

**GOWERS REVIEW OF INTELLECTUAL PROPERTY  
SUBMISSION OF EVIDENCE BY**



**A EXECUTIVE SUMMARY**

The Entertainment & Leisure Software Publishers Association (ELSPA) welcomes the opportunity to submit evidence to this important Review. ELSPA was founded in 1989 to establish a specific and collective identity for the British computer and video games industry. The industry has rapidly developed and matured and ELSPA membership now includes nearly 70 companies concerned with the publishing and distribution of interactive leisure and entertainment software in the UK.

ELSPA is an active member of the Alliance Against IP Theft, which is also making a submission to the Review that we endorse.

The majority of interactive entertainment global industry players – developers and publishers, software and hardware companies – have their main European or worldwide base in the UK and around 35% of software sold in Europe emanates from UK development studios. The industry employs directly around 22,000 people. It attracts significant inward investment from the US and Japan.

The UK is the world's third largest computer and video games industry by value, recording sales in excess of £2.3 billion annually and being a net exporter of products valued at around £200 million in 2003. There is about one games console for every three people in the UK and some 335 million units of games software have been sold in the last decade. Recent independent research found that some 21.6 million people play electronic games at least once a week.

Against this background of consistent success, the interactive entertainment software industry faces unique problems in particular from the unauthorised reproduction and dissemination of creative content protected under the UK's existing IP framework. The existing IP framework presents two major challenges for this industry:

*Enforcement of legal rights and strength of penalties -*

- how to deliver the strongest possible deterrents and public protection against IP crime using the existing legal framework and available public and industry resources

*Technological Protection Measures and Digital Rights Management -*

- how best to deliver strong protection for developers' and publishers' IP rights whilst offering secure, accessible and innovative products for our customers;

In this submission, we detail our concerns about the strength and robustness of the existing IP framework. In particular, we believe that there are four areas where the Review should consider specific policy and practical recommendations:

*1. More resources and training for successful prosecution of IP crime*

The industry expends significant resources in combating IP crime. ELSPA's own Anti-Piracy Unit for example, has 12 staff working full time on criminal investigation and IP enforcement issues. There are existing criminal remedies available to UK law. These include the offences

for criminal copyright infringement found within s107 Copyright, Designs and Patents Act 1988 (CDPA) and the offences for the criminal infringement of trade marks within s92 Trade Marks Act 1994 (TMA). The latter only are enforced by local authority trading standards departments with whom ELSPA works closely to ensure that pirates and counterfeiters are properly dealt with by appropriate criminal remedies. The anomaly that copyright offences are not similarly enforced is discussed in this submission. We also note that, whilst companies spend a great deal of time assembling evidence and assisting enforcement authorities, public bodies are under resourced to prosecute offences disclosed. **ELSPA believes that the Government should seek to increase funding and training for trading standards authorities and public prosecutors to further improve enforcement and to add greater weight to existing deterrents.**

2. *Full implementation of Section 107A of the Copyright, Designs and Patent Act 1988*

The manner in which IP owners can enforce IP depends to a large extent on who or what the alleged infringer is. Civil law may be an appropriate approach if for example the code of a game has been copied by the developer of a new game. However, it is submitted that the majority of IP infringement in the digital field is committed criminally by pirates and counterfeiters who merely copy the works created by the games industry. These are then sold on disc format wherever the pirates and counterfeiters are able to interface with the public, including work places, markets and via various Internet auction sites. Moreover digital files are made available for uploading or downloading via the internet including “warez” sites, Peer-2-Peer (P2P) sites, and other locations. These sites contain copies of games that have had the copy protection removed (hacked out) from them. This situation is compounded by the widespread supply of chips and other technical measures designed to circumvent the protection measures incorporated in consoles to prevent the use of counterfeit and pirate copies of games - see also 3 below. **The Government should without further delay implement section 107A of the CDPA thereby placing a duty on Trading Standards Authorities to enforce all of the criminal offences within CDPA.**

