Piracy and illegal file-sharing: UK and US legal and commercial responses

This article examines the piracy problems that have occurred in the online music, film, television, video-games and e-publishing industries, and the key legal, commercial and educational solutions that rights-holders in the UK and US have used to tackle these.

Reference: www.practicallaw.com/1-502-7956

A three-pronged approach

Piracy and illegal file-sharing in the online music, film, television, video-games and book publishing industries have become increasingly ubiquitous problems since the internet began. Online piracy has resulted in large losses in revenue - some estimate as much as US$6.1 billion worldwide for film piracy in 2005 alone (see *Motion Picture Association of America, Worldwide study of losses to the film industry and international economies due to piracy*) - and the law and legal remedies have often been unable to keep up with the technological advances that enable it to continue. Copyright owners continue to search for ways to stem the flow of piracy, as well as to dissuade consumers from engaging in piracy in the first place.

While there are no easy solutions, the most effective way to tackle online piracy is to adopt a three-pronged approach across the following key areas:

- Using legal remedies.
- Creating lawful commercial alternatives.
- Increasing education and awareness.

This article examines these key areas in the music, film, TV, video-games and e-publishing industries in both the UK and the US.

Developments in music piracy

The music industry has typically borne the brunt of online piracy, because the smaller file sizes of songs make them easy to download and share. According to the British Phonographic Industry (BPI), which represents the interests of the UK music industry, online copyright infringement cost the music industry over £200 million in lost revenue in 2009, and the cumulative total losses between 2001 and 2012 are estimated to be £1.2 billion (see *BPI, File-sharing FAQs*).

For a number of years, peer-to-peer (p2p) networks were the main source of file-sharing and piracy. John Enser, a partner at *Olswang* in London, notes that "we are beginning to see a move away from p2p networks to things like locker services, such as RapidShare and Zshares websites". These websites, also known as cyber-lockers, enable large files of music and other media to be

stored, and users can send and use links to retrieve the content. Cyber-lockers make it more difficult for copyright owners to track down where the infringing files are held.

Other developments include pirate websites moving to offshore locations like China, Ukraine or Russia to escape prosecution from Western and European laws. This phenomenon, known as 'bulletproof hosting' has become a rising trend in recent years, particularly since the successful Swedish prosecution of file-sharing website The Pirate Bay in 2009 (see *The Guardian, Internet pirates find 'bulletproof' havens for illegal file sharing, 5 January 2010* and *see box, The Pirate Bay case*).

The movement of pirate websites to foreign jurisdictions cannot easily be tackled through litigation in those countries, so often a more nuanced response is required (*see box, International piracy solutions*).

According to Barry Slotnick, partner at *Loeb & Loeb* in New York, "we are now seeing a more sophisticated means of infringement taking place, with better-funded file-sharing entities than five years ago. Back then, they were hobbyists and kids who thought this was a cool thing to do. Now you have adults who see infringement as a business model". Karen Thorland, partner at the Los Angeles office of *Loeb & Loeb*, agrees and says that "the challenge copyright owners are facing right now is that there is an increasing prevalence of pirate sites of various kinds. New ways to share content are springing up every day".

Legal remedies for music piracy in the UK

Individual litigation

Suing individuals for copyright infringement under the Copyright, Designs and Patents Act 1988 (CDPA) was one of the first legal solutions used by the UK music industry to combat piracy and illegal file-sharing. In recent years, the BPI brought around 150 cases against individual infringers. Simon Baggs, a partner at *Wiggin LLP* in London, comments that "it was a question of pursuing individual file-sharers and seeking undertakings that they would not infringe again, as well as seeking damages". According to Baggs, while this measure has worked to some extent in raising the profile of the problem, it is impractical for the record industry to pursue in the long term, given the number of people engaged in online infringement in this way: "The costs in pursuing every infringer through legal action would be vast. Such actions are expensive and the litigation option is perhaps a blunt tool to use in respect of every infringement."

Volume litigation

As an alternative, according to Ben Allgrove, a partner at *Baker & McKenzie* in London, the UK market saw the advent of what is known as 'volume litigation'. Volume litigation involves copyright owners banding together, and going onto the file-sharing networks to discover the Internet Protocol (IP) addresses that are infringing copyright. The copyright holders will then seek a court order requiring the internet service providers (ISPs) to provide them with the personal details of those infringing customers. The copyright owners will then typically contact those customers (which can number in the thousands) through lawyers, who warn them that they face potential court action unless they pay a large settlement sum. Fines typically range from £500 to £700.

Allgrove says that this method of volume litigation is based on only a percentage of people who are targeted paying the fine, which means "the programme then often becomes self-funding".

"The ultimate aim of volume litigation is typically to get publicity, (to act as a deterrant), and some revenue from settlement sums in a cost-effective manner," adds Allgrove.

However, like individual litigation, this method has proved controversial with the media and public. Particularly since the inception of the Digital Economy Act 2010 (*see below, Digital Economy Act*), there have been fears that innocent households will be targeted and exploited for sums of money they cannot afford. It has also been argued that volume litigation has not actually reduced levels of infringement to any noticeable degree.

The data protection issues surrounding the gathering of information on individual users are also unclear under the Data Protection Act 1998 (DPA). The DPA states that personal data about a subject cannot be processed without a person's consent, unless it falls into one of the exemptions. It is unclear whether one of these exemptions might apply to the rights-holders and ISPs in this case (see *PLC IPIT & Communications Practice note, Overview of UK data protection regime*).

Targeting the pirate sites

An alternative to suing individuals is to target the owners of the pirate sites that enable and encourage infringement to occur.

As Enser says, "Rights-holders want to go after the industrial-strength users the people who are facilitating piracy. The challenge is that very few of the websites that facilitate piracy are based in the UK". As a result, litigation needs to be brought locally. There have been some examples of successful litigation within the EU, such as in Sweden against The Pirate Bay, and against Switzerland-based RapidShare in Germany (although RapidShare later successfully appealed) (see *PLC Article, Legal responses to file-sharing in Europe, 21 October 2009* and *TorrentFreak, Court orders RapidShare to proactively filter content, 24 June 2009*). However, with websites based outside the EU, it can be difficult to litigate because of lax copyright enforcement in some jurisdictions. Some possible legal solutions arise in the Digital Economy Act and through other international responses (*see below, Digital Economy Act* and *see box, International piracy solutions*).

Digital Economy Act

In June 2009, in response to music industry concerns about the growing problem of piracy and illegal file-sharing, the then Labour government's Department for Business Innovation and Skills (BIS) and the Department for Culture Media and Sport (DCMS) produced a Digital Britain report, which set out the ways in which online copyright infringement could be reduced (see *PLC Legal update, Final Digital Britain report published, 16 June 2009*).

In autumn 2009, the government introduced the Digital Economy Bill, which implemented a number of proposals set out in the Digital Britain report (see *PLC Legal update, Government publishes Digital Economy Bill, 20 November 2009*). The House of Commons passed the Digital Economy Act (Act) in April 2010 (see *PLC Legal update, House of Commons passes copyright provisions of Digital Economy Bill with amendments, 7 April 2010* and *Office of Public Sector Information, Digital Economy Act 2010*). While the Act moves the law closer in line with technological developments and provides additional solutions to online copyright infringement, it has had its critics.

