

Gowers Review of Intellectual Property

Call for Evidence

Evidence of Business Software Alliance

● **April 21st 2006**

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Introduction

On February 23rd, 2006, Andrew Gowers announced the launch of a Review of the United Kingdom's "intellectual property frameworks", and invited submissions and evidence as to whether those frameworks require reform. Mr. Gowers explained the context of the Review as follows:

"Intellectual property is crucial to the success of knowledge-based industries, which are increasingly important for the UK's economic competitiveness in the global economy. The IP framework must balance the need to encourage firms and individuals to innovate and invest in new ideas and creative works with the need to ensure that markets remain competitive and that future innovation is not impeded".

In a recent speech to the Social Market Foundation, Lord Sainsbury, Parliamentary Under Secretary of State for Science and Innovation, expanded further on the intention behind the "Gowers Review":

"The IP system offers us a way of exploiting our creativity and our ideas, but it can only do so if it is in good shape itself. This is why the Government has commissioned a review - to check that the IP regime is appropriate for the digital knowledge-based economy of the 21st Century. This is not about a wholesale re-writing of IP law. The balance between the consumer and the inventor is, we believe, broadly right. The UK regime is also part of an international framework. But we believe improvements can be made".

The Review is therefore, in one sense, a health check of intellectual property law and procedure, to ensure that creative industry, a vital part of the UK's economy in the 21st Century, has the best environment within which to flourish.

In this regard, the **Business Software Alliance (BSA)**¹, is pleased to offer this Submission (with accompanying evidence) to the Review.

BSA's comments focus broadly on two themes raised in the Review: does the UK's intellectual property framework sufficiently protect creators, and does that intellectual property framework need reform? BSA members have been at the forefront of technological development in "knowledge-based" industry for many years, and, as such, are well placed to offer comment. BSA has long been concerned that the intellectual property enforcement framework in the UK has not matched the value that intellectual property offers to the creative economy. This requires urgent attention. Equally importantly, the broader consequences (both for industry and consumers) of any reforms (such as the introduction of a "private copy exception") must be carefully considered before any reform can be implemented.

BSA Submission Structure

The Gowers Review is a request for evidence: as such, BSA's Submission takes the form of the following observations, with additional evidentiary materials referenced in the course of the Submission.

Hard copies of the evidentiary materials are contained in the Appendices to the Submission: a soft copy format of this Submission, together with copies of the evidentiary materials, has also been prepared.

¹ The Business Software Alliance (www.bsa.org) is the foremost organization dedicated to promoting a safe and legal digital world. BSA is the voice of the world's commercial software industry and its hardware partners before governments and in the international marketplace. Its members represent one of the fastest growing industries in the world. BSA programmes foster technology innovation through education and policy initiatives that promote copyright protection, cyber security, trade and e-commerce. BSA members include Adobe, Apple, Autodesk, Avid, Bentley Systems, Borland, Cadence Design Systems, Cisco Systems, CNC Software/Mastercam, Dell, Entrust, HP, IBM, Intel, Internet Security Systems, McAfee, Microsoft, PTC, RSA Security, SAP, SolidWorks, Sybase, Symantec, Synopsys, The MathWorks and UGS.

This Submission presents evidence in relation to both the General Questions and Specific Issues detailed in the Gowers Review. Intellectual property rights are generally referred to as “IPR” in this Submission.

Executive Summary

BSA’s key messages arising from the evidence presented to the Review are as follows:

- **Enforcement: key aspects of the civil enforcement arena, insofar as they relate to the enforcement of intellectual property rights, require urgent reform: including the manner in which civil search and seizure orders are made, and how damages are awarded in cases of intellectual property infringement.**
- **Private Copy Exception: there is no evidence to suggest that the implementation of any new “private copy” exception in the United Kingdom is either necessary or desirable.**
- **Fair Compensation and Private Copying: the system of “copyright levies”, insofar as they are applied to the means of digital distribution of creative content within the European Union, is unfair, unjust and harmful, and has no place in the United Kingdom.**
- **Digital Rights Management Technologies: there is no evidence to suggest that further regulation of the use and implementation of digital rights management technologies is necessary.**

General Questions

BSA's Submission in relation to the General Questions is made with regard to General Question 4, as follows:

1. "HOW IP IS CHALLENGED AND ENFORCED"

1.1 Are there specific problems with enforcing the main different forms of IP: patents, copyright, trade marks and designs?

BSA members, which range from global software publishers to smaller, locally focussed companies, rely heavily upon two forms of IPR protection: copyright and trade marks. Copyright protection is afforded to all forms of computer software and related artistic materials. Trade mark protection is afforded to the brand names, logos and other product identifiers used by BSA members to distinguish their products from other products in the market.

It is vital that BSA members are able to effectively enforce their IPR, both in the criminal and civil courts. Unfortunately, the UK's intellectual property law enforcement frameworks contain key deficiencies which make effective enforcement, particularly of copyright, difficult. Two of the most significant deficiencies are detailed below.

1.1.1 Civil Search and Seizure Provisions

If creative economy stakeholders are to flourish, they need all the enforcement tools that have been made available to them. The anachronistic and unnecessary bar on the introduction of anonymous evidence in civil search and seizure cases should therefore be removed.

Civil search and seizure orders allow a party to search for and, if necessary, seize, evidence relating to the infringement of its IPR rights. Such orders are granted if a party can show that the evidence would otherwise be destroyed or concealed. For example, a branded

goods manufacturer may receive information that suggests that a consignment of counterfeit branded goods are held at a particular location, ready for onward shipment. A civil search and seizure order will enable that manufacturer to conduct a “raid” upon those premises, and seize that evidence before it can be disposed of.

The obligation upon EU member states to introduce such a civil search and seizure remedy, together with certain obligations relating to the utilisation of such a remedy, was reflected in Article 7 of the Enforcement Directive². The Enforcement Directive was promulgated in 2004, in an effort to remove disparities across the European Union caused by inconsistencies in IPR enforcement measures.

