



HOME OFFICE CONSULTATION

**NEW POWERS AGAINST ORGANISED AND FINANCIAL
CRIME**

**RESPONSE FROM THE ALLIANCE AGAINST
INTELLECTUAL PROPERTY (IP) THEFT**

19 OCTOBER 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

Background

Intellectual property theft is fraud and acknowledged by the Serious and Organised Crime Agency (SOCA) as a ‘serious’ and ‘organised’ criminal activity. It is extremely profitable with the added attraction, as with most forms of fraud, of being perceived as low risk by those undertaking it and as victimless by wider society. It is closely linked with other forms of criminal behaviour such as drugs, people smuggling, benefit fraud, exploitation of children and obscene pornography, and viewed by enforcement agencies as a useful gateway to reducing the harm caused by a wide-range of crimes.

The inclusion of counterfeiting on the schedule of offences under the Proceeds of Crime Act has been crucial in allowing enforcement agencies to recoup prosecution costs and has brought IP crime into the sphere of the Assets Recovery Agency. This, coupled with the inclusion of counterfeiting in the Home Secretary’s priorities for SOCA, has gone a long way to raising the profile of IP crime and the need for targeted action to ensure it can be properly addressed.

However, profile raising only goes so far. IP crime needs to be on the National Policing Plan and supported by, what this consultation document goes some way to provide, more tangible legal, enforcement and regulatory options to deal with IP fraudsters.

SUMMARY

The Alliance Against Intellectual Property (IP) Theft support a number of the measures proposed in ‘New Powers Against Organised and Financial Crime’.

Improved Data Sharing

Efficient and effective sharing of data and information is crucial in combating IP theft and other organised crimes. Those involved in addressing IP crime are already sharing and collating information via the TellPat database operated by the Patent Office. This has been developed with the express purpose of helping in the fight against IP crime. While more resources are needed in order for it to be truly effective, it is nonetheless an important step, which brings together public and private enforcement bodies.

TellPat provides a working model for how such information can be gathered and shared and the Alliance strongly recommends TellPat be part of a greater knowledge and data sharing operation.

Widening of Clause 2 of the Law Commissions draft Bill

The Alliance fully supports the Government's proposal to widen Clause 2 to ensure those who could be said to have a reasonable degree of belief that an offence was likely to take place could not escape prosecution. The vast majority of counterfeit and pirated goods are sold at markets such as car boot sales. It is of great concern to rights holders, enforcement bodies, trading standards and the police that organisers of such markets are able to avoid responsibility for what is being sold. The Alliance has long been campaigning for measures to ensure that, after adequate warning, trading standards are able to prosecute such repeat offenders. Widening Clause 2 in the proposed way would place a much needed requirement on market organisers to better cooperate with trading standards, and provide trading standards with a strong legal alternatives should warnings not be heeded.

Creation of Organised Crime Prevention Orders

The Alliance is similarly supportive of the proposals to introduce Organised Crime Prevention Orders. These would be particularly relevant and useful to address counterfeiting operations that rely on the production of blank product, such as clothing, which are sold and turned into product bearing counterfeit trade marks at a later date.

Chapter 1: Data Sharing

Q1. Should public sector information on suspected fraudsters be shared more widely within the public sector and with the private sector to prevent and detect fraud?

Yes. Criminals involved in intellectual property fraud do not restrict themselves to that single criminal activity; or indeed, to a single sector or region. They are incredibly organised and generate huge profit from their illicit activities. To beat them, those charged with combating fraud need to be just as organised and make full use of all the resources available, including sharing intelligence, data and resources. This sharing needs to happen, of course, not just within the public sector but also across the private enforcement bodies as well as between the two.

Within the area of IP fraud such cross-industry, public/private information sharing is already taking place and delivering tangible results. The creation of the IP Crime Group and the adoption of a National IP Crime Strategy have provided the catalyst for data and intelligence to be disseminated across the numerous enforcement bodies and agencies involved.

A national IP crime database has been established – TellPat. Still in its infancy, TellPat, with proper re-sourcing, will be an invaluable tool in combating IP crime, giving both private and public sectors access to key intelligence.

A clear example of the benefits of such data sharing on suspected fraudsters can be seen in the joint operations between rights holders enforcement bodies and the Department of Work and Pensions. Three major operations have taken place to date – the most recent being on Sunday 15 October. Operation Buzzard saw a multi-agency taskforce led by the DWP investigate allegations of benefit fraud and other illegal activities. Working with investigators from the music, film and games software industries, ten people were arrested following an operation into people who were claiming benefits whilst making a living selling pirated material at local markets. Without data and intelligence sharing such joint operations would be impossible.

The proposals outlined in this consultation would allow for much needed wider cooperation by enforcement bodies, public and private, across a range of criminal activities, eliciting valuable information, throwing up trends and identifying common players.

