

The Communications Green Paper: What do we know, and why should we care?

Open Rights Group. April 2012

On 16th May 2011 Jeremy Hunt, the Minister for Culture, Media and Sport (DCMS) published an open letter that set out a range of questions about the future of the communications sectorⁱ. DCMS will soon publish a 'green paper', sparking a consultation that will ultimately lead to new legislation. Some of the policies proposed will involve powers to control or manage content online.

This briefing sets out some things that we understand have been considered for the the Communications Green Paper, and the key issues that will impact on citizens' and consumers' interests.

The following is informed speculation, gathered from leaks, Freedom of Information requests, news reports and previous government announcements. We are publishing this brief now for two main reasons. First, we are getting a bit bored of waiting for the Green Paper. The publication has been delayed repeatedly, and we are currently not sure when it will emergeⁱⁱ. Second, we would like to help promote ongoing, informed discussion about the proposals and contribute to the development of a balanced and proportionate Communications Bill.

Specifically, this briefing sets out concerns about powers to have content removed or to restrict access to information online. Such powers, as we believe they are currently considered, could potentially undermine competitive markets and encourage censorship.

What will the Communications Green Paper cover?

In a speech to the Royal Television Society in September 2011, Jeremy Hunt set out plans to "protect consumers from offensive and unlawful content"ⁱⁱⁱ. He said this will include new proposals for internet filtering to protect children and for making search engines, ISPs and other 'intermediaries' more responsible for tackling copyright infringement.

Why these proposals matter: the power to decide what we see and do online

The Communications Green Paper will help create a framework for the regulation of information on the Internet. This is a kind of digital power carve up, establishing the way that decisions are taken about what content is or is not accessible to the UK public. Decisions about what information people access online should, as a rule, be in their own hands. Any restrictions on access must be:

- limited to exceptional circumstances;
- governed by law and a clear legal process;
- necessary and the least restrictive means required to achieve the aim^{iv}.

There are two key consequences when such policies don't have these features:

Problem 1: Competition and fair markets

The Internet is a potential platform for great social and economic innovation. One reason for this is that it lowers barriers to entry and makes it easier to bring a product or service to market. If businesses or others are allowed to make decisions about the ranking of search results, or the websites that people are allowed to visit, or which services should have their payments withheld,

there are clear risks of market abuse. Giving businesses these powers inevitably involves an element of 'picking winners', which would inhibit competition and stifle growth.

Problem 2: Censorship

The UN Special Rapporteur for Freedom of Expression, Frank La Rue, noted last year that restrictions on access to information can have a ““chilling effect” on the right to freedom of opinion and expression.”^v Without adequate safeguards, handing powers over what information people can access, or over the visibility of certain kinds of information, inevitably opens the door to censorship, either through mistakes or abuse.

Overall, we are concerned that powers that DCMS will propose in the forthcoming Green Paper to restrict access to information are being given away too cheaply. The result is a suite of proposals that will likely damage the Internet as a tool for the promotion of freedom of expression and innovation through fair and open markets.

Key issues with child protection and internet filtering

Jeremy Hunt suggested that this would include measures to protect children through ISPs “ensuring all their customers make an active choice about parental controls”^{vi}.

Avoiding over-blocking and censorship

Helping parents to manage their children's Internet access is a worthwhile goal. But a filtering system that is designed to help achieve this can actually affect many more users than intended, and block more sites than necessary. To avoid this, any filtering system must involve an 'active' choice that is clear and fully explained, be properly transparent (meaning transparency of what is blocked, why and how), and must involve simple and speedy ways to opt-out or correct mistakes.

In the longer term there should be an effort to move away from filtering at the 'ISP-level' towards device-based filtering. As a rule, the 'closer' to a user the filtering happens, the more control over that filtering is possible.^{vii}

Key facts

- One quarter of UK 9-16 year olds say that they have seen sexual images in the past 12 months, whether online or offline. 11% encountered sexual images online.^{viii}
- “...overall, most children have not experienced sexual images online and, even of those who have, most say they were not bothered or upset by them”^{ix}
- 24% of those who said they had seen sexual images online, or 3% of all the children surveyed, claimed they were upset or bothered by something they had seen.^x
- 23 per cent of parents think it likely that their child will experience something that bothers them online in the next six months.^{xi}
- Ofcom found that in 2010, 26% of parents were very or fairly concerned about the content of websites their children were visiting.^{xii}

Key issues with copyright enforcement

To help enforce copyright, the Minister laid out a number of plans to make 'intermediaries' do more to prevent copyright infringement. These will involve:

- Plans to make search engines promote official legal sources of content and demote sites

- that are accused of infringement
- New plans for quicker or broader website blocking schemes
- Plans to make ad networks and payment providers cut off funding to infringing sites

What's wrong with the proposals?

We are concerned that all of the proposals involve efforts to make businesses or private bodies act as online content 'police' instead of the courts and the law.

1. Changing search results

We published initial proposals from rights holders for the regulation of search results in January following a Freedom of Information request^{xiii}. The proposals included plans to assign lower rankings to sites that repeatedly make available unlicensed content, and prioritising websites that obtain certification as a licensed site under a recognised scheme. Rights holders prioritising keywords including 'mp3', 'listen', and 'free' "when combined with an artist name, song or album title contained on a list to be regularly updated and provided to a search engine by a recognised and properly mandated agency representing rights holders for a particular sector, such as BPI"^{xiv}.

These or similar proposals are likely to be included in the Communications Green Paper.

The legitimacy of tampering with search engine results

Search engines already respond to notifications of infringing links. There are perhaps improvements to be made to this process, for example working to reduce the time taken to remove links. But this is far better than giving businesses, trade association or government a mandate to change the search results people receive.

