

**CULTURE, MEDIA AND SPORT
SELECT COMMITTEE INQUIRY
'NEW MEDIA AND THE CREATIVE INDUSTRIES'**

**RESPONSE FROM THE
ALLIANCE AGAINST INTELLECTUAL PROPERTY (IP)
THEFT**

27 FEBRUARY 2006

Members:

Anti-Counterfeiting Group

British Association of Record
Dealers

British Brands Group

British Jewellery & Giftware
Federation

British Music Rights

British Phonographic Industry

British Video Association

Business Software Alliance

Copyright Licensing Agency

Entertainment and Leisure
Software Publishers
Association

Federation Against Copyright
Theft

Federation Against Software
Theft

Film Distributors Association

Institute of Trade Mark
Attorneys

Publishers Licensing Society

Video Standards Council

INTRODUCTION

The Alliance Against IP Theft welcomes the Select Committee's inquiry into New Media and the Creative Industries and believes the inquiry has raised some important areas for discussion.

The Alliance members are drawn from all aspects of the creative and manufacturing industries, along with representatives from the world of publishing and copyright licensing¹. Further information regarding the organisation can be found at www.allianceagainstiptheft.co.uk.

All of our members are employing new technologies to develop new services and indeed many are already licensing their works to a wide range of new media platforms.

VALUE OF THE CREATIVE INDUSTRIES

The creative industries contribute a large amount to the UK, not merely in terms of financial contributions to the country's economy but also by providing an environment whereby innovation, creativity and enterprise can flourish.

To put it in stark terms, the creative industries contribute over 8% of the UK's GDP² and are responsible for nearly 2 million jobs³. This contribution is possible because the creative industries are working with government to ensure that creativity is properly rewarded and protected.

We have a hugely successful creative sector of which the country can be proud, demonstrated by the success of movies such as Harry Potter, artists like Coldplay and games such as Tomb Raider (Lara Croft). In fact, in the Great British Design Quest, organised by the Design Museum and BBC's Culture Show, two British computer games – Tomb Raider and Grand Theft Auto – have been voted into the Top 10,

¹ Members of the Alliance Against IP Theft are: Anti Counterfeiting Group; British Association of Record Dealers; British Brands Group; British Jewellery Giftware and Finishing Federation; British Music Rights; British Phonographic Industry; British Video Association; Business Software Alliance; Cinema Exhibitors Association; Copyright Licensing Agency; Entertainment Leisure Software Publishers Association; Federation Against Copyright Theft; Federation Against Software Theft; Film Distributors Association; Institute of Trade Mark Attorneys; Publishers Licensing Society; Video Standards Council

² EU Study "The Contribution of Copyright and Related Rights to the European Economy, Europe"

³ Figure from the Department for Culture, Media and Sport

alongside such iconic British designs as the red phone box and the Mini. The UK creative industries are innovative and dynamic, but require the right regulatory environment for them to remain so.

OPPORTUNITIES FROM DEVELOPMENTS IN NEW MEDIA

Technological advances are opening up new opportunities for the creative industries and consumers alike. The variety of platforms available for people to access creative content such as films, television programmes, music and games, offer consumers a wide range of options as to how and when content is watched, listened to or played. This expansion of choice also provides distributors of content the ability to reach a wider audience with their products. In this, the British creative industries both react to consumer demand and lead the way in developing new technologies to benefit those consumers.

However, at present both consumers and the creative industries are operating in a transitional environment. Whilst opportunities to access creative content through digital means are already widespread and rapidly expanding, consumers and business alike are still adapting to the diverse range of digital platforms, be they Video-on-Demand (VoD), Internet downloading or delivery of content to the mobile telephone and other devices. During this period of transition and convergence, industry and government must ensure that consumers are protected from scams and the sale of inferior, illegal products no matter where or how purchases are made; and that the rights of IP rights holders are similarly protected.

Digital Rights Management

Increased access to creative content in the digital age has been made possible because of technological advances such as Digital Rights Management. Digital Rights Management (DRM) benefits consumers and industry alike, allowing content providers to adapt their business models and leading, as a result, to an unprecedented expansion of consumer choice in content delivery. With the ever growing array of electronic hardware, content providers can now offer consumers a menu of options to choose from at different price points, together with the possibility of using and enjoying content in a variety of ways. Examples of such use include: the purchase and download of individual works for single or multiple use; subscription services; rental services; video on demand (VoD) and pay per view (PPV); previews; evaluation and trial use; and real time distribution of content.