However, the Home Office, in its response to this consultation, must avoid repeating the mistakes of the Department for Trade and Industry over the Enterprise Act in 2002. Despite numerous warnings, Part 9 of the Act resulted in the closure of the civil gateway for the sharing of information between public and private bodies. This was incredibly damaging to those operating in the field of IP protection as it restricted the ability for information to be shared between trading standards and industry enforcement bodies for the purpose of private prosecutions against infringers. This is only finally being rectified following intensive lobbying via a clause in the Companies Bill.

What sort of safeguards would you expect to see?

We would expect to see similar safeguards that exist for other forms of data sharing. However, while such safeguards should obviously comply with privacy laws,

protecting the identity of criminal fraudsters should not override the needs of detection agencies (in the public and private spheres) to access and utilise effective information.

Chapter 2: The Criminal Law

Q5. Should Clause 2 be restricted to those who believe that an offence will take place or should this be widened?

The Alliance strongly urges that Clause 2 is widened. As is clearly identified in the consultation document, there is a need to ensure that those who could be said to have a reasonable degree of belief that an offence was likely to take place could not escape prosecution by arguing that they were not absolutely certain that the offence would take place.

We agree with the Government's recommendation to lower the threshold for this offence to *'cover those who might be able to claim not to have the degree of certainty implied in saying they believed something would happen but who are nevertheless in a position where they know it is highly likely that it will or have a strong suspicion that this will be the case'*.

The level of belief required for this offence will need to be carefully thought through, however, it has the potential to greatly assist in the fight against intellectual property crime.

For example, the vast majority of counterfeit and pirated goods are sold at markets such as car boot sales. These criminals attend such markets, often the same market, week after week. As identified in the consultation document, currently this creates a problem. Trading standards have to wait until the principal offence is committed or attempted (in this case, the actual selling of fake goods), and in order to be truly effective and disrupt the activity, need to conduct weekly raids. Pressure on resources mean, though, that this cannot be the case.

It is very apparent to many of the market organisers that such illegal activity is taking place. In fact, they are often informed so by trading standards and the rights holders enforcement bodies. Anecdotal evidence even suggests such illegal traders are given preferential treatment by some market organisers. By allowing action to be taken against organisers who have been told by relevant enforcement agencies that IP crime is taking place at their markets, SOCA's objective of identifying acts of assistance or

encouragement to an offence is met, action can be taken before the primary offence is committed and organised crime disrupted.

Q6. Is the Government right to consider extending liability to those who indirectly encourage or assist a person (X) where they suspect this encouragement or assistance will aid X's criminal activities (as against specific criminal offences)?

Yes. Greater deterrent is needed to discourage involvement in organised criminal activities. It is of particular relevance in the realm of IP crime. Counterfeiting and intellectual property theft is an organised crime lifestyle offence set out in Schedule 2 of POCA with much activity instrumental in fuelling the illegal acts taking place on the periphery. As such, it is right for the Government to consider extending liability in the proposed manner.

For example, counterfeit goods need to be stored. The ability to target people renting storage facilities to known or likely criminals would meet the Government's criteria of *D doing something for a person (X) whom they knew or suspected to be involved in serious organised crime and that D believes or suspects their own actions could encourage or assist the criminal activities*. It would help disrupt the criminals' activities, make it harder for them to operate, and create an environment whereby people may be more willing to inform on the primary offenders.

In addition, this would provide another legal avenue to address the growing problem of markets, as a strong case can be made that market organisers are providing encouragement or assistance to individuals when they suspect this encouragement or assistance will aid organised crime.

As with the proposal above, much detail would need to be worked out regarding levels of knowledge or belief but the Alliance supports the Government in its consideration.

Chapter 3: Organised Crime Prevention Orders

Q7. The Government would welcome views on the kinds of conditions that might be attached to an organised crime prevention order.

As outlined in the summary, the Alliance supports the introduction of a new civil order in the guise of the "Serious Crime Prevention Order", and believe they have the

potential to be a valuable tool in the prevention and disruption of organised crime, including IP crime, given its clear inclusion as a criminal lifestyle offence under POCA.

General financial conditions, of use in the fight of all fraud, would have similar benefits in the fights against IP crime. However, the Alliance has three suggested conditions, which may have particular relevance to dealing with IP criminals, particularly those recidivist and large-scale offenders:

- Confiscation of goods i.e. computer equipment used to mass-produce pirated optical discs.
- Requirements to only trade with ‘reputable’ manufacturers / suppliers or dealers
- Exclusion zones prohibiting certain individuals from attending particular markets

Q8. The Government would welcome views on the types of situation where an organised crime prevention order may prove useful and proportionate in preventing organised criminality.