Article 7(5) of the Enforcement Directive provides for courts to, in effect, hear “anonymous” evidence in the course of applications for civil search and seizure orders. This is an important provision: it is frequently the case that persons who are in the possession of intelligence relating to the infringement of IPR do not wish their identities to be made known: the desire for “anonymity” may be for employment, social or personal security reasons. It is, however, in the interests of justice for that evidence to be presented to a court, so the court can assess that evidence in the context of deciding whether or not a civil search and seizure order should be granted.

The “anonymous” evidence is technically referred to as “hearsay” evidence. Hearsay evidence can be used in UK civil proceedings by virtue of the Civil Evidence Act 1995. However, a combination of existing court decisions, together with the express and implied terms of the Civil Procedure Rules (CPR) that apply to civil litigation in England and Wales, mean that such “anonymous” evidence is not admissible before a court in an application for a civil search and seizure order. The consequential injustice to IPR holders (together with an indication as to the lack of prejudice that would be suffered by intended Defendants were

² Directive on the Enforcement of Intellectual Property Rights (2004/48/EC)

this position to be reversed) are detailed in previous submissions on this subject³. Despite several opportunities, the UK Government has failed to introduce any measures to remedy this serious but easily remediable flaw in UK civil procedure.

1.1.2 Presumptions of copyright ownership in criminal matters

The absence of copyright presumptions in criminal cases is a bar to the effective administration of criminal justice in the United Kingdom. Copyright infringement is an offence serious enough to merit a maximum prison sentence of ten years: undermining this deterrent remedy through the absence of copyright presumptions is not in the interests of justice.

Presumptions of copyright ownership (generally referred to as “copyright presumptions”) are essential to the effective enforcement of copyright and related rights. Copyright presumptions have their foundation in various international instruments⁴, which are in turn reflected in the Copyright, Designs and Patents Act 1988 (generally referred to in this Submission as “the Act”)⁵. These copyright presumptions do not create presumptions of fact: rather, they simply reverse the burden of proof in infringement cases⁶.

Copyright presumptions are both in the interests of justice and the administration of justice. However, in the UK, copyright presumptions do not apply in relation to criminal prosecutions in respect of the infringement of copyright. This is a feature peculiar to copyright law: for example, trade marks law provides, in effect, that a trade mark is

³ See Appendix 6, BSA Recommendations to United Kingdom Government Regarding Implementation of the Enforcement Directive, October 2005, pages 7-8; Appendix 8, BSA Letter to Patent Office re Civil Search Procedure February 6 2006; Appendix 7, “Consultation on the UK Implementation of the Directive on the Enforcement of Intellectual Property Rights, Response from the Alliance against IP Theft - 14th October 2005”, and in particular comments therein regarding Article 7 of the Enforcement Directive.

⁴ Including Berne Convention on the Protection of Literary and Artistic Works, 1971, Article 9(2), and WIPO Copyright Treaty, 1996, Article 10

⁵ See Section 104 and Section 105(3) of the Act

⁶ See Appendix 7, “Consultation on the UK Implementation of the Directive on the Enforcement of Intellectual Property Rights, Response from the Alliance against IP Theft - 14th October 2005”, and in particular comments therein regarding Article 5 of the Enforcement Directive.

presumed to be valid⁷. Thus, in criminal proceedings⁸, a Defendant cannot require a trade mark proprietor to prove that there was no defect in the trade mark registration process.

In prosecutions for infringement of copyright, the position is rather different, to the extent that the remedy is, in many cases, effectively useless. For example, in relation to criminal prosecutions in respect of the infringement of copyright in computer software, the absence of copyright presumptions may require a copyright owner to submit detailed and complicated evidence from a variety of sources as to its ownership of copyright. This is frequently impractical and constitutes a bar to the effective administration of justice⁹.

The introduction of copyright presumptions in relation to criminal proceedings would be in the interests of justice, and would not prejudice Defendants. There is close precedent for such a step: the Irish Copyright Act provides that copyright presumptions apply in all infringement cases, criminal and civil¹⁰.

Ireland has a written constitution, and thus this provision was assessed in light of that constitution, and in particular, the right to a fair hearing. It has not been suggested that this provision infringes upon this right. Similarly, in relation to Section 6 of the Human Rights Act, and in particular, the right to a fair hearing, the House of Lords has found, in *R -v- Edwards*¹¹, that presumptions of the nature of copyright presumptions contained within the Act do not violate the Human Rights Act.

⁷ Section 72 of the Trade Marks Act 1994: "In all legal proceedings relating to a registered trade mark ... the registration of a person as proprietor of a trade mark shall be prima facie evidence of the validity of the original registration and of any subsequent assignment or other transmission of it"

⁸ Section 92 of the Trade Marks Act 1994

⁹ Legal title to software copyright is often complicated by the fact that a number of personnel may work together, in a combination of employee and contractor relationships, to create a programme that may then be the subject of one or more assignments. In any criminal prosecution in respect of infringement of such software, if ownership of copyright was to be put into question by a Defendant, a complicated evidential paper trail would need to be produced, supported by personal testimony given by (possibly) several witnesses. The costs of such an exercise (which would have to be paid by the State in most cases) would call into question whether or not there was sufficient public interest in proceeding with such a prosecution: in addition, it would impose an onerous obligation upon software publishers (both in terms of expense and lost man hours) to support such prosecution.

¹⁰ Copyright and Related Rights Act, 2000, Section 139: "The presumptions specified [in this section] shall apply in any proceedings, whether civil or criminal, for infringement of the copyright in any work".

¹¹ [2004] All ER (D) 288

1.2 Are there barriers to challenging infringement and enforcing your IP rights on grounds of costs? What drives these costs?

Given the importance of the creative economy to the UK, it is highly undesirable that the civil search and seizure remedy should be denied to many IPR holders simply by virtue of its inherent expense.