It is important to remember that a number of such services, such as BskyB's satellite broadcasting, has been in existence for a long time, thanks to DRM technology. In fact such existing and new services could not operate without DRM. Without DRM consumer choice would be significantly restricted. For example, DRM allows for the legal streaming and downloading of a movie, or a single online purchase of a music track to be transferred legally onto an iPod or other MP3 player. DRM allows the rights holder to be paid for such access. With increasing public demand for alternatives to physical carriers of content such as CDs, DVDs and games, owners of intellectual property want to be able to offer new ways for their content to be accessed legally. Online purchasing needs to be viewed in the same way as traditional shopping. Just as someone would walk into a record shop and buy a CD, similar payment needs to be made for music downloaded from a website. This is crucial in order for record companies, authors and artists to be assured of remuneration for their work and investment. Most people agree that it is a crime to help oneself to the property of another without payment or permission, and accessing illegal content online must be viewed the same. This scenario can be replicated across the creative industries, making it crucial to their survival for a robust IPR regime as we go further into the digital age.

In addition, there is also concern about the problem of piracy and underage access. While the film and games industries operate under a statutory classification system to protect minors from unsuitable material, which is enforced in the sales and rental market and punishable by criminal penalties, pirates do not adhere to labelling and classification regulations. Traders in pirated material not only supply work that has not been examined by the British Board of Film Classification, but the same traders also supply content that would not be passed as suitable for home viewing at all, such as pornographic and paedophilic content.

There is now a host of new online services offered by both the music and film industries. These allow consumers to purchase and download legally films and music via the internet. Such services for music include:

- iTunes
- MyCokeMusic
- HMV Digital
- Lovefilm.com

Industry is still severely threatened by illegal filesharing services such as Limewire, BitTorrent and KaZaa, but with these new legal alternatives there are now over 1 million music tracks available to download legally, with legal download sales

surpassing 600,000 a week⁴. Crucially, these offer consumers a legal alternative to the purchasing of music online.

The film industry is also launching online services. Examples include:

- Home Choice Video-on-Demand (VoD) packages, a TV-over-DSL service based in London and SE England
- Kingston Interactive Television in Hull
- Lovefilm.com, which launched in December 2005. This service has about 150,000 subscribers in the UK who are downloading movies on a rental basis, ie they have 24 hours to view; films are also available via AOL.

Factors that will transform the market prospects include the continuing rapid expansion of broadband availability, technological advances and price reductions in the key areas of bandwidth capacity, functionality and interconnectivity between devices in the home, along with the successful resolution of security issues, and also competition between broadband suppliers. BT, Wanadoo and Bulldog are all planning to offer TV, SVoD (subscription) and true VoD services in the near future.

Digital rights management also assists consumers in their role as creators. DRM tools allow people to turn their own intellectual property into marketable and saleable content, enabling cottage industries to develop whereby individuals can make a living from their creations, while being afforded proper protection.

EFFECTS ON CREATIVE INDUSTRIES OF UNAUTHORISED REPRODUCTION AND DISSEMINATION OF CREATIVE CONTENT

The Committee has asked for views on the effects of unauthorised reproduction. While there is no doubt that new media advancements bring opportunities for consumers and businesses alike, industry and government needs to be mindful of existing and potential dangers. The increased household penetration of fast broadband services, DVD re-writers and recorders, mobile devices such as the video-iPod, PSPs and mobile telephony all offer tempting prospects for illicit copying.

Without exception, and something which crosses the new and old technology divide, the biggest threat to the prosperity and development of the creative industries is intellectual property theft. Illegal copying, filesharing and other illicit uses of copyright material are growing exponentially, while counterfeiting and piracy is becoming increasingly attractive to organised criminal gangs.

