



Sky's Supplementary Comments to IPO Call for Views on Illicit IPTV Streaming Devices

1. This submission is made further to our full response to the IPO on 12 April 2017 in light of the recent CJEU judgement in the Stichting Brein v Jack Frederik Wullems case ("Filmspeler").
2. The CJEU's judgment in the Filmspeler case is a welcome development in addressing the problem of illicit streaming devices. It finds that a user makes an act of communication to the public, "when he intervenes, in full knowledge of the consequences of his action, to give access to a protected work to his customers and does so, in particular, where, in the absence of that intervention, his customers would not, in principle, be able to enjoy the broadcast work."
3. Based on the facts of Filmspeler, a person communicates to the public when he or she sells a streaming device that he or she has loaded with add-ons which enable access to protected content. In light of the judgment, such a person may now face criminal liability under section 107(2A) of the CDPA. (The judgment does not alter the challenges faced in prosecuting a supplier under any of the other statutory provisions set out in our 12 April submission).
4. Although this is a positive development, it is Sky's strong view that it does not obviate the need for legislative change. The judgment leaves a number of gaps or doubts in relation to circumstances in which a prosecution could be brought under section 107(2A). For example, even putting to one side the fact that a prosecution under section 107(2A) would clearly not be available in relation to the sale of a "vanilla" device (even though such devices are frequently sold in the knowledge that they can be easily adapted by the user in order to access unauthorised content, and are very often adapted in that way):
 - It is unclear from Filmspeler whether a device sold "vanilla" but with accompanying instructions about how to install add-ons would constitute a communication to the public;
 - There is room for argument over whether the sale of a device that had been pre-configured with add-ons by a person other than the device seller would be caught. In that case, there is not a clear intervention by the seller; alternatively the seller may be able to argue that he did not have the requisite knowledge for the purposes of section 107(2A), and proof of that to the criminal standard may be challenging.
5. It is perhaps trite to point out that an inevitable, or at the least highly likely, consequence of Filmspeler is that those involved in the sale of streaming devices will quickly adapt so that they no longer sell pre-loaded devices, with the effect that very quickly (and we are seeing this trend already), the judgment's benefit from a prosecutorial perspective will be nullified.

6. Sky's proposed changes to the CDPA address all of the above issues. As set out in our submission dated 12 April 2017, they propose relatively minor amendments to section 297A of the CDPA. That section, unlike section 107(2A), is focussed on the concept of an unauthorised device, rather than the motives of the defendant, and is therefore a clearer cut, more objective, more demonstrable test for a prosecutor to satisfy. There is a defence in section 297A available to defendants who can prove that they had no knowledge that they were dealing with an unauthorised device, but importantly the burden is on the defendant in that situation, not on the prosecutor as would be the case with a prosecution under section 107(2A). The changes we propose simply bring up to date, and future proof, a section of the CDPA which has become outdated, and which should therefore in any event be revisited.
7. The prevailing political and judicial attitude is very much in favour of protecting copyright and Filmspeler is a further welcome development in that regard. We believe that with their current call for views, the IPO and UK Government have an opportunity to further support the direction of travel by the introduction of a narrow set of changes to the CDPA which signal their determination to support the creative industries in taking on piracy and the damage that it causes to the UK economy.