Notification and technical sanctions

Under section 3 of the Act, once a copyright holder has gathered evidence of infringement, it can contact the ISP hosting the IP address of the infringer. The ISP must then:

- Notify users that they have been infringing copyright.
- Retain information on the number of times the users have infringed and been subject to these notifications.
- Provide copyright owners with lists of those who have been accused of infringing at least three times in one year.

The Secretary of State, after considering a formal assessment of the situation by Ofcom, the UK broadcasting and media regulator, can order the ISPs to impose technical sanctions on the users who have been repeatedly warned about infringement, but who do not stop. Such sanctions include slowing down a user's internet connection or cutting it off completely. Before going ahead, the order from the Secretary of State must be scrutinised and approved through a 60-day consultation period with both Houses of Parliament.

A number of other European countries have also debated introducing three-step notification provisions, similar in substance to what is contained in the Act (*see box, Three-strikes legislation around the world*).

Baggs thinks that the notification provisions will have a big effect "because the procedure will finally get ISPs communicating with their customers on this issue". He notes that a survey of online music consumers undertaken by *Wiggin LLP* in 2008, in conjunction with Entertainment Media Research, showed that the majority of respondents said they would stop file-sharing if they received a letter from their ISP telling them they were infringing. The 2009 survey's results found that the number of people who said they would stop infringing after a letter from their ISP fell to 33%, and suggested that further sanctions would be needed in addition to letter-sending alone (see *Wiggin and Entertainment Media Research, 2009 Digital entertainment survey final report*).

However, some fear that the monitoring and notification system could be inaccurate and result in innocent consumers being accused of infringement (see *The Guardian, 12 April 2010, Digital Economy Act likely to increase households targeted for piracy*).

Some commentators are also concerned that the ultimate sanction of slowing down or cutting off access to the internet is a very draconian measure, particularly in a society that increasingly views access to the internet as a right, rather than a privilege.

Website blocking

Section 17 of the Act enables the Secretary of State to make regulations allowing the courts to grant a website-blocking injunction for a website which has been, is being, or is likely to be used for or in connection with, infringing copyright. This can only be granted if the infringement is having a serious adverse effect on business or consumers, and if blocking the website is a proportionate means of dealing with the problem.

Enser notes that Section 17 could be used to block access to websites that have moved abroad in order to escape prosecution in the English courts (*see box, International solutions to piracy*). This would be a particularly useful remedy for copyright owners.

However, many ISPs are unhappy about section 17. The Internet Service Providers Association (ISPA), the trade body which represents UK ISPs, argued that there had not been enough consultation on this provision, and that it would "prevent new innovative lawful models of

distributing content online" (see *ISPA Press release, Third reading of Digital Economy Bill ISPA statement, 8 April 2010*). There have also been criticisms from ISPs and digital consumer groups that the provision is too wide and could lead to legitimate websites such as Google and Wikileaks being blocked (see *The Guardian, Internet provider defies digital bill, 8 April 2010*).

On the other hand, Baggs is concerned that section 17 was diluted at the last minute because of concerns that the provision had not been subject to enough debate. The dilution he refers to is the further process of consultation and new regulations that are required before an injunction can be granted under this provision. "The Act has not been "future-proofed". This may hinder attempts to deal with developments in piracy in years to come, but rights-owners may also look to existing legislation under the CDPA as a means of ensuring that future developments are tackled without needing further legislation," he comments.

Ofcom's draft code of practice

Under the Act, Ofcom must draft a code of practice (code) to deal with the initial obligations of the ISPs in notifying users of copyright infringement. In late May 2010, Ofcom published a draft code of practice on the process of notification, which is open for consultation until 30 July 2010 (see *Ofcom, Draft code of practice to reduce online copyright infringement, 28 May 2010*). The draft code deals with how and when ISPs are expected to notify users who have been accused of copyright infringement. Initially the code will only apply to ISPs with over 400,000 customers, so this will include the UK's biggest ISPs such as BT, Virgin, Sky, Orange, O2 and the Post Office.

The code sets out what information and evidence copyright holders must gather and give to the ISPs (in a copyright infringement report (CIR)) before the ISPs can get in touch with the infringing user. The code also provides details of the three-step notification process: after the ISP has sent three letters to the infringing user, the user's details will be added to a list of serial copyright infringers. The list remains anonymous until the copyright holder applies for a court order to get the details of those on the infringement list, in order to take legal action against them. The code also sets out an appeals procedure for users accused of copyright infringement.

Ofcom will also be consulting with stakeholders on how to enforce the code, how to deal with disputes, and how to share the costs between ISPs and copyright holders. The aim is for the code to be implemented by early January 2011.

Further reactions to the Act

ISPs have voiced their concern that the Act and code are too bureaucratic, costly and burdensome to fulfil. One UK ISP, TalkTalk, also pointed out that there is no consideration of data protection issues within the code (see *The Guardian, Digital Economy Act: ISPs told to start collecting filesharers' data next year, 28 May 2010*).

There are also concerns that the cost of the monitoring, notification and appeals process will be passed onto consumers. The government set up a consultation on the costs-sharing issues under the Act (see *PLC Legal update, Government consults on costs-sharing under Digital Economy Bill online copyright infringement notification obligations*). The Open Rights Group, a digital consumer rights group, is particularly concerned that consumers will end up paying significantly more towards the monitoring and notification system, as well as having to pay a fee to appeal against incorrect notifications (see *Open Rights Group, Response to the consultation on cost sharing)*.

Some technical issues have still not been addressed under the Act, and could be used as loopholes by infringers. For example, infringers who frequently change their ISP could prove difficult to pursue.

Others are concerned about the length of time that will pass before the Act and code are fully implemented, and before ISPs are ordered to use technical measures against their users for persistent file-sharing, as this could add an element of uncertainty to the effectiveness of the Act. The time delay may enable infringers to seek out alternative methods of getting content for free, or to use new technology such as anonymisers, which would make it difficult for their IP addresses to be identified.

Another element of ambiguity is the fact that the new UK coalition government's potential plans for the Act are still unclear, so there could still be changes made in the future. It remains to be seen whether the Act will be the powerful measure that copyright owners had been hoping for.

Legal remedies for music piracy in the US

Individual and volume litigation

As in the UK, the US music industry's original means of tackling piracy was to litigate against infringing individuals.

However, according to John Delaney, a partner from *Morrison & Foerster* in New York, like in the UK, litigation in the US has moved away from focusing on individuals to focusing on those who facilitate piracy. Volume litigation has also decreased in favour of focusing on facilitators. For example, in late December 2008 the Recording Industry Association of America (RIAA) announced, after a long and negatively received litigation campaign against individuals, that it would stop the practice of volume litigation (see *Wall Street Journal, Music industry to abandon mass suits, 19 December 2008*).

Website litigation

According to Slotnick, "the methods of dealing with piracy and illegal file-sharing have become more sophisticated". There are companies that provide services to copyright owners to track any online infringements of their copyright. The companies provide statistical models and evidence, "so that when the inevitable happens, which seems to be a lawsuit, the copyright owners are armed with better and more sophisticated information to explain to a court why it is a copyright infringement that is taking place," says Slotnick.

However, while litigation is the most popular avenue for copyright holders to enforce their right, the success of cases brought has been mixed.

