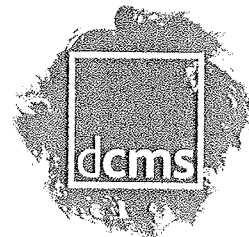


CMS 164003/asg



department for  
culture, media  
and sport

Ed Richards  
Chief Executive  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA

2 February 2011

Dear Ed

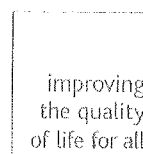
#### **SITE BLOCKING FEASIBILITY ASSESSMENT: TERMS OF REFERENCE**

The site blocking provisions within the Digital Economy Act 2010 are a reserve power, set out in sections 17 and 18 of the Act. There has been interest from some copyright owners in bringing the provisions into effect, but there has also been significant concern shown by people responding to the "Your Freedom" website about the effects of such provisions.

I am, therefore, asking Ofcom to carry out a review of the site blocking provisions of the Digital Economy Act 2010. Assuming that a site or a set of sites has been ruled by the court to be subject to a blocking injunction that requires a service provider to prevent its service being used to gain access to a location on the internet, in the view of Ofcom would it be:

- Possible for access to the site to be blocked by internet service providers?
- How robust would such a block be – in other words would it have the intended effect, and how easy would it be to circumvent for most site operators?
- What measures might be adopted by internet service providers to prevent such circumvention?
- How granular can blocking be – i.e. can specific parts of the site be blocked, how precise can this be, and how effective?
- How effective are sections 17 and 18 of the Act in providing for an appropriate method of generating lists of sites to be blocked?
- If possible, identify either a potential range of costs for ISP blocking solutions or the main drivers of those costs.

In order to keep the review focused I would suggest that the scope is limited to the major



fixed-line ISPs, although if the cost to mobile operators would be significantly different it would be helpful if that was flagged up.

I should also underline that this is a request for a narrow assessment of sections 17 and 18 of the Act, and it is not concerned with the policy framework within which such considerations will take place. The question of proportionality as well as the other important considerations set out in section 17(3) and elsewhere should not form part of the review – its purpose is to assess whether the provisions would work, rather than whether they are appropriate.

I would be grateful if you could, in the first instance, let me know by when you think you may be able to complete this review.

I look forward to hearing from you.

A handwritten signature in black ink that reads "Jeremy". The signature is written in a cursive, slightly slanted style.

**Rt Hon Jeremy Hunt MP**  
**Secretary of State for Culture, Olympics, Media and Sport**

Ed Vaizey MP  
Department for Culture, Media and Sport  
2-4 Cockspur Street  
London  
SW1Y 5DH

[www.openrightsgroup.org](http://www.openrightsgroup.org)  
[info@openrightsgroup.org](mailto:info@openrightsgroup.org)  
+44 (0) 20 7096 1079

28<sup>th</sup> February 2011

Dear Mr Vaizey,

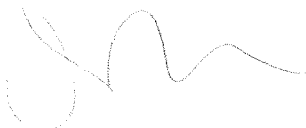
I am writing with regard to a meeting held last week to discuss alternative plans for web blocking, as reported in the Guardian on Friday 25th February.

The issue of web blocking has been the cause of great concern amongst individuals and organisations interested in human rights, civil liberties and consumer rights. At Open Rights Group we can claim to represent tens of thousands of people who have expressed strongly held concerns about the impact and workability of web blocking as a means of tackling file-sharing.

These issues raise very serious problems relating to freedom of expression, access to knowledge and privacy. But it is likely that these issues will not be given sufficient weight should discussions feature only rights holders and ISPs. To include only these voices means there is a real risk that the flaws of the Digital Economy Act will be repeated.

We would like to stress that we believe groups such as Open Rights Group, Liberty and Consumer Focus should be invited to participate in any discussions aimed at taking a fresh look at web blocking provisions and at finding a 'Plan B' for tackling file-sharing.

Yours faithfully,



Jim Killock  
Executive Director

cc: Rt Hon Jeremy Hunt MP

[REDACTED]

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**From:** [REDACTED]  
**Sent:** 04 March 2011 17:22  
**To:** [REDACTED]  
**Subject:** Invitation to working group - voluntary arrangements on site blocking  
**Attachments:** Site blocking invitees.doc

Dear Geoff,

You will recall that when we met on 23<sup>rd</sup> February to discuss progress on discussions between ISPs, copyright owners and internet intermediaries we agreed that we should meet as a smaller working group to focus on the prospects for a voluntary arrangement on site-blocking. I hope that you are able to attend a meeting at **10.00-12.00 on 4<sup>th</sup> April**. Location details will be sent closer to the date.

