

**A critical analysis of the effect of copyright infringement on the UK
film and cinema industries**

Stephen R Perrin

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ABSTRACT

Film studios and major cinema operators strongly contend that copyright infringement, commonly known as piracy, is costing the worldwide industry many billions of dollars in lost revenue. A number of senior industry figures, as well as other commentators, foresee the industry's slow death due to illegal consumption. Consequently, for the past two decades the industry has lobbied governments and legislators to provide legislation that restricts illegal online access to their product. During this period, however, the industry has witnessed significant growth in worldwide box office returns, admissions, film production investment and in the number and quality of cinema available for the exhibition of films. These two observations appear to be at odds. Arguing that film, and especially cinemas, provide socio-cultural as well as economic benefits, this thesis critically examines the industry and academic evidence pointing to the quantum of revenue loss, as well as academic evidence examining the effectiveness of the legal measures that the industry has been successful in establishing. The thesis reaches two conclusions. First, the equivocal nature of research findings regarding revenue losses suggests that estimates of infringement revenue effects appear to have been overstated. Second, the effectiveness of legal measures appears to be in doubt, with any positive effects being short-lived. However, it is argued that the equivocality of the evidence does not permit the counterfactual conclusion that the industry is totally unaffected by copyright infringement, or that legal measures are totally ineffective. Alternative perspectives and their implications are discussed.

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List of Abbreviations

Abbreviation	Description
BFI	British Film Institute. The Government's lead body for film policy in the UK.
CAS	Copyright Alert System (USA)
CCI	Center for Copyright Information (USA).
CCUK	Creative Content UK. A collaboration between Government, music and film trade bodies and major ISPs created to carry out the activities foreseen in sections 2-18 of the DEA.
CF	CreativeFuture. A USA collaboration of creative industries formed to lobby Government and to promote legal consumption of creative content.
CJEU	European Court of Justice.
CMU	Carnegie Mellon University
CPDA	Copyright, Designs and Patents Act (1988), amended 2003.
DCMA	Digital Millennium Copyright Act (USA) 1998.
DEA	Digital Economy Act (2010).
ECHR	European Convention on Human Rights.
FACT	Federation Against Copyright Theft. A not-for-profit organisation established to protect its members' Intellectual Property. Works on behalf and is funded by the film, music and television industries.
FDA	Film Distributors' Association. The trade body representing film distributors in the UK.

IPI	Institute for Policy Innovation, USA.
IPO	Intellectual Property Office (UK).
ISP	Internet Service Provider. E.g. BT, Sky, EE, TalkTalk, Virgin.
MPAA	Motion Picture Association of America. The trade organisation that represents the economic, cultural and political interests of the six major studios in the USA. Internationally, it represents its members' interests as the Motion Picture Association (MPA).
NATO	National Association of Theater Owners. The trade organisation that represents the interest of cinema owners in the USA.
PIPA	Protect IP Act (USA).
PIPCU	Police Intellectual Property Unit. A division of the City of London Police that investigates intellectual property theft and the counterfeiting of hard goods, especially in the digital world.
RIAA	Recording Industry Association of America.
SOPA	Stop Online Piracy Act (USA).
UKCA	United Kingdom Cinema Association. Trade body representing the interests of cinema owners in the UK. Formerly the Cinema Exhibitors' Association.
UKFC	UK Film Council. The previous lead body for film policy in the UK. Established by the Labour Government in 2000 though disbanded by the Coalition Government in 2010.
UNIC	The International Union of Cinemas (Union Internationale des Cinemas). An international trade association representing the interests of cinema companies across 36 European states.

Table of contents

Chapter 1. Introduction and background	Page
1. Introduction	1
1.2 Background	2
1.3 The rise of copyright infringement in the film industry	3
1.4 The rise of legal and non-legal copyright protection measures	4
1.5 The rise of commercial and academic research	6
1.6 Research questions	6
1.7 Interpretive approach	7
1.8 Research methodology	8
1.8.1 Academic research and literature	8
1.8.2 Industry research and literature	9
1.8.3 Industry data	9
1.8.4 An empirical approach with interviews	9
1.9 The geographic and market focus of this thesis	11
1.10 Summary	12
Chapter 2. An examination and discussion of emerging copyright infringement themes	
2.1 Introduction	14
2.2 Claimed revenue effects resulting from copyright infringement	15
2.3 Comments on research, interpretation and terminology	15
2.4 The Motion Picture Association (MPA) study	18
2.5 UK industry studies	20
2.6 Academic studies	22
2.7 Industry statistics	28
2.8 Discussion of research into revenue effects	30
2.9 Does copyright infringement affect the creative and cultural output of film and cinema companies?	31

2.10 The nature of film and cinema culture	32
2.10.1 Cultural concepts with the film industry	34
2.11 Analysis of industry data	36
2.11.1 Film availability	36
2.11.2 Film diversity and breadth of choice	36
2.11.3 Exhibition	39
2.12 Production	42
2.13 Discussion of industry data findings	45
2.14 Conclusions	46
Chapter 3. Legal, operational and voluntary copyright protection measures adopted by the industry aimed at curbing copyright infringement	
3.1 Introduction	47
3.2 Legal measures employed by the industry	47
3.2.1 Website blocking	47
3.3.2 Website blocking activities in other markets	50
3.3 The effectiveness of website blocking	52
3.4 Industry research	53
3.5 Academic studies	54
3.6 Discussion of results	55
3.7 Other issues concerning website blocking	56
3.7.1 'Whac-a-mole'	56
3.7.2 Website blocking and circumvention	57
3.8 Opponents of website blocking as a copyright protection strategy	58
3.8.1 Online freedom campaign organisation A	58
3.8.2 Online freedom campaign organisation B	59
3.8.3 Discussion	61

3.9 Graduated response strategies and consumer alert programmes	62
3.9.1 HADOPI	63
3.9.2 Comments on the graduated response strategy	64
3.9.3 Discussion	65
3.10 Industry generated protection measures	66
3.10.1 Technical and operational security measures	66
3.10.2 Production and post production security	66
3.10.3 Distribution and exhibition	67
3.10.4 Security; screeners and security 'hacking'	68
3.11 Release Pattern strategy	69
3.12 Educational initiatives	71
3.13 Voluntary Consumer Awareness Strategy (VCAP)	73
3.14 Conclusions	73
Chapter 4. Copyright protection measures as an example of Fabian Defensive Strategy	
4.1 Introduction	76
4.2 Fabian Defensive Strategy (FDS) Described	76
4.3 Similarities between FDS and film industry copyright protection measures	77
4.3.1 Frustration and delaying tactics	77
4.3.2 Non-alienation	79
4.3.3 Protecting one's own position	81
4.3.4 Formation of alliances	81
4.4 Summary of measures representing Fabian Strategy	83

4.5 Conclusions	83
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Chapter 5. Cinemas revisited: windows of opportunities of threats?

5.1 Introduction	85
5.2 Windows; the distributors' perspective	86
5.3 Windows; the exhibitors' perspective	87
5.4 Interpretation and discussion	88
5.5 Current windows developments	90
5.6 Conclusions	91

Chapter 6. Summary and conclusions

6.1 Introduction	93
6.2 Main research findings	93
6.2.1 Revenue and output effects	93
6.2.2 Effectiveness of legal and non-legal protection measures	94
6.3 Discussion	95
6.4 Good news for cinemas?	96
6.4.1 New technology	97
6.4.2 Legal implications of new technology	97
6.4.3 Legal consequences	99
6.5 What next?	100
6.5.1 Are new laws required?	100
6.5.2 The role of new technology	101
6.6 Wider relevance	102
6.7 Conclusions	103

Appendix 1. Interview rationale and methodology	105
Appendix 11. Ethical issues	117
References	124
Film Industry and other reports	131
Websites and blogs searched during the course of this research	133

*Away to the cheating world you go,
Where pirates are all well-to-do;
But I'll be true to the song I sing,
And live and die a Pirate king;
For I am a Pirate King,
And, it is a glorious thing,
To be a Pirate King!*

From the *Pirates of Penzance* by
Gilbert and Sullivan

Chapter 1

Introduction

1. Introduction

This thesis is prompted by the writer's 37 years' experience in the film and cinema industries. During that time the cinema industry has faced a number of challenges - from home viewing opportunities, the rise of the multiplex and the constant need to invest in the technology that differentiates the cinema viewing experience from that possible in the home. The last two decades, however, have seen the rise of a potentially greater challenge; widespread copyright infringement (commonly referred to as 'piracy'). Whereas film 'piracy' has always been present, the ubiquity of the internet and fast broadband speeds now facilitate user opportunities to download and, more recently, to stream films illegally, though with relative impunity. The perceived scale of revenue 'losses' to the film industry due to internet-based copyright infringement has resulted in the emergence of number of negative survival narratives, often expressed within metaphors of 'death' and 'the waging of a war'. Such sentiments have encouraged numerous industry and academic research projects designed to measure potential negative revenue effects. Equally, the industry has lobbied national Governments to enact such laws that recognise the ease with which its product may be viewed illegally and to offer solutions designed to stem and reduce the amount of such activity. However, reliable data published over this period demonstrate that the industry has been growing in terms of revenue, the size of the cinema establishment and in the range and diversity of films available for viewing. Claims of potentially mortal infringement effects might thus be regarded as being in tension with such a healthy picture. The purpose of this thesis is thus twofold. Its first aim is to examine critically and assess the results of major studies into the potential revenue effects of illegal activity. It is suggested that such an assessment is important in that cinemas are not only commercial vehicles, but form part of an overall cultural landscape, the loss of which might have consequences that transcend the pure economic. To date, it is suggested, the potential effects of copyright infringement on cultural aspects of the industry have been neglected. Second, it will examine and assess the effectiveness of the legal measures that the industry currently exploits in the protection of its product. It is suggested that such an examination is

important in that an overall reliance on legal measures may be to the detriment of alternative, non-legal, measures that may be useful in reducing illegal consumption.

1.2 Background

'Piracy is a cancer in the belly of the film industry...and can cause serious injury to the body and soul of the movie business'. So observed Jack Valenti, former president of the Motion Picture Association of America (MPAA), in 1979¹. At that time of course he was referring to the widespread illegal activity of duplicating VHS cassettes and then making them available for sale at street market and other outlets. What Valenti could not have envisaged in 1979 was the advent later of the internet and the ease with which digital copies of films could be made and posted for illegal downloading and viewing. Nor could he have foreseen the rapid development of this new delivery mechanism and the speed with which today's unauthorised viewer could access and stream major feature films to a wide range of digital devices with relative impunity. Over time his successors increasingly recognised the danger and in 2006, the MPAA published the results of a study suggesting that worldwide revenue 'losses'² to the film industry amounted to \$6.1 billion, predominantly due to unauthorised internet activity. Since that time, a narrative arc may be discerned pointing towards the end of the film industry as we know it, often framed within the metaphors of somatic damage and the waging of a war. An example of the perceived negative effect of widespread copyright infringement may be seen in The Film Distributors' Association (FDA) recently commissioned short film *The Last Cinema*. Made by graduates of the National Film and Television School (NFTS), it tells of an imagined future in which 'piracy' has wrought the end of the industry; there are no more films and no more cinemas. Whereas the film is deliberately provocative, it makes the serious point that if left unchecked, copyright infringement represents a severe danger to the industry. However, this film, and other such spoken sentiments (Helen Mirren previously spoke of the death of cinema; 'It'll be the internet and piracy that will kill film...the reality is that piracy will destroy the film industry and film as an art form because it's expensive to make a movie.'³) paint a picture of negativity. In a similar vein, Michael Weatherly, the Coalition Government's adviser on

¹ TV interview on *60 Minutes*, 1979. Available to view at <http://www.youtube.com/watch?v=7UIn6HUXAmg>

² The expression 'losses' is controversial and will be discussed in Chapter 2.

³ Interview with Helen Mirren, *Time Out*, July 2008, available at <http://www.timeout.com/london/film/interview-with-helen-mirren>

intellectual property asked; 'Can you really enjoy watching a pirated film when you're helping destroy the industry that made it?'⁴. Such statements, raise important questions, questions that this thesis examines.

1.3 The rise of copyright infringement in the film industry

Whereas academic research examining the subject of copyright infringement in the film industry focuses mainly on the digital world (for example, De Vany and Walls (2007), Ma et al (2015), Rob and Waldfogel (2015)), unauthorised access to and viewing of film is not a new phenomenon, the history of which is described by Dames (2009). Frazer (1979) describes Thomas Edison as having ordered his technician to bribe a French projectionist to 'loan' him a copy of Georges Méliès' film, *Le Voyage Dans la Lune*. This was subsequently copied and shown all over the USA, thus depriving its copyright owner of those revenues that were rightfully his⁵. However, widespread and potentially damaging illegal activity rose dramatically with the copying of, first, VHS recordings and then of DVDs once 'pirates' broke the digital rights management (DRM) code that producers thought would protect them from such copying and duplication. This and earlier periods of illegal copying are comprehensively discussed by Waterman et al (2007). As mentioned, it was in fact the high level of illegal activity surrounding the copying and sales of cassettes (and subsequently DVDs) that prompted the Valenti 'cancer in the belly' statement referred to earlier.

