

**INDEPENDENT REVIEW OF
INTELLECTUAL PROPERTY AND GROWTH**

SUBMISSION FROM THE ALLIANCE AGAINST IP THEFT



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INTRODUCTION

The Alliance Against Intellectual Property (IP) Theft welcomes the opportunity to provide evidence to the Independent Review of Intellectual Property and Growth. This review is a timely opportunity to demonstrate the essential role that the United Kingdom's IP framework has in stimulating and sustaining economic growth, providing the foundation for a number of key sectors, and in turn, millions of jobs in the UK.

Our evidence and response makes three crucial observations:

- We agree that the Government should look to the creative and technology industries to generate growth for the British economy. The creative sector is a vibrant, dynamic, constantly evolving sector that has delivered a huge variety of products and services to both business and consumers.
- IP is the basis for the £16 billion which companies invest annually in the UK economy by building brands¹, and allows the UK's brand-building creative industries (including advertising, marketing and design agencies) to generate around £1 billion in Gross Value Added through exports alone². UK businesses invested £23 billion in design in 2008³. According to a recent report by TERA Consulting, the creative industries alone account for 2.7 million jobs in the UK and contribute €175 billion to the UK's GDP⁴. Ensuring that IP rights are protected and enforced provides industry with the requisite certainty to invest in the research and development that in turn leads to growth and employment.
- Innovation is rewarded because the IP framework enables those who generate and invest in ideas and creativity to be rewarded, be they designer, scientist, artist or commercial enterprise. However, while the IP legal framework is fit for purpose, the IP enforcement framework is currently inadequate in dealing with situations when that IP is abused or infringed. Counterfeiting and piracy remain a huge drain on investment, creativity and innovation, particularly in IP-rich industries, such as music, film, video and television, manufactured goods of all kinds, software, games, publishing and for sports rights owners⁵. The lack of IPR enforcement is a major barrier to growth, resulting in ever-increasing attacks on legitimate industry, making it difficult for businesses to compete fairly on a level playing field.

Robust enforcement, and the confidence that investment will be protected, will be a key driver of the UK's creativity, technological progress and competitiveness as a whole. Infringement of IP rights, with inadequate enforcement to combat it, will have precisely the opposite effect. Addressing this is an essential step in ensuring further economic growth.

¹ <http://www.britishbrandsgroup.org.uk/upload/File/WBS%20VoB%20128.pdf>

² Information provided by the British Brands Group

³ 'Driving Economic Growth', NESTA http://www.nesta.org.uk/library/documents/Driving_Ecc_Growth_Web_v2.pdf

⁴ 'Building a Digital Economy: The Importance of Saving Jobs in the EU's Creative Industries' TERA Consulting March 2010 p17

⁵ TERA Consulting estimated that in 2008 the UK lost €1.4bn and 39,000 jobs in the film, TV, music and software industries from digital copyright infringement.

RECOMMENDATIONS

Professor Hargreaves asks, 'what, if anything, should we do to change the UK's IP system in the interest of promoting more rapid innovation and economic growth?'⁶

Our view is that the UK's IP framework is an important driver of innovation and growth in the UK as it provides the legal vehicle and platform from which to register, commercialise and protect 'tradeable' IP. IP law itself does not need fundamental change. The changes that should be made lie in (a) improving how IP policy is dealt with in, and by, government (domestically and internationally), and (b) ensuring IP rights are properly protected – both online and offline – via effective and consistent enforcement.

1. Improve how IP policy is dealt with, in and by government

- Move responsibility for creation and implementation of IP policy from the IPO, an Executive Agency, and place it at the heart of the Department for Business, Innovation and Skills.
- Appoint a Minister for Intellectual Property at Minister of State level with no other major portfolio responsibility.
- Establish quarterly cross-departmental ministerial meetings, chaired once a year by the Secretary of State.
- Provide hands-on, practical, sector-led IP advice and information for micro firms and SMEs to help them maximise, protect and commercialise their IP.
- Measure the contribution of IP to economic growth and the economic damage caused by IP crime.
- Commission full economic impact assessments prior to implementing any significant changes to the IP framework.
- Establish a properly funded IP economic research department.

2. Develop an export strategy to ensure the value of UK IP is maximised

- Take a strong stance at international level on the protection of intellectual property rights by making sure that UK officials engaged in discussions and negotiations fully understand the significance of legal protection for IP in realising value for UK exports and attracting inward investment.
- Align with and support those countries taking steps to improve their IP framework via action plans and MOUs, and encourage others to take similar steps.
- Provide advice for IP-rich industries looking to export by connecting closely with UK Trade & Investment and EU helpdesks as key avenues for UK businesses looking for information and guidance on how to acquire, protect and exploit IP abroad.
- Focus UK law enforcement agencies on the impact that the reduction of economic crimes will have on domestic wealth and employment opportunities when prioritising work with their international partners and within international organisations such as Interpol.
- Provide practical and business-focused advice on foreign IP regimes and jurisdictions to UK SMEs to assist in their development and expansion overseas.
- Adopt the US system of placing 'IP attachés' in embassies around the world.

3. Improve the consistency and effectiveness of IP rights enforcement in the UK

- Examine the published strategy of the US Office of the Intellectual Property Coordinator (which brings together senior political support, trade policy and coordination across the numerous IPR enforcement bodies and government departments responsible for different aspects of the IP framework) and assess its value as a model for advancing and delivering UK growth, jobs and revenue.

⁶ <http://www.ipo.gov.uk/ipreview-c4e.pdf>

- Introduce legal parity for unregistered design rights, including similar criminal provisions as exist for copyright.
- Consult on appropriate measures to protect brands from misappropriation.
- Introduce a deterrent element to UK civil damages for IP infringement
- Address the discrepancies in the level of financial penalties available in Magistrates' Courts (not only for different IP offences but also for different copyright offences).
- Increase maximum penalty for digital copyright theft to match that available for physical copyright theft.
- Increase percentage of POCA awards which are returned to investigators and prosecutors.

4. Ensure IP rights can be protected and enforced online

- Encourage all stakeholders (IP rights owners, ISPs, intermediaries, etc) in the Internet and web economy to work together to ensure legitimate businesses do not suffer at the hands of illegal sites and services.
- Protect businesses and consumers from websites offering, or facilitating access to, illegal goods or content by implementing all provisions of the Digital Economy Act.
- Address the continuing problem of online copyright infringement via the educational notifications and consumer awareness campaigns provided for in the Initial Obligations of the Digital Economy Act.
- Ensure that online IP crime policy is dealt with nationally and coordinated centrally and feeds into the Government's plans for organised crime and cyber crime, thereby creating a coherent strategy for dealing with all criminality on the Internet.
- Establish a dedicated online crime unit with investigatory and operational powers

Whilst the UK is considered to be the best IP framework in the world for protecting, exploiting and enforcing intellectual property⁷, this Review provides an excellent opportunity to suggest improvements to ensure its future success.

By introducing these reforms the Alliance believes individual and commercial users of the worldwide web will have more confidence in what they are accessing, how they are using it and what the business opportunities are to launch new services and platforms without misusing the IP of others they need and depend on to provide a satisfactory and worthwhile online experience.

The Alliance speaks on behalf of one of the broadest representations of IP stakeholders in the UK, from macro to micro and across all industry sectors. A significant amount of dialogue, input and effort has gone into this submission, which we believe provides the IP Review team with real, achievable and balanced recommendations for implementation. However, our long term goal is for it to serve Government and future policy makers with a meaningful blueprint for an IP framework, a catalyst for the UK's IP creators, to provide the growth and stimulation necessary for economic and job certainty in the next decade.

⁷ <http://www.taylorwessing.com/ipindex>

THE CURRENT IP FRAMEWORK

There is much about the current IP framework to applaud. Not only has it allowed for the development and success of existing businesses and industries, it has provided the necessary environment for the creation of a multitude of new digital services and platforms, all designed to deliver a better and more varied consumer experience.

For example, related to Alliance members' activity, the last few years alone have seen:

- A sustained development in online retail websites for all the major companies and numerous other trading platforms for the purchase of manufactured goods and services;
- The ability to watch Premier League matches either on a live, delayed, highlights or clips basis across a number of platforms in 211 countries;
- More than 70 legal digital music services, more than anywhere else in the world;
- An abundance of online film and TV services;
- Numerous video games sites that allow the consumer to play online or download games;
- The availability of a vast array of academic journals;
- The widespread availability of e-books for the mainstream commercial market, with the vast majority of new releases available in e-book and traditional print formats.

In each instance, access is provided how and when consumers want.

In addition, new internet platforms businesses have launched in the UK – some enjoying greater success than others for a variety of reasons. In particular, the UK enjoys a highly competitive online price comparison sector through the likes of moneysupermarket.com, gocompare.com and confused.com. It is worth noting that location has little impact on the commercial viability of such enterprises per se: for example, social networking site Bebo has failed to have the impact of similar services, and MySpace has encountered a number of well-publicised commercial problems.

