

Interdepartmental Committee to Combat DVD Piracy



DEPARTMENT OF JUSTICE, EQUALITY AND LAW REFORM
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Introduction

In 2006, the Department of Justice, Equality and Law Reform called together a wide range of relevant Departments and agencies with a view to identifying the scope for improved interdepartmental co-ordination in combating DVD piracy. Membership of the group is set out at Appendix A. The group met with industry representatives, invited submissions from the public and held discussions concerning the issues arising. In January, 2008 the Group was reconstituted to finalise and put into effect a range of recommendations arising from its discussions.

Nature of the Problem

Entertainment industry representatives have raised justifiable concerns at the extent of DVD piracy in Ireland and have highlighted the costs to their industry and the threat to legitimate employment arising as a consequence, particularly in retail/rental outlets. The creative sector is also subject to huge losses, including in Ireland.

The combination of more efficient electronic transmission of copied material with access to duplication equipment and technology has made it far easier to quickly distribute high quality pirated material. This has transformed the quality and scale of this activity internationally, from the traditional image of 'home-taping' to undertakings which have the capacity to duplicate and circulate on a scale not hugely different to that of the legitimate industry. In an Irish context, copying (DVD burning) typically takes place locally using source material received internationally. Distribution is then effected through car-boot sales, markets and door to door sales. The low overheads and flexibility this permits makes it an attractive business proposition for organised criminals. There is also, evidently, a sufficient proportion of consumers for whom the attractiveness of the product price outweighs any scruples they might have concerning the illegality of the product or its association with organised crime.

According to industry analysis, the scale of the illegitimate trade in DVDs may be as high as 50% or more of that of the legitimate business. As with any clandestine activity, it is difficult to fully assess its scale, but there is no doubt that it has grown in recent years, a phenomenon reflected in growing Garda seizures. In addition to threatening the home entertainment business, there are implications for the cinema sector arising from pirated new releases and for the film production sector generally into the future.

Some ambivalence may exist in public opinion, or at least part of it, as to the seriousness of the crime. It may appear to some to be a 'victimless' offence, or one where the only victim is a distant international corporation. Nevertheless, this activity is causing substantial damage to legitimate economic activity, which will have inevitable impacts on employment and growth, including in Ireland. This includes the impact on the livelihood of creative artists, only a small number of whom will generate substantial earnings over their careers. It also provides a haven and income generator for organised criminals, supporting and financing other illegal undertakings. Furthermore, in common with other black market activity, there are taxation revenue losses detrimental to the exchequer arising from the impact on legitimate sales and employment.

Existing Legislation

Irish legislation in this field is modern and provides for serious sanctions. Sections 127 to 148 of the Copyright and Related Rights Act 2000 deal generally with copyright offences, including descriptions of offences, remedies available to the copyright owner (including award of damages, Order for delivery up, and application for seizure of infringing material), and the maximum penalties on conviction.

On the criminal side, a District Court conviction can result in a fine of up to €1,900 in respect of each offending copy, or to imprisonment of up to 12 months, or both. Conviction on indictment in the upper Courts can result in a fine of up to €190,000, or a 5 year term of imprisonment, or both. On the civil side, infringers are subject to a comprehensive range of civil remedies, up to and including exemplary damages, which may be imposed without upper limit at the discretion of the Court.

In the case of forms of copyright theft that typically involve trade mark offences (such as DVD and CD piracy), this regime of penalties is effectively supplemented by the broadly similar regime provided for by section 92 of the Trade Marks Act 1996.

Industry representatives contend, however, that the full range of sanctions is rarely applied by the Courts and that suspended sentences and small fines are the norm. While detailed statistics as to sentencing practice are not readily available, this contention is borne out by Gardaí involved in taking these cases.

The legislation in respect of Casual Trading is also relevant in light of the reliance on street markets as a means of distribution. The Casual Trading Acts provide a regulatory framework for this type of activity and include provisions which prohibit trading without a permit, or trading in goods not specified in the permit (section 3(1) of the Casual Trading Act 1995) and which enable the Gardaí to arrest a person they believe to be contravening the Act as well as the power to seize and remove goods (section (11)(1) of that Act). A fundamental requirement in relation to all offences under the Act is, however, that the relevant local authority has made by laws under section 6 of the Act for an infringement to exist and not all local authorities have made such bye laws.

An important recent development in respect of the Casual Trading legislation is contained in Section 98 of the Consumer Protection Act 2007 which provides that the Minister for Enterprise, Trade and Employment now has powers to publish statutory guidelines under the Act, which would be binding on local authorities.

