



**Intellectual
Property**

Intellectual Property Enforcement 2021

**All-Party Parliamentary
Group for Intellectual
Property**

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FOREWORD



Intellectual Property (IP) is the lifeblood of modern economies, and in the wake of unprecedented challenges, it is crucial to the UK's economic recovery. IP enriches our lives by providing us with work, entertainment and education. It is hard to think of a single service, product, or activity which in some way does not depend on IP.

There is incredible growth potential in our creative sectors and IP rich business industries. Prior to Covid-19 the UK's creative industries contributed £111.7bn to the UK economy in 2018 and were growing at five times the rate of the UK economy as a whole¹. When so many of our sectors are flatlining, we are practically reindustrialising this nation on the imagination, creativity and talent of the people of this country. What a wonderful way to grow and recover, based on those virtues. This is why it is vital that we not only continue to protect our intellectual property regime but ensure that it is effectively enforced.

In light of the Intellectual Property Office's plans for a new five-year enforcement strategy, the All-Party Parliamentary Group for Intellectual Property has been speaking with representatives across IP rich and

creative sectors to gain an understanding of the challenges faced by our creators and businesses. The findings within this report offer practical solutions to some of these key challenges. The Group hopes the Intellectual Property Office (IPO) not only takes these findings into consideration but adopts our recommendations as the strategy is renewed later this year.

I would like to thank all the organisations that attended our meetings and provided the Group with their expert analysis and insights. I must also thank my fellow Officers and APPG members who have supported this initiative and continue to champion IP issues: Baroness Neville-Rolfe, Lord Clement-Jones and Lord Foster of Bath, and finally to the Alliance for Intellectual Property and their membership who continue to support the Group and our important work.

As we seek economic recovery following the pandemic and look to forge new trading relationships with our global partners, let us enhance IP enforcement and continue to grow our economy on the imagination of our people.

Pete Wishart MP

Chair of the All-Party Parliamentary Group for Intellectual Property

SUMMARY AND RECOMMENDATIONS

The All-Party Parliamentary Group for Intellectual Property recently took evidence from industry representatives from across the creative and IP rich business sectors to examine the UK's intellectual property enforcement regime ahead of the Intellectual Property Office's (IPO) proposed five-year enforcement strategy. This report identifies some key areas for improvement within the UK's intellectual property (IP) enforcement regime and outlines how parliament could take these recommendations forward.

In 2016, the Government committed to reviewing existing methods of legal recourse for IP infringement every five years to ensure they are effective, consistent, and proportionate.² The previous strategy has now expired and is due to be renewed, through a review led by the IPO.

In light of the IPO's review, the Group discussed a number of issues during three evidence gathering meetings between October 2020 and January 2021.

- ➔ The first of these meetings examined the **challenges faced by authorities who try to prevent illegal activity online**, and took evidence from the Motion Picture Association.
- ➔ The second meeting **identified some key improvements that could be made to the Intellectual Property Enterprise Court (IPEC) and Small Claims Track (SCT)** to provide small businesses with better access to justice when they suffer from IP infringement. During the second meeting, the Group heard from the British Association of Picture Libraries and Agencies and Anti-Copying in Design.
- ➔ The third meeting **considered international IP enforcement rights and processes**, and took evidence from the Anti-Counterfeiting Group and the Publisher's Association. During this session, the need for the exchange of information with EUROPOL was highlighted as well as the importance of continuing to resource the UK's IP attaché network around the world.

Supporting the creative sectors and small businesses that rely on IP is more crucial than ever in driving economic recovery in the UK in light of the impact of the COVID-19 pandemic. Protecting and enhancing the UK's world leading intellectual property regime will enable UK creators to continue to innovate and invest, dedicating time and resources to new projects.

KEY RECOMMENDATIONS

The Group has identified a number of reforms which will significantly enhance the UK's intellectual property enforcement regime and ensure creators, and businesses of all sizes, can continue to contribute to the cultural life of the UK and the economy.



TACKLE AND REDUCE ILLEGAL ACTIVITY ONLINE:

- Implement 'Know Your Business Customer' protocols



MEASURES TO IMPROVE THE INTELLECTUAL PROPERTY ENTERPRISE COURT SMALL CLAIMS TRACK:

- Consolidate information, advice, and guidance on the Small Claims Track (SCT) in one place online and make it simpler for rightsholders to understand.
- Increase the SCT cap to £25,000 in line with a Fast-Track claim.
- Allow Registered Design cases to be heard before the SCT – this would ensure designers who register their designs can make a more cost-effective claim should their designs be infringed. It would also avoid the need for designers to publicly shame infringers online.
- Abolish the charge for written judgements, which would reduce costs for claimants and help ensure consistent judgements.