As noted, in 2006 the MPAA published a study suggesting that studios 'lost' some \$6.1 billion in revenue. A study conducted by the UK Film Council one year later suggested that the impact on film and television consumption amounted to £486 million, whereas a similar GB industry study published in 2011 suggested that 'losses' amounted to some £500 million. A more graphic picture of the extent of present day illegal viewing may be gleaned from the following dataset.

⁴ Speaking to *The Independent*, October 14, 2014

⁵ Ironically, the film itself was derived from themes developed by Jules Verne who received no credit.

Table 1.1 Combined Top 10 most illegally downloaded films from 2010 to 2015

<u>Year</u>	<u>Total illegal downloads</u>
2010	92,450,000
2011	74,820,000
2012	70,772,000
2013	74,400,000
2014	271,364,000
2015	366,480,000

Source; table compiled by the writer from data published by Variety.com in appropriate years based on data researched and collated by Excipio⁶.

Whereas the methodology and assumptions underlying the Excipio measurement technology have been questioned (see for example Geller in Quora.com, 2015⁷), examination of the data over the past six years suggests that illegal downloads have increased fourfold. Even allowing for a degree of mismeasurement and assuming the same possible error at each measurement point, the data clearly demonstrate a trend, even if in absolute terms the quanta may not be accurate. The significant increase in unauthorised downloads demonstrated for 2014/2015 may suggest: issues with the measurement techniques employed by the researchers; a rapid expansion in technological capability; or, it may just be the case that the films for those years were more desirable⁸. Notwithstanding, the upward trend does imply that the market for illegal viewing has increased dramatically.

1.4 The rise of legal and non-legal protection measures⁹

Attempts to stem copyright infringement have often been likened to the waging of a war with those involved in unauthorised activities posed as the 'enemy' and the strategies used

⁶ <https://www.texcipro.com/products-and-solutions/piracy-data-api/>

⁷ <https://www.quora.com/Paul-Geller>

⁸ An industry analyst suggested to the researcher that a more parsimonious explanation may be that the highly viewed though illegal site *Popcorn Time* may be a factor. Although it was active earlier than 2014, the year in which it was taken down, it left a legacy of clone sites that opened, closed, and re-opened flowing legal blocking actions.

⁹

to foil them as 'weapons'. Over the past decade, and in the face of the apparent significant increase in unlawful activity, the industry has been successful in lobbying national Governments to either strengthen existing copyright protection legislation or to introduce new legal measures that recognise the potential threat that infringement represents in the digital age. The proliferation of the internet, high speed broadband and the development of new applications that facilitate the sharing of data files in a peer to peer environment have prompted such legal measures as website blocking (for example, the 1988 Copyright, Designs and Patents Act Section 97A in the UK and the 2001 EU Information Society Directive, Article 8.3) and graduated response strategies (for example the 2009 Hadopi law in France), all aimed at reducing the opportunities for unauthorised viewing activities to occur. At the same time, and in recognition of the fact that legal measures alone are unlikely to represent a sufficient condition for a reduction in infringement, the industry has developed a range of internal, non-legal measures aimed at working in concert with the legal. Ranging from the technical, operational, educational, and voluntary arrangements with internet intermediaries, strategies have been designed to work synergistically with legal measures to frustrate, slow down and in other ways hamper those who choose to view film illegally. However, both sets of measures do not exist without critics. The ease with which website blocks can be circumvented by existing and easy-to-obtain technology render this measure largely ineffective, as has been noted on the websites of such organisations as The Open Rights Society and the Electronic Freedom Frontier. Likewise, it has been argued, a graduated response strategy, no matter the penalty, may only serve to deter the casual user. Again, advocates for and against such strategies put forward their arguments as if they were self-evident, with little regard for evidential corroboration. This thesis seeks to examine and discuss these issues with reference to available evidence. Further, the fact that a metaphorical 'war' is being waged suggests that a military comparison might be a useful framework within which to assess the overall effectiveness of the suite of protection measures adopted by the industry. Rather than assessing each particular action as a standalone measure, this thesis suggests that regarding each measure as forming part of an overall strategy is a more useful approach.

1.5 The rise of commercial and academic research

The past decade has witnessed a burgeoning literature on the subject of copyright infringement in the film industry, a reflection perhaps of the fact that previous literature on copyright infringement in the creative industries focused on the music industry and the rise of Napster and similar applications e.g. Kernfeld (2001), Oberholzer- Gee and Strumpf (2007), Rob and Waldfogel (2006), Danaher et al, (2014). Research into copyright infringement in the film industry has focused predominantly on two major areas; the measurement of potential lost revenue (De Vany and Walls, 2007, Ma et al 2015) and the effectiveness of copyright protection measures (Danaher et al 2016), (Giblin, 2014), (Danaher et al 2013). In so doing, academic researchers have adopted a range of methodologies, including; questionnaires, face to face interviews, analysis of weekly box office fall-off rates, the tracking of activity on unauthorised websites, the measurement of downloads and the comparisons of actual versus expected revenues. Such research approaches have been employed in attempts to estimate the scale of potential revenue losses (predominantly at the box office) and to assess the effectiveness of, for example, website blocking actions. Whereas research has been designed to answer the questions posed in the previous section, to date little consensus have been reached. This thesis, whilst noting the wide disparity of research findings, will assess their value in providing relevant and reliable clues to the, largely unempirical, comments and narratives described earlier. However, it will also introduce further data sets that might serve to paint a more reliable picture of the industry's health in an attempt to provide a further empirical basis for assessing the validity of these consequential narratives. To date, researchers have generally ignored the wealth of present and historical data in their analyses – a lacuna that this thesis seeks to address.

1.6 Research questions

This thesis addresses two key questions. First, what evidence exists that demonstrates the film industry is in severe trouble as a result of copyright infringement? If the industry is under such threat, what does this actually mean, not just in economic terms, but within the domain of 'social welfare'? That is, what is the cultural significance of such a demise, especially to the century old cultural practice of 'going to the movies'. Clearly, as the

FDA/NFTS film suggests, a decline in film-making may lead to the loss of cinemas as social and cultural venues. Often regarded as being as important to communities as the local pub, post offices and other desirable social assets, cinemas are frequently sought as project ‘anchors’ by the developers of new retail establishments in the regeneration of town and city centres¹⁰. Their demise, it might be suggested, could have consequences that transcend pure economics. As importantly, cinemas are at the heart of the film industry and are the favoured viewing outlet by directors. Speaking about his new film, *Dunkirk*, at a recent industry conference, British director Christopher Nolan stressed the importance of cinemas. Speaking to cinema owners he said; ‘I am depending upon all of you to try and present this film in the best way possible’. He went on; ‘This is a story that needs to carry you through the suspenseful situation and make you feel that you are there, and the only way to do that is through theatrical distribution [i.e. in cinemas]’. Likewise, the US director, Sofia Coppola, in speaking about her new film, *The Beguiled*, stated; ‘I hope people see it in the theatre, where it was meant to be seen’.¹¹

Second, what evidence exists to suggest that the effort put into legal measures by copyright-holders, Governments and national courts are effective in meeting the aims of protecting content from unlawful use? The importance of such an assessment, it is suggested, is two-fold. If legal measures are either significantly or minimally effective, then there are consequences in terms of reliance on those additional non-legal strategies that the industry currently adopts or may so do in the future. Moreover, the degree of effectiveness may potentially influence court decisions (as will be discussed in Chapter 3).

1.7 Interpretive approach

In the posing of questions and in the attempt to provide answers within the domain of copyright infringement, this thesis deviates from previous work on the subject in that it widens the scope of examination. Previous published work has tended to focus on the analysis of distinct elements related to copyright infringement within the industry, and through a particular lens. Doctrinal and interpretative elements have been discussed by, among many others, Weatherall and Burrell (2011), Husovec (2014), Marsoof, (2015) and

¹⁰ See for example ‘The Economic and Regeneration Impact of a Cinema Development in Preston City Centre’, a report by dcinex Consulting for Preston City Council (2014).

¹¹ Both comments were widely reported although see the recent article in The Guardian at <https://www.theguardian.com/film/mar/30/christopher-nolan-sofia-coppola-netfix-amazon-cinema>

Kelly (2016). Issues related to potential economic losses have been researched extensively by a number of authors including Danaher and Waldfogel (2012), DeVany and Walls (2007), Zentner (2012) and Strumpf (2014). A number of authors have also been active in the area of the assessment of legal remedy effectiveness, especially Danaher, Smith and Telang, (2015) and Giblin (2014). Other authors have provided critical commentaries, for example, Frosio, (2016), Lessig (2007), and Mason (2008) while Buccafusco and Fagundes (2016) examine the moral indignation felt by a number of those whose works have been wrongfully used.

Whilst the objective of the works noted above is to provide answers to specific questions, this thesis seeks to draw them into a cohesive framework and discuss them in terms of the implications for the industry itself. Inevitably, such an approach runs the risk of the sacrificing concentration on the specific in order to draw wider conclusions and discuss broader implications. Further, it is recognised that in the discussion of the latter, an element of personal orientation may become apparent. However, any such personal comments, wherever possible, will be balanced with corroborative statements from other authors.

1.8 Research methodology

This thesis adopts a threefold methodology aimed at the understanding and analysis of the themes and issues described earlier. These include: an examination of existing academic and industry-produced research and literature; the identification and analysis of descriptive industry statistics; and, a series of formal and informal interviews with a number of senior executives within the industry itself and other relevant organisations.

1.8.1 Academic research and literature

The answers to the questions at the heart of this thesis are unlikely to be found via a dialectical approach; they demand an empirical investigative strategy focused upon published academic research. It is perhaps not surprising to discover that library and Google searches using such terms as 'piracy', 'film theft', 'cost of film piracy', etc. yield many returns, the majority of which lie within economics domain, with an emphasis on econometric analyses. It is perhaps also unsurprising to discover that little consensus exists among the various researchers who adopt vastly different methodologies yielding vastly different

conclusions. Whereas economic studies and analyses play a valuable role in providing a number of key discussion points, they do not, in themselves, provide complete answers. Additional literature sources are thus required.

1.8.2 Industry research and literature

This thesis will draw additionally on those sources that have a strong focus on the industry itself in respect of its internal workings and structures, commercial aims, and other core industry matters. The industrial literature (company reports, research findings, press releases, website information) is a valuable source in describing such matters. Further, the thesis will draw on such Government publications that impart information and objectives that inform the wider debate around copyright infringement and protection strategies. However, even with the addition of such sources, a complete picture may not emerge. Further research material may thus be instructive.

1.8.3 Industry data

The film industry is not alone in being subject to a high degree of both high level and granular measurement, both from within and from third parties. To date, it would appear that this rich source of information has barely been mined by academic researchers in their attempts to understand, measure and offer scholarly comments on the effects of copyright infringement on the industry. Given the volume and ubiquity of such data, this thesis will utilise those published film industry datasets that inform and illuminate the issues posed by the consequential narratives described earlier.

1.8.4 An empirical approach with interviews

It is perfectly possible that the range of academic, industry and mainstream publications and comments to be presented and discussed within this thesis may in fact suffice to provide potential answers to the two key questions it poses. However, this thesis adopts the position that interviews with a number of key industry personnel might add a valuable and insightful research strand. As far as the available academic literature suggests, a discussion and analysis of copyright infringement issues within the film industry that includes interviews with major industry and related third party professional executives has rarely occurred. Currah (2006) was successful in interviewing 150 studio and related industry

executives on the subject of the film industry's use of the internet as an economic tool, but further examples are elusive. In addition to the provision of a description of what the industry actually does to protect its product, interviews may yield insights into how the industry perceives such actions and what they expect such actions to produce. Moreover, whereas the legal options open to the industry are well known, the actions that it takes internally and operationally in the digital age are less so. Interviews with relevant industry executives might serve to expand knowledge about such issues as technological content protection and other related non-legal strategic business practices. The writer's experience also suggests that meeting and talking with industry executives may lead to the provision of useful reports, data and research studies that are not always available within the public domain. Equally, interviews with one person may lead to unexpected introductions to others – those who either might not have occurred to the researcher or indeed may not have been available without personal introductions. Interviews, thus, may throw up serendipitous opportunities.

In short, it is believed that the addition of an interview research strand may add more richness of context than might otherwise be the case and allow the reader to gain more insight into how a creative industry thinks and behaves with a product desired by both authorised and unauthorised consumers. Table 1.2 lays out the organisation types and interview numbers for each.

A more comprehensive narrative on the decision to employ direct interviews, their nature and design, the organisations and personnel approached, and the ethical considerations are contained in Appendices 1 and 2.