⁴ Sales data from the Official UK Charts Company (OCC) 2005

Evidence from Alliance members shows that:

- The market in pirated DVDs increased 20% in 2005.
- Typically a major release of a new film on DVD loses 20-30% of sales through counterfeiting and piracy, amounting to an average of £4 million lost per “blockbuster” title and up to £1.5 million in lost box office sales.
- British film, *Harry Potter and the Prisoner of Azkaban*, saw 21% (£9 million worth) of DVD sales and a further £2.8 million of box office receipts lost through counterfeiting and piracy.
- The audio-visual industry annually loses over £800 million through copyright theft.⁵
- The music industry lost £654 million during 2003 and 2004 through illegal downloading⁶.
- Piracy in the UK is now so endemic that a ten-point drop in software piracy in the UK would:
 - Add nearly £11 billion to the UK economy.
 - Create nearly 34,000 new jobs.
 - Increase local industry revenues by £9.6 billion.
 - Generate an additional £2.8 billion in tax revenues⁷.

The increasing digital environment is also impacting on creators of physical goods. UK brand owners estimate that there are more than 80 million websites selling fake goods globally. One brand owner’s internet enforcer took down three websites recently which carried over 15,000 pieces of fake sportswear in one hour.

The video industry has a similar and growing problem with the sale of counterfeit and pirated goods over the internet. The BPI removed 57,463 infringing items from internet action sites in 2005 and have removed 28,728 so far in the first 2 months of 2006.

Last year the Federation Against Copyright Theft (FACT) served 114 cease and desist notices on infringing websites. This was an increase of 50% on 2004. The organisation also removed over 26,000 infringing auction listings pages, from sites such as eBay. The number of actual fake items for sale, however, is considerably higher as each page may have multiple items for sale but totals are not recorded.

⁵ Research conducted by IPSOS in November 2005 into Digital and Physical Piracy in Great Britain

⁶ TNS two year study April 05 that tracked purchasing habits of downloaders against non-downloaders

⁷ Business Software Alliance/IDC Global Software Piracy Study 2005

While this is an issue for industry to tackle, research does show a worrying lack of awareness by the public about counterfeiting and piracy and its links to other criminal activity. In recent research carried out for the film industry by OTX, film piracy was seen as a less severe crime than shoplifting and credit card fraud⁸. This demonstrates two things – first, that theft of content is still not being viewed as seriously as theft of a physical product, and second, that despite communications campaigns mounted by industry, there remains a lack of understanding amongst the general public of the many organised and associated crime units behind counterfeiting and piracy.

A raid conducted by Alliance members FACT and the BPI in December 2005 highlighted the exploitation of young people in the sale of counterfeit DVDs. As part of a co-ordinated strategy to target illegal trade at Barras Market in Glasgow, a nearby house that was being used as a factory supplying the market sellers was raided. Approximately eight thousand DVDs, computer games and CDs were found at the property, along with master copies of pornographic films, computers and burners. The Police arrested twelve individuals, four of whom were under 16, with one as young as 13 years old. Children are increasingly becoming involved in the sale of counterfeit DVDs and CDs. What appears to be a harmless weekend job is a route into crime and the wider dangers this brings.

The Government has also recognised the increasing links between IP theft and other criminal activity. The Department of Work and Pensions (DWP) formed part of a national multi-agency investigation into persons involved in the production and sale of counterfeit goods, predominately CDs, DVDs and computer games while claiming benefits from the DWP. The DWP Counter Fraud Investigation Service (CFIS), industry Anti Piracy Units, Trading Standards and the Police all came together for Operation Zouk to uncover this criminal activity and was an excellent example of multi-agency working. The Operation saw raids that netted over half a million pounds' worth of DVDs and CDs, with 123 people arrested – 96 of whom were in receipt of state benefits. The total value of the goods seized was over £3 billion pounds⁹.

STEPS THAT NEED TO BE TAKEN TO PROTECT CREATORS

Technology is becoming more mobile and consumers' desire to transfer content between different platforms is growing. Government and industry need to work

⁸ OTX research into Digital Piracy in the UK conducted between March 04 and Sept 05

⁹ Patent Office Annual Enforcement Report 2004

together to ensure creators are protected in this new environment and the correct balance is maintained between consumer access and creators' rights.

