

The future direction of UK IP legislation

(and how to lobby for change)

As levels of counterfeiting continue to rise, the former IP adviser to the UK prime minister considers what steps the UK government is taking to tackle the issue, what targets it should focus on in the future and how counsel can ensure that their concerns and those of their company are heard

Imagine that you are fortunate enough to get a private audience with the UK prime minister. He is running between meetings with just a few minutes to spare and he asks you the seemingly easy and obvious question: “What do we need to do in relation to intellectual property?”

Here is your one opportunity to make important recommendations directly to someone who can make a difference. Most readers will be involved in the world of intellectual property and will daily come across improvements or suggestions that could further protect rights holders. So pause here a minute and daydream about your answer. Try to ensure that your response can be explained in under four minutes. It should also be practical and acceptable to the public – many of whom have no idea what ‘IP’ stands for (as I found out to my horror when I entered Parliament and the majority of MPs whom I spoke to had no idea what it meant, yet alone what we should do with it).

As you might imagine, the answer is not as simple as it seems.

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I have put this question dozens of times to many different audiences and I am sorry to say that most responses are wide of the mark with regard to what is required. Answers such as ‘strengthen rights’ or ‘tighten legislation’ may be conceptually correct, but the prime minister does not want concepts – he wants concrete suggestions which can be enacted. That is why he is asking you, as the expert with the facts. He wants to instruct his civil servants – who will know very little about intellectual property – on specifics, not ethereal messages of hope.

What is worse, rights holders still do not campaign on the big-ticket issues, preferring to argue about nuances such as the private copying exception or the equalisation of offline and online penalties (more on that later). While these points are important, they miss the big picture.

For me, it is about two groups, which all IP legislation needs to be aimed at. The first are those that make large amounts of money out of illegal websites

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– whether they are responsible for online streaming or selling physical counterfeits. Stop the money to those sites and we are well on the way to winning the battle against piracy. The second group of people to be targeted are those in society that create the demand for online illegal services. They need to stop deliberately buying illegal products on the Internet or face the consequences.

Education, carrot, stick

The prime minister made it clear in our chat that the last thing he wanted to do was to target the errant teenager who downloads a few tracks, preferring to exhaust other options first. While that is important, we need to get to a position where such behaviour is not only socially unacceptable, but also impossible.

So in my answer, I suggested that we need to beat piracy by using a three-step solution: education, carrot, stick.

The first step is education. We have lost the hearts of the public, who have become used to downloading copyrighted works for free and buying counterfeit goods. Most do not see the harm they are doing – we are all familiar with arguments such as, “I wouldn’t have bought it anyway” and “They are rich and can afford it.” I am sure I do not need to set out here why those arguments are wrong, but we very much need to win over the general population.

The next step is the carrot. The industry – especially the music industry – was very slow to adapt to and embrace new marketing models. Streaming, for example, was seen as evil and to be resisted. However, this is a mistake. When I speak to university students about why they download from illegal sites, their answer is simple: it is easy and user friendly. Legal streaming websites for music and film need to be much simpler, faster and have much wider licensed content than their illegal counterparts. Rights holders ignore consumer preference at their peril – consumers have a way of telling suppliers how they want product delivered and at what value.

Once we have won the argument as to how counterfeiting ruins long-term products and we have the right business models in place, then of course there needs to be an effective stick – especially when dealing with large-scale criminality.

How we get through these stages – and what the government can do about it – was my task. To that end, I produced four reports for the prime minister, containing 36 recommendations.

Four reports

Search engines

I started with the highest profile of the first-step solutions – search engines – and produced my first report in May 2014: “Search Engines and Piracy”



Previous reports by the author have emphasised the three-pronged approach required to beat piracy: education, carrot, stick

(www.olswang.com/media/48165108/search_engines_and_piracy_mike_weatherley_mp.pdf).

Search engines are often cited as the evil opposition. After all, many say that they destroyed the US Stop Online Piracy Act by mobilising the population and holding the Internet to ransom. The argument goes that without search engines directing users to illegal sites, the world would be a better place. Certainly, I agree that the search ranking of illegal sites should be demoted (actually I would go further

and say that if a court has ruled that a site is illegal, it should not appear anywhere on a search engine’s results), and that search engines could do much more about this; but let us not forget that search engines are not actually the enemy when it comes to stealing intellectual property. They do not create or consume the illegal content. They could do more and certainly they should not make money from any illegal activity; but there is so much more to beating counterfeiting and piracy than simply scapegoating search engines. Incidentally, Google went up against Congress on the Stop Online Piracy Act primarily because there had been no dialogue – the ensuing debacle is an apt reminder of why stakeholders should always be consulted before legislators attempt to draft or implement new legislation.