Measures are also included in Customs legislation to protect rights holders and tackle counterfeiting and piracy insofar as ensuring that counterfeit or pirated goods are neither imported into nor exported from the EU.

The key measures are set down in Council Regulation (EC) No.1383/2003 and the implementing provisions in Commission Regulation (EC) No.1891/2004. These regulations make provision for rights holders to make application to Customs to take action against such goods and also for Customs to take arbitrary action where suspect goods are encountered but no application has been received.

Where counterfeit or pirated goods are encountered they are liable to forfeiture as prohibited under Customs Law, i.e. s.186, Customs Consolidation Act 1876 where the goods are being imported or s.3, Customs Act 1956 where the goods are being exported. The person concerned is also liable to prosecution for offences under the same enactments and can face penalties up to treble the duty paid value or €12,695 whichever is the greater and/or up to 5 years imprisonment for import offences and treble the duty paid value or €125 whichever is the greater for offences at exportation. The conveyance involved is also liable to forfeiture. There are also a range of summary offences in connection with entering counterfeit goods for free circulation or making a false declaration for release of such goods contrary to the European Communities (Customs Action against goods suspected of infringing certain Intellectual Property Rights) Regulations 2005 (S.I. 344 of 2005).

Finally, sale of pirated DVDs will also amount to a breach of the Video Recordings Act, 1989 in that it is an offence under sections 19 and 20 of that Act to supply a DVD or video for sale or rent without a retail or wholesale license from the Irish Film Censor's Office.

Enforcement

The Gardaí are very active in this area and liaise closely with the PSNI as well as with INFACT (the industry enforcement experts) in breaking up piracy operations. In 2008, as in recent years, one of the policing priorities set out in An Garda Síochána's policing plan is to 'focus on high value white-collar crime, particularly that of trading in contraband goods'. The Gardaí has adopted a proactive approach in tackling the problem, with the National Bureau of Criminal Investigation (NBCI) targeting the main players and other Garda units concentrating on market stall, car boot sales and other roadside locations.

In 2003 Operation 'Pine' was established as a joint operation between An Garda Síochána and the PSNI to tackle the sale, supply and distribution of pirated products. This operation continues to be active and is co-ordinated by the Anti-racketeering unit at NBCI. In 2005 the operation had its biggest success in Duleek, County Meath when a large production factory was uncovered and copying equipment valued at €300,000 seized. INFACT estimated at the time that particular factory had the capability of producing €14m worth of counterfeit DVDs per annum.

Activity has been maintained at this high level, with 156 searches carried out country-wide by the Anti-Racketeering Unit with assistance from INFACT and IRMA. A total of 84,000 counterfeit DVDs, 7000 counterfeit CDs and large quantities of DVD burners, copiers and scanners with an approximate retail value of €7.5m were seized. Further details on recent Garda activity in this field are at Appendix B

In keeping with their mandate in this field, Customs enforcement action in tackling counterfeit or pirated goods is concentrated mainly on the points of importation into the State. In the case of DVDs, the usual importation route is by post and by air. Consequently most seizures of counterfeit DVDs are made at mail centres such as Port Laoise and to a lesser extent at Dublin Airport. The source country is usually China. In this regard, an important development in the ability to take follow-up action is the Customs Co-operation Agreement between the European Commission and China that was signed at the Hague on 8 December 2004 which undertakes to tackle both commercial fraud and counterfeiting. This agreement provides the opportunity for follow-up investigations to be conducted in China in connection with the supply of counterfeit DVDs. Since 2006, Customs have seized 443 consignments containing almost 11,500 counterfeit DVDs and CDs valued at about €200k imported mainly from China and to a lesser extent Malaysia.

Lastly as part of the follow-up action taken in connection with all seizures of counterfeit DVDs, i.e. both Garda and Customs seizures, the Revenue Commissioners will carry out checks to ensure full tax compliance.

Public Consultation

As part of its examination of this issue the Committee met with industry representatives and also invited submissions by way of a public notice which appeared in national newspapers in June 2006. A very limited response was received, perhaps reflecting the ambivalence in the public mind concerning this type of offence. Four submissions were received in response to the Committee's Advertisement. Two of these were from private individuals while two came from industry bodies (INFACT and IRMA, both of which subsequently updated their submissions).

