

Response to ‘Addressing websites that are substantially focused on infringement’ working paper

By the Football Association Premier League Limited; the Publishers Association; BPI (British Recorded Music Industry) Limited; the Motion Picture Association; and the Producers Alliance for Cinema and Television.

Ed Vaizey website blocking roundtable, 15 June 2011

Consumer Focus has serious concerns about the proposal by copyright owner trade associations which would see ISPs block access to websites at a network level for all UK users. Our main concern is the fact that the trade associations do not identify the problem, ie the websites they think should be blocked. If the trade associations were to do this, it would be possible to evaluate whether website blocking in principle is necessary to reduce copyright infringement by consumers and increase the use of legal services.

Essentially the trade associations are proposing that the Applications Court of the High Court issues permanent injunctions on the basis that a ‘Council’ and ‘expert body’ have come to the view that the evidence submitted by copyright owners is valid and the blocking access to the website is appropriate. These proposals are a significant regulatory intervention and require at the very least significant changes to the Civil Procedure Rules. As such they should be publicly consulted on and evidence based.

The case for website blocking has not been made

The trade associations assert that their approach ‘begins with a commitment to ensuring that there are legitimate offers in the marketplace, adapted to the changing opportunities provided by digital technology’. We welcome such a commitment and believe it is in line with Prof Hargreaves’ recommendations on balanced and evidence based enforcement. However, the trade associations do not outline how they intend to meet consumer demand through legal services.

We do not believe website blocking should be seriously considered as an option if copyright owners have not licensed their content to meet consumer demand through new digital platforms. We understand that the Premier League would like to see websites blocked which enable UK consumers to stream football games from other territories. We believe that the first step to address this problem is to assess whether consumers’ evident demand for streaming football games online is met by legal services. A number of UK football clubs have recently started to stream games on their websites, eg Leeds United through LUTV and Arsenal through ArsenalPlayer. During the World Cup the England v Slovenia live stream was watched by 800,000 UK consumers (5.5 per cent of the TV audience for the game), setting a new record. These experiences should offer helpful insights into how fans can be migrated to legal services.

An increasing number of customers now stream movies online, through for example BBCiPlayer, or watch movies on small screens, for example using iPhones or iPads. Consumers’ willingness to, or preference for, watching football games online and on mobile devices will not diminish because access to unlicensed websites is blocked. As such website blocking does not represent an effective solution. There appear to be concerns that stadium attendance would decrease if football clubs stream their games online – we doubt that this is the case. It is more likely that fans who are currently using unlicensed services would switch to a licensed service offered by their football club; than it would be for fans who currently support their team in the stadium to downsize to a small screen. Actual market developments, and changes in consumers’ viewing habits, could be gauged through market research and assessing the impact the World Cup live streams, LUTV and ArsenalPlayer had on fans’ use of unlicensed services.

Consumer Focus would welcome the opportunity to work with copyright owners and their trade associations to ensuring that consumers have access to legal services. At this point we are not convinced that the case for website blocking has been made in relation to copyright infringement.

Gaps in the proposal:

- The cost of the proposed scheme is not indicated, but is likely to be substantial, this includes the running cost of two non-judicial independent bodies and the cost to ISPs of permanently blocking websites
- The proposal does not identify through which network level address blocking method ISPs are to block websites. As outlined in our [submission to Ofcom's technical feasibility assessment](#), network level address blocking carries the risk of:
 - degraded internet service, including speed and network reliability, for all UK consumers
 - increased price of broadband for all
 - denying all consumers access to legal content and services

Proposal for the Interim Applications Court to issue permanent injunctions

- The proposal requires changes in the Civil Procedure Rules¹ so that the Applications Court issues permanent injunctions on the basis of the advice given by a 'Council' and 'expert body'. As such permanent injunctions would be issued by the Applications Court without a full trial. Consumer Focus is not able to support this proposal, and we believe the Ministry of Justice should be consulted
- The proposal envisages that the 'Council' and 'expert body' decide that a website is 'substantially focused on infringement directly or by authorisation' on the basis of evidence submitted by copyright owners. On this basis the Applications Court is to issue permanent injunctions for UK ISPs to block a domain to UK users in under two hours of hearing time. Consumer Focus is concerned that the court is supposed to rubber stamp a decision by two non-judicial bodies, on the basis of 'general support' in case law for the concept of 'websites substantially focused on infringement'²
- Consumer Focus does not share the view that the cited case law establishes the principle of 'websites substantially focused on infringement'. In any event, we do not believe that it is appropriate for two non-judicial bodies to broadly interpret existing case law, effectively establish new copyright law, and direct the Applications Court to issue a permanent injunction, without a trial
- Interim Injunctions are available from the Applications Court in intellectual property cases in advance of a full trial. The leading case law on interim injunctions concerns patents.³ It is not clear what the advantage of the proposal is over the current system

Applications Court:

The 'Applications Court', also known as the 'Interim Applications Court', sits in the High Court and makes interim orders relating to case management, and interim injunctions, for example in family or privacy cases. The Applications Court issues interim injunctions if it is satisfied that a serious matter is to be trialled and that the claimant's cause of action has substance, a relatively low hurdle. Interim injunctions are for matters which cannot wait until full trial and made where there is risk of injustice if an interim injunction is not granted. The claimant has to provide 'a cross undertaking as to damages', ie commit to pay compensate for any loss sustained from the order if the court later conclude that the injunction should not have been granted.

¹ See [PRACTICE DIRECTION 25A – INTERIM INJUNCTIONS](#), supplements Civil Procedure Rules Part 25

² See [Twentieth Century Fox Film Corp v Newzbin Ltd](#) [2010] EWHC 608 (Ch.); [L'Oreal SA v eBay International AG](#) [2009] EWHC 1094 (Ch); [Roadshow Films Pty Ltd v iiNet Limited \(No. 3\)](#) [2010] FCA 24; [Roadshow Films Pty Ltd v iiNet Limited \(No. 4\)](#) [2010] FCA 645

³ See [American Cyanamid Co v. Ethicon Ltd](#) [1975] AC 396