EFFECTIVE INTERNATIONAL IP ENFORCEMENT:

- Confirm that the current UK IP Attachés around the world will continue to be resourced.
- Appoint and resource an IP Attaché in Brussels as a priority and consider an Attaché in the Middle East region.



ILLEGAL ONLINE ACTIVITY

BACKGROUND

The Group heard that the pandemic has brought a surge in online piracy. In June 2020, EUROPOL disrupted a single criminal gang operating illegal streaming distributors across three continents which had earned more than €15 million in estimated profits.³ Despite efforts to intervene by authorities, both in the UK and across Europe, the Group heard that there are a number of challenges which prevent action being taken against some of the most active online pirate operators.

THE CHALLENGE

Investigators, such as the Motion Picture Association (MPA), who collate the evidence required for intervention, have come across common challenges within the current UK and EU legislative frameworks.

The Group heard that digital service providers, including online hosting services, are often unable to inform investigators of the identities of those operating illegal websites, despite being paid millions of pounds a year for their services. This is because the illegal operators do not provide the host with legitimate identifying documentation or contact information. This challenge is making it exceedingly difficult to stop digital piracy.

Article 5 of the E-Commerce Directive⁴, transposed into UK law by the **Electronic Commerce Regulations 2002 (E-Commerce Regulations)**⁵, requires service providers to offer 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; and the **details of the service provider**, including their electronic mail address.

Although Regulation 6 of the E-Commerce Regulations⁶ requires businesses to identify themselves on their websites, it was reported to the Group that 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 therefore do not suffer any consequences. It was argued that this, in effect, renders the safeguards of Regulation 6 of the E-Commerce Regulations completely ineffective. The result being that fraudulent businesses are exploiting the lack of enforcement of the basic information requirements under Regulation 6. The Group heard how this has facilitated the use of UK-based infrastructure by completely anonymous commercial entities who intentionally distribute illegal and harmful

content, to the detriment of a safe and trustworthy online environment.

It was evident that this problem is one that extends far beyond piracy. It includes operators of scam websites and online services distributing illegal gambling, sexual abuse material, counterfeits, malware and more⁷.

IMPLEMENTATION

It was suggested that, as a first step, the IPO could include the development of KYBC as a priority within its Enforcement Strategy, so a full consultation on its implementation could then be undertaken.

Addressing the challenge in the UK would require strengthening and amending the enforcement elements of the UK's Electronic Commerce Regulations. Such an amendment would require service providers to verify the necessary information required by Regulation 6 and where that information is proven to be false, terminate the services to those businesses.

The Government's forthcoming Digital Strategy, which is expected later this year⁸, was also suggested as a starting point to raise these issues. KYBC obligations have also been raised as part of the consultation on the Competition and Markets Authority's Digital Markets Taskforce.

The European Commission recently published its proposals for a Digital Services Act (DSA), which included a provision to ensure the traceability of traders in Article 22. However, the proposed obligation to 'Know Your Business Customer' is currently only applicable in the context of online marketplaces, and there have been calls from MEPs to broaden the legislation and ensure that the KYBC principle also requires platforms to check and stop fraudulent companies using their services to sell their illegal and unsafe products and content.

RECOMMENDATIONS

It was suggested to the Group 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, which would be consistent with existing UK law.

The Group heard that this would not involve businesses having to monitor their customers' behaviour, but merely ask them to identify themselves and apply simple due diligence checks.

The Group heard that these would be 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. An obligation to provide such basic documentation is easy for legitimate businesses to comply with but much more difficult for criminals, who rely on anonymity to cloak their illicit activities. The need to undertake routine due diligence will not only increase transparency but also act as an effective deterrent.

Where the customer identity is known to be fake, the service provider should be required to terminate the service.

In 2020, the European Internal Market Committee outlined its ambition for the EU to become a standard setter when it comes to digital regulation. In their report, the 'Digital Services Act - Improving the functioning of the Single Market', they recommended that the guiding principle for the DSA should be "what is illegal offline is also illegal online", along with a firm approach to user safety and consumer protection in the form of a KYBC principle⁹. The Group heard that the DSA was a missed opportunity to address the broad range of illegal and harmful content online and that the UK can demonstrate leadership in tackling online harms by going further.



