



Illicit IPTV streaming devices: Response to the Intellectual Property Office's call for views

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Introduction

21st Century Fox is grateful for this opportunity to respond to the Intellectual Property Office's Call for Views on Illicit IPTV Streaming Devices. Before responding to the IPO's specific questions, we provide an introduction and some background to our responses.

21st Century Fox is a diversified global media company with interests in four main industry segments: cable network programming; filmed entertainment; television; and direct broadcast satellite television. In addition to a global portfolio of cable and broadcasting networks and properties including FOX, Fox International Channels, National Geographic and STAR; film studio Twentieth Century Fox Film; and television production studios Twentieth Century Fox Television and a 50% ownership interest in Endemol Shine Group, 21st Century Fox also holds equity interests in Sky Europe and Tata Sky, which provide audio-visual content to millions of subscribers through pay-TV services in Europe and Asia respectively. 21st Century Fox employs nearly 6,500 people in its wholly-owned businesses across Europe, the Middle East and Africa, and tens of thousands more through those in which it has an equity stake.

We are deeply concerned about the emerging problem of illicit IPTV streaming devices (IPTV boxes). The number of people in the UK (and elsewhere) using IPTV boxes to stream unauthorised content is rising inexorably. This inevitably undermines business models within the content industries and beyond and threatens investment in new content creation and services. In addition, as in the case of conventional piracy, there are significant concerns around consumer harm, in particular relating to malware and advertising on IPTV boxes. We do not consider this latter point further in this response, but refer to [the letter sent by John Carr, on behalf of the Children's charities' coalition on internet safety to the Secretary of State for Business, Energy and Industrial Strategy](#).¹ Clearly, the challenge needs to be met on multiple levels, including education campaigns, use of technology, increased enforcement activity and, crucially, clearer laws which are simpler to enforce.

Our ultimate conclusion and view is that a fit-for-purpose statutory framework is needed to address the proliferation of IPTV boxes and the current framework falls short in many respects – there is no specific offence, the offences that exist are, in particular, (i) too narrow, given that they were conceived of in response to specific problems; and (ii), crucially, when it comes to their practical application, too complex for both non-IP judges and juries to understand. There is no existing offence which adequately covers the behaviours and value-chain/persons involved. This is understandable, the Copyright, Designs and Patents Act 1988 was conceived of and drafted in the mid-1980s and needs to be updated to reflect new technology and new trends. The other provisions currently relied upon by law enforcement (in the Proceeds of Crime Act 2002 and Serious Crime Act 2007) are general and go to aiding, abetting and encouraging offences, but they require an underlying offence.

We therefore support the calls made for some time and by different parties for the insertion of a new specific and future-proofed statutory offence into the CDPA, which is tailored to address illicit IPTV streaming devices.

In addition, in this context, an important aspect to consider is the question of funding of the organisations investigating and prosecuting these offences. Organisations such as PIPCU, Trading Standards and the Crown Prosecution Service must be given sufficient resources to investigate and prosecute more than just the handful of offences they currently can handle given their existing resources. Further, as ever when it comes to digital piracy, we

¹ The letter is available here: <http://www.chis.org.uk/2017/03/15/letter-to-secretary-of-state-for-business-energy-and-industrial-strategy-calling-for-action-against-the-growth-in-piracy-over-iptv>

would encourage the IPO to consider the role of intermediaries in facilitating this growing phenomenon at some stage in the near future.

At the outset, we note that there are considerable variations in the guises and functions of the IPTV boxes offered to customers. Indeed, we note that there are IPTV streaming devices which are entirely legitimate. In short, IPTV boxes are devices for the storage and playback of unauthorised content, loaded with a piece of open source software (for example, and very often, Kodi) and then additional software (so-called apps or add-ons) which enable users to stream high-quality television programmes, feature films, live sports and other content.