LimeWire. Building on the successful 2005 lawsuit against the p2p site Grokster (see *US Copyright Office, MGM Studios v Grokster, 27 June 2005*), in May 2010 the RIAA won a copyright infringement case brought against LimeWire, a p2p network where users could swap content (see *Wired, LimeWire crushed in RIAA infringement lawsuit, 12 May 2010*). LimeWire was found to have induced, encouraged and assisted this copyright infringement. Thorland comments that although this was a big victory for the US music industry, LimeWire was a traditional p2p site, whereas a lot of the new cyber-locker sites which allow users to store or upload content might be more difficult to litigate against, as it can be harder to locate where the infringing files originate from.

Veoh. Veoh, an online video service, was sued by the Universal Music Group (UMG) for copyright infringement of music and video content that had been uploaded onto its site. In a controversial decision, the federal court ruled that Veoh was protected by the 'safe harbor' provision in section 512(c) of the Digital Millennium Copyright Act 1998 (DMCA) (see *Wired, Online video-sharing sites score copyright victory, 6 January 2010*).

The 'safe harbor' protection states that a website will not be liable for copyright infringement if all of the following apply:

- The material is placed on it by another person or user.
- The website does not know that the material on its site is infringing material.
- The website takes steps to stop the infringement as soon as it becomes aware of it (see *US Copyright Office, Digital Millennium Copyright Act, section 512(c), Title 17 of the United States Code*).

UMG is currently appealing to the 9th US Circuit Court of Appeals.

Delaney notes that the scope of the safe harbor provisions, as applied to emerging internet technologies and business models, remains unclear, as such provisions were drafted over a decade ago, when the internet was still in its infancy. Thorland agrees, and states that the Veoh case was "a pretty big loss for the music industry. Courts are setting a very difficult standard, where copyright owners have to prove that they waved a red flag that should have put those sites on notice of infringement". She states that the 'safe harbor' provisions can make cases "pretty tough; not unwinnable, but very difficult to win".

Google. Google, the search engine, was recently sued by Blues Destiny Records for contributory copyright infringement because it allegedly benefitted from its users' queries into infringing material. Although the record label eventually withdrew its lawsuit, it stated that it may re-file at another time. Google therefore sought to clarify with the US District Court in Northern California that it qualified under the DMCA safe harbor protections, because it had removed access to any infringing links when it was notified about them. However, in June 2010, after the record label agreed that it would not pursue a claim against the search engine, Google withdrew its claim (see *The Hollywood Reporter, Google withdraws lawsuit against record label, 16 June 2010*).

YouTube. The online video service, YouTube, has been the subject of many copyright lawsuits. The most recent and high-profile case against it was brought by Viacom in 2007, where Viacom accused it of infringing the copyright of its programmes. In June 2010, Viacom's case was dismissed by a US District Court judge (*see below, Developments in television piracy: The television industry's response* and *FT.com, Viacom loses $1bn copyright case to YouTube, 24 June 2010*).

Alliance-building with ISPs

As in the UK and Europe, the US music industry has tried to build alliances with ISPs to get them more involved in the process of notifying customers who are infringing copyright. Thorland comments that the music industry has been encouraging ISPs to send graduated notifications to infringing users, with the final sanction being termination of their internet account. She notes that research in the US has shown that users will often stop infringing once they have been notified that the ISP and copyright owner are aware of the infringement.

However, Slotnick thinks that the European-style "three-strikes" concept looks unlikely to be codified at present in the US (*see box, Three-strikes legislation around the world*). Laurie Self, a partner from *Covington & Burling's* Washington DC office, thinks that a more likely scenario is a more consensus-based voluntary approach between the music industry and ISPs to terminate accounts of repeat infringers.

Lawful commercial alternatives to music piracy

Given the limited success of legal means, the most effective and lucrative method of tackling piracy is to develop lawful alternatives for consumers to access content online. Enser notes that in the UK "these lawful alternatives have come a long way even in the past year or two. Now there is much more legitimate content online". In the US too, Delaney thinks that "the professional online music distribution industry has never been stronger", with a wide array of options for the consumer to choose from. "Publishers and copyright holders have put a lot of energy into making it easier and more convenient for consumers to obtain legal digital copies of music and other entertainment content," says Delaney. He thinks that publishers can compete with free pirated music by providing a better service and a better product. Consumers who obtain pirated material often find that the material is poor quality, has pop-up adverts built into it, or can even infect their computer with a virus. Delaney points out that obtaining a pristine version of the song for a small sum of money is something a lot of consumers would prefer.

Commercial sites where people can buy music online include Apple's iTunes and Amazon, among many other music-downloading services. Other sites allow consumers to stream music and listen to it rather than buy it, such as Spotify and mflow in the UK, and Pandora and Rhapsody in the US. These sites are generally supported by advertising revenue or subscription models.

Negotiating rights and licences. In order to provide music to users, music-streaming sites must negotiate rights clearance and licence fees. This includes the Performing Rights Society (PRS) in the UK, and various collecting societies in Europe. One of the difficulties faced by streaming sites is the length of time this negotiation can take. The lack of a unified system is burdensome and costly for Spotify and other start-up companies, which affects the viability of their business model. US music-streaming site Pandora stopped operating in the UK and Europe for this reason (see *BBC News, Pandora to cut off UK listeners, 9 January 2008*). As a result of these difficulties, there have been calls to unify the system for obtaining copyright licences across Europe (see *Out-law.com, EU must break down national copyright barriers, says Commissioner, 6 May 2010*).

The Society for Computers and Law published a policy paper on solutions to the current problems of online piracy in music, and suggests that access providers should be able to pay licence fees to content owners so that users can ultimately listen to music for free. However, it also notes that the system of rights ownership, which is spread across a number of parties, including composers, lyricists, publishers and record companies, makes it increasingly difficult for ISPs and websites to be able to negotiate licences. The policy paper therefore concludes that the only identifiable solution is "a compulsory licensing system, similar to statutory schemes which were established to allow recordings to be made during the early development of the phonograph". However, it also notes that presently neither the ISPs nor the music industry are willing to engage in the idea of a compulsory licensing system. (See *Society for Computers and Law, Digital music and online intermediaries, 27 May 2010.*)

A viable revenue model? The advertising-based model that Spotify uses to enable users to get music for free has reportedly not generated enough viable revenue for the site and artists. In fact, the British Academy of Songwriters, Composers and Authors (Basca) maintains that Spotify gives very small payments to songwriters, as well as not disclosing the deals it has made with record labels and publishers (see *The Guardian, Spotify slammed by songwriters, 13 April 2010*).

As a result, Spotify has consciously moved towards a subscription-based model, where users pay a monthly fee to listen to music without adverts. This would ultimately allow it to compete with major players such as iTunes (see *FT.com, Spotify hopes to challenge iTunes, 27 April 2010*). It has also launched a successful application (or "app") for smart phones such as the Apple iPhone and Android handsets.

However, in spite of the problems, one rival music-streaming website in the UK is continuing with the advertising-revenue model. Music-streaming website We7, whose revenue is based on an advertising model, has reported that it has managed to cover its costs, as well as the costs of royalties (see *The Guardian, We7 shows ad-funded model can work for online music, 28 April 2010*).

YouTube, which also operates on an advertising revenue model, has been working to legitimise and monetise the content that might have been illegally uploaded by obtaining licence agreements with copyright owners for songs that are uploaded onto it.