I am delighted to report that as a result of my report, the UK government now holds regular bi-monthly meetings with stakeholders and search engine companies. In addition, and as a direct result of my lobbying, a commitment was added to the manifesto to insist that illegal sites be de-ranked (the first time that intellectual property has ever found its way into a Conservative manifesto).

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Finance

Following this first report, I turned my attention to what I consider to be the most effective and promising weapon in our armoury – stopping the money flowing to the criminals. My report “Follow the Money: Financial Options to Assist in the Battle Against On-line Piracy” (www.olswang.com/media/48204227/follow_the_money_financial_options_to_assist_in_the_battle_against_online_ip_piracy.pdf) made a number of recommendations, focusing on the following three main components:

- a voluntary scheme to stop brand owners from

- advertising on illegal sites;
- a request that we legislate to tackle the remaining rouses sites (typically porn and casino sites); and
- efforts to target payment providers – if you cannot pay for goods on an illegal site, that takes sales away directly.

The Digital Citizens Alliance estimated that in the United States in 2013, piracy sites made \$227 million in revenue from advertising. The Police Intellectual Property Crime Unit (PIPCU) has estimated that as much as 90% of piracy could be stopped if governments could stop the flow of money to the criminals. I am pleased to say that a voluntary code is now in place and the UK Intellectual Property Office is reviewing what the next stages could be.

Education

For my third report, “Copyright Education and Awareness” (www.mikeweatherley.com/wp-content/uploads/2014/10/11.pdf), I focused on the message of education and what the government and stakeholders need to do together. I am pleased to report that a steering group now meets regularly, with good proposals coming through. A passing note on Create Content UK – the process by which individuals who are downloading illegally receive notification that their behaviour is against the law: while I am delighted that this is going ahead with all the associated extra promotional effort, I would like to see harsher penalties being meted out to those who ignore the notifications. Although internet service providers (ISPs) are already cooperating in the notification process, I believe that there is scope for them to be much quicker and more helpful.

ISPs

This brings me on to the fourth report – my parting shot as I left Parliament: “Safe Harbour Provisions and On-line Service Providers” (www.mikeweatherley.com/wp-content/uploads/2015/03/Safe-harbour-provisions-and-online-service-providers-FINAL.pdf). During my time as the prime minister’s adviser, I was impressed by how everyone engaged and made helpful suggestions, with the exception of one general group: the ISPs. When representatives of one of the ‘big four’ met with me and declared, with folded arms, that they were not going to help and that we would have to legislate to get them to do anything constructive in the fight against piracy, I felt that it was my duty to issue a report that stirred up the debate around safe harbours. None of the ISPs has commented at all on any of the recommendations, which perfectly illustrates why the report was necessary.

International perspective

The United Kingdom is not alone in recognising the threat posed by counterfeiting and piracy – there follows a small selection of anti-counterfeiting efforts from around the world.

In June 2015 a Canadian court instructed Google to de-list – rather than merely demote – an illegal site, regardless of territorial domain.

In August 2015 the Indonesian government instructed 200 providers to block 22 illegal websites.

In Spain, the creative industry introduced

www.mesientodecine.com – similar to the United Kingdom’s www.findanyfilm.com, this platform allows film fans to search for and watch, buy, rent or download films with full confidence that what they are accessing is legal and legitimate. Almost two years after the site was first launched, it hosts over 30 different platforms and includes a staggering 35,000 films and nearly 850 television series, which are accessible with a single click.

In June 2014 the Italian advertising industry, together with the country’s music and audiovisual content protection organisations, took an encouraging first step and signed a memorandum of understanding to cut off advertising revenues for piracy sites.

In Denmark, in October 2014, the Ministry of Culture facilitated a code of conduct between Danish rights holders and access providers for the Telecommunications Industry Association. The code makes it possible to rapidly expand a site blocking court order against one ISP to all other ISPs without the need to return to court. This was followed six months later by a second code of conduct involving most major internet stakeholders in Denmark. What makes this particular code so special is that not only rights holders and access providers, but also search engines, ad networks, payment processors and other intermediaries, have signed a declaration of intent to promote lawful behaviour online and take measures against copyright infringement. The signatories – which include Google, Microsoft, Mastercard, the ISP Association and a broad group of rights holders – declare that they will not contribute to unlawful activities either by providing financial support (eg, via ad revenue or payment services) or by legitimising criminal services. In particular, the code outlines the following five principles: “With this Code, the parties wish: (i) to contribute to make the Internet a safe and legitimate platform for consumers and businesses; (ii) to emphasise that copyright is an important foundation stone for growth and innovation; (iii) to collaborate to reduce financial crime, based on copyright infringement; (iv) to collaborate in promoting the spread of legal products; (v) to contribute to efficient processes that can help to limit



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PICTURE: MYOTIS/
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copyright infringement and crime associated therewith.”

