

Website blocking roundtable 19 September 2011

Consumer Focus response to ‘Proposal for Code of Practice addressing websites that are substantially focused on infringement’

Proposal by the BPI (British Recorded Music Industry), Motion Picture Association, Producers Alliance for Cinema and Television (PACT), Premier League & Publishers Association

Consumer Focus would like to see competitive markets which satisfy consumer demand for copyrighted content legally. We do not support copyright infringement but have serious concerns about the proposal by copyright owners for internet service providers (ISPs) to block access to websites at a network level for all UK users. Essentially the copyright owners are proposing that the Applications Court of the High Court issues permanent injunctions on the basis that an industry body decides that a website does not comply with a Code of Practice. These proposals require at the very least significant changes to the Civil Procedure Rules and as such they should be subject to consultation and evidence based.

As with [the last proposal](#), Consumer Focus is concerned that the copyright owners do not identify clearly why existing judicial processes for website blocking are inadequate. Nor do they show how website blocking will be sufficient to stop copyright infringement by consumers and facilitate the growth of the legal market. In practice the effectiveness of website blocking is seriously diminished unless users of unlicensed services have viable legal alternatives. There is, in our view, an urgent need to refocus efforts on growing the legal market.

Proposal to block websites which ‘favour or encourage’ copyright infringement

It is misleading for the copyright owners to suggest that the High Court judgement in the Newzbin case is the ‘solid legal basis for moving to an expedited system of site blocking’. We are particularly concerned that the proposed Code goes well beyond existing case and statute law.

- The proposed Code on websites which ‘favour or encourage’ infringement is not supported by the Newzbin precedent
- The Applications Court cannot, and should not, give legal force to a Code that goes beyond existing case and statute law
- It is unknown whether Cleanfeed can be effectively used to block access to Newzbin

Website blocking raises serious public interest concerns and always 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

To ensure that website blocking is only employed where it is proportionate, judicial oversight is imperative. Given the lack of case law in this area it is premature to suggest that an industry body can be entrusted with deciding whether websites comply with the law. To date Newzbin is the only case in which the UK High Court has granted a blocking injunction under section 97A of the Copyright, Designs and Patents Act 1988 (CDPA) on the basis that the website infringes by effectively authorising its members to infringe copyright. The Newzbin blocking injunction obtained by the Hollywood studios in [Twentieth Century Fox v BT \[2011\]](#) is not yet operational so it is premature for the copyright owners to conclude that website blocking is effective and proportionate. As part of the Government’s commitment to evidence-based policy it would be prudent to wait until the block is implemented. Effectiveness should be determined in relation to whether access to Newzbin can be blocked, and whether the block supports the growth of the legal market.

Refocusing efforts on growing the legal market

Ultimately the Government wants to grow the market in legal content, by increasing the number, and use, of legal services available. In assessing the likely effectiveness of the Newzbin blocking injunction the High Court reasoned that the inconvenience and additional cost of circumventing the block may prompt Newzbin users to pay for legal services, rather than pay Newzbin, to obtain the latest Hollywood movies. However, UK consumers currently have few legal choices for watching the latest Hollywood movies. Since the injunction was granted the Competition Commission has found that Sky's control over pay-TV movie rights by all major Hollywood studios is 'restricting competition between pay-TV providers, leading to higher prices and reduced choice and innovation for subscribers.'

Blocking Newzbin will not in itself lead to the increased availability of legal film services, which can only be achieved through the Hollywood studios effectively licensing their movies to a variety of UK services. Hollywood movies should be available at different price points, through subscription, 'all you can eat' or pay-per-view. However, the successful 'all you can eat' movie subscription service Netflix, credited with reducing copyright infringement in the US, has chosen Spain rather than the UK for its EU debut because it was easier to obtain the necessary copyright licences. Netflix also launched in all 43 Latin American countries this month because it could readily obtain the necessary licences. We believe the Department for Culture, Media and Sport should focus efforts on ending anti-competitive practices in copyright licensing and making the UK the first choice for successful legal online services who want to launch internationally or in Europe. We would welcome the opportunity to participate in a working group focused on breaking the current licensing deadlock where consumer demand goes unmet and the UK's international competitiveness is endangered.

The current proposal by copyright owners

The most recent proposal is in our view problematic for a number of reasons. We are concerned that the Applications Court is meant to give legal effect to a code which goes beyond established case and statute law. We are also concerned that the copyright owners conclude that the Newzbin block would be effective, despite the blocking order not yet being in effect. Our concerns are set out in further details below.

