



Digital Economy Act 2010

2010 CHAPTER 24

Online infringement of copyright

13 **Subscriber appeals**

After section 124J of the Communications Act 2003 insert—

“124K Subscriber appeals

- (1) The requirements concerning subscriber appeals are—
 - (a) for the purposes of section 124E(1)(h), the requirements of subsections (2) to (8); and
 - (b) for the purposes of section 124J(1)(b), the requirements of subsections (2) to (11).
- (2) The requirements of this subsection are—
 - (a) that the code confers on subscribers the right to bring a subscriber appeal and, in the case of a technical obligations code, a further right of appeal to the First-tier Tribunal;
 - (b) that there is a person who, under the code, has the function of determining subscriber appeals;
 - (c) that that person is for practical purposes independent (so far as determining subscriber appeals is concerned) of internet service providers, copyright owners and OFCOM; and
 - (d) that there are adequate arrangements under the code for the costs incurred by that person in determining subscriber appeals to be met by internet service providers, copyright owners and the subscriber concerned.
- (3) The code must provide for the grounds of appeal (so far as an appeal relates to, or to anything done by reference to, a copyright infringement report) to include the following—
 - (a) that the apparent infringement to which the report relates was not an infringement of copyright;

- (b) that the report does not relate to the subscriber's IP address at the time of the apparent infringement.
- (4) The code must provide for the grounds of appeal to include contravention by the copyright owner or internet service provider of the code or of an obligation regulated by the code.
- (5) The code must provide that an appeal on any grounds must be determined in favour of the subscriber unless the copyright owner or internet service provider shows that, as respects any copyright infringement report to which the appeal relates or by reference to which anything to which the appeal relates was done (or, if there is more than one such report, as respects each of them)—
 - (a) the apparent infringement was an infringement of copyright, and
 - (b) the report relates to the subscriber's IP address at the time of that infringement.
- (6) The code must provide that, where a ground mentioned in subsection (3) is relied on, the appeal must be determined in favour of the subscriber if the subscriber shows that—
 - (a) the act constituting the apparent infringement to which the report relates was not done by the subscriber, and
 - (b) the subscriber took reasonable steps to prevent other persons infringing copyright by means of the internet access service.
- (7) The powers of the person determining subscriber appeals must include power—
 - (a) to secure so far as practicable that a subscriber is not prejudiced for the purposes of the copyright infringement provisions by an act or omission in respect of which an appeal is determined in favour of the subscriber;
 - (b) to make an award of compensation to be paid by a copyright owner or internet service provider to a subscriber affected by such an act or omission; and
 - (c) where the appeal is determined in favour of the subscriber, to direct the copyright owner or internet service provider to reimburse the reasonable costs of the subscriber.
- (8) The code must provide that the power to direct the reimbursement of costs under subsection (7)(c) is to be exercised to award reasonable costs to a subscriber whose appeal is successful, unless the person deciding the appeal is satisfied that it would be unjust to give such a direction having regard to all the circumstances including the conduct of the parties before and during the proceedings.
- (9) In the case of a technical obligations code, the powers of the person determining subscriber appeals must include power—
 - (a) on an appeal in relation to a technical measure or proposed technical measure—
 - (i) to confirm the measure;
 - (ii) to require the measure not to be taken or to be withdrawn;
 - (iii) to substitute any other technical measure that the internet service provider has power to take;

- (b) to exercise the power mentioned in paragraph (a)(ii) or (iii) where an appeal is not upheld but the person determining it is satisfied that there are exceptional circumstances that justify the exercise of the power;
 - (c) to take any steps that OFCOM could take in relation to the act or omission giving rise to the technical measure; and
 - (d) to remit the decision whether to confirm the technical measure, or any matter relating to that decision, to OFCOM.
- (10) In the case of a technical obligations code, the code must make provision—
- (a) enabling a determination of a subscriber appeal to be appealed to the First-tier Tribunal, including on grounds that it was based on an error of fact, wrong in law or unreasonable;
 - (b) giving the First-tier Tribunal, in relation to an appeal to it, the powers mentioned in subsections (7) and (9); and
 - (c) in relation to recovery of costs awarded by the Tribunal.
- (11) In the case of a technical obligations code, the code must include provision to secure that a technical measure is not taken against a subscriber until—
- (a) the period for bringing a subscriber appeal, or any further appeal to the First-tier Tribunal, in relation to the proposed measure has ended (or the subscriber has waived the right to appeal); and
 - (b) any such subscriber appeal or further appeal has been determined, abandoned or otherwise disposed of.”