

COVER SHEET FOR RESPONSES

Contact details of respondent

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Please indicate below which issues are covered by your response. Not all issues will be relevant to all respondents – please feel free to skip questions that are not relevant to you.

General Questions covered:

How IP is awarded
How IP is used
How IP is licensed and exchanged
How IP is challenged and enforced X

Specific Issues covered:

Current term of protection on sound recordings and performers' rights
Copyright exceptions – fair use and fair dealing X
Copyright – digital rights management X
Copyright – orphan works X
Copyright – licensing of public performances
Copyright – designated archive status
Patents – utility patents
Pharmaceutical Supplementary Protection Certificates (SPCs)
Trade Marks – international issues
Designs – registered designs and unregistered design rights
Legal sanctions on IP infringement X
Parallel Imports / International Exhaustion X
Coherence between competition policy and IP policy

Have you raised any other issues in your response? / N

(Please continue on additional sheet if necessary) Details of accompanying documents

Please TICK BOX if you DO NOT want your response posted on the Gowers Review website.



Gowers Review of Intellectual Property MPA Response to the Call for Evidence 28 April 2006

EXECUTIVE SUMMARY:

The current legal environment in the United Kingdom generally strikes the right balance of protection for the interests of copyright owners, consumers and other stakeholders. While the marketplace is marked by vibrant competition and innovation, the legitimate market for audiovisual and other copyright works is being severely eroded by increases in levels of copyright theft. This Response highlights the importance of free market development in the audiovisual sector, and we also note the usefulness of consideration by the Government of the negative effects of piracy. With that in mind, we offer some suggestions for certain minor legislative changes to the UK legal framework. There are grave challenges facing Intellectual Property, so we welcome the current inquiry. Notable in this Response are the following key comments:

- UK content sector is one of the world's most vibrant, but there has been a steady erosion of investment return due to the effects of digital piracy. Indeed, the MPA estimates that copyright theft cost the entire UK film industry 1,007US\$M in terms of consumer spending loss in 2005.
- Key to growth of the sector and concomitant increase in consumer choice is the use of Digital Rights Management Tools (DRMs). As a result, strong legal protection of technological measure (TMs) is also crucial.
- For consumers to enjoy greater choice in services, copyright owners must be able to effectively exercise and protect their rights in copyrighted works through constructive management of their rights in the digital environment. The cost of the failure to protect intellectual property adequately is often ignored in the polemics over DRMs.
- The market has seen an increase in multi-industry cooperation to address security concerns and interoperability. Government should continue to provide a support for such industry dialogue and intervene only in cases of market failure.
- The current exceptions provided by UK copyright law strike a balance that is fair to beneficiaries of exceptions and copyright owners. No further exceptions, including a private copy exception, are necessary at present.
- Introduction of further exceptions into UK law, including a private copy exception, might provoke introduction of a system of private copy levy collection as a means of compensation for the government authorized limitation of exclusive reproduction rights. Such systems are not favoured by the marketplace.

- Current infringement sanctions, including the current system of damages and sentencing policies, should be strengthened, and inconsistencies in legislation governing copyright and trademark should be resolved.
- An anti-camcording provision should be introduced and improved criminal sanctions for online infringements should be introduced.
- Government should provide incentives aimed at fostering greater cooperation by Internet service providers in addressing Internet piracy.
- Government should support the deployment of technologies to permit redistribution controls for unencrypted digital TV signals and a solution for the so-called analogue hole.
- Government should raise the profile of copyright as an institutional matter.

Introduction—The Motion Picture Association (MPA) is a trade association representing seven major international producers and distributors of audiovisual works, including films, home entertainment and television programs.¹ The MPA and its members welcome the Gowers Review of Intellectual Property and the opportunity to comment on the intellectual and legal framework of Intellectual Property in the United Kingdom with the objective of ensuring continued creativity and innovation as well as providing a sound basis for new business opportunities in the UK. As noted in the Call for Evidence (CFE), economic competitiveness, both at national level and within the IP industries, depends significantly upon creative industries. These industries account for more than 8 percent of the UK's Gross Domestic Product and generate nearly 2 million jobs. The economic impact of the creative industries, if sufficiently protected, will continue to grow, driven by development of new business models.

