

## GOWERS REVIEW OF INTELLECTUAL PROPERTY COVER SHEET FOR RESPONSES

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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	*

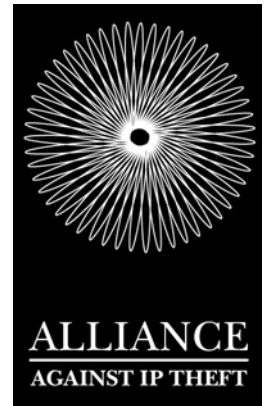
Specific Issues covered:	
Current term of protection on sound recordings and performers' rights	
Copyright exceptions – fair use and fair dealing	
Copyright – digital rights management	*
Copyright – orphan works	
Copyright – licensing of public performances	
Copyright – designated archive status	
Patents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

Have you raised any other issues in your response?

Y / N

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

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



# GOWERS REVIEW OF INTELLECTUAL PROPERTY

## RESPONSE TO CALL FOR EVIDENCE

### ALLIANCE AGAINST INTELLECTUAL PROPERTY (IP) THEFT

21 APRIL 2006

**Members:**

Anti-Counterfeiting Group

British Association of  
Record Dealers

British Brands Group

British Jewellery & Giftware  
Federation

British Music Rights

British Phonographic  
Industry

British Video Association

Business Software Alliance

Cinema Exhibitors  
Association

Copyright Licensing  
Agency

Entertainment and Leisure  
Software Publishers  
Association

Federation Against  
Copyright Theft

Federation Against  
Software Theft

Film Distributors  
Association

Institute of Trade Mark  
Attorneys

Publishers Licensing  
Society

Video Standards Council

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## **EXECUTIVE SUMMARY**

The Alliance Against IP Theft believes the protection and promotion of intellectual property rights are of fundamental importance to the UK's knowledge based economy. The creative industries generate over 8% of the UK's GDP, while brand manufacturing (which relies heavily on intellectual property) accounts for 14% of UK manufacturing and over £50 billion of gross output. They also have a crucial role to play in encouraging innovation – something recognised by government in its establishment of the Technology Programme.

The Alliance is extremely concerned about the impact of IP crime – on the economy, consumers and society. There is evidence that British industry loses billions of pounds annually through the theft of IP. Consumers are put at physical risk through the sale of dangerous products and lose out financially by paying inflated prices for shoddy, substandard items. Alliance members, accompanying trading standards and police on raids, have also witnessed the role this criminal activity plays in anti-social behaviour. Criminal gangs exert control over markets and cause financial harm to legitimate local businesses unable to compete with the prices of fakes. Because IP theft generates huge criminal gains it has become a very attractive type of crime and there is growing evidence of the links between this and other forms of criminality such as benefit fraud, people smuggling and the exploitation of young people.

The Alliance does not believe the system of IP rights is that broken, but welcomes the Review as an opportunity to address the problems that do exist and ensure the system going forward is fit for purpose. This is particularly important given the progress in new technology and the increased digital access which, while bringing benefits to consumers and industry, also comes with threats in the shape of widespread illegal filesharing, the sale of fake goods online, fraudulent trading, copyright theft of published academic and literary works and underage access.

Existing problems, which affect the effective enforcement of intellectual property, include:

- Inadequate resources for trading standards
- Inability to prosecute market organisers who persistently allow the sale of fake goods
- Trading standards having neither the power nor the duty to enforce copyright legislation
- Infringement of intellectual property in the workplace
- Inadequate legal redress for copycat packaging
- Lack of presumptions for copyright ownership in criminal matters
- Inability for courts to hear 'anonymous' evidence in civil search and seizure applications

The Alliance urges the Gowers Review to recommend effective remedies to these issues.

In addition, a number of inconsistencies and inadequacies exist in the way the law applies legal sanctions to infringement of different forms of IP or to different circumstances, which the Alliance looks to the Gowers Review to address. These include:

- Inadequate system of damages
- Sentencing policy
- Inconsistent application of trade mark and copyright legislation

These all seriously impact on Alliance members' abilities to effectively protect their intellectual property. The Gowers Review provides an ideal opportunity for such inconsistencies and inadequacies to be addressed, ensuring that the IP framework going forward is robust, effective and fit for purpose.

The members of the Alliance Against IP Theft are:

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

## **1. INTRODUCTION: OBJECTIVES OF REVIEW**

The Alliance Against IP Theft welcomes the Gowers Review of Intellectual Property. Intellectual property is of huge importance to the UK – to both the country’s economic and social welfare. It stimulates creativity and innovation, and a system of IP rights enables proper reward in our increasingly knowledge-based economy.

This Review is an ideal opportunity to analyse the current IP framework, what works and what doesn’t, and provide recommendations as to how the value of intellectual property can continue to be safeguarded in order to assure the future of Britain’s skills in design, innovation, technological developments and creativity – all vital to secure the country’s success in a rapidly changing global economy.

## **2. ABOUT THE ALLIANCE**

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

The Alliance is concerned with ensuring intellectual property rights are valued in the UK, and that a robust, efficient legislative and regulatory regime exists which enables these rights to be properly protected. In our response to the Call for Evidence we outline the importance of intellectual property, and the need for a correspondingly rigorous protection regime, and provide evidential answers to those questions of most relevance to our members – primarily those concerned with intellectual property protection and enforcement.