3. *Creation of a new offence of “chipping”*

This industry has always been digital and pioneered the use of Technological Protection Measures (TPMs) against IP crime. It owes much of its existence to the use and exploitation of, and the protection afforded by, intellectual property rights. ELSPA notes in this submission that there is an anomaly in the protection afforded to computer software in that it is not a direct offence to circumvent the technological protection measures applied to computer programs. **We believe that a new criminal offence covering this, carrying strong penalties, including imprisonment, would significantly enhance the existing IP protection framework and would be a major deterrent to commit IP crime.**

4. *A permissive environment for the development of new rights management technologies*

The interactive entertainment software industry considers it vital that our members are allowed to develop DRMs individually to ensure that they offer even greater benefits to legitimate customers. **We support measures to continue the development and implementation of secure DRM systems and we would not support attempts to mandate DRM systems from external sources.**

DRMs are in an early but very rapid stage of development. It is likely even that DRM thinking will have moved on during the course of this Review. ELSPA members would be pleased to assist the Review further on this issue as its investigations continue. In particular, we may wish to offer the Review supplementary evidence on DRMs towards the summer.

## **B ANSWERS TO CONSULTATION QUESTIONS**

### **Categories of Intellectual Property**

The two categories of IP of most interest to the Games Industry are:

#### *Copyright*

In the case of an interactive entertainment product this subsists in the software programme, operating the game, but other facets of copyright will be present in a game, notably film sequences and sound recordings. Copyright is not of course registrable in the UK.

#### *Trade Marks*

The games publisher, the platform provider, and indeed the game's name and characters are normally registered as trade marks. These generally appear on the game's advertising, packaging and on the screen when the game is played. Trade marks are of course registrable.

Both categories of IP detailed above are infringed by the illegal copying of games and their packaging and also by the advertising of illegal copies in print and via web and auction sites.

### **Award and Use of IP**

In the UK, the members of ELSPA publish games and where appropriate register trade marks [many also register copyrights in other countries that have registration]. These members have been advised to submit individually to the review on question 1, 2 and 3. However ELSPA is aware of some members' responses to these questions.

#### **2 - How is IP used?**

(a) What types of IP does your organisation use and why?

Member: Both copyright and trade mark rights are used. Often it is easier to enforce trade mark rights as there are less burdens regarding proof of ownership than with enforcement of copyrights.

(b) To what extent do you seek multiple overlapping forms of IP protection?

Member: We protect the software by copyright protection, and the titles and brands under which we sell our software by means of trade marks. All our products receive both forms of protection.

ELSPA's response to question 4 follows.

#### **4 How is IP Challenged and Enforced?**

Again ELSPA's focus is on the defeat of the piracy and counterfeiting of its members' copyrights and trade marks.

(a) The main problems facing ELSPA as it seeks to enforce the protection of its members' copyrights and trade marks are as follows:

(i) The failure of successive governments to implement s107A CDPA that would give trading standards the duty and powers necessary to enforce the criminal

copyright offences within CDPA. This particularly hampers ELSPA, where for whom some 75% of anti-piracy operations are trading standards led, in the event that trade marks are not present on the counterfeit product. This may be because the counterfeiter deliberately blank copied trade marks from appearing on discs and their packaging, and for circumventing of technical protection measures.

- (ii) The lack of resources available to trading standards to secure the enforcement of IP rights. This is an age-old problem and ELSPA has fought hard alongside The Alliance Against IP Theft (the 'Alliance') to persuade Government to remedy this problem. There have been some successes, notably the ability of trading standards to receive funds confiscated from lifestyle criminals under the provision of the Proceeds of Crime Act 200 ('POCA'). There does, however, remain a general problem of under-resource in the field.
- (iii) Sentences handed down to guilty infringers are inconsistent and are extremely ineffective in that they provide no deterrence to repeat and potential new offenders. This is evidenced by the large number of repeat offenders that are known to us through our operational anti piracy unit.  
In ELSPA's experience, in cases of criminal copyright infringement, the local authority or Crown Prosecution Service prosecutors are not proficient enough in the relevant sentencing case law, are not familiar enough with the offences and the extent of the damage caused by the infringement, and the substantial gains made by the pirates. Cases are not presented in an effective manner, and insufficient sentences, which are simply not harsh enough, are handed down. Sentencing practices, make widespread use of community service orders that provide no deterrence to infringers, who make a lot of easy money out of infringing IP rights, thus undermine the judicial system.

