

# ALLIANCE

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FOR INTELLECTUAL PROPERTY

August 2020

## Alliance for Intellectual Property response to Digital Markets Taskforce: Call for Information

### Introduction

The Alliance for Intellectual Property is a unique association of 20 organisations representing IP rich businesses and creators – sectors that continue to grow and outperform the wider economy. Our members include representatives of the audio visual, music, toy and games, business software, sports rights, branded manufactured goods, publishing, retailing, image, art and design sectors. They share a collective interest in ensuring that Intellectual Property (IP) rights are valued in the UK and around the world and that legislative regimes exist that enable the value and contribution of those rights to be fully realised.

We are pleased to respond to the Call for Information from the Digital Markets Taskforce. As an Alliance, we have not taken a position as to the test of whether certain firms have Strategic Market Status. We believe, however, that digital service providers share a responsibility and duty to help reduce Intellectual Property theft that takes place either on their services, or is facilitated by their services, and when these services have Strategic Market Status, this responsibility is greater still. Our response is therefore focused on the remedies that should be applied to both firms with Strategic Market Status, and the broader digital services markets and the procedure for applying those remedies.

It is also important to note that the Government has explicitly excluded IP infringement from the measures to be included in Online Harms legislation. In the Online Harms White Paper, published on 12 February, the Government stated that:

*'The following harms will be excluded from scope: All harms to organisations, such as companies, as opposed to harms suffered by individuals. This excludes harms relating to most aspects of competition law, most cases of intellectual property violation, and the organisational response to many cases of fraudulent activity.'*<sup>1</sup>

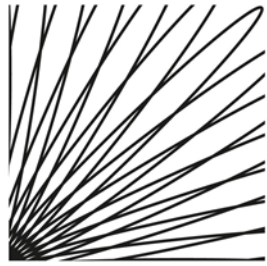
We therefore see the work of the Digital Taskforce as an important contribution to the development of more effective regulatory measures to help tackle IP infringement.

### Scale of counterfeiting and piracy

Counterfeiting and piracy is a significant drain on the UK economy. Figures from the annual IP Crime Report estimates that the loss to the UK economy through counterfeit and piracy is £9.3bn per year

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<sup>1</sup> <https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper-S2.4> (we note however that online IP infringement should remain indirectly in scope to the extent that it is mixed with personal harms, such as those having to do with malware/viruses, consumer health and safety, protection of minors, etc.).



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and 60,000 job losses.<sup>2</sup> There are also significant links of serious and organised crime to counterfeiting and piracy.

As Giles York, QPM, Chief Constable of Sussex police and the national police lead for IP Crime, wrote in the Annual IP Crime Group Report in September 2019:

*'The publication of this year's annual IP Crime and Enforcement Report provides ample evidence of the corrosive effect organised crime has on businesses and communities; specifically in connection with the trade in counterfeit and illicit trade goods. Intellectual Property Crime is a feature of organised crime and highly profitable, accounting for almost 4% of UK imports (£9.3 billion in value) and more importantly accounts for £4 billion in lost tax revenue and 60,000 UK jobs.'*

## **The opportunity for the growth of IP rich industries**

In 2018, the Government published its Creative Industries Sector Deal which aims to double Britain's share of the global creative immersive content market by 2025. By this time, the value of this market is expected to reach £30 billion. The Sector Deal commits to a joint investment from government and industry of £150 million to help the country's world-leading cultural and creative businesses thrive. Within this raft of initiatives are measures to improve IP protection, including the formation of three roundtables to discuss the challenges presented by: social media and user upload sites; online marketplaces; and digital advertising with internet intermediaries. These voluntary measures, though welcome, have been extremely slow in coming to agreements and have no statutory underpinning. Any codes of conduct agreed through the roundtable process, given they are voluntary, must not preclude or impact either the assignment of Strategic Market Status or the creation of individual codes of conducts for specific firms that might flow from the consultation.

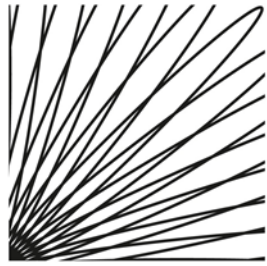
We therefore believe that the eventual outcome of the Digital Taskforce's work will be vital in ensuring firms, including but not limited to those with Strategic Market Status, take responsibility for their part in reducing IP infringement. Tackling IP infringement is all the more crucial for IP rich industries, and those that work in them, which have been significantly impacted by the COVID-19 pandemic and are now facing unprecedented challenges.

