

## **Proposal for Code of Practice Addressing Websites That Are Substantially Focused On Infringement**

### **Introduction**

This paper expands upon the working paper submitted to the Minister for Culture, Communications and the Creative Industries on 10 June 2011. It sets out proposals for an agreed process based on existing law, embodying judicial oversight, which would enable proportionate and effective action to be taken against websites that are substantially focused on infringement of copyright.

The proposals made in this paper are without prejudice to the rights of copyright owners under UK law. In particular, the proposals are expressly without prejudice to the position that may be adopted by members of the Rightsholder Group<sup>1</sup> (and/or their constituent members) in any ongoing or future proceedings.

There are a number of recent developments that give impetus and a solid legal basis for moving to an expedited system of site blocking where sites are set up for the purpose of infringement, namely the:

- High Court judgment in the *Newzbin2* case;
- European Court decision in *L’Oreal SA v eBay International AG*;
- Government-commissioned Ofcom report into site blocking; and
- DCMS paper entitled “*Next steps for implementation of the Digital Economy Act*”.

As a result of the developments above, it is much clearer that blocking of sites that are substantially focused on infringement: (i) is necessary and appropriate; (ii) will be effective in reducing levels of online infringement; and (iii) is consistent with EU law and human rights.

Both the Ofcom Report and the *Newzbin2* judgment find that just because blocking may be circumvented does not mean that it should be rejected. They both also find that blocking measures can be implemented as a matter of technical and practical reality by ISPs.

Both the Ofcom Report and the *Newzbin2* judgment fully endorse the rationale underlying the Rightsholder Group’s proposal for cooperation from ISPs in helping to tackle infringement of copyright undertaken using the internet. Both support the view that blocking relief to address websites that are substantially focused on infringement is necessary. The DCMS Paper also finds that file sharing is only part of the piracy problem and that there is an urgent need to tackle other growing forms of piracy, including sites which enable unlawful access to copyright works.

### **Court jurisdiction to order an ISP to block a website**

Section 97A of the Copyright, Designs and Patents Act 1998 provides that: “*The High Court ... shall have the power to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright.*”

This existing legislation was tested in the *Newzbin2* case. The judgment establishes that an ISP can be required to take steps to prevent websites and subscribers using its service to infringe and that a blocking order is an appropriate order to be made in such circumstances.

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<sup>1</sup> BPI, MPA, PACT, the Premier League and the Publishers Association.

## **A rapid judicial procedure is appropriate**

Whilst Government has elected not to bring forward additional regulations on site blocking under the Digital Economy Act 2010 at the present time, the Ofcom Report concludes (and the DCMS Paper acknowledges) that:

- site blocking could play an important role in tackling online copyright infringement;
- Section 97A CDPA enables a blocking order to be made; and
- the approach to website blocking set out in Sections 17 & 18 the Digital Economy Act is unlikely to be effective because of the pre-requisite steps necessary to implement it as well as the slow speed that would be expected from a full court process (which would apply via the DEA-prescribed approach).

The latter point, in particular, further supports the need to continue to adopt a rapid (but still carefully executed) judicial procedure which is proposed by the Rightsholder Group and which has been fully endorsed in the *Newzbin2* judgment.

## **Is site blocking proportionate and consistent with EU law and human rights?**

The court in *Newzbin2* fully considered all relevant legal issues, including the impact of an order on the freedom of expression of users, the site operators and BT, and the proportionality of making a blocking order.

It found that *“the order sought by the Studios is a proportionate one. It is necessary and appropriate to protect the Article 1 First Protocol rights [property rights] of the Studios and other copyright owners”*.

The Court also found that an order requiring an ISP to block access to a website would not conflict with any other requirement of EU law, including the requirement not to impose a *“general obligation to monitor”*, since any monitoring required was of a specific nature, not general.

Given the serious damage caused to the UK’s creative industries and digital economy every month by sites that are substantially focused on infringement, it is appropriate that key stakeholders, assisted by Government, should put in place a mechanism that allows access to such illegal sites to be blocked under a swift, affordable and objective procedure.

## **Criteria for Identification of Websites**

### **Overview**

The overarching aim of a scheme is to tackle websites that are ‘substantially focused’ on infringement. For the system to be fully effective and to secure industry wide participation, the selection of websites must be based on a transparent set of criteria which are fair and proportionate and which are applied with this objective in mind.