For ease of reference, the sections in the Call for Evidence to which our submission relates are:

### **General Questions**

Section 4. How is IP challenged and enforced

### **Specific Questions**

- Copyright – digital rights management
- Legal sanctions on IP infringement
- Coherence between competition policy and IP policy

### 3. IMPORTANCE OF INTELLECTUAL PROPERTY

*“Intellectual Property Rights have a key role to play in this new world. They underpin innovation by providing a tool for businesses to make a return on their investment. For many innovators, access to finance is impossible without IP protection”.*

Lord Sainsbury, Minister for Science and Innovation

#### **Economic contribution**

As the UK increasingly relies on a knowledge-based economy, the value of its intellectual property to the country's GDP and balance of payments is growing. The creative industries alone contribute a large amount to the UK, not merely financially, but also by providing an environment where innovation, creativity and enterprise can flourish. Manufacturers, though they may sometimes manufacture their goods in low wage countries, still contribute substantially to the UK's prosperity via skilled employment in R&D, corporate profitability, taxation, licensing and export sales of finished goods.

To put it in stark terms, the creative industries contribute over 8% of the UK's GDP and are responsible for nearly two million jobs, while at least the same again can be added for the contribution of other industries which rely on intellectual property, such as brand manufacturing – which alone accounts for 14% of UK manufacturing and over £50 billion of gross output<sup>1</sup>. It is therefore clear that a robust system to protect intellectual property is of paramount importance.

In today's knowledge-based economy intellectual property protection is not a “nice to have” but is an absolute essential. This view was echoed recently by the Secretary of State for Culture, Media and Sport. Referring to the creative industries, Tessa Jowell, commented, “Far from being ‘economy lite’ our creative sectors should be seen as ‘economy central’ ”. The Alliance strongly supports this sentiment.

#### **Innovation**

The UK has always valued intellectual property and recognised the need for those holders of intellectual property to be able to capitalise on their creations. This can be seen in the increasingly successful British film and music industries through, for example, the international success of films such as Harry Potter and bands such as Coldplay. The British computer game industry is a similarly valuable contributor to both the UK economy and British innovation through highly successful games such as Tomb Raider. The quality and value of British innovation and design permeates much wider, however, than simply the creative industries, something highlighted by the recent Great British Design Quest, organised by the Design Museum and the BBC's The Culture Show. With worldwide-acclaimed designs and products such as

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<sup>1</sup> Coopers and Lybrand 1995

Concorde, the Mini, the Dyson vacuum cleaner, the worldwideweb and the Dr Martens boot, Britain is synonymous with innovation and quality. The importance of such innovation to the UK is seen through the creation of the Innovation Department in the DTI, and the significant investment announced in this year's Budget - £80 million to support technology and innovation, the latest allocation of the government's £370 million Technology Programme that aims to create wealth for the UK economy through innovation.

### **Impact of IP Crime**

This level of innovation is only possible in an environment where intellectual property is properly valued and protected. With intellectual property theft growing and becoming more ingrained as an organised criminal activity<sup>2</sup>, British industry is losing billions of pounds a year, the Treasury is losing significant tax revenue, consumers are being put at risk and ripped off, and local legitimate businesses are finding it hard to compete with the illegal traders. The impact can thus be measured in terms of economic, consumer and social harm.

### **Economic harm**

Evidence from Alliance members shows that:

- In 2005 the criminal gain from selling 77.75 million fake DVDs was £287 million.
- Typically a major release of a new film on DVD loses 20-30% of sales through counterfeiting and piracy, amounting to an average of £4 million lost per "blockbuster" title and up to £1.5 million in lost box office sales.
- British film, *Harry Potter and the Prisoner of Azkaban*, saw 21% (£9 million worth) of DVD sales and a further £2.8 million of box office receipts lost through counterfeiting and piracy.
- The audio-visual industry annually loses around £800 million through copyright theft.<sup>3</sup>
- The music industry lost £1.1bn from 2003 to 2006 through illegal downloading<sup>4</sup>.
- Piracy in the UK is now so endemic that a ten-point fall in business software piracy in the UK would:
  - Add nearly £11 billion to the UK economy.
  - Create nearly 34,000 new jobs.
  - Increase local industry revenues by £9.6 billion.
  - Generate an additional £2.8 billion in tax revenues<sup>5</sup>.

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<sup>2</sup> Proving the Connection

<sup>3</sup> Research conducted by IPSOS in November 2005 into Digital and Physical Piracy in Great Britain

<sup>4</sup> TNS three year study April 06 that tracked purchasing habits of downloaders against non-downloaders

<sup>5</sup> Business Software Alliance/IDC Global Software Piracy Study 2005

### ***Consumer harm***

Consumers are at increasingly high risk of harm from fake goods, both physically through the sale of dangerous products and financially by paying for shoddy, substandard items, with no retailer's exchange policy or manufacturer's guarantee. The fakers invest very little in their products and, through clever marketing and pricing, make a huge profit. There are no research and development costs, no compliance with quality and safety standards, no advertising or retail costs, and of course, no taxes to be paid.