Another business model is being tried by the US-based company Beyond Oblivion (see *FT.com, Making paying for downloads painless, 28 April 2010*). It proposes that it would collect the payment for copyright licences directly from computer and device manufacturers and ISPs, who would then integrate the licence fee within the price of their products. The end user would not have to pay any more to listen to music beyond the price they initially paid for their computer or mp3 player. Beyond Oblivion would then use the licence fee revenues to pay out royalties to artists and record companies, depending on how often their tracks are played. The company is in talks with a number of parties from the music industry, but still has some way to go before its idea can come to fruition. The company has attracted investor interest from investment banks, as well as News Corp in the US.

Using social networking. More sites are trying to build connections with social-networking sites such as Facebook and Twitter. Music-streaming site mflow, integrates its service with social-networking, by enabling its users to send (or 'flow') songs to their friends, who can listen to them and buy them. If any of the songs sent are purchased by their friends, the user will get a credit with which to buy more songs. It remains to be seen whether this new model of monetising shared content within a social-networking setting will generate enough revenue to be successful (see *The Guardian, Click to download: mflow, Twitter's hipper little brother, 1 April 2010*).

Differentiating the product. Problematically, despite the growth of legitimate ways to access music online, many commentators in the music industry think that these sites may not have actually made any difference to the amount of illegal downloading and online piracy that occurs, nor to the amount of lost revenue (see *BBC News, What is the future of online music?, 20 October 2009* and *Warner retreats from free music streaming, 10 February 2010*).

Delaney notes that the music industry appears to be increasingly focused on differentiating its product to attract more customers. One of the methods copyright owners and publishers are using to differentiate their product is to include extra material with any purchased song or music

video. This could include extra footage of the artist, different versions of the song or enhanced content featuring the artist. This acts as an added incentive for fans to purchase music through official channels. "The pirates simply cannot provide access to the artist, the personalities and the glamour, whereas the record company can," says Delaney. As a result, many record companies appear to be focusing on leveraging the artist.

Delaney says that "ultimately, even pirate sites want to make money, and realise that it is difficult to attract advertisers if they are not legitimate". Pirate sites may also have difficulties in forming relationships with merchant banks, credit card companies and other payment system providers. Furthermore, pirate sites that seek to charge money for content have to compete with pirate sites that offer the same content for free.

Instead, some lawyers feel that the bigger piracy problem now tends to come from college students who do not want to gain any commercial advantage in sharing music; or from internet pirates located in foreign jurisdictions.

Education and awareness of music piracy

One of the other methods used to tackle piracy and file-sharing has been through education and increasing public awareness of the problem. Baggs comments that "education on copyright, while not the quickest or most direct method of combating piracy in music, is an equally important battle. You have to get people to understand what copyright is and why it is important not to infringe it". He notes that the UK music industry has done a lot to this end, with initiatives such as the Music Matters campaign (see *Music Matters website*). Enser notes that the BPI, UK Music and other bodies have tried to supply teaching materials to schools, to be used in citizenship and media studies classes.

Allgrove agrees that education is, and will continue to be, a crucial component in tackling piracy: "We now have a whole generation who take copying as the norm, and changing that behaviour is very difficult, so new business models and education are key".

Florian Koempel, counsel to UK music industry body, UK Music, notes that one of the body's activities is "to ensure that people understand the value of music, and that the people who invest in music, such as publishers and record companies, need to have enough money to invest in the development of new artists".

Lisa Peets, partner at *Covington & Burling* in London, agrees and says that education from a young age is crucial in addressing "the fundamental lack of understanding regarding the link between intellectual property and creativity, culture and innovation". She also sees education as a good way to deter youngsters from starting to illegally download in the first place.

Enser also comments that one of the key anti-piracy educational measures in recent years has been the involvement and support of media and entertainment unions such as the Broadcasting Entertainment Cinematograph and Theatre Union (BECTU). This union involvement underlined the fact that piracy was affecting "real jobs, with real people behind them, and was not just about big content owners not making money".

However, some lawyers and commentators think education has its limits. Mark Owen, a partner from UK firm *Harbottle & Lewis*, points out that "education has been tried, but when and where do you fit this into an already packed curriculum? It is probably a pretty low priority for educators". Enser comments that some campaigns in recent times were less successful than

hoped, but the industry recognises it is a long-term strategy. He notes that "people use the analogy of drink driving - there has been a change in attitude towards this over the years, and like that, people have to be educated and persuaded that piracy is wrong".

In the US, Slotnick agrees that education has been a significant component of the anti-piracy arsenal for many years. He thinks that, with the onset of piracy over 30 years ago, "education was always the key way to explain to governments, law enforcement officials and the public that the taking of music is not victimless, and that the new artists and musicians are the ones who suffer with lack of funding from the industry".

Developments in film piracy

While film piracy has grown significantly in recent years, the film industry has benefited from seeing and reacting to the innovations that have occurred in music piracy first. Baggs comments that "so far, the film industry has not had to trail blaze in the way the music industry did in pursuing consumers in litigation. Because of the large size of the files involved, films are more difficult to download. The film industry has therefore had a bit more time to anticipate the problem". He acknowledges, however, that despite the differences in file size and the relatively slow take-up of online film piracy, the film industry still faces very similar problems to the music industry.

As with music piracy, websites offering p2p file-sharing and cyber-locker facilities are used as the main method of sharing large film files. Sites such as The Pirate Bay are often used to access all media, including music, film and TV. Many of the legal and commercial responses from the film industry have been very similar to those of the music industry.

Legal remedies for film piracy

The legal remedies available to the film industry are the same as those used by the music industry.

UK

There have been some significant cases relating to online film piracy in recent years. For example, in the UK, a number of distributors and film-makers, including Twentieth Century Film Corporation, brought a successful copyright infringement case in the High Court against a website, Newzbin (*Twentieth Century Film Corporation and others v Newzbin Limited [2010] EWHC 608 (Ch), 29 March 2010*). Newzbin operated as an indexing network that users could use as a database to store large files containing copies of films. The case was significant as it was the first to establish, under section 16 of the Copyright, Designs and Patents Act 1988, that a website could commit copyright infringement on the internet by authorising, enabling and encouraging its users to copy and infringe films (see *PLC Article, Digital pirates: nowhere to run, nowhere to hide?, 28 April 2010*). This decision, along with the existing legislation under the CDPA, "could make it easier for copyright holders to block websites that allow the infringement of copyright to take place," according to Baggs.

US

According to Thorland, "In the past, as in the music industry, the film industry has resorted to suing individual infringers, particularly those known as 'early propagators', who are the first people to post films that are still on theatrical release, or which have not even made it to theatrical release". She notes that studios will often begin a civil process, where they identify the individual

who is infringing, and then, if the infringement is heinous enough, they will involve the law enforcement authorities. At this stage, the civil case is usually dismissed, and a criminal case can begin.

An example of this occurred in 2009, when the Twentieth Century Fox film 'Wolverine' was leaked onto the internet a month before it was released in the cinema. Media reports stated that US Department of Justice (DOJ) and the Federal Bureau for Investigation (FBI) were involved in investigating the case and shutting down the website that leaked the film (see *The Guardian, Upcoming X-Men movie leaked online ahead of release, 2 April 2009*). However, Thorland acknowledges that, as with the music industry, the film industry cannot sue everyone, and only the most extreme cases can move beyond the civil to the criminal courts.