Table 1.2 Interviewees

<u>Organisation type</u>	<u># Organisations</u>	<u># Interviews</u>
Major Studios	5	8
Exhibitors	3	3
Trade Bodies (UK)	3	3
Trade Bodies (International)	3	5
Enforcement Bodies	2	2
Practicing Lawyers	1	1
Judiciary	1	1
Industry Consultants	3	3
Anti-blocking lobbyists	2	2
Technical experts	2	2
Total	25	30

1.9 The geographic and market focus of this thesis

Copyright infringement exists as a worldwide phenomenon and many markets, to a greater or lesser extent, have been subjected to research and analysis (Danaher and Smith, 2013, Peukert et al, 2015, Walls, 2008). This thesis, for reasons of practicability and resource availability will focus on the UK theatrical market. Whereas international data and comparisons will be introduced where relevant and illuminating, it is proposed that an understanding of the UK position with respect to copyright infringement, current debate, existing research and the range of protection measures adopted represents a useful proxy for other markets. This proposal is based on a number of key factors. The UK is the fourth largest market in the world (after the USA, China and Japan); arguably led the world in the implementation of website blocking legislation; has a vast array of reliable industry data;

and, is about to implement one of the world's first voluntary industry/ISP initiatives designed to reduce unauthorised viewing¹².

Clearly, there are a number of limitations with this approach. First, as with any country, the theatrical market only represents a portion of total industry revenues; any results gained thereby can only paint a partial picture of potential revenue losses¹³. Against this, it might be argued that the vast majority of worldwide research *has* focused on the theatrical market, the assumption being that unauthorised activity at this phase of a film's release is the most damaging to a film's immediate and longer term prospects. Second, as the cultural element of this thesis necessarily requires a concentration on cinemas, it may be argued that such an approach is too narrow and elitist as it possibly downplays the social and cultural value of other forms of film-viewing (for example, families watching a (legal) DVD together may be an equally valid cultural activity for study). However, this thesis argues that cinema-going represents a long-held behavioural tradition and that the physical manifestation of cinemas marks them out as more widely and socio-culturally relevant.

1.10 Summary

The purpose of this thesis is twofold: to examine the validity of a range of important narratives that have arisen concerning the potential economic dangers posed to the industry by the perceived high level of copyright infringement; to examine the potential consequences to cultural and social welfare aspects of cinemas and the socio-cultural behaviour of cinema-going; and, to examine the effectiveness of current, and the potential effectiveness of new copyright protection measures adopted by the film industry in the UK. The examination of each of these key objectives will include the views of those individuals and organisations that are critical of current industry practices and their underlying philosophies. The thesis seeks to examine and discuss these issues through three lenses: academic literature review; interviews with industry and related executives; and, examination and analysis of published industry descriptive statistics and other reports.

This thesis will thus proceed as follows.

¹² Described more fully in Chapter 3.

¹³ According to the British Film Institute (BFI), theatrical revenue in 2015 represented approximately 30% of all film revenue in the UK. Physical DVD sales represented 19%, digital sales represented 12%, whereas films on television were worth almost 40% of consumer revenues.

Chapter 2 will examine the validity of the consequential narratives described above, especially with respect to potential damage to cinemas, based upon available academic and industry literature.

Chapter 3 will examine and assess the effectiveness of current and proposed copyright protection measures, again based upon existing academic literature.

Chapter 4 will re-examine the potential issues faced by cinemas resulting from copyright infringement, either directly or indirectly, and will discuss their future within a copyright infringement framework.

Chapter 5 will undertake a further examination of current protection measures and characterise them as representative of a Fabian Strategy. The implications of this characterisation will be discussed.

The final chapter will summarise the findings of the various examinations and comment further on their implications for further research, further possible industry actions and more generally for the creative industries as a whole.

Chapter 2

An examination and discussion of emerging copyright infringement themes

2.1 Introduction

The introductory chapter described a number of themes that have emerged over the past decade in response to the apparent rise of copyright infringement, especially via the internet. Counter narratives suggest that, notwithstanding the present level of illegal film watching and its potential economic, social and cultural effects, the film industry is fundamentally sound and is able to survive such attacks on its enterprise as far ahead as may be reasonably seen. This chapter will further examine such themes and claims and assess their validity against existing evidence and data. The importance of such an examination, it is suggested, rises from the fact that if such claims are valid, or anywhere near so, then the industry might be regarded as facing a doubtful future and the century old pastime of watching films, especially in the cinema, may become a thing of the past. The popular and electronic press display such pessimistic headlines as;

‘Piracy is the biggest threat facing the film industry as we know it’¹⁴

‘Piracy is the biggest threat to the U.S. motion picture industry’¹⁵

‘Movie piracy: threat to the future of film intensifies’¹⁶

Contrary to such comments, others suggest that;

‘Will piracy kill the movie industry? Nope.’¹⁷

‘Once again, Piracy is destroying the movie industry...To ever more records at the box office!’¹⁸

Interestingly, in a 2011 online survey of 252 film industry professionals conducted by the Film Policy Review Group (FPRG - an organisation appointed by the UK Government to

¹⁴ Award winning producer Jason Blum, writing in Vox, April 20 2016

¹⁵ Statement by L.E.K. in the MPA report *The Cost of Movie Piracy* p3

¹⁶ *Guardian* story, July 17 2014

¹⁷ Producer, Jon Mixon, writing in quora.com, November 16 2015

¹⁸ Quora.com, January 11th, 2016.

advise on industry matters), only 77 of 493 respondents (15.6%) mentioned piracy as a key challenge affecting the industry in the next five years.

These issues will be examined with recourse to existing data in the following manner. First, if it is the case that revenue loss due to copyright infringement is a threat to the future and well-being of the industry, then an examination of claimed potential revenue losses is called for. Second, if such losses do exist, then to what extent might film and cinema culture be adversely affected?

2.2 Claimed revenue effects: industry and academic studies

The past decade has witnessed a burgeoning literature directed at the examination of copyright infringement (generally via digital means) and its effects on revenues. Despite this increasing level of interest, a meta-analysis of over 44 published and working papers conducted by Hardy et al (2015) concludes that the literature remains equivocal and inconclusive. Despite these findings, the industry remains adamant in its belief that illegal activity is damaging its revenues, evidenced by the time, effort and financial resource that it invests in the protection of its product. A Trade body leader based in the USA, Trade Body Exec 1, commented that, despite all efforts, the six major studios estimate that they lose up to \$2 billion per annum each.

This section will present and discuss the more prominent attempts made to quantify potential revenue losses to the film industry due to copyright infringement. It will refer to industry sponsored studies and a number of academic research programmes. However, before progressing, a comment on the approach adopted in this thesis towards the analysis and discussion of relevant research might be noted.

2.3 Comments on research, interpretation and terminology

The reader of research articles and papers on 'losses' due to copyright infringement can become so accustomed to reliance on secondary accounts that (s)he fails to recognise a number of important issues that a particular paper throws up, or indeed the caveats to the conclusions that the original authors make themselves. Most reports that cite the research and studies detailed below do not appear to analyse their methodologies, assumptions,

results and conclusions in any systematic manner. Rather, they are included as background, or accepted as accurate and requiring no further comment. In some cases, such an approach does not materially affect the scope and conclusions of the particular report in question. For example, Waterman et al (2007) discuss enforcement and control of piracy in the film industry and cite a number of the studies mentioned below. Likewise, in a report for the UK organisation Respect for Film, Oxford Economics (2009) make use of relevant previous research to provide context and background to their analysis. In these cases, the lack of any questioning of the research cited is not necessarily important as they do not impact in their results and conclusions. However, an uncritical acceptance of results and conclusions can compound downstream errors. For example, in a report for the Institute for Policy Innovation (IPI), Siwek (2007) takes the results of the MPA/LEK study described below and extrapolates total losses to the US economy utilising various economic multipliers– including lost government tax, employment taxes and loss of revenues by third party suppliers – to represent more than three times the suggested studio revenue losses of \$6.1 million at \$20 billion. The accuracy of the latter figure, of course depends on the accuracy of the first. In fact, Siwek appears to apply a number of economic multipliers relevant to the USA to a worldwide figure and then suggests that the said £20 billion applies to losses to the US economy alone – i.e. an assumption that the \$6.1 billion would all have found its way back to the USA. Clearly, such a conclusion is dubious. As the USA Joint Economic Committee reported in 2012, ‘...creating precise estimates of the magnitude of counterfeiting and piracy is difficult because of the complexities associated with measuring a secret, illegal activity...p4) Further, nowhere does Siwek suggest that the MPA/LEK figure itself might be dubious. As will be described below, there are strong reasons to believe that it is¹⁹.

Likewise, the failure to examine published research in detail misses a number of potential errors or misunderstandings that may affect authors’ conclusions. For example, De Vany and Walls (2007) state that ‘The [MPAA] estimates that US studios lose more than \$3 billion annually in box office revenues from piracy’ (p291). An examination of the report from which the authors deduce this figure (*MPA - The Cost of Movie Piracy*) suggests that they are

¹⁹ The IPI is partially supported with ‘unrestricted funds’ from the MPAA. Whereas such funding does not necessarily invalidate its findings, it is interesting to note that that the research carried out, and described in this thesis, by Carmel Mellon University, and generally supportive of the notion that unauthorised viewing is harmful to the industry, is also in receipt of ‘unrestricted funding’ from the same organisation.

mistaken. The report suggests that worldwide losses are \$6.1 billion, of which 62% comes from 'piracy of hard goods'. Simple maths demonstrates that a \$3 billion loss to the US box office cannot be the case. The authors go on to state that 'A \$3 billion loss to an industry that takes in less than \$10 billion annually is a serious loss' (p292). Again the authors conflate two figures; even if it was the case that worldwide box office losses were \$3billion the authors are mistaken in using the figure of \$10 billion as the comparator. In fact, \$10 billion relates to total *US* box office, not *worldwide*, revenue²⁰. Thus, a serious, peer reviewed piece of research commences by quoting figures that are at best confusing and at worst just wrong.

The literature also demonstrates a degree of confusion between the concepts of 'losses' and 'potential losses'. De Vany and Walls (2007) use the expression 'potential' to mirror the language used in the MPA/LEK report. In fact, the report only uses the expression 'potential' in relation to 'market shares' lost to piracy (p6). All other references to revenue clearly use the expression 'loss'.

The expression 'loss' (of revenue) connotes a clear and empirically demonstrable *actual* loss i.e. revenue that *would* have been earned had any illegal activity not taken place. The expression 'potential loss', though, possesses a different quality in that it follows an assumption drawn from researched data about revenues that *might* have been earned. Thus, in the case of China, the MPA/LEK study suggests that US studios 'lost' revenues of \$244 million in 2004 i.e. an actual loss. Given that the same report suggests that 90% of all film viewing in the country is illegal, actual revenues would have amounted to an unlikely \$2.44 billion, or just over one third of all MPAA company losses. A more appropriate way of describing the suggested revenue loss would be as a 'potential loss', since the basis upon which the calculation is made is 'potential market share lost to piracy' since the counterfactual revenues (i.e. with no piracy at all) are not known. There is though a further manner within which the matter might be framed. Interviewee Exhibitor 1, an independent operator, suggested that the use of the concept 'losses due to piracy' is a misnomer.

As piracy has always been present, business plans have been drawn up accordingly.

In other words, the revenue never existed other than theoretically. To claim a loss

²⁰ In 2016 US box revenue represented 29.5% of global box office revenue

for something that one never had is thus wrong. More appropriately, I see what others call losses as potential revenue gains. That is, the revenue I might gain if piracy were eradicated.

Accordingly, the following description and analysis of appropriate industry and academic research will use the expression 'potential' loss, except where a direct quote from the original research is given. Further, the following sections will include the caveats that the authors themselves point up in their conclusions.

2.4 The Motion Picture Association (MPA) study

Whereas the primary focus of this thesis reflects the UK experience, an examination of wider measurement attempts is useful. An understanding of the USA experience is important, not just because it was the first major measurement project with a worldwide scope, but because it set the tone for all subsequent research internationally. The first substantive attempt to quantify revenue losses in an empirical and credible manner was published by the MPA in 2006²¹. Recognising the increasing threat posed by the internet and its ability to make film available for widespread unauthorised viewing, the MPA briefed L.E.K. Consulting²² to carry out the first research into worldwide revenue losses across all consumer sales platforms. LEK described their methodology as a survey of 20,600 movie consumers in 22 countries via the use of focus groups, telephone, internet and face to face interviews. Findings from the 22 countries were extrapolated to 42 additional countries via a regression model developed in conjunction with UCLA to produce a worldwide picture.

LEK reported a number of significant findings. Highlights included:

- The major US motion picture studios lost \$6.1 billion in 2005 to piracy worldwide
- 80% of these losses occurred overseas [i.e. 20% in the USA]
- 62% of the losses resulted from the piracy of hard goods, 38% from internet piracy²³
- Highest piracy rates were experienced in China, Russia and Thailand
- Losses due to piracy in the UK were put at \$406 million²⁴.

²¹ The research was carried out under the banner of MPA, the MPAA's international body. Its aim was to provide 'an accurate and detailed assessment of the film industry's worldwide losses to piracy...' p3

²² An international strategy consulting firm based in the USA though with offices located in other major markets.

²³ Assuming the accuracy of the research findings it might be reasonable to expect that these percentages would be at least reversed by 2016.