Questions Addressed—This submission addresses primarily the issues presented in Section 4, How is IP challenged and enforced. The specific questions focused upon are:

- Digital Rights Management in Copyright
- Copyright Exceptions (“fair use”)
- Orphan Works
- Legal Sanctions on IP infringement
- Parallel Imports and Exhaustion (detailed answer not provided. MPA supports the current regime of Community exhaustion. It is vitally important to the health of the film sector, future productions and consumer choice)

¹ The MPA's member companies are: Buena Vista International, Inc., Paramount Pictures Corporation, Sony Pictures Releasing International Corporation, Metro-Goldwyn-Mayer Studios, Inc., Twentieth Century Fox International Corporation, Universal International Films, Inc., Warner Bros. Pictures International, a division of Warner Bros. Pictures, Inc.

General Overview—the legal framework for copyright protection in the UK generally strikes the correct balance between right owners, consumers and other stakeholders. Whilst welcoming the review, we do not believe that the UK’s copyright laws require any significant revision. Due to the importance of copyright to the UK economy, we believe it should be given more prominence within the Government from an institutional point of view.

This Response includes some minor suggestions for legislative changes, including in particular provisions criminalising the unauthorised camcording of a motion picture in a cinema, improved enforcement measures, the establishment of further incentives for Internet service providers (ISPs) to cooperate with copyright owners to curb piracy on the Internet, support for the deployment of technologies to permit redistribution control of unencrypted digital TV signals and a solution for the so-called analogue hole.

The MPA notes that the current legal environment has not posed problems for consumers as a general matter, nor has competition in this sector been stymied or innovation frustrated. Indeed, the UK content sector is one of the world’s most vibrant, with major UK producers such as the BBC, successfully competing internationally. UK consumers, meanwhile, benefit from a growing array of devices and platforms over which to choose content from an increasingly diverse menu of suppliers, with retail prices declining in line with the growing competition.² We would argue that this choice is reflective of a well functioning consumer market for copyright products. Specific concerns, for example, about effects on “fair use”³ of so-called “digital lock up” have been shown to be wildly misplaced, as content producers and service providers compete to service growing legitimate demand for ever more innovative ways to consume and enjoy audio-visual content.

The market may have been slower than we would have liked to respond to consumer demand for greater flexibility in consumption, but the recent licensing agreements (as well as other innovative new services⁴) illustrate how well the content producers have used digital technology as a means of making their works available to consumers in more and different ways, and at more and different locations, all the while preserving the essence of film production. It is in interest of copyright owners to exhibit and otherwise distribute their works. It is not in their interest to lock them up.

² Recent licensing deals in the UK involving MPA members include Warner Bros. licensing to LoveFilm, which has licensed its portfolio to ISPs including AOL, enabling on-demand and download services. Warner Bros. is also in advanced discussions with other potential on-demand service providers. Another film Video On Demand (VOD) service is FilmFlex, a joint venture of Sony Pictures TV International, Walt Disney TV International and the ON Demand Group. It provides full range of on-demand functionalities including pause, fast forward and rewind and with no need to buy, or rent new equipment.

³ Fair use, which is a concept found only in U.S. law, is often incorrectly construed in the European context where specific enumerated exceptions to copyright are the norm.

⁴ Warner Bros. has entered the German market with an electronic sell-through service, In2Movies, and expects to roll-out this model to other territories, including the UK when appropriate. Other MPA Member Companies are also launching electronic sell-through services.