Over recent years, reforms have been made to civil litigation practice in the UK that have assisted right holders in terms of streamlining enforcement procedures, thus driving down costs. However, one area of cost remains which constitutes a huge obstacle to the utilisation of one of those key remedies.

The problem again relates to the civil search and seizure remedy. BSA, and BSA members, have extensive experience of utilising the civil search and seizure remedy across the EU. In light of this experience, BSA estimates that the legal costs of a “typical” civil search and seizure application and execution in certain key EU markets are as follows: France, €10,000; Germany, €12,000; Sweden, €12,000; Ireland, €15,000; Benelux, €10,000 and Spain, €10,000.

However, typical costs of executing a civil search and seizure application in the United Kingdom are somewhere in the region of (the equivalent to) €35,000 to €50,000. The costs are, generally, at least triple the costs of utilising the remedy anywhere else in the EU.

The principle reason for this disproportionate level of cost is the “supervising solicitor” requirement. The CPR currently requires that an independent solicitor act as “referee” during the conduct of a civil search and seizure action, and report accordingly. The “supervising solicitor” requirement was introduced prior to the reforms that led to the introduction of CPR, and in particular, the sanctions that can be applied to both parties and practitioners should CPR not be complied with¹². It should be removed.

¹² See Appendix 6, BSA Recommendations to United Kingdom Government Regarding Implementation of the Enforcement Directive, October 2005, page 3; Appendix 7, “Consultation on the UK Implementation of the Directive on the Enforcement of Intellectual Property Rights, Response from the Alliance against IP Theft - 14th October 2005”, and in particular comments therein regarding Article 7 of the Enforcement Directive.

1.3 To what extent does your organisation make use of other methods than litigation to resolve IP infringement cases, for example the Patent Office opinion service, mediation services, alternative dispute resolution, or the Copyright Tribunal?

BSA actively litigates on behalf of its members in the United Kingdom. Taking into account the overriding objective in CPR 1¹³, BSA actively seeks to use mediation and other means of alternative dispute resolution to settle intellectual property related disputes with the minimum of cost. BSA believes the mediation and/or alternative dispute resolution are the preferred means of resolving the majority of intellectual property disputes.

1.4 To what extent do you use IP litigation insurance? How effective is it?

BSA has no evidence to offer in relation to this subject.

1.5 Are there barriers to using such methods to settle IP disputes without recourse to litigation? How might they be removed?

BSA has two comments in this regard: a comment in relation to “current and pre-action disclosure” procedures and how they should be improved, and submission in respect of a simplifying amendment to UK copyright law which would streamline (and in many cases eliminate) the bulk of investigation costs.

1.5.1 Pre-Action Disclosure

BSA recommends that the default costs rule in pre-action disclosure applications be revoked, and that costs awards be wholly discretionary based on the circumstances of a particular matter.

¹³ See CPR 1.1 (2)

As part of the CPR reforms, a new procedure for securing “pre-action disclosure” was introduced¹⁴. The procedure is intended to reduce, or in certain cases, eliminate, the costs of civil litigation by providing a means by which parties could be ordered to disclose documents that might render proceedings unnecessary, or, at the very least, save costs. These documents are usually documents that would have to be produced if legal proceedings were started.

The “pre-action disclosure” remedy is a welcome addition to the costs saving remedies available to rights holders within CPR. However, in situations where documents are sought from a party that an IPR holder would otherwise take proceedings against, the current rules regarding costs provide an unfair advantage to that party and actually deter IPR holders from utilising the remedy. This is because the default costs rule in such applications is that the party from whom documents are being sought should have its costs paid¹⁵. These costs can run to several thousands of pounds. These costs may not be recoverable from that party, even if the documents result in an IPR dispute being settled as between those parties.

The effect of this rule is that it can make it more cost effective for civil litigation to be commenced, and for documents to be sought by way of standard disclosure rather than pre-action disclosure. This is inherently undesirable and against the intention of pre-action disclosure rules. The court should not have its hands tied when assessing costs in such cases.

1.5.2 A Statutory Duty to Produce Licences

As the knowledge-based economy develops, it will be increasingly the norm that the users of digital product (both business and consumer) will do so under licence. The tracking and recording of such licences will be a key feature of such distribution. The Alliance Against IP

¹⁴ See CPR 31.16 et seq

¹⁵ See CPR 48.1 (2)

Theft¹⁶ has recommended that the Act should be amended so that there is a duty upon a licensor of copyright protected material to prove it has a licence in respect of its use of that material: BSA endorses this view and believes that users of copyright protected material should be under a duty to retain proof of their licence to use that material, and, further, that they should be under a duty (subject to appropriate safe guards) to produce evidence of such licence to a licensor upon reasonable and proportionate request.

1.6 Are there specific barriers to challenging an enforcement of IP rights for small businesses or individuals?

BSA refers to the comments made above at 1.2, and in particular, the requirement that a supervising solicitor be engaged in the conduct of a civil search and seizure order. The additional costs of this measure render the use of the civil search and seizure beyond the means of most businesses, leaving them at a disadvantage.

1.7 To what extent is the risk of litigation a factor in your organisation's investment in innovation?

BSA offers no evidence in relation to this question.

1.8 What are the principle barriers to efficient and successful challenge and enforcement internationally?

The Enforcement Directive was intended to remove barriers to successful enforcement within the European Community caused by disparities in national laws concerning IPR enforcement. Whilst the Directive is a welcome addition to the array of international instruments intended to combat piracy, more remains to be done on the part of National Governments to ensure that piracy is reduced both domestically and cross-border.

¹⁶ Appendix 7, "Consultation on the UK Implementation of the Directive on the Enforcement of Intellectual Property Rights, Response from the Alliance against IP Theft - 14th October 2005", and in particular comments therein regarding Article 5 of the Enforcement Directive.