ACCESS TO JUSTICE FOR SMALL BUSINESSES

BACKGROUND

Intellectual property claims are heard either by the Intellectual Property Enterprise Court (IPEC) or other courts in the Intellectual Property List in the Business and Property Courts of England and Wales. The IPEC provides a “streamlined and more cost-effective forum” to hear lower value and less complex intellectual property claims. IPEC cases are allocated either to the Multi-Track or the Small Claims Track (SCT). The IPEC Small Claims Track provides a forum with simpler procedures by which the most straightforward intellectual property claims with a low financial value can be decided.

However, the Group heard that, currently, many small and micro businesses, such as designers and photographers, struggle to access the necessary routes to enforcement through the IPEC SCT. This is due to a variety of reasons, such as high costs, time effectiveness and the complexity of evidence required to prove infringement has been damaging.

Anti-Copying in Design (ACID) and the British Association of Picture Libraries and Agencies (BAPLA) outlined a number of issues with access to justice specifically relating to the SCT system. These issues have led to a significant lack of deterrent and therefore loss of income for creators due to the continued infringement of their rights.

THE CHALLENGES FOR CREATORS

COST OF LEGAL FEES

The Group heard that the recovery of legal costs is capped at £260, which does not reflect the cost of time and administration that rights holders have to take to pursue legal action through the SCT. The cost of making a claim is also unaffordable for many creators, where, for example, the average designer earns £16.43 per hour¹⁰, while an IP lawyer typically charges between £200-500 per hour.

Small Claims judgments are also not published unless they are paid for by the claimant, meaning appeals cannot be lodged unless the claimant pays for the judgment. This raises serious issues of transparency and the lack of published case law can create inconsistencies in judgements.

CAP ON CLAIMS THROUGH SCT

There is currently a £10,000 cap on the value of claims that can be brought to the IPEC Small Claims Track. The SCT is intended for straightforward infringements where, for example, an image has been used on a website without being paid for and without the permission of the photographer.

The Group heard that although this process is quicker and cheaper for rights holders, the compensation cap means it does not account for the true value of products, designs, and photographs that have been infringed. Many small and micro businesses are therefore faced with having to choose between using the more complicated and costly IPEC Multi-Track process in order to claim the full value of their creations or using the simpler SCT to save time but concede that their compensation may not cover their losses.

BAPLA emphasised that this is not in line with the UK's implementation of the Enforcement Directive¹¹, which is there to ensure infringement of IP is met with an appropriate recompense. It was also noted that, even if

creators decide to take the IPEC Multi-Track process to claim the full value, it could still be redirected to the SCT as it is designed for the simpler and more straightforward infringements.

CASE STUDY

An Award winning wildlife photographer spent eight years collecting photographs of all 39 birds of paradise species. Over those eight years, the photographer had made 18 expeditions to 51 different field camps and spent more than a year and a half of cumulative time in the field. The photographs produced were later licensed to National Geographic for a sum of over £80,000. However, one of the images went on to be used by a website advertising wildlife tours, without the permission of the rights holder.

The rights holder was faced with choosing an expensive and lengthy multi-track process if he wanted to claim more than £10,000 (subject to the relatively straightforward claim being allowed in multi-track) or reduce his own compensation by pursuing the SCT which would mean the matter was dealt with more quickly.

CONFUSING GUIDANCE IN RELATION TO THE SCT

According to BAPLA, it is currently very difficult to understand what support is available to small businesses should they decide they need to seek legal action. The published guidance is overly complicated, and the information should be simplified and made more transparent.

BAPLA noted that there are two websites which offer information about the IPEC- the Judiciary website and the Government website. However, BAPLA added both websites are difficult to navigate and provide inconsistent information.

LACK OF ACCESS TO THE SCT FOR REGISTERED DESIGNS

Anti-Copying in Design (ACID) highlighted a number of issues within the enforcement and redress system for design rights holders, which have resulted in a significant lack of deterrence and continued infringement of designs. The Group heard that Registered Designs do not qualify for the SCT, which is inconsistent with the encouragement that the Government has given to design rights owners to register their designs.

The SCT process could offer the most time- and cost-effective way for designers to make a claim. Without having access to the SCT for Registered Designs, many designers are unable to take action against infringers as they lack the time, money and resources to seek justice. This increases the likelihood of infringement and loss of revenue for micro-businesses and SMEs.

Due to the lack of formal legal process to enforce such rights, a number of designers have had to resort to shaming infringers on social media in order to seek some kind of redress.

RECOMMENDATIONS

Within the session a number of reforms were identified that would improve the IPEC SCT and ensure that small businesses have sufficient access to justice when they suffer from IP infringement.

Increase the cap on recovery of legal costs and abolish charges for written judgements

– The cap on the recovery of legal costs discourages rights holders from making a claim and subsequently reduces the deterrent element.