That said, there has been a steady erosion of investment return in copyrighted works due to the effects of digital piracy. Earnings from distribution of audio-visual works provide the funds for the production of new works. Producers recoup their investment in each film or TV programme from distribution in all markets and all territories. Looking at the industry average, only one out of ten films recoups from theatrical distribution alone, six out of ten from all media and markets, and four out of ten never recoup. This is all apart from development costs, and only one out of every ten projects that is developed reaches the "silver screen". To the extent film revenues are lost by piracy, compulsory licenses, or "exceptions" to the rights of the copyright holders, those revenues must be recaptured from other sources. Failure to secure the necessary revenues must by definition mean that less capital will be available for investment in new films.⁵

The battle against the illegal theft of intellectual property has broader consequences for national economic efficiency, as is perhaps most succinctly stated by Professor Richard A. Epstein in his recent report for the US National Association of Manufacturers⁶:

"Theft, measured in billions of dollars of lost revenue, has the same disastrous consequences for IP as it does for everyone else. Individuals and firms are denied the legitimate return on their labour. They must devote a substantial fraction of their resources to protecting what they have, which leaves less for research, development, and sales. Legitimate consumers must foot the costs of theft, assuming they remain in the market at all."

The CFE correctly states that the widespread use of the Internet and the advent of high-speed digital networks have made duplication and sharing of perfect copies of copyrighted works increasingly easy. This has enabled, as noted in the CFE, widespread copyright infringement, most notably through file-sharing networks, DVD ripping, and unauthorised camcording of films in the cinemas. We therefore submit that improvements undertaken by the Government concentrate on a tightening of security in the digital environment where distribution of illegitimate copies is increasing coincident with the increase and growth of legitimate works in the market.⁷ There is also a need to address the issues of the unauthorised redistribution of digital TV signals (see below figures on TV piracy) and the analogue hole.

These improvements will not undermine the benefits of copyright exceptions allowed by law. Indeed, we believe technological measures employed in Digital Rights Management systems (DRMs) actually increase the availability of motion pictures.

⁵ While the information may not be readily available for major producers whose financials tend to be consolidated, Stefan Arndt, the producer of "Goodbye Lenin" one of the most popular films in German film history, stated (as reported in the Los Angeles Times June 18, 2004) that because of illegal copying [770,000 illegal copies estimated by German officials] his production company Xfilm Creative Pool, was unable to produce three additional features.

⁶ See http://www.nam.org/s_nam/bin.asp?CID=202515&DID=236749&DOC=FILE.PDF

⁷ To provide some evidence of the massive growth in the availability of movie content in recent years, the British Video Association (BVA) reports that approximately 5,600 titles were released in the retail sector during 1996. For 2006, the BVA expects to report that 8,679 titles were released on DVD, increase of more than 54% over the ten year period.

In considering these points, it should not be forgotten that digital piracy is not a problem that is limited to the Internet. In the UK, there is, and has been for some time, a significant problem with digital piracy in the form of illegal copies of films being sold on DVDs or DVD-Rs. Typically pirate DVDs are imported from China, Southeast Asia and Russia, whereas pirate DVD-Rs are produced in small burning operations based in the UK. Pirate DVDs and DVD-Rs can be found on sale across the UK just a few days after a film's first theatrical release (whether it has been released in the UK or not) and are sold through a wide variety of channels including in the workplace, at car boot sales and weekend market and even by street sellers in pubs and shops.

The grim picture of economic harm occasioned by growing levels of piracy in the UK is presented in the following statistics⁸:

- As noted above, the MPA estimates that copyright theft cost the film industry in the UK 1,007US\$M in terms of consumer spending loss in 2005.⁹
- Criminal gain from 2005 sales of illegal copies of DVDs – £287 million;
- Sales of illegal DVD copies of *Harry Potter and the Prisoner of Azkaban* were £9 million; loss of box office receipts were estimated at £2.8 million;
- The audiovisual industry loses £800 million annually due to copyright piracy; the music industry lost £654 million in 2003 and 2004 due to piracy (illegal downloading); and
- A major release of a new film on DVD typically loses 20-30% of sales due to counterfeiting and piracy, which equates to approximately £4 million lost for a “blockbuster” release and approximately £1.5 million in lost box office receipts.

