

6th Annual MPA Tokyo Film Festival 2016 Seminar – Role of ISP Blocking in the fight against piracy
'DEVELOPING A HEALTHY & PROSPEROUS DIGITAL VIDEO ECOSYSTEM'

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Thank you Mr Chairman. It is indeed a delight to be back here in Tokyo after appearing on this stage one year ago. Tokyo is perhaps my favourite city in the world after London and I welcome any opportunity to be back here.

I have been asked to speak on the effectiveness of ISP – Internet Service Providers – site blocking around the world and how that integrates into the fight against Piracy both locally and globally. As part of that, I will touch on Search Engine blocking, and other ways to stop piracy like my favourite initiative 'Follow The Money' which takes the money out of pirate sites. But more on that later.

For this presentation I have been provided with materials directly by the Intellectual Property Office in London – the IPO, The Intellectual Property Office in Singapore - IPOS, The Motion Picture Association of America – the MPA – in both Europe and Asia, The Alliance For IP in London, Adobe in San Francisco, Google in San Francisco also, and the Police Intellectual Property Crime Unit – PIPCU – in London. I thank them all for their input. **And spoiler alert - they all conclude with one main point: That ISP Blocking works!**

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And I should just add in my background and why I have been privileged to be asked to speak today. From 2010 to 2015 I was a Member of the British Parliament in former Prime Minister David Cameron's Government. Having owned an international manufacturing company, and also worked in the music and film industries, I took an interest in IP legislation in the UK as an MP, and in 2013 the Prime Minister made me his personal IP adviser – the first and only to be so appointed in the history of the UK Parliament. During this time I wrote 4 reports for the Prime Minister which I am delighted to say have been used as reference documents around the world.

I hope in this room I do not have to go through why we need to beat piracy and protect Copyright holders. Actually, when entering Japan I was heartened to see on the customs declaration not only the usual questions on guns and drugs, but also a declaration that I wasn't bringing in any goods that would infringe Intellectual Property Rights. So I know Japan is a huge respecter of IPR. It then just becomes a matter of how to best address it.

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And of course there is **no one 'silver bullet' to beat the pirates**. In my time as the Adviser to the Prime Minister I wrote four key reports and the main theme throughout was a three step process. **Education, Carrot and Stick**. **Education** because we do need to bring the goodwill of the people with us. The general population needs to be behind getting piracy under control. **Carrot** because the creative industry needs to adapt and amend their business practices to be part of the evolving business world – Spotify would be a good example of how to purchase music is adapting, and services such as 'Find Any Film' in the movie world. And then, once we have the hearts and minds of the people and the businesses are adapting, we need to use the **Stick** – enforcement.

Now on enforcement, we need to be careful what we mean by this. None of us wants to run around prosecuting teenagers and putting them in jail. There has to be other ways to stop piracy before we get to that point. I am not ruling out putting persistent offenders behind bars – in the same way that a habitual shoplifter will eventually get jail. **But let's take the temptation to infringe away and not put anyone in jail.**

So the question then becomes how do we get to a place where the illegal product is inaccessible?

The first is obviously to not have the illegal web sites there to start with.

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The British Police Intellectual Property Crime Unit (otherwise known as PIPCU) once said to me that they reckoned that 80% of all sites that carry illegal activity could be stopped if we found a way to take the money out of the hands of the pirates. There are of course some that will create a site with illegal content just for the fun of it, but the vast majority do it because they can make money out of it. Pirate Bay was making \$50m a year. This was the subject of my second report to the Prime Minister and has been embraced by everyone around the world in one form or another. It has even now become the main focus of the current EU consultation process. Follow The Money. This is done by a three pronged process: (i) Get Brands and other reputable companies to undertake a voluntary process of stopping their ads appearing on sites with illegal content. This is more difficult than it seems due to the network of ad agencies – MI6, the British secret Service, even advertised for staff unwittingly on a pirate site. But it can be done. And once we have the easier, voluntary codes in place, then (ii) we need to go after those that don't care if their brand is associated with the shadier side of life – the porn sites, casinos and so on. We need legislation to go after this part – probably through money laundering legislation but also through specific legislation. And then (iii) there are the payment providers who allow these sites to take payments. They must do more to stop this.

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Then there is route to stop those looking for easy download sites being able to find them. **So if the results are not on Search Engine listings, it is more difficult to find the content.** That was actually the subject of my first report to the Prime Minister. It had 10 recommendations in it and the various Search Engines I am pleased to say have agreed to adopt 8 of them. Google often get a lot of criticism in this area but I have to say that my experience has been one of them trying to work out what can practically be done. More still needs to be done for sure, but it is more difficult now than before to find illegal sites.