Industry acknowledges that it has a role to play in encouraging people to respect copyright. It is already making headway to ensure intellectual property is respected and protected through such initiatives as British Music Right's *Respect the Value of Music* and the Industry Trust for IP Awareness's communications campaign from the video industry, targeting different types of users and audiences. In addition, 'Digital File Check', software created for IFPI, is a simple consumer facing tool developed by industry that enables computer users to identify and remove file-sharing software and illicit files and provides guidance on how to enjoy copyright works legally. Also, in June 2005, the record industry teamed up with Child Net to launch a campaign aimed at educating parents about the dangers of peer2peer filesharing.¹⁰

Industry does understand consumers' misunderstanding of the use and function of copyprotection measures. The issue needing to be tackled, however, is how to protect content on existing technology, once revolutionary but now vulnerable, in the digital / Internet environment.

This is not a matter which industry can tackle alone. If DRM technologies were not afforded appropriate levels of legal protection, this expansion in consumer choice would not have been possible. Under the WIPO Copyright Treaty and the EU Copyright Directive (now implemented into UK law), an international framework for the protection of such technology has been created. This has ensured that the technology used to distribute and access content is afforded similar protection to the content itself. Such a move was vital to ensure that the opportunities which increased use of DRM bring are not cancelled out by those seeking to bypass the technology, to the disadvantage of content providers and consumers alike.

However, while the digital environment brings such regulatory and legislative challenges, there also remain inconsistencies within current intellectual property law, which is hampering the creative industries' ability to protect its IP. The Alliance strongly believes that these need to be addressed.

Outstanding legislative issues

- Law on damages

A consultation is expected from the Department for Constitutional Affairs reviewing the damages regime in UK. This is important as the amended system that came into effect with the Copyright Designs and Patents Act 1988 (CDPA) has had the effect of

making the awarding of additional damages in copyright cases extremely difficult, with it being impossible in trade mark cases as no such legislation exists. Criminals are making huge profits through counterfeiting and piracy. For example, the video industry calculate the criminal gain in video and film piracy at £278 million, at street prices, while criminals are making £540 million annual through games software piracy. The compensatory damages awarded against them at present impact little on these profits. The ability to use damages as a deterrent would be a valuable tool to those fighting this criminal activity and assist creators in protecting their creative content, particularly given the ease with which illegal copies can now be produced.

- Directors' Liability

With the majority of people having access to the internet at work, the control which directors exercise over the business is becoming increasingly important. Over 60% of software piracy takes place in the workplace and investigations conducted by Alliance members have found evidence of illegal file sharing and downloading. Current legislation limits directors' liability to their actual knowledge (consent or connivance) in connection with copyright offences committed by the company. Directors may escape personal risk through denying knowledge, which ultimately means that there is little real incentive to make sure the company does not commit copyright offences and maintain compliance. Alliance members are also concerned about directors of companies who allow illegal trade on their premises through such activities as outside traders being allowed on the company premises and illegal trade at car boot sales on their property, and would like to see measures introduced which place a legal responsibility on directors to stop such illegal activity.

- Illegal imitation

Whilst not 'new media', this is an issue which is nonetheless affecting a section of the creative industries. Creators and innovators of packaging of branded goods are constantly having their material copied by others operating in the same market. This copying of packaging design not only misleads the consumer by making shoppers purchase goods they did not intend to buy, but it 'free-rides' on the quality, heritage, innovation and investment of the original branded packaging. More effective statutory protection is needed for this area of the creative industries to ensure consumers are not confused, and importantly, to protect creators' designs.

- Burden of proof

In cases of copyright theft, the law at present places the burden of proof on the copyright holder to prove that no permission has been given for the product / design / image to be copied. The growth in illegal copying enabled by the development of

¹⁰ See www.childnet-int.org/music

new technologies makes this an ever more costly burden to the creative industries. The Alliance believes that this burden of proof should be reversed, with those accused of illegal copying having to prove they had agreement from the copyright holder.

- Resources

Effective enforcement of intellectual property rights (along with protection of consumers and legitimate businesses) is being hampered by a lack of resources and powers for trading standards. The most robust set of legislative measures may be put in place to protect IP both in the digital and non-digital environments, but if accompanying resources are not made available to those charged with the enforcement of such measures, the system falls down. The enactment of s107A of the CPDA, which gives trading standards the duty to enforce copyright law, is crucial, as is the proposed incentivisation scheme whereby trading standards can recoup a percentage of the costs of prosecutions from assets seized under the 2002 Proceeds of Crime Act.