(a) Are there specific problems with enforcing the main different forms of IP: patents, copyright, trade marks, and designs?

Member: As a developer and publisher of interactive entertainment software for personal computers and advanced entertainment systems, we encounter difficulties in enforcing copyrights in particular due to the current burdens on copyright holders to provide information:

- o to prove that rights subsist in our works (presumptions could be more helpful to industry if the subsistence of copyright was included as a copyright presumption as in other jurisdictions such as Ireland and separately copyright presumptions were applied in criminal cases as well.); and
- o the legal expenses and delays usually involved in litigating to protect all of our IP rights, and in supporting criminal infringement actions.

b) Are there barriers to challenging infringement and enforcing your IP rights on grounds of cost? What drives these costs?

Member: Our industry spends a significant amount of money on conducting investigations into criminal infringements, and collecting sufficient evidence against infringers in order to get police or trading standards officers to take action against the infringer.

ELSPA's members will have observations on the costs of civil IP enforcement and alternative remedies, as well as insurance issues.

(c) To what extent does your organisation make use of other methods than litigation to resolve IP infringement cases, for example the Patent Office opinion service, mediation services, Alternative Dispute Resolution, or the Copyright Tribunal?

Member: The nature of the infringements committed against our products, as well as the short shelf-life of our products, means that these alternate methods are not useful in cases of piracy, which is the biggest threat to our IP rights. In addition, piracy is a crime and not just a civil infringement of our rights.

(h) What are the principal barriers to efficient and successful challenge and enforcement internationally?

Member: The principle barriers include lack of cross-border co-operation between law enforcement agencies; costs of investigations into infringing activity and tracking of counterfeit/pirated goods; poor legislation in certain countries; and the cross-border activities by organised criminals. Further, the lack of deterrent penalties in the UK is probably the number one reason piracy remains a significant problem in the country.

### **Specific Issues**

Again ELSPA members may have submissions on specific issues raised in this section of the Review. ELSPA has the following specific issues.

### **2 Copyright Exception – Fair Use/Fair Dealing**

With regard to computer programs, in addition to the general fair dealing exception provisions of Chapter III of the CDPA, the software directive previously referred to allows, back-up copies to be made in restricted circumstances – s50A.

The Courts have regarded this provision strictly, so that as software delivery has moved from floppy discs onto the more robust format of CDs, it is likely to be rarely considered necessary for a back-up copy to be made.

ELSPA considers that the status quo should be maintained in respect of s50A.

Moreover, it is considered that the digital industry as a whole is now in a state of transition from delivery of product by hard goods, i.e., from optical disc to on-line delivery of products by various means. The use and dealing in such products will be controlled by the use of DRMs, considered separately in this submission.

In ELSPA's view any private copying except legislated for at present would be a premature step since it will become obsolete no sooner than drafted. Further, as noted, issues on this have already been adequately addressed by the Software Directive and the courts.

The Industry represented by ELSPA is strongly opposed to any form of private copying levy or licence of right. This is for the following reasons:

- a) Games are developed and marketed for specific games formats and consoles, one copy is therefore sufficient for use by the user. The use of computer games cannot be equated with, for example, music, where different media can be used to play the work via CD player, computer, ipod.
- b) The European experience is that collecting societies become expensive bureaucratic institutions and little of the levies generated reach the rights owners.

- c) Purchasers who pay the levy wrongly believe that they can make unlimited copies of the work. Thus a private copy exemption/copy levy becomes a gateway to piracy.

(c) Are there other areas where copyright exceptions should apply?

Member: No. There are no other areas where copyright exceptions should apply for entertainment software.

(d) Are the current exceptions adequate or in need of updating to reflect technological change? For example copyright law in the UK does not currently have a private “fair use” exception. Such an exception might allow individuals to copy music CDs onto their PC and MP3 player for their personal use. Should UK law include a statutory exception for “fair use”?