Specific Issues

BSA's Submissions in relation to the Specific Issues are as follows:

2. COPYRIGHT EXCEPTIONS - FAIR USE/FAIR DEALING

- 2.1 (a) **What are your views on the current exceptions in copyright law?**
- (b) **Could more be done to clarify the various exceptions?**
- (c) **Are there other areas where copyright exceptions should apply?**
- (d) **Are the current exceptions adequate or in need of updating to reflect technological change? For example copyright law in the UK does not currently have a private "fair use" exception. Should UK law include a statutory exception for "fair use"?**

2.1.1 Exceptions Applicable to Computer Programmes

The exceptions present in the Act insofar as they concern computer software are a reflection of the exceptions as set out in the Software Directive¹⁷. The Software Directive exclusively determines the copyright exceptions in the context of computer software, and the Act reflects the copyright exceptions applicable to computer software as set out in that Directive¹⁸. As such, any "fair use" provision or "private copy exception" that may be introduced in the UK should not apply to computer software, a principle reinforced by the express terms of the Copyright Directive¹⁹.

¹⁷ Council Directive of 14 May 1991 on the legal protection of computer programmes (91/250/EEC), Article 5 and 6

¹⁸ See Sections 50A, 50B, 50BA and 50C of the Act

¹⁹ Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (Copyright Directive), Article 1(2)

2.1.2 *A Private Copy Exception in the UK*

- **To the extent that the Gowers Review results in recommendations regarding an expansion to current copyright exceptions, care should be taken to exclude all forms of computer software from such recommendations.**
- **There is no evidence to suggest that creative industry or consumers would benefit from the introduction of a private copy exception in the UK. To the extent that a private copy exception is considered, any such exception must reflect the requirements of international law and be sufficiently flexible to reflect the broad array of distribution and consumption models available in respect of creative content.**

The UK is one of the few European Union (EU) Member States not to have a broad range “fair use” provision, or, as it is generally referred to in the EU, “private copy exception” in its copyright law. Such exceptions generally provide that a lawful user of a copyright protected work (for example, the various works listed in Chapter 1 of the Act, including music, film and literary works) may make a small number of copies of that work without infringing copyright, and, in particular, without infringing the content owner’s reproduction right.

BSA is not aware of any evidence that suggests that such a “private copy exception” is either necessary or desirable in the UK. This is particularly so given the increasingly prevalent use of digital rights management technologies to give effect to precise licensing terms and conditions as between content providers and consumers. The precision of such licensing eliminates the need for copyright exceptions.

Further, BSA does not believe that some form of “one size fits all” private copy exception is desirable, or indeed workable, given the variety of distribution and consumption models offered by creative industry, both in the off-line and on-line context.

BSA observes that this latter conclusion was shared by the UK Government in its “Regulatory Impact Assessment” published as part of its consultations relating to the implementation of the Copyright Directive²⁰. At paragraph 3.3 of that Assessment, the Government stated as follows:

“As was made clear in consultations with interest groups both before and after adopting the Directive, **it has always been the Government’s intention to remain as far as possible the existing exceptions regime in UK law, and thereby continue the present balance in the law between the interests of all the key stakeholders. No new exceptions permitted by the Directive have therefore been proposed in the current regulations;** rather, existing exceptions have been analysed and amended as necessary in light of the detail of the permitted categories in the Directive and new requirements arising from the ‘3 step test’.” *(emphasis added)*

If the UK Government intends to review these conclusions, BSA would encourage it to undertake a separate analysis as to the implications and consequences of such an exception. In any event, any such exception would need to be carefully drawn to ensure that it complies with international norms regarding exceptions to copyright²¹, that is, that any private copy exception should be confined to certain special cases, should not conflict with the normal exploitation of the work, and should not unreasonably prejudice the legitimate interests of the right holder.

²⁰ See Appendix 9

²¹ See Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) 1994, Article 13, WIPO Copyright Treaty, 1996, Article 10, Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (Copyright Directive), Article 5(5)

3. FAIR COMPENSATION AND PRIVATE COPYING

The issue of “compensation”, in respect of acts undertaken pursuant to the “private copy exception”, is a highly controversial area of European and international copyright law. In the EU, various Member States have sought to institutionalise the recovery of such compensation through the imposition of, in effect, a “copyright tax” upon a broad range of media and hardware, this “tax” being intended to compensate content owners for losses suffered as a result of acts of private copying. BSA’s evidence in relation to this “copyright tax” - the various forms of which are generally referred to as “copyright levies” - is that such levies, in the context of the use and enjoyment of digital works, are both unfair and unjust.

3.1 The Private Copy Exception and Copyright Levies

The Copyright Directive sought to harmonise existing practice in the field of copyright exceptions across the EU by making provision for Member States to implement, if they so chose, exceptions or limitations to the “reproduction right”, including the implementation of a “private copy exception”. Such an exception is expressed to be -

“in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that **the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned**”²² *(emphasis added)*

“Fair compensation” in this context is intended to provide content owners with remuneration in respect of acts that would ordinarily be reserved to them as the copyright holder, but which are taken outside the scope of their exclusive rights by the terms of a private copy exception. It is claimed that acts of private copying deprive copyright owners of revenue that they could otherwise have obtained through the licensing of such acts.

²² Article 5(2)(b)

In the context of digital distribution of copyright protected content, several national Governments have imposed “copyright levies” on a variety of media and equipment, these levies being intended to provide copyright holders with fair compensation in respect of acts of private copying associated with that digital content. These “levies”, in practice, take the form of an arbitrary sum (ranging from a few Euro-cents to several Euros) that suppliers of a wide variety of media and hardware are required to add to the acquisition price of an item at the point of sale. The levy is designed to be paid by the ultimate consumer of that media, the amounts recovered by the imposition of the levy being paid to various agencies acting on behalf of the relevant content owners.

BSA refers in this Submission to a significant body of evidence that demonstrates that the imposition of such levies is wholly inappropriate in the context of digital distribution and use of content. Not only do such levies fail to satisfy their theoretical objective, which is to compensate content owners for “losses” attributable to acts of private copying, but they have been implemented without any regard for either the harm that they are intended to address, nor modern means of digital content distribution. Further, by their very nature, they harm the market for digital content, and may even lead to a wholesale erosion of traditional copyright rights.