Instead, US studios are targeting specific websites that are considered particularly serious copyright offenders. For example, in May 2010, a number of Hollywood film studios managed to obtain an injunction from a German court to stop the notorious website The Pirate Bay from operating its site and sharing infringing films (see *The Guardian, Pirate Bay sunk by Hollywood injunction- for now, 17 May 2010*). Since a Swedish court jailed the co-founders of the website in 2009, the site was moved to a number of different locations to avoid being shut down.

There have been US media reports that volume litigation has also been picking up again in the film industry, even after the RIAA abandoned its volume litigation attempts for the music industry (see *Wall Street Journal, Music industry to abandon mass suits, 19 December 2008*). The tactic of suing and fining a high number of individuals for alleged copyright infringement, and attempting to get the ISPs to provide information about these individuals, has attracted criticism from rights groups and consumer organisations. ISP Time Warner Cable is attempting to block a number of subpoenas from an organisation called the US Copyright Group asking for the names and addresses of individuals accused of infringing copyright by watching illegally downloaded films (see *Law.com, Lumped together? Groups say firm 'stacked the deck' in download suit, 7 June 2010*).

International

In other countries, such as Australia, there have also been some attempts by rights-holders and film studios to sue ISPs for their failure to stop illegal file-sharing of films, with varying success (*see box, Australia's iiNet case*).

In Spain, there have been complaints from Hollywood studios that internet film piracy is so widespread that instead of litigation they might simply stop releasing DVD versions of films after they have finished their run at the cinema. As a result, the Spanish government has called for new internet laws to close down sites that sell pirated films and music (see *The Guardian, Spain finds that film piracy is a hard habit to break, 31 March 2010*).

Commercial solutions

As in the music industry, highlighting the high quality experience of watching the official version of a film is an important tool for the industry when combating piracy. Baggs comments that it is difficult for pirates to replicate the occasion and atmosphere of going to the cinema. However, he also acknowledges that shortening the time between the cinema and home release has been successful in dealing with some piracy (as some people prefer to watch films at home). In spite of

this, he also thinks that shortening the release window must not undermine the cachet and point of seeing a film at the cinema, so there is a fine balance for the film industry to strike.

Slotnick agrees that film studios in the US will have to get used to the time between cinema and DVD release being shortened, and that they will need to adjust to the new commercial reality of how audiences want to watch films.

In fact, Thorland says that studios are already looking into releasing their films on the internet either simultaneously with, or before, a DVD release so that viewers can watch it on their internet-connected televisions while it is still being screened in cinemas. She notes that "the industry had concerns about doing this because it could potentially invite more piracy, so they have gone to the Federal Communications Commission (FCC) for permission to use selectable output control (SOC), so that viewers would not be able to record the film". In May 2010, the FCC granted the studios permission to use the SOC technology, which enables high definition (HD) films to be broadcast but also content-protected, on a limited basis. Thorland thinks "this could clear the way for the industry to give users the flexibility that they want".

Other notable commercial solutions put forward in both the UK and US include official film-streaming and downloading websites such as Hulu and Blinkbox, and studios' own sites, where users can pay to download or stream films. Slotnick thinks that "technology creates opportunities to do things in ways that the industry had not thought of before and in ways that perhaps video and recording companies were once uncomfortable with, but now can do". He notes that allowing films to be sold over the internet "will involve a breaking-in period: every new technology comes with a thought that the old means of delivering copyright material will be destroyed. But it does not destroy it; it simply opens up a door to something else".

In fact, a number of these sites are offering free trials and opportunities to access films at reduced costs. In June 2010, a UK online film site, Blinkbox, offered a £20 credit for one week only, as part of a campaign to get users to try legal digital streaming. The 'Full Stream Ahead' campaign ran from 7 to 13 June 2010 (see *Full Stream Ahead website*).

Education and awareness

As with the music industry initiatives to educate its audience, the film industry has also begun to mobilise educational programmes, emphasising the importance of the genuine cinema experience and the negative impact which piracy has on those who work in the industry. An organisation in the UK, the Industry Trust for IP Awareness, has developed a number of adverts and campaigns to increase awareness of piracy and its effects (*see The Industry Trust website*). Adverts shown on DVDs and before films in the cinema have moved from an emphasis on the criminal aspects of piracy to the more positive aspects of how buying a cinema ticket is supporting the industry (see *The Guardian, Campaign against film piracy tells moviegoers how precious they are, 2 April 2009*).

Enser notes that the European arm of the Motion Picture Association of America (MPAA) has been involved in educational campaigns, and a charity called Film Education produces teaching packs that are sent to schools for use in media studies and citizenship classes. As with music, he thinks the film industry needs to target young people to change the deeply entrenched attitude that illegally downloading films is harmless. The president of the UK's Film Distributors' Association (FDA) has also commented on the importance of educating young children about

the value of intellectual property and copyright (see *The Guardian, Film piracy: Lord Puttnam targets tween curriculum, 11 March 2010*).

In the US, there have also been educational campaigns run by the MPAA, with adverts in cinemas, the printed media and elsewhere, emphasising the fact that pirated copies of films are not as enjoyable as official versions (see *Motion Picture Association of America website, Public awareness campaigns*). Thorland thinks that that the emphasis on the poor experience piracy gives to consumers is important. Particularly with the advent of 3D and HD films, the experience of watching a high quality movie at a cinema or on an HDTV cannot be replicated by pirates on the internet.

Developments in televison piracy

Television is subject to many of the same piracy problems as music and film. Pirated television programmes have become readily accessible online, and their availability has increased with faster broadband and download speeds.

However, because of its very specific medium and the development of its technology, television has arguably been better able to circumvent, or compete with, many of the piracy issues that music and film have faced.

Initially, the biggest problem faced by the television industry concerned illegally streamed live sports events, whose exclusive rights had been bought by cable and satellite channels. According to Baggs, this continues to be a major issue for the industry.

The television industry's response

Legal solutions

In both the UK and US, the legal remedies available to television rights-holders are the same as those available to the music and film industry.

Litigation. Some recent examples of litigation have raised the public profile of the problem of television piracy. For example, in the US in 2007, the TV series '24' was leaked on YouTube. Twentieth Century Fox immediately filed a subpoena against YouTube to find out the details of the individual responsible for leaking the content. Following this, US law enforcement were able to prosecute the person responsible (see *Newsfactor.com, Fox goes after YouTube for '24' leak, 26 January 2007*).

Thorland states that although TV studios do have this avenue open to them, many have instead been focusing on strategically pursuing websites who encourage or facilitate piracy, and seeking co-operation from the ISPs in limiting piracy by notifications to users or otherwise. For example, in 2007 Viacom began a high-profile US$1 billion lawsuit against YouTube for copyright infringement of its programmes. Court documents were released in March 2010 revealing that Viacom had uploaded much of its own content, which it had then demanded YouTube take down. There were also revelations that the founders of YouTube had been aware of copyright infringement taking place, with one of them even putting up infringing material onto the site (see *FT.com, YouTube 'knew of copyright violations', 18 March 2010*). In June 2010, a US District Court judge found that YouTube had not infringed Viacom's copyright because it had removed the clips when it had been informed about them, and was therefore protected by the 'safe harbor' regulations (see *FT.com, Viacom loses $1bn copyright case to YouTube, 24 June 2010*). Viacom is likely to appeal the decision.

However, as with music and film, the main legal avenues of litigation against individuals and websites are often used only for the most severe cases of piracy - often when programmes have been leaked before they have been aired on television.