The best judge of whether a search result is right or relevant is the user. External influences over rankings of results should only be permitted for the narrow range of content for which the UN Special Rapporteur for freedom of expression suggested some restrictions may be permissible, and they should be governed by the same principles.^{xv}

Copyright infringement and a websites' legality are complex issues best decided on by a court. If action against sites is not based in court action, there is a real danger that those powers could be used to hinder competitors. It would also effectively mean coercing search engines to 'pick winners' in markets for cultural or technology products and services.

2. Advert networks and payment providers

Schemes involving rights holders, law enforcement and payment providers working to cut off funding to sites and services already exist. But they have to date been unacceptably opaque. The City of London Police, for example, announced they would work with the IFPI, and international music industry trade body, and payment providers such as PayPal to cut funding to websites accused of copyright infringement.^{xvi}

However, no mention or account is given of the role of the IFPI in supplying accusations or evidence of wrongdoing, nor is there an account of any court process or right of reply involved.

Any proposals in the Communications Green Paper must involve transparency, independence of investigation and a clear legal process including a clear right of reply and redress. Otherwise the power to stifle a business or to restrict access to information through choking off a site's money supply, unfairly or by mistake, are obvious.

3. New website blocking powers

Rights holders can already go to court under current copyright laws to apply for an injunction to force ISPs to block access to sites that infringe copyright. But Jeremy Hunt's suggestion in September was for a "a cross-industry body, perhaps modelled on the Internet Watch Foundation, to be charged with identifying infringing websites against which action could be taken"^{xvii}. This represents a move away from courts making decisions about sites that should be blocked, towards industry bodies making such decisions. That would pose a serious risk of abusive or mistaken blocking.

Fundamentally we believe that blocking access to websites is a dangerous and pointless approach. But where existing powers are used, it is vital that they are guided by a clear legal process.

4. No evidence, behind closed doors: problems with the policy making process

There are three problems with copyright enforcement policy making to date, that have contributed to the imbalances noted above:

1. The proposals were conceived in private negotiations held by DCMS that primarily involved only copyright holders and the relevant intermediaries. That means broader perspectives and the considerations of citizen and consumer interests were not considered fully.
2. The Department for Culture, Media and Sport admitted last year that they have no evidence or analysis of their own regarding the scale of copyright or the merits of various options for addressing the problem.^{xviii}
3. DCMS favour self-regulation but threatened legislation if no such agreement was forthcoming. However, they have not set out how they will judge their preferred outcomes, or the kind of agreement they would consider acceptable. Coupled with the lack of evidence and analysis, this contributes to a sense that the interests of creative industry trade bodies is being conflated with good public policy.

All of the proposals for copyright enforcement powers are characterised by a lack of evidence and analysis. They cannot represent proportionate, considered proposals.

It is essential that during the consultation that follows the publications of the Green Paper, DCMS commit to more open and transparent process. This must involve setting out a clear process, being clear who they are meeting and in what capacity, and ensuring that all stakeholders receive a fair hearing. This should also mean an end to private roundtables that prioritise one set of stakeholders.

One example of good practice for an open consultation process would be the Intellectual Property Office's copyright consultation, which included a number of broadly constituted consultation events, a focus on evidence, and an effort to reach diverse stakeholders^{xix}.

Furthermore, we would advocate for a fundamental evaluation of digital culture through an evidence-led review. That is the only way to ensure that artists, citizens, innovators and consumers can make the most of the opportunities that new technology affords.

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- i <http://www.culture.gov.uk/consultations/8678.aspx>
- ii See for example <http://www.guardian.co.uk/media-network/media-network-blog/2012/mar/15/communications-green-paper>
- iii See http://www.culture.gov.uk/news/news_stories/8431.aspx
- iv See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf, May 2011 (page 6-16)
- v See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf, May 2011 (page 8)
- vi See http://www.culture.gov.uk/news/news_stories/8431.aspx
- vii For more information, see our briefing on types of filtering: <http://www.openrightsgroup.org/assets/files/files/pdfs/Net%20Filtering%20Brief.pdf>
- viii Livingstone, S., Haddon, L., Görzig, A., and Ólafsson, K. (2011). Risks and safety on the internet: the UK report. LSE, London: EU Kids Online.
- ix Livingstone, S., Haddon, L., Görzig, A., and Ólafsson, K. (2011). Risks and safety on the internet: the UK report. LSE, London: EU Kids Online.
- x Livingstone, S., Haddon, L., Görzig, A., and Ólafsson, K. (2011). Risks and safety on the internet: the UK report. LSE, London: EU Kids Online. p. 8-9.
- xi The Bailey Review, <http://www.education.gov.uk/publications/standard/publicationDetail/Page1/CM%208078> page 36
- xii UK Children's Media Literacy, Ofcom, 2011, <http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/media-lit11/childrens.pdf> p. 66
- xiii <http://www.openrightsgroup.org/blog/2012/new-powers-over-search-results-proposed>
- xiv See leaked search regulation proposals: <http://www.openrightsgroup.org/assets/files/pdfs/proposals%20to%20search%20engines.pdf>
- xv Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf, May 2011 (page 8)
- xvi See for example <http://www.cityoflondon.police.uk/CityPolice/Media/News/270711-paypalpartnership.htm>
- xvii See http://www.culture.gov.uk/news/news_stories/8431.aspx
- xviii <http://www.openrightsgroup.org/blog/2011/evidence.-copyright-enforcement-and-self-regulation>
- xix See <http://www.ipo.gov.uk/types/hargreaves.htm>