However, the stated objectives of this review, coupled with comments made by the Prime Minister when the review was launched and from meetings we have held with members of the Review Team, indicate a presumption that there is something in the current framework which is stopping certain types of businesses from developing. A particular emphasis has been placed on 'fair use'.

We are concerned with this presumption as it wrongly links two unconnected phenomena:

- A relative absence of high value global consumer-facing platforms that have been developed in the UK (particularly in the field of search engines and social media); and
- A broad fair use copyright exception in the US which is absent in the UK (where instead there is fair dealing and a system of exceptions underpinned, as is fair use, by the Berne Convention and the three-step-test).

The first cannot be linked with the second, given the existence of numerous other factors which impact on the success or otherwise of a business. This point is explored in greater detail in our response to Copyright Q1.

Instead, we believe that the flexibility of the UK's IP framework should be recognised for its proven ability simultaneously to promote and to protect innovation and creativity. It has been remarkably adaptable in meeting and responding to technological advances – delivering new businesses, products and services while allowing existing businesses to evolve and take full advantage of the opportunities afforded by the Internet. As a technology-and business-neutral model, our IP framework has facilitated technological advances in a highly flexible and responsive manner.

HOW IP POLICY IS DEVELOPED AND IMPLEMENTED

The Alliance urges the Review to consider whether the means by which IP policy is developed and IP issues advanced within Government are delivering maximum benefits for businesses and creating the right environment for growth, and whether the Intellectual Property Office (IPO) is structured in such a way as to provide the right level of expertise and support to businesses.

Responsibility for the development of IP policy currently rests with the IPO. As we understand it, this responsibility is not by virtue of statute but is the result of a deliberate move, post-Gowers, for the IPO to take on an increasing role and responsibility for IP policy. This was most visibly demonstrated by the renaming of the Patent Office to the Intellectual Property Office – a move we supported.

However, it is debatable whether policy functions sitting within an Executive Agency in this way deliver effective policy, particularly at a time when IP policy is of critical importance both to new and to mature enterprises of all sizes and across all business sectors throughout the UK.

The IPO, as an Executive Agency and an appendage of one Department, lacks ‘clout’ within Whitehall, resulting in IP either being an after-thought in broader strategic policy discussions, or its role and function viewed through a narrow policy prism – as evidenced, it could be argued, by this Review itself.

In addition, while the IPO currently develops IP policy, more often than not responsibility for enacting the policy rests with another department, and its enforcement with yet another. For example, policies impacting on the advancement, protection and enforcement of IP rights sit across numerous government departments – BIS, DCMS, Home Office, MoJ, DCLG and the Treasury.

There is also the question of whether the IPO’s operational function (patent, trade mark and design registrations) and the accompanying dependence on this for its funding, results in an over-focus on issues relating to registration and support for the lone inventor, whether through policy or other initiatives, to the detriment of recognition and support for the needs of new or established businesses, be they start ups or SMEs.

British business needs to be encouraged to exploit and commercialise its intellectual property. British business needs a champion of IP, which, under its current configuration, should not and cannot be the IPO.

The Alliance believes that it would be beneficial to move IP policy from the IPO and place it directly within the Department for Business, Innovation and Skills. Both the policy and executive functions related to IP should report to a Minister of State for IP with no other significant portfolio responsibility except to promote and deliver effective IP protection and enforcement as a driver of economic growth and innovation. This would result in better, more coordinated policy of benefit to businesses, law enforcement and the economy.

Recommendations

- Move responsibility for creation and implementation of IP policy from the IPO, an Executive Agency, and place it at the heart of the Department for Business, Innovation and Skills.
- Appoint a Minister for Intellectual Property at Minister of State level with no other major portfolio responsibility.
- Establish quarterly cross-departmental ministerial meetings, chaired once a year by the Secretary of State.
- Provide hands-on, practical, sector-led IP advice and information for micro firms and SMEs to help them maximise, protect and commercialise their IP
- Commission a full economic impact assessment prior to implementing any significant changes to the IP framework.
- Establish a properly funded IP economic research department.

RESPONDING TO THE DIGITAL AGE: RESPONSE TO CALL FOR EVIDENCE (COPYRIGHT)

Copyright Q1: Is there evidence from other national frameworks to suggest how the UK (and EU) copyright systems could better support innovation?

- ***E.g. comparisons with the USA's system (including "fair use") along with other jurisdictions in Asia and Europe***

The IP frameworks in the US, UK and across the EU are broadly similar. While there are some differences in terms of the "exceptions" that are applied to certain copyright protected works (so, in the US, copying is permissible if it falls within the "fair use" exception, whereas in the EU, there are a number of specific exceptions, all of which comply with the historic "three step test"), both systems are engineered to support and reward innovation and creativity.

However, although the IP framework is an important foundation to delivering innovation and economic growth, it is by no means an end in itself. Numerous other factors come into play which can determine whether one country has greater success than another in developing new products and services. These include:

- The ready availability of capital willing to invest in new products and markets. Venture capital investment in the US in Q1 2010 stood at \$4.81 billion, while in Europe the corresponding figure was \$632 million⁸.
- Whether its society supports and encourages a culture of risk-taking, such as US society does. For example, while bankruptcy carries with it a huge stigma in the UK, attitudes are different in the US.
- The size of the domestic market. A larger domestic market often leads to greater initial investment and innovation as the ability to see a return on that investment is all the greater due to economies of scale.
- Whether tax incentives are available. Canada's games industry, which enjoys a multitude of tax reliefs recently introduced across a number of provinces, has grown by 33% in the past two years as a result. The UK games sector, without any tax relief, has seen a corresponding contraction of 10%, despite having the largest developer base in Europe⁹.
- Whether 'talent' can easily move from one company to another or is restricted by employment contracts and / or immigration law. Delegates at a recent Review seminar, organised by the ippr, gave anecdotal evidence to support this position, one delegate in particular highlighting the problems recent changes in immigration law are causing him, resulting in difficulties in recruiting the skilled technical staff he requires.
- The scale and level of Internet/broadband speeds and household penetration.

The issue of the ability of start-ups to access finance and the difference in attitude between US venture capital companies and those in Europe appears particularly pertinent to this debate.

The latest Global Entrepreneurship and Development Index was launched on February 28th 2011. While it places the UK second only to the US as the most enterprising big economy, it points to a shortage of venture capital as a reason for UK performing below its potential¹⁰.

In addition, the Telegraph has been running a very informative series of articles looking at this issue. A recent article written by Richard Titus, an experienced technology and media executive, investor and advisor, pinpoints a number of key differences in approach and attitude which he feels have proved critical to the success of start ups in Silicon Valley¹¹, including:

⁸ <http://thebln.com/2010/04/us-venture-investment-comes-back-strong-europes-lowest-for-5-years>

⁹ <http://www.bbc.co.uk/news/uk-scotland-12373513>

¹⁰ <http://www.economist.com/node/18227144/print>

¹¹ <http://www.telegraph.co.uk/technology/technology-startup100/8325627/Start-Up-100-Whats-wrong-with-European-venture-capital.html>

- **A lack of operational experience amongst European VCs.** According to Titus, “In Silicon Valley, the vast majority of VCs (venture capital providers) have some degree of operational experience: most firms pull a minimum of one, if not more than half, of their partners from the ranks of entrepreneurs and operators. In Europe, you are hard pressed to find significant entrepreneurial or start-up operational experience amongst the general partners or associates at these funds”.
- **A lack of follow-on investment in Europe making Europe as a whole severely undercapitalised.** Titus comments “The number of great businesses I’ve seen wither while searching for follow-on investors for the series B (or even A if their seed round was big) is... depressing, to say the least. In many cases, I’ve seen these businesses simply move to Silicon Valley”
- **The European VC scene being finance-focused as opposed to being entrepreneur-focused.** According to Titus, in Silicon Valley growth is valued over profit in the early years. “Scale” being the goal in order to be able to monetise effectively.

Mary Ellen Field from Brand Finance Ltd, supports these comments in a recent posting on the IPKat blog. She states that there are three major problems facing innovative individuals and SMEs in the UK *“and the IP framework is not one of them”*. She continues, *“The UK has never been short of innovators and it isn’t now, it’s just extremely bad at supporting its innovators, forcing many to move abroad or giving up their innovations for next to nothing because it’s not polite to fight back. I have several innovative British SMEs as clients, they export throughout the world and they use the Internet as an integral part of their businesses. Sadly most of them could not raise funds here and have raised them abroad from foreign investors who take a long term view”*¹².

Fair use v fair dealing – a summary

The above question asks specifically for comments on whether introducing a provision for “fair use”, as in the US, into the UK would better support innovation. The answer to this question is that there is no evidence whatsoever that this would be the case. As highlighted above, it is simply not that important to the success, or otherwise, of Internet companies.

