

[REDACTED]

From: [REDACTED]
Sent: 04 April 2017 12:52
To: Enforcement
Subject: Illicit IPTV streaming devices: call for views
Categories: IPTV call for views

To whom it may concern,

Please see below FACT's response to the IPO's call for views on illicit IPTV streaming devices.

Best wishes

[REDACTED]

Introduction

Established for over 30 years, FACT is at the forefront of the fight against intellectual property crime in the UK and internationally, specialising in protecting both physical and digital content. FACT's role in successfully detecting and targeting those involved in IP crime, also requires the ability to foresee and be aware of the technological changes that are constantly occurring. The criminals involved are often the pioneers of these developments. FACT prides itself at being at the forefront of emerging technology and is always up-to-date on technological changes and advancements. Working in both the UK and internationally, FACT's range of services and strategic and tactical solutions are designed to disrupt all forms of intellectual property crime.

Q1: Please provide evidence of the scale of the problem of illicit IPTV streaming devices and the economic harm it is causing to broadcasters and content owners.

The exact scale of the problem is unknown, but from the intelligence FACT has gathered we believe it currently provides the greatest threat to rights holders.

Research conducted by Incopro^[1] and by ICM Unlimited on behalf of the audio-visual sector^[2] in 2015/6 shows the sale and use of set-top boxes and sticks that have been uploaded with software that provides access to unauthorised copyright material to be a significant and growing problem amongst British consumers.

Over 20% of respondents to ICM's October 2016 consumer survey said they were spending less or had cancelled subscriptions to services such as Sky, Now TV, Virgin Media, Amazon Prime Instant Video and Netflix.^[3]

From the supply perspective, there is no fixed point with this type of crime from which to work out growth or spread. What FACT has done in the past is provide evidence in individual criminal prosecutions of the harm that is being caused to broadcasters and rights owners by the actions of the defendant. This has proved acceptable to the courts and always receives comments from the judge about the impossibility of providing exact figures of loss or harm. In the O'Leary and O'Reilly case, the judge stated that 'putting a loss on the fraud is contentious'. He then went through the evidence of turnover of the business and calculated a notional loss. He stated, 'the real loss must be considerably greater than that'. As a result, he said, 'it is not easy to put this case into boxes of the sentencing guidelines'. O'Reilly, the principal defendant, was sentenced to four years' imprisonment – the judge clearly recognised the scale of the offending and the harm and loss caused even though there was no exact figure. What can be done is to take that loss and harm and apply it to the number of cases under investigation. That still only provides a small snapshot, and it only looks at the UK. This problem is replicated in every country.

Case history

Q2: Please provide examples of cases that you are aware of (with references where possible) where prosecution in the UK has been successful for the:

- a. Import;**
- b. Offer;**
- c. Sale; or**
- d. Use of set-top boxes for illicit streaming.**

Please indicate the legal basis used for these prosecutions.

To my knowledge there are only three cases that have so far been through the courts and all involve the sale of set-top boxes/IPTV devices

O'Leary and O'Reilly mentioned above, conspiracy to defraud
16/9/16, Montgomery, Airdrie Crown Court, plea of guilty to S296ZB
6/3/17 Mayes, Hartlepool Crown Court, plea of guilty to S296ZB

Q3: Please provide examples of cases you are aware of where prosecution of ostensibly valid cases were not pursued under the above provisions. Please indicate why these cases were not taken forward.

We are aware of two valid cases where no further action was taken, which we do not agree with.

- 1.) *West Yorkshire Trading Standards* – FACT referred a case to West Yorks TS regarding infringing Amazon Firesticks. They were unable to take the case on as it did not meet the criteria for action within the local control strategy as they warranted that it did not cross the product safety threshold.
- 2.) *Gateshead Trading Standards* – following a referral from FACT and as part of a multi-agency day of action, Gateshead TS executed three warrants in March 2016 at the home addresses of three individuals involved in the sale of IPTV devices which allowed users to watch all 380 Premier League games, Sky television channels without a legitimate subscription, and films which had not been officially licensed by the rights holders. At one of the addresses it is believed that during this time that evidence of a 'card sharing' operation was removed from the premises.

On receipt of the final FACT forensic examination reports it was determined that Appnettv had committed 'aiding & abetting' type offences under Section 7, The Fraud Act 2006 for making and supplying articles for use in frauds and under Section 44, The Serious Crime Act 2007 for encouraging or assisting offences i.e. by supplying devices preloaded with applications which gave direct access to illegal content and by posting updates and links on social media to illegal content. However, the Gateshead Council Litigation Team were unwilling to support the alleging of these 'aiding & abetting' offences and therefore Gateshead Trading Standards therefore intend to issue written warnings to the three suspects.

Q4: Are there specific areas where you believe the current legal framework does not provide the necessary tools to investigate and prosecute this issue? If so, please provide as much detail as you can on how you think the current

provisions could be amended and how these amendments would address the perceived gap.

The existing legislation is not specific in being applicable to IPTV boxes. This particularly applies to S296ZB although it has been successfully used and has also been applied to other cases awaiting prosecution. In relation to the Fraud

Act, the legislation was designed with very wide interpretation in mind so that it would not fall foul of future technology or other unimagined developments that would render it obsolete. It is meant to be tested so that case law regarding its use can be built up. Many prosecutors/lawyers are reluctant to use it in IP cases because of uncertainty of the question of fraud. At FACT we have used it successfully in many cases but it is true that if fraud was the obvious way of dealing with IP cases then there would be no need to have copyright (and related) legislation. Not all IP matters are fraud or theft, which is why there is separate legislation.