Intellectual property theft continues to be the perceived low risk, high profit criminal activity it has become, with little value placed on the production of ideas and creativity. The Government has made some movement on this front, but investigating IP crime by Trading Standards and mounting subsequent prosecutions still imposes huge burdens on already tight budgets. With the proliferation of digital theft of IP rights, this burden can only be set to grow. The Government must ensure adequate funding is made available.

In addition, the Alliance remains concerned over the implementation of the EU Enforcement Directive into UK law. Following the consultation last year and the Government's subsequent response, there remain a number of outstanding issues of concern to our members. Attached in the annex is the Alliance's recent submission to the Patent Office, which outlines these concerns.

IP CRIME GROUP

However, great strides have been made within government and key advancements made to ensure IP theft is properly addressed. The Alliance is very supportive of, and a key player in, the Patent Office's IP Crime Group. This Group performs the important and crucial function of bringing together all those involved in IP protection and enforcement, from the individual industries to the police, HMRC and trading standards. This allows, for the first time, a central point for intelligence gathering and information dissemination.

The success of the IP Crime Group can be seen in the hugely successful Operation Dawn, which took place just before Christmas. This cross industry, cross agency operation in Wembley saw the seizure of counterfeit goods worth more than £1.5 million. Co-ordinated by the IP Crime Group, this operation also led to the arrest of two people, the detention of a number of suspected illegal immigrants and the identification of a number of benefit fraudsters.

The Group's work is being taken forward with regional intelligence on IP crime to be disseminated via the Patent Office to Trading Standards Services and police forces. It is of utmost importance that the work of the IP Crime Group is fully supported across parliament and government, as it is providing real results in the fight against IP crime and affording the creative industries some real protection.

CONCLUSION

The growth in new media and the accompanying new technologies is changing how consumers access and pay for creative content and how content providers distribute such material. This means the protection of intellectual property will also need to change.

The Alliance believes that as the UK makes the transition from accessing creative content through hardware such as CDs and DVDs, to a market where content is accessed and consumed via a wide range of platforms it is important that the intellectual property rights which accompany such access are properly protected.

Intellectual property theft is already too endemic in the UK. As this submission demonstrates, it costs industry financially, and has unsavoury connections to many other forms of criminal activity. For the creative industries and consumers to be able to make the most of the opportunities new media offers, intellectual property needs to be respected and protected.

ANNEX 1

6 February 2006

Jeff Watson
Senior Policy Advisor
Intellectual Property and Innovation Directorate
UK Patent Office
Concept House
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Newport
NP10 8QQ

Dear Jeff

Further comments on the UK Implementation of the Enforcement Directive

Following the Government's response to its consultation on the UK Implementation of the Enforcement Directive, there remain a number of related issues which the Alliance would like to raise:

Article 4 Persons entitled to apply for the application of measures, procedures and remedies

We welcome the changes suggested in section 102A enabling representative associations to bring action in their own name as provided for in the Directive, but endorse the further points regarding this Article the Federation Against Software Theft make in its submission.

Article 5 Presumptions

The Alliance accepts the Government's rationale that to extend the presumptions proposed for civil proceedings to criminal proceedings via this Directive would be inappropriate, and will seek other avenues for this extension to take place.

However, the Government's response thus far does not address the further points raised in the Alliance's submission regarding presumptions – namely those of subsistence of copyright and lack of licence.

Presumption of subsistence of copyright

As outlined in our original submission, the Alliance submits that such a provision as exists in Section 139 (2) of the Irish Copyright Act - "*Copyright shall be presumed to subsist in a work until the contrary is proved*" – should be included within the CPDA. This is important in order to afford proper protection to creators, innovators and owners of copyright whose claims can be disproportionately extended by defendants

who simply put them to strict proof on all elements of the claim. Although the practical burden of proving subsistence may be very great for some right holders, subsistence is in truth much less disputable than authorship, a presumption of which has been part of our law since 1911 and is required by the Berne Convention. Such a presumption is less burdensome for defendants than the existing presumption of authorship, which is widely accepted as being necessary and reasonable.