Increase level of potential damages in the SCT – Increase the level of potential damages to £25,000.

Allow Registered Design Cases to be heard before the IPEC SCT – This would ensure designers who register their designs can make a more cost-effective claim should their designs be infringed. It would also avoid the need for designers to publicly shame infringers online.

Consolidate and simplify guidance – This would decrease the amount of administrative time small businesses need to spend researching their legal options and give them a clearer idea of what avenues they need to pursue to protect their creations.



INTERNATIONAL INTELLECTUAL PROPERTY ENFORCEMENT

BACKGROUND

It is important that the UK continues to co-operate with international enforcement organisations, in particular Interpol and EUROPOL. Clearly, now the UK has left the EU, its relationship with EUROPOL will change, as will its relationship in respect of broader non-IP co-operation. The UK-EU Trade and Cooperation Agreement (TCA) commits to continuing dialogue between the two parties on IP issues, such as enforcement co-operation. It is crucial to the UK's creative sector and IP rich businesses that this happens in a meaningful way.

The global IP framework, established by multilateral institutions such as the World Intellectual Property Organisation (WIPO) and the World Trade Organisation (WTO), form the foundation of international and national IP discourse. Input from UK stakeholders and businesses is crucial when shaping international IP narratives and we

are fully supportive of the IPO's appointment of an Attaché in Geneva to support those discussions.

The UK IP Attachés help ensure UK businesses' interests are protected in international export markets. The Attachés are based in embassies and consulates around the world and are the points of contact for businesses to gain a crucial understanding of their IP rights abroad. These Attachés also offer UK businesses the opportunity to engage with host governments and stakeholders, and advise on how to protect and enforce their IP rights in key markets. There are now attachés covering South East Asia, China, Brazil, North America and India. We would be very supportive of the IPO appointing an Attaché in the Middle Eastern region, but of even greater importance would be the appointment of an Attaché in Brussels, given it is vital that we maintain co-operation on IP enforcement with the EU.

INTELLECTUAL PROPERTY ENFORCEMENT CO- OPERATION IN THE EUROPEAN UNION

The Group heard that currently there is a lack of clarity over the extent of IP enforcement and the limitations of co-operation between the UK and the EU. This lack of clarity raises concerns over whether the UK can continue the exchange of information which is reliant on a collaborative approach with EUROPOL. EUROPOL is a vital organisation in helping to protect IP rights as it empowers policing, as well as customs officials who can enforce IP rights at the border. This exchange of data with EUROPOL has ensured that UK businesses are able to protect and enforce their IP rights across the EU 27.

It was reported that the European Intellectual Property Office (EUIPO) recently funded significant improvements in EUROPOL which have allowed IP crime to be maintained as an operational and tactical priority within the EU. This has benefited UK businesses seeking to enforce their IP rights.

It was also emphasised that EUROPOL relies on significant information input from all member states to ensure effective IP enforcement across borders. This shared intelligence informs databases, such as the Applications for Action (AFA), which is a customs-based database that allows businesses to register their rights to be protected at the borders.

The Group heard that, following the UK's departure from the EU, the UK is now at risk of losing access to that shared information and key databases, which have proven to be critical for UK businesses in protecting their rights.

It was reported that the UK introduced a system on 1st January 2021, which allows UK companies to be able to register their

rights with UK customs. However, for this to function properly, the UK needs enforcement authorities within the EU to reciprocate the exchange of information and provide access to databases.

THE CHALLENGE

The Group heard that the reciprocal exchange of information is crucial to combatting IP theft that uses 'nearshoring' as a method of supplying and selling illicit goods.

According to the Anti-Counterfeiting Group (ACG), the sale of illicit goods is becoming increasingly difficult to police because counterfeiters are setting up different elements of a business in different jurisdictions, a practise known as 'nearshoring'. For example, websites are hosted in one jurisdiction, while a business is run from a second, manufacturing in a third, and distribution of illicit wares globally by mail or international carriers from another.

The Group heard that, where supply chains have been disrupted, counterfeiters are looking to build production sites in the UK. This practice of nearshoring by counterfeiters threatens both the EU and UK borders, and could encourage further production of illicit goods.

However, it was emphasised that, for political reasons, the EU may not wish to allow full access to their databases to third countries. The EU may be concerned that if they give access to the UK, they might be forced to give access to other countries.

The Group heard that while other countries, most notably the US, do have certain access rights, the request for full reciprocal exchange of information is an arrangement that no other third country currently has with the EU. Although the UK's enforcement regime is respected, the difficulty is designing a bilateral arrangement that will maintain the UK's previous level of collaboration with member states of the EU.