Alliance member, the Anti-Counterfeiting Group (ACG) has uncovered examples of fake goods on sale which include widespread distribution of fake DETTOL antibacterial cleaner (results of analysis unknown, but are not subject to any quality control or safety checks), fake Nokia car phone chargers which melted when used, and fake Star Wars figurines which contained high levels of lead. Counterfeit cigarettes are in plentiful supply and have been found to contain much higher levels of tar and dangerous additives than the real thing. Fake appliance batteries are a constant threat, for sale in many markets and car boots sales – ACG members report that there have already been instances of explosions under testing conditions. Fake disposable razors have caused extensive skin damage. Sun cream, sunglasses, alcoholic drinks, power tools, soap, instant coffee, condoms and perfume are all being counterfeited, with much of it carrying a major threat to consumer safety. Most worrying of all perhaps is the growing trade in fake pharmaceuticals on the Internet, which is soon expected to circumvent the stringent licensing and sale requirements in Europe and bring a flood of counterfeits into the UK.

### ***Social harm***

Local communities also find themselves affected as this level of criminality is often linked to other forms of anti-social behaviour. The sale of fake goods in towns up and down the UK is a very visible reminder of the organised criminal activity which exists in local communities. By allowing it to go unchecked, a dangerous message is being sent, not only to the criminals involved, but also to the public and particularly to children – a message that counterfeiting and copyright theft is acceptable and is a 'victimless' crime. It is not. It allows criminals to exert control over local markets, puts consumers in harms way, damages the UK economy, and deprives entrepreneurs of a return on their investment and reward for risk taking.

The recently launched Serious and Organised Crime Agency (SOCA) also has counterfeiting in its sights, with IP crime falling into SOCA's definition of organised crime.

The Government is keen to tackle anti-social behaviour and promote a return to respect for more traditional values in communities. Alliance members who have been present at police and trading standards raids at car boot fairs and markets have seen teenagers manning stalls loaded with counterfeit material, have witnessed

criminal and anti-social behaviour taking place at such markets, and would be happy to provide taped evidence of this. Tackling IP crime would offer one inroad into such anti-social behaviour.

### **Links with other criminal activity**

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

A clear, established link has been made between the sale of fake DVDs and people smuggling from China. In every city centre illegal Chinese immigrants, who have been smuggled to Britain by the Snakeheads, ply their trade in fake DVDs on the streets, pubs, takeaways, restaurants, cafes, hairdressers, indeed any soft target they can find. Despite trading standards' reliance on police and immigration officers to make arrests, it appears that little is being done to stem the flow. John Taylor, Head of Trading Standards in Brent and Harrow reports that what began as a minor problem of Chinese DVD sellers drifting around shopping centres has turned into intimidation of shoppers, leading to increased complaints from the public and MPs. Trading standards don't have the powers or resources to deal with it. Mr Taylor says, "It seems to be compounded by the fact that immigration officers also don't appear to have an agreement with the Chinese Government to take illegal immigrants back. Even when arrested they are back on the streets in 24 hours. Huge profits are made and at a higher level it's about money laundering – these illegal immigrants are just the foot soldiers." While the case of the Chinese cocklepickers is still in court, it is known by the Federation Against Copyright Theft/industry enforcers that one of the two main defendants also faces charges of copyright theft.

The Government has also recognised the increasing links between IP theft and other criminal behaviour. The Department of Work and Pensions (DWP) formed part of a national multi-agency investigation into persons involved in the production and sale of counterfeit goods, predominately CDs, DVDs and computer games, while claiming benefits from the DWP. The DWP Counter Fraud Investigation Service (CFIS), industry Anti Piracy Units, Trading Standards and the police have come together for two operations so far to uncover this criminal activity. These are excellent examples of multi-agency working. One operation saw raids that netted over half a million pounds' worth of DVDs and CDs, with 123 people arrested – 96 of whom were in

receipt of state benefits. The total value of the goods seized was over £3 billion pounds<sup>6</sup>.

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<sup>6</sup> Patent Office Annual Enforcement Report 2004

## **4. THE CURRENT SYSTEM**

### **What's good about the current system?**

The Alliance agrees with the Gowers Review team that the UK's system of IPR is "not that broken". It recognises the importance of intellectual property, allowing for a system of financial reward and control for rights owners over innovation and product development. It is an approach which reflects the creative and entrepreneurial nature of UK business where strong property rights are required. It is flexible and received a recent update and health check via the implementation of the EU Copyright Directive. For a regime which has, naturally, had to evolve and adapt, we believe a fair balance has been created between consumers' access and intellectual property owners' rights. In fact, the Alliance strongly believes that contrary to some consumer groups' arguments, these two objectives are not incompatible – in fact the reverse is true, one cannot survive without the other. Without a market (consumer demand) for IPR there would be no way of ensuring a return on investment for innovators and creators – and thereby no incentive to continue creating and manufacturing. Therefore it is in rights owners' interest to ensure consumers are able to access and purchase products in the manner in which they wish.

The addition of intellectual property theft to the schedule of the Proceeds of Crime Act 2002, following intensive lobbying by the Alliance, has also strengthened the current system, with the Assets Recovery Agency (ARA) successfully obtaining Confiscation Orders against a number of counterfeiters. Working with Derby Trading Standards, the ARA obtained over £17,000 from John Wagstaff who had pleaded guilty to 22 counts of counterfeiting and copyright offences with a further 20 offences taken into consideration. East End DVD pirates Sidney Austin and Dino Simm were ordered to pay back £1.5 million last year. Over £78,000 is to be recovered from two video game pirates, after it was found that one of the offenders, Paul Gibbons, benefited from his criminal activity to the tune of nearly £285,000. This has been a significant development in combating the perception of IP theft as a low risk / high return criminal activity. It is vitally important to demonstrate counterfeiting and piracy do not pay, and those involved will be targeted financially.