## **The problem**

Tackling counterfeiting and piracy is crucial to delivering on the UK's ambitions to grow our IP rich industries. There are a whole range of initiatives that are being deployed to achieve this aim including education campaigns, directing consumers to legitimate sites, growing the number of legal services that are available, civil action to block access to illicit services, and law enforcement activity to disrupt the criminals who run the illicit services.

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<sup>2</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/842351/IP-Crime-Report-2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/842351/IP-Crime-Report-2019.pdf)



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## **Remedies and Code of Conduct - *Response to questions 5-8***

The Call for Information from the Digital Markets Taskforce mentions the objectives for a code of conduct suggested by the market study, those being fair trading, open choices, and trust and transparency.

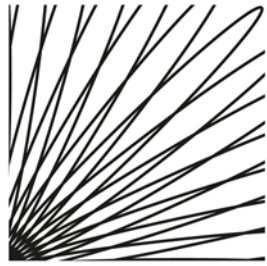
We believe that reducing IP infringement has a direct correlation with two of those objectives: fair trading and trust and transparency, with a particular focus on trust and transparency. We agree that high level objectives with supporting guidance on how they should be applied would be a reasonable approach.

One of the major challenges faced by IP owners in tackling infringement is the availability of information on those who are making available IP infringing services on digital platforms, both counterfeit goods and pirated content. Many IP owners also struggle to control the sale of goods which infringe territorial copyright.

The current self-disclosure regime for operators of online services contained within the E-Commerce Directive for digital services (Article 5) is ill defined and has no enforcement regime. This makes it very easy for illicit business operators to provide counterfeits and pirated content to the public – they can simply ignore the requirement to self-disclose their identity, and indeed they routinely do so with complete impunity. Fixing this gap in the law would fulfil the original intent of the self-disclosure scheme by ensuring that consumers and other businesses know who they are dealing with when they interact with online services. It would also bring much broader benefits for building trust in digital markets and ensure fair competition for legitimate businesses, since knowledge of operator identity is essential to fighting a wide range of harms, such as scam websites and websites offering other types of illegal services having nothing to do with IP.

It is important that all providers of critical business infrastructure, including but not limited to digital platforms with Strategic Market Status, take greater responsibility to ‘Know their Business Customers’, and have a duty to have verification protocols in place to ensure such business customers are engaged in legitimate business activities, and where they are found to be engaged in illicit activity such as IP infringement, there is a clear process in place to prevent that activity. Such a process could at last provide for meaningful consequences – in the form of loss of access to business-critical UK infrastructure (hosting, payments, etc.) – whenever illicit businesses choose to ignore the self-disclosure regime of the E-Commerce Directive.

We would urge, that, given the Taskforce is committed to looking at *Interventions to address competition problems which may also relate to platforms that do not have SMS*, a greater responsibility to Know Your Business Customer should be applied more widely, ensuring fair competition by reducing the sense of impunity that currently attaches to businesses that traffick in IP infringement and other harmful services and thus helping to protect the consumer, innovators and legitimate businesses.



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## **Designing Procedure and Structure Questions 10-12**

As we have found through the voluntary roundtables aimed at finding measures to deal with IP infringement, interventions and changes have been slow to emerge. We would therefore welcome any new regulatory procedures that have speed, flexibility, clarity and legal certainty. As new digital services emerge, so do new IP infringement challenges and being able to react quickly is vital, but we also recognise that clarity and legal certainty is important to ensure digital services know clearly what responsibilities they have.

### **Summary**

We welcome the work of the Digital Taskforce and would urge inclusion of IP infringement within its scope. There is no other regulatory process to deal with IP infringement currently being considered, and therefore we believe tackling IP infringement should form part of the Taskforce's work as it clearly falls within the objectives that have been set out. We believe that introducing greater clarity over 'Know Your Business Customers' regulation could fall within any Code of Conduct, and defining an enforcement regime would not only help to reduce IP infringement but also bring broader benefits for building trust and confidence for all those using digital services.

**For further information please contact:**

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<https://www.allianceforip.co.uk/>