Arguments advocating such a development, under the guise of promoting growth and encouraging innovation, are red herrings. It is often the case that those very companies who complain about aspects of the IP framework have in turn relied heavily on the same framework for their success (by providing, for example, access to creative content produced by others) and also use it to defend their own rights regularly and vigorously. Identifying certain parts of the IP framework for reform could have the perverse result of undermining a system which supports all companies and creators, regardless of their chosen business model, in favour of picking individual commercial “winners” (something which the Chancellor has expressly said the Government cannot do¹³).

The Prime Minister, announcing the Review on 4th November, said that the founders of Google had told the government they could not have started their company in Britain. He said: “The service they provide depends on taking a snapshot of all the content on the internet at any one time and they feel our copyright system is not as friendly to this sort of innovation as it is in the United States”. We believe this charge by Google deserves close scrutiny:

1. It is wrong to state definitively that Google could not have started in the UK. The Copyright Directive is unclear as to whether the technology and process used to capture web content for search purposes would fall under its exception provisions. Whether this was permissible pursuant to a fair use exception in the US was equally unclear and required judicial input from the highest authority. Other issues as to the legality of Google’s business remain unresolved.

¹² <http://ipkitten.blogspot.com/2011/02/systems-fine-but-wheres-money.html>

¹³ http://www.hm-treasury.gov.uk/press_37_10.htm

2. It is foolhardy to consider one element of US law in isolation from the rest of the IP and legal framework in which it operates. Crucially, in the US “fair use” is carefully balanced by other provisions and backed up by a very robust protection framework and sanctions for those found infringing e.g. statutory damages.
3. Fair use is a highly litigated area of US law creating investment uncertainty. Google themselves have found themselves in front of the court as it has been very unclear whether its business practices fell short of what was legal or not. According to the US Copyright Office, “The distinction between fair use and infringement may be unclear and not easily defined”. The advice continues, “If there is any doubt, it is advisable to consult an attorney”. This may be why Professor Hargreaves, on his fact finding trip to Silicon Valley, found that “in Palo Alto, the IP lawyers almost outnumber the software engineers”.
4. The fact that fair use is a highly litigated area of US law indicates that it could not simply be adopted in the UK even if this was desirable. It takes decades for case law to develop through judicial interpretation. In the UK one also has to be mindful of EU legislation and international rules under the Berne Convention. It is no panacea.

Investment requires certainty. The UK framework, if properly enforced (see response to enforcement questions), delivers such certainty to businesses and investors, which is why the UK has more digital music services than anywhere else in the world and the world’s best Internet TV service in the BBC’s iPlayer.

There are similar diverse views associated with introducing a ‘private copying’ exception – not least driven by the fact that different sectors would be impacted differently by such an exception. Responding to changing consumer demands, copyright holders are finding new ways in which to permit or license such private uses and these are best left to the market to develop further. For example, if you purchase a music track from iTunes, this purchase has an in-built licence allowing for the transfer of that music onto other devices in your household. Similarly, many DVDs and Blu-ray Discs are sold with a digital file embedded to provide copies for those who wish to watch the video on different devices.

Setting aside the potential commercial impact of any such exception for personal use, copyright also importantly allows the owner to exercise control over how their work is used. Photographer Paul Ellis, writing on the IP Review Blog, addresses this point very succinctly. He writes: *“Not all uses of my work involve financial gain. I don’t want my pictures used on an extremist political website, or the website of a charity I don’t agree with, or to promote religious ideas I abhor. I fail to see how any of these would fall within the scope of the “derogatory treatment” Moral Right. I wouldn’t give any of these people my time or money. Why should I be obliged to donate to them the use of my property?”*¹⁴.

This does not mean, however, that there are not initiatives we can replicate from other jurisdictions that will lead to greater support for innovation and growth. As mentioned above, the US is better at promoting and defending internationally its IP. Its government takes a more robust stance on enforcement and has created a dedicated office of the White House to ensure US IP is valued and protected at home and abroad¹⁵. This brings together senior political support, trade policy and coordination across the numerous IPR enforcement bodies and government departments responsible for different aspects of the IP framework, ensuring all parts of government work together effectively and towards the same goals.

The Publishers Association recently suggested that the UK government adopt the system of ‘IP attachés’ utilised by the US. This sees many of their embassies around the world hosting staff with specific IP knowledge who can advocate for respect of IP in the nations with which US IP firms wish to trade.

¹⁴ http://www.uk-ipo.net/blog/2011/01/28/my_week_on_the_review/#comments

¹⁵ <http://www.whitehouse.gov/omb/intellectualproperty>

Recommendations

- Examine the published strategy of the US Office of the Intellectual Property Coordinator, to assess its value as a model for advancing and delivering UK growth, jobs and revenue.
- Adopt the US system of placing 'IP attachés' in embassies around the world.

Copyright Q3: Is there evidence of how the UK copyright framework supports growth and innovation?

- **Has it adapted to the economics and opportunities of the digital age?**
- **Does it meet the needs of digital industries e.g. software, games, internet services?**
- **Does it provide the right incentives for investors and creators?**

The UK IP framework is excellent at supporting innovation and delivering growth. It has an in-built flexibility which has delivered significant growth over the past 15 years, is highly accessible and, crucially, business-model neutral – allowing for and accommodating developments in technology and consumer behaviour. It has allowed established companies to transform their businesses online, delivering further economic growth and enhancing their offer to consumers.

For example, the current copyright framework has allowed significant growth and innovation in the video games sector. From facilitating the development of original IP in the UK (such as Little Big Planet, Tomb Raider and Grand Theft Auto) to allowing for the evolution of new business models (such as the microtransaction model or ad-supported models), the existing framework enables traditional and new businesses alike to innovate and adapt in the digital age¹⁶.

The Entertainment Retailers Association reports the creation of numerous new digital retail services – all of which were developed and launched under the existing copyright framework. These offer the consumer a variety of purchasing options, from streaming and downloading to own, to being able to purchase online a physical product. These include, amongst others:

- We7
- iTunes
- HMV Music
- Amazon.co.uk
- Tesco Digital
- Lovefilm
- Emusic.com
- T Mobile Downloads
- Get Games
- Blinkbox

Case study: traditional businesses reinventing themselves – Video games and interactive entertainment

The UK's IP framework has always supported the traditional 'boxed product' business model in the video games industry, delivering games to consumers through retail, to be played on consoles or on a PC. It continues to do so: *Call of Duty: Black Ops*, released in November 2010, broke new records grossing more than £113.8 million in its first week of sales, the biggest grossing week of all time for video games software. At the same time, those who dominate the traditional boxed product business model continue to thrive through innovation and adaptation in a digital age. This includes delivering their products to consumers via new digital platforms, for example Steam.

Steam is an online game platform, which allows consumers to purchase, download and play over 1,100 games from any computer. Steam represents the way in which new business models are developing to meet consumer needs in a digital age, and how older businesses – not just the new players – are able to evolve at

¹⁶ See the submission from UK Interactive Entertainment (UKIE) for more information

the same time, within the current IP framework: traditional methods of distribution are evolving and boxed product purchases can now be made online, as direct downloads for consoles and PCs. This model has been adopted in the UK, indicating once again that the current IP framework is not a barrier to the success of new business models in the UK, such as within the video games industry.

As well as supporting innovative business models and allowing them to flourish in the domestic market, the UK has matched this innovation with Get Games, a UK equivalent to US-developed Steam.

Case study: traditional businesses reinventing themselves - Publishing

In December 2010, Egmont Press launched, to critical acclaim, a storybook app for *'Sir Charlie Stinky Socks and the Really Big Adventure'*. Winner of the Practical Pre-School Bronze medal and shortlisted for the Red House Children's Book Award and the Cambridgeshire Children's Book Award, the app allows children to follow Sir Charlie Stinky Socks through an interactive adventure. The app also includes narration, the ability to touch various objects to hear words and sounds, a songbook and the opportunity for children to colour in the illustrations¹⁷.

In addition, the Work Foundation's report, *A Creative Block?*, cites research from Frontier Economics which shows that, contrary to popular belief, there has been strong growth from start-ups in UK creative industries – further evidence of how the UK copyright framework has been supporting growth and innovation. It found that between 1995 and 2005 start ups in the creative industries contributed £31.8 billion of the £66.4 billion total turnover growth for the creative industries.¹⁸

A further, very tangible, example of how IP has supported growth and innovation can be seen in the numerous innovation hubs around the UK. Far from the UK failing to develop an equivalent of Silicon Valley, there are actually a number of areas where like-minded industries have come together, from Soho in London, home to world-leading businesses in video and film post-production facilitated by investment in a super-fast broadband network, to Dundee in Scotland where computer software developers have coalesced and Cambridge – home to world-leading technology companies.

Case study: Cambridge

Microsoft is one of the world's leading innovative companies, but its innovation is not confined to work in the US. Microsoft Research has been involved in the development in the UK of a number of world-class innovations which are subject to UK and international copyright, patent and other IP-rights protections. One of the key factors that has led Microsoft to conduct such research in Cambridge is the UK's longstanding, robust IP system. One recent innovation that originated at Microsoft Research in Cambridge is "Kinect".