I recognise that this is not going to be a meeting where we reach swift agreement on the principles and the detail – if it was that easy it would already have been done. If we are to make real progress, though, I'm sure that one thing is a pre-condition – that we all come with as open a mind as possible and with a willingness to recognise that there will be a need for give and take if we are to reach a mutually acceptable way forward. If we do then I would hope that there is a real chance that this will be a productive session.

Emma Ascroft from Yahoo! will be producing a list of issues, as promised at the meeting on 23<sup>rd</sup> February, and we will be circulating that together with a suggested agenda closer to the meeting. I hope it will also be possible for my officials to speak to at least some of you beforehand to ensure that we all have a clear idea of the different perspectives and approaches, and the key issues on which we may need to focus in order for this to move forward.

Please let [REDACTED] in my office know whether you can attend on the 4<sup>th</sup> April.

Ed Vaizey  
Minister for Culture, Communications and Creative Industries

\*\*

[REDACTED]

Assistant Private Secretary to Ed Vaizey, Minister for Culture, Communications and Creative Industries |  
Department for Culture, Media and Sport | T: 0207 211 [REDACTED] | M: [REDACTED] | E:  
[REDACTED]@culture.gsi.gov.uk

## Site-blocking meeting 10-12.00 4<sup>th</sup> April 2011

### Copyright owners

Geoff Taylor, BPI  
Feargal Sharkey, Music UK  
Chris Marcich, MPA  
Bill Bush, FAPL  
Richard Mollet, PA

### ISPs

Marc Watson, BT  
Max Alexander, Talk Talk  
David Wheeldon, BSkyB  
Jon James, Virgin Media  
Nick Lansman, ISPA

### Intermediaries

Matt Brittin, Google  
Emma Ascroft, Yahoo!

### Ofcom

Campbell Cowie

[REDACTED]

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**From:** [REDACTED]  
**Sent:** 30 March 2011 18:37  
**To:** [REDACTED]  
**Subject:** 4th April working group voluntary arrangements on site blocking with Ed Vaizey  
**Attachments:** Site blocking WG\_4 April 11\_Agenda.doc; Key issues for site blocking scheme.doc; 2nd round table follow up\_letter to Ed Vaizey fin.pdf

**Importance:** High

Dear all,

Please see attached the following papers in advance of the working group looking at voluntary arrangements on site blocking. The meeting will take place on the Monday 4<sup>th</sup> April from 10am – 12pm at DCMS, 2-4 Cockspur Street, London, SW1Y 5DH.

- Agenda and summary list of issues that it would be helpful for the group to look at, with thanks to Yahoo!, Google, TalkTalk and ISPA for contributing their thoughts for this

- As background, also attaching the pdf of the full letter from Yahoo!, Google, TalkTalk and ISPA, setting out their thoughts in more detail.

Please note that there is only room for **one** representative per organisation so please do not bring any colleagues. Additional people will have to be turned away.

Please do not hesitate to contact me if you have any further questions. Look forward to seeing you all next week!

Kind Regards,

[REDACTED]

[REDACTED]

Assistant Private Secretary to Ed Vaizey, Minister for Culture, Communications and Creative Industries |  
Department for Culture, Media and Sport | T: 0207 211 [REDACTED] | M: [REDACTED] | E:  
[REDACTED]@culture.gsi.gov.uk

## **Voluntary site-blocking arrangement - Working Group**

Monday 4 April 2011, 10.00 – 12.00

Department for Culture, Media and Sport  
2-4 Cockspur Street, London, SW1Y 5DH

### **AGENDA**

- The purpose of the Working Group
  - Objectives
- Identifying the key issues which need to be considered
  - Is the list circulated comprehensive?
  - Are there other issues which should be considered?
- Exploration of the issues
  - What issues are we already in agreement on?
  - Where there isn't agreement, what are the differing concerns which need to be balanced?
- Next steps
  - What is the best way of taking things forward?
  - What role can Government most usefully play?
  - Membership of the group



Rt Hon Ed Vaizey MP  
Minister for Culture, Communications and Creative Industries  
Department for Culture, Media and Sport  
2-4 Cockspur Street  
London SW1Y 5DH

8 March 2011

Dear Ed,

*Re: Second round table meeting on digital content and piracy, 23 February 2011*

Thank you for running a second roundtable meeting to continue the discussion on these important issues.