This evidence is presented with this Submission: the principal conclusions drawn from that evidence are as follows:

3.2 Levies Do Not Constitute “Fair Compensation”

There is overwhelming evidence to suggest that levies do nothing to provide compensation that is in any sense of the word “fair”. Rather, they are an arbitrary form of rough justice that takes no account of the level or existence of the harm that they are supposed to militate against.

BSA has both prepared, and collaborated in the gathering of, a large body of evidence relating to the levels of copyright levies imposed across the European Union, the most recent exercise culminating in the publication of “Levies Collection Study: Market Value of Private Copying Levies on Digital Equipment and Media in Europe (nine countries)” by the

Copyright Levies Reform Alliance²³ in April 2006 (“the Study”). The Study updates and expands upon previous similar studies, and as such BSA regards it as the pre-eminent source material with regard to the use of copyright levies across the European Union.

The Study reviews the levies collection regulations implemented by nine EU member states, including France, Germany, Italy and Spain. It details the amounts levied on particular items of digital media and equipment (including personal computers, hard drives, mobile telephones and music player devices such as iPod devices and MP3 players), breaking down the amounts recovered as a result of the imposition of these levies as between the individual media and equipment. The Study analyses the amounts recovered by the imposition of levies since 2001, and projects the amounts likely to be recovered by the imposition of levies through to 2009.

In this regard, the Study concludes that

“since adoption of the European Union Copyright Directive in 2001 a major expansion of the levy collection is in progress through the application of levies to digital media equipment”²⁴

and, in respect of the amounts recovered by such levies

“levies collected on digital and analogue media equipment in the surveyed countries totalled €534.4 million in 2001... levies collection will increase to an estimated **€1.57 billion in 2006 to €1.82 billion in 2007, and to €2.12 billion in 2009.** These figures exclude levies that are currently claimed but disputed.”

In Austria, Germany, Netherlands and Spain, legal challenges have been made as to the extent to which certain levies should be imposed. These levies are referred to in the Study as “disputed levies”. The Study finds that if these “disputed” levies were effectively applied,

²³ See Appendix I

²⁴ Page 2

“levies collection in [Austria, Germany, Netherlands and Spain] would rise to €3.382 billion in 2006 and €4.712 billion in 2009”²⁵.

The Study contains abundant evidence as to both the quite remarkable sums of money recovered through levies collection, although it is arguably in Germany that the grossly disproportionate impact of levies is most obviously demonstrated. The Study estimates that “without the inclusion of claimed but disputed levies, total levies collection amounted to €67.58 million in 2001 and it is forecast that levies collected will reach €353 million by 2006 and €453 million by 2009”. Further “if claimed but disputed levies were to be included, it is estimated that total levies collection would amount to €449 million in 2001 and would reach €1,319 million by 2006 and €1,587 million by 2009”.

These levies are supposed to constitute “fair compensation” in respect of losses attributable to acts of private copying. It would be “unfair” for these sums to be recovered unless some evidence of those losses existed. Indeed, Recital 35 of the Copyright Directive makes it clear that levels of fair compensation should be assessed having regard to such evidence, as follows -

“In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, **account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question**” *(emphasis added)*

The quite extraordinary amounts recovered through the imposition of levies are supposed to reflect the need for “fair compensation” to be awarded in respect of acts of private copying. It would therefore be expected that some evidence as to the level of such losses would be produced in the context of the imposition of a levy, and that such evidence would

²⁵ The methodology of the survey is detailed at pages 5 and 6 of the Survey, and in the relevant appendices

be taken into account by national Governments when such levies are thereby imposed. The Study's findings, as far as they relate to Germany, suggest that the financial harm caused to content providers through private copying that takes place utilising digital media and equipment will be €350 million this calendar year. However, to the best of BSA's knowledge, no evidence exists to suggest that losses caused by private copying come close to even approaching this amount.

The Study analysed the steps taken by national Governments in this regard when assessing their levies regimes²⁶. In the 20 EU countries where levies are imposed upon digital media and equipment, CLRA examined whether or not an assessment of "harm" had been undertaken by the relevant national Government before the imposition of a levy. The Study reaches some disturbing conclusions: the majority of countries have undertaken no analysis of harm in the context of the imposition of levies: indeed, certain of the markets where levies produce the most disproportionately high levels of recovery has the least analysis being undertaken.

3.3 Levies and Digital Rights Management Technologies

At a time where DRM uptake is increasing year on year, levies collection shows no sign of decreasing. Such levies bear no relation to the actual use, distribution and supply of DRM-enabled creative content, and as such are a wholly unjust tax on consumer enjoyment of such content.

The Study demonstrates as referenced in 3.2 above, how the imposition of levies is "unfair". Further, one of the clearest reasons why levies are inappropriate in the context of digital distribution of content is that their imposition ignores the increasing impact of Digital Rights Management ("DRM") technologies. This is unjust.

DRM technologies underpin digital distribution of content. They provide certainty to both content providers and consumers as to the level of enjoyment consumers can expect in

²⁶ Copyright Levies Reform Alliance: "Analysis of National Levies Schemes and the EU Copyright Directive", April 2006 (Appendix 2)

respect of digital content: they also provide flexibility in that DRM technologies encourage the development of new, attractive ways of distributing digital content that enhances consumer access and options for purchase and delivery.

The utility of DRM technologies is reflected in both statistics relating to the uptake of DRM protected digital content, and to industry developments such as the motion picture industry offering direct download of motion pictures to consumers²⁷. In October 2005, BSA published its "Survey on On-Line Distribution" (see Appendix 3), which concluded that "on-line music revenues in Western Europe are expected to reach €559.1 million by 2008 compared with €27.2 million in 2004... the UK is and will remain the largest on-line music market"²⁸. This trend is reflected across the European Union.