The illegal streaming of live sports events continues to form a large part of television piracy. In the US, Delaney says that stopping this sort of piracy can be difficult, but that the pirated experience, perhaps coming from a handheld camera, would inevitably be a poor substitute for the real thing. The other method of pirating a live event involves intercepting the broadcast airwave on which the event is being transmitted. This is difficult to achieve because most sports are broadcast on encrypted channels, but it does still occur.

Peets says that a lot of illegal live sport streams are intercepted from China. She notes that "it is a real challenge to investigate and prosecute them. Investigation requires constant monitoring, because obviously with a live broadcast, the real value of the broadcast is real time". Rights-holders therefore need to act very quickly to take it down the content once it begins streaming. Working with a local office in China can help where the technology providers are based in that market.

Digital Economy Act. In the UK, the television industry can also make use of the Digital Economy Act, which will enable it to monitor frequent infringers and get ISPs to notify them of their infringement. The Act could also enable television rights-holders to obtain injunctions against websites that are particularly serious copyright infringers (*see above, Digital Economy Act*).

Commercial solutions

Television has been reasonably quick to capitalise on the changing ways in which viewers want to watch programmes. However, "one of the biggest challenges facing the television industry is not necessarily piracy alone, but the proliferation of time-shifting and place-shifting devices," according to Delaney.

Time-shifting enables viewers to watch programmes when they want to, rather than when the channel has scheduled it. In the US, the television and film industry challenged the move away from traditional viewing methods 25 years ago, with a landmark Supreme Court case regarding video cassette recorders (VCRs). In that case, the Supreme Court permitted the VCR, one of the first time-shifting devices, to be sold to US consumers, against the objections of copyright owners (see *Cornell University Law School Legal Information Institute, Sony Corporation of America v Universal City Studios Inc, 464 US 417 (1984)*). Technology has since moved on to offer both time-shifting and place-shifting, with new devices such as Slingbox that allow programmes to be viewed at different times and in different locations.

Many copyright owners have successfully used video-on-demand services to compete with websites showing pirated copies of their programmes. In the US in 2009, Time Warner and Comcast announced a concept called 'TV Everywhere', which consisted of its television programmes being made available on the internet (see *Time Warner newsroom, Time Warner Inc announces widespread distribution of cable TV content online, 24 June 2009*). The beta version of TV Everywhere was initially rolled out in December 2009 to current Comcast subscribers. It received a mixed response, and a new version was rolled out in May 2010 with an easier process to log in and access the service (see *NewTeeVee, Comcast to revamp its TV Everywhere service, 11 May 2010*).

Some US sites such as Hulu, which allow a number of programmes from different channels to be viewed for free, supported by advertising revenue, have been successful. Thorland points out that Hulu has been particularly good at drawing viewers away from watching short fragments of programmes illegally posted on YouTube. However, there have been reports that Hulu, while successfully gaining viewers, has not been as successful with its revenues. Also, some companies, such as Viacom (which owns the channel Comedy Central), have taken their programmes off the site and onto their own official sites (see *Advertising Age, Hulu's a towering success- just not financially, 29 March 2010*).

In the UK, video-on-demand services such as BBC iPlayer have increased the flexibility and choices for viewers. New sites such as *SeeSaw* offer a range of programmes from different UK and US broadcasters to watch for free or to rent. In addition, some broadcasters are beginning to realise the commercial and technological potential of broadcasting over the internet and are using p2p networks to disseminate their programmes. The EU has also invested in the development of a p2p network called *P2P-Next*, a project aimed at redeveloping and boosting TV broadcasting on the internet.

However, Enser notes that there is a limit to how effective video-on-demand can be. He cites the BBC programme, Top Gear, as one of the most illegally downloaded shows on the internet, thanks to its demographic and popularity in the US, and because it is only available on the iPlayer for seven days. He comments that "legitimate services can only get you so far because often you cannot make programmes available at all times for rights reasons".

According to some lawyers, the biggest challenge to the industry now is how to control where and when content is being accessed, particularly for content which may not be authorised for viewing in certain jurisdictions (such as US programmes that may have exclusive broadcast deals with specific channels in Europe). Some note that place- and time-shifting devices have become powerful and could potentially cut into the revenue streams of content providers. Commentators think that the question of whether unauthorised time- and place-shifting is copyright infringement or fair use is unclear under US law. However, many do think that litigation will be inevitable with these place- and time-shifting devices, to establish what effect and harm they do to the original copyrighted work.

Delaney thinks that content owners are certainly becoming more interested in getting their content viewed online and on new platforms, such as the Apple iPhone and iPad. He says, "It is a brave new world, where the big issue is how we will be consuming TV programming five years from now." An example of this in the UK could include free-to-view internet-connected TV, which the industry is hoping will be the next technological step up from the current Freeview set-top boxes. The BBC, ITV and Channel 4, as well as a number of other channels, have been discussing and negotiating this possibility, and have called the venture Project Canvas (see *Digital Spy, Project Canvas: TV's next evolution?, 2 July 2010*). This scheme would enable viewers to connect internet-enabled set-top boxes to their televisions, to allow them to watch content from the internet directly on their TVs. The plan has attracted criticism from satellite and cable broadcasters, however, and in May 2010, the Office of Fair Trading ruled that it did not need to be investigated for UK competition law breaches (see *FT.com, Watchdog gives go-ahead to free internet-TV joint venture, 20 May 2010*). Since this announcement, one of the UK's terrestrial broadcasters, Channel Five, dropped out of the project, but there have also been indications that the UK mobile phone and broadband operator, Orange, would be interested in being involved (see *The Guardian, Orange in talks to join Project Canvas, 14 July 2010*).

Developments in video-game piracy

The video-games industry has suffered, like all the other creative industries, at the hands of piracy and file-sharing. According to Paul Cairns, partner from *Harbottle & Lewis* in the UK, in 2009, one of the most popular video-games was 'Call of Duty: Modern Warfare 2'. He comments that this was one of the most commercially successful launches in history, not just in terms of video-games but in the broader entertainment field. However, this game was also reported to be subject to 4 million illegal PC downloads. He notes that the piracy was not confined to PC users, but was also widespread among console users as well. For example, in 2009, Nintendo suffered from piracy as a result of widespread use of the R4 card for its Dual Screen handheld console. The R4 card was able to hold numerous games on it, many of which were pirated and, until recently, were freely available for purchase on eBay and Amazon. In July 2010, the High Court of England and Wales decided that the advertising, importation and sale of the R4 card was illegal because it needed to bypass Nintendo's security system in order to work (see *PLC Legal update, High Court upholds Nintendo claim in "modchips" case, 28 July 2010*).

Modified consoles are a big source of piracy in the gaming industry. These consoles, such as the Microsoft Xbox 360, can have a chip, called a 'modchip', physically attached to them, which enables players to play pirated or unauthorised games from other countries and regions. Microsoft has responded to the prolific use of modchips in its Xbox console by stopping illegally modified consoles from being able to join its online interface (*see below, Commercial solutions*).

In the US, Thorland notes that, unlike with music and film, she is unaware of an organised campaign by games companies to tackle piracy, but she expects that this will happen soon. In the UK, various video-games trade bodies such as the Entertainment and Leisure Software Publishers Association (ELSPA) and TIGA represent the interests of the games industry to government and business. ELSPA has led a sustained anti-piracy campaign since 1994, and provides information to its members on what needs to be done to tackle piracy at all levels (see *ELSPA, Intellectual Property Crime Unit*).