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But 'Follow The Money' is a long and difficult process. And no matter how successful Follow the Money is and no matter how much Google de-ranks or removes certain sites, there will always remain sites where the average person can access illegal copyrighted material. And this is where site blocking comes in. Both as a first option available to us to stop the pirates and also as part of the package.

If the ISPs can stop the material coming down the wires, then we are on our way to winning. With that in place we can focus on the other measures at our disposal.

So how have other countries done this and how effective has it been?

Let me start with the UK

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- The legal basis for website blocking in the UK is s97A of the Copyright, Designs and Patents Act 1988. This provision is the implementation of Article 8.3 of the EU Copyright Directive.
- Website blocking is a relatively simple legal procedure under the Civil Procedure Rules.
- Before filing an application seeking an order requiring the UK's five largest ISPs to block access to a site, right holders write to the site concerned asking them to confirm that they will remove, and keep removed, all copyright infringing content. In case of no response or non-compliance, right holders can file a court application.
- The first test case was brought in respect of The Pirate Bay
- Right holders are not required to bring a prior action against the infringing site, or join the site in the proceedings, or even serve them with the proceedings.
- Rightholders are not required to show that 100% of the content on the site is infringing music.
- Due to extensive discussions and negotiations with the ISPs ahead of time, ISPs usually consent to the orders or agree not to oppose them. Since the first hearing in The Pirate Bay case, all cases have been dealt with by the judge "on the papers" i.e. without a hearing.
- ISPs have had to bear their own legal costs and the costs of implementing the blocks. This has been recently confirmed in the "Cartier" case which was initiated by trademark owners.
- The procedure once before the court has been relatively quick – the orders regarding the sites to be blocked from October 2013 onwards were obtained within 2 months of issuing court proceedings.
- The website blocks in the UK are implemented at both DNS and IP level and the ISPs will block via a combination of IP address and DNS blocking. The orders include provision for additional IP addresses and domains to be included if the block is being circumvented. The ISPs must pay their own legal costs and the costs of implementing the blocks.

Some people have questioned the effectiveness of blocking orders since it is not difficult from a technical perspective to circumvent the order using a VPN or a reverse proxy. But even when this happens it is possible to take action. PIPCU has such a case at the moment in relation to an individual who was operating reverse proxies (which mirror the destination server and therefore avoid the block) for torrent sites that had been subject to blocking order. This case is currently at the Crown Court in Nottingham and awaits trial.

One thing we can say categorically however is that website blocking has been successful in the UK with 63 sites ordered to be blocked following rightholders' initiatives, in addition to hundreds of mirror or proxy sites that have been blocked subsequently.

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On effectiveness, a study was published in 2015 by CMU which concluded the following:

The results show that blocking The Pirate Bay alone had little impact on consumption through legal channels — instead, consumers seemed to turn to other piracy sites, Pirate Bay “mirror” sites, or Virtual Private Networks that allowed them to circumvent the block. In contrast, after the next actions when blocking 19 different major piracy sites at the same time, this caused users of those sites to increase their usage of paid legal streaming sites such as Netflix by 12% on average. The heaviest users of previously blocked sites increased their legal paid streaming clicks by 23.6%. The results suggest that website blocking requires blocking of a number of piracy sites in order to effectively migrate pirates to legal channels. **In conclusion, this initial report showed that where countries are using website blocking to fight digital piracy, the record shows it has been effective in driving users from illegal to legal sources of copyrighted material online.**

And then in May 2015 a further study by INCOPRO, after even more sites had been blocked, concluded that ISP implemented site blocks have had a significant impact on all blocked sites and their related proxies analysed for the UK, with all categories showing a significant decline in usage since the blocks were implemented; To quote the report:

- Blocked sites consistently declined over a two month period immediately after the block was implemented, before settling at a new lower usage level. On average, blocked sites in the UK lose approximately 77% of their estimated usage in the 2 months following a site block.

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So, perhaps I can quote the Alliance for IP and the BPI in the UK to do a summary for that country: And again I quote:

‘Before the first s97a action, the view from some quarters was that this would break the internet and be the tip of the iceberg by cutting off free speech etc. BUT – clearly blocking in UK works – it hasn’t broken internet and applications are now unchallenged by ISPs. This has reduced traffic by 75% on average to those sites AND There is now a good relationship between Rights Holders, ISPs and the court BUT There is a view that ISPs could voluntarily do this, ie without court process’ – a view I share Personally and actually the subject of my 4th and final report to the Prime Minister – but the reality is that it needs to be court order initiated.