In the arena of online platforms, the facts are no rosier. According to a February 24, 2005 study by Envisional Ltd., “The UK is the largest downloader of online pirate TV programmes in the world.” (...) and “[There is a C]urrent worldwide explosion in online TV piracy of which around 18% is occurring in Britain.” The Gowers Review inquiry, therefore, comes at an opportune moment, affording the Government, consumers and industry a forum in which further measures that might be undertaken to turn back this tide can be considered. Any proposed reform should be considered only where it can be shown to provide a Pareto improvement, insofar as it increases incentives for content producers to invest in the UK's creative economy.

⁸ Taken from the Submission on the Gowers Review provided by the Alliance Against IP Theft.

⁹ This figure breaks down as follows:

- US Studios-787 US\$M (78.1%)
- UK titles-192 US\$M (19.1%)
- Other- 28 US\$M (2.8%) (foreign language features)

Questions Addressed—

I. How is IP challenged and enforced?

The digital age has posed a significant opportunity to right owners and distributors of copyrighted works. That opportunity, which has begun to yield great benefits to consumers, goes hand in hand with the threat of digital piracy of copyrighted works. Piracy that is the most damaging to the current and future health and viability of the copyright industries is that of mass copying and widespread distribution of digital reproductions.

While there may be no silver bullet solution to the threat of digital piracy, both in terms of hard goods reproduction and online piracy, one key factor in reduction of current levels of piracy and concomitant increase in consumer choice is the use of Digital Rights Management Tools (DRM). As a result, strong legal protection of technological measure (TMs) deployed by rights owners to manage and protect their works is crucial, a fact which many governments (including outside the EU) have recognized in enacting prohibitions against circumvention of TMs.¹⁰ There can no longer be any question that such protections are not only crucial as part of any framework that allows for the legal distribution of digital works but are now also the international legal norm.

--Digital Rights Management (DRM)

We are concerned that much of the public debate on DRM¹¹ has suggested that content producers might employ the technologies to limit consumers in their abilities to enjoy content. We hope that this review enables a more balanced debate. It is always appropriate to consider the broader social consequences of technological innovation; however, consumer (and overall economic) benefits of such innovation need also to be considered, despite these aspects being too often considered unfashionable or unpopular. We submit that the true cost of failure to protect intellectual property is not much examined in the debate over DRM.

¹⁰ "In the nearly 10 years since the conclusion of the Diplomatic Conference resulting in agreement on the WCT and WPPT, nearly 100 countries/territories have undertaken copyright law amendments implementing protections against the unlawful circumvention of TPMs." See, Schlesinger, Michael, "OVERVIEW OF GLOBAL IMPLEMENTATION OF TPMS: EMERGING GLOBAL STANDARDS" presented at the Fordham University School of Law, Fourteenth Annual Conference International Intellectual Property Law & Policy, Thursday, April 20, 2006, New York, NY, USA.

¹¹ The terms DRM and technological measures (TMs) are frequently used interchangeably. A TM is defined by the Copyright, Patents and Designs Act 1988 (Section 297ZF), as amended, in the following terms: "technological measures" are any technology, device or component which is designed, in the normal course of its operation, to protect a copyright work other than a computer program." DRMs on the other hand are not subject to any legal definition and generally are considered to encompass something broader than a TM. In other words, DRM may employ TM (e.g., encryption) but also have other features including rights management information (RMI is defined by the CPDA, see Section 296ZG). According to Wikipedia, DRM "handles the description, layering, analysis, valuation, trading and monitoring of the rights held over a digital work. In the widest possible sense, the term refers to any such management." Definitions of DRM abound.