- The total loss to the worldwide industry, including all non-USA product, producers, distributors, cinemas, stores and pay-per-view operators, amounted to \$18.2 billion

At first, these findings were hailed by MPAA as an accurate and credible reflection of the revenue losses experienced by them and other industry partners as a result of unauthorised activity. However, the findings were soon called into question by a number of industry commentators on the basis of the lack of methodological transparency.²⁵

Such were the criticisms and general atmosphere of doubt surrounding the published report that the MPAA ordered a re-analysis of the raw data collected by LEK, resulting in a qualification of the findings by MPAA itself. In 2008, it published the following statement;

...we discovered an isolated error in the LEK processes two years ago that resulted in an inflated number for piracy for college students. The 2005 study had incorrectly concluded that 44% of the motion picture industry's domestic losses were attributable to piracy by college students. The 2007 study will report that number to be approximately 15% - or nearly a quarter of a billion dollars in stolen content annually by college students in the US.²⁶

Despite the promise of a revised report covering 2007 to be published in due course, the report was either never carried out, or at least made public²⁷. Notwithstanding its partial retraction of the 2006 report, the MPAA release continued to state that;

...piracy remains a profound global problem that affects not only the motion picture industry, but consumers, the overall economy and American workers generally.

Since that time, the MPAA has not quoted any definitive number to quantify piracy losses, although it maintains its view that;

...revenue losses are significant and that the industry needs to do all it can to develop techniques to combat piracy and to work with governments around the world to protect its product²⁸.

²⁴ At the prevailing exchange rate this would equate to approximately £223 million

²⁵ Commenting on the findings, The Wall Street Journal noted that 'The MPA shared some details of the study but not the questionnaire, how respondents were selected and details of how the dollar figures were calculated'.

²⁶ MPAA press release January 22 2008

²⁷ Based on interviews with MPAA executives, the present researcher has been unable to find any evidence that a further research study has ever been carried out.

Two immediate issues followed this controversial research project. First, it reinforced the widely held notion – both within and out of the industry - that losses due to illegal activity and unauthorised consumption are inherently unknowable. That is, the ability to posit a clear relationship between the number of times a film is viewed without authorisation, and actual lost sales will always be spurious. Such claims also violate the ‘*nobody knows anything*’ principle which suggests that since the commercial results of any particular film cannot be predicted in any accurate manner, trying to predict potential losses is equally unknowable²⁹. Put differently, Sean (2011) suggests that since attempts to quantify the effects of piracy is based on unquantifiable data no estimate can be either true or false.

Nevertheless, the MPA/LEK report detailing losses of \$6.1 billion has become the ‘defining measure of movie piracy’ and ‘...a symbolic weapon in the war against piracy.’ (McDonald, 2016, p696)³⁰.

2.5 UK industry studies

Notwithstanding the difficulties experienced by the MPA research and its subsequent qualification, the UK industry has commissioned a number of studies examining the same issue. In 2007, the UK Film Council (UKFC) published a report suggesting that the impact of piracy on the UK industry amounted to £486 million, of which £88 million was due to revenue losses at the cinema box office. In 2010 The Industry Trust³¹ commissioned a major technology research company to carry out a study to measure the extent to which the UK population is involved in film and TV piracy and, from this, to estimate the amount of revenue potentially lost to the industry as a result of illegal activity. As with the MPA/LEK study, these research studies involved interviews with adults over 15 and weighted to be representative of the population as a whole³². One key difference was that all of the interviews took place face to face in the street or in interviewees’ homes, as opposed to the diverse interview methods of the earlier study. A further difference may be seen in the

²⁸ See note 13 above

²⁹ A dictum attributed to William Goldman (1983, p39). ‘Nobody knows anything...not one person in the entire motion picture field knows for a certainty what’s going to work. Every time out it’s a guess and, if you’re lucky, an educated one’.

³⁰ Note the use of the ‘war’ metaphor when describing the industry’s attempts to protect its product.

³¹ An industry body representing the UK film, TV and video industry sectors, financially supported by its members, generally via each sector’s own trade body. Its main functions are to assist in the protection of members’ copyright and to engage in anti-copyright infringement educational initiatives.

³² Research carried out by Ipsos Media CT. Although the research was overtly commissioned by the Industry Trust, industry sources suggest that the power behind it was a major US studio.

language used to describe revenue effects. The authors use the expression 'Estimated Financial Impact of Piracy' though still continue to use the expression 'loss' as if it were equivalent to Estimated Financial Impact. Either an actual loss has been quantified or an 'estimated loss' has been quantified. The two are not interchangeable.

Based upon the results of the interviews and further data analysis the Industry Trust study authors concluded that some £511 million in retail revenue across the viewing chain was 'lost' to illegal viewing in 2011³³. Of this, an estimated £216 million was 'lost' at the UK cinema box office. (Such a 'loss' of revenue to cinema owners might bring into question the sustainability of their businesses as this amount is equivalent to the loss of two major 'blockbuster' films per year.³⁴) Unlike the USA research, this UK research was never released to the press and remains as an internal industry reference document³⁵. It has thus not been subjected to any degree of rigorous analysis or critique by either industry experts, industry press or the academic world. A number of comments may therefore be usefully made here.

Leaving aside any methodological concerns about the extent to which respondents might provide accurate answers and any confusion over when, where and how they may have viewed a particular film, the amount deemed to have been 'lost' would represent a 20% loss to potential revenue had the losses not occurred³⁶. One might also ask whether it is reasonable to have expected the revenue impact at the box office to have more than doubled within a four-year period. Notable is the scepticism with which the results of such research are held by a number of senior industry members. Based upon interviews with UK based industry executives, there is a strong belief that revenue losses do in fact result from illegal activities, although the accuracy of research is often doubted. Distribution Executive A commented that; 'We know that we lose money, we just don't know how much'. As far as is known this research has not been carried out again and the conclusions still represents the

³³ This compares with the estimated total British industry loss of £223 million in 2005 reported in the LEK study. If both estimates are accurate this would suggest that revenue losses due to illegal activity more than doubled in the intervening 5 years. Although there is no firm way of knowing, it seems unlikely that the UK would experience a doubling of revenue losses due to illegal activity, notwithstanding the increased availability and usage of the internet.

³⁴ For example, the two biggest James Bond films, *Skyfall* and *Spectre*, jointly grossed approximately £200 million.

³⁵ The complete report was supplied to the researcher for the purpose of this thesis. Further publication or specific references would require additional permissions. However, the key findings of £500 million in overall revenue losses and £216 million box office revenue loss have been published and quoted in UKCA annual reports.

³⁶ Total UK box office in 2011 was approximately £1 billion according to Rentrak, a major box office reporting organisation.

currency that the industry adopts. The 2015 Annual Report of the UK Cinema Association states ‘...the last reliable figures dating from 2011 when financial losses to the UK cinema sector were calculated at some £216 million, or 21% of annual box office...’ (p8). Again the choice of language is interesting; ‘reliable’ and ‘financial losses’ suggest actuality, when in fact there is no evidence to suggest ‘reliability’ or actual loss³⁷.

2.6 Academic studies

Any controversy or scepticism regarding the value and accuracy of industry studies designed to quantify potential revenue losses has not, however, meant the end of research into the relationship between copyright infringement and potential revenue losses. Rather, the industry, and MPAA specifically, has adopted a different research approach through collaboration with academic, rather than commercial, researchers. The latter have adopted more robust quantitative econometric approaches to the evaluation of the potential revenue effects of illegal activity.

The most prominent and most oft-quoted studies have focused upon the effect of illegal viewing at both pre-official release and post-release phases on potential box office revenue. The difficulties faced by such research are many and complex and revolve around the ability to translate a measure of illegal activity into a measure of potential revenue loss. Examination of the available literature yields a range of methodological and assumptive approaches to such measurement, together with a range of equivocal conclusions. A description of the most prominent studies follows.

2.6.1 The effects of pre-release unauthorised availability on box office revenues

The availability of a film prior to its official release date is perhaps the most concerning aspect of illegal activity to the producer and related parties. Apart from any enhanced potential revenue loss (compared to later availability), it clearly means that there is a ‘leak’ in the pipeline between the production, post-production and distribution cycles³⁸.

In 2007, De Vany and Walls, in conjunction with a major studio, examined the box office revenue effects of a particular film that was available illegally prior to the film’s official

³⁷ The concept of a data point becoming ‘anchored’ i.e. not adjusted in the light of evidence, in the minds of relevant parties, is discussed by Plous (1993).

³⁸ The practice and nature of film release patterns will be discussed in Chapter 3.

release date. It adopted the method of examining the rate at which the film's box office receipts decreased week by week as a function of the number of illegal sites making the film available and the number of unauthorised downloads that the studio measured with a third party consultant using web-crawling technology. The research was conducted across four major markets and the gathered data were analysed within an econometric model developed by the authors. The key conclusion arising from this study was that;

...the pre-release and contemporaneous Internet downloads of a major studio movie accelerated its box-office decline and caused the picture to lose about \$40 million in revenue. (p291)

If this conclusion represents even an approximation of potential box office revenue loss, then this would be a highly disturbing outcome. Whilst it is not within the competency of this thesis to comment on the relevance or suitability of the chosen statistical model developed by the authors, a number of observations may nevertheless be made about some of the assumptions underlying the model. First, the utility of the model depends upon the weekly revenue drop off rate at individual cinemas. The authors state;

If pirate copies take revenues from theaters, then revenue per screen would decline. This would lead theaters to drop the pirated film for a better prospect. (p293)

This statement leads to the plausible conclusion that, in the case of the film being studied, the rate of revenue decline over time is a proxy for the effect of illegal viewing. The broader conclusion is that films that experience pre-release leakage into illegal channels might be expected to experience a faster fall off rate than those that do not experience such leakage (presumably because potential paying viewers have watched the film illegally instead). The authors' statement, though, requires some analysis.

It is the present writer's experience, and confirmed through informal discussions with senior sales executives that the rate of box office decline is likely to be as much a factor of word of mouth and subsequent desire, or lack of desire, to see the film, as it is with the availability of illegal viewing opportunities. If a film receives poor word of mouth amongst consumers then, all things being equal, the fall off rate will be high. The opposite is also true. The rate of box office decline is also likely to be related to the number of cinemas actually playing the

film on the official release date. Drake (2008) notes that theatrical revenues in the 2000s are more 'front-loaded', earning the majority of the first two weeks. It thus appears to follow that a 'fall-off' rate will be much accelerated after this period. Acland (2008) similarly comments that rapid fall-off rates are attributed by many industry commentators to more saturated releases i.e. more screens on the opening weekend, and crowded release schedules. Average revenue per screen for a particular film, all other things being equal, will be the result of the interplay between availability and desire; a higher desire to see and a lower number of screens available on which to view the film will result in higher per screen average box office takings. Assuming the film has a high desire to see factor and a high number of cinemas actually screening the film, box office results in the very early stages of the release are likely to be high and then fall off quite rapidly since desire to see has been satisfied very early, irrespective of any illegal availability. Finally, it might be noted that all films behave differently and the findings of one study on one film are not easily transferable to other films³⁹. It thus follows that there are alternative possible explanations for the conclusions drawn by DeVany and Walls. Arguably, for the authors' conclusions to be more reliable, a number of 'control' films might have been useful.

A further underlying assumption made by the authors is that;

If the pirated copies are poor...and contribute to poor assessment of the movie...then word of mouth would have a negative effect on theatrical grosses.
(p293)

Again, feedback from experienced distributors suggests that this statement may be applicable to some films, though not necessarily to all. Given that pirated movies are likely to be those most in demand by the viewing public and highly marketed by their owners, poor word of mouth on either the quality of the copy or the film itself is unlikely to exert a deterrent effect over the choice of whether or not to see the film⁴⁰. For example, the interest in and desire to see the latest *Star Wars* film is unlikely to be materially dented by a friend saying that s(he) has just seen a pirated copy on the internet but that the quality

³⁹ The authors appear to have changed their mind since 1999 when they commented, 'Movies are complex products and the cascade of information among film-goers during the course of a film's run can evolve along so many paths that it is impossible to attribute the success of a movie to individual causal factors'.

⁴⁰ Although, the possibility has been put to the researcher that high quality pirated copies may make for good word of mouth.

wasn't very good. Interviewee Consultant 1 also suggested that people expect the quality to be poor for pirated copies, and there is a scale of desirability for pirate copies based on the quality. Within this perspective, the expectation and the delivery of poor quality might not necessarily be a negative factor for the film.

Whereas the authors provide an indication of the negative revenue effects of pre-release availability, it might be unwise to assume that their findings are generalizable without further replication by others. Indeed, the authors themselves concede that their study was 'based on...a single widely-released movie' (p300).

There are, though, further reasons why the authors' conclusions may be questionable. Although the film studied is not known (the authors state that it was a major wide release), there are examples of similar pre-release leaks. In 2009, a work print on DVD of the film *X-Men Origins: Wolverine* (a major wide release) was leaked and uploaded onto the internet. According to the distributor, 20th Century Fox, the film was downloaded about 4 million times. If one assumes that each download was watched by an average of 4 people, then 16 million people watched the film online. If one assumes further that as many as 50% of the unauthorised viewers would have bought a ticket, then a potential \$60m was potentially lost at the box office⁴¹. However, as has been noted, the MPAA also states that 80% of all piracy comes from international markets. So, using MPAA's own figures, a potential loss of \$12.5m in US theatrical revenue is a more justifiable figure. In reality it is unlikely that ticket sale displacement as high as 50% would be the case, meaning that potential box office losses would have been much less. More empirically, in a 2010 study for the International Chamber of Commerce, TERA Consultants suggest that the substitution rate on cinema ticket sales as a result of unauthorised viewing is 1 in 20. Applying this ratio to the above analysis, the assumed 'loss' of US theatrical revenue would only have been in the region of \$1.25m. The theoretical loss in this example does not compare to the \$40m finding of the above authors. Even though we do not know the film they studied, it appears to be unlikely that the real world effect on the film in question would be the amount claimed.