### **What needs changing?**

As identified in the Call for Evidence, this Review provides the ideal opportunity to address existing problems and ensure the regime going forward retains the positive attributes, such as flexibility, while creating a system fit for purpose in the 21<sup>st</sup> C century. While the Alliance believes on the whole that the legislative system affording IP rights does not require wholesale amendments, some problems relating to the enforcement of rights do exist.

Anomalies include:

- System of damages which does not currently reflect the true profit being made by counterfeiters and pirates

- Directors able to “turn a blind eye” to IP infringements carried out in the workplace
- Rival producers able to deliberately make their products look like the leading brand in order to confuse consumers and mislead them into thinking the products share the branded products’ heritage and values
- Fundamental inconsistencies between the enforcement provisions under the Trade Marks Act 1994 and the Copyright, Designs and Patents Act 1988
- Difficulties in information sharing between private and public enforcement organisations
- Cost to industry and individuals of protecting intellectual property

## **5. IMPACT OF NEW TECHNOLOGIES AND DIGITAL MEDIA**

Given the rapid development of new technologies, and the high media profile given to opportunities afforded by digital media, there is an understandable consumer and political focus on this area. It is similarly in the forefront of industry's mind.

There are obviously major advantages for industry offered by new technologies and digital media. The legitimate creation, distribution and sale of both physical goods and content are ever more effective, cost-efficient and high in quality.

However, at present both consumers and industry are operating in a transitional environment. Whilst opportunities to access creative content through digital means are already widespread and rapidly expanding, consumers and business alike are still adapting to the diverse range of digital platforms, be they Video-on-Demand (VoD), Internet downloading, delivery of content to mobile telephones and other devices, or simply the global dissemination and sharing of knowledge. The Internet offers a staggering volume of consumer goods for sale which rivals the high street, with easy access and payment methods.

During this period of transition, industry and government must ensure that consumers are protected from scams and the sale of inferior, illegal products no matter where or how purchases are made; and that the rights of IP rights holders are similarly protected.

### **The benefits**

Online developments mean that consumers now have greater choice than ever before in how they purchase and consume products. CDs, DVDs, computer games, along with clothing, electronic devices and everyday household goods can now be purchased via the Internet. In the case of the first three, these can even be downloaded and listened to, watched or played at source. This puts the consumer in a position of great power and control, and widens consumer choice as never before. It creates a competitive environment, which stimulates trade and provides unprecedented exposure for industry to a huge market.

In many cases, such control comes via developments in Digital Rights Management (DRM). This benefits consumers and industry alike, allowing content providers to adapt their business models and leading, as a result, to an unprecedented expansion of consumer choice in content delivery. Examples include: the purchase and download of individual works for single or multiple use; subscription services; rental services; VoD and pay per view (PPV); previews; evaluation and trial use; and real time distribution of content.

DRM technology is not new, as can be evidenced by services such as BskyB's satellite broadcasting. In fact such existing and new services could not operate

without DRM. Without DRM consumer choice would be significantly reduced. For example, DRM allows for the legal streaming and downloading of a movie, or a single online purchase of a music track to be transferred legally onto an iPod or other MP3 player. Importantly DRM allows the rights holder to be paid for such access. With increasing public demand for alternatives to physical carriers of content such as CDs, DVDs and games, owners of intellectual property want to be able to offer new ways for their content to be accessed legally.

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

- iTunes
- MyCokeMusic
- HMV Digital

Industry is still severely threatened by illegal filesharing services such as Limewire, BitTorrent and KaZaA, but with these new legal alternatives there are now over one million music tracks available to download legally, with legal download sales surpassing 600,000 a week<sup>7</sup>. In addition, on Sunday 2<sup>nd</sup> April 2006, a turning point was reached when “Crazy” by Gnarls Barkley made pop history as the first track ever to get to Number 1 in the charts purely on download sales alone. With such legal alternatives, there is no defence to the purchasing of music online illegally.

The film industry has also introduced online services. Examples include:

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

In March 2006, Lovefilm.com also launched a ‘download to keep’ service – made possible by DRM. Under £20, the price includes a download version for a PC, a download version for a portable device, as well as a copy of the actual DVD.

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

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<sup>7</sup> Sales data from the Official UK Charts Company (OCC) 2005

## **The threats**

With this explosion in high speed Internet access comes threats, particularly in the form of filesharing, the sale of fake goods online, fraudulent trading, copyright theft of published academic and literary works and underage access. In an unprotected 'virtual' environment, buyers cannot inspect their purchases before buying, and scams of all kinds are rife. Policing the Internet is already proving to be a huge challenge to law enforcement, and can only grow as a problem.

Therefore, the Alliance strongly recommends the Review reject any move to extend the exceptions currently afforded under the EU E-Commerce Directive to content aggregators, hyperlinks, and location tool services. We believe the current discussions regarding such extensions to be premature and would challenge those seeking such a move to provide clear evidence as to why they are necessary.