As mentioned in the summary, the manufacturing industry has a huge problem with the mass production of blank clothing such as polo shirts to which a range of brand logos (Lacost, Tommy Hilfiger, Ellisse etc) are illegal applied post production. A Serious Crime Prevention Order may usefully be used to ensure the manufacturer of the blank clothing does not sell said product to those likely to insert onto the clothing counterfeit trade marks, with a list produced detailing exactly whom the person can trade with. This follows the outline of Prevention Orders Against Organisations: Case Study 1 in the consultation document.

Chapter 4: Proceeds of Crime

The Alliance has no specific comments on the proposed new measures, which include plans to merge confiscation and enforcement hearings. However, we do wish to stress the importance of the Proceeds of Crime Act in tackling IP and other organised crimes. The Act has only been in operation for a short time, but already activity by the Asset Recovery Agency is proving beneficial in restraining suspect assets and disrupting criminal behaviour with Confiscation Orders successfully obtained against

a number of counterfeiters. Working with Derby Trading Standards, the ARA obtained over £17,000 against 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. More resources and trained personal would increase the effectiveness of this Agency even more.

In addition, the incentivisation scheme giving the Police and Trading Standards a share in the confiscated assets obtained through IP crime which sits alongside POCA has proved vital in increasing the number of IP crime cases reaching the courts. Given the meagre budgets of many trading standards department, the ability to recoup a percentage of the costs of prosecutions, when historically single cases have been responsible for wiping out yearly budgets, this has been a very important development and one we would like to see strengthened.

About the Alliance Against Intellectual Property (IP) Theft

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.

Further Information

Links with other criminal activity

1. 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.

2. In December 2005, a multi agency operation involving FACT, South Tyneside Trading Standards and Northumbria Police disrupted and thwarted a group of individuals operating in a well-known local market. Covert surveillance revealed that the perpetrators were using a second hand stall to front their activities. The stall was actually being used to sell counterfeit DVDs and music as well as counterfeit and duty free cigarettes.

Simultaneous raids were carried out on the market and the properties and vehicles of the counterfeiters. Officers seized computers and counterfeit DVDs along with counterfeit cigarettes. A quantity of illegal drugs was found in the possession of one of the market traders and in one of vehicles.

The investigation also uncovered a large quantity of paperwork relating to sales of counterfeit product over the Internet. Investigators traced the counterfeit DVD master copies back to the Far East.

3. A clear, established link has been made between the sale of fake DVDs and people smuggling from China. Across the whole of mainland UK illegal Chinese immigrants, who have been smuggled to Britain by Snakehead gangs, ply their trade in fake DVDs on the streets and in pubs, takeaways, restaurants, cafes, hairdressers, as well as visiting office and business premises - 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, legitimate retailers and MPs. Trading standards do not have the powers or resources to deal with it on their own. 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.” The Federation Against Copyright Theft reports that that Lin Mu Yong, one of the two main defendants in the Morecambe Bay Chinese cocklepickers case also pleaded guilty to 11 offences under the Trade Marks Act of 1994 and was further sentenced to 9 months imprisonment in addition to a 5 year sentence for Assisting and Facilitation Illegal immigration and perverting the Course of Justice.

The Metropolitan Police Film Piracy Unit, part of the Specialist and Economic Crime Command, are tasked with targeting high level organised crime activity funding and profiting from film piracy in the UK. The largest problem is currently that of Chinese organized criminal networks.

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.

Economic Harm

Evidence from Alliance members shows that:

- In 2005 the film industry lost £719 million through counterfeiting and piracy
- This includes the amount lost to box office sales, retail home video, rental video and pay per view
- 77.5 million fake DVDs were bought in 2005
- Using an average street value of £3.78 and home copy average price of £2.84, this equates to a criminal gain of £278 million¹

- 35-40 million pirated CDs are bought annually
- 45% of these purchases represent lost legitimate sales (16.5 million)
- These purchases represent £165 million of lost sales a year
- Using an average street value of £2.48, this equates to a criminal gain of between £87 million and £99 million²

- 27% of software in the UK is pirated
- This translates into a loss of just over £1 billion to the business software industry
- A 10-point drop in this piracy rate would create nearly 34,000 new jobs, allowing the IT sector to grow by 37%, and add over £10 billion to the economy³

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 that 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 problem of Chinese illegals selling on the streets of UK towns and cities has been known to create a level of violent activity. The street sellers carry cash (can be several

¹ Research conducted by IPSOS in November 2005 into Digital and Physical Piracy in Great Britain

² Research conducted by IPSOS in Q1 2006

³ Business Software Alliance/IDC Global Software Piracy Study 2005

hundred pounds) and are thus vulnerable to being attacked by local gangs. These incidents can spill over into running street battles with knives, machetes and other weapons being used to defend territory.

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.

Alliance Against Intellectual Property Theft
October 2006