With the same research objective as the above study, Ma et al (2015) attempted to study the potential effects of pre-release and post-release availability of illegal viewing

⁴¹ According to the MPAA Theatrical Market Statistics Report, 2015, the average ticket price for US cinemas in 2009 was \$7.50

opportunities on box-office results, though adopting a slightly different methodology. In this case, the authors used data from a website that publicises the availability date for 'pirated' films (though makes no comment on actual download data). Then, using a sample of 475 films released between 2006 and 2008 inclusive, the authors also added such variables as production budget, star and director appeal, genre and rating. Further, they developed a statistical model that regressed box office results with illegal availability. From this, the authors concluded that pre-release availability reduced box office revenue by an average of 19.1% per film in their sample. A further significant finding from the research is that approximately 10% of films are available illegally prior to the legal release date. However, there are reasons to be cautious with such conclusions. Whereas the finding that 10% of films were available illegally prior to the legal release date may be a straightforward exercise (assuming the data accuracy of the data source⁴²) the more substantive conclusion that such leakage causes, on average, a potential loss of box office revenue of 19% is less clear cut. Unlike the data source used by De Vany and Walls (i.e. observable and measurable illegal activity from clearly identified websites), the present authors insert the caveat that they can only;

... *infer* the existence of pre-release piracy...we do not have information on the intensity or pre-release downloads of the pirated copies. (p262, emphasis added)

Whereas both studies point to potential box office revenue losses, although with different methodologies, they appear to lack the robustness from which to draw confident conclusions. Other studies, though, have reached opposing conclusions.

Adopting yet a further, though highly innovative, methodological twist, Strumpf (2014) compared actual box office results in the USA of films with unauthorised pre-release availability to the predictions of the Hollywood Stock Exchange (HSX) – an organisation that predicts box office performance and film stock prices – for the period 2003-2009. Claiming that HSX has a track record of accurate forecasts Strumpf's research concludes that file sharing has only a modest effect on box office revenue. Specifically, the study found that over the period of research file sharing displaced legal sales by between \$200-300 million, or 0.3% of all expected (HSX predicted) revenue. (Media reviews of these research findings

⁴² Vcdquality.com

also comment that over the same period, the MPAA is estimated to have invested over \$500 million in copyright protection measures⁴³). Again, there are reasons to be sceptical about Strumpf's conclusion.

Estimates of a film's potential revenue (similar it might be imagined to a musical work or a book) are presumably based upon comparisons of the results of similar films in terms of stars, director, genre, subject matter and budget, among other factors. If one accepts that all films used within the comparison base had themselves experienced piracy displacement effects, then such effects would necessarily have been discounted in the revenue estimates of the target films. Assuming that HSX's estimates are otherwise accurate (and Strumpf states that HSX has a track record of accurate forecasts) then it is not surprising that he finds no negative effect⁴⁴.

Numerous other studies have reported findings of a very small infringement effect. Rob and Waldfogel (2015) concluded that unpaid consumption reduced potential revenues by 3.5%, based upon a self-reporting study involving 500 USA college students. Moreover, in a French study involving students, Bounie et al (2006) found that whilst 'piracy' had a strong negative impact on video [purchases] it had 'statistically no impact on box office revenue' (p25).

A further indication of the lack of confidence in the negative effects of file-sharing on box office revenues may be found in research by Zentner (2012). This author's research correlated the growth of file sharing and the growth of high speed internet penetration across a number of countries with the rise or fall in box office revenues. Whereas his findings led the author to conclude that file sharing displaced hard copy sales substantially, he did not find 'conclusive results on whether or not file sharing decreases the theatrical performance of movies...' (p4). A similar conclusion was reached by McKenzie and Walls (2016). In a study of the box office displacement effects of file sharing in Australia, the authors found a statistically significant though relatively small effect, leading to the conclusion that displacement effects are very small.

⁴³ See for example <http://www.trademarksandbrandsonline.com/news/online-file-sharing-has-little-impact-movie-revenue-report-claims-4020> and <https://torrentfreak.com/files-sharing-doesnt-hurt-box-office-revenue-research-finds-140715/>

⁴⁴ Regarding the accuracy of box office forecasts, DeVany and Walls (1999) commented that '...revenue forecasts have zero precision. In other words, Anything Can Happen. p 285

Such a disparity of findings demonstrates that the task that these researchers set themselves is complex; the determination of a 'displacement' effect is not straightforward. The disparate range of methodologies utilised, the reliance on self-reported data, the lack of an agreed research paradigm and, arguably, the lack of any deep insights on the part of the researchers into how the film industry actually works, all combine to suggest that research into the potential effects of infringement on industry revenues lacks a degree of reliability⁴⁵.

Because of the equivocal nature of these research findings, it is not possible to reject the null hypothesis – that illegal activity has no statistically significant effect on industry revenue. Rather, they can only suggest that revenue losses are likely to occur, even if a reliable quantum does not emerge from such research. Their value as evidence that the industry is in severe trouble is thus dubious.

The examination of alternative datasets may yield additional perspectives on the matter.

2.7 Industry statistics

The plausible acceptance that revenue losses may in fact occur, even if unquantifiable in any reliable manner, does not allow the drawing of a conclusion that the industry is under threat, even to the extent of material damage. Further examination is required. The hypothesis under question may also be examined with reference to industry statistics. The prediction of such a hypothesis would be that, due to illegal activity, industry revenues are being damaged to an extent that potentially renders the industry unsustainable.

Fortunately, the film industry, both in the UK and worldwide, is heavily measured, generally by outside consultants, and relevant and uncontroversial data is plentiful. The examination of such data yields a number of interesting findings. First, Table 2 displays UK cinema admissions and box office trends over the past decade.

⁴⁵ During a 2010 interview with Vice Magazine (vice.com, August 1 2010) a senior RIAA board member stated the RIAA didn't try to calculate potential losses for illegal downloads as it was 'very difficult to calculate the displacing effect of illegal downloading'. Unempirically, one might suggest that this statement was encouraged by the failure of MPAA to provide a credible and reliable measurement of 'loss' through its own research.

Table 2.1 UK cinema admissions and gross box office receipts 2006-2015⁴⁶

Year	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Gross Box Office (£m)	762	821	850	944	988	1040	1099	1083	1058	1236
Admissions (m)	156	162	164	173	169	172	172	165	157	172

Source; BFI Yearbook 2016, based on data collected by Rentrak

Over the past decade, UK paid admissions to cinemas have risen from 156 million in 2006 to 172 million in 2015. Whereas the data suggest that admissions have reached a plateau, box office receipts have risen from £762 million in 2006 to £1.236 billion in 2015. Clearly, the data suggest a high degree of box office price inflation (average ticket price of £4.88 in 2006 compared to £7.18 in 2015), although it is quite reasonable to conclude that, whatever else may be occurring in the market, the UK public still retains a strong propensity to go to the cinema and pay for tickets. Whereas there may indeed be an ‘infringement’ effect at work, these data do not provide evidence of a serious negative effect.

Second, the position in the USA is similar, as demonstrated by the data in Table 2.3.

Table 2.2. USA Cinema admissions and box office receipts 2006-2015⁴⁷

Year	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Gross Box Office (\$billion)	9.2	9.6	9.6	10.6	10.6	10.2	10.8	10.9	10.4	11.1
Admissions (billion)	1.4	1.4	1.34	1.42	1.34	1.28	1.46	1.34	1.27	1.32

Source; Theatrical Market Statistics 2015, MPAA

Again, these data suggest that admissions in the USA have reached a plateau, although box office has risen a little over the decade, if not as much proportionately as in the UK.

However, there is no discernible downturn, especially one that might suggest that the industry is in any sort of terminal decline.

Third, data for the international markets (i.e. the world excluding the USA), are as follows.

Table 2.3. International box office receipts 2011-2015

Year	2011	2012	2013	2014	2015
Box Office (\$ bill)	22.4	23.9	25.0	26.0	27.2

Source; Theatrical Market Statistics Report 2015, MPAA

⁴⁶ In film industry statistical reports, the UK includes the Republic of Ireland as both countries are administered from the UK.

⁴⁷ Likewise, for the purposes of reporting, the USA includes Canada.

Again, the data above suggests steady growth, stability and health. However, when drilling down into these figures, a number of interesting pointers emerge. First, the region experiencing the greatest growth is Asia Pacific where box office receipts have increased by 56% over the period. Second, China is now the largest international market, with 2015 receipts of \$6.8 billion, compared to the third largest market, the UK, with \$1.9 billion. The interesting fact to be gleaned from these data is that the largest growing market, Asia Pacific – especially China – for legal purchases is also regarded as the largest region for illegal consumption⁴⁸.

2.8 Discussion of research into revenue effects

This section has examined the notion that the present level of copyright infringement is damaging the industry, even to the extent that its future may be in doubt. In order to examine this proposition, the results of both industry and academic research have been presented and discussed. Further, a range of reliable industry statistics have been introduced to the debate as they help illuminate the issues being discussed. Acland (2007) has noted that ‘...movie going has been battered for years, often with popular and industry critics alike becoming Cassandras to hear the imminent burial of this beloved practice’ (p83). However, such dire predictions are not borne out by the data presented here. The overall result of this examination suggest that far from being damaged, and being in a terminal state, the industry is in fact growing, more people are watching films in cinemas internationally and that there still exists a propensity on the part of the film watcher to pay for the experience. The brief methodological critiques of the available industrial and academic studies presented above, however, should not be taken to mean that potential revenue losses due to copyright infringement do not actually exist. Rather, they merely suggest that the losses may not be as unequivocally calculable as the various authors imply. What is at stake is the quantum of the losses, and these studies, arguably, can only hint at, rather than specify, what they might actually be. Indeed, interviews and discussions with experienced industry executives confirm that, whereas they truly believe that losses do occur, they have little faith that such research can demonstrate them in any accurate or robust manner.

⁴⁸ See the MPA report at 10 above.

Further, taken together, none of the studies, nor the industry statistics provide any clear cut evidence to suggest that the industry is being damaged, at least at the level of analysis used here. Whereas it is intuitively plausible to accept that revenues are damaged in some way, such potential losses do not appear to be on a sufficient scale to be causing any observable damage, or are at least factored into industry practitioner's budgets and operations.

As revealing as these industry data are, they do not address the counterfactual question of what they might look like *absent* unauthorised consumption. The industry may indeed be even healthier and developing more strongly than present data suggest. One might imagine what the global picture might be without the assumed high levels of infringement in such markets as Russia and, importantly, China⁴⁹. Arguably, though, it may matter little whether the research data are correct, or even anywhere near correct. The fact remains that evidence points to at least *some degree* of potential revenue loss and this in itself may be all that is required to justify the industry's investment in anti-infringement activities and relevant organisations.

If the research and data presented above provide no clear-cut and overt evidence of negative infringement revenue effects, might further research uncover some hidden effects? The next section will examine the data and evidence regarding creativity and culture within the film industry.

2.9 Does copyright infringement affect the creative and cultural output of film and cinema companies?

The origins of copyright laws have at their heart the utilitarian notions of the encouragement of new works and the appropriate reward to the authors of such new works such that incentives for creativity and innovation obtain. For example, the 1710 Statute of Anne vested copyright into the hands of authors rather than publishers in an attempt not only to adequately reward authors, but also to act as an incentive for further works that might add to public learning and the availability of knowledge (Deazley, 2006). Similarly, the 1790 US Copyright Act spoke of protecting authors with a period of monopoly while the public get access to new works and make free use of contained facts, data and ideas

⁴⁹ The L.E.K. report suggests that infringement rates in Russia and China are 79% and 90% respectively. Although the findings of this report have been called into question, infringement at even half these rates might be regarded as significant.

(Vaidhyathan, 2001). Although some authors have been critical of certain aspects of copyright law and their stifling effect on, rather than their encouragement of, creativity⁵⁰, the implication of such utilitarian objectives is that without adequate protection, authors would have little incentive to create and the public would lose the opportunity to experience new and innovative works. Whereas a discussion of the merits and demerits of the effect of copyright law on creativity is beyond the scope of this thesis, they serve as a useful framework within which to view the film industry-based findings of research discussed below.

The application of the copyright protection/creativity nexus to the modern-day film industry implies that without adequate protection, the incentives to produce motion pictures would diminish, leaving the cinema-going public with an inadequate choice of content and fewer establishments in which to view whatever was on offer. The following sections will examine the claim that copyright infringement is, or potentially may be, adversely affecting creativity and film and cinema culture. First, it will address the question of what 'culture' actually means within the industry in general and to cinemas specifically. Second, having isolated a number of key 'cultural' factors an examination will be carried out using appropriate industry statistics and current economic activities within the industry to determine whether any evidence of cultural attrition may be found.