The gaming industry's response

Legal solutions

As with the music, film and television industries, the gaming industry is able to use litigation against individuals and websites that encourage and commit video-game piracy. However, litigation can be costly and takes time to undertake. Further, targeting individual gamers, many of whom are also legitimate customers, is also an unattractive proposition for the gaming industry.

In spite of these drawbacks, there have been some important cases for the gaming industry in the UK, where individuals have been found to have infringed copyright by selling modchips that enabled pirated games to be played. One case in 2009 (*R v Christopher Gilham [2009] EWCA, Crim 2293, 9 November 2009*), also established that playing games enabled by a modchip involved a substantial breach of copyright (see *PLC Legal update, Court of Appeal upholds modchips conviction and considers substantial part copyright test, 9 November 2009*).

In the UK, the Digital Economy Act will affect illegally copied and pirated software and games in much the same way as music, film and television programmes. The Act will ensure that there is greater co-operation between ISPs and copyright holders, and that ISPs will provide details of infringing gamers and websites to the games publishers and copyright holders. However, there are doubts about how exactly the Act will be implemented, and details are unlikely to be available

for several months. Cairns notes that "this is a fast-moving industry and, by next year, things may well have moved on in terms of technology". Instead, Cairns thinks that one effective solution to piracy is to make more content available online, and for the industry to move more of its sales online.

Commercial solutions

The video-games industry has an advantage over other content industries when it comes to fighting piracy, because many video-games require an online interface. "This means that console companies can ensure that gamers who want to play online with others need to have unmodified and legal versions of games and consoles," says Baggs. For example, Microsoft's Xbox 360 provides an online interface, where gamers can play against other gamers from around the world. Baggs comments that "an important aspect of gaming is that there is an ongoing relationship, unlike in film or music where you buy the content and then you can watch it how you want; with gaming you continue to have an interaction with the gaming provider". This ongoing relationship and online community therefore provides "a real opportunity for gaming and a really powerful answer to piracy", according to Baggs. Without a legitimate copy of a game, many users simply cannot get involved in the full experience of playing it.

Creating an online interface and online community emphasises the superior quality of authentic products over their pirated versions. "It is very difficult, if not impossible, for pirates to replicate these advantages," says Delaney. Cairns agrees, and thinks the best option for the industry is to create something extra "that gamers are willing to pay for."

In addition, Cairns notes that the gaming industry is increasingly turning to technological methods to stop pirated consoles and games from being used, rather than outright litigation. Microsoft has started using a method that detects and blocks gamers from accessing the Xbox online services if they have modified their Xboxes with modchips. The company carries out an annual check on its machines, and stops those that have been tampered with from accessing the network. Although this does not stop the console from working, it does hinder users from taking advantage of the interactive element that is important to a lot of gamers (see *The Guardian, Microsoft cutting off up to 1m gamers with modified Xbox 360 consoles, 11 November 2009*).

Developments in e-publishing piracy

Despite some claims to the contrary, book publishing continues to be a lucrative and flourishing industry. With new devices such as the Apple iPad, Amazon Kindle and Sony e-Reader, readers now have a range of new and interesting methods to read books, and no longer need to rely on the physical form of a book. Sites such as Scribd are growing in popularity, and are used by a number of newspapers and publishers, such as Random House, as an online depository for their electronic content. Readers can then buy and upload content onto their e-readers. Apple and Amazon are also selling digital books that can be read on various devices, including the iPhone and iPad. Thorland comments that "an increase in the number of sites offering books to read on e-book readers could potentially lead to an increase in pirated copies of these books."

According to Baggs, "as long as there is a free access point to content that you would otherwise have to pay for, a lot of people are willing to go down that road. Publishing will suffer similar piracy problems to the other industries; it is not yet as pronounced, but it is coming".

Allgrove comments that sharing e-books, because they are text-based files and "not very complex," will be easy for readers to do. He thinks that the online publishing industry will

face a bigger cultural challenge than the music industry, because readers expect to be able to give their books to their friends once they have finished with them: "Books are often one-off consumption items for consumers, it is not like buying a CD and then keeping it to listen to many times". He therefore considers it important that the industry explains that "when you are providing a digital book, as a matter of law, it is a service, not a good, and is not the same as buying a book from a book shop. The reader is getting a licence to read it. This is going to create cultural and behavioural challenges for the market".

However, Allgrove and Baggs note that the actual level of piracy in e-publishing may not turn out to be as high as it is for the music, film and TV industries. This is because the demographic of readers tends to be older than the demographic who consume online music, film, television and video-games. "This demographic may be less inclined to engage in piracy," says Baggs. Further, an older audience may be less likely to seek out pirated content because they would rather obtain content in the easiest way possible, which should invariably be to buy the legal versions.

In addition, Allgrove thinks that although people might be happy to share their books, they may not tend not to amass a large library of books, in the way they might with music and films. However, he acknowledges that this can vary from person to person. Nevertheless, he says, "it will be interesting to see if the piracy problem is as bad as it is for other industries".

The publishers' response

Potential litigation

There have been a few instances of pirates scanning and uploading pages of books onto the internet, although this appears to be a niche and rather laborious method of pirating books (see *The Millions, Confessions of a book pirate, 25 January 2010*). Because these instances are rare and the digitisation of books has not yet become widespread, there have not yet been any major instances of copyright litigation.

However, rights-holders claim that sites such as Sribd contain a lot of content that infringes copyright, and it has already attracted a lawsuit from a US author for copyright infringement (*Elaine Scott v Scribd Inc, Case 4:09-cv-03039*) (see *The Guardian, Book sharing site Sribd rejects claims of copyright infringement, 21 September 2009*). Although legal actions have not yet been widespread, Slotnick thinks that it will be a matter of time before publishers and authors begin to pursue this option. This could particularly be the case when e-readers become more popular, although it is not year clear whether piracy will become widespread for digital books (see *The Guardian, Who's afraid of digital book piracy? 18 February 2010*).

Commercial solutions

The publishing industry has reaped the benefits of being one of the last industries to be digitised and to go online. As a result, publishers will be keen to capitalise on the range of new commercial and technological opportunities that are presenting themselves. Thorland comments that, in the US, publishers are deciding "how to copy-protect their files when they do distribute them legitimately".

Potential solutions include digital rights management (DRM), which would allow the file to be read only on the device on which it was originally downloaded. However, DRM proved very unpopular in the past with music and video-game consumers, and led to iTunes and Amazon selling DRM-free music tracks which could be played on any device and music player after they were purchased.

Allgrove does not think UK publishers will go down the DRM path; "The model seems to be moving towards content on any platform, driven by what the consumer wants". However, he also notes that enabling content to be viewed on all media does not always lead to the best consumer experience. "The attraction, from a consumer point of view, is when content is optimised for your particular device - however, regulators and consumer groups are indicating that we should be able to use content on all devices", he explains.

Already, publishers and authors are considering the ways in which their books can be made available online. In the US, there have been disputes between authors such as Kurt Vonnegurt and William Styron's estate, and their publishing houses, regarding who owns the rights to publish the digital copies of their novels (see *Los Angeles Times, Random House settles e-books lawsuits, 5 December 2002* and *New York Times, Random House cedes some digital rights to Styron clan, 25 April 2010*). So far it appears that, generally, authors have been successful in those cases. However, some commentators anticipate a wave of book publishing companies suddenly not having the rights to books that they want to license for use on the iPad or Kindle (see *New York Times, Legal battles over e-book rights to older books, 12 December 2009*).