Kinect is Microsoft's natural-interface sensor technology that allows people to interact with a computer, enabling such activities as computer games to be played without handheld or keyboard controls. As the Institute of Electrical and Electronics Engineers (IEEE) reported recently, key elements of this breakthrough innovation, which 'machine-learning' experts had been trying to achieve for twenty years, were developed at Microsoft Research in Cambridge:

"Kinect wouldn't have been possible without the help of IEEE Fellow Andrew Blake and his team at Microsoft Research Cambridge, in the United Kingdom, Microsoft's flagship research lab in Europe. Blake is the managing director there. The lab came up with one of the breakthroughs that lets Kinect track a person without the person having to wear sensors—something researchers in machine learning had been working on for two decades."

Anna Bogdanowicz, The Motion Tech Behind Kinect, The Institute, (6 Jan. 2011)¹⁹

¹⁷ <http://itunes.apple.com/us/app/sir-charlie-stinky-socks-really/id407953805?mt=8>

¹⁸ http://www.theworkfoundation.com/assets/docs/publications/277_A%20creative%20block.pdf

¹⁹ http://www.theinstitute.ieee.org/portal/site/tionline/menuitem.130a3558587d56e8fb2275875bac26c8/index.jsp?&pName=institute_level1_article&TheCat=2201&article=tionline/legacy/inst2011/jan11/featuretech.xml&

Nesta's report '*Creative clusters and innovation: Putting creativity on the map*' also shows how, far from innovation being stifled, digitisation is driving, organically and under the existing framework, significant innovation in the creative industries²⁰. In fact, the creative industries overall display levels of innovation above the national average for all indicators.

However, it is just as important for new innovative companies to be able to protect their IP. Nosy Crow is a small children's publisher which is using new digital technology to tell traditional stories. Their first app, *The Three Little Pigs*, needs a strong IP framework to protect the new ways in which the story is being told and interacted with because, unlike the vast majority of published content, they are relying on IP to protect their technology, given that the *Three Little Pigs* is a non-copyright work.

Case study: Nosy Crow

When we started Nosy Crow – almost a year ago now - we knew that we wanted Nosy Crow to be a publisher of apps for children as well as a publisher of print books. We felt that there was an opportunity to use the features of touchscreen tablets and devices to tell stories in new ways that were interactive and multimedia. And we felt that there was an opportunity for a small, agile newcomer to make apps publishing central to its activity. Unlike larger publishers, we're all in one room, so we don't have a "digital department" that's separate from the rest of our activities.

*Working on *The Three Little Pigs* required us to think in more media and dimensions than, as print publishers, we were used to. In our app, you can make the pigs jump, somersault and speak; you can help the pigs build their houses and drop the wolf down the chimney; you can chase the escaping pigs down the road and you can even huff and puff onto the screen to blow down the pigs' houses.*

The gestation was longer and more complicated than we'd thought, and the result was even better than we'd hoped. Other people seem to think so too.

Kate Wilson, Managing Director, Nosy Crow

Copyright Q4: Is there evidence of areas where the UK copyright framework does not deliver the optimal outcomes:

- **Do established rules or practices obstruct research and innovation?**

Areas do exist which are not delivering optimal outcomes but these, on the whole, relate to the legal as opposed to the copyright framework.

1. Discrepancies in penalties

The Alliance has a long-held concern over the fact that comparable cases of IP infringement attract different levels of penalties depending on a) whether it involves an infringement of copyright or other IP law and b) whether the infringement has taken place online or in the "physical world".

- a) Changes introduced by the previous government created a damaging anomaly as it increased the maximum financial penalty available in the Magistrates Courts for two copyright offences only and no increase at all for trade mark offences. Alliance members already report a lack of understanding and acceptance of the seriousness of IP offences, and such a disparity in penalties available only adds to this confusion. It means, for example, that two sellers of the same counterfeit work can receive different sanctions depending on whether what they were doing infringed copyright or trade mark. Because of this misleading 'hierarchy' of offences caused by a more severe financial sanction being available to certain copyright offences only, trade mark offences may be viewed as less serious and the copyright

²⁰ <http://www.nesta.org.uk/library/documents/Creative-Clusters-29Nov.pdf>

offences to which this increased penalty does not apply (specifically ss297A and 296ZB) can also be seen as less serious or 'soft' offences.

- b) Criminal sanctions should not be dependent upon whether the offence is taking place in an online or physical environment. Intellectual property is still being stolen, whichever format is being used.

2. Lack of implementation of the Digital Economy Act (DEA) 2010

Delay in implementing the DEA is adversely impacting growth and investment in the UK's creative industries. Online copyright infringement is causing significant damage to UK businesses, in particular illegal peer2peer (P2P) filesharing to the UK music and audiovisual business. Jupiter Research estimates, for example, that in 2010 the music industry alone lost £219 million from illegal P2P filesharing and each month the DEA goes unimplemented sees this illegal P2P activity grow²¹.

The DEA is a fair and proportionate response to this growing problem, with the ultimate objective of delivering widespread behavioural change. The detail of this is being developed by Ofcom in its Initial Obligations Code.

While we have not yet seen Ofcom's final Code, we were clear in our response to the consultation on this that the process of subscribers being sent a series of letters, containing educational information on Internet security and legal services and given a 'grace' period between each letter to act on the information given, embeds that fairness. The DEA also makes provision for the establishment of an accessible appeals system should people feel they have been issued with a notification by error.

Our full response to Ofcom's consultation on its draft Initial Obligations Code can be found [here](#).

3. Absence of deterrent damages

Discussed later in this submission (see response to Enforcement Q4), the absence of a deterrent in the UK's civil damages regime means that there is no disincentive to infringe. If the maximum perceived consequence of stealing a licensed product is the prospect of being required to acquire a licence for that product, then there is no down-side to trying to acquire it without payment.

In addition, there are non-copyright related areas of the UK legal framework which are not delivering optimal outcomes. These include:

Lack of legal parity for unregistered design rights

Covered in greater depth in the submission from ACID (Anti-Copying in Design), we have concerns over the lack of availability of criminal penalties for infringement of unregistered design rights. Design right-dependent SMEs are finding their growth is being stifled by post publication revenue being siphoned off by (wealthier) imitators. The ability to have fines imposed in Magistrates Courts (and the attendant reputational damage) would do a lot to help these businesses.

Protection afforded to brands against misappropriation

This is an area where the IP framework falls short of international standards. The Gowers Review recommendation in connection with misleading product packaging, that consumer protection measures be given a chance to work or else government should consult, remains outstanding. Five years on the problem persists, consumer protection measures have not worked and it is time for government to consult. More information on this issue can be found in the Anti-Counterfeiting Group and British Brands Group's submission.

²¹ Research conducted by Harris Interactive for the BPI's Digital Music Nation saw a net increase of 7% in P2P usage in the first half of 2010 <https://bpi.co.uk/assets/files/Digital%20Music%20Nation%202010.pdf>

Recommendations

- Introduce legal parity for unregistered design rights, including similar criminal provisions as exist for copyright.
- Consult on appropriate measures to protect brands from misappropriation.
- Introduce a deterrent element to UK civil damages for IP infringement.
- Address the discrepancies in the level of financial penalties available in Magistrates Courts (not only for different IP offences but also for different copyright offences).
- Increase maximum penalty for digital copyright theft to match that available for physical copyright theft.
- Address the continuing problem of online copyright infringement via the educational notifications and consumer awareness campaigns provided for in the Initial Obligations of the Digital Economy Act.

Copyright Q5: Is there evidence to suggest that the current framework impacts the production and delivery of goods and services which consumers want?

- *E.g. derivative and transformative works*
- *Development of new goods and services*

The Alliance knows of no such evidence. What evidence we have, conversely, proves the opposite – that the current framework has proved incredibly successful in producing and delivering goods and services which consumers want.

Copyright Q6: What evidence is there that the necessity / complexity / cost of obtaining permissions from existing rights holders constrain economic growth?

The Alliance does not have any evidence of its own in relation to this question, but understands, based on conversations with its members, that licensing is taking place and there are plenty of UK businesses offering licensed content.

Copyright Q7: What non-legislative changes could improve practices around copyright to improve overall outcomes?

Education has an important role to play in raising awareness amongst consumers of copyright – in particular, what it is and why it is important. Industry is already playing a leading role in this regard. For example:

- The Industry Trust for IP Awareness undertakes consumer research and executes consumer campaigns on behalf of the audiovisual industry. All these campaigns are designed to change consumers' attitudes and behaviour by raising awareness of the importance of copyright and promoting legal online services.
- Film Education is a charity supported by the UK film industry which promotes and supports understanding and appreciation of film within the curriculum. It provides free classroom resources which cover a wide range of curriculum areas and information and guidance for teachers on how to use film to teach other topics and take their ideas further.
- Childnet recently launched a leaflet in partnership with the audiovisual and music industries. 'Music, Film, TV and the Internet: A guide for parents and teachers' provides practical advice and support to help children stay safe and legal when accessing content online. To date, over 400,000 leaflets have been sent out, including copies to all secondary schools in the UK²².