2.10 The nature of film and cinema culture

Culture has a myriad of meanings, and is difficult to define in a manner that will attract broad agreement. In general, it is accepted to encompass a set of beliefs, behaviour patterns, tradition, ideas and ideas that are manifested in artefacts and created arts that differentiate one group from another. It has to do with identity, perception of others and is contextually derived⁵¹. Culture is also deemed to be an inherited construct and set of behaviour patterns that are passed from one generation to another and only gradually amenable to change. In fact, such are the various interpretations of the concept of culture that Spencer-Oatey (2012) has compiled a comprehensive description of culture across a range of domains.

⁵⁰ See Ghosh, 2002, for a review of alternative approaches to copyright law and its effect on creative output.

⁵¹ In the sense that it has different interpretations and applications within different domains e.g. psychology, language, business, organisations etc.

Within the film industry, however, there are a number of views on what 'film culture' incorporates. According to its 2010 Annual Report the now defunct UK Film Council (UKFC), its key aims were;

To ensure that UK audiences can enjoy great films. We do this by nurturing our film talent, assisting our film industry, celebrating and safeguarding our film culture (p9).

Further, its CEO stated a core aim as being;

...to stimulate a competitive and vibrant UK film industry and culture, and to promote the widest possible enjoyment and understanding of cinema throughout the nations and regions of the UK. The UKFC has a mandate that spans cultural, social and economic priorities (p6).

A further sense of what actually comprises film culture may be seen in a 2012 wide-ranging review on film policy in the UK in which the Department for Culture and Sport (DCMS) noted that;

There has been an explosion in home entertainment and multi-platform viewing possibilities. The widespread use of the internet has made both legitimate and illegitimate activity manifestly easier. There has been a growing appreciation of the importance of copyright and intellectual property protection in helping to stimulate growth in the creative sector (p5).

The implication here arguably is that the opposite, infringement, would damage these objectives. Regarding opportunities to view film the report notes that;

The value of the sector needs to be understood in social and cultural as well as economic terms. Alongside local libraries and post offices, cinemas offer a communal space, enjoyed by a wide cross-section of local residents, particularly in deprived and rural neighbourhoods (p29).

Likewise, in its 2012 5-year business plan, the BFI sees part of the cultural role of film as 'Expanding education and learning and boosting audience choice'. It goes on to discuss the role of film as;

...having the power to transform the way we see and understand the world. Our aim is to ensure that everyone, wherever they live, can develop a lifelong relationship with film (p13).

These sentiments echo those to be found in a 2005 UKFC study on the subject of local cinemas which notes;

...the overview demonstrates a wide range of positive impacts local cinemas have on their communities. The venues foster a sense of place and provide a focus for the local community, whilst enhancing local cultural life through the provision of mainstream and/or specialised film (p3).

A reasonable distillation of these views might revolve around issues of film diversity (i.e. not just Hollywood mainstream and genre-specific films), creativity, nationality, and access to a range of cinemas providing broad geographic opportunities to view⁵². Interviews with senior commercially –focused UK industry executives reveal, perhaps surprisingly to the outsider, that they regard the availability of a wide range of film and a variety of cinema types as essential to the long-term health of the industry and thus reflect the views of more culturally orientated commentators⁵³.

2.10.1 Cultural concepts within the film industry

The defining and measurement of culture is challenging, subjective and elusive. A number of theorists and researchers adopt a sociological approach to the study and measurement of cultural constructs (Grindstaff et al, 2010). Empirical (qualitative and quantitative) attempts to date have normally revolved around specific types of culture e.g. individuals and behaviour in (normally commercial) organisations⁵⁴. Few, if any, attempts have been made to elucidate, define and measure what might be construed as non-organisational cultural constructs within the creative industries. A number of authors see film and other creative

⁵² Whilst at UKFC the writer and colleagues summarised their aims as providing ‘...a wider range of films in a wider range of cinemas’.

⁵³ Surprising in that such executives might not be expected to have such enlightened views. In reality, major distributors and exhibitors recognise that the long-term health of the industry, and thus their careers, depend upon a continual flow of individuals interested in seeing films at a cinema. As such a habit is thought to be formed at quite an early age, new generations of cinema-goers need to be nurtured via access to film and cinema whether they live in large urban communities (where supply is ample) or smaller, suburban and rural locations (where supply is sparse). Such enlightened views might thus be regarded as protective rather than purely ‘cultural’.

⁵⁴ Such studies are normally carried out by commercial (usually US) organisations. See www.culturelq.com as an example.

outputs as the starting points for further discussion and the development of new ideas. Lessig (2008) for instance posits the existence of a 'remix' culture and discusses how earlier ideas can be adapted to produce new interpretations. Rather than attributing copyright infringement as a block on new works, the author regards copyright laws themselves as a key inhibiting factor. Similarly, Cummings (2013) differentiates between the concept of 'stealing' someone else's work and the 'essential right of the public to build and evolve its own culture'. Whereas some authors have critiqued the idea that copyright protection laws assist in the development of new works (Lessig, 2004, Ghosh, 2002), Mason (2008) envisages piracy as essentially an example of youth culture challenging and changing conventional business models and where remix culture is 'changing the way production and consumption are structured, rendering the nineteenth-century copyright laws we use obsolete'. Levine (2011) goes even further in suggesting that the internet itself, rather than its illegal use *per se* threatens the survival of culturally based businesses, a sentiment shared by Andrew Keen (2007).

Such approaches to culture within the creative world are essentially dialectic and invite further discussion about the nature of copyright and the legal protection currently afforded. However, the approach taken here is pragmatic and attempts to identify a number of key cultural elements (as suggested by appropriate industry and governmental bodies), decide what they mean in practical terms, and then to seek the most appropriate analytical dataset with which to analyse them. Further, in an attempt to shed light on the questions of whether the measurable variables have changed over time, they will be assessed over a 10-year time frame.

The key elements that this thesis will regard as major contributors to film and cinema culture are: a diverse range of films; the total quantity of available films (from both studio and independent sources); access to a range of cinema types; and, employment levels. These might be regarded as the necessary conditions that foster and maintain the cultural behaviour of 'going to the movies' (Maltby et al ,2007). Quantitative examination of these variables over time might serve as a starting point for any discussion regarding potential 'cultural' damage caused by illegal viewing.

2.11 Analysis of industry data

The fact that the rise in cinema admissions and spending on cinema visits suggest a positive and healthy industry has already been discussed. However, in order to inform the present discussion, data regarding the cultural contributors noted above will be presented and discussed.

2.11.1 Film availability

The total number of films released per annum in the UK over the past decade is shown in table 2.4. These data demonstrate that the number of films released over the period rose from 500 in 2005 to 759 in 2015, a 50% increase.

Table 2.4. Number of films released in UK cinemas 2006-2015⁵⁵

2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
500	515	527	503	557	558	647	698	712	759

Source; BFI Yearbook 2016

These data do not suggest any diminution in the availability of film content. However, such broad data informs little about the question of choice, diversity and availability. A more detailed picture needs to be examined.

2.11.2 Film diversity and breadth of choice

Whereas the above dataset suggests a significant increase in releases over the past ten years, they do not, as they stand, suggest anything about the *type* of film released. A deeper examination is thus called for.

The meanings that the industry attaches to these variables revolve around the notion of genre, differentiating between mainstream and specialised and/or arthouse films, the latter being usually (though not exclusively) produced and distributed by the independent sector. These films are characterised as being: difficult to place in a specific genre; of difficult or more challenging subject matter; generally low budget (in both production and marketing); and, generally released on a relatively small number of screens at any one time. They may

⁵⁵ A release is normally defined by the industry as a film that played in at least one cinema for at least one week.

also include documentaries and foreign language films⁵⁶. For an infringement effect on film choice to be apparent, one might expect to witness a decrease in the number and types of films released over the past decade - bearing in mind that this period equates to a large increase in internet availability and usage.

According to data collated by the BFI, the quantity of non-mainstream films released over the past 10 years was as follows;

Table 2.5. Diversity of films exhibited in UK 2006-2015

Genre	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Documentary	34	36	49	56	58	68	86	89	98	117
Foreign language*	171	170	188	161	199	180	230	279	255	277
Re-release (archive)	25	29	26	25	28	31	34	42	49	38
Other specialised	73	109	97	117	88	88	100	70	87	52
Total	302	344	360	371	373	367	450	480	489	484

*Source; BFI Yearbook 2016 *38 different languages represented*

If one element of film and cinema-going culture in the UK is defined by and dependent upon the range and diversity of films available for the public to view, then by the measures presented here the cinema-goer is well served. The availability of films that might be described as outside of the mainstream has risen consistently over the past decade, with 484 released in 2015 compared to 302 a decade earlier. Analysis of box office data demonstrates that the types of films represented here perform disproportionately (66% of releases vs. less than 10% of total receipts) although such a finding does not support a basic proposition that the range of films available to UK cinema-goers has been affected by any obvious illegal activity in the market. Culture, partly defined as diversity, remains strong. Further insights into the question of film choice, diversity and availability to audiences may be gleaned from the data contained in Table 2.6.

⁵⁶ The description of 'specialised films' given here was developed by the present writer and colleagues at the UKFC in the early 2000s.

Table 2.6. Box office share of films by country of origin released in the UK 2006-2015

Country of origin	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Europe	1.2	1.8	2.3	1.2	2.1	1.7	4.8	3.0	4.9	2.4
UK (Independent)	4.7	6.8	5.7	8.2	5.4	13.1	9.3	6.6	16.1	10.5
UK (USA studio financed)	14.4	21.8	25.4	8.5	18.6	22.5	22.8	15.5	10.7	34.2
USA	77.1	67.7	65.2	81.0	71.8	60.9	61.3	72.7	65.8	51.1
(USA Total)	91.5	89.5	80.6	89.5	90.5	83.4	84.1	88.2	76.5	(85.3)
Rest of world	2.5	2.1	1.7	1.2	2.1	2.0	1.8	2.1	2.6	1.8
Total	100	100	100	100	100	100	100	100	100	100

Source; BFI Yearbook 2016

Examination of this dataset yields a number of findings. Films financed by the USA studios have lost a little of their market share over this period (85% in 2015 vs. 91% in 2006) whereas UK independently produced films have increased their share from 4.7% in 2006 to 10.5% in 2015. Films from other parts of the world have also seen a small increase in their market share. Based on these data, it is hard to conclude that copyright infringement has in any observable way had a detrimental effect on the production and distribution of non-mainstream film – those that might be defined as more diverse in their subject matter. Drilling down even further BFI data demonstrate that the market penetration of purely ‘specialised’ film (as opposed to more mainstream independently produced films) rose from 58% to 64% in terms of actual releases and from 5.9% to 9.5% in box office performance⁵⁷ – again suggesting that this sector of the market is growing rather than shrinking.

There is though, a further cultural dimension that these data hint at – employment. Table 7 suggests that there has been a shift in studio production from the USA to the UK (as suggested in the market share of USA financed films made in the UK). Whereas such films as the *James Bond* and *Harry Potter* series were always made in the UK, Government tax incentives have encouraged the production in the UK of such other studio product as *Star Wars*, *Guardians of the Galaxy*, *Gravity* and others. Whereas these latter films may not be regarded as ‘cultural’ in any sociological sense, they have contributed to a cultural environment for film production that, according to the Department for Culture Media and Sport (DCMS) has seen inward investment for film production rise from £183 million in 1994

⁵⁷ A high point was reached in 2011 with a box office share of 16.4%, most likely due to the success of the documentary *Senna* which alone earned over £3 million at the UK box office.

to £1,177 million in 2015⁵⁸. At the same time, according to the BFI 2016 Yearbook, the number of those employed in the UK film and television industries has risen from 37,000 in 2010 to 66,000 in 2015⁵⁹.

2.11.3 Exhibition

So far, this examination of the potentially harmful effects of copyright infringement has focused on films themselves in terms of diversity of supply, local production and the propensity of audiences to watch films other than mainstream ‘blockbusters’. A further important field of examination is the exhibition sector. It will be recalled that both the DCMS Film Policy Review and the stated objectives of the BFI share the view that a vibrant and diverse cinema establishment is an important factor in helping to shape the cultural landscape for film. From this, it might be suggested that illegal activity would be damaging to such a landscape, and thus detrimental to film culture overall. This section examines the current exhibition landscape in the UK and provides such evidence as may be available from which a number of conclusions may be drawn. As such it will focus on both cinema establishment, screen diversity, and on investment and market activity.

2.11.3.1 The broad picture

According to UKCA in 2016 the UK had 788 cinema locations with almost 4000 screens. This compares to 697 sites and 3440 screens ten years earlier, demonstrating a growing market. The BFI breaks these numbers down in a more detailed manner, differentiating between multiplex and more traditional cinemas (generally owned by a mix of independent commercial operators, publicly owned cinemas (e.g. by local councils) and other publicly-supported venues (e.g. Showroom Sheffield).

The data in table 2.7 clearly demonstrate a significant growth over the past 10 years; whereas, the largest growth is seen within the multiplex sector, other cinema types have increased their footprint, although by a smaller amount. Moreover, the same source demonstrates that although the majority of cinema screens are located in major metropolitan areas, a significant proportion are located out of town, in suburbs and in more

⁵⁸ Reported by the British Film Commission. Accessible at <http://www.britisgfilmcommission.org.uk/uk-high-end-tv-soars-as-film-production-tops-1bn-for-second-year/>.