Boxes

The Pirate Bay case

In April 2009, a Stockholm court found the four co-founders of the file-sharing website, The Pirate Bay, guilty of the criminal offence of contributory copyright infringement. They faced jail and were also given a US$3.6 million fine for a concurrent civil case, which was brought by the International Federation of the Phonographic Industry (IFPI), which represented the interests of media, film and TV companies, including Sony BMG, MGM, 20th Century Fox, Warner, EMI and Universal (see *PLC Article, Legal responses to file-sharing in Europe, 21 October 2009*).

After this case, the site continued to operate. However, after a group of Hollywood film studios successfully applied for an injunction against the site in May 2010, it stopped operating for a short time. The site then went back up shortly afterwards, and continues to operate, through a different server hosted by the Swedish pro-p2p political party Piratpartiet (see *TorrentFreak, The Pirate Party becomes The Pirate Bay's new host, 18 May 2010*).

Three-strikes legislation around the world

A number of European countries are considering introducing legislation to cut off infringers' internet connections after they have received two or more warnings from copyright holders and ISPs. The so-called "three-strikes" system has attracted controversy, however, and the European Parliament has ruled that it is unconstitutional to suspend internet services without a fair trial. Civil rights organisations have also claimed that it is too draconian (see *TechSpot, French "three-strikes" law ruled unconstitutional, 10 June 2009*).

France adopted the *Law for the Protection under Criminal Law of Artistic and Literary Works on the Internet*, or the '*Hadopi 2*' law in 2009 (see *France24, Parliament adopts internet anti-piracy law, 24 November 2009*). This law states that online infringers will receive two warnings before they are tried in court, and a judge will decide what the next step will be. This could include cutting off the infringer's internet connection or issuing a fine. The law came into effect in early 2010, and its effects on internet piracy are yet to be seen (see *BBC News, New internet piracy law comes into effect in France, 1 January 2010*).

The Republic of Ireland's biggest ISP, Eircom, has also adopted a system whereby infringers who are warned three times about illegal file-sharing will have their service taken down for a week. If they continue to infringe for a fourth time, their internet service will be cut off for a year (see *BBC News, Big Irish crackdown on net piracy, 25 May 2010*). The new system, which is initially being trialled only by Eircom, has provoked controversy and some debate over data protection issues. However, the Irish High Court found that data protection would not be breached in such a situation, as IP addresses of consumers are not considered personal data (see *Irish Courts Service Judgments, EMI Records and others v Eircom Ltd, [2010] IEHC 108, 16 April 2010*). The Irish music industry's representative body, the Irish Recorded Music Association (IRMA), has begun legal proceedings against two other large ISPs in Ireland, O2 and 3, to get them to implement the system (see *The Irish Times, O2 and 3 face lawsuit over illegal file-sharing, 28 May 2010*).

In 2009, following the high-profile court case against file-sharing site The Pirate Bay, Sweden passed a law banning internet piracy. The law, which is based on the European Intellectual Property Rights Enforcement Directive (IPRED) (but does not have a specific "three-strikes" element), enables copyright holders to obtain the IP addresses of serial copyright infringers from ISPs. There were reports that the new law seemed to be having an immediate effect on the amount of illegal file-sharing that was taking place in Sweden (see *The Guardian, Swedish internet use plummets after filesharing curb introduced, 4 April 2009*).

Similar laws have also been passed outside Europe. South Korea enacted similar three-strikes legislation in 2009, to combat the high levels of online piracy that were occurring in the country. The new law, in conjunction with a government-backed educational campaign and previous legal action against file-sharing websites, has reportedly had a positive effect on online music sales (see *The Economist, Repelling the attack, 22 April 2010*).

International piracy solutions

Using the local legal systems to sue infringing websites that operate out of countries such as China, Russia and the Ukraine can be difficult and frustrating because copyright laws are not always enforced, and convictions can also be hard to obtain.

However, instead of attempting to litigate in those countries, a longer-term solution is to encourage western governments to lobby those countries on the industries' behalf, to better enforce copyright laws. Ben Allgrove, a partner from *Baker & McKenzie* in London, notes that "as these developing economies become part of a globalised market place, they will need to control the levels of piracy at home if they want to benefit from protection in other countries. The incentive is reciprocal protection, whereby IP rights from their country are protected in other countries too".

Lisa Peets, a partner at *Covington & Burling's* London office, notes that colleagues from her firm's office in Beijing have had some success in getting some compliance in China. "When you contact Chinese ISPs and ask them to take down illegal content, the compliance rate tends to be around 70%, unlike in Europe where it is 98%. Firms and governments lobbying these countries' governments will eventually bring compliance rates up."

In the UK it is possible that section 17 of the Digital Economy Act (which could allow website-blocking injunctions) could eventually be used to block access to these foreign pirate sites. (See *above, Digital Economy Act*.)

The Anti-Counterfeiting Trade Agreement (ACTA) is also currently being negotiated by a number of countries. The intention is to create an international treaty to improve intellectual property rights through better international co-operation, stronger enforcement and a clear legal framework to deal with large-scale counterfeiting. The countries negotiating and hoping to be part of ACTA include both emerging and developed markets, such as Australia, Canada, the EU, the US, Mexico and Morocco. The first draft negotiating text was published on 16 April 2010 (see *Anti-Counterfeiting Trade Agreement, Public predecisional/ deliberative draft text, April 2010*).

According to Allgrove, the ACTA "is similar in structure to the Digital Economy Act in that it would require ISPs to play a role and take some responsibility to act. But it is very high level and

non-specific at this stage so it is too soon to tell what impact it may have in practice". There have also been discussions as to whether ACTA should have a similar three-step notification process to the Digital Economy Act.

Australian iiNet case

In February 2010, an Australian ISP was taken to court by a group of 34 copyright owners, including a number of US film studios, for allowing its subscribers to access their films through the use of file-sharing software. The Federal Court of Australia dismissed the claim, and found that the ISP could not be found liable for copyright infringement simply by providing internet access to its infringing subscribers (see *Australian Copyright Council, Federal Court decision on iiNet vs Film and television studios, 13 February 2010*).

Software piracy

The software industry was among the first to be hit by piracy. Lisa Peets, a partner at *Covington & Burling's* London office, says that business software piracy has been a problem "since the dawn of the internet, because unlike music, books and movies, software has been digitised since its inception and so has been an easy target".

Peets comments that the software industry has suffered as a result of people wanting to share the latest versions of software, such as Microsoft Word or Office, not for remuneration, but because they want to be the first to make it available. "It has been a long-term issue, and the industry has used the legal remedies of litigation and enforcement, as well as far-reaching notice-and-take-down programmes to deal with it."

However, Peets also says that the industry is very focused on education and awareness-raising initiatives, and is unique in that "it wants to ensure that the key thing that is being sanctioned is the conduct and not the technology". The industry is also focused on protecting the rights of internet users, where appropriate. As a result, she says, the UK software industry lobbied to ensure a due process angle is built in to the Digital Economy Act "so that people's access to the internet would not be put in jeopardy without them being heard".

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