RECOMMENDATIONS

It was suggested that the Government could negotiate access on the basis that the UK's qualified data protection rules were built in line with the EU's.

As part of the TCA the UK now has a six-month window to negotiate data adequacy provisions with the EU. This may offer an opportunity to discuss enforcement data exchange, particularly against the background of co-operation with the EU.

To mitigate these threats and effectively enforce IP rights, it was suggested that the Government should continue its negotiations to ensure the reciprocal exchange of information as a priority.

IMPORTANCE OF THE IP ATTACHÉ NETWORK

The Group heard that the UK's IP Attachés are crucial to protecting UK business interests in key export markets and ensuring the effective enforcement of IP rights, particularly for sectors such as publishing, which are export driven and sell to a hugely diverse set of markets around the globe.

It was emphasised that the Attachés provide vital intelligence on issues such as market access and the legal protections available in a country, while highlighting proposals to change the IP legislative framework and opportunities to influence those discussions. According to the Publishers Association, many trade associations representing UK businesses lack the resources needed to mobilise a team on the ground for gathering in-country intelligence and engaging authorities and Governments to effectively protect their interests. The Group heard that businesses often look to these trade associations for leadership on enforcement, particularly in key global markets where IP regimes are incredibly complex. Being able to liaise with the IP attachés means that trade associations can offer real time support to UK businesses who export abroad.

CASE STUDIES OF EFFECTIVE IP ATTACHÉ ENGAGEMENT

INDIAN IP ATTACHÉ

In India there is a current Government consultation examining the domestic copyright exception for the use of educational publications. These exceptions to copyright allow certain use of copyright protected works without the permission of the copyright owner. Currently the Indian education copyright exception is extremely broad and, as a result, Indian universities can essentially use UK content for free. This means that UK content companies who are selling publications such as academic textbooks to India find it a difficult and unattractive market to export to.

The IP Attaché in India not only flagged the consultation, but it also gave the Publishers Association the opportunity to feed into the UK Government's submission to the Indian consultation and thereby extend the influence of the industry.

The Attaché has also shared important intelligence and insight about the reaction to the consultation from other organisations and stakeholder groups in India. For example, a group of academics in India suggested that the education exception should be broadened further to include online content. This would again make it a more difficult market for UK publishing companies to export to.

With India being such a key market for publishing, the intelligence provided by the UK IP Attaché has been invaluable. It is crucial that trade associations are able to continue this collaboration to protect UK businesses.

RECOMMENDATION

As the UK Government seeks to develop its trade relationships as part of its Global Britain agenda, the Group heard that the Attaché Network is becoming even more important for protecting UK business interests abroad and for effectively enforcing IP rights. Having a consistent dialogue with stakeholders within key international markets opens up opportunities to build alliances with industry partners to gain intelligence and build influence.

It is therefore important that the UK continues to extend the Attaché Network and ensure there are long-term in-country placements for building knowledge of the IP regimes within key markets. Currently, the UK Mission in the EU does not have an IP attaché based in Brussels. With a lack of clarity over the extent of co-operation and exchange of information for IP enforcement with the EU and the EU considering significant legislative changes that could impact UK rights holders, an attaché in Brussels is becoming increasingly important. The Group heard from the IPO that it is currently working to bolster the IP Attaché Network and ensure intelligence is being shared as much as possible. The IPO is also considering where additional need is required.



CONCLUSION

This report has outlined a number of ways in which the UK's IP enforcement regime could be enhanced to improve protection for UK creators and consumers.

As the UK recovers from the pandemic and seeks to forge new relationships with partners across the world, it is vital that the Government takes steps to protect creativity and encourage future investment and innovation to stimulate the economy. Industries dependent on intellectual property are not only central to that recovery, but key to maintaining and enhancing the UK's global economic and political position.

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Intellectual Property

About the All-Party Parliamentary Group for Intellectual Property

The Group was launched in 2003 to create a resource for parliamentarians of both Houses interested in learning more about intellectual property (IP), its role in stimulating creativity and economic growth, how new services are developing to serve consumer needs, and the harm that can be caused when IP is not properly respected and protected. Luther Pendragon provides administrative support to the Group on behalf of the Alliance for Intellectual Property.

The Group is well supported by the Alliance for Intellectual Property, which is made up of a wide variety of organisations and industry groups across the creative sector, such as design, photography, sports, film and art. Their membership includes the likes of the Premier League, Motion Picture Association, the British Phonographic Industry (who run the BRIT Awards), the English Football League, British Toy and Hobby Association and the British Brands Group, among a number of others.

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