Conspiracy to defraud has also been successfully used but it must be borne in mind that, as above, the fraud might be difficult to show, and of course there might not be a conspiracy.

The proposed amendments that have been put forward I believe are a sensible and simple way of plugging any perceived gap in the legislation. It is better to act on this now rather than wait and see important cases fail. History has shown with the TVLinks case that it can take years to rectify the problems of a failed prosecution and we cannot afford to be in that position with this type of crime,

Q5: Is there any UK case law which you believe limits the applicability of the statutory offences listed above?
No.

Q6: Are there any issues around evidence gathering for these existing offences? This could arise conceivably from the need for digital forensic capability, or the often dispersed nature of the illicit streaming infrastructure.
In general, these cases are no more complicated than other streaming based investigations/prosecutions. However, a digital forensic capability is a must.

Q7: Please provide examples of where this issue has been raised with law enforcement agencies or government officials/ministers in other countries.

I have travelled and met with broadcasters, government officials and law enforcement in India and Hong Kong, alongside the City Police, to discuss our activities in the UK, to look for common working possibilities, and to impress upon LE in particular what can be done about the problem.

Q8: Please provide examples of where there is an international element to the supply and support of this activity in the UK, and give your views on how this dimension of the problem could be addressed in terms of:

- a. The supply of illegal boxes;
- b. Websites hosting illegal content; and
- c. Other illicit streaming services.

The supply of illegal boxes mainly comes from China and the Far East although Russia and Turkey are also believed to be manufacturers. Stopping the supply would obviously be desirable. Little has been done to date because the boxes are generally identified as 'clean' when imported and it is only the configuration of those boxes by a re-seller that makes them illegal. I believe that a large quantity of IPTV boxes are still illegal even if unconfigured because they are a constituent part of a constant cycle of offending, i.e. they have no other use.

Additionally, we have embarked on a series of testing of boxes for electrical safety and, as they all fail to meet UK standards, this seems to be a good way of approaching the seizure of imported boxes.

Websites will almost certainly be abroad. Various actions can be taken but apart from site blocking all involve an interaction with a foreign jurisdiction for action.

Other illicit streaming services will also mainly originate from abroad.

Q9: Are there examples of enforcement powers in other countries that have been introduced to deal with these issues? Please provide examples of approaches you are aware of in other countries and any evidence you have of their success.

I don't know for certain but there could be. I doubt it because this is still a relatively new means of offending. As far as I know the UK is way ahead of any other jurisdiction in tackling this type of crime.

Q10: Are there any other barriers to the successful investigation and prosecution of these issues?

The usual barriers apply – lack of knowledge by prosecutors, lack of desire to improve that knowledge and take a case to prosecution are the main blockages. Policing resources are also an issue although the support from victim organisations should mean that any such lack is mainly negated by the amount of work done on the behalf of LE. FACT in particular is the best illustration of that.

Q11: Do enforcement agencies have the powers required to investigate this activity? Given the split in offences between IP legislation and other provisions such as the Fraud Act, are warrants readily available to those investigating?

Yes.

The main barrier here is that TS do not have the powers of search and seizure under the Fraud Act. In several areas of the UK, TS officers will not commence investigations due to this. The outcome is that, where police resources are limited, criminals are more or less free to operate, causing increases in offending.

Q12: Are there specific areas where further guidance (from IPO and/or CPS) would be beneficial in the investigation and/or prosecution of this activity?

The IPO is getting more and more involved with partner organisations in this type of crime and is encouraging and facilitating various forms of action such as media attention and the FACT led 'days of action' which have so far taken place in the North East and the North West. The CPS, despite some initial interest in the 'days of action' have not had any involvement otherwise and are not a suitable organisation to seek guidance from.

Q13: Are there any non-legislative approaches that you think could help with the situation? Please provide examples.

There are a number of other possibilities such as the involvement of hosting providers and registrars but this tends to be a piecemeal approach rather than a concerted effort to tackle the problem in different ways.

Q14: Do you have any other suggestions or experience relevant to this exercise?

At present there are a number of cases going through the courts, the results of which will become apparent over the next two to six months (and thereafter). Continued success in these cases does not mean however that the law is perfect and does not need to be amended. A clearer law would be beneficial to all parties but particularly to the CPS who would be able to prosecute without fear of failure because a reason perhaps for not currently prosecuting is that they are uncertain about the current law.

The majority of cases we are involved in end up as private prosecutions because of this failure by the public prosecutor.

Lastly, a series of failures in the courts would be an absolute disaster for future dealings with IPTV boxes et al and the eventual enactment of a new law would not redress the situation. If there is going to be a new law it needs to be immediate.

Meantime, FACT (and others working with us) continue to use our investigative and prosecutorial experience and capability to make sure these cases are successful in court.

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^[1] **IPTV boxes are widely available on both online marketplaces and dedicated IPTV box selling web sites.** Using eight keywords relating to IPTV boxes 13,815 listings were found across 51 online marketplaces. This corresponds to over 4 million items in stock. The reason for these high numbers is that some of the marketplaces - particularly those from China - deal in bulk orders only. It is expected that these Chinese marketplaces are responsible for the influx of 'fully loaded' boxes in the UK. Sellers are likely to be placing batch orders of these boxes, installing Kodi and the infringing add-ons (if not already installed direct from China), and then re-selling on a regional basis.

^[2] Research was commissioned by the Industry Trust for IP Awareness on behalf of its members in video, film, television and cinema companies.

^[3] Q: Since you started using a set-top-box/stick to watch unauthorised film/TV/sport, would you say that your spending on the following services has changed?