

All-Party Parliamentary Group for Intellectual Property Note for Virtual Meeting on the IP Enforcement Strategy

Date: Tuesday 6th October 2020

Time: 14:00-15:00

Attendees: Pete Wishart MP, Lord Clement-Jones, Lord Foster of Bath

Issues covered:

- Update from the IPO on the Enforcement Strategy
- Challenges acting against illegal activity online
- Know your Business Customer proposals

Background

This meeting was the first in a series of APPG meetings to discuss the Intellectual Property Office's (IPO) proposed five-year Enforcement Strategy, which it recently begun work on and is due to be published early in 2021. At the end of the series of meetings, it is intended that the APPG will produce a set of recommendations to the Government in the New Year, to help shape the Enforcement Strategy.

Update on the IPO's Enforcement Strategy

- The IPO is working towards maintaining and strengthening the UK's world leading IP regime that also aims to ensure an enforcement environment is effective balanced and proportionate.
- Key issues identified in the IPO's research involve:
 - The role of intermediaries and the increase use of social media and peer to peer sharing.
 - The use of fulfilment houses on self-storage.
 - How IP infringement is reported.
 - How intelligence is shared.
 - Consumer behaviour.
- The IPO will be looking at these issues across the whole supply chain, from purchasing and production to distribution and consumption, as well as routes to enforcement and international issues.
- Each theme will be considered in line with three core strategic aims; leadership partnership and education:
 - **Leadership:** How to stay a world leader in this area, as well as support innovation and creativity, to make the UK the best place in the world for businesses to start and grow.
 - **Partnership:** Collaborating with partners, both domestically and internationally, also, within both private and public sectors.
 - **Education:** Empowering consumers to identify illicit goods, but also to understand the wider harms of purchasing them. Collaboration between government, law enforcement agencies and industry is absolutely key to achieving education.

- Last month, the IPO ran a series of workshops, and now they are looking at the information from those to help refine the issues, and the challenges and potential actions for the strategy.
- The IPO aims to publish the strategy early next year.

‘Know your Business Customer’ proposals

The challenge

- The pandemic has brought a surge in online piracy with UK traffic to illegal film and TV sites increasing by nearly 60% during lockdown.
- There has been some active intervention by authorities, both in the UK and right across Europe against some of the most active online pirate groups.
- However, investigators such as the Motion Picture Association (MPA), who collate the evidence required for intervention by authorities, have come across common challenges and deficiencies within the current UK and EU legislative frameworks.
- Online hosting providers are often unable to inform investigators of the identities of the illegal website operators, despite being paid millions of pounds a year for their service. This is because the illegal operators do not provide the host with legitimate documentation or contact information. This challenge is making it exceedingly difficult to stop website based online harms.
- Article 5 of the E-Commerce Directive (ECD)¹ requires service providers to provide to the recipients of the service and competent authorities, at least the following information: the **name of the service provider**; the **geographic address** at which the service provider is established; the **details of the service provider**, including his electronic mail address.
- Although Article 5 of the ECD² requires businesses to identify themselves on their websites, those conducting illegal activity do not comply with this obligation. Unfortunately (and unsurprisingly) businesses that have the intention of making a profit out of illegal or harmful content do not comply with this obligation and do not suffer consequences.
- This is having the effect of rendering the safeguards of Article 5 of the ECD completely ineffective. The result being that fraudulent businesses are exploiting the lack of enforcement of the information requirements under Article 5 of the ECD. This has facilitated the use of UK-based infrastructure by completely anonymous commercial entities that intentionally distribute illegal and harmful content, to the detriment of a safe and trustworthy online environment.
- This problem is one that extends far beyond piracy. It includes operators of scam websites and operators of online services distributing illegal gambling, sexual abuse material, counterfeits, malware and more.

¹ Directive 2000/31/EC: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0031&from=en>

² In UK law – Regulation 6 of The Electronic Commerce (EC Directive) Regulations 2002: <https://www.legislation.gov.uk/uksi/2002/2013/regulation/6/made>

The solution- 'Know Your Business Customer'

- It was suggested that the UK Government should amend the legislative framework to require intermediaries providing commercial services to online businesses to implement a 'Know Your Business Customer' (KYBC) protocol, in line with existing UK law implementing Article 5 in the E-Commerce Directive.
- This does not mean monitoring their business customers' behaviour, but merely asking them to identify themselves and applying simple due diligence checks on the basis of publicly available data. These would be simple routine due diligence measures for verifying identity on the basis of validated documents, data, or information such as VAT registration, or other sufficient proof of identity. This documentation is easy for legitimate businesses to comply with, but difficult for a criminal.
- Where the customer identity is known to be fake, the service provider should be required to terminate the service.

How to implement

- It was suggested that the first step would be for the IPO to study this issue as part of its development of a new Enforcement Strategy and validate the issue as part of the enforcement review.
- Addressing the challenge in the UK would require strengthening and amending the enforcement elements of the UK's **Electronic Commerce (EC Directive) Regulations 2002**³ which implement the E-Commerce Directive in UK law. This could include amendments to force service providers to terminate the services to those who cannot provide the necessary information required by Article 5 or where that information is proven to be false.
- The Government's forthcoming Digital Strategy which is expected later this year⁴ could be a good starting point to raise these issues. The KYBC proposals have been raised as part of the consultation on the Competition and Markets Authority's Digital Taskforce⁵.
- It was noted that similar reforms are also being requested of the EU Commission in the context of the EU's forthcoming Digital Services Act (DSA). Specifically, the Commission is being asked to widen the scope of the DSA. Currently the Commission's Inception Impact Assessment⁶ only mentions KYBC in the context of online marketplaces. Such a limited approach would be a missed opportunity to address the broad range of illegal and harmful content online.

³ Regulation 6 The Electronic Commerce (EC Directive) Regulations 2002:

<https://www.legislation.gov.uk/ukxi/2002/2013/regulation/6/made>

⁴ Oliver Dowden, Speech to UK Tech Cluster Group, 23 June 2020: <https://www.gov.uk/government/speeches/digital-secretarys-closing-speech-to-the-uk-tech-cluster-group>

⁵ <https://www.gov.uk/cma-cases/digital-markets-taskforce>

⁶ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12417-Digital-Services-Act-deepening-the-Internal-Market-and-clarifying-responsibilities-for-digital-services>

Next Steps

- Gain support for the KYBC proposals from the IPO and seek to have this issue included within the IPO's Enforcement Strategy.
- Briefing for parliamentarians on the challenges and further detail on the potential routes to reform the UK's legislative framework.
- Set up a follow-up meeting with APPG officers to discuss priorities for raising KYBC issues in parliament and developing a strategy for legislative reform.

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