

# COPYRIGHT COMMENT

## Let's get digital

Does the UK's 2017 Digital Economy Act really deter IP fraud?  
Adam H Bloomenstein explores

**All fraud is now equal – or is it? This year's copyright legislation brought in as part of the UK government's revamped Digital Economy Act, seeks to bring criminal sanctions for online copyright infringement back in line with offences such as counterfeiting. With the maximum prison term jumping significantly from two to 10 years, the government clearly means business.** But does the Act stand a chance of stopping the most determined illegal downloader?

It's no easy task to stem the tide of online IP crimes which have escalated since our digital economy was established. The music industry alone estimates that 1.2bn tracks are downloaded unlawfully in the UK each year, in stark contrast to reported online track sales of just 370m.<sup>1</sup> Whether it is a new music track or film, a new brand or the next high-tech gadget design, once released online any idea or product is at risk.

### What are the risks to business?

Fast broadband has now penetrated most areas of the UK, providing the ideal infrastructure for mass data downloads. There has been a huge rise in online streaming through Kodi boxes, bulk data sharing, downloading and seeding with software such as BitTorrent (a hyper distribution communications protocol for peer-to-peer or P2P file sharing). It is easy to see how a company might lose track.

Business integrity can be severely harmed through illegal downloading activities with copyright holders facing lost royalties, lost sales and serious risks to their reputation.

Creative industries alone contribute an estimated £59bn to the UK economy and support up to 2.3m jobs within their own and associated industry sectors. According to government statistics,<sup>2</sup> a third of all online copyright infringement is via P2P file sharing;

and so it is paramount that action is taken to reduce this economic pillaging. Despite the fact that rightsholders and internet service providers (ISPs) have voluntarily agreed to a framework for educating alleged infringers about the harm of piracy, it's a persistent problem.

The Act has lowered the threshold for criminal sanctions to include infringements where not only does the accused intend to make a gain causing loss to the copyright owner, but will also include cases where there is merely a risk of loss to the owner.

It is expected that the Act will lead to the issuance of the higher-level sanctions for those hosting copyrighted works or making them available to others without the consent of the copyright holder. Service providers and software distributors which facilitate and encourage individual acts of infringement by others are more likely to bear the force of the law than individual end-users who are not communicating the work to the public.

### Tempting the trolls?

Lower thresholds for sanctions and higher penalties for infringement signal support for businesses in protecting themselves from online fraud. However, could this also lead to a rise in copyright trolling? This is where a party aggressively enforces copyrights it owns for the purpose of making money through litigation – without necessarily producing or licensing the work it owns for paid distribution.

For example, a film maker produces a flop on a low budget, then mysteriously does not stop the work from being made available on BitTorrent so users 'seed' the content elsewhere. In this scenario, the producer effectively sets people up to flout copyright rules so that they can be sued or "trolled" for damages.

It remains to be seen whether, under the new legislation, the courts will take a dim view of such obvious "honey traps" and apply

leniency to the downloader, which could in turn deter all but the most determined trolls.

### Maximising IP protection

According to the European Commission,<sup>3</sup> intangible assets account for more than half the value of organisations and their importance is growing throughout the UK and EU where companies compete more on innovation, creativity and quality than on price.

It makes economic sense for businesses to maximise their intellectual property protection, but methods will vary. Some could choose to spend money on reactive measures such as litigation, others may choose a proactive path – a "prevention is better than cure" approach. This could include partnering with a third-party supplier with expertise in corporate risk management and investigations including IP protection, trademark and patent infringement, piracy, counterfeiting, product diversion and litigation support. In such circumstances, corporate investigations may range from monitoring a single employee to uncovering elaborate schemes at multiple facilities both within and outside the UK.

### The way ahead

Aggressively protecting your IP does not always prevent its theft, but it does make it easier to take legal action against anyone caught doing so – and the government is serious about ramping up the measures to stamp out, or at least reduce, online IP criminal activity. The new legislation may have been ratified but this is doubtless a work in progress, as the speed of change in digital technology will always present challenges to law makers.

### Footnotes

1. <http://bit.ly/2x9ffg2>
2. *Id.*
3. <http://bit.ly/2ITgBYq>

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