

Illegal downloading at work - an employer's liability?

What is an employer's liability if staff use a workplace computer to conduct illegal downloads.

Internet cafes and libraries will no doubt have welcomed recent amendments to copyright legislation but employers can still be in the firing line if their staff step over the mark.

The change follows previous controversial attempts to address this issue. Under the new amendment, employers and others (e.g. internet cafes and libraries), who provide internet access to many people, will no longer be considered internet service providers for the purposes of the anti-file sharing regime.

This is good news for employers, because it means they won't need to deal directly with rights holders or follow the specific procedures for issuing infringement notices under the Act.

That said, employers will still be account holders with their internet service providers. In this sense, the Act very much places the obligation on the employer to ensure its staff are not file sharing using the employer's internet connection. If any employees do engage in illegal file sharing at work, it will be the employer who receives the infringement notices from the internet service provider. After receiving three such notices, the employer could be fined up to \$15,000.

Employers should take note of two issues, in particular, when dealing with this risk.

From an employment law perspective, employers should take care to ensure that they have appropriate policies in place prohibiting employees from making illegal downloads and appropriate disciplinary action mechanisms in place if illegal activity occurs.

From an intellectual property perspective, employers need to consider whether they would be in a position to successfully defend file-sharing claims if they arise, or to at least minimise potential liability.

With this in mind, employers should quickly respond to any infringement

notices received from their internet service provider. If an employer intends to challenge the allegations, they must do so within 14 days of the date of the notice. Employers will have to ensure that administrative mechanisms are in place to ensure this is possible. Notices and challenges, if any, are considered by the Tribunal if enforcement proceedings eventuate. A late response is deemed to be a non-response and will not help the cause of an employer who is trying to take all steps possible to prevent infringement.

If an employer challenges an infringement notice, a rights-holder is entitled to maintain their allegation but must do so formally within 28 days of the date of the notice. (If that time frame lapses, the challenge is deemed to be accepted). After three infringements and notice procedures, a decision will be made about the account holder.

There was much debate before this legislation became law about the penalties against "innocent" parties - such as employers who could be penalised for the illegal actions of employees. In response, a significant degree of discretion has been included in the enacted legislation which allows a decision-maker to refuse to make an order of costs if it would be manifestly unjust to the account holder.

This means that any positive and real steps taken by employers to reduce the risk of copyright infringement in the workplace will assist in mitigating costs and could, in fact, prevent any being ordered against them. Again, having appropriate, robust internal policies and disciplinary procedures in place will help put employers in the best position possible if faced with a tribunal case involving alleged file sharing.

The clear message for employers is: monitor employee's internet use, have clear staff policies and disciplinary procedures in place addressing illegal internet behaviour, and deal promptly with any notices from internet service providers alleging infringement.

YOUR EMPLOYMENT CONTACTS



Scott Wilson

Partner

s.wilson@
DuncanCotterill.com



Raewyn Lovett

Partner

r.lovett@
DuncanCotterill.com



Ken Brotherson

Partner

k.brotherson@
DuncanCotterill.com



Mark Lawlor

Partner

m.lawlor@
DuncanCotterill.com



Aaron Dearden

Partner

a.dearden@
DuncanCotterill.com



Sarah Townsend

Associate

s.townsend@
DuncanCotterill.com



Kirsty McDonald

Associate

k.mcdonald@
DuncanCotterill.com

This newsletter provides general information and is not intended to be comprehensive or a substitute for legal advice. Legal advice should be sought before applying it to particular circumstances. Whilst care has been taken in the preparation of this newsletter, no liability is accepted for any errors.

© Duncan Cotterill Lawyers 2011

www.DuncanCotterill.com