

Legal Regulation & Education: Doing the Right Thing?

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The Digital Economy Act (DEA) 2010; Subscriber Monitoring and the Right to Privacy under Article 8 of the ECHR

Through case-law research, this paper critically assesses the compatibility of the Digital Economy Act (DEA) obligation to notify subscribers of Copyright Infringement Reports (CIRs) (Section 3 of the DEA) with Article 8 of the European Convention on Human Rights (ECHR). It draws on the European Court of Human Rights (ECtHR) case-law, Ofcom's Initial Obligations Code (the Code), the DEA judicial review decision, namely, *BT PLC and Talk Talk PLC v Secretary of State for Business Innovation and Skills* and others, and the DEA judicial review appeal decision, i.e., *BT Plc and Talk Talk Telecom Group Plc v Secretary of State for Culture, Olympics, Media and Sport* and others. This paper focuses on the three-parts of the Strasbourg Court's cumulative test, in an effort to determine whether Section 3 of the DEA: firstly, is 'in accordance with the law'; secondly, pursues one or more legitimate aims contained within Article 8(2) of the Convention; and thirdly, is 'necessary' and 'proportionate', and as to whether this constitutes a breach of a subscriber's right to privacy under Article 8 of the ECHR. The paper provides an in-depth examination of the three-parts of the ECtHR's cumulative test. It contrasts parts one, two and three of the ECtHR's test with the Code's provisions, and considers the compatibility of Section 3 of the DEA with Article 8 of the ECHR. It concludes that Section 3 of the DEA must be specifically targeted to serious online copyright infringement cases of 'commercial scale'. The contrary rule would mean that it neither would be 'in accordance with the law' nor 'necessary' or 'proportionate'; that is to say, it would infringe part one and part three of the ECtHR's test, thus violating subscribers' Article 8 ECHR rights under the Convention.