The survey evidence as far as UK uptake of on-line music offerings suggested that the market for on-line distribution of music in the United Kingdom will develop as follows:

UK	2000	2001	2002	2003	2004	2005	2006	2007	2008
Downloads (€ mil.)	0.0	0.1	0.1	0.7	11.1	39.0	68.4	101.6	148.6
Subscription (€ mil.)	0.0	0.0	0.0	0.4	1.7	7.8	19.3	33.0	45.9
Total (€ mil.)	0.0	0.1	0.2	1.1	12.8	46.8	87.7	134.6	194.5

Although uptake figures vary across the EU, the Study's conclusions demonstrate an exponential increase in this market. An essential feature of this market is that the distribution of on-line content is underpinned by DRM technologies, which provide the consumers of on-line content with certainty in terms of the parameters of their use of on-line content.

The advantage of DRM-enabled delivery systems for on-line content is that they provide certainty. The content provider knows exactly what it has licensed to the consumer (for

²⁷ see for example www.lovefilm.com

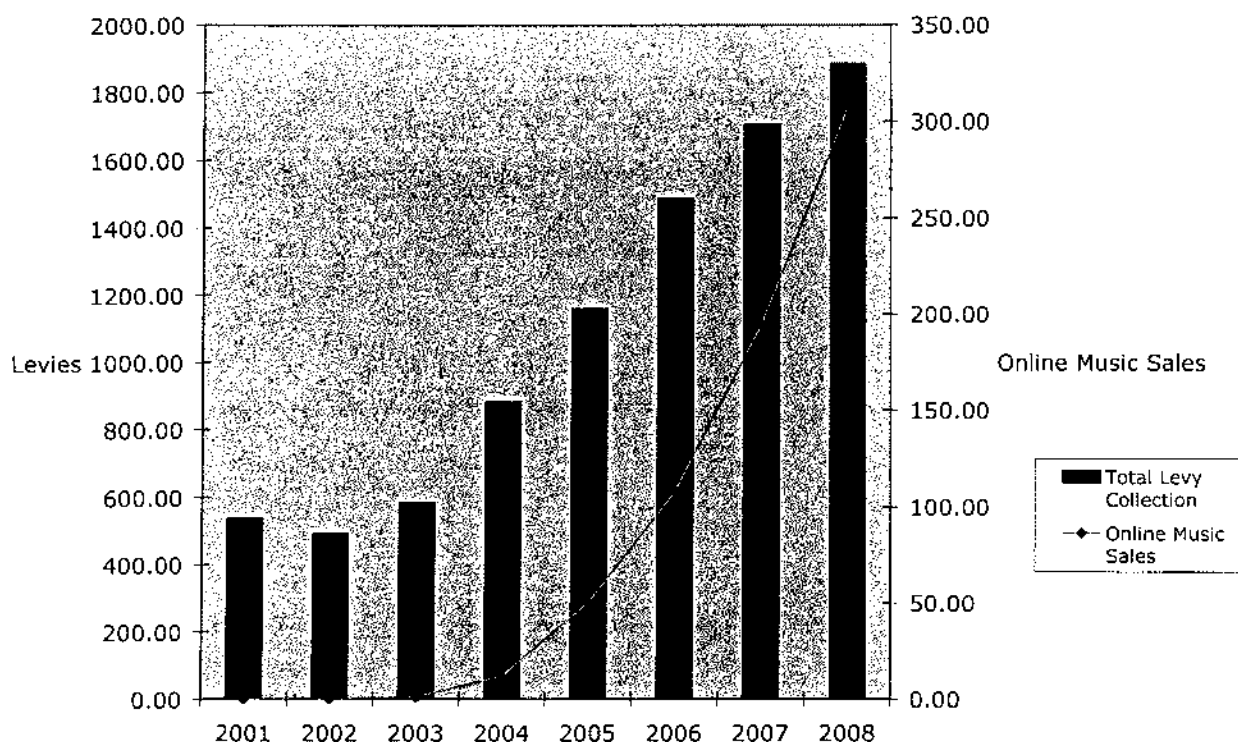
²⁸ Paragraph 2.1, page 4

example, in terms of the number of copies that a consumer may make), and the consumer knows what he or she has acquired (for example, how many copies he or she can use). Given this, it is important to stress that the “private copy exception” does not endow the user with any “rights”: it simply provides that certain activities undertaken by the user of a copyright protected work fall outside of the content owner’s exclusive rights. Therefore, in situations where a content owner has provided a clear and specific licence to a user, delineating the precise terms upon which the work can be used and enjoyed (a facility that is underpinned by the use of DRM), any further acts of private copying are, by their nature, specifically excluded from that arrangement.

The Copyright Directive took this into account in making clear that any “fair compensation” regime must take into account “the application or non-application of technological measures”²⁹, which includes DRM technologies. This means that levels of compensation should drop as DRM-enabled content consumption rates increase. However, the below graph illustrates how this is manifestly not the case across the European Union.

²⁹ See Article 5(2)(3).

Comparison: Levy Collection and Online Music Sales (2001-2008), m€



Recital 35 of the Copyright Directive states that “the level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive”. As with the assessment of “harm”, the Study analysed the steps taken by national Governments in relation to the assessment of the impact of DRM uptake. Again, the Study reaches some disturbing conclusions: little, if any, analysis of DRM in the context of the imposition of levies has taken place, and again, in markets where levies produce the most disproportionately high levels of recovery has the least analysis being undertaken. Levies bear no relation to the amount of content being consumed in a manner that renders private copying irrelevant.

3.4 Levies and Unfairness to Consumers

Levies constitute an opaque tax on consumers, frequently in respect of activities that those consumers cannot or will not undertake.

The Study demonstrates that the imposition of levies in the context of digital distribution produces unfair and unjust consequences for industry and consumers alike. Both are paying

huge sums that bear no relation to either the levels of private copying itself nor the “harm” caused by such copying.

