

THE UK PUBLISHERS ASSOCIATION

E-PIRACY:- COPYRIGHT INFRINGEMENT AND ENFORCEMENT

GENERAL INTRODUCTION

It would be misleading to characterise all challenges to copyright in the UK as “piracy”. Rather there is a broad range of types of copyright infringement, requiring a similarly broad spectrum of responses. As an industry, publishing has always sought to pursue the appropriate remedy for a given infringement, rather than adopt a “one size fits all” approach. Here we set out an overview of electronic infringement in the UK, followed by a detailed analysis of key areas: Commercial Piracy, Interdiction and Enforcement.

Electronic Copyright Infringement - Spectrum of Infringers.

Types of infringement may be ranked on a scale ranging from that which has historically been regarded as relatively benign, such as copying music (records, tapes, CDs) to cassette for playing in the car or at parties, to medium and large scale commercial piracy and serious organised crime.

In today’s electronic environment these types of infringement may be tabulated as follows.

- Copying purchased content for personal private use - e.g. copying a cassette to make up a car or party tape or copying a purchased audio book CD to an iPod.
- Downloading for private use:
Downloading copies of works already purchased in another format
Downloading copies of works not purchased.
- Uploading / Making available:
Unwitting uploading - e.g. while downloading with BitTorrent
Knowingly uploading in quantity - e.g. P2P
Making available in quantity with no revenue - e.g. via a free website with advertising.
- Cottage Industry commercial piracy:
Pay-to-enter websites offering infringing copies
Sale of infringing copies in electronic/CD/DVD format via websites, eBay, car boot sales etc.
- Large scale commercial piracy. .

Electronic Copyright Infringement - Spectrum of Responses.

Methods of combating copyright infringement lie along a similarly broad range, although often more than one response may be appropriate. Following the analysis above we may tabulate the responses as follows.

- Private copying: Although there is no exception in English law for private copying we see no benefit in taking action against customers who *themselves* copy legally purchased content solely for their own private use,

e.g. format shifting.

- Downloading: While not a criminal act, this form of infringement is nevertheless very serious. For example, in a recent test we were able to download approximately 6000 infringing e-book and audio-book files in 24 hours from just 10 USENET news groups.

Despite the massive scale we have never suggested that enforcement action against individual downloaders is appropriate (and indeed we are unaware of any industry body having taken such action). In such cases the appropriate remedies lie in education and interdiction: spoofing, disruption, Notice and Take-Down.

NB: It is crucial to stress that downloading can never be a legitimate method of exercising any private copying exception.

- Uploading / Making available: This category of infringing behaviour covers the widest range, both of offences and responses. While “soft” responses, as for downloading, are appropriate for low-volume unwitting uploaders, infringements in this category increase in seriousness to the point where the perpetrators are verging on commercial piracy, by being active in profiting from the exploitation of infringing copies of copyright works.

In the more serious cases appropriate responses range from interdiction, particularly Notice and Take-Down, to evidence gathering and prosecution, in cases where there is either a commercial motive or significant commercial damage.

- Commercial piracy: This is the main growth area for publishing related infringement and as such merits the most serious action. For small scale or first time offenders the usual first response is interdiction, usually via Notice and Take-Down or a proprietary NTD system such as eBay’s VeRO programme.

In more serious cases prosecution is warranted. Such investigations usually begin with an evidence gathering exercise, including a test purchase. Ultimately, however, the cost of private criminal prosecutions is prohibitive and some form of state action, ideally prosecution by a local authority Trading Standards department is required.

DETAILED ANALYSIS: COMMERCIAL PIRACY.

The market.

2005 saw a significant increase in the volume of counterfeit works being offered for sale in the UK. A burgeoning trade in pirated audio books, targeting the more traditional consumer, supplemented the existing underground market in pirated e-books, typically sold to enthusiasts and students.