The boxes may be sold "fully loaded", that is, with all the software necessary to access such unauthorised content pre-installed. Alternatively, the boxes may be sold with some or none of the software installed. In that case, the user can – very easily and within a matter of clicks – download and install the software, choosing the desired product from a range of highly organised and user friendly "repositories" of software. Some "non-loaded" IPTV boxes are advertised as enabling access to unauthorised content and/or sold together with detailed instructions on how to install the relevant software and access unauthorised content. If necessary, the user can teach herself how to install such software (and indeed which software is suited best to her purposes) from a vast number of online video tutorials or articles.² Menus, "skins", or other features to ensure user friendliness and/or an appearance of legitimacy can easily be applied to the boxes. For example, skins can be applied to make it look like the content is delivered through or affiliated with the BBC iPlayer or Sky.

A particular feature of the prosecution of the actors involved in the making available of content via IPTV boxes is that there are, in many cases, several actors, each of whom makes a vital contribution. For example, one actor may import the boxes, another create the software (apps/add-ons), a third install the software and a fourth market and sell the boxes. Like in all cases of digital piracy, some of these actors are difficult to identify.

Against this background, we note that a judgment has not yet been handed down in Case C-527/15 *Filmspeler* which is pending before the Court of Justice of the European Union. Guidance as to the interpretation of Articles 2 (reproduction right) and 3 (communication to the public/making available right) of Directive 2001/29 in the specific context of illicit IPTV streaming devices will follow from that judgment. At this stage, we have only useful input from the Advocate General's Opinion. While the Court's guidance may ultimately turn out to be supportive both in the civil and criminal contexts, we query whether the complex and constantly evolving concept of communication to the public, even with the CJEU's guidance, will be suitable for application by juries.

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.

We refer to the ICM/Industry Trust for IP Awareness study,³ which found that 19% of adults in the UK have engaged in IPTV piracy.⁴ Clearly, where IPTV box piracy is becoming normalised and an acceptable means of accessing copyright content for such a large part of the population, this will have a very serious effect on the ability of broadcasters and content owners through lost subscription fees, advertising revenue, and sales of content on legitimate sites as well as of tickets at the box office.

² By way of illustration, as at 27 March 2017, a search for "kodi" on Amazon (amazon.co.uk) yields 2,619 results. In the predictive search function, the phrase "kodi fully loaded tv box" features first. A search for "kodi tutorial" on YouTube produces over a million results.

³ The study is indicative of emerging audience behaviour.

⁴ IPTV Piracy: A study on set-top box and stick infringement for the industry

Indeed, the IPO itself has noted in the IP Crime Report 2015/2016 that IPTV boxes is one of the main challenges the industry faces: the "[s]et top boxes and the proliferation of Internet Protocol TV (IPTV) offer viewers increasingly easy access to pirated digital content."⁵

Looking at some specific data on the impact on the industry from the ICM/Industry Trust for IP Awareness study, we note the following:

- 20% of IPTV box users have spent less on or cancelled subscription to legitimate services.
- 50% of IPTV box users have used the boxes to access unauthorised sports events which were only available through a subscription service.
- 45% of IPTV box users have used the boxes to access films which were only available in the cinema.
- 20% of IPTV box users have used the boxes to access unauthorised television content which was only available through a subscription service.

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:

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

Please indicate the legal basis used for these prosecutions.

In addition to the cases mentioned in the call for views, we are, anecdotally, aware of the successful prosecution of a Mr Malcom Mayes in connection with the supply of "fully-loaded" illicit streaming devices.⁶

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

We have sought counsel's advice on various aspects and across several jurisdictions, including the UK, on the matter of IPTV boxes. In terms of the UK criminal law framework, counsel advises us that it is difficult (and expensive) to bring a prosecution against most actors across the IPTV box ecosystem – in particular, there are problems in bringing cases against app/add-on developers and operators of repositories with apps and add-ons.

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.

We note the legal framework as set out by the IPO – the CDPA, the Fraud Act 2006 and the common law offence of conspiracy to defraud together with the inchoate offences in the Serious Crime Act 2007 and the Proceeds of Crime Act 2002. In addition, we note that the criminal offence of communication to the public set out in section 107(2A) of the CDPA could be applicable to certain persons involved in the sale, assembly, advertising and/or supply of IPTV boxes. While each case should be evaluated on its merits, there are a number of gaps in this legal framework, and we

⁵ IP Crime Report 2015/2016, page 13

⁶ See: <http://www.bbc.co.uk/news/uk-england-tees-39184505> [accessed 27 March 2017]

consider these below. Subsequently, we make some general remarks relating to amendments. As noted above, we are of the view that a new offence needs to be created.