The issues identified by the industry bodies focused on such matters as the need for additional enforcement, legislative powers, mandatory minimum penalties, cross-agency enforcement, licensing issues for markets, and improved awareness raising. Awareness raising was also flagged in the private submissions, as was the question of stiffer penalties, additional industry security and pricing policy.

New Forms of Copyright Abuse

As noted above, the ease with which pirated material can be circulated and copied electronically has fuelled the growth in recent years of DVD piracy. This is a rapidly evolving field, however, with criminals identifying and exploiting new opportunities on a continuous basis. In particular, during the course of its work it became evident to the Committee that on-line forms of copyright abuse could over time represent as serious a threat to copyright owners as more traditional means of distribution, especially as broadband access and, more particularly, bandwidth and download limits, expand nationally. Both IRMA and INFACT drew the committee's attention to this emerging phenomenon. Since this issue falls outside the Committee's specific mandate to examine DVD piracy, however, and involves a range of other stakeholders, the Committee was reluctant to attempt to frame specific recommendations outside of its mandate. Moreover, at the instigation of entertainment industry firms the role of Internet Service Providers in filtering traffic is currently being pursued in the Courts, in Ireland and elsewhere. It is important, in any event, that the Irish legislative and regulatory response remains relevant, and that effective and proportionate measures are in place to take account of evolving technologies and their impact on copyright owners.

Discussions and Conclusions

The Committee's discussions and examination led them to make a series of recommendations with the emphasis on the central element of their mandate – improved co-ordination of response from State agencies. In general, the focus was on practical operational suggestions. The legislative base and penalties in place are generally seen as satisfactory, and hence a few options only were identified for possible legislative consideration.

Industry representatives acknowledge that the legislative framework is a good one but argue that while the sanctions provided for in legislation are serious, in practice the tendency is for penalties to be awarded at the lower end of the scale. That said, there are indications that fines imposed are increasing and that custodial sentences are being applied. The Committee considered but did not recommend the introduction of a mandatory minimum regime of penalties, given the difficulty of framing an offence which would take account of differing levels of criminal responsibility and the risk of disproportionately penalising persons with low levels of involvement or gain from the activity. Nevertheless, this is clearly an issue to which the authorities will have to revert if the substantial sanctions provided for in legislation are not being applied in serious cases.

The operational focus of the recommendations should also provide for disruption of criminal activity and confiscation of the gains to be made from piracy, which will itself penalise those involved and act as a deterrent. These would also be complemented by additional legislative measures to provide powers to seize assets associated with piracy activity, including vehicles used in door to door selling as well as those who permit or allow their lands or property to be used for the sale and distribution of pirated material.

The group also noted that there are strong consumer and market factors driving this type of offence which the State has limited capacity to tackle. Specifically, the attractiveness of the counterfeit products' pricing appears to tempt many consumers to overlook the fact that they are illegal. Such demand side factors cannot readily be policed. Accordingly, a number of recommendations have been made in respect of industry security, awareness raising and pricing policy.

Recommendations

Operational Recommendations

- ⦿ Combating of piracy should continue to feature as a national policing priority within the Garda Commissioner's policing plan and the current high level of cross-border co-operation in this field should be maintained.
- ⦿ It is recommended that the Garda Commissioner assign responsibility for co-ordination of anti-piracy measures to a named officer within each Garda Regional area.
- ⦿ Each such officer should establish at a regional level an enforcement contact group with a flexible membership but including as necessary members of the DSFA Investigation Unit, Revenue Commissioners and the Irish Film Censors office. Each enforcement contact group should also work closely with industry enforcement experts, in particular INFACT and IRMA. This multi-agency grouping could facilitate the co-ordination of investigations to ensure full tax and social welfare compliance by those engaged in piracy. Such an approach has already been taken against individuals selling tobacco products in Dublin City centre with very positive effects.
- ⦿ The regional enforcement model should be replicated at a central level under the direction of a Detective Inspector based at the Garda NBCI. The liaison group that Inspector would engage with should meet as necessary to exchange general information on anti-piracy activity and more regularly to co-operate on operational matters. Close liaison with industry experts should also take place.
- ⦿ Each Regional Garda Anti-Piracy co-ordinator should collate statistics on piracy related offences, prosecutions and other relevant data according to a common template and forward this data at regular intervals to NBCI for central analysis.
- ⦿ The Department of Enterprise, Trade and Employment should make contact with all local authorities reminding them that they have powers under section 4(2)(3)(a) of the Casual Trading Act 1995 to place conditions in casual trading licenses. The text of a condition relating to traders who wish to sell DVDs should be drafted by An Garda Síochána and should be circulated by the Department of Enterprise, Trade and Employment to all local authorities. Depending on the impact of this approach, the possibility of issuing statutory guidelines under section 98 of the Consumer Protection Act 2007 could subsequently be explored.