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

The Alliance believes online purchasing must be viewed in the same way as traditional shopping. Just as someone would walk into a record shop and buy a CD, similar payment needs to be made for content downloaded from a website. This is crucial in order for content suppliers, authors and artists to be assured of remuneration for their work and investment.

This growing problem of the sale of fake goods on the Internet is a cross-industry one.

- In 2005 the BPI anti piracy unit removed 57,463 infringing items from eBay. 2006 has already seen over 168,000 items removed by the BPI.
- Last year the Federation Against Copyright Theft (FACT) removed over 26,000 infringing auction listings pages, from sites such as eBay. The number of actual fake items for sale, however, would be considerably higher as each page may have multiple items for sale but totals are not recorded.
- In the eight months from August 2005 to March 2006, Microsoft has taken down 43,159 auctions from eBay.

The increasing digital environment is also impacting on creators of physical goods. UK brand owners estimate that there are more than 80 million websites selling fake goods globally. One brand owner's Internet enforcer took down three websites in

one hour recently, which carried over 15,000 pieces of fake sportswear. Sophisticated digital 3D scanning technology enables the swift passage of designs and new products from legitimate business to the fakers. Complex product security devices, both overt and covert, now expect to last for six months as a deterrent or means of protection before they will be illegally replicated on fake goods.

Industry acknowledges that it has a role to play in encouraging people to respect copyright. It is already making headway to ensure intellectual property is respected and protected through such initiatives as British Music Rights' *Respect the Value of Music* and the Industry Trust for IP Awareness's communications campaign from the video industry, targeting different types of users and audiences. In addition, 'Digital File Check' is a simple consumer facing software tool developed by industry that enables computer users to identify and remove file-sharing software and illicit files and provides guidance on how to enjoy copyright works legally. Also, in June 2005, the record industry teamed up with Child Net to launch a campaign aimed at educating parents about the dangers of peer2peer filesharing.<sup>8</sup>

Research does show, however, a worrying lack of understanding by the public about counterfeiting and piracy and its links to other criminal activity. In recent research carried out for the audiovisual industry by OTX, video piracy was seen as a less severe crime than shoplifting and credit card fraud<sup>9</sup>. This demonstrates first, that theft of content is still not being viewed as seriously as theft of a physical product, and second, that despite communications campaigns mounted by industry, there remains an unwillingness to accept that there are many organised and associated crime units behind counterfeiting and piracy.

These examples can be found across industry, making a robust IPR regime crucial as we go further into the digital age.

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<sup>8</sup> See [www.childnet-int.org/music](http://www.childnet-int.org/music)

<sup>9</sup> OTX research into Digital Piracy in the UK conducted between March 04 and Sept 05

## **6. ROLE OF PATENT OFFICE**

Great strides have been made within government, and key policy advancements have been seen, in ensuring IP theft is properly addressed. The Alliance is very supportive of, and a key player in, the Patent Office's IP Crime Group. This Group performs the important function of bringing together all those involved in IP protection and enforcement, from the individual industries to the police, HMRC and trading standards. This has created a welcome focus on IP crime within the Patent Office and crucially has brought with it liaison with other government departments allowing, for the first time, a central point for intelligence gathering and information dissemination.

The success of the IP Crime Group can be seen in the hugely successful Operation Dawn, which took place just before Christmas 2005. This cross industry, multi agency operation in Wembley saw the seizure of counterfeit goods worth more than £1.5 million. Co-ordinated by the IP Crime Group, this operation also led to the arrest of two people, the detention of a number of suspected illegal immigrants and the identification of a number of benefit fraudsters.

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

The Alliance believes the success of the IP Crime Group in bringing together industry, government and enforcement agencies, offers best practice which should be replicated across the Patent Office.

However, the Alliance does have concerns with the Patent Office's dual remit to address both consumer and industry issues and concerns. This can result in a dilution of IP policy and initiatives. There needs to be a clear government department or agency whose sole focus is the promotion and protection of intellectual property, and may be easily achieved by a simple rebranding of the Patent Office into a clear "Intellectual Property Bureau" or IP "champion".

## **7. RESPONSE TO QUESTIONS POSED IN CALL FOR EVIDENCE**

### **General Questions**

#### **4. How is IP challenged and enforced**

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

Alliance members are primarily concerned with copyright, trade marks and designs and so our answer is restricted to those forms of IP. Problems include:

- Inadequate resources for trading standards
- Inability to prosecute market organisers who persistently allow the sale of fake goods
- Trading standards having neither the power nor the duty to enforce copyright legislation
- Infringement of intellectual property in the workplace
- Inadequate legal redress for copycat packaging
- Lack of presumptions of copyright ownership in criminal matters
- Inability of courts to hear 'anonymous' evidence in civil search and seizure applications

##### **Inadequate resources for trading standards**

In a 2003 survey of trading standard services across the country carried out by the then chair of the TSI, the lack of staff and funds was quoted respectively by 54 and 52 out of 68 respondents as the main reason why more enforcement work could not be undertaken. Shortage of storage facilities and specialist training was also identified as a problem. Industry responded to the latter by working with the TSI to develop a new section in the TS qualification examination and this has been in place since 2004 with in the region of 80 candidates sitting the exam. However, without the adequate funding plus the necessary political will to prioritise IP crime in the local authority, an easy route into local crime reduction is still overlooked in many areas. In some local authorities where trading standards are particularly enthusiastic about enforcing IP law, modest industry donations to fund the purchase of walkie talkies or CCTV can make a great difference to enforcement activity on the ground, emphasising how easy it would be to improve resources nationally if funds were to be allocated in a coordinated way.