1. The Legal Framework

As we indicate above, we are of the view that the existing legal framework is inadequate in addressing the threat presented by IPTV boxes.

CDPA

Communication to the public (section 107(2A)):

- It is an offence to infringe the copyright in a work by communicating that work to the public either in the course of a business or to such an extent as to affect prejudicially the copyright owner. The offence is only committed if the accused knew or had reason to believe that copyright in the work would thereby be infringed. The term "communication to the public" is to be interpreted in the same way as under section 20.
- We note that there is a proposal in the Digital Economy Bill to amend this section, to (i) remove the requirement that the communication be in the course of a business or to such an extent as to prejudicially affect the copyright owner and (ii) add a requirement that the offender intends to make a gain or knows or has reason to believe that the act will cause a loss or expose the owner to a risk of loss. Thus, while the *actus reus* component of the offence is broadened, the *mens rea* component is narrowed.
- Prosecution of those involved in IPTV box piracy under section 107(2A) may be difficult, on both versions of the text.
- A key, preliminary point is that the law on communication to the public is a complex area of law which is under continuous judicial development both by the domestic court and the CJEU. Given that legal academics and practising lawyers are divided over the interpretation of the notion of communication to the public, the concept of communication to the public may not necessarily lend itself well to being applied by a non-legally trained jury. The recent C-527/15 *Filmsteper* referral to the CJEU demonstrates the difficulty in applying the law to IPTV boxes specifically, but of course it is one of a long line of related cases that have been before the Court.
- Further, the requirement relating to undertaking the act in the course of business or to such an extent as to prejudicially affect the copyright owner may be difficult to meet in practice, especially when it comes to persons involved in the creation and supply of apps and add-ons (as supposed to the sale of the boxes).

Circumvention of technological measures (section 296ZB):

- This offence only applies where effective technological measures have been applied to copyright works and these measures are circumvented.
- The key issue in prosecuting this offence is that it is not applicable to content from sources to which no technological measures have been applied. This includes, crucially, websites from which unauthorised content is streamed. We note that such websites do not apply technological measures to the content they

make available, but, almost invariably, that content is originally obtained through circumvention of technological or conditional access measures.

Unauthorised decoders (section 297A):

- This offence only applies to decoders which are designed or adapted to enable encrypted transmissions, i.e. transmissions made available on a conditional access basis, to be decrypted. It applies only to transmissions originating from the UK or another EU Member State.
- Again, the key issue in prosecuting this offence is that it is not applicable to content from sources to which no conditional access means have been applied.
- In addition, the territorial element will preclude the application of the offence to certain transmissions (e.g. those from websites whose servers are located outside the EU).

Fraudulent reception of transmissions (section 297):

- This offence is limited in its application to: (i) the reception of television (or radio) programmes; (ii) from a place in the UK; and (iii) with the intent of avoiding payment of subscription/other fees applicable.
- The three points above are key limitations in the applicability of the offence to IPTV boxes, which may supply broadcasts (and other copyright content) for free and/or originating from outside the UK.

Fraud Act

Sections 6 and 7:

- These offences concern possession and supply of articles for use in fraud.
- They are typically limited by the need to evidence fraud, as (narrowly) defined in the Act, which may not necessarily be easily applicable to persons involved in the sale, advertising, assembly and/or supply of IPTV boxes.

Common Law Conspiracy to Defraud

This has to date been, perhaps, the most useful offence under which to charge criminal copyright infringement. It requires two or more persons to agree to embark on a course of action and will thus only be applicable where it can be shown that two or more persons have agreed to do so.

In addition, we note that both courts and guidance from the Attorney General indicate that where criminal conduct can be prosecuted under a statutory offence (rather than common law conspiracy to defraud), it should.