The proposed Code on websites which 'favour or encourage' infringement is not supported by the Newzbin precedent. In [Twentieth Century Fox v Newzbin \[2010\]](#) the High Court found that Newzbin is authorising copyright infringement by its members. In contrast, the copyright owners propose a Code for the identification of sites which 'favour or encourage' copyright infringement on the basis of 'evidence that the site... enables or assists its users to commit infringement.' Existing case law and the Copyright Designs and Patents Act 1988 (CDPA) do not support a Code which identifies websites as liable for copyright infringement on the basis that they favour or encourage infringement by enabling users to infringe copyright. The Newzbin administrator went beyond technically enabling infringement and was found to have authorised infringement because 'a reasonable member would deduce from the [Newzbin administrator's] activities that it purports to possess the authority to grant any required permission to copy any film that a member may choose from the Movies category on Newzbin and that the [Newzbin administrator] has sanctioned, approved and countenanced the copying of the claimants' films.'

Authorisation of copyright infringement is an infringement of copyright as per section 16(2) of the CDPA. When deciding that Newzbin infringed copyright by authorising others to do so the High Court applied [CBS Songs v Amstrad \[1988\]](#) which clearly states 'that "authorise" means the grant or purported grant of the right to do the act complained of. It does not extend to mere enablement, assistance or even encouragement.' This principle was established in relation to Amstrad's twin deck tape recorders, which were used for home taping by consumers. Blocking websites on the basis that an industry body has found them to favour, encourage or enable copyright infringement by users goes beyond the Newzbin precedent. We are concerned that the proposed Code criteria would cast the net too widely, including the likes of Google and Facebook.

The Applications Court cannot, and should not, give legal force to a Code that goes beyond existing case and statute law. The copyright owners say they envisage a process akin to the Advertisement Standards Authority's self-regulatory system, which 'does not have the force of law but operates alongside it'. However, the copyright owners also propose that the Applications Court rubber stamps their applications for blocking injunctions under section 97A of the CDPA on the basis of the Code. This would effectively give legal force to the Code. In contrast the Newzbin injunction was granted on the basis that Newzbin had previously been found by the High Court to have authorised infringement by its members.

The Applications Court only grants interim injunctions where it is satisfied that the claimant's course of action has substance, as in having any hope of success, and the claimant provides 'a cross-undertaking as to damages' if the court later rules that the injunction should not have been granted. It is therefore improbable that the Applications Court would grant an injunction, interim or otherwise, on the basis that a website does not comply with the terms of a voluntary Code which is not based on case or statute law. We think it is unlikely that the Civil Procedure Rule Committee would agree to the proposals, which would also involve changing the civil procedure rules to allow the Applications Court to issue permanent injunctions. We furthermore question why the copyright owners, despite not taking advantage of the interim relief available to them for websites which authorise infringement, claim that the existing judicial process does not allow them to block live event streams or pre-release movies and music before they become widely available.

It is unknown whether Cleanfeed can be effectively used to block access to Newzbin. The Hollywood studios want BT to block access to the Newzbin website using Cleanfeed, the blocking technology implemented by BT and other ISPs in 2004 to block URLs identified by the Internet Watch Foundation (IWF) in relation to child abuse images. With reference to the Newzbin case copyright owners propose that Cleanfeed is also used to block websites identified by the industry body to 'favour and encourage' copyright infringement. However, in asserting that Cleanfeed could be used to effectively block access to websites copyright owners fail to clearly distinguish between 'protection' and 'compliance' blocking. The copyright owners overlook the fact that the IWF's primary success has been in terms of takedown and protection blocking, ie preventing internet users from stumbling across child abuse images. The IWF has not been successful in terms of compliance blocking, ie preventing paedophiles from accessing child abuse images. In its Annual Report 2010 the IWF states that 'blocking is not a complete solution; it cannot put an end to offenders abusing children nor can it effectively deny determined criminals who are actively seeking such material.' This year the Dutch government has decided not to implement Cleanfeed to block child abuse images because it concluded that blocking websites 'can no longer serve as a reliable and effective way to contribute to fighting child pornography on the internet' and 'therefore cannot be employed effectively'.

In its assessment Ofcom concedes that circumvention is 'technically trivial' for site operators and 'relatively straightforward' for determined users. Very recently Newzbin announced that it has modified its service to circumvent a Cleanfeed block and it is therefore premature for copyright owners to conclude that website blocking would be effective in denying UK users access to Newzbin. If the majority of Newzbin members are able to circumvent the Cleanfeed block at no extra cost, the block would be clearly ineffective in terms of compliance blocking. If the Cleanfeed block is easily circumvented by the site operators, the block would also be ineffective in terms of protection blocking. Other methods of network-level address-blocking are thus far untested in the UK. They are equally easy to circumvent but carry higher risks of over-blocking legal content and degrading internet service. The public interest and economic issues at stake are such that the implementation of the Newzbin block requires careful judicial oversight, and in October the High Court will seek to make an order for the blocking of Newzbin in a way that is effective and minimises unintended consequences. In the absence of the High Court having come to the conclusion that the Newzbin block is effective it would be premature to implement Cleanfeed blocks of 'a number of sites totalling the low hundreds', as proposed by the copyright owners.