



McCarthy Tétrault *Advance*™
Building Capabilities for Growth

Fordham IP Conference: Copyright & Trademark Enforcement: *FairPlay Canada's Website-Blocking Proposal*

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FairPlay Canada Proposal

“To combat the piracy problem, the CRTC should create an independent agency to identify websites and services that are ***blatantly, overwhelmingly, or structurally engaged in piracy.***

Following due process and subject to judicial oversight, ISPs would ultimately be required to disable access to the identified piracy sites and services.”

CRTC Application



FairPlay Canada Partners



- “Piracy is a large and growing problem that ***threatens the massive employment, economic, and cultural contributions*** of Canada’s film, television, and music industries.”
- “The Internet has had a profoundly positive impact on Canadian society and individual Canadians but it also has exacerbated the piracy problem, making it easy for pirate operators to make their pirate sites available in Canadian homes.” *CRTC Application*

The application “presents a Canadian solution to a global problem causing direct and measurable harm in Canada, that is carefully tailored to the current Canadian legal and regulatory environment but based on an internationally recognized and widely-adopted approach.”



- Site blocking for copyright purposes is widely available.
- EU/EEA member states Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Norway, Portugal, Sweden, Spain, UK, and the legal basis also exists in the other member states of the European Union based on Article 8(3) of the *Infosoc Directive*.
- Others include: Mexico, Argentina, Australia, India, Indonesia, Malaysia, Russia, Turkey, Singapore, South Korea, Thailand, Saudi Arabia, Uruguay.
- Legal basis: specific regimes, civil, criminal, and administrative laws.
- By courts and government agencies (Italy, Greece, Portugal, Malaysia, Mexico, South Korea, Indonesia).

Intervenor submissions

- ↪ FairPlay Canada Coalition
- ↪ Canadian Association of Broadcasters
- ↪ Canadian Chamber of Commerce
- ↪ TELUS
- ↪ Shaw Communications
- ↪ Sandvine
- ↪ Richard Ownens (MLI)
- ↪ Barry Sookman
- ↪ Internet Society, Canada Chapter
- ↪ Canadian Internet Registration Authority
- ↪ Canadian Network Operators Consortium Inc
- ↪ Public Interest Advocacy Centre
- ↪ TekSaavy
- ↪ Michael Geist
- ↪ Individuals

Intervenor submissions

- ↪ Information Technology Innovation Foundation
- ↪ Premiere League
- ↪ Friend MTS Limited
- ↪ BBC
- ↪ Internet Society
- ↪ i2Coalition, Internet Infrastructure Coalition
- ↪ Electronic Frontier Foundation
- ↪ David Kaye, UN Rapporteur on Freedom of Expression
- ↪ Wikimedia Foundation

Issues raised by intervenors

- Is piracy a problem?
- Is blocking effective; can/will it be easily circumvented?
- Will it result in over-blocking e.g. non-pirate sites, illegal sites with some legal content?
- Violate fundamental rights e.g freedom of expression; requirement for courts to make orders?
- Violate net neutrality?
- Impacts on privacy?
- Jurisdiction of CRTC?
- Misinformation about proposal?

Efficacy shown in studies

- ↪ Brett Danaher et al., “Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behavior”, April 19, 2016
- ↪ Incopro, “Site blocking efficacy study United Kingdom”, revised March 19, 2015
- ↪ Incopro, “Report Site Blocking Efficacy: Australia”, May 2017
- ↪ Incopro, “Site Blocking Efficacy – Key Findings Australia”, February 2018
- ↪ MPA, “MPA Study on Site Blocking Impact in South Korea (2016)”
- ↪ Incopro, “Site Blocking Efficacy in Portugal (2017)”

Efficacy without over-blocking

- **Netherlands:** *Stichting BREIN v Ziggo BV*, First Chamber 14/02399 LZ/EE, Supreme Court of the Netherlands, 13 November 2015 and *Stichting BREIN v Ziggo BV*, THE HAGUE COURT, Commercial Law Division, Case/Docket Number District Court C/09/535341/KG ZA 17-891, Sept 22, 2017; *The Football Association Premier League Limited v Ecatel*, ECLI: NL: RBDHA: 2018: 615
- **UK:** *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch) (17 October 2014), affirmed [2016] EWCA Civ 658 (06 July 2016); *The Football Association Premier League Ltd v British Sky Broadcasting Ltd & Ors* [2013] EWHC 2058 (Ch) (16 July 2013) and *Football Association Premier League Ltd v British Telecommunications plc*, [2017] EWHC 480 (Ch); *Union Des Associations Européennes De Football v British Telecommunications Plc & Ors*, [2017] EWHC 3414 (Ch) (21 December 2017)
- **Australia:** *Universal Music Australia Pty Limited v. TPG Internet Pty Ltd*, [2017] FCA 435, (28 April 2017)
- **Norway:** *Disney Entertainment Inc. v. Telenor Norway AS et al.*, 17-093347TVI-OTIR/05, Norway, Oslo District Court (3 November 2017)
- **Portugal:** *Associação Para a Gestão e Distribuição de Direitos et al. v. Acessos e Redes de Telecomunicações et al.*, Portugal Tribunal of Intellectual Property (24 February 2015)
- **Denmark:** *Sonofon A/S v. Aller International A/S et al.*, B-530-08, High Court of Eastern Denmark (26 November 2008)
- **Spain:** *Asociación de gestión de derechos intelectuales (AGEDI)*, E/2012/00358, Spain, Intellectual Property Commission (28 October 2014)
- **Sweden:** *Sony Music Entertainment Sweden et al. v. B2 Bredband AB*, PMT 11706-15, Sweden, Patent and Market Appeals Court (13 February 2017)