##### **Inability to prosecute market organisers who persistently allow the sale of fake goods**

A substantial proportion of fake goods are sold via occasional markets such as car boot sales. A 2005 report (Fake Nation) co-funded by the government and industry

into consumer usage and attitudes towards counterfeits and fakes revealed that roughly 25% of all purchases take place at such markets. The lack of power for trading standards to close markets down which persistently partake in the selling of fake goods causes a specific problem for rights holders, their enforcement bodies, local retailers and ultimately the local community. Following adequate warning, trading standards must be able to prosecute organisers who continue to allow the sale of infringing goods at their markets.

### **Trading standards having neither the power nor the duty to enforce copyright offences**

The sale and supply of counterfeited and pirated goods – ranging from branded clothing and household products to pirated music and videos – generally involves the violation of either copyright or trade mark rights, or on occasion both. Violations of copyright and trade mark rights are both criminal offences but at present, trading standard officers only have the powers and duty to investigate and act upon cases involving trade mark infringement. If the acts involve copyright infringement alone then there is no power or duty to act at all. This is an illogical and damaging anomaly that should be urgently rectified through the enactment of Section 107A of the Copyright, Designs and Patents Act 1988. This is of increasing importance given the rapid rise in trade mark-free counterfeits. 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. Government must ensure that trading standards receive the funding they need.

### **Infringement of intellectual property in the workplace**

Whether it is with illegal, unlicensed software installed on people's computers, an employee running illegal music files on their computers, or simply sellers of counterfeit DVDs being allowed to ply their wares in offices, infringement of intellectual property is increasingly occurring in the workplace.

With over 60% of software piracy taking place in the workplace, 20% of fake DVD sales taking place at work and investigations conducted by Alliance members finding evidence of illegal file sharing and downloading<sup>10</sup>, the Alliance believes it is becoming increasingly important that company directors exercise their responsibility to ensure that such criminal and infringing activities in the workplace do not continue.

In cases of copyright offences committed by a company, current legislation limits directors' liability to their actual knowledge (consent or connivance). Directors may escape personal risk through denying knowledge, which ultimately means that there is little real incentive to make sure the company does not commit copyright offences and maintains compliance.

The Alliance is keen to develop an industry code of conduct that encompasses a duty of IP compliance, and discourages illegal traders being allowed onto company

premises. Talks are underway with the Bill Team of the Company Law Reform Bill as it seems the non-statutory draft guidance to be published alongside the final Act would be a good starting point. We look to the Review to endorse such a development and recommend measures to ensure company directors are pro active in dealing with such activities in the workplace.

### **Inadequate legal redress for copycat packaging**

Copycat packaging adopts distinctive features of familiar branded goods in order to mislead the consumer. It can persuade some shoppers to buy goods they did not intend to buy, while misleading many more into believing the products have similar qualities and heritage to the brand being mimicked. In addition, distinctiveness is destroyed making it harder for consumers to make choices, while enormous damage is caused to the brand owners and the years of investment, innovation and reputation building they have undertaken.

Copycats free ride on the original, damaging its competitiveness. It trades off its reputation, gained over years of investment, innovation and consumer experience. Costs of the original rise, competition with other products in the category become distorted and innovation inhibited.

The copiers tend to steer around the IP rights held in aspects of the packaging and a “passing off” action is very difficult to bring because of the very high level of proof required that consumers are confused. The situation in the UK is at odds with other European jurisdictions that have more effective forms of unfair competition law.

### **Lack of presumptions of copyright ownership in criminal matters**

The Alliance believes the absence of copyright presumptions in criminal cases is a bar to the effective administration of criminal justice in the UK. In a number of criminal cases the defence challenges these issues as a cynical tactic to make the burden of prosecution more onerous, on occasion making the burden of prosecuting so onerous that the CPS has declined to prosecute.

Applying presumptions in criminal law would simply remove the ability to mount unmeritorious and spurious defences. The presumptions would, of course, be rebuttable and the Alliance notes that recent cases in the Court of Appeal<sup>10</sup> have shown that the reversal of such a burden of proof does not run counter to the provisions of the Human Rights Act 1998.

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.

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<sup>10</sup> R v Edwards, R v Denton & Jackson, R v Hendley, R v Crowley [2004] EWCA Crim 1025

### **Inability for courts to hear ‘anonymous’ evidence in civil search and seizure applications**

The Alliance urges the Review look to recommend the removal of the bar on the introduction of anonymous evidence in civil search and seizure cases.

Civil search and seizure orders allow a party to search for and, if necessary, seize evidence relating to the infringement of its IP rights, with such orders being granted if a party can show that the evidence would otherwise be destroyed or concealed. Often such information comes from people who would prefer their identity not to be known. This may be for employment, social or personal security reasons. Current case law and the wording of Civil Procedure Rules (CPR) means judges cannot take anonymous statements into account because the statements are inadmissible because it does not say who gave the information. Therefore the application is dismissed. This inability to allow such witnesses anonymity seriously hampers the ability of Alliance members to protect their intellectual property rights.