Even better, Denmark has also adopted a perfect approach to the question of online versus offline equalisation of penalties by putting the two on a par with one another and then graduating the offence, so that only the most egregious criminals will face extended penalties.

In the United Kingdom, we are consulting on whether to equalise penalties (which I agree with in principle) by increasing sentencing for online infringement up to 10 years. This has provoked a storm of protest, with wildly inaccurate commentary that the proposal would result in errant teenagers being imprisoned for terms longer than for many serious violent offences.

Lobbying

All of these international actions results from dialogue, highlighting why it is important that brands take a proactive role in lobbying for change. No matter how good your argument, the bottom line is that most legislators (like the public) find intellectual property:

- confusing;
- not a vote winner with their constituents;
- of less importance that the economy or the health service; and
- boring.

Long, well-drafted briefing papers with perfect economic justifications sent to MPs will swiftly be filed (unread) in the trash folder.

Neither is hosting talks and receptions a particularly effective tool – those who already know the arguments will turn up, but the 95% of others will go to something else. This is true even if you have celebrities attending (although having a photoshoot as part of any outreach can be effective – MPs love PR-friendly media pictures).

Of course, both of those things need to be done and can help. However, the big breakthrough is to make your lobbying personal. Legislators have more than one eye on the next election and will usually be much more receptive if the subject on which you are lobbying is something that can help them to get re-elected. Yet here is the dilemma – intellectual property is not a vote winner. For this reason, you need to develop innovative ways to get your message across. These might include visits to schools, colleges or universities that teach creative subjects, plus any type of related business in your constituency (especially those with strong brand reputations). These are time consuming to arrange and cannot really be carried out by individual companies, so they should be effected via

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an association organisation. The performance of such organisations is down to their membership pushing for results – everyone reading this article should be in touch with their own trade associations to see what they are doing with legislators on a personal basis (meetings in parliament do not really count – it must be in the constituency and directly relevant to the legislator).

I have a passion for intellectual property, so I co-founded the competitions Rock the House and Film the House (www.rockthehouseuk.com and www.filmthehouse.com) – which have gone on to be the most successful competitions ever in the history of Parliament. They directly link creatives with their elected representatives, demonstrating that IP protection and promotion

THE POLICE INTELLECTUAL PROPERTY CRIME UNIT

PIPCU was established in 2013 and reports to the City of London Police, although in practice it has a national role. It is dedicated to tackling serious and organised IP crime (counterfeiting and piracy) which affects physical and digital goods (with the exception of pharmaceutical goods), with a focus on offences committed online. PIPCU was the subject of my first

recommendation to the prime minister when I asked him to extend its funding; he did, and it is now funded until 2017. My recommendation to those countries that do not have a PIPCU would be that they look into establishing one.

Since its launch in the United Kingdom in 2013, PIPCU has arrested 52 people, suspended over 5,000 domain names and

diverted more than 11 million visits from copyright-infringing sites to the PIPCU domain suspension site.

In addition, it has coordinated the reduction of 73% of UK top companies' advertising spending on piracy sites, set up a list of infringing websites and hacked 251 suspected pirate sites, replacing advertising banners with anti-piracy messages.

is important culturally and economically to every constituency. It is a grass-roots mechanism that forces MPs to engage with IP policy. Creative, fun and engaging solutions such as these are an example of how to engage on a personal basis with legislators, without relying on dry charts and numbers.

I will end with two more pleas – things that every single person reading this article can do. First, while many companies are actively involved with their trade associations, an alarming number are not. Brands are among the worst offenders here (including some that simply do not see the economic benefit of being part of an anti-piracy or anti-counterfeiting campaign). So please, get involved and spend some money so that your trade representatives can really engage with legislators and associated supporting organisations such as PIPCU. Second, please look at your own in-house rules and procedures. You may think that this is obvious, but a huge number of brand companies advertise on illegal sites. They might hide behind the argument that they employ a digital ad agency which subcontracts and thus cannot determine where all the ads go. This is nonsense. You are in control and not a single ad of yours should ever appear on any website that facilitates counterfeiting or piracy in any way.

Conclusion

So what would be my answer to the prime minister if he were to ask me that question again? Without a doubt, the biggest and easiest action we can take against counterfeiters and pirates is to follow the money.

While many additional actions can be taken around education, product change encouragement and enforcement, if you go after the big-ticket item, the Pareto principle will apply. Take 80% of the illegal websites offline by removing their reason for existing and then we can worry about tackling the remaining 20% of illegality as we go. Ask your trade organisation, legislator, IP office, government department or members what they are doing to support and implement the recommendations I set out in my reports. Do not leave it to the person across the room reading this report or the organisation on the next floor – getting action really is up to each and every one of us doing our bit. In this way we really can win the fight against counterfeiting and piracy. **WTR**



Mike Weatherley was formerly an MP and IP adviser to the UK prime minister



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