The imposition of copyright levies imposes multiple costs upon consumers. As detailed above, where digital content (such as music or film) is made available to consumers through digital download services, the distribution model adopted for those services will involve the payment of a licence fee by the consumer that is intended to permit that consumer to engage in a defined use of the particular content. The issue of remuneration for further, incidental private copying will not therefore arise. However, where a levy is imposed upon the devices that the consumer utilises in the course of obtaining and enjoying digital content, the consumer will pay that levy in respect of acts that he or she will not and, in many instances, cannot, undertake.

Similarly, consumers who chose not to use such devices for the use and enjoyment of creative content – for example, using PCs for e-commerce and e-mail purposes only - or restrict their use of content to works not protected by copyright, or independently created works - will pay a levy in respect of acts that they will never undertake. So, an artist who utilises digital devices to create his or her own copyright protected musical works will pay a levy in respect of the copying of content in respect of which they own the copyright.

There is also evidence that copyright levies disadvantage consumers in that they stifle consumer access to digital products in Europe. Disproportionate charges in some European countries can lead to products being withdrawn from the market and/or price consumers out of the market, thereby impeding consumer choice. If business chooses to absorb copyright levies and not pass them on to their consumers, the net effect of copyright levies is that they will constitute an unreasonable and disproportionate tax on that business.

3.5 Levies will lead to a wholesale erosion of copyright

The full impact of levies is not limited to financial disadvantage. Such levies have the potential to erode the very basis of exclusive copyright rights.

There is abundant evidence to suggest that consumers in many EU member states are wholly unaware as to the true nature and extent of copyright levies. However, there is evidence to suggest that consumers are aware that some form of levy exists, and, further, that that levy is viewed generically as a form of “copyright tax”. The perception of levies as a form of “tax” creates understandable but highly damaging levels of confusion amongst consumers: consumers are unsure as to the extent to which the payment of the “tax” entitles them to conduct acts of private copying. Indeed, the fact that the “tax” has been paid creates a misleading impression on the part of consumers that some sort of “right” to make private copies exists, as demonstrated by recent legal challenges brought by consumers in France and Belgium³⁰.

This perception is damaging enough in the context of the lawful use of content. BSA has not made any reference to the unlawful use of content in this section of its Submission, simply because copyright levies are not relevant in the context of such unlawful use. However, there is further evidence to suggest that the fact that a levy has been paid creates in consumers the impression that some form of “licence” has thereby been acquired in respect of the use of content generally, especially content sourced through the internet. Indeed, proposals recently laid before the French Parliament were intended to have precisely this effect, whereby consumers, following the payment of a fixed amount, would not be considered to infringe copyright in respect of their downloading of any copyright protected work, whether through lawful or unlawful means.

Such a proposal would have constituted a “compulsory licence” of copyright protected works. Compulsory licensing goes completely against all forms of traditional copyright rights. Indeed, the “collectivisation” of copyright in this way would lead to a wholesale collapse of the creative economy.

³⁰ See, for example, *Association Union Federale de Consommateurs Que Choisir and other vs SA Films Alain Sarde and others*: Tribunal de Grande Instance de Paris 03/08500, April 30, 2004; *L’ASBL Association Belge des Consommateurs Test-Achats vs La SA EMI Recorded Music Belgium and others*: Tribunal de Premiere Instance de Bruxelles 2004/46/A, April 27, 2004. The practical extent of the private copying exception in France was illustrated in a case before the Tribunal de Grande Instance de Rodez (*Case 03001251*, October 13, 2004), which an individual who admitted making 488 copies of copyright protected works was acquitted of any criminal liability, on the basis that he satisfied the court that such copying was made for his own personal purposes, and thus covered by the private copy exception.

This is probably the most damaging long term effect of copyright levies. As indicated above, they are unfair in that they bear no relation to the actual or perceived losses suffered as a result of acts of private copying; they are “unjust” in that their imposition ignores the very factors that are mandated to be considered when implementing levies, and further, unjust in that they “tax” without any regard to actual practice. In this latter regard, the imposition of copyright levies is akin to imposing a tax on all citizens of a country to remedy the harm caused by automobile pollution, regardless of whether or not the citizens use or own such an automobile. But what if such a tax thereby encouraged citizens to pollute? Similarly, levies have the potential to wholly erode the fundamental basis upon which copyright rights are utilised, enjoyed and above all respected.

3.6 Summary

BSA’s evidence has been confined to the means of securing compensation through the imposition of copyright levies upon digital media and equipment. Its evidence is that such levies are unjust, unfair, opaque and quite possibly unlawful - and have no place in the UK.

4. COPYRIGHT - DIGITAL RIGHTS MANAGEMENT

4.1 Do you have a view on how the use of digital rights management technology should be regulated?

BSA has submitted comments in respect of two recent Inquiries in relation to the broad issues surrounding the use of DRM technologies³¹. Those comments are resubmitted as part of BSA's Submission. BSA is wholly supportive of the development and implementation of DRM technologies, for the simple reason that such technologies provide huge opportunities for the development of creative industry in the UK.

Distributing creative content across a digital platform is one of the key features of the 21st century creative economy. As recently as ten years ago, creative industry employed such diverse distribution models as VHS cassettes (for films), audio cassettes and CDs (for music), hard copy format publications (for books and other literary works), or a combination of a variety of media (software products). The diversity of distribution methods increased costs for both industry and consumers, who had to acquire a variety of hardware devices in order to be able to enjoy such products.

Distribution of creative content in the 21st century takes place in a far more streamlined, coherent fashion. Many "creative" products are now produced and distributed in similar fashion, that is, digitally. The phenomenon of a variety of creative industry adopting broadly similar content delivery and distribution models has been referred to as "digital convergence". Digital convergence has immense advantages for both industry and consumer alike - for the consumer, digital convergence means that a variety of creative content can be accessed and enjoyed in the same way, utilising a far smaller number of devices and means.

