



Federation Against
Software Theft

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Response to the Gowers Review of
Intellectual Property

April 2006

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The Federation Against Software Theft

The Federation Against Software Theft (the “Federation”) was set up in 1984 by the British Computer Society's Copyright Committee and was the world’s first anti-piracy organisation working to protect the intellectual property rights of software publishers. Initially concentrating on lobbying parliament to revise the Copyright Act 1956, achieving success with measures in the Copyright (Computer Software) Amendment Act 1985, and in the Copyright, Designs and Patents Act 1988, it soon expanded its remit to provide an extended range of services to Members.

The Federation works on many fronts to combat software piracy and to defend its Member’s digital rights, through enforcement, prevention by education, lobbying initiatives and continuous consultation with like minded bodies committed to protecting members’ intellectual property.

The Federation is a member of The Alliance against IP Theft (the “Alliance”) and supports its submission in connection with the Review.

Federation membership includes over 20 leading law firms practising in the converging areas of IP, IT and e-commerce. Those members are known as the “Federation Legal Advisory Group (FLAG)”. In responding to the consultation, the Federation has prepared this document in consultation with its FLAG membership.

Introductory Comments

In making the response to the Gowers Review ("Review"), the Federation makes reference to the paper produced by the Review team, titled, 'Gowers Review of Intellectual Property Call For Evidence'.

The Federation wishes to make a submission to the Review team considering the importance of intellectual property to the future wealth of the nation.

The Federation concurs with wording in the DTI document, The Recommendations of the Creative Industries Forum on Intellectual Property, namely, "*The creative, knowledge economy is increasingly a key global driver for economic prosperity. The UK's Creative Industries are a real success story, they are one of the economy's fastest growing sectors contributing over £53 billion to the UK in 2002, accounting for 8% of GDP; supporting 1.9 million jobs and growing at an average of 6% between 1997 and 2002 - double the rate of the economy as a whole. We want to build on that success nationally and internationally.*"

The Federation is further encouraged by the supportive words in Lord Sainsbury's speech for the Social Market Foundation meeting on 28 February 2006 in respect of the Review, "*So let's not get caught up in a destructive debate but let's have a real conversation about how we ensure that the UK - with our strengths in ideas and creativity - has a robust IP system which allows us to flourish in the global knowledge economy.*" Being totally IP dependent, the software industry necessarily looks to Government to maintain a robust IP system. It considers that Government need not reinvent the wheel of the IP system, but rather, make considered changes in order that both the fertility and activity within the creative industry are protected and advanced.

General Questions - Response

4. How IP is challenged and enforced

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

The Federation submits that there are a number of specific issues which require addressing:

- Company director complacency
- Failure to implement Section 107A Copyright, Designs and Patents Act 1988
- Lack of presumptions of copyright ownership in criminal matters

Company director complacency

With the majority of people having access to the internet at work, the need for management control to be exercised over the business is becoming increasingly important.

The vast majority of software piracy occurs in the workplace. The Federation receives approximately 100 reports a month from whistle blowers reporting under licensing in a business. From an investigation carried out by The Federation under "Operation Tracker", illegal file sharing has been shown to occur through company connections to the internet.

Over 60% of software piracy takes place in the workplace according to the Business Software Alliance. In addition it calculates that a ten-point drop in software piracy in the UK would:

- Add nearly \$19 billion to the UK economy
- Create nearly 34,000 new jobs
- Increase local industry revenues by \$16.8 billion

- Generate an additional \$4.9 billion in tax revenues¹

The problem is wider than just software; in a recent software audit conducted at the behest of The Federation, a UK financial services organization with 2,500 PC was found to have over 5,800 illegal digital music files saved on company equipment.

Under existing law, s107 of the Copyright Design and Patents Act 1988 (CPDA 1988) imposes criminal liability for certain infringements of copyright, while s110 of the CPDA imposes criminal liability on a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity when such an offence is committed by a company with the consent (express agreement) or connivance (tacit agreement) of the director. Therefore, presently a director/manager is only likely to be liable under Section 110 if he can be shown to:

- Have known of the facts constituting the offence
- Expressly or tacitly have agreed that those facts should occur.

As current legislation limits directors' liability to actual knowledge, directors may escape personal risk through denying knowledge.