At the end of the meeting there was a brief discussion of next steps that might be taken in respect of web site blocking. The concern expressed was that more than a year after site blocking had been suggested by rightsholders, that there had not been any assessment of how a scheme might actually work in practice and whether (and, if so, how) it could overcome the substantial and complex risks and issues inherent in blocking Internet traffic. Ofcom's review of section 17 is narrow in scope and only addresses a small subset of the issues. Thus, we are pleased that you invited the rightsholders to regroup and properly develop their idea for a scheme (voluntary or otherwise) and how it might actually work in practice. Without a concrete and substantive proposal, further discussion on the subject is likely to be unproductive and slow.

At the end of this letter, we have outlined what we see as the main issues that site blocking raises for discussion if government is minded to continue exploring this option. The list is not exhaustive but it is, we believe, a good starting point for the rightsholders when they are developing a design for a scheme and considering the appropriateness of it.

We were concerned that some of the discussion at the roundtable suggested that the IWF scheme could be used as a template for a scheme to block access to sites facilitating downloading of unlicensed content. It is obvious to us that the type of material in the two cases - child sexual abuse images in one and unlicensed content in the other - is of a wholly different nature and consequently warrants a wholly different approach. Whilst there might be some learning to be gleaned from the technical approach and process steps used by the IWF, the analogy is very limited. We have another concern regarding the IWF in that any scheme to block sites hosting unlicensed content may undermine public confidence in the



IWF's work or inadvertently encourage Internet users to adopt tools that would circumvent IWF measures or reverse engineer the IWF's list. The risk of these (unintended) consequences must be properly considered in assessing any scheme.

Many of the issues that need to be addressed go beyond the private relationship between ISPs and rightsholders (for example, safe harbours in law) and will have profound implications on the UK public and Internet users. It is critical to fully understand and take into account these issues in assessing any scheme. It was agreed at the first round table in November that it will be critical to include consumer and civil liberty groups in ongoing discussions about blocking, as any scheme developed behind closed doors is likely to be mistrusted and abused. We would strongly recommend therefore that further discussion on this issue involve these groups and that they be invited to the next round table meeting.

It will also be important to have a broader and more substantive public debate around how measures such as site blocking would impinge on the expectations and rights of UK Internet users and on wider British culture and social values. The parties being asked to 'volunteer' under this proposal have to consider such issues in the way they design and operate their businesses. It is therefore appropriate that government ask all parties in this dialogue to engage in these matters in order to ensure fundamental issues about the Internet in the UK are examined in the round, rather than only through a single prism like copyright.

We hope that these thoughts are helpful. We look forward to discussing these points at the meeting on 4 April.

Yours sincerely,

Emma Ascroft, Director, Public Policy, Yahoo!

Andrew Heaney, Executive Director, Strategy and Regulation, Talk Talk plc

Sarah Hunter, Public Policy Manager, Google

Nick Lansman, Secretary General, ISPA

## KEY ISSUES FOR SITE BLOCKING SCHEME

### OVERALL FRAMEWORK

- *Decision-making body* – It is inappropriate for either rightsholders or ISPs to decide which sites should be blocked. The body that does take on this role would have to be legally competent, independent, accountable and transparent to ensure that any decisions are fair and robust and have the public's trust and confidence. One option would be for this body to be part of the judicial system. Rightsholders' proposal for a scheme should include details of how an independent panel (or alternative approach) might function in practice and the degree of legal certainty/risk they would provide.
- *Legal interpretation* – Details must be given about what test would be used to assess whether a site should be blocked or not and on what (if any) legal basis a decision to list a site would be made – for example, would only sites whose primary/sole purpose is to distribute pirated content be listed or would a lower threshold apply? Any proposal would have to include an assessment of the potential implications of applying a definition that would capture sites which have purposes other than solely distributing pirated content.
- *Prior hearing/appeals* – Consideration must be given to how suspected illegal sites would be able to defend themselves prior to any decision being made and what appeals process might be put in place to expeditiously consider complaints by site owners that their site (or part of site) has been inappropriately blocked.
- *Indemnification* – Any scheme would mean that ISPs would block traffic to a site in good faith and on the basis of the decision of a third party. It is essential therefore that ISPs are fully indemnified against claims made by sites who are blocked (claims may arise in the UK or abroad) and by Internet users. A scheme must be clear about who would take legal responsibility for all decisions and how the indemnification mechanism would actually work.
- *Relationship with other enforcement activities* – There is general consensus that, given the potential collateral damage and limited efficacy of site blocking, that it should only be used as a last resort and that every effort must be made to take down content at source as a first course of action. Thus, any proposal would have to limit site blocking to circumstances where other enforcement activities have been properly pursued (particularly notice and take down and/or litigation against the site) and shown not to be successful. This would most likely focus on content hosted outside mature markets where notice and take down works well.
- *Scope* – To ensure that a scheme could not result in distortions in market competition, it should be universally (or close to universally) adopted by ISPs. If not, it would diminish any incentive for ISPs to (voluntarily) participate.