Home market manufacture and sale of pirated e-books has traditionally been concentrated in the Scientific, Technical and Medical (STM), Information

Technology and Science Fiction and Fantasy markets. SF&F also accounts for most of the volume of pirated audio books.

The pirate market in the UK is still primarily electronic in nature, though we are seeing a shift to “real world fulfilment” with the use of CDs and DVDs to distribute content.

Offenders and methods.

In the UK offenders are mainly “cottage industry” pirates: networks of individuals and small groups operating across force boundaries and primarily trading electronically. Currently the domestic market for pirated e-books and audio books is too small to attract serious organised criminals, although we anticipate that this will change with future developments in consumer technology.

Domestically, production occurs on a just-in-time model, with CDs and DVDs being burned to order. There has been a shift away from pirates manufacturing their own master files (by scanning printed books or ripping CD audio books to MP3) to recycling files obtained from other sources, both publicly available and closed networks. This is evidenced by the increasing number of pirated US editions being offered for sale in the UK.

Sales methods range from pay-to-enter websites offering infringing copies to the sale of infringing copies in electronic/CD/DVD format via websites, eBay etc. Often the offender will use auctions for popular items, such as the latest Harry Potter book, to generate an e-mail list of customers. He will then market directly to those customers, bypassing the auction sites fees and enabling him to offer a “copied to order” service.

Large-scale distribution also occurs via Internet channels such as web and FTP sites, IRC, Peer to Peer networks and USENET news groups. While much of this distribution is open and “free”, restricted channels also exist, where participants are required to upload a certain quantity of new pirated material in order to gain access to the existing stock.

The damage.

In the realm of electronic piracy, it is notoriously difficult to quantify the potential harm, especially once we move beyond sales to include free mass distribution. Problems include estimating the number of downloads and arriving at a conversion ratio for pirated copies to lost sales.

However, a recent set of four test purchases netted £569 retail value of product for a price of £31. Another pirate sold over £22,000 worth of pirated audio books via eBay in 42 hours. When the PA put a stop to this he moved into music, offering the entire Beatles catalogue on CD for £6. A brief search on that auction site showed 60 sales of these titles alone over a two-week period. Assuming uniform sales that would scale to £0.5m worth of product per annum - for one series by one author on one website.

Systematic monitoring of individual pirates reveals that they are now using online auction sites to determine the price the market will bear, by gradually increasing the price of their offerings until sales drop off.

DETAILED ANALYSIS: INTERDICTION.

Our primary tool for interdiction is **Notice and Take-Down (NTD)**. This is a system where, upon becoming aware of the presence of infringing copies on a website or other site, the rights owner or his representative contacts the Internet Service Provider (ISP) hosting the site (the Notice), requesting that he remove or block access to the infringing material (the Take-Down).

Rationale

The Internet plays host to an incredibly high volume of infringing web sites, FTP sites, auctions and so forth. Given the cost in both money and time of gaining an injunction any attempt to seek a remedy through the courts for each infringer is clearly not practicable. Instead there is a clear need for a system for removing such infringements which is cheap, fast and effective.

In 2002 the PA led a DTI sponsored mission to the USA to learn from their experience of operating such a Notice and Take-Down system under the aegis of the Digital Millennium Copyright Act. Our report concluded that the NTD system operated in the US had been proven to work well and that there were significant benefits to be gained from the implementation of a similar system in the UK which addressed specific UK issues, such as privacy and the right to freedom of expression, while remaining interoperable with the US model. Following negotiation with ISPs and civil liberties groups, the PA developed model notices and launched its own pilot NTD scheme. As this system becomes “proven”, we would hope that the example could be taken up in other EU member states.

Barriers to effective operation.

1. Safe Harbour: Under the UK e-Commerce Regulations an ISP becomes “liable” from the point at which it acquires or is put on knowledge of an alleged infringement (i.e. its ‘safe harbour’ for storage of information provided by the recipient of the service, ceases to apply).