The law insufficiently recognises that a breach of copyright could be attributable to actual neglect on behalf of the director involved. This loophole is leading to complacency allowing software piracy to flourish. Software compliance remains a limited risk and therefore a side issue for businesses. With the law structured as it is, it is also very difficult to bring offenders to account.

The Federation endeavors to first work with business to develop a non-regulatory solution to this problem, if possible. We are only too aware of the demands on business, our members are businesses themselves, and we, through the Alliance, are planning a campaign aimed to encourage company directors / managers to be more aware of the activities of their employees and to pro actively ensure the company operates legally.

¹ Business Software Alliance/IDC Global Software Piracy Study 2005

As an Alliance member, The Federation, together with a number of Alliance members, has already been working to raise awareness amongst the business community of software piracy and has developed a number of initiatives which are ongoing.

- The Industry Trust for IP Awareness has produced corporate literature entitled "*Copyright and Security Guide for Companies and Governments*". This clearly explains what actions companies need to take to avoid legal and security risks on their networks, and in doing so it helps promote respect of intellectual property rights and responsible attitudes towards the downloading of copyright protected works from the internet.
- 'Digital File Check' is a simple educational tool that aims to guide computer users on how people and organisations can enjoy their copyrighted products responsibly. This software helps remove or block any of the unwanted "file-sharing" programs commonly used to distribute copyright protected files illegally and allows the user to delete copyright protected music and video files from the "shared folder" of the computer from where they are commonly swapped illegally on the internet.

The Federation considers that software piracy and illegal downloading in the workplace can have serious repercussions for companies.

- Software piracy is illegal and if companies are found to be using unlicensed software they can be liable to prosecution.
- Illegal downloading and file sharing can affect the security of companies' networks. Spy ware software can find its way onto systems, and firewalls can be compromised.

The Federation's recommendation is that company management is made more accountable by non-regulatory in first instance, but via Statute if necessary, to foster a pro active attitude to ensure the legal use of software.

Failure to implement Section 107A Copyright, Designs and Patents Act 1988

The duty and power for Trading Standards to enforce copyright has remained unimplemented since its inception in 1994 when it was inserted by the Criminal Justice and Public Order Act 1994. Considering that the UK needs to maintain a robust IP system, it is wholly illogical as to why Section 107A has not been implemented. Echoing the view of the Alliance Against IP Theft (Alliance), we understand that the reason this section has not yet been enacted is one of funding. If IP is to be valued and respected it needs to be protected accordingly. Government must ensure that trading standards receive the funding needed.

The Federation's recommendation is that Section 107A be brought into force as a duty with immediate effect.

Presumption of authorship or ownership

The Federation asks that the Government apply the rule on presumptions to criminal (copyright) proceedings. Nuisance challenges on legal aid can stifle prosecution and in turn seriously question the CPS commitment to proceed.

(b) Are there barriers to challenging infringement and enforcing your IP rights on grounds of cost? What drives these costs?

- Cost and complexity of civil search and seizure remedy

Cost and complexity of civil search and seizure remedy

The Federation supports the representations made by the Alliance.

(f) Are there specific barriers to challenging and enforcement of IP rights for small businesses or individuals?

Representative Rights

In accordance with Article 4 of Directive on the enforcement of intellectual property rights (2004/48/EC) (the "Directive"), The Federation considers that professional defence bodies (including anti-piracy organisations) have a public interest to protect in bringing proceedings themselves where intellectual property rights are infringed. Such organisations may correctly wish to take legal action on behalf of, for example, a single and/or small member company owning intellectual property who neither has the financial muscle (in particular when the infringement has led to financial difficulty) or enforcement profile to take enforcement action - but where the infringing conduct of the kind complained of is damaging to a wide repertoire of businesses. Options to call upon police powers may be limited as the police may have other priority matters to investigate.

Article 4 requires that persons entitled to seek application of the measures, procedures and remedies referred to in this chapter include professional defence bodies. The Directive requires that anti-piracy organisations have a course of action where intellectual property rights are infringed.

The current rules - whether under Part 19 of the Civil Procedure Rules or by way of power of attorney - do not give professional defence bodies the locus standi to take claims in their own name on behalf of (a) member(s) as envisaged by the Directive in the absence of copyright ownership, an exclusive licence or (in certain limited circumstances) a non-exclusive licence.