⁵⁹ BFI Statistical Yearbook, 2016.

rural locations. In addition, the BFI states, ‘...augmenting commercial cinema is a thriving voluntary sector in film exhibition, and film society admissions are highest in areas less well served by multiplexes’.

Table 2.7. UK cinema screens by type, 2006-2105

Year	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Multiplex Screens	2512	2578	2689	2735	2767	2883	2851	2924	2959	3096
Independent and other	928	936	921	916	904	934	966	952	950	950
Total UK Screens	3440	3514	3610	3651	3671	3767	3817	3867	3909	4046

Source; BFI Yearbook, 2015

This latter statement is interesting in that it suggests social and cultural access to cinema is not totally geographically limited and that sufficient local interest exists to make such venues viable⁶⁰.

Importantly, though, the data demonstrate that, whatever other disruptive activities may be occurring, there is sufficient faith in the market for organisations and individuals to invest significant sums in building and developing cinemas.

Such faith is demonstrated by three major recent developments in the UK market.

2.11.3.2 Recent investment activities

(a) Odeon Cinemas

Odeon cinemas, the largest operator in Europe with 2,236 screens across 5 countries was recently purchased by AMC Entertainment⁶¹ for a reported £921 million. Odeon operate major multiplexes and concentrate on mainstream, usually USA, product as their mainstay. In other words, their contribution to film diversity is less marked. Their contribution to access and opportunity to view film though is vital. Whatever the perceived contribution such a company may or may not make to film ‘culture’, such an investment clearly suggests

⁶⁰ Such a conclusion might be tempered, however, with the fact that audiences for such venues are generally thought to be older and, at least theoretically, less likely to turn to illegal viewing in the absence of adequate legal options. Younger residents may be more active in this regard.

⁶¹ A USA cinema company owned in turn by Chinese conglomerate Dalia Wanda Group. AMC is also currently in discussions regarding the purchase of another US cinema company, Carmike Cinemas for a figure reported to be \$1.1 billion.

that there is no belief that illegal activity is materially damaging the sector and reducing the opportunities for individuals to view film.

(b) Everyman Cinemas

Unlike Odeon, Everyman is a smaller, privately owned cinema chain that has quadrupled in size over the past five years, via the purchase of other cinemas and the building of their own⁶². It is actively seeking to purchase older, even defunct cinemas from other operators and is concentrating on sites in smaller locations and often out of town. Everyman's programming policy is mixed i.e. a varied offering of mainstream and more specialised film and, according to its CEO, an experience that differentiates itself from the regular multiplex. Everyman has been able to accumulate a 'war chest' of over £20 million in investment for expansion and is currently capitalised at over £50 million.

Although a much smaller company than Odeon, Everyman, and its investors, have demonstrated a similar faith in the continuing health of the market, and would not appear to regard any ongoing illegal activity as materially damaging to its long term future.

Other examples exist of smaller, independent cinema companies investing in expansion, with financial backing from both banks and other financial institutions. Such investment suggests that any perception of the potential effects of unpaid, illegal film-viewing is not sufficient to deter investment in the future of cinema⁶³.

(c) Vue Cinemas

It was reported on July 18 2017 that Vue Cinemas would likely be put up for sale at £1.6 billion. As the management own 27% of the company, they are in line for a windfall pay-out of some £400 million collectively⁶⁴.

None of the above financial stories indicate an industry in trouble.

Thus far, industry data has been presented in an attempt to demonstrate that, despite the level of illegal viewing activity in the market, no significant damage to either film or cinema

⁶² An example is the Everyman Cinema in the Leeds Trinity Centre.

⁶³ The newly opened Light Cinema in Sheffield's city centre is recent example of expansion from an independent cinema company.

⁶⁴ Announced in the Daily Telegraph 18 July 2017.

availability is clearly discernible. One further sector remains to be discussed. Production lies at the heart of the industry and without which there is no industry at all.

2.12 Production

It has been suggested that film and cinema culture may be seen as lying within a number of empirically measurable factors. An examination of industry statistics suggests, at least in any clear and observable manner, that the rise in local and international cinema admissions, coupled with a rise in available films and cinemas within which to view them do not suggest that copyright infringement has or is currently harming the environment within which film and cinema culture might be said to exist.

The reference to the rising number and variety of films that might be thought to reside within a more cultural domain and available for viewing in cinemas, though, is not really surprising for a number of reasons. First, such films tend to be of lower budgets, more challenging in their subject matter and may be said to appeal to a smaller section of the audience than their more mainstream counterparts. The increased use of digital in making such films more cheaply than the former analogue process increases the opportunities for such films to be produced. Second, the more specialised the film, the less chance exists that illegal operators will wish to access them since the market is small and will thus yield poor returns; the risk-reward ratio is not worth the effort⁶⁵. A more fruitful approach towards the detection of a possible ‘infringement’ might therefore lie in an examination of a large, high budget production within the, generally studio-based, mainstream sector.

2.12.1 ‘Hollywood’ studio production

According to the MPAA’s 2015 report *Theatrical Market Statistics*, its studio members and their affiliated subsidiaries⁶⁶ released 147 studio-financed productions in 2015 compared to 204 in 2006 – a reduction of 28% over the decade. At the same time, non-MPAA members (i.e. independents) increased their output from 390 to 561 – an increase of 44% over the same period. Despite this, data from Box Office Mojo demonstrate that the studio share of

⁶⁵ An exception to this proposition may be the release of the romantic comedy *And Then Came Lola*, a small LGBT orientated (\$250,000) budget film that was uploaded to a number of unauthorised websites. Its controversial poster was banned by Facebook on the basis that it was ‘overly explicit, provocative and...revealed too much skin’. Some people may have thus thought it was pornographic.

⁶⁶ For example, Fox Searchlight is a subsidiary of Twentieth Century Fox

USA box office has remained steady at around 80%. On first analysis, these figures are somewhat perplexing; output has dropped but share has remained constant – even in a rising market. It might also be remembered that illegal activity is aimed in the main at these types of film. The extent to which major Hollywood films are targeted by both the operators of illegal sites and their users may be demonstrated by the following data.

Table 2.8. Top 10 most illegally downloaded films in 2015

Film	Illegal Downloads (million)	Studio/Distributor	Estimated Production Budget (\$m)	Reported Worldwide box office \$m
Interstellar	46.8	Paramount/Warner Bros	90	675
Fast and Furious 7	44.7	Universal	155	1,516
Avengers: Age of Ultron	41.6	Disney	267	1,520
Jurassic World	36.9	Universal	150	1,670
Mad Max: Fury Road	36.4	Warner Bros	150	378
American Sniper	33.9	Warner Bros	58.8	547
Fifty Shades of Grey	32.1	Universal	40	571
The Hobbit: Battle of The Five Armies	31.6	Warner Bros	250	956
Terminator: Genisys	31.0	Paramount	155	440
Kingsman: The Secret Service	30.9	20 th Century Fox	90	414

Source; Data collated by Excipio, published by Variety.com

The reduction in the quantum of Hollywood production over the past decade may be explained in a number of different ways. A copyright infringement argument might suggest that the reduction is due to the threat that illegal activity poses to large budget, mass-market, mainstream films than to other types of film. Studio output consequentially has reduced in order to lessen potential revenue losses and to put more effort into their protection. Equally, it might be argued that the observed reduction in the slates of US studios might be seen as a response to the downturn in in home entertainment revenue, leaving less money to be invested in production.

An alternative argument might be as follows. Whereas the number of films being produced has reduced, the production cost per film has risen. In order to attract both a domestic and international audience, films need to be bigger and better than the last one. In the digital world in which entertainment choices are vast, films must have attraction qualities that transcend pure story; they must be spectacular, effects driven and only truly appreciated on the large screen. Evidence that production costs per film have risen whilst overall numbers

have reduced may arguably be seen as risk-aversion with studios recent reliance on sequels, prequels and remakes. Equally, as pointed out by Buchman (2014), the cost of actually marketing a film can be so high as to equal almost 70% of the production budget⁶⁷. (A number of distribution interviewees suggested that on many occasions, the marketing budget equals 100% of the production costs). This explanation suggests that fewer but more expensive films are being made as a way to maintain the mass public's interest in and desire to go to the cinema, rather than being a result of copyright infringement. As studio lawyer 1 commented, 'Just because people steal Batman doesn't mean that we're going to stop making it'.

A final explanation may just lie in the way that production statistics are presented and analysed. The data noted above represented combined totals for the studios and their subsidiaries. Over the past decade, a number of major studios have gradually either closed or sold their subsidiaries, a fact that, all being equal, suggest that total production numbers attributed to them have reduced. However, that does not mean that the films have been 'lost'. Examination of MPAA data demonstrates that, while their members' output has decreased, that of USA independent producers has risen from 390 in 2006 to 591 on 2015. It is quite possible that the films that might have been made by studio subsidiaries are now actually made by the independent sector. Thus, in aggregate, overall output has not been affected, merely reassigned.

Whereas one might debate the concept of mainstream, Hollywood type films as in any way representing 'culture', their importance to the overall market place is important. Without a genre of film that sells around 67% of cinema tickets worldwide, there would be no cinemas – at least in the numbers and variety that exist today. As McDonald (2008) noted, 'Hollywood film today is as much a part of British culture as fish and chips or warm beer.' (p223). Indeed, the latest figures from the Office for National Statistics (ONS) suggest that the economic value of Hollywood production taking place in the UK in 2017 to date rose 8.2% year on year⁶⁸. Moreover, ONS data show that the economic value of the UK's film, TV and music industries has grown by 72.4% since 2014. It is these aspects of

⁶⁷ Eric Buchman, 2014, 'Why are movies more expensive than ever when tech makes them easier to make?'. Digital Trends, accessible at <https://www.digitaltrends.com/ericbuchman>

⁶⁸ Monthly economic commentary: July 2017. <https://www.ons.gov.uk/national-accounts/uksector-accounts/articles/monthlyeconomiccommentary/july2017>

Hollywood that are important to cinema culture and, as noted, the evidence that such culture is being damaged is scarce.

2.13 Discussion of industry data findings

This section has examined the proposition that copyright infringement in the industry damages its 'culture' and diverse creativity. Using such variables as diversity of film content, quantum of overall film choices available, and opportunities to consume film both geographically in a range of cinema types as proxies, it has presented an analysis of a number of appropriate industry statistics in an attempt to examine whether such a proposition has a basis in evidence. Since almost all measures demonstrate an upward and healthy trend, it concludes that evidence for copyright infringement as a damaging factor on film and cinema culture is lacking. However, a number of factors may militate against such a conclusion.

First, the approach to the definition of film and cinema culture has been a pragmatic one in that it has distilled a number of industry orientations towards the subject into a number of clear and measurable variables. A more sociologically orientated notion of culture may require alternative research and explanatory methods and yield different conclusions. Second, it has focused solely on the theatrical sector of the industry; it is known that the industry has experienced a significant loss of revenue from the DVD and Blu-ray sector over the past decade, revenue which has yet to be recouped through authorised digital sales and download channels.⁶⁹ A similar examination of this sector might yield totally different conclusions. Third, this chapter has focused on the UK, although international data have been introduced to provide additional contextual evidence. A close examination of further markets might be useful and informative. Finally, the research methodology adopted in this chapter does not answer the counterfactual question of whether the picture here presented might look markedly different in the absence of illegal activity.

The most that can be concluded here is that, on the basis of the chosen methodology, there is little evidence to suggest that copyright infringement is damaging film and cinema culture in the UK, and possibly elsewhere. As Lemley (2015) noted;

⁶⁹ According to industry analysts, IHS Technology, worldwide DVD revenues fell from an estimated \$19 billion in 2006 to an estimated \$10 billion in 2015.

‘Efforts to use IP to lock down the internet have so far failed to stem the unauthorized distribution of content. But contrary to the predictions of IP theory, the result of that failure has not been a decline in creativity. To the contrary, creativity is flourishing on the internet as never before, despite the absence of effective IP enforcement.’ (p460).

2.14 Conclusions

This chapter has examined the validity of a number of narratives that have emerged as a function of the perceived damage copyright infringement is exerting on the film industry. Despite the apparent rise in illegal activity over the past 10 years, and the generally dire and negative resultant narratives that have arisen, evidence to suggest that the industry is in decline, whether, financially, creatively or culturally is lacking. Whereas a number of studies reveal significant potential revenue losses, this thesis has questioned their credibility, methodology and underlying assumptions. Research results are at best mixed, equivocal and at worst unreliable, providing little compelling evidence to support any proposition that the film industry is being irreparably damaged. In contrast, examination of real world data suggests a healthy, growing and positive future, with sales, visits and cinema-infrastructure continuing to grow. Examples of continuing confidence in the health and growth possibilities in the industry have also been presented, leading to the conclusion that the industry is still a viable investment proposition.