The legislation requires an “expeditious “ response from ISPs after they have been put on knowledge, and the ISP must assess its exposure for any action (or inaction). However ISPs see their role (correctly) as intermediaries, and reasonably wish to avoid a situation in which, lacking “safe harbour” they are obliged to judge and act between disputing parties, either or both of whom may seek to hold them liable.

This has led to cases in which either infringing material is not removed by the ISP or non-infringing material is removed without any right of appeal, as the ISP seeks to minimise its exposure.

In the USA the DMCA squared this circle by extending the safe harbour to protect ISPs who took down (or put back) allegedly infringing material as long as they abided by the established process as set down. While the PA favours a voluntary

scheme for NTD, along the lines of the Code of Practice developed with ISPs, we believe that some form of statutory underpinning, which provides this type of safe harbour, would address many of the concerns about the efficiency of such a scheme.

2. Extension on limitation of liability for hyperlinkers etc: - dangers - NTD based interdiction is, at root, a fast-track alternative to litigation. It can work only due to the recipient's desire to avoid any legal action arising out of his liability for the infringement. However any extension of the limitations of liability in the e-Commerce Directive risks making NTD unworkable, effectively legitimising online piracy.

Currently an infringer who has promoted awareness of his site is liable regardless of whether he hosts the infringing files himself or simply links to them. We may therefore use NTD to remove the site, necessitating that he start from scratch if he wishes to continue.

Were any limitation of liability extended to hyperlinkers he would effectively become untouchable by NTD, and be able to maintain his site, simply altering his hyperlinks as rights owners attacked, one at a time, the individual files being linked to. Ultimately, the infringer operates as a scofflaw, providing a one-stop-shop for pirated content.

DETAILED ANALYSIS: ENFORCEMENT.

Our UK enforcement activity is primarily directed at cottage industry pirates selling illegally copied audio books and e-books. The damage done by these operators is significant and increasing. For example, over the past year we have observed infringers making ever more significant inroads into the increasing revenue stream from sales of audio books.

One key goal is to address the problem of the "level 2 gap". Domestic commercial piracy mainly operates at level 2 criminality, falling between the remits of local police forces and the SOCA. The lack of ownership of this area of criminal activity creates problems at both stages of the enforcement process: evidence gathering and prosecution.

Evidence gathering: Much good work has been done over the past year on access to information. In particular we would like to praise the work of the Patent Office in establishing the IP Crime Group and TellPAT, the National IP Crime Database.

Nevertheless, private sector enforcement action can only go so far, due to data protection and privacy laws, and more state support is needed.

Prosecution: Sadly the position here is much less satisfactory. The high cost of private criminal prosecutions, coupled with the large numbers of cottage industry commercial pirates makes it impracticable for the industry to prosecute offenders without state support. It is currently very difficult to secure a state prosecution of a cottage industry pirate, even though he may be causing significant damage and committing offences which are triable either way.

We are currently pressing the UK government to fulfil its commitment to the EU Enforcement Directive by requiring the Trading Standards Officers to police copyright in the same way as they do Patents and Trade Marks. Until this is done, rightsholders dependent on copyright alone are severely disadvantaged.

Other threats to enforcement:

There are two other threats which risk making it impossible to enforce against certain types of commercial pirate.

1. The extension of limitations of liability for hyperlinks: The problems presented by this proposal are discussed in detail above. Suffice it to say that should such a loophole be created, it would be inevitable that commercial pirates would begin selling hyperlinks to infringing content hosted outside the UK in order to benefit from the immunity offered.
2. The “private copying service defence”. First observed in the USA in the mp3.com case, this is when the commercial pirate claims that, rather than selling infringing copies, he is offering a backup or conversion service, enabling people who already own a legitimate copy of the work to exercise their private copying exception.

Despite being thrown out by the courts, we currently see commercial pirates in the UK attempt to use this “defence” every day. The threat is that, without careful wording, any private copying exception might risk legitimising such actions, thereby giving commercial pirates carte blanche to operate without fear of prosecution.