Legislative Recommendations

At the next suitable opportunity, serious consideration should be given to providing for the following additional legislative measures;

- Power for Gardai to detain and seize goods and vehicles without warrant where reasonable grounds exist for believing they are pirated or where vehicles are being used to facilitate the production, distribution or sale of pirated goods.
- Provision for a representative sample of goods to be examined and certified as pirated for the purposes of evidence in a prosecution
- Penalties for sale of products without IFCO certificate or without IFCO license to supply to be increased
- Statutory provision to permit sharing of information gathered during investigations between Gardaí and other State enforcement agencies to facilitate investigation of Revenue and Social Welfare abuses.
- Legislative measures to penalise effectively persons who permit their land or other property to be used in the sale or production of pirated material should be explored. Possible models exist in the field of waste management controls (section 11A Waste Management Act 1996), Revenue powers in respect of oil laundering (sections 102-103 Finance Act 1999) and in anti-terrorism legislation.
- The effectiveness of the available sanctions and their application by the Courts to be kept under review. In order to assist in informing the Judiciary to the impact of this type of crime, this report, along with relevant supporting material should be made available to them

Other Recommendations

Awareness raising and public education on the part of the industry should be stepped up. Impact on Irish employment and business should be highlighted and particular attention should be devoted to raising awareness amongst young persons. The impression that the only victims are faceless multinationals or extremely wealthy entertainers should be counteracted and attention drawn to the plight of persons on modest incomes, including many creative artists, whose livelihoods depend on earning from intellectual property. The scope for co-operation with other intellectual property based business should be explored, in particular within the software industry, which itself faces serious piracy issues. The increasing significance of intellectual and artistic property to Irish economic activity requires that we act vigorously to protect such activity within our own borders, just as we would expect other countries to do on behalf of Irish creative artists.

- Industry should prioritise investment in security within production processes and also in the development of encryption methods to accompany the introduction of new distribution technologies. The arrival of more secure new media formats and the use of new distribution channels should provide significant opportunities for the industry to reduce the scope for piracy in the medium term. Needless to say, the strategic decisions in respect of these matters will be taken at a multi-national level. Nevertheless the Irish industry should use any scope it has to influence and prioritise developments in this direction.
- Price competitive and marketing policies, to the greatest extent commercially feasible, should also form part of the industry's response to combating piracy.

Appendix A

Department/Agency	Representative Name
Department of Justice, Equality and Law Reform	Mr. Sean Aylward, Secretary General, (Chair), Mr. Doncha O'Sullivan (Secretary)
Department of Enterprise, Trade & Employment	Mr Michael English, Mr. Brian McCabe
Department of Social & Family Affairs	Mr John Melia, Mr. John Glennon
Department of Arts, Sports & Tourism	Sabina O'Donnell Victoria Pope (Irish Film Board) Declan Brennan
Department of Environment, Heritage & Local Government	Kevin Ring, Feargal Ó Coigligh
Office of Revenue Commissioners	Dave Godwin
An Garda Síochána	Assistant Commissioner Martin Callinan, Assistant Commissioner Martin Donnellan

Appendix B

Recent Garda & PSNI Activity

Over recent months there has been a concentrated effort and a large number of searches carried out of the major markets, notably at Drogheda and Balbriggan and operations targeted at the major manufacturers of pirated DVDs in the border regions. The most significant seizures were at Balbriggan Market in December, 2007 where 10,125 counterfeit DVDs were seized and in May, 2007 at a search in Co. Louth where DVDs and duplicating accessories valued at €750,000 were seized. The NBCI have ongoing operations in respect of a number of individuals believed to be amongst the main manufacturers and distributors on counterfeit DVDs here and in Northern Ireland.

There continue to be high levels of cross-border co-operation between the PSNI and An Garda Síochána in combating DVD piracy. Successful joint operations along the Cavan/Fermanagh and Louth/Armagh border in 2007, again targeted at a number of key individuals and simultaneous searches on both sides of the border led to seizures, including a major seizure by the PSNI in Dungannon. In follow up searches 2 manufacturing factories were located by the PSNI in the Coalisland area.