Film elements of works that are not protected—or which the owner has no incentive to protect—will be lost, and, to the extent film markets are eroded, costs can increase for consumers while willingness of creators to invest in productions of quality declines. In addition, new and existing services in the realm of copyright consumption could not operate – or at least would be short-lived—without DRMs that incorporate TMs. This is because these permit the licensing and management of copyright works and facilitate the legitimate provision of copyrighted works to consumers by protecting copyright owners thereby creating incentives for them to continue investment in production. This in turn enhances consumer benefit by making more works available in ways that increase choice and access. Dissemination of copyrighted works in any form, including DVD or via legal online download services, could not occur, at least not profitably, without the protection provided by TMs. Such digital tools therefore require strong legal protection, one not handicapped by unfounded (and unproven) fears as to digital lock up or limitations on “fair use”.

The MPA member companies have been developing a variety of online services and are licensing their works to a broad array of new media platforms. New services offer consumers exciting and novel ways to enjoy copyrighted content, in particular via the Internet.¹² New business models make content available to consumers in a variety of ways, offering flexible pricing, subscription services and other video-on-demand outlets. New formats, including DVDs, new generation DVD, digital cinema, digital TV, etc, also offer greater consumer choice.

The growth in new business models and the market access for new intermediaries, such as LoveFilm, provide low cost entry opportunities for UK producers, including independent producers, and new ways for consumers to reach a diverse range of content. Reduced entry barriers stimulate increased competition at all stages in the value chain, reducing retail prices, further stimulating innovation and improving economic efficiency. DRM tools play a central role in the success of these new business models, particularly in offering consumers the ability to enjoy content when and where they want and to pay only for what they want. The key to the future in which consumers will continue to enjoy greater choice in their use of copyrighted works is the notion that copyright owners can effectively exercise and protect their rights in copyrighted works through constructive management of their rights in the digital environment. Unless copyright owners continue to be able to license and manage their works in the digital realm, they will not be able to recover the massive investment made to create those works. There would be a resulting lack of incentive to invest in the creation of new content or to increase the availability of existing content online. Effective management tools are the only means to ensure secure exploitation of works, recovery of related investment, and deployment of new business models. In short, they are vital for both copyright owners and consumers.

¹² New online services launched in the UK include: Home Choice Video-on-Demand (VoD) packages (a TV over DSL service based in London and in the Southeast of England), Kingston Interactive Television (in Hull), Lovefilm.com, a 150,000 and growing subscriber service for movie downloads, for rental and now for download, launched in the UK in December 2005).

From time to time in the discussion of DRM deployment, questions are raised as to interoperability issues, and related concerns that not all devices will accommodate all types of content, in form and/or format. These concerns often spill over into discussions about exceptions and whether protected content (through DRM or TMs) offered to consumers can be accessed by consumers when and where copyright exceptions allow. At the heart of this debate intersect copyright exceptions and protection of technological measures, equally important objectives of the EU Copyright Directive (EUCD) and which have been addressed in the UK implementation of the Directive. As a backdrop to the legal framework for the debate, the marketplace is at work to resolve any existing interoperability issues in a manner that does not prejudice the underlying technological and copyright protections as well as the usage rights accorded to consumers by copyright owners.

We submit that interoperability cannot come at the expense of security of content. The EUCD provides legal protection for technological measures, used to protect works, against circumvention and trafficking in circumvention devices and services. Copyright owners and users of copyrighted works should, where necessary, reach voluntary agreements to afford the beneficiaries of exceptions who would otherwise not be able to benefit from them, the ability to do so (see, Article 6.4 and Recitals 51/52 EUCD). The market has only just begun to deal with these issues. While it is not a foregone conclusion that governments have no role to play in mandating a technical outcome, it is patently true that copyright owners' interests are served when consumers are able to access copyrighted works in accordance with applicable laws. DRM may indeed provide a solution for accommodation of copyright exceptions. As an example of work on voluntary arrangements, the MPA is engaged in discussions with the British Film Industry on issues of print deposit for film preservation and the educational use of film materials.