The structure of the proposed self-regulatory scheme is akin to the Advertising Standards Authority’s self-regulatory system covering non-broadcast advertising, sales promotion and aspects of direct marketing. A fundamental part of that scheme is a Code designed to complement a statutory framework that does not have the force of law but operates alongside it. This code is constantly revised.

The Copyright Designs & Patents Act provides an existing statutory framework upon which a Code can be built. The Code in this instance should be sufficiently flexible so as to be capable of adapting to relevant judicial decisions (both relating to Code compliant applications and in a wider context) and to advancing technologies.

### **Structural summary of the proposed Codified Scheme**

The proposed scheme would comprise the following elements:

- Identification of substantially infringing website by rights holder
- Notification by rights holder to the website concerned
- Form of Site Blocking Order
- Judicial assessment and approval of blocking measures
- Implementation of the blocking measure

#### **Identification of substantially infringing website by rights holder**

The responsibility for the identification of sites and the collation of appropriate evidence would fall to rights holders. The evidence would need to be sufficient to reasonably identify that a website is substantially focused on infringement.

The *Newzbin* case provides general principles for determining liability in online copyright infringement: (i) authorisation; (ii) making available/communication to the public; and (iii) procurement and encouraging infringement/common design. It will be those websites that 'favour or encourage' infringement and which undertake acts of infringement, or authorise others to undertake acts of infringement, which would fall to be notified under the proposed scheme.

The test that should be applied before a notification is made is whether a site is substantially focused on making available infringing content or inducing or encouraging infringement by others. To fulfil this test the following criteria could be applied (note that a website would not be required to fulfil all stated criteria). These criteria would need to be updated periodically to deal with developments in case law and the activities of infringing sites:

1. **Active encouragement of copyright infringement:** The site actively encourages copyright infringement. This may include evidence that the site:
  - a) takes affirmative steps to foster infringement;
  - b) stimulates its users to commit infringing acts;
  - c) is generally aware of substantial infringement by its users;
  - d) enables and assists its users to commit infringement;
  - e) generates revenue from infringing use by its users as part of its business model (e.g., where access to copyright material is used as a draw for fees paid by the site's users or for advertising revenue);
  - f) provides direct assistance to users to engage in copyright infringement (e.g., by providing technical support); and/or

g) fails to mitigate the infringing activities.

2. **Inducement:** The site induces, incites or persuades the primary infringer (the end user) to engage in copyright infringement.
3. **Common design:** The site participates in a concerted action or agreement on a common action to secure acts which in the event prove to be individual identified acts of copyright infringement.
4. **Provision of the means of infringement:** The site provides equipment or other material that constitutes the essential means used to infringe and which will inevitably be used to infringe.
5. **Technical configuration:** The site provides a technical system that focuses on infringing works (for example, by search and categorisation).
6. **Control or supervision over the site's users:** The site has effective actual or potential control over the means by which users undertake copyright infringement and/or adopts a supervisory role in relation to its users' activities. This would include evidence that the site operator has a power to prevent copyright infringement occurring but elects not to do so and that the site operator is deliberately refusing to control or supervise the site despite notice of infringement having been received.
7. **Knowledge:** The site is operated in knowledge of the copyright infringement that it facilitates and/or has actual knowledge of infringement and is in a position to take reasonable steps to prevent the infringement but fails to do so.
8. **Material intervention:** The site materially intervenes in making the identified infringing copies available to a new audience.

The criteria must be considered in the round and with the overarching aims of the Proposed Codified Scheme in mind, i.e. the scheme's objective to tackle websites that are 'substantially focused' on infringement.

It is also important that the criteria are capable of application to sites where a substantial part of the website fits the criteria set out in the Code and where the site operator is able to take readily available steps to prevent the infringement but fails to do so after notification.<sup>2</sup>

The above approach is consistent with:

- Ofcom's advice that consideration could be given to the interaction between a notice and take down procedure and site blocking. Website blocking would then be reserved primarily for sites that fail to cooperate in a timely way with notice and take down procedures.<sup>3</sup> This approach would minimise any potential over-blocking; and
- the "*diligent economic operator test*" established in *L'Oreal* and the CJEU's findings that site operators may be required to take measures which are not limited to bringing to an end specific infringements of their rights but which are aimed at preventing further infringements of intellectual property.

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<sup>2</sup> This reflects the 'substantiality' requirement in section 17(4) DEA.