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Moving away from the UK I would like to mention how site blocking legislation was introduced in **Singapore**

In 2012, the Government appointed a Panel to study the issue of digital piracy in Singapore. The panel recommended a balanced approach comprising: (i) the provision of legitimate content sources by content rights owners and (ii) regulatory measures (particularly, site blocking) and (iii) public education. Spookily close to my 'Education, Carrot, Stick' summary

In July 2014, the Ministry of Law tabled site blocking legislation in Singapore. The ministry noted that that online piracy in Singapore turns customers away from legitimate content and adversely affects Singapore's creative sector **and - this point is hugely important - 'undermines our reputation as a society for the protection of intellectual property'**. **In other words they felt that site blocking was important to send a message to the world that Singapore takes IP protection seriously.**

The site blocking legislation was therefore introduced into the law in December 2014 and one successful application has already gone through to block 'solarmovie.ph'

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In Italy there is a solid legal framework and procedure in place that is both fast and cheap for rightholders. And they have a solid verification process that is handled by the government. Along with Portugal, Italy tops the list of ISP blockings at over **250 sites**.

Denmark however have added a further dimension.

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As you may know, in October 2014, the Ministry of Culture facilitated a Code of Conduct – or Memorandum of Understanding - between Danish right holders and the access providers of the Telecommunications Industry Association in Denmark. The Code of Conduct makes it possible to rapidly expand a site blocking court order against one ISP to all other ISPs without the need to go back to court. In mid 2015, a follow up Code of Conduct was created, involving most major Internet stakeholders in Denmark. Besides rights holders and access providers, also search engines, ad networks, payment processors and other intermediaries have signed a declaration of intent to promote lawful behaviour online and take measures against copyright infringement. Among the signatories are Google, Microsoft, Mastercard, the ISP association and a broad group of rights holders. The signatories declare they won't contribute to unlawful activities by either providing financial support via, for example, ad revenue or payment services, or by "legitimising" criminal services.

So what sets the Danish system apart from others across the EU is the following:

1. As per the MOU, once the court orders one ISP to block a specific site, all other ISPs will block that site as well without requiring a court order
2. As per the MOU, they have a flexible approach (similar to the UK), where new domains and mirror sites can be blocked easily

3. The creative industry has fully signed up to the 'Share with Care' consumer education project. This means that ISPs have a harmonized message once they are required to block a site which actually leads consumers to the 'Share with Care' website that lists all legal platforms. This is something we have yet to achieve in the UK.

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Now let me tackle the a point that is often brought up – that if we block peoples access to certain sites via asking ISPs to block traffic, that somehow we are infringing peoples personal space or privacy. This is a fair question. At the end of the day no one wants to invade the privacy of anyone. However the beauty of blocking illegal activity via using ISP blocking is that no one's personal secrecy is invaded. The case for blocking a site is not done by looking at any individual's usage of the web, but at the web site itself. The web site in question is publically putting their product up on the web for all to see. There is no secrecy to their activity. There is secrecy for the individuals accessing that site, but the block is not against the individual but against the public site. It is simply not possible or credible to say that any individual is having their privacy invaded by blocking illegal content that they may wish to find or download. To reiterate, no data on individuals is obtained for any court order – it is all based on publically available web content.

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I do want to just say a last point on 'Follow The Money' and PIPCU. Disrupting the capability of organised criminals to use payment facilities has become a focus for PIPCU. They are working successfully with UK card issuers and FFA UK to inform them of merchant facilities that are used in connection with IP crime so that the bank concerned can take action that they consider to be appropriate and proportionate. This work interestingly does not use legal powers but relies on financial institutions considering their risk both in regulatory and business / reputational terms. The aspect of a legal money laundering dimension will be reviewed in 2017.

The lead on Follow the Money / Payment Disruptions in PIPCU is Detective Inspector Mick Dodge and he would welcome contact from any brand, rights holder or IP protection / investigation body to explore future opportunities. I would urge any conference to invite him to explain all this in detail.

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So in summary, Site Blocking has been put in place by a large number of countries now. **The internet has not been 'broken' and free speech or secrecy of communications has not been restricted. Apart from being the moral right thing to do, it seems that site blocking can be proved to be working. It is not the only way to beat the pirates and nor should it be – we need a complete and comprehensive approach. But it is a very effective tool.** The number of countries that allow site blocking is now over 40 including Australia, Argentina, Austria, Belgium, Chile, Denmark, Finland, France, Germany, Greece, Iceland, India, Indonesia, Ireland, Italy, Malaysia, Norway, Portugal, Russia, Saudi Arabia, Singapore, South Korea, Spain, Turkey, and the United Kingdom. **And very soon the number of countries taking part in court ordered site blocking will not be listed by those doing it but list by those not doing it.**

I would urge Japan to not be on that 'not doing enough' list but to be on the list of countries actively being part of the ISP blocking process.