

CLYDE&CO

SMEs and the internet

A curate's egg of problems and opportunities

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INTRODUCTION

- Computers, the internet, the paperless office and technology generally have, in the past 25 years, created a new risk environment, the consequences of which SMEs and their insurers are still grappling with
- For SMEs the internet has brought a wealth of opportunities but grappling with compliance issues is challenging and time consuming
- For insurers it's a market that cannot be ignored, notwithstanding the difficulties

Why are the SME and non-profit markets important

- 5.5 million businesses are small (0-49 employees)
- 35,600 businesses are medium size (50-249 employees)
- 7700 businesses are large
- In 2022, SMEs employed 16.4 million people in the UK, 61% of the total number of people employed by private sector companies.
- Turnover for UK SMEs was £2.1 trillion in 2022, 51% of the total turnover of private businesses.
- 166,000 charities in the UK
- Top 1000 charities spent 20 billion in 2022

Key risks

- Data protection
- Breach of copyright
- Trademark infringement
- Defamation
- Trade secrets and confidential information

Data Protection

An increasing demand for cover:

- Data protection claims against SMEs have increased dramatically
- Working from home – a different footprint
- Ransomware attacks – no longer fussy about smaller targets
- Ambulance chasing firms – still going strong

It's not just about ransomware attacks:

- Negligent/accidental data breaches
- Data correction claims as a substitute for defamation
- DSARS – an increasingly common weapon
- The data sharing minefield
- Data retention and minimisation claims – one to watch

GDPR Security Principle

Data controllers and processors must:

- Take steps to ensure the confidentiality, integrity and availability of the personal data they hold and process.
- Be able to restore access and availability to personal data in a timely manner.
- Consider the risks and costs of implementation, as well as the state of the art and the nature of the data involved.
- Easier said than done.

Data Protection – insurance headaches

Insurers keen to service SME market but:

- Low premiums – lots of claims
- Lax security measures – “one false step..”
- GDPR compliance – “in process”
- Uncertainty about what’s covered and what’s excluded:
 - Secret cyber - still a problem
 - Data protection clauses in non – cyber policies
- Disproportionate legal and technical costs:
 - Small claims costs – a bit of a lost cause
 - Extension of fixed costs regime might be an improvement but....
 - Still a wild west : some “respectable” firms stretching “compliance” to the absolute limit

Copyright claims - more common than you might think

Copyright basics

- Copyright law protects any original creation and gives the author control over how it can be copied, distributed, or exhibited
- Covers literature paintings, photographs, drawings, films, music (and sculptures and software code)
- Copyright protects the expression of an idea rather than the idea itself.
- Civil and criminal remedies
- Exemptions:
 - research and private study (both must be non-commercial)
 - criticism / review / quotation, and news reporting (sections 29, 30, 178); as well as
 - parody, caricature and pastiche (section 30A)
 - illustration for teaching
 - incidental inclusion of a copyrighted work in an artistic work, sound recording, film, broadcast or cable programme does not infringe copyright.

Copyright claims - more common than you might think

- Copyright infringement much more common as a result of the internet
- Websites have become the default shop window for many organisations - a way to sell and advertise products and offer services as well as providing information about your organisation
- For many without much spare cash, the internet appears to be an Aladdin's cave of opportunity – where it is possible to find images, music and logos to embellish their online and offline marketing initiatives for free
- International publication facilitates forum shopping by claimants
- Germany: fixed damages and costs awards
- Claimant search engines facilitate claims

Trademark infringement on the internet

- Unauthorised use on website
- Unauthorised use in domain name
- Unauthorised use as a meta tag

Copyright and trademark infringement - problems for insurers

- Many SMEs and charities:
 - ignorant of law
 - believe that copyright/trademark owners won't bother to sue
 - are keen to get to the top of the Google list
- Breach of Copyright and trademark infringement covered by many policies simply because they are not excluded
- Specialist/expensive legal costs
- Numbers of claims increasing

Defamation

- Defamation basics:
 - Published statements which damage another's reputation
 - Must show actual or probable serious harm
 - Defences: truth, honest opinion, qualified privilege, public interest

Defamation

- Many policies include cover for defamation
- Publication on website, email, text , social media
- Damages are high compared to data breach claims
- Costs are expensive
- Claims more often than not made by those with damaged reputations – still entitled to damages

Trade secrets and confidential information

- Confidential in nature i.e. having the “necessary quality of confidence”
- Communicated in circumstances importing an obligation of confidence
- A duty to keep information confidential arises:
 - When a contract is made between two or more parties
 - When the circumstances of the disclosure imply an obligation
 - When there is a special relationship between the parties concerned

Trade Secrets and the internet

- Prior to the internet trade secrets and confidential information could be locked in a drawer and physically protected
- Computers and the internet has made it much more difficult to protect trade secrets and confidential information
- Vast quantities of valuable information can be stored on a computer and transferred anywhere in the world in seconds
- Although most of the focus on cyber incidents has been on the theft of personal data , trade secrets and confidential information are a much bigger prize

Trade Secrets

Many SMEs and insurers unsure about:

- What constitutes trade secrets and confidential information
- How to protect them
- Can be difficult to value
- Many insurance policies do not exclude cover for it
- Can be a business's biggest asset
- Many businesses store their own and other businesses trade secrets and confidential information- lawyers and accountants are prime examples

A step in the right direction: Digital Operational Resilience Act

- Applies to more than 22,000 financial entities and ICT service providers operating within the EU, as well as the ICT infrastructure supporting them from outside the EU
- Specific requirements for all financial market participants including banks, investment firms, insurance undertakings and intermediaries, crypto asset providers, data reporting providers and cloud service providers
- Five key topics : ICT Risk Management; Reporting on ICT-related Incidents; Digital Operational Resilience Testing; Management of Third-Party Risk; and Information and Intelligence Sharing
- Came into force on 16th January 2023 - Compliance by early 2025

A hard grind

No magic bullets:

- Training and education
- Internal procedures
- Genuinely secure systems
- Identifying intellectual property and trade secrets held by the business
- Insurance – gap analysis for insureds and wording reviews for insurers
- Proper record keeping
- Vigilance