The creation of more voluntary partnerships to find non-regulatory solutions would also improve overall outcomes.

²² <http://www.childnet.com/downloading>

Evidence: Real Deal

The *Real Deal* campaign is a unique voluntary, cross-stakeholder initiative funded by industry, which has brought together rights holders, trading standards, local authorities and market operators to tackle the huge problem of counterfeit and pirated products being sold at markets and car boot sales²³. Over 100 markets across 32 local authorities have already signed up with plans underway to significantly increase campaign penetration in 2011.



We would like to see, and are actively working towards, similar voluntary initiatives in the online environment. Alliance members are looking to work with intermediaries such as search engines, ISPs, payment system companies and advertisers to reduce the level of IP infringement taking place online. We encourage such activity to be viewed by these companies as key elements of their CSR strategies.

The ease with which consumers can find, access and purchase content on illegal sites is a matter of great concern, particularly given that the vast majority are not necessarily looking for an illegal site over a legal one – they are just looking for the content or product. For example, when searching for UK Top 20 singles on Google, 17 out of the top 20 search results are for links to illegal sites²⁴. This ease of access has a direct impact on economic growth given that the illegal sites and services pay no tax, employ few staff, stifle innovation as they free-ride on others' creativity and impact the ability of legal services to get off the ground and make a return on their investment.

It also damages small businesses trying to make a living. The 2010 Winter Edition of AIM's (Association of Independent Music) Business Journal contains a case study from a one-man record label cataloguing the series of problems he has faced with Google search. Even though Alastair Nicholson undertook a series of pre-launch initiatives to minimise the prospect of the record being posted on illegal file-sharing sites prior to launch (initiatives which proved successful), the situation post launch was very different...

"Fileshares and straight one-click free downloads of the album from blogs took up the first five pages of search results provided by our good friend Google. And then finally on page 6, meekly poking their heads through the infringing thicket were our own humble links to actually buy the album, with money, from our website, iTunes and a few other legitimate sources. (I have to say this is the first time I think I've ever made it through to page 6 of any search results. But being mightily pissed off gives you wings...). The point here is that even if someone had heard about the album at that point, wanted to buy a copy and searched, they wouldn't have found a legitimate source unless they really put some work in."

Alastair Nicholson, Son Records

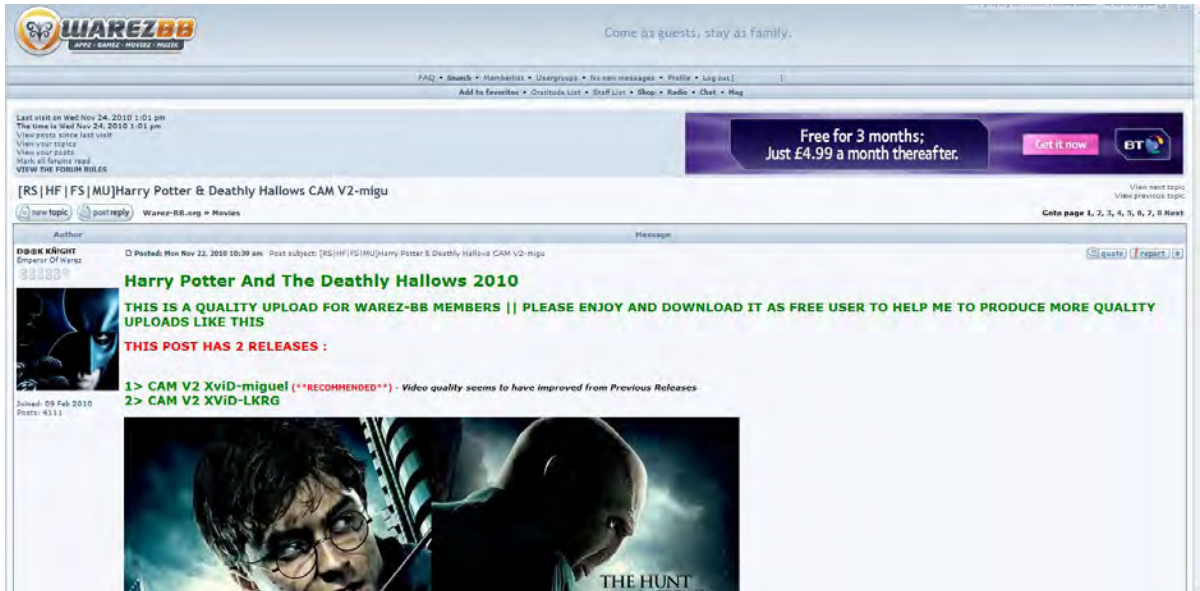
Nicholson is also highly critical of Google's notice and take-down procedures for individual content owners. Instead of providing an email link, the content owner is instead required to write to a postal address in California with a hard copy of the DMCA notice. Not only that (and this has also been experienced first-hand by Alliance members), Google appears to share this with 'free speech'/anti-copyright activist site, chillingeffect.org, something which, according to Nicholson, *"would be difficult not to construe as an effort to make content-owners think twice about exposing their pro-copyright credentials and in so doing possibly appearing uncool to the kids (if not provoking a DDoS attack on their website) in the current climate of 'everything should be free' and militant copyleftists."*

²³ <http://realdealmarkets.co.uk>

²⁴ 'Digital Music Nation 2010' <https://bpi.co.uk/assets/files/Digital%20Music%20Nation%202010.pdf>

While Google has made some welcome announcements in relation to this in recent months, we do believe there is more the company could do proactively to assist those who haven't publicised their exasperating experiences, and not place obstacles in the way of legitimate businesses using its search technology.

In addition, the presence of advertising from blue chip companies on infringing sites and the ability to pay by PayPal, Visa or Mastercard all add an aura of legitimacy which confuses consumers into thinking such sites are legal. See examples below.



Advertising from BT



Advertising from Hawes & Curtis

The government can play an important role in aiding and facilitating discussions between these interested stakeholders. But, as was the case which eventually gave rise to the Digital Economy Act, sometimes self-regulation isn't possible. In instances such as these it is absolutely right that the government has the ability to step in.

Recommendations

- Encourage all stakeholders (IP rights owners, ISPs, intermediaries etc) in the Internet and web economy to work together to ensure legitimate businesses do not suffer at the hands of illegal sites and services.

Copyright Q9: To what extent are the international rules around copyright more or less important than those in the UK? How should the UK approach this matter?

UK creative industries are huge exporters, which means that international rules supporting intellectual property are very important²⁵. Royalty and licence fees feature particularly strongly in the relatively successful performance of creative industries exports, which reflects the strength of the UK as a source of ideas.

Without robust and well-enforced rules governing the protection of intellectual property rights, the UK will not receive a proper return on investment and employment would be threatened. The UK needs to lead by example and ensure the protection it affords its copyright interests is second to none.

According to PRS for Music, the UK is one of only three net exporters of music in the world (the others being USA and Sweden), and they saw a significant increase in revenues in 2009 from British music being used abroad (up over 19% on 2008 to £166.9 million). Subject to the government working to remove regulatory barriers and ensuring the value of IP is retained in export markets, this is projected to increase again by another 40% over the next five years, which will bring valuable revenue back into the UK.

The importance of the international market is not restricted to music. The UK Film Council has advised that the top 10 performing UK films grossed \$1.8 billion worldwide in 2009 (with *Harry Potter and the Half Blood Prince* earning over \$900 million²⁶). International revenues generated by the Premier League reached £400 million in 2010. The Publishers Association report that their members realized approximately £1.88 billion from international sales in 2009.

Evidence: Peppa Pig

In Peppa Pig, Entertainment One (EOne) has used intellectual property to transform an incredibly successful UK programme (merchandising sales in the UK alone reached £200 million in 2010) into a global asset. Using the rights they own in the programme and characters EOne has been able to take the show to US children's channel Nick Jr with industry sources forecasting that, if the show is as successful in the US as it has been in the UK, merchandising revenues could top \$1 billion a year. Shares in EOne have more than doubled in the past year, largely on the back of Peppa's potential.

Recommendation

- Provide practical and business-focused advice on foreign IP regimes and jurisdictions to UK SMEs to assist in their development and expansion overseas.

²⁵ This is noted in the Work Foundation report, *A Creative Block*

http://www.theworkfoundation.com/assets/docs/publications/277_A%20creative%20block.pdf

²⁶ <http://sy10.ukfilmcouncil.ry.com/6.0.asp>

IMPORTANCE OF EFFECTIVE ENFORCEMENT: RESPONSE TO CALL FOR EVIDENCE (ENFORCEMENT)

With IP theft growing and becoming more ingrained as an organised criminal activity²⁷, British industry is losing billions of pounds a year, the Treasury is losing significant tax revenue and consumers are being ripped off.

*We are going to aggressively protect our intellectual property. Our single greatest asset is the innovation and the ingenuity and creativity of the American people*²⁸.

