>th</sup> October granted permission to appeal. Leave to appeal was granted on all grounds except

Article 15 of the E-Commerce Directive (which is the ban on the imposition of general monitoring obligations).

- This appeal was heard on 16<sup>th</sup> / 17<sup>th</sup> January 2012, and the judgment was given today.

### **What is the latest appeal looking at?**

BT / Talk Talk dropped proportionality from their grounds for appeal and were refused leave to appeal on the E-Commerce Directive. This appeal focussed on the following grounds:

1. The Government failed to give the European Commission sufficient notice for it properly to scrutinise the legislation as required;
2. The Act does not comply with existing EU legislation on data protection and privacy;
3. The Act is incompatible with Articles 3 and 12 of the E-Commerce Directive; and
4. The Act is incompatible with the EU Authorisation Directive.

In his ruling on 20<sup>th</sup> April, Justice Parker stated in regard to the four grounds:

**1. The Government failed to give the European Commission sufficient notice for it properly to scrutinise the legislation as required**

The judge found that because the DEA was not currently legally enforceable against individuals or ISPs, it was perfectly acceptable for the Government to notify the DEA to the European Commission at the same time that it notifies the forthcoming draft Initial Obligations Code.

**2. The Act does not comply with existing EU legislation on data protection and privacy**

The judge found that the processing of data by ISPs (and by copyright holders) under the DEA was appropriate & lawful. It helped to protect copyright and helped to establish whether or not any further copyright infringement action could be taken.

**3. The Act is incompatible with existing EU e-commerce legislation**

Mr Justice Parker found that the DEA did not make ISPs liable in damages for copyright infringement, nor did it impose on them a general obligation to monitor.

**4. The Act is incompatible with the Authorisation Directive**

Mr Justice Parker found that it was lawful for the Claimants to pay 25% of their Relevant Costs and 25% of the Case Fees; but that ISPs could not be required by Government to pay 25% of the Qualifying Costs (as such costs amounted to an administrative charge). Nothing in the DEA will be overturned as a result of this, but Government has had to consider how to amend the draft Costs Order.

### **Summary of Justice Parker's full ruling on 20<sup>th</sup> April**

- The Digital Economy Act was challenged on five separate grounds by BT and TalkTalk, but they lost on 93% of their case.

- The Judge dismissed all challenges to the Digital Economy Act provisions made by the ISPs, except for a relatively narrow finding relating to the draft Costs Order.
- In essence, the Claimants argued that the draft Costs Order (which determines who pays what costs under the DEA) was allegedly unlawful in requiring the ISPs to pay:
  - (1) 25% of Ofcom's costs and the costs of establishing an appeals body (Qualifying Costs), with copyright holders paying 75%.
  - (2) 25% of the ISPs' costs of receiving information from copyright holders about infringements & sending notifications to subscribers (Relevant Costs), with copyright holders paying 75%.
  - (3) 25% of the costs of any appeals by subscribers to the appeals body (Case Fees), with copyright holders paying 75%.
- Mr Justice Parker found that it was lawful for the Claimants to pay 25% of their Relevant Costs and 25% of the Case Fees; but that ISPs could not be required by Government to pay 25% of the Qualifying Costs (as such costs amounted to an administrative charge). As a result, the Government amended the draft Costs Order to reflect the Judge's ruling.

#### **Who are the Creative Industries 'Interested Parties'?**

- **The Unions: Equity, The Musicians Union, BECTU and Unite**
- **The Producers Alliance for Cinema and TV ("PACT")** - the UK trade association representing and promoting the commercial interests of independent feature film, TV, digital, children's and animation media companies.
- **The British Video Association ("BVA")** - the trade body that represents the interests of UK publishers and rights owners of video entertainment on all platforms, both physical and digital.
- **The Film Distributors' Association ("FDA")** - the trade body for theatrical film distributors in the UK – the companies that release films for UK cinema audiences.
- **The Motion Picture Association ("MPA")** - represents the six major international producers and distributors of film, home entertainment and TV programmes.
- **The BPI (British Recorded Music Industry)** - represents the interests of independent and major record companies in the UK. BPI currently has over 400 members who produce approximately 90% of the sound recordings which are sold legally within the UK.
- **The Premier League** - represents the interests of the 20 Premier League football clubs, including protecting the audio-visual works that are owned by and exclusively licensed by the Premier League.

#### **Key Statistics:**

- Up to a quarter of a million jobs will be at risk if nothing is done about copyright infringement in the UK by 2015. *Source: TERA Report 2010*
- Piracy was responsible for retail losses of £1.2 billion in the UK in 2008 which resulted in 39,000 job losses. *Source: TERA Report 2010*
- The UK has the largest creative sector in the EU, and relative to GDP probably the largest in the world. *Source: The Work Foundation 2007*
- Exports of services from the Creative Industries totalled £17.3 billion in 2008, equating to 4.1% of all goods and services exported. *Source: DCMS 2010*
- The UK creative industries generate £60 billion per year. *Source: DCMS 2010*

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