- *Legal compatibility* – Any scheme must be assessed for its compatibility with existing Directives including *inter alia* the ePrivacy Directive, e-Commerce Directive, Authorisation Directive and Data Protection Directive.

#### OPERATIONAL/COMMERCIAL ISSUES

- *List management* – Clarity would be needed around how any list would be maintained. The IWF list is, for instance, updated twice daily. Less frequent updating will reduce blocking accuracy (i.e. higher incidence of under- and over-blocking).
- *Volume* – Clarification must be given of how many URLs might fall within the scope of this proposal (which would depend on the test applied). This is important to understand because the number of URLs would directly impact on the effect a blocking solution has on users' experience of the Internet and the functioning of the underlying network.
- *Blocking technique* – There are a number of technical methods that could be used by ISPs to block access to sites. These have different cost implications and impacts on the operation of the underlying network. Available techniques would need to be assessed (alongside volume – above) with respect to copyright infringing sites for the effectiveness and impact.
- *Governance* – It would be critical that the design and day-to-day management of any scheme is governed effectively, with appropriate safeguards in place were it to fail in any way. This would have to include processes designed to deal with unexpected crises such as technical incidents of the kind encountered by the IWF when a Wikipedia page was placed on its URL list. Any proposal would also need to address issues such as audit, reporting and possible role for a supervisory board comprising relevant experts, independent members and representatives of the parties.
- *Costs and funding* – Clarification should be given about how much such a scheme might cost to set up, resource and operate including costs incurred ISPs, rightsholders and the decision-making/administrative body(s). It would be fair that all costs incurred (including by ISPs) are fully paid for by rightsholders, who would be the economic beneficiaries of any scheme.

#### IMPACT

- *Impact on the Internet ecology* – The Internet has been founded on and succeeded because of its openness. Indeed, the ongoing debate about net neutrality and traffic management is focussed on how to maintain the openness of the Internet in future and ensure that ISPs and other intermediaries continue to act in consumers' interests by respecting the balance of rights and responsibilities enshrined in the eCommerce Directive and based on European human rights statutes. Any attack on this principle (even if it is for apparent good reason) will be perceived as a form of 'censorship' and a threat to the future of the Internet and continuing innovation damaging the credibility of the scheme

- *Public trust and confidence* – Experience shows that Internet users and the public at large care passionately about potential limitations to their ability to use the Internet and will see site blocking as a form of ‘censorship’ that may result from over-blocking. A scheme would not be successful without public confidence. Therefore, any scheme would have to be very transparent and clear about its framework and approach and have very clear constraints to address the risk of over-blocking and scope creep. Building trust and confidence can be best achieved by including user and civil liberty groups at the development stage. Any scheme developed behind closed doors is likely to be mistrusted and abused.
- *Unintended consequences* – There will inevitably be some unintended consequences from any action to block sites. For example:
  - There could be over-blocking, restricting access to legitimate services;
  - Blocking may encourage the use of encryption techniques which would render lawful interception extremely difficult;
  - Blocking may encourage increased use of proxy servers which would render the IWF scheme and parental control services ineffective;
  - A list of copyright-infringing sites (or worse the IWF’s list) could be reverse-engineered in order to identify the sites in order to access them by other means (such as via proxy servers).

Consideration must be given to how to minimize these unintended consequences. Also their impact must be taken into account when properly assessing whether a scheme could be proportionate or appropriate.

- *Effectiveness / proportionality* – It does not require a high level of technical expertise to circumvent blocking and those who wish to continue to access a listed site can relatively easily bypass a block using, for example, a proxy server. Indeed, the IWF solution is only aimed at preventing inadvertent viewing of child sexual abuse images and not at tackling determined and persistent offenders. The effectiveness of any scheme would be diminished by sites moving to new URLs in order to circumvent any blocking (even frequent list updating will not address this). Thus any proposal must assess the likely and realistic benefits that would be delivered and whether these (net of disbenefits) outweigh the costs incurred (both quantifiable and non-quantifiable).