President Barack Obama

Failure to protect intellectual property rights stifles innovation and creation and hampers economic growth and investment.

Pakistani Prime Minister Yusuf Raza Gilani

Enforcement Q1: Is there any evidence of the relationship between the overall IP enforcement framework and economic growth or innovation?

Lack of effective enforcement has a direct impact on economic growth and innovation. The European Commission's recent examination of the implementation and application of the EU Enforcement Directive found that, "Proper protection of IP rights is fundamental to stimulate innovation and culture in a competitive, wealth-generating, knowledge-based economy"²⁹. The inability to protect IP rights and the investment which sits alongside them, whether involving physical goods or online activities, damages legitimate sales, lowers governments' tax revenues, hurts jobs in upstream and downstream industries and damages innovation and competitiveness.

This was brought home recently in the TERA report which estimated that in 2008 the UK lost €1.4 billion and 39,000 jobs in the film, TV, music and software industries from digital copyright infringement alone³⁰. Across Europe the same report estimates that 185,000 jobs were lost to piracy in 2008, and that this will rise to 1.2 million if nothing is done.

A further study, conducted by Frontier Economics, on the impact of counterfeiting on governments and their consumers³¹ conservatively estimates that counterfeiting costs the UK:

- €4.1 billion in lost taxes and higher welfare spending
- 380,000 jobs destroyed, with 31,000 individuals unlikely to be able to find new jobs; and
- €1.7 billion for every 1% increase in crime caused by counterfeiting.

In addition, IDC's 2009 Global Software Piracy study found that while the UK suffers from a business software piracy rate of 27%, reducing this by 10% over 4 years could result in:

- 13,000 new jobs in the UK
- An additional contribution of \$8.4 billion to the UK's GDP³²
- An additional \$3.2 billion in taxes to the Exchequer

²⁷ <http://www.soca.gov.uk/threats/intellectual-property-crime>

²⁸ <http://www.whitehouse.gov/the-press-office/remarks-president-export-import-banks-annual-conference>

²⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0779:FIN:EN:PDF>

³⁰ *Building a Digital Economy: The Importance of Saving Jobs in the EU's Creative Industries*' TERA Consulting March 2010

³¹ <http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/Impact%20of%20Counterfeiting%20on%20Governments%20and%20Consumers%20-%20Exec%20Summary.pdf>

³² http://portal.bsa.org/globalpiracy2009/studies/09_Piracy_Study_Report_A4_final_111010.pdf

In 2009 Oxford Economics conducted research into what the economic benefits would be to government from taking some straightforward steps to tackle film piracy. It found that a series of legislative changes would increase economic output by £614 million, protect the jobs of many thousands of people employed in the film industry, as well as create some 7,900 jobs in the wider economy.

It is, therefore, clear that counterfeiting and piracy has a direct impact on economic growth. The money lost to business and the wider economy is not redirected back into the legitimate economy via legal businesses and services, contributing to innovation, tax revenues and job creation. Investment is also impacted by a lack of confidence and certainty in enforcement, making any investment in industries and businesses which rely on IP more risky.

Evidence: UKIE

In 2010, some 2.6 million individuals were identified as participating in peer-to-peer swarms, exchanging copies of video games.³³ If only a fraction of the consumers involved in P2P infringement bought a copy of the game instead of downloading it unlawfully, this would have resulted in millions of pounds more in revenue for the UK video games industry, with accompanying tax revenue for the Treasury. This money could be reinvested by the industry to develop new products to meet consumer demand and of course to sustain the jobs supported by the video games industry: jobs in development (the UK has the largest developer base in Europe); jobs in marketing, jobs in publishing, and, of course, jobs in retail.

The relationship between effective enforcement and economic growth has also been explored in a recent study by BASCAP (Business Action to Stop Counterfeiting and Piracy). Examining data produced by the OECD, it finds that effective protection of intellectual property rights attracts inward foreign direct investment in developed, developing and least-developed countries. It also points to a further OECD study which found that a 1% increase in the strength of trade mark and copyright protections correlates to a 3.8% and 6.8% increase in foreign direct investment, respectively³⁴.

According to BASCAP this important link is acknowledged by the World Economic Forum with extensive WEF surveys confirming that a country's IP protection is linked with its economic 'competitiveness'.

Because European competitiveness builds on the innovation and value added to products by high levels of creativity, the protection and enforcement of intellectual property go to the heart of the EU's ability to compete in the global economy. EU growth and jobs are hampered when our ideas, brands and products are pirated and counterfeited.³⁵

DG Trade website, European Commission

Recommendations

- Measure the contribution of IP to economic growth and the economic damage caused by IP crime.
- Establish a permanent and properly funded IP economic research function (as already mentioned).

³³ This research was carried out by an industry monitoring programme, covering 230 video games franchises

³⁴ <http://www.iccwbo.org/bascap/index.html?id=41138>

³⁵ http://ec.europa.eu/trade/creating-opportunities/trade-topics/intellectual-property/index_en.htm

Enforcement Q2: In terms of promoting economic growth, what should be the objective of the overall framework for enforcing IP rights?

- a. **Achieving near-total compliance with IP rights?**
- b. **Achieving an acceptable level of compliance?**
- c. **Deterrence of only blatant rights infringement?**

The way in which this question is drafted suggests that a weakened enforcement regime will have a positive net benefit on economic growth. It is our strong belief that the reverse is true as evidenced by South Korea.

Evidence: South Korea

South Korea's rampant online piracy, facilitated by the fastest domestic broadband connections in the world, which had resulted in almost total disappearance of the legitimate audiovisual sector, is only now being reined in by a new law similar to the Digital Economy Act.

There is some evidence that legislation is having a positive effect. Recorded music trade revenues grew 16% in 2008 and 34% in 2009³⁶, and the Korean Copyright Protection Centre reported³⁷ that the volume of music and film piracy fell by 31% and 35% respectively in 2009 (though these figures are based on consumer surveys, so may represent a mix of actual reduction and increased reluctance to admit to piracy, given education campaigns designed to make it less socially acceptable).

This clearly demonstrates that effective enforcement can deliver economic growth, but is an improvement from a low base. Piracy, while no longer getting any worse in Korea, remains a serious problem.

Content industries are also struggling for survival in Spain, something highlighted in the submission from the BPI. Trade revenues in the video sector have fallen by over 60% in five years (2004 – 2009) chiefly due to the high level of Internet piracy being left unchecked by inadequacies in the law and online enforcement.³⁸

Rights holders must be able to protect their creation / investment and the enforcement framework plays a critical part in their ability to do this. This is of particular importance to small and medium sized enterprises ("SMEs"). In a recent survey conducted by the Strategic Advisory Board for IP (SABIP) over 77% of SMEs rated IP rights as important or above to their businesses – over 45% went so far as saying that these rights were "essential"³⁹.

Effective enforcement can also transform illegal services, which contribute nothing to the economy, into legitimate businesses.

Case study: Napster

Napster was one of the first illegal websites facilitating access to copyright-protected content. Enforcement action was taken against it and the business was shut down. As a result of this enforcement action Napster relaunched itself as a legal company, paying tax and employing staff etc, therefore contributing to economic growth.

Were such enforcement action not taken against illegal companies it would be very difficult to make the case to investors that they should invest in legal services and sites as there would be no guarantee that their investment would be protected or that they would see a return.

³⁶ Informa, *Music and Copyright*, March 2010

³⁷ Copyright Protection Centre *Annual Report on Copyright Protection 2010*, <http://dcenter.or.kr/FileDownload?filepath=/app/weblogic/domains/dc/dcenterWeb/board/attachFile/dcpds&filename=13540.pdf&orgfilename=2010%EC%A0%80%EC%9E%91%EA%B6%8C%EB%B3%B4%ED%98%B8%EC%97%B0%EC%B0%A8%EB%B3%B4%EA%B3%A0%EC%84%9C.pdf>

³⁸ International Video Federation Year Book 2010 <http://www.ivf-video.org/new/index.php?>

³⁹ <http://www.ipo.gov.uk/ipresearch-ipenforcement-201010.pdf>

Enforcement Q3: How can the effectiveness of the enforcement framework be measured?

- a. **The ability of companies to obtain financing based on their IP?**
- b. **The ability of companies to innovate within the law?**
- c. **The economic viability of new products, brands, or other innovative behaviour?**

The Alliance believes measuring the effectiveness of the enforcement framework on purely economic and financial measurements results in important functions of enforcement being ignored – namely its absolutely crucial role in consumer protection and stopping often serious and organised criminal activity.

IP crime is a serious problem for at least three main reasons:

- *It is damaging our economic wellbeing – affecting big business but also smaller businesses like retailers who rely on legitimate commerce to earn a living.*
- *It poses considerable risks for consumers – through dangerous goods like fake medicines and electrical goods to counterfeit alcohol containing dangerous substances.*
- *Those engaged in counterfeiting and piracy are often found to be involved in other criminality...as it provides an easy way for them to make a profit to fund other illegal activities they are involved in.*

Deputy Chief Constable Giles York, 2009 IP Crime Report

A simple measure of the effectiveness of enforcement can be seen by studying the overall level of counterfeiting and piracy. The *Annual IP Crime Report*, published by the Intellectual Property Office, gives an indication of the success of public enforcement along with details of industry work and statistics on seizures⁴⁰.