Accordingly, the market should be given a chance to address and resolve problems as and if they arise. By the same token, DRM, which are developing rapidly, are in their infancy. Regulation at this nascent stage would doubtless do more to chill the market, both in respect of deployment of new business models and development of content specific for those models, than it could to help it, particularly when it remains unclear whether problems of frustrated legal access exist and, if extant, how profound such problems might be. There are a number of obstacles to DRM development that should be considered as part of government oversight in this area. DRM delivery of motion pictures faces a number of technological challenges, including "hackability," unprotected analogue video outputs, the ability to digitize analogue signals without respecting copy protection signalling (thereby exploiting the so-called analogue hole and allowing for analogue re-conversion). These vulnerabilities, taken together with the problem of unauthorized retransmission of unencrypted digital signals, could exacerbate the environment of rampant piracy of motion pictures.

Governments can address these technology loopholes through encouragement and, as appropriate, facilitation of cooperation between content creators and providers, technology providers and other interested stakeholders to help control piracy and allow legal alternatives to flourish.

Given the consumer interest in this area, there exists significant incentive for the market to resolve these issues. The market has also seen an increase in multi-industry cooperation to address security concerns and interoperability issues though continued and further cooperation is needed.¹³ Public policy should provide a support for such industry dialogue, rather than seeking to substitute for the traditional forms of industry-led standardisation and cooperation. Proposed interventions should be restricted to cases of market failure and only where it can be shown that proposals would lead to improved investment incentives and greater service innovation.

--Copyright Exceptions ("fair use")

The current exceptions provided by UK copyright law strike a balance that is fair to beneficiaries of exceptions and copyright owners. As such, no further exceptions, including a private copy exception, are necessary at this time. Consumers now have the ability to copy for time-shifting purposes (which is exempt as an infringing activity under the current law). Moreover, the private copy exception—i.e., an exception to the copyright owner's exclusive right of reproduction—when applied in the digital realm, can be problematic for copyright owners. Consumers can easily confuse the scope of the exception, for example, believing the copies can be made from illegal sources. In France, the Supreme Court has made it clear that the exception does not extend to the copying of encrypted formats such as DVDs (see *Que Choisir v. Studio Canal et al*, 28 February 2006). The *Que Choisir* debate, played out in the courts of France, highlighted the tensions that pit exceptions against legal protections for TMs, which should be themselves protected by law (per the EUCD's Article 6 and CPDA Section 296ZA et seq.). The Copyright Directive does not allow for circumvention of technological measures for the purposes of benefiting from an exception. Alternative mechanisms exist which do not undermine the security of the technology.

The debut of a private copy exception into UK law at a time when unauthorized DVD sales continue to climb and when unauthorized file sharing is also increasing would put copyright owners at an unnecessary and unfair disadvantage, compromising their exclusive rights by potentially immunizing consumers who copy works then upload those works into file-sharing networks.

¹³ For example, ongoing in work in the Digital Video Broadcasting project (www.dvb.org), Coral Consortium (www.coral-interop.org), and the Digital Living Network Alliance (www.dlna.org).

Given the fact that unauthorised file-sharing entails the unauthorised copying and the making available of protected works, the introduction of a private copy exception risks seriously reducing the remedies available to copyright owners who seek to enforce their rights for infringement. Dovetailing this danger are the immeasurable risks of economic loss faced by copyright owners, when the ability of consumers to copy (perfectly) their works and distribute them via Internet is facilitated by the introduction of private copy exceptions in the digital realm.

It is important to take note of the increasing number of product offerings that provide consumers with the choice of making a copy of their purchased item in a secure manner. The market is actively working to provide consumer-friendly solutions without undermining content security. The cross-industry efforts underlying these offerings rely on the current legal and technological protections to develop and obtain consumer trust. A new exception could severely hamper and undermine (if not render futile) efforts to develop new legal product offering. As a result, availability of legitimate content would decrease.

As per the Copyright Directive, the introduction of a private copy exception in UK law would logically provoke pressure from certain copyright owner groups who would favour introduction of a system of private copy levy collection as a means of compensating them for the government authorized limitation of their otherwise exclusive reproduction rights. Levies may also be seen as the counterpart to a “right” to copy, even though such a construction is unwarranted by the law at national, European and International levels. Under a levy system, levies in varying amounts would be added to the wholesale price of equipment and media used in connection with private copying and distributed to copyright owners as a “compensation” for the loss or limitation of their reproduction rights. Levies can create a negative pressure on commerce, due to price increases not occasioned by market forces other than the copyright owners’ remuneration rights.

