



AUDIOVISUAL ANTI-PIRACY ALLIANCE SUBMISSION ON THE UK IPO'S CALL FOR VIEWS ON ILLICIT STREAMING DEVICES

The Audiovisual Anti-Piracy Alliance¹ (AAPA) represents companies involved in the provision of protected audiovisual services, including rights owners, security technology for such services, and the manufacturing of products which facilitate the delivery of such services. AAPA's mission is to enable the fight against piracy where the piracy involves the development, promotion, distribution, application or use of technologies to circumvent content protection, resulting in the unauthorised use of protected audiovisual content. To achieve its mission, AAPA co-ordinates intelligence and enforcement action amongst its members. Effective enforcement action requires appropriate and effective legislation, implemented consistently and efficiently across the EU in the first instance, supported by global co-ordination.

AAPA is an active participant in the EU Observatory on IP Infringements and is a member of Europol's Intellectual Property Crime Coordinated Coalition (IPC3) Stakeholders Advisory Board.

AAPA welcomes the leadership which the UK Intellectual Property Office (IPO) has shown in addressing the issue of illicit streaming devices (ISDs). The IPO's support and commitment, including at Ministerial level, demonstrates to other countries and institutions worldwide that illegal streaming is a serious problem.

Although AAPA itself has no direct experience of taking legal action against ISDs in the UK or elsewhere a number of its members do. They will be responding individually to the IPO's call for views: hence, AAPA's submission is confined to broader observations.

¹ www.aapa.eu (EU Transparency Register ID 131611211983)

ADEQUACY AND EFFICACY OF THE LAW

As the IPO is aware the problem of illegal streaming and associated devices has emerged only in the last few years. Accordingly, the extent to which laws have been tested is limited. Nonetheless, some observations can be made.

First, as the call for evidence states *“there are a wide range of provisions which may be applicable to the sale, advertising, supply or use of set-top boxes for illicit streaming”*. These provisions, of course, come with different degrees of complexity and carry different sanctions. There is, thus, a requirement to find the most effective and least complex legislation for enforcement action, with no single provision standing out as the way to proceed.

AAPA members use both civil and criminal law to pursue legal action against audiovisual pirates. There is, however, a growing tendency to prefer criminal law (including money laundering, fraud, conspiracy, proceeds of crime, etc., as well as computer fraud and misuse) for a number of reasons. These include the fact that these laws are often more comprehensible for, and familiar to, judges; the investigative techniques available can be more appropriate for audiovisual piracy; and the penalties are often more onerous.

Secondly, some of the legal provisions do not embrace adequately the full scale of the problem. As the IPO knows the definition of what is an illicit device is not straightforward. To receive services via the internet the end user typically uses a reception device comprised of hardware and software. Pirates separate hardware and software deliberately to circumvent anti-piracy legislation by rendering the definition on an illicit device difficult to enforce at the points of manufacture, sale, marketing, distribution, etc. At any of these points the device may be capable of being considered as legitimate, although its final intended use is not. To complicate the issue further, the hardware might be made in one territory (typically China), shipped in an ‘innocent’ state, configured by a retailer or end-user in another territory, and used to obtain unauthorised access to

audiovisual content in a third country. Unauthorised access to content often occurs from within a territory where the broadcaster has no licence to broadcast (further complicating the enforcement process for an affected party). The software required to configure the illicit device is accessed over the internet and can be hosted in territories unconnected with the unlawful activity. Not only does this distribution structure make it difficult to take legal action, where legal intervention is possible it becomes necessary to explain the complicated web and technical arrangements to courts who may not have the necessary experience to make a judgment on the matter.

Typically, ISDs fall into three categories:

- “Fully loaded” (‘Configured’) and operational ISDs: devices which are capable of gaining unauthorised access to broadcast content without any additional user intervention or configuration, i.e., ‘plug-and-play’ straight from the box;
- “Unloaded ISDs” [(‘Partially configured’): Devices that are capable of being configured by end-users / unscrupulous re-sellers to gain unauthorised access to broadcast content. These devices are often marketed towards an innocent use, but contain partial configuration that can be exploited to upgrade the device capabilities; and
- Dual-function” or hybrid boxes which are jointly capable of gaining unauthorised access to broadcast content via either card sharing or streaming and they further demonstrate an awareness on the part of pirates that hacking via cardsharing is transitioning into illicit streaming as localised infrastructure improves.

The general experience of AAPA members is that only the first category – “fully loaded ISDs” – is susceptible to legal and other enforcement action, despite the marketing and other materials which make clear that the other categories of boxes are also used and intended to be used for gaining illegal access to content.

AAPA members estimate that fully loaded ISDs constitute less than 20% of ISDs intended for illegal use. Thus, only a small part of the supply of such devices can be tackled through legal mechanisms. It is likely that the ‘tip of this iceberg’ will only grow as pirates become even more sophisticated in circumventing the law. AAPA suggests that consideration should be given to the definition on an ISD so that the majority of suppliers, etc., are not capable of avoiding legal action.