Efficacy even with possibilities for circumvention

- ↪ CJEU C-134/12, *UPC Telekabel Wien*
- ↪ **Netherlands:** *Stichting BREIN v Ziggo BV*, First Chamber 14/02399 LZ/EE, Supreme Court of the Netherlands, 13 November 2015
- ↪ **Belgium:** *VZW Belgian Anti-Piracy Federation v. NV Telenet et al.*, 2010/AR/2541, Belgium, Court of Appeal for Antwerp (26 Sept. 2011)
- ↪ **France:** *Société Française du Radiotéléphone et al. v. Orange et al.*, Case No: 14/03236, France, Paris Court of First Instance (04 December 2014)
- ↪ **Finland:** *The Finnish National Group of IFPI et al. v. Anvia Oyj et al.*, Docket no. 2015/625, Finland, Mark Court (29th April 2016)
- ↪ **UK:** *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch) (17 October 2014) and cases above.

Fundamental rights

- Article 9 *International Covenant on Economic, Social Rights*
- Article 19 *Universal Declaration of Human Rights*
- Article 11 *EU Charter of Fundamental Rights*
- Article 10(1) *European Convention on Human Rights*
- Section 2(b) *Canadian Charter of Rights and Freedoms*

Website blocking consistent with human rights

- **CJEU:** *UPC Telekabel Wien* (CJEU case no. C-314/12)
- **UK:** *Cartier CA, Cartier, Twentieth Century Fox v. Sky UK*, [2015] EWHC 1082; *Twentieth Century Fox Film Corp & Ors v British Telecommunications Plc* (No. 1), [2011] EWHC 1981 (Ch), [2012] Bus LR 1471
- **Belgium:** Court of Appeal Antwerp, 26 September 2011, No. 3399 Rep. 2011/8314, p. 14.
- **France:** Tribunal de Grandes Instances de Paris, 28 November 2013, No. 11/60013; Paris Court of Appeal judgment of 15 March 2016 [No 040/2016].
- **Norway:** *Warner Bros. Entertainment Norge AS and others v Telenor Norge AS and others*, Oslo District Court, 01/09/2015, case number 15-067093TVI-OTIR/05,
- **Iceland:** *STEF, samband tónskálda/eig flutningsréttar [Performing Rights Society of Iceland] v Fjarskipti hf.*, District Court of Reykjavik, 14. October 2014
- **Netherlands:** 2012 District Court order quoted in *Stichting BREIN v Ziggo BV*, THE HAGUE COURT, Commercial Law Division, Case/Docket Number District Court C/09/535341/KG ZA 17-891, Sept 22, 2017
- **Germany:** FCJ judgment of 26 November 2015, Case No. I ZR 174/14 and case no. I ZR 3/14; *Constantin Film Verleih GmbH v. Vodafone Kabel Deutschland GmbH*, 7 O 17752/17, Germany, Regional Court of Munich (1 February 2018)

Proposal consistent with net neutrality principles

- U.S. - FCC's *Restoring Internet Freedom* order re-affirmed policy in effect since 2005 that the no blocking rule only applies to lawful content. See, transparency (mandatory disclosure rule) adopted as part of the 2017 order only applies to “lawful content”.
- “Four Freedoms” originally adopted as policy statement in FCC 05-151 repeated the “freedom for consumers to (1) “access the lawful Internet content of their choice”.
- EU - Article 3(3)(a) exception to “(a) comply with Union legislative acts, or national legislation that complies with Union law, to which the provider of internet access services is subject, or with measures that comply with Union law giving effect to such Union legislative acts or national legislation, including with orders by courts or public authorities vested with relevant powers”

The logo for the Canadian Radio-television and Telecommunications Commission (CRTC). It features the letters "CRTC" in a large, bold, black, sans-serif font, centered within a light blue rectangular background.The wordmark for the Government of Canada. The word "Canada" is written in a black, serif font. Above the letter "a" is a small red maple leaf, which is the national symbol of Canada.

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