The Alliance also supports the existing mechanisms whereby appeals in cases of IP infringement can be resolved.

#### **Recommendations:**

- Funding for trading standards to be increased and targeted in a more co-ordinated manner
- Trading standards to be given the ability to prosecute market organisers who persistently allow the sale of fake goods at their markets
- Section 107A of the CDPA Act to be enacted giving trading standards the power and duty to enforce copyright legislation
- Company directors be held accountable for IP theft in the workplace, through non-regulatory means initially, but via statute if necessary
- Brand manufacturers be able to initiate action against copycats under Unfair Commercial Practices legislation
- Presumptions of copyright ownership and lack of licence to apply in criminal proceedings
- Courts to allow witness anonymity in civil search and seizure applications

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

The sheer scale of counterfeiting and piracy, both worldwide and in the UK, means there are financial challenges to enforcing IP rights. In addition, film piracy is so lucrative that it is an attractive source of revenue for organised criminal gangs who

are adept at hiding their criminal activities, which only increases the cost of investigating such piracy. The industry has significantly increased funding to its respective enforcement bodies and to cross-industry initiatives to meet the growing threat, but the scale of the problem continues to present a barrier in terms of the resource required to challenge it.

This is particularly so in the case of Internet piracy, which can and does involve many thousands of individuals engaging in illegal activity, often in a large number of different countries.

### **Cost and complexity of civil search and seizure remedy**

The cost of the civil search and seizure remedy in the UK is of serious concern, making it an effective remedy for only the wealthiest rights holders. It also prejudices small rights holders when faced with attacks upon their rights by larger, wealthier organisations. For example, while the legal costs of a “typical” civil search and seizure application and execution in France are €10,000, Germany €12,000, Spain €10,000 and Sweden €12,000, the costs in the UK are at least three times higher, with average costs being in the region of €35,000 to €50,000.

The principal reason for this disproportionate level of cost is the “supervising solicitor” requirement. The role of a supervising solicitor is to ensure, as far as possible, that the conduct of a civil search and seizure action takes place within the limits set by the Court. The Alliance believes this to be a superfluous role given that Officers of the Court conduct the search and seizure. They have a duty to the Court to ensure the Order is correctly complied with, and severe sanctions apply for unauthorised or excessive conduct.

### **Burden of proof**

In cases of copyright theft, the law at present places the burden of proof on the copyright holder to prove that no permission has been given for the item to be copied. The growth in illegal copying enabled by the development of new technologies makes this an ever more costly burden to the creative industries. The Alliance believes that this burden of proof should be reversed, with those accused of illegal copying simply having to prove they had agreement from the copyright holder.

### **Lack of sampling provision in criminal cases in Scotland**

Scotland stands alone in Europe in demanding 100% examination of seized product. In cases involving the illicit production of thousands of counterfeit discs – which are relatively common in Scotland – this has involved the expenditure of thousands of pounds by industry to fly staff to Scotland and put in the necessary hours to provide the evidence. By way of example, a recent case undertaken by the BPI involved a 20 hour day removing productions from a counterfeiters house, with the subsequent scheduling and examination of the music and MP3 discs alone taking over 300 man hours. The case file, comprising 15 volumes and about 3000 pages, took a further

150 man hours to compile, with this time commitment not even taking into account the hours required to examine the PC equipment removed from the same house with a total storage capacity of 13,000 Gb.

Moreover, the examination, once undertaken, must be corroborated by a second witness. In cases where the seizure comprises of essentially the same item this adds an unnecessary burden and expense which falls on the rights holder.

**Recommendations:**

- Role of the supervising solicitor be removed
- Burden of proof be reversed in cases of copyright infringement
- Sampling of seized infringing product be allowed in criminal cases in Scotland

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

Small businesses may often lack the financial muscle or enforcement profile to take action following an infringement of their IP rights, and look to their professional defence body to take action on their behalf. However, under current law, such professional defence bodies are unable to sue in their own name on behalf of a single and/or small member company.

The decision by the UK government not to implement Article 4 of the EU Enforcement Directive means this issue remains unresolved. The current rules 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, resulting in infringing conduct going unchallenged.

Concern has been expressed that such a move could give rise to professional defence bodies acting in an uncontrolled manner. The Alliance submits that this could readily be countered by either including a requirement in appropriate situations for notice to be given in writing to the intellectual property rights owner or for authority to be given in writing by the rights owner, and that such authority be given in advance of the issuing of proceedings.

**Recommendation:**

- An appropriate provision be included within the Copyright, Designs and Patents Act to allow professional defence bodies to take action on behalf of their members

**SPECIFIC QUESTIONS****Copyright – digital rights management**

Much is made by certain consumer groups of the ‘harm’ caused to consumers by DRMs and the ‘restrictive nature’ of the technology. The Alliance believes such language distorts the debate and portrays DRM technology inaccurately to the public.

There are two forms of DRM tools – those which aid rights holders in ensuring fair remuneration for use of their copyright, and those which enable consumers a choice of access to copyrighted material.

In an increasingly digital environment, with content access ever more varied and mobile, owners of copyright need to be able to protect their creation and receive payment for its use. Without this, investment in innovation along with the incentive to innovate will be lost. It is not in rights owners’ interests to prevent consumers’ access, but rather to ensure that copyright protected material retains its value and that the necessary remuneration finds its way back to industry for reinvestment.