Inchoate Offences

The chief drawback of the inchoate offences in the Proceeds of Crime Act 2002 (money laundering) and the Serious Crime Act 2007 (encouraging or assisting) is that they can only be committed in connection with another, underlying

offence. Thus, if you cannot show another offence – as we have demonstrated may be difficult in some cases relating to IPTV boxes – these offences cannot be relied on.

2. Amendments

A specific offence or specific offences is/are needed to address all actors in the IPTV box ecosystem. Nevertheless, the technology evolves and the offences, while specific, should, we believe, be technology neutral and, to the extent possible, future proof.

The amendment should create a copyright offence addressing those who manufacture, maintain, assemble, distribute, import, possess in the course of a business, market or sell pre-loaded IPTV devices and those who market devices as a means to gain access to unauthorised content. Moreover, the offence needs to comprise software i.e., "installing or maintaining software for use in/with IPTV devices". This would help to address those who develop, make available and maintain infringing apps and add-ons.

Question 5: Is there any UK case law which you believe limits the applicability of the statutory offences listed above?

While there have been successful cases brought under this offence, there have also been cases which demonstrate the difficulty of prosecuting criminal copyright infringement. By way of example, we draw the IPO's attention to *R v Rock and Overton*, in which the Judge dismissed the charges against the operators of streaming website TV Links, stating that TV Links was "*in some ways similar to the Radio Times in that it told people where programmes or material was to be found but it did not itself 'make available' such material. That material was made available by others.*"

This statement runs counter to the law subsequently developed by judges of the High Court and the CJEU, such as *Twentieth Century Fox Film Corporation v Newzbin Ltd* [2010] EWHC 608 (Ch) and *GS Media v Sanoma* (Case C-160/15). It demonstrates the need for clear criminal offences, which both non-IP judges and juries can understand and apply.

Question 6: 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.

The first issue that should be noted is that the vast scale of the problem means that even where fairly straightforward evidence gathering is possible in one case, it becomes very expensive to do so in a sufficient number of cases to ensure a real impact.

However, we note two specific issues:

- UK law enforcement has difficulties with quickly processing forensic analysis on seized hardware (e.g. computer servers etc.). More forensic capacity would be very helpful in this space.
- The identification of persons operating repositories of apps and add-ons and those developing apps and add-ons, which rarely are identifiable by their real names, is often time-consuming.



Question 7: Please provide examples of where this issue has been raised with law enforcement agencies or government officials/ministers in other countries.

21st Century Fox has raised its serious concern about the proliferation of IPTV streaming devices in all markets in which we are both active commercially and engage with government officials given the serious impact these devices are having across our businesses. In particular, we have had extensive discussions with the U.S Government (IP Enforcement Coordinator, USPTO, State Department, Customs, etc.); the European Commission, Hong Kong, Singapore and India. In those discussions we flag that this growing phenomenon is one of our top priorities given its significant detrimental impact across all of our businesses -- content production, distribution, as well as our pay TV channel business. We also cite the risks that these challenges pose to our consumers/customers.

Question 8: 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.***

We note that the websites used by the add-ons as content sources frequently have servers located outside of the UK (indeed outside of the EU) to avoid the reach of law enforcement. The same goes for websites through which the IPTV boxes may be retailed. Even where law enforcement is able to target these websites and temporarily disrupt their services, they can easily move and "site hop"; by, for example, simply shifting the address suffix from, for example, .com to .biz.

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.

We are not aware of specific offences or enforcement powers to address IPTV boxes that have been introduced in other countries.

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?

We provide no comment on this matter.

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?

We agree that guidance will be beneficial once the law has been amended.

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

This is an important question and, as stated at the outset, we believe IPTV box piracy must be addressed through a multi-pronged approach. Some suggestions are:



- Education – we are concerned that IPTV box piracy is becoming normalised and to that end are supportive of education campaigns.
- Enforcement – PIPCU, the CPS and Trading Standards need sufficient resources to investigate and prosecute.
- Civil Legal Action – pursuing certain actors in the civil courts may be more straightforward and/or effective than doing so through the criminal route.

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

We refer to our introduction.