Its 2009 report also highlights the recent assessment by the US Government Accountability Office into IP crime which found that “the studies and experts [they] spoke with suggested that counterfeiting and piracy is a sizable problem which affects consumer behaviour and firms’ incentives to innovate”.

Another way of measuring this effectiveness can be found in asset recovery actions brought under the Proceeds of Crime Act. POCA is designed to ensure criminals do not profit from their criminal acts and there have been a number of successful cases involving IP crime over the years. These are criminal profits on which no tax has been paid, no person has been lawfully employed and therefore have not contributed to the UK’s economy in any way.

Case study: Federation Against Copyright Theft (1)

The Samrana case saw four men sentenced to a total of 18 years for DVD piracy. One of the men was a senior member of a Chinese organised criminal gang and was coordinating and supplying 15 organised crime groups with all the necessary materials to run piracy operations across London and the South East. Financial investigation has identified criminal assets in their millions with a range of properties purchased in the UK, and major cash flows and monies transferred to China, Pakistan and Dubai. The POCA hearing is upcoming.

Case study: Federation Against Copyright Theft (2)

A counterfeiter and handler of stolen goods who made over £56,000 while illegally pocketing benefits was jailed for five years, following an investigation by West Yorkshire Police, Federation Against Copyright Theft and the DWP. David Martin was counterfeiting DVDs and travelling to the continent to trade in tobacco. He pleaded guilty to a variety of offences including benefit fraud, selling counterfeit DVDs and possessing money as criminal property. West Yorkshire Police is in the process of seizing assets from him, including cash and his home address.

⁴⁰ <http://www.ipo.gov.uk/ipcreport09.pdf>

At present, those agencies involved in investigating and prosecuting IP offences share 50% of the total POCA confiscated assets, with the other 50% going to the Treasury. Given how stretched local authority budgets are going to be, and the expected (some of which are already being realised) cuts to trading standards departments, an increase in the amount that investigators and prosecutors are able to get back has the potential to act as a real incentive to protect consumers and businesses by pursuing IP crime cases.

BASCAP also points to a survey carried out for the European Commission in 2008 by IDC of SMEs in the ICT sector. This shows that while these businesses are using IP rights to protect their research investments, they are also using these rights to attract investment and implement innovation. While 81% of SMEs surveys said they used their copyright to launch new products and services and exploit new innovations, 27% said they used it to gain access to funding. The corresponding numbers for trade marks were 71% and 18% and for registered designs 67% and 26%.

Recommendation

- Increase percentage of POCA awards which are returned to investigators and prosecutors.

Enforcement Q4: What evidence is there of the effectiveness, in terms of promoting economic growth, of various approaches to improving compliance with IP rights?

- a. Type of sanction: criminal/civil/injunctive relief***
- b. Use of mediation or other alternative dispute resolution***
- c. Adjustments in commercial terms eg pricing***
- d. Education***
- e. Technological protection measures***

The Alliance has long held that the civil damages regime is ineffective and provides no deterrent to those seeking to infringe IP rights – infringement which, as evidenced above, directly impacts economic growth.

The current regime offers little opportunity for organisations to claim back the true costs of the losses they suffer, apart from the often nominal unpaid licence fee, or takes into account the profits a person may have made on the back of this infringement. Therefore, given the only penalty available is an ability to reclaim the fee which should have been paid in the first place, a situation is promulgated which provides an incentive to infringe.

This issue was highlighted by the European Commission in its report of 22nd December 2010 on the Enforcement Directive. It accepts that currently damages do not appear to effectively dissuade potential infringers from engaging in illegal activities, particularly where damages awarded by the courts fail to match the level of profit made by the infringers. It says that “in such cases, it should be considered whether the courts should have the power to grant damages commensurate with the infringer’s unjust enrichment, even if they exceed the actual damage incurred by the rights holder”⁴¹.

Such a move has also been recommended by the Gowers Review, the Culture, Media and Sport Select Committee, the Law Commission, the Whitfield Committee and the UK Film Council (see extract from Alliance submission to *The Law on Damages* consultation, July 2007, attached as Appendix a).

As recommended earlier (in response to Copyright Q4) the only logical solution can be found in the introduction of pre-established and exemplary damages for cases of IP infringement.

⁴¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0779:FIN:EN:PDF>

Evidence: mediation at work

Alliance member ACID advocates mediation as a mechanism to resolve IP disputes. ACID represents 1,000+ mainly micro firms and SMEs who find court-based solutions too expensive. Since 2000, they have carried out over 2,000 on the spot mediations at trade fairs, with approximately 70% being resolved on-site. Of the remaining 30%, the majority have been resolved by letters before action or by obtaining undertakings. In addition, ACID has conducted 15 timed mediations with a barrister or trained mediator with 70% being resolved.

Recommendation

- Introduce a deterrent element to UK civil damages for IP infringement.

Enforcement Q5: To what extent is cost of litigation a factor in the effectiveness of civil remedies?**a. Evidence of litigation insurance****b. Effect of different civil fora: High Court / County Court / IPO Tribunal**

The costs involved in protecting and enforcing rights is undoubtedly a factor for companies and businesses, particularly SMEs.

ACID highlights the number of difficulties faced by micro firms being able to afford the time and money to enforce against IP infringement, many of whom simply go out of business because they cannot fight their corner. Its case studies, contained in its own submission, also highlight the vulnerability of SMEs who respond to tenders/pitches only to find that either their products are given to a third party to produce more cheaply or their work is stolen and changed sufficiently so that it is difficult and costly to legally challenge.

A couple of the case studies demonstrate the current culture of some major high street retailers who follow SME innovators, select products which have a proven market success and then copy them. They are then sent out to China to manufacture cheaply and brought back to flood the market. There is no level playing field in micro v macro legal challenges and current practice is to stonewall challenges and perpetuate litigation.

Further case studies highlight issues at the exhibition/trade fairs where, unlike EU counterparts, UK exhibition organisers (an industry worth £9.3 billion) do not take a tough stance on copying. This is particularly important given that trade fairs are usually the first point of market entry for new, innovative products and whilst it is a valuable platform, it is also vulnerable to copyists.

Among other issues faced by micro firms is the difficulty to protect, register and enforce their IP rights in BRIC⁴² countries, the difficulties in accessing sector specific IP training and education and approximately 87% believe that IP infringement in the UK is blatant.

However, the reality is that the cost of litigation is also a factor in whether criminal prosecutions are brought. Particularly in a time of crippling local government cuts, the cost of prosecuting IP crime offenders is acting as an incentive to counterfeiters and pirates to chance their arm in this lucrative, and relatively low risk (given the low sentences routinely handed down in respect of IP crime) criminal activity.

⁴² Brazil, Russia, India, China

Enforcement Q6: To what extent, if any, does the enforcement of IP rights operate as a trade barrier, particularly for UK companies attempting to expand overseas? Are there particular issues with particular countries?

- a. Are foreign enforcement systems accessible to UK rights holders?**
- b. Does the digital / online environment affect enforcement abroad?**

America's greatest export has been, and remains, the creativity, ingenuity and innovation of the American People...But creating intellectual property rights without effective enforcement rights is meaningless and leads to stifling of innovation and growth.

Victoria Espinel, US Intellectual Property Enforcement Coordinator⁴³

It is vitally important for UK businesses to be able to protect their rights at home and abroad (also see response above to Copyright Q9). Strong export growth for the UK in IP rich industries relies upon improving respect for IP laws, in foreign markets as well as in the UK. This role that trade policy has to play is recognised by our competitor nations, most notably the US.

Therefore, the UK needs to:

- Take a strong stance at international level on the protection of intellectual property rights and ensure that, in Europe and further afield, whether in direct negotiations with trading partners or in international fora, the UK pursues its national interests by embedding IPR protection in our trade policy.

To deliver that, UK officials engaged in those discussions, both at embassy level and when representing the UK within supra-national organisations, must understand the significance of legal protection for intellectual property in realising value for UK exports and attracting inward investment.

In reaching trading terms with potential partners, negotiators should be accountable for obtaining measurable improvements in reducing both civil infringement and the threat of IP crime, to dissolve the massive barrier to entry that unenforceable rights represent.

- Align with and support those countries taking steps to improve their IP framework and encourage others to take similar steps. The UK Government should work in close co-operation with allies who have a similar view of the significance of IP policy to their trade policy, notably the US Government and individual member states within the EU. The UK position must also be clearly reflected in the pan-European priorities of DG Trade and the new European External Action Service.
- Provide advice for IP-rich industries looking to export. The structures for UK business advice must be connected up with UK T&I and the EU helpdesks to provide information and guidance on how to acquire, protect and exploit IP abroad, particularly in the major developing BRIC economies where export success could have a disproportionately large impact on the UK economy compared to other trading partners.
- Bring to the attention of UK law enforcement agencies the role of economic crime reduction in increasing domestic wealth and employment opportunities when prioritising work with their international partners and within international organisations such as Interpol.