INTERNATIONAL ISSUES

As stated above, the supply of ISDs and illegally streamed content is an international activity. A more harmonised and collaborative cross-border approach to this form of piracy is essential if effective enforcement action is to be taken. As the IPO knows, the internet has no borders (unless access to, or use of, the internet is blocked by an administration). It is easy for pirates to act in an unidentifiable and virtually unstoppable manner. Moreover, pirates are often not based in the country where the IPR infringement takes place, using servers – or a web of proxy servers – located in another country or countries. Where a pirate business is interrupted (whether by legal action or some disruption measure) the criminal activity can be moved to another country with relative ease. This creates a mismatch with the legal approaches to enforcement which, despite harmonisation in the civil law IP enforcement area within the EU, are applied differently in different Member States². The situation is exacerbated in the criminal law area where harmonisation has not been possible for political reasons. Extending legal action beyond the boundary of the EU is even more problematic.

Thus, a situation exists which may discourage – or make impossible - legal action. Various obstacles include:

- The need to have a local complainant in many cases;
- Slow and bureaucratic procedures, including where the Mutual Legal Assistance Treaty and European Arrest warrant are invoked;

² It remains to be seen whether cross-border challenges become more or less difficult after Brexit.

- Challenges in providing information and referring cases to international police organisations such as Europol and INTERPOL;
- Conflicting interests in which country should take the lead on a case where multiple jurisdictions are involved; and
- The expense of supporting legal action outside a complainant's own territory which may be tantamount to writing a "blank cheque".

NON-LEGISLATIVE APPROACHES

Regardless of whether civil or criminal law, or a dual approach, is used it is important to emphasise that any legal action is slow and costly and is very unlikely to yield results in a reasonable period of time. Audiovisual piracy cases lasting for over 4 years are not uncommon in the UK and elsewhere. Thus, both the punitive effect and the value of any signal which may be sent to other pirates following a successful case are delayed and diminished. In the absence of fast and effective legal procedures AAPA members use disruption measures (within the confines of what is legally permissible) to limit the damage caused by audiovisual piracy.

Such measures include working with intermediaries such as hosting providers, e-commerce platforms, payment providers, advertisers, etc. While AAPA and its members have made some headway in these areas much more needs to be done. AAPA considers that collaboration between a wider set of industry stakeholders may result in enhanced co-operation with intermediaries. This would be supported further by public sector backing for any non-legislative initiative (which may be in the form of a MOU, Code of Practice, guidelines, changes in terms of trade, etc.). AAPA would be pleased to discuss with the IPO how the IPO's leadership in recognising and addressing the problems caused by ISDs and illegal streaming could be used to extend existing and new non-legislative approaches to other countries.

There are other non-legislative measures which would help in the war on illegal streaming. These include:

- training of enforcement officers, prosecutors; etc. In this context AAPA has sponsored audiovisual piracy e-training modules on the International Intellectual Property Crime Investigators College (IIPCIC) platform³. These modules can be accessed free of charge by law enforcement agents. It would be helpful if the IPO could make all involved law enforcement officers aware of these courses. AAPA has also organised training at the EUIPO, in conjunction with Europol and Eurojust, and at Europol. It would be pleased to support the IPO in other training initiatives; and
- education and public awareness. This should be aimed not only at consumers but also retailers, the media, etc. Ill-informed comment by the press is particularly unhelpful⁴. AAPA would be pleased to discuss with the IPO and the Industry Trust how a Europe-wide programme could be devised. (This could possibly involve the EUIPO.)

SUMMARY

AAPA welcomes the IPO's continuing interest in the subject of ISDs and illegal streaming. Responses from individual AAPA members will provide views on the very appropriate and detailed questions posed in the Call for Views.

A number of recommendations flow from AAPA's general observations which highlight areas where the legal process could be improved, regardless of whether the IPO concludes that there should be changes in legislation. These include:

- Addressing obstacles to cross-border enforcement. For example, the possibility of giving Europol additional powers to investigate, as well as co-ordinate, cross-border activity should be examined;

³ <https://college.iipic.org/#/login> . A demo of the AAPA courses can be found at <http://iipic.org/curriculumEN.php>

⁴ See, for example, <http://www.dailyecho.co.uk/news/15165923>. [Five reasons you should install Kodi right now](http://www.dailyecho.co.uk/news/15165923) /?ref=mr&l p=4

- Reviewing and giving guidance on what constitutes an illicit device in the context of the separation of hardware and software;
- Mechanisms for sharing data should be improved. The direct submission of data by the private sector to public sector agencies, including Europol and INTERPOL, should be considered;
- Encouragement should be given to the judiciary and relevant administrations to process cases, including applications for injunctions, faster. This applies in all areas but is particularly important where the illegal streaming of live events is involved. A live football match, for example, may be over long before an injunction can be granted;
- The use of criminal law, particularly involving computer crime, requires a level of knowledge and expertise which is not widely available to law enforcement. More resources should be devoted to training law enforcement officers, prosecutors and judges;
- The possibility to take action both on a cross-border basis and in another territory for which rights are not held should be improved; and
- A range of non-legislative measures outlined above would support the fight against ISDs and illegal streaming.

AAPA would be pleased to discuss its observations with the IPO.

AAPA

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