--Orphan Works

It may be of interest that the US Government has engaged in a lengthy consultation with stakeholders in order to promulgate legislation to address so-called orphan works.¹⁴ This consultation and ensuing recommendations for legislation have attempted to balance the need to facilitate use of such works as well as the rights and interests of copyright owners.

The MPA has taken the position that any legislation response to this issue should provide for a limitation on remedies for the infringing use of works for which the rights owners cannot be located and permission obtained, under the following conditions:

¹⁴ See, www.loc.gov (US copyright office website)

1. A diligent, good faith search for the rights owner is conducted, using generally accepted search methods and tools
2. The infringing use is terminated promptly in the event the rights owner becomes known -- e.g., the use is discontinued or permission is obtained
3. A reasonable royalty is paid for the infringing use should the rights owner be located.

Such limitation is only on remedies for infringement, not on the exclusive rights of the owners of works. In other words, the use of orphan works would be infringing, but statutory remedies, for example, damages and injunctive relief, would be limited. Such limitation would apply only when the rights owner cannot be located after a diligent search, and would not apply when the rights owner is located by denies permission to use the work.

--Legal Sanctions on IP Infringement

Inadequate system of damages: A consultation is expected from the Department for Constitutional Affairs reviewing the damages regime in UK. This is important as the amended system that came into effect with the Copyright Designs and Patents Act 1988 (CDPA) has had the effect of making the awarding of additional damages in copyright cases extremely difficult, with it being impossible in trade mark cases as no such legislation exists. Criminals are making huge profits through counterfeiting and piracy. For example, the video industry calculates the criminal gain in video and film piracy at £278 million, at street prices, while criminals are making £540 million annually through games software piracy. The compensatory damages awarded against them at present impact little on these profits. The ability to use damages as a deterrent would be a valuable tool to those fighting this criminal activity and would assist creators in protecting their creative content, particularly given the ease with which illegal copies can now be produced.

The UK Government has published a Statutory Instrument¹⁵ 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 the anticipated Department of Constitutional Affairs inquiry into damages.

Sentencing Policy: One of the main inconsistencies and inadequacies rests with the sentences handed out in cases of IP infringement. The Review should recommend that the Sentencing Guidelines Council examine sentencing in IP infringement cases and publish minimum sentencing guidelines.

¹⁵ No 1028 The Intellectual Property (Enforcement etc) Regulations 2006

Inconsistent application of trade mark and copyright legislation – Sections 107A and 198A: As referred to earlier, with trading standards not having the duty to enforce copyright law, a major inconsistency exists in the way in which the law treats different forms of IP infringement.

While rights owners do all they can to protect their rights, they do not have any enforcement powers. This means that although they may have clear evidence of infringing activity, they cannot enter premises and cannot inspect and seize goods and documents relating to that infringing activity.

Rights owners rely on police and Trading Standards officers to protect and enforce their IP rights. This is as it should be – Trading Standards perform a public function and are there to ensure trade is fair and lawful. This is in the interest of the consumer, the rights owner and those who trade in legitimate products.

Introduction of Criminal sanction for unauthorised camcording in cinemas: The introduction into UK law of specific provision prohibiting the copying of a motion picture by camcorder would be a useful step towards reduction of levels of piracy of motion pictures. In a substantial proportion of cases, the origin of a pirate copy of a film on its first appearance on the Internet is a recording made secretly in a cinema. The films illicitly recorded in this way are made available before or during theatrical release, which is highly damaging to the value of the copyrights. Major films are increasingly released “day and date” around the world, in an attempt to reduce the market advantage of pirates outside the country of first release, but this means that illicit recording of sound and vision has become an international problem. Titles camcordered in British cinemas and released by Internet pirates include *Harry Potter and the Prisoner of Azkaban*, *Mr and Mrs Smith*, *The Cave*, *Kinky Boots*, *Hitchhiker's Guide to the Galaxy*, and *Star Wars: Episode III - the Revenge of the Sith*). In its report of December 2004, “Film Theft in the UK”, the UK Film Council recommended as an action in the near term that the UK “make the act of camcording a film in a cinema a criminal offence”. The MPA strongly supports this recommendation. It is noted that Italy has just adopted a law specifically criminalising camcording (Art. 21, Decreto-Legislativo 16 marzo 2006, N. 140).