**(a) Do you have a view on how the use of digital rights management technologies should be regulated?**

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

## **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?**

### **Inadequate system of damages**

It is expected that the Department for Constitutional Affairs will launch an Inquiry this year, reviewing generally 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, video industry consumer research shows the criminal gain from copyright theft of audiovisual content in video and film piracy at £278 million, at street prices, while criminals are making £540 million annual through games software piracy. The compensatory damages awarded against them at present impact little on these profits. The ability to use damages as a deterrent would be a valuable tool to those fighting this activity and assist creators in protecting their creative content, particularly given the ease with which illegal copies can now be produced.

The Alliance notes the recently published Statutory Instrument<sup>12</sup> that seeks to give effect to Article 13 of the Enforcement Directive. However, given the wording of the SI, it is unclear whether it in itself will provide for any meaningful reform to the current damages system in intellectual property cases. It is also unclear how this will be affected by the anticipated Department of Constitutional Affairs inquiry into damages. The Alliance therefore recommends the Review continues to consider this issue.

### **Sentencing policy**

One of the main inconsistencies and inadequacies rests with the sentences handed out in cases of IP infringement. Following investigation by Alliance members, the longest sentence revealed for trade mark infringement was 36 months. Prosecutors often opt instead to bring proceedings under the common law offence of conspiracy to defraud, as the courts will more readily hand down prison sentences for that offence. The Review should recommend that the Sentencing Guidelines Council examines sentencing in IP infringement cases and publishes minimum sentencing guidelines.

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<sup>11</sup> 2006 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 power or 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 they 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.

### **Circumvention of technical protection measures**

The offence of circumventing technical protection measures in the UK does not apply to computer programmes. This affects both the software and computer games industries meaning they do not receive the same level of legal protection as film and music.

#### **Recommendations:**

- System of damages be reviewed and amended to allow the awarding of additional damages in cases of IP infringement
- Sentencing Guidelines Council be charged with examining sentencing and publish minimum sentencing guidelines
- Sections 107A and 198A of the CPDA be enacted
- The offence of circumventing technical protection measures be extended to computer programmes

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

Criminal sanctions should not differentiate between whether the offence is taking place on or off line. The Alliance strongly urges that online infringement is not viewed as a lesser crime than infringing the rights in physical product. Other matters, such as the harm caused by the act, should be taken into account.

## **Coherence between competition policy and IP policy**

The Alliance considers that current competition law and IP policy have a satisfactory and cohesive relationship. Competition law provides an effective means of addressing concerns about 'unfair' practices linked to IP rights, and as such we do not believe that it should have a greater role in regulating IP. It is not necessary to alter the structure of IP law in an attempt to pre-empt the proper application of competition law, which is fully developed to address the role of IP in the market.

The Alliance does, however, have strong concerns regarding 'unfair trading' which, given the Call for Evidence's question inviting comment on unfair competition, we believe the Review should seek to address.

### **Unfair Trading**

For the reasons outlined earlier, the Alliance maintains that copycat packaging is an act of unfair trading. In addition to misleading consumers, it damages the competitiveness of the original product, in the following ways:

- The copycat incurs none of the costs of investment that the brand has spent over years to build its reputation (which is concisely communicated through its packaging), therefore 'free-riding' on the original.
- The original brand has to spend significant amounts of money and resource to challenge the copycat. It can cost well over £100,000 to undertake the necessary preparatory work and surveys to determine whether a case can be brought which has a reasonable prospect of success.
- Brand manufacturers' costs are increased as they are forced to adopt new packaging to distance themselves from copies – only to find the new designs are then themselves copied.

With current provisions under free-riding law proving ineffective (please see submission from the British Brands Group for detail and case studies), the Alliance strongly recommends either the introduction of new unfair trading legislation and for brand owners to be able to initiate action against copycats under the Unfair Commercial Practices legislation, which is currently being discussed.

## **RECOMMENDATIONS**

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

- Funding for trading standards to be increased and targeted in a more co-ordinated manner
- Trading standards to be given the ability to prosecute market organisers who persistently allow the sale of fake goods at their markets
- Section 107A of the CDPA Act to be enacted giving trading standards the power and duty to enforce copyright legislation
- Company directors be made more liable for IP theft in the workplace, through non-regulatory means initially, but via statute if necessary
- Brand manufacturers be able to initiate action against copycats under Unfair Commercial Practices legislation
- Presumptions of copyright ownership in criminal matters to apply
- Courts to allow witness anonymity in civil search and seizure applications

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

- Role of the supervising solicitor be removed
- Burden of proof be reversed in cases of copyright infringement
- Sampling of seized infringing product be allowed in criminal cases in Scotland

### **Are there specific barriers to challenging and enforcement of IP rights for small businesses or individuals?**

- An appropriate provision be included within the Copyright, Designs and Patents Act to allow professional defence bodies to take action on behalf of their members

### **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?**

- System of damages reviewed and amended to allow the awarding of additional damages in cases of IP infringement
- Sentencing Guidelines Council be charged with examining sentencing and publish minimum sentencing guidelines
- Sections 107A and 198A of the CPDA be enacted
- The offence of circumventing technical protection measures be extended to computer programmes