³¹ See Appendix 5: BSA Response to All Parliamentary Internet Group Inquiry into Digital Rights Management, January 13th, 2006; and Appendix 4, BSA Response to Culture, Media and Sport Committee New Inquiry "New Media and the Creative Industries" February 28th 2006.

BSA members have been the driving force behind digital convergence, creating software and hardware products that are designed to enhance and expand consumer choice concerning the use and enjoyment of digital content. The digitisation of creative content has been one of the key technological developments of the 21st century, enabling consumers to access creative content in a manner, and at a time and place that is chosen by the consumer. This expansion of choice has benefited consumers as the expanded, multi-national market place for creative content has developed.

In both the on-line and off-line world, the use of DRM technologies has provided much of the basis for the expansion of consumer choice in respect of the use of creatively produced content. In the study referred to above, BSA demonstrated how UK consumers lead the way regarding the use of DRM based on-line services³². This expansion of choice would not have been possible without the use of the DRM technologies that facilitate such delivery.

DRM technologies are the foundation upon which modern digital distribution of content has been developed. Content providers would find it impossible to distribute creative content without the use of DRM technologies. There is little evidence that the utilisation of such technologies has created problems in terms of the use and enjoyment of creative content: however, to the extent that such problems may arise, BSA believes that creative industries will develop their own innovative and consumer friendly solutions to address any such problems.

There is no evidence to suggest that the current regulatory frameworks that apply to DRM technologies require either review or expansion. There is a raft of consumer protection legislation in effect in the UK that provides consumers with a variety of remedies which would encompass situations where the delivery of creative content took place in a manner that contravened those rights. In respect of consumers' personal privacy and data security, the EU has probably the most stringent and highly developed data privacy and data security regulatory framework in the world, providing consumers with both the necessary levels of reassurance that their personal data will remain secure in the context of on-line, DRM

³² Appendix 3.

based delivery, and that, should that data not be kept secure, an array of personal and state effective remedies exist to make good any damage.³³

5. LEGAL SANCTIONS ON IP INFRINGEMENT

5.1 Are you aware of any inconsistencies or inadequacies in the way the law applies legal sanctions to infringement of different forms of IP or to different circumstances?

BSA recommends that the damages provisions within copyright and trade mark law be revised: the absence of a genuine deterrent remedy in IPR infringement cases is the most significant driver of IPR piracy rates in the UK.

BSA has provided extensive input to the UK Government on the issue of damages awarded in intellectual property infringement cases, and in particular, damages awarded in “end user” piracy cases³⁴. BSA does not wish to repeat the submissions made in respect of the damages issue in this Submission: rather, it refers to its existing evidential input in this regard. It is, however, worth repeating that the current damages regime in the UK does not constitute a “deterrent to further infringements”, as required by Article 41(1) of TRIPs and, further, that damages are not “dissuasive” as required by Article 3(2) of the Enforcement Directive.

There is a significant problem in the United Kingdom with regard to infringement of works that are typically licensed by the right holder. Historically, such a model has been the model utilised by the software industry, although increasingly a distribution model based upon the payment of a licence fee is the model adopted by distributors of on-line digital content, including the film and music industries.

³³ In a recent US case, whilst the utilisation of digital rights management technologies was found to have contravened certain user rights, it was also clear that existing remedies were adequate to provide redress.

³⁴ See Appendices 6 and 7.

The “damages” issue with such distribution models is that an illegal user of such content can, once it has been identified as such, simply acquire a licence for the work in question, and claim that no damages are payable to the right holder following such acquisition. This means that there is a complete lack of deterrent in respect of such piracy. In the software context, it means that an organisation can, for example, run 100 copies of various software applications upon 100 PCs and, once identified as an illegal user by the relevant software publishers, can simply acquire licences in respect of those applications largely without fear of any further significant sanctions. This has contributed significantly to the rates of end-user piracy in the UK.

The UK Government has published a Statutory Instrument³⁵ which seeks to give effect to Article 13 of the Enforcement Directive. However, given the terms of the Statutory Instrument, it is unclear as to whether this Instrument of itself will provide any meaningful reform to current damages rules in intellectual property cases. It is also unclear as to how this Statutory Instrument will be affected by any further consultations in relation to damages, in particular, the anticipated Department of Constitutional Affairs inquiry into damages.

5.2 Should criminal sanctions and on-line infringement be the same as those relating to physical infringement?

Primary legislation should be introduced to remedy this disparity as soon as possible.

There are currently disparities in criminal sanctions applied to on-line infringements and off-line infringements in UK copyright law³⁶. There is no policy reason why on-line infringements should not attract the same penalties as off-line infringements.

³⁵ 2006 No 1028 The Intellectual Property (Enforcement etc) Regulations 2006

³⁶ See Section 107(4) and Section 107(4a) of the Act

Appendices

NUMBER	DESCRIPTION	DATE
1.	Copyright Levies Reform Alliance: Levies Collection Study: "Market Value of Private Copying Levies on Digital Equipment and Media in Europe (9 countries)	April 2006
2.	Copyright Levies Reform Alliance: "Analysis of National Levies Scheme and the EU Copyright Directive"	April 2006
3.	Business Software Alliance: "DRM Enabled Online Content Services in Europe and the USA"	October 2005
4.	Business Software Alliance: Submission to Culture, Media and Sport Committee re "New Media and the Creative Industries"	February 28th 2006
5.	Business Software Alliance: Submission to All Parliamentary Internet Group re "Inquiry into Digital Rights Management"	January 13th 2006
6.	Business Software Alliance: BSA Recommendations to United Kingdom Government regarding Implementation of the Enforcement Directive	October 2005
7.	Alliance Against IP Theft: Response from the Alliance Against IP Theft regarding Enforcement Directive	October 2005
8.	Business Software Alliance: Letter to UK Patent Office regarding Enforcement Directive	February 6th 2006
9.	The Patent Office/Copyright Directorate: Regulatory Impact Assessment regarding Implementation of Copyright Directive	Undated - Published in 2003