⁴³ http://www.whitehouse.gov/sites/default/files/omb/IPEC/ipec_annual_report_feb2011.pdf

Case study: Sporting iD (Premier League licensees since 1993)

As licensees, Sporting iD do not own the IP that forms the basis for their business, but ensuring it can be effectively protected, domestically and internationally, is fundamental to the success of their company.

Thailand and China are the largest suppliers of unofficial football replica and although the UK is the largest market for the Premier League (and indeed an important target market for these illegal producers), there is a significant market for unofficial product in many developing nations such as in Latin America, Asia and Africa.

The communications, time and cost (and effectiveness) of enforcement in China and Thailand is a key issue for us, the Premier League and its member clubs (and the sportswear brands producing for each club). In Guangzhou, China, for example, there have been very few cases successfully brought to court compared to the level of activity of which everyone is aware.

The UK government should be exerting more focused pressure on foreign governments (and local regions within China) to improve their IP enforcement for activities of particular interest to UK businesses.

Richard Strange
Sporting iD

Recommendations

- Take a strong stance at international level on the protection of intellectual property rights by making sure that UK officials engaged in discussions and negotiations fully understand the significance of legal protection for IP in realising value for UK exports and attracting inward investment.
- Align with and support those countries taking steps to improve their IP framework via action plans and MOUs, and encourage others to take similar steps.
- Provide advice for IP-rich industries looking to export by connecting closely with UK Trade & Investment and EU helpdesks as key avenues for UK businesses looking for information and guidance on how to acquire, protect and exploit IP abroad.
- Bring to the attention of UK law enforcement agencies the role of economic crime reduction in increasing domestic wealth and employment opportunities when prioritising work with their international partners and within international organisations such as Interpol.

There is also a growing problem with the proliferation of counterfeit and pirated material being made available over the Internet. This goes far wider than the well-documented problem of illegal peer-2-peer filesharing and streaming, and encompasses other forms of digital copyright theft as well as the explosion in the sale of counterfeit physical products online via e-auction and other retail sites and fake websites.

This is causing significant damage to legitimate businesses in the UK, allowing criminals to make money from other people's investment, and placing consumers at risk. Industry, government and law enforcement need to work together to protect consumers and legitimate businesses by making it difficult for such sites to operate and make money. If necessary that also includes blocking access to such sites, provision for which is already made in the DEA, subject to parliamentary approval. This will protect consumers from unwittingly breaking the law by accessing the sites and it ensures that unscrupulous players are not able to thrive while legitimate UK businesses suffer.

Recommendations

- Ensure that online IP crime policy is dealt with nationally and coordinated centrally and feeds into the Government's plans for organised crime and cyber crime, thereby creating a coherent strategy for dealing with all criminality on the Internet.
- Establish a dedicated online crime unit with investigatory and operational power.
- Protect businesses and consumers from websites offering, or facilitating access to, illegal goods or content by implementing all provisions of the Digital Economy Act.

Enforcement Q7: To what extent would international courts, or similar bodies, make a difference to enforcement of rights and hence the UK economy?

a. E.g. the proposed EU Patent Court

International cooperation and collaboration has always been imperative to the protection of IP rights. For example, with the vast majority of counterfeit product being brought into the UK from overseas (notably China) and often transported across the EU, it has been vitally important that UK public and private enforcement bodies work closely with their international counterparts. Not only that, there is increasing concern regarding the EU's ability to deal with 'goods in transit'⁴⁴.

The increase in digital copyright theft has raised the importance of international cooperation to a new level. Many sites which offer infringing content for download or streaming, or provide other mechanisms and tools to access or copy content without the permission of the rights owner, are hosted outside the UK's jurisdiction, yet are being accessed by people in the UK and severely damaging the UK economy and UK business interests. According to the Premier League, rights owners in the UK are having their rights diluted by websites offering Premier League content 'safe harboured' in jurisdictions where enforcement action is impossible.

Often those who operate such sites base themselves outside the UK and hide their assets off-shore so it is often impossible to enforce against them in the UK courts. FACT was involved in a case which demonstrated exactly the legal and logistical challenges in enforcing rights internationally. The case involved servers hosting infringing material based in Panama, bank accounts in Latvia (with deposits of up to \$40,000 per month from advertising revenue), but the individual involved was a UK national.

We recommend that the Review approaches with caution proposals for an international court or similar bodies. This would introduce an incredible amount of complexity and add an additional layer of bureaucracy. It is a distraction from the real issue which is the need for greater cooperation between international enforcement bodies. It is this which will deliver growth.

⁴⁴ Please see the submission from the Anti-Counterfeiting Group for detail on this issue.

ABOUT THE ALLIANCE AGAINST IP THEFT

Established in 1998, the Alliance Against IP Theft is a UK-based coalition of trade associations and enforcement organisations with an interest in ensuring intellectual property rights receive the protection they need and deserve. With a combined turnover of over £250 billion, our members include representatives of the audiovisual, music, games and business software, and sports industries, branded manufactured goods, publishers, retailers and designers.

The Alliance is concerned with ensuring that intellectual property rights are valued in the UK and that a robust, efficient legislative and regulatory regime exists, which enables these rights to be properly protected. Our members work closely with trading standards and local police forces to reduce the harm caused by intellectual property crime in local communities and to ensure that legitimate businesses and traders are able to operate fairly.

We work closely with the Department for Business, Innovation and Skills and the Intellectual Property Office to raise awareness of the harm caused by IP theft. We, and many of our members, are also participants in the IP Crime Group, which facilitates cross departmental dialogue and joint working amongst the relevant enforcement bodies and organisations, and SOCA's Programme 18 (where IP crime now sits).

ALLIANCE MEMBERS

Anti-Copying in Design
Anti-Counterfeiting Group
Authors' Licensing and Collecting Society
British Brands Group
BPI (British Recorded Music Industry)
British Video Association
Business Software Alliance
Cinema Exhibitors Association
Copyright Licensing Agency
Design and Artists Copyright Society
Entertainment Retailers Association
Federation Against Copyright Theft
Film Distributors Association
Motion Picture Association
Premier League
PRS for Music
Publishers Association
Publishers Licensing Society
UK Interactive Entertainment

Supporters:

British Jewellery, Giftware & Finishing Federation
Video Standards Council

APPENDIX A – EXTRACT FROM ALLIANCE SUBMISSION TO LAW ON DAMAGES CONSULTATION, JULY 2007

8. SUPPORT FROM GOVERNMENT AND PARLIAMENTARY BODIES

The inadequacies of the current damages regime, and its inability to act as a deterrent, are well-acknowledged across parliamentary and governmental bodies. Below is merely a selection of those who support the call for the damages regime to be used as a deterrent in cases of IP infringement:

- **The Gowers Report of 2006**

“Damage awards should act as a disincentive to infringement”

The Report recommended that the Department for Constitutional Affairs (as the Ministry of Justice then was) seek further evidence to “**ensure that an effective and dissuasive system of damages exists for civil IP cases and that it is operating effectively**”. The Review clearly recognised that a deterrent element needed to be introduced into the damages regime for IP infringement.

- **The Culture, Media and Sport Select Committee Report into New Media and the Creative Industries**

“The deterrent effect of the present law in this respect is near zero: it should be substantial, as are some of the illicit profits being made”

- **Law Commission Report into Aggravated, Exemplary and Restitutionary damages 1997**

“Substantial number of consultees considered that exemplary damages do or could have a useful role to play in filling these gaps. They fulfil a practical need. We agree.”

“Legislation on exemplary damages would have the effect of ‘clarifying’ the law”.

- **The Whitford Committee on whose recommendations reform of the 1956 Act was based**

“It is our view that the provisions for exemplary damages should if anything be strengthened and that the power of courts to award additional damages if there has been a flagrant infringement should not be fettered by any requirement that the plaintiff must show some particular benefit which has accrued to the defendant or that the plaintiff must satisfy the court that effective relief could not otherwise be available. In the case of flagrant infringement the court should be left with a complete discretion to make such award of damages as may seem appropriate to the circumstances, so that the existence of this provision will act as a deterrent if the existing deterrent of conversion damages is removed.” (§ 704, Cmnd 6732, cited in *Redrow Homes Ltd v. Bett Brothers Plc* [1998] UKHL 2).

- **The UK Film Council Report ‘Film Theft in the UK 2004’**

“Exemplary damages are paid as a punitive measure rather than compensating for actual loss in cases where, simply put, there has been some form of malicious intent behind the actions. Given that much organised piracy is carried out with a clear intent to reap a reward from another’s loss, the extension of the principle would appear logical and persuasive. Such a move would act as a disincentive by considerably increasing the financial risk to organised pirates.”