Presumption of lack of licence

The Alliance also submits that there ought to be embodied in UK law a presumption that the defendant does not have a licence to exploit the copyright work. Again, this presumption would be rebuttable and the defendant could easily prove the fact of his licence by producing it to the court. This would follow the law relating to various every day offences where the relevant information is normally within the knowledge of the defendant, such as driving without insurance (burden on the accused to produce his certificate of insurance).

There is a precedent for such provision given there was a qualified presumption of subsistence under the 1956 Act, and therefore the Alliance believes the CDPA should be amended to reflect this. The Alliance also believes this amendment is necessary to meet the general obligation under Article 3 that IP protection must be effective and not unnecessarily complicated or costly. The burden of proving a lack of licence from any possible source is disproportionately onerous on a rights owner in light of the ease with which a defendant can produce or prove the grant of licence on which he relies.

Article 7: Civil Searches

The Alliance accepts that there is a civil search and seizure remedy present in the United Kingdom, and as such, Article 7 does not need to be implemented to introduce such a remedy. However, the Alliance is disappointed that no review of the remedy itself, and in particular the costly, anachronistic and unnecessary "supervising solicitor" obligation, has been undertaken. This latter requirement means that the remedy is beyond the means of all but the wealthiest of right holders.

In addition, the Alliance endorses the position taken by BSA in its response to the Patent Office concerning Article 7(5): the Alliance does not believe that unattributed evidence is admissible in civil search and seizure applications, a matter that should be addressed by a proper implementation of Article 7(5).

Article 8: Right of Information

The Alliance is concerned with the current wording used in the heading of Regulation 5 and feels it could unintentionally be misleading. At present the heading reads "Order in Scotland for disclosure of information about infringing articles". Given that the disclosure is concerned with the circumstances of infringing *acts*, which could include services, the Alliance respectfully suggests this is amended.

In addition, the Alliance strongly recommends that the Government avoid there being a different right of information regime in Scotland from that in England, which would be the case if the regulation were to be adopted as currently drafted. To avoid this, the Alliance suggests the regulation simply read:

“The jurisdiction referred to in the decision of the House of Lords known as *Norwich Pharmacal Co. v Customs and Excise Commissioners* to order persons to disclose full information as to the circumstances of tortious acts and as to the identity of wrongdoers shall be exercisable in Scotland as it is in England and Wales”.

Article 9 Provisional and precautionary measures

The Alliance also seeks greater clarity over the explicit provision in relation to all IP rights for the grant of an injunction against an intermediary to prevent or determine an infringement by a third party.

The consultation response makes reference to this suggestion but with no final decision or recommendation made. This provision is very important and already exists in respect of copyright infringement by a third party, via section 97A of the CPDA, and should be extended to all IP rights.

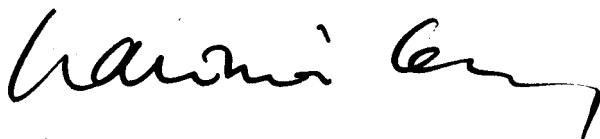
The Alliance is disappointed that the Patent Office has not taken this opportunity to, at the very least, make any recommendations in respect of damages awarded in cases of IP theft, ahead of the anticipated DCA review of damages generally. It is widely accepted that the absence of an effective damages regime to protect intellectual property rights in the United Kingdom is a direct cause of IP theft, a fact that should be recognised and addressed if the crippling levels of IP crime present in the United Kingdom are to be reduced.

Finally, the Alliance also notes that the jurisdiction of Northern Ireland has not been addressed. There are several areas that will need reform, as there are with Scotland and England and Wales, and a regime that is consistent across all three jurisdictions is highly desirable to reduce cost and confusion, as well as to comply with the harmonising intent of the directive. In particular there is a need for pre-action disclosure as in rule 31 in England and Wales and a need for clarity on non-compensatory damages (unless the DCA consultation is intended to deal with Northern Ireland as well).

If you have any questions or would like to discuss the above further please do call me.

Kind regards.

Yours sincerely



Lavinia Carey
Chair