Circumvention of technical protection measures: The relevant provisions of UK law are generally in line with EU and International norms, but a technical amendment is required to address an issue related to standing and joinder. As we noted in our submission to the All-Party Parliamentary Internet Group in February of this year:

The CPDA appears to be broadly in line with the EUCD regarding legal protection of technological measures, but two points of concern may however be useful mentioned at this stage. Firstly, the British implementation appears to feature an omission of the “limited commercially significant purposes or use” test in the section on criminal sanctions (Art. 6.2b of the EUCD) as well as a narrower implementation of the Art. 6.2a test (“promoted, advertised or marketed for the circumvention of” effective technological measures).

In addition, a significant procedural problem arises in sections 296ZA(4) and 296ZD(3) from the incorporation by reference of section 102(1) of the Act. The circumvention provisions rightly allow both the publisher of TPM-protected works and the owner of the technology affected to bring proceedings against prohibited circumvention activities. Section 102(1) requires copyright infringement claimants with interests in the same work all to be joined in the action. As applied to the circumvention provisions, it arguably requires the technology owner to join everyone with any copyright interest in the work protected (and vice versa) before he can proceed with his action. This is a pointless fetter on potential claimants, especially given that under the Civil Procedure Rules, the court can at its discretion join any party whose participation in the action seems desirable (CPR, rule 19(2)). This mandatory requirement did not appear in the pre-EUCD anti-circumvention provisions introduced in 1988 (section 296) and should be deleted.”

Criminal sanctions for online infringement: Whether infringement is taking place on or off line, intellectual property is being stolen. The MPA strongly urges that online infringement is not viewed as a lesser crime than the stealing of a physical product. Indeed, the UK might consider the introduction of a specific criminal sanction to deter the development of services that actively induce copyright infringement.

Internet Service Provider/Co-operation to address Internet piracy/Limitations on Liability: The MPA notes that DTI is considering an extension of the limitations on liability, introduced into UK law by the Electronic Commerce (EC Directive) Regulations 2002 to further categories on intermediary activities. We oppose any such extension. As we stated in our submission of 23 September 2005:

“It has to be recognised that the Electronic Commerce Directive has failed to create a safe environment for legitimate online business, while creating incentives against cooperation between content producers and Internet service providers....[Instead i]t may be necessary, in the words of Article 21 of the Directive, to consider “the need for additional conditions for the exemption from liability, provided for in Articles 12 and 13, in the light of technological developments”. In particular, the threshold conditions of eligibility included in the Digital Millennium Copyright Act (such as a policy for termination of repeat infringers) may be necessary to create a better balance between ISP and right holder interests.

The MPA considers that it is premature to consider any extension of the current exceptions from liability until stable cooperation has been established between ISPs and right holders in the prevention of mass piracy. The focus should be on encouraging efficient action by ISPs to terminate infringements notified to them by right holders and on facilitating the sharing of information to permit infringers, where appropriate, to be brought before the courts. Codes of conduct, as contemplated by Article 16 of the Directive, have a useful role to play in this.”

We urge the Gower’s review to consider the introduction of provisions which provide further incentives for ISPs to cooperate to stem the tide of on-line piracy. Other tools, including injunctions against ISPs (cf., CDPA ss97(A) and 191JA) are already available but cooperative efforts are favoured.

We would be happy to provide further details on the above-mentioned issues upon request. We thank you for your attention and consideration.

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