Claims under Part 19 of the Civil Procedure rules may possibly be taken by members of professional defence organisations on behalf of other members with equivalent interest. However, professional defence organisations themselves cannot be said to have an interest which corresponds sufficiently to that of the relevant rights holder to bring a representative action.

Even where a power of attorney for example, is in place, any action brought by the body would necessarily be in the name of and for the benefit of its member: the claimant would still be the rights holder.

Therefore, in order to give meaningful effect to the Directive, professional defence bodies must be given statutory support for their locus standi under the substantive law. The Federation submits that an appropriate provision establishing this must necessarily be included within the Copyright Designs and Patents Act 1988 (CDPA).

The Federation notes that concerns as to professional defence bodies acting in an uncontrolled manner could be readily countered by either including a requirement in appropriate situations for notice to be given in writing to the intellectual property right owner or for authority to be given in writing by the intellectual property right owner and that such authority may be given in advance on a generalised basis before the issue of proceedings.

The Federation notes that Article 4 of the Directive has not been implemented in the new Intellectual Property (Enforcement, etc.) Regulations 2006 transposing the Directive.

The Federation's recommendation is that provisions equivalent to Article 4 be implemented forthwith into UK law.

Specific Issues - Response

Copyright exceptions - fair use / fair dealing

The Federation acknowledges that the concept of fair dealing accords with the three-step test within the Berne Convention Article 9(2) and that the current regime of acts permitted provides a fair balance. This is consistent with the important "flexibility" of copyright as per Lord Sainsbury's comments for the Social Market Foundation meeting on 28 February 2006.

The Federation's recommendation is that the status quo is maintained.

Legal sanctions on IP infringement

(a) 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?

- The failure of the damages regime to act as a deterrent
- Circumvention of technical protection measures

The failure of the damages regime to act as a deterrent

The standard measure of damages in software copyright infringement actions is compensatory, so that the infringer is likely to end up merely paying the software licence fee that would have been payable had the parties agreed a licence.

Compensatory damages do not mark disapproval of the defendant's conduct in failing to take a licence. They also do not dissuade further infringements, since infringers are aware they have nothing more to lose than the licence fee they would otherwise pay. This creates an environment where there is little respect for software copyright, and reduces incentives to negotiate for a licence. In one instance in a report made by a whistle blower to the Federation, comments made confirmed that if the infringing company were caught without a software licence, it would simply pay the licence fee. This confirms that compensatory damages do little to dissuade further infringements.

The Federation notes the Government's decision to implement Article 13 of the Enforcement Directive by way of the Intellectual Property (Enforcement, etc.) 2006.

The Federation understands the implementation Art 13 with reference to damages is to ensure that the Courts have regard to actual prejudice caused by the infringement, including taking into account negative economic consequences and non-economic factors, such as any moral prejudice for infringement of any intellectual property right.

The Federation is aware that the Department for Constitutional Affairs is due to hold a consultation on the damages regime and welcomes this. It remains unclear whether the Courts will now give greater weight to factors such as flagrancy in awarding meaningful damages despite the spirit of the Directive. Needless to say, the Directive envisaged a damages regime which echoed Article 3(2) of the Directive, requiring remedies to be "effective, proportionate and dissuasive".

The Federation recommends the introduction of legislation to require the courts to award meaningful damages to deter infringements of software copyright.

Circumvention of technical protection measures

The Federation concurs with the Alliance in creating a level playing field instituting an offence of circumventing technical protection measures applied to computer programs. Software should merit the same legal protection afforded to film and music.

(b) For example, should criminal sanctions on online infringement be the same as those relating to physical infringement?

Following the view of the Alliance, The Federation submits that online criminal sanctions should not differentiate between whether any infringement takes place on or off line.

The Federation considers that if online infringement were viewed as a lesser wrong, a collective view will, in time, form that on line theft causes lesser damage and may be condoned.

Executive Summary

The Federation submits that in accordance with the recommendations in this document, certain changes are required to improve intellectual property regime to ensure the health of the software industry now and in the future. The Federation holds a particular concern that respect for copyright is dwindling and this issue should be addressed as one of importance.

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