Member: The EC Software Directive (Article 5) excludes such 'fair use' exceptions from operating against software: private copying of computer software is restricted, and the making of back up copies is only permitted where this is "necessary". If a “fair use exception” is introduced (although we do not think it should be), we trust that the introducing law would comply with this Directive.

(g) Are there issues concerning the archiving of material covered by copyright?

Member: This has to be limited to true archiving by legitimate archiving entities.

### **3. Copyright – Digital Rights Management (DRMs)**

It is essential that DRM technologies should be clearly defined and distinguished from the copy protection currently applied to hard goods, that is optical discs carrying computer games, music, and films. This industry also uses technological protection measures on its consoles in a variety of forms to prevent the use of copied games from being played on those machines. These too should not be regarded as DRM technology but instead are referred to generally in the industry as “TPMs” or copy protection, and serve valuable and distinct purposes.

True DRMs provide for broad and varied rules to be given as to how content is accessed and consumed. They enable the industry to make game products available to consumers on an increasing number of platforms and in non-traditional formats. Increasingly games are accessed and played on on-line formats and DRM technology allows this to develop in line with the rights and terms that have been agreed with the consumer. DRMs thus allow for the industry to make its products available to consumers, where the access and usage rules can be pre-defined and made fully known before purchase or a commitment to buy has been made.

TPMs and copy protection systems on the other hand allow companies to protect their valuable investments in intellectual property from the all too prevalent and increasing tendency of criminal elements to pirate and counterfeit digital products. This industry has seen the development of very successful TPM solutions by individual companies. This form of self-help by individual companies is to be encouraged. Developing and launching a successful game is a very expensive process, including as it does the development of the game software, its promotion and marketing leading to its launch in to the market. Consequently it is a legitimate concern of the industry that it is able to develop relevant and appropriate TPM copy protection technologies now and in the

future for the purpose of protecting its investment in intellectual property and to safeguard the future development of interactive entertainment products.

This industry strongly objects however, to mandated DRM systems from external sources but instead believes that the industry collectively and individually at member company level, should be allowed to develop and promote DRM technologies.

## **10 Legal Sanctions on IP Infringement**

The Copyright Directive, which was implemented by the Copyright and Related Right Regulations 2003 has, as it is observed in the Review documentation, led to some anomalies in copyright law. These are discussed below. However the biggest anomaly of concern to legal sanctions is the inconsistency of sentencing experienced in the criminal courts that is between different sentencing judges and magistrates' courts. As to legal inconsistencies ELSPA notes the following areas of concern:

- a) The s107A CDPA issue detailed above;
- b) S296 ZB CDPA which creates criminal offences for the circumventions of technological measures applied to copyright works but by operation of s296 ZF(1) this excludes computer programs. This appears to be based upon the existence and provisions of the Council Directive 91/250/EEC on the legal protection of computer programs and the UK implementation in the Copyright (Computer Programs) Regulations 1992. However it is submitted that there is no legal reason why the UK should not implement domestic criminal legislation to protect technical protection applied to computer programs.

The large scale supply of programmed computer chips and other devices designed to circumvent technical protection applied to games consoles within the UK is a serious problem. S296 ZB offences should apply by an extension of the provision to include to computer programs.

- c) Moreover the penalties for the on-line communication of electronic digital works by uploading in s107(2A) should be brought into line with those for physical goods. It seems obvious given the unremitting move away from optical disc to on-line delivery of digital goods, that piracy in the on-line is equally if not more damaging than that for physical goods.

Members comments:

- (a) Are you aware of any inconsistencies or inadequacies in the way the law applies to legal sanctions to infringement of different forms of IP or to different circumstances?

Legal sanctions are inadequate – the level of punishment is not acting as a deterrent against trade mark infringement and copyright piracy in the UK. This is an important area for improvement. Sentences need to include imprisonment in order to act as a true deterrent.

- (b) For example, should criminal sanctions on online infringement be the same as those relating to physical infringement?

Yes, at a minimum.