<sup>3</sup> Ofcom Report, page 7

### **Notification by rights holder to the website concerned**

Under the proposed scheme, websites would only be suitable for blocking if they had previously been sent one or more notifications meeting the criteria that the notification(s) is:

- in written form;
- includes the full name and address of the sender of the notice;
- contains particulars of the allegations of primary infringement (but this should not require the rights holder to identify each infringing copy and instead should allow for sufficient generality to afford a proportionate process for notification);
- contains a declaration that the sender of the notice (whether the copyright owner or its agent) believes in good faith that the material being hosted/transmitted is an infringement of copyright and includes a copy of the relevant rights;
- verifies the accuracy of the statement;
- contains an explanation of the methods used to collate the data contained in the notice, if relevant;
- contains details of the specific steps that the recipient is required to take; and
- contains details of the infringing content that the copyright owner is asking the website operator to remove and/or to prevent access to (this does not require individual listing of URLs on the site and can be given in the form of a list of content owned by the particular copyright owner/s).

The notification should require that the website operator take down the infringing content and provides a contractual undertaking that it will not provide access to further copies of the identified content, or will refute the allegations, within 14 days. It should make clear to the website operator the consequences of failure to take the requested action. An agreed standard form of notification would be provided for under the scheme.

Where the website operator has provided neither:

- the geographic address at which the website operator is established; nor
- an electronic mail address which makes it possible for the copyright owner to contact the website operator rapidly and to communicate with him in a direct and effective manner; and
- there is no other readily identifiable and reasonable means of communicating with the website operator provided on the website,

the requirement for prior notification would be dispensed with. In these circumstances, the rights holder would need to provide evidence that there are legitimate reasons for not notifying the website operator.

This would also apply where a notification is known to have failed in circumstances such as where the website operator has provided incorrect or invalid contact details and a 'no such address' indicator has been returned to the sender.

## Form of Site Blocking Order

We propose that an agreed form of Order should be included in the Code. This reflects Ofcom's advice that the process needs to satisfy the principle of clarity and any obligations placed upon ISPs need to be set out clearly.<sup>4</sup>

If necessary, the model Order could be modified for particular ISPs depending on that ISPs' technical processes.

The Order should be for the ISP to take technical measures to ensure:

- IP address blocking in respect of each and every IP address from which the website operates or is available and which is notified in writing to the Respondent by the Applicants or their agents; and
- DPI based URL blocking utilising at least summary analysis in respect of each and every URL available at the website and its domains and sub domains and which is notified in writing to the Respondent by the Applicants or their agents.

The Order should be notified to the website concerned to allow the website owner to apply to set aside the Order in the event of any material change of circumstances.

We propose that the model Order should lead to the ISP acting expeditiously to implement the blocking measure. The costs position and the extent of any cross undertaking in damages should be discussed following the order by the court in the October hearing in *Newzbin2*.”

## Judicial assessment and approval of blocking measures

This aspect of the procedure is substantially informed by the *Newzbin2* judgment. Under the proposed agreed scheme, the relevant rights holder would make an application to the court where the site in question qualifies for blocking action in accordance with the requirements of an agreed Code. Where the website complies with the Code criteria, the ISP would not oppose the application. In considering applications, the Judge would use the discretion conferred by section 97A of the CDPA.

Code compliant applications to court for an appropriate order would be dealt with in the Applications Court of the High Court which offers an expedited, proportionate and cost effective means of judicial consideration of the blocking measure and, in appropriate cases, approval of the order sought.

Applications can be heard within days (or within a shorter period in the case of urgent matters) provided that the time estimate for the hearing is less than two hours. Provided that the agreed scheme and Code are properly implemented, applications could feasibly be dealt with in less than one hour.

## Implementation of the blocking measure

To the extent that participating ISPs do not already have an automated blocking process in place (such as the system referred to as '*Cleanfeed*' in the *Newzbin2* proceedings), the ISP would need to develop or acquire such a system. ISPs in negotiations on the agreed scheme already have automated systems in place to block websites (whether in part or in their entirety). It is proposed that the form of Order will be agreed with each participating ISP in advance of the scheme coming into effect.

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<sup>4</sup> Ofcom Report, page 7

Under the proposed notification procedure, the site operator would be given notice of the action that will be taken in the event that it does not comply with the notice. The website operator should have the ability to respond to the Order directed at blocking the website operated by it if it feels that the Order is inappropriate.

The Code would need to address:

- the timeframe within which the website operator can appeal to overturn the Order;
- the form of evidence the website operator must have; and
- a requirement that the application is made on notice to the rights holder who has secured the Order .

### **Governance**

The code will be updated as necessary through oversight by a body composed of representation from the ISP and rights holders, but with an independent chair, representation from Government and external appointments.