However, a caveat regarding these conclusions should be noted. The data presented in this chapter relate to the UK and worldwide theatrical market. Whereas this market provides film producers with the highest proportion of their revenues outside of Pay TV contracts, DVD and Blu-ray, despite falling revenues over the past decade, nevertheless represent significant revenue streams. These have not formed part of the discussion in this thesis. A similar analysis of the DVD/Blu-ray market may reveal a more damaging infringement effect. Notwithstanding any such effect, estimates for future worldwide revenues still stretch upwards, with the consulting firm PricewaterhouseCoopers (PwC) estimating that global box office revenues will rise from \$38 billion in 2015 to \$49 billion in 2020⁷⁰.

⁷⁰ As reported in statistica.com, 8 September 2016. A private estimate from an eminent industry analyst is \$46.7 billion suggesting a reasonable level of agreement about the future of cinema revenues.

Chapter 3

Legal, operational and voluntary measures adopted by the industry aimed at curbing copyright infringement

3.1 Introduction

The previous chapter suggested that the industry potentially suffers a degree of revenue loss as a result of illegal activities although potential revenue losses remain unquantified in any reliable manner. Nevertheless, the fact that a revenue effect of some amount is most likely to occur has motivated the industry to develop structures and to devote financial resources in attempts to mitigate the effect of illegal and unauthorised activity. This chapter will describe and comment on the legal and non-legal strategies that the industry employs in the protection of its product. Further, it will examine the findings of studies that have attempted to assess the effectiveness of the respective strategies. Finally, it will assess and comment on the stated positions of certain organisations that are basically opposed to a number of legal protection measures in an effort to determine the value of their arguments.

Again, the focus of this chapter will be on the UK experience, although international experience will be noted where appropriate and informative.

3.2 Legal measures employed by the film industry

3.2.1 Website blocking

Recognising the dramatic rise in the use of the internet and the ease with which illegal files may be uploaded and subsequently viewed, either for payment or in many cases for free, and the potential subsequent damage to copyright holders, the 1988 Copyright, Designs and Patents Act was amended in 2003. The amendment provided copyright holders with the ability to request the courts to provide injunctions against the largest internet service providers (ISPs)⁷¹ to block users' access to certain websites that, based upon evidence

⁷¹ These include: BT, Sky, EE, Virgin, and TalkTalk.

provided by the copyright holder, were either directly or indirectly infringing copyright. Section 97A (1) of the act states⁷²;

The High Court (in Scotland, the Court of Session) shall have the power to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright.

Since that time, major film companies based in the UK and other significant European markets have used this legal instrument to seek ‘website blocking orders’ targeted at a number of websites hosting illegal film content or facilitating the viewing of such material via, for example, P2P torrent type technology⁷³. The first use of this UK copyright law took place in 2011 in the so called ‘Newzbin2’ case in which Arnold J, ordered BT⁷⁴ to block access to the Newzbin2 site.⁷⁵ Since that time, some 135 infringing websites have been blocked by similar injunctions. These include such well-known sites as:

- The Pirate Bay
- Movie 2K
- EZTV
- Popcorn Time
- Solar Movie
- Megashare
- Moviez

The latest cases took place as recently as May 2016 when the courts ordered at least 8 sites to be blocked⁷⁶.

The practice of website blocking is of course not confined to the UK. All EU member states have an obligation under the European Copyright Directive (2001) to offer such protection

⁷² The Act was amended by the insertion of this section as a result of the EU Copyright Directive 2001/29/EC. Article 8(3) of the Directive provides that Member States shall ensure that right holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related work. The directive also requires member States not just to stop illegal activity but to take steps to prevent it happening in the first place. It also states that ISPs are ‘best placed to bring such infringing activities to an end’.

⁷³ For a technical discussion on P2P websites and torrent type technology see Site Blocking Efficacy Study, Incopro, 12 November 2014. http://incopro.co.uk/case_studies.categories/report-2/

⁷⁴ BT did not object and other major UK ISPs followed suit.

⁷⁵ This case followed a case in 2010 in which an infringing website - Newzbin1 – was closed down by the order of Kitchen J, (2010) EWHC 608 (Ch).

⁷⁶ The number of sites blocked by any one order is an important matter and will be discussed later when assessing the effectiveness of such orders.

to copyright holders. According to an internal MPAA report, EU member states have to date collectively obtained blocking orders for almost 750 illegal sites (including the 135 attributed to the UK). Notable examples include Italy with 267 sites blocked, France with 135 and Portugal with 200.

Leaving aside at present the question of whether such actions are effective in reducing opportunities for unauthorised viewing, it is useful to note the work that film (and by implication other creative industry) copyright holders undertake prior to a case actually reaching the court stage. Such investments in time and money by the industry go to the heart of the belief that, although not quantifiable, copyright infringement significantly affects revenue.

Prior to an application to the courts for a 'website blocking' injunction, copyright holders must demonstrate the existence of sites that host stolen content and that users are viewing such content without authorisation. In order to demonstrate this, companies use the services of internet brand protection and security organisations⁷⁷. According to a senior manager at one such organisation their role is to examine the internet for rogue sites, and measure the amount of illegal traffic. These data are then used as evidence and placed in the hand of the lawyer chosen to present the case at court. Whereas the actual cost of the evidence gathering process has not been specified, the cost of hiring the services of a lawyer, though, is well documented. A QC interviewee who handles the majority of film industry cases in seeking website blocking orders informed the writer that his fee for each website blocking application is £14,000⁷⁸. This figure is also confirmed by Arnold J in the recent judgment in the *Cartier* case⁷⁹.

It is interesting to note that such cases are invariably brought to the courts by MPA (representing the major studios) with little or no additional representation from independent UK based companies. The evidence placed before the court includes a list of those studio films that have been found on unauthorised websites, with little or no reference to independently produced or distributed product. On the one hand, one might regard this as being expected since the studio companies have more to lose than the

⁷⁷ Popular service providers include Incopro, Mark Monitor, Entura. All are used by various major film companies from time to time.

⁷⁸ One might imagine that the cost of an application for the blocking of 10 websites at one appearance would be scalable.

⁷⁹ *Cartier International AG and Ors vs. British Sky Broadcasting and Ors* [2014] EWHC 3354 (Ch)

independents. However, an alternative explanation might be that local independent companies do not (a) feel threatened by illegal activity or (b) are content to allow the studios to take the lead and place themselves under their protective wing. More prosaically, as MPAA is funding the litigation, independent companies may not feel inclined to use their own financial resources.

3.2.2 Website blocking activities in other markets

Outside Europe, examples of major markets with similar laws are sporadic. However, a number stand out as being interesting examples of the various approaches adopted by their respective Governments and courts.

3.2.2.1 USA

Despite attempts in the USA (the world's biggest market for film) to introduce legal measures designed to block access to infringing websites, no laws have yet been passed, nor does there appear to be any such prospect in the foreseeable future. In 2011 an attempt was made to introduce a Bill that, among other things, would provide for the blocking of websites by ISPs - the proposed Stop Online Piracy Act (SOPA). Despite support for the Bill by the US creative industries, opponents described the measures as a threat to free speech and claimed that the Bill would enable enforcement bodies to block access to entire domains, rather than being confined to individual websites. Citing threats to the First Amendment, opponents also claimed that such a law would 'begin an arms race of unprecedented internet censorship'⁸⁰. In 2012, Wikipedia and a large number of smaller websites went offline for a day in protest against the measures. Google and some others protested by posting anti-SOPA messages on their sites. To date, no attempts to re-introduce this, or an alternative, measure have been attempted.

However, cases have begun to emerge suggesting that websites do have a duty to protect copyright holders, rather than relying on the 'safe harbor' provisions of the Digital Millennium Copyright Act (DCMA)⁸¹. In a 2015 landmark case *BMG*, a US music rights protection trade body, sued Cox Communications, a major US ISP, for alleged 'contributory

⁸⁰ Letter from computer scientist, Vint Cerf, to Lamar Smith, Chairman of the Committee on the Judiciary. Dec 14, 2011. Available at <http://inforjustice.org/letter-from-vint-cerf-to-the-house-judiciary-committee-regarding-sopa>

⁸¹ Digital Millennium Copyright Act 1998 contains a provision (Section 512) that requires ISPs to send 'take down' notices to sites hosting or providing access to infringing content.

copyright infringement' by failing to act to send warning notices to those users that were discovered to have been sharing copyrighted music files via the ISP⁸². In finding that the ISP could not rely on the 'safe harbor' provision, since it had both knowledge of and evidence that its services were being used to infringe copyright, the judge found the ISP guilty and handed down a fine of \$25 million. Whereas such a judgment does not necessarily imply that web blocking laws may be forthcoming, it does suggest that US based ISPs, and presumably other internet intermediaries, have a duty to protect copyright material and take action against infringers when infringing activity on their network is brought to their attention.

3.2.2.2 Australia

Until very recently, Australia had no legal provision for copyright holders to apply for web blocking orders. Indeed, courts have even been reluctant to order ISPs to send infringement notices to users when such infringing activity was brought to their notice by copyright holders⁸³. In a further film related case, the Australian courts also blocked a producer from accessing the details of users that had been illegally viewing its film on the internet via BitTorrent unless it paid a substantial sum to cover the cost of obtaining the details of the alleged infringers⁸⁴. However, the legal landscape changed in 2015 when the Australian Government passed The Copyright Amendment (Online Infringement) Bill which enables copyright holders to apply for ISP web blocking orders. This brought Australian Law broadly in line with the UK and EU laws and a few other countries.

In February 2016, the first action under the new section 115A of the Copyright Act (1968) was undertaken by Village Roadshow and other copyright owners of films with an application for up to 50 ISPs to block access to the infringing site, solarmovie.ph and three other solarmovie domains⁸⁵. The blocking order was granted in December that year. During the same hearing, a Foxtel application for an order for ISPs to block access to a further 60+ primary and mirror sites, including The Pirate Bay, solarmovie and Torrenthound was

⁸² BMG Rights Management (US) LLC vs Cox Communications, Inc and Coxcom, LLC. Case No. 1:14 -cv- 1611 (LO_JFA)

⁸³ See Roadshow Films Pty Ltd v iiNet Ltd (2011) FCAFC 23 and subsequently (2012) HCA 16

⁸⁴ Dallas Buyers Club producers decided not to appeal citing 'commercial' reasons'

⁸⁵ Roadshow Film Pty Ltd and Ors v Telstra Corporation Ltd and Ors [2016] FCA 1503

granted⁸⁶. More recently, Universal Music Australia sought and was granted an injunction forcing ISPs to block access to the torrent site, Kickass⁸⁷.

3.2.2.3. Singapore

Pre-dating the Australian amendment by approximately 12 months, Singapore passed its own Copyright Amendment Bill in 2014, designed to give copyright owners a streamlined facility to block infringing websites. However, it wasn't until much later that MPA decided to test the law and bring its first application for a web blocking order – again against *solarmovie.ph*⁸⁸.

3.3 The effectiveness of website blocking orders

The extent to which such orders are or are not effective in their aim of reducing copyright infringement by users is a matter of some import. First, at a purely pragmatic level, copyright holders expend significant time, effort and financial resources in bringing such requests to court. Second, again pragmatically, copyright holders expect the outcome of such orders to have some effect. Third, given the way the relevant UK and European laws are framed, courts need to be confident that such an order will in fact be effective in preventing users from accessing the offending sites. Husovec (2015) notes that one of the 'floor' conditions contained within the InfoSoc Directive 2011 implies that injunctive relief available against intermediaries must be 'effective and dissuasive.' 'Effectiveness' is also one of package of necessary conditions contained within EU Directive 2004/48⁸⁹. Other conditions contained within Article 3 of the Directive include; fair, equitable, not unnecessarily costly, proportionate and dissuasive. 'Effective', though, is undefined. If one suggests that effectiveness might represent a continuum between not at all effective and totally effective, empirical evidence demonstrating at least partial effectiveness might suffice and meet a required standard. For example, in an appeal case concerning a website blocking injunction, the court commented that the results of blocking orders need not be completely effective, as long as they seriously discourage internet users from accessing the

⁸⁶ Foxtel Management Pty Limited vs TPG Internet Pty Ltd and Ors [2016] NSD 241 of 2016

⁸⁷ Universal Music Australia Pty Limited vs TPG Internet Pty Ltd [2017] FCA 435

⁸⁸ According to interviews with MPAA legal executives, they decided to bring the *solarmovie* case first, rather than more complex cases such as The Pirate Bay as they wished to test the courts in the first instance and get the courts 'used to dealing' with such cases.

⁸⁹ Directive 2004/48/EC on the enforcement of intellectual property rights (IPRED).

illegal website in question⁹⁰. Similarly, the CJEU questioned the potential effectiveness of a requested filtering mechanism from a copyright holder against an ISP when no evidence of effectiveness had either been presented, or indeed could possibly be presented⁹¹. In the UK, Arnold J commented that such orders have... 'proved reasonably effective in reducing the use of [sites blocked by S97A orders] in the UK'.⁹² On the basis of these two judgments, one is drawn to the conclusion that required level of 'effectiveness' might lie towards the lower end of the continuum⁹³.

The extent to which such opinions are informed by existing academic and industry research is not completely known, although the judge interviewed for this thesis referred to both sources. Interviews with studio lawyers suggest that equal regard be accorded to the same sources. MPA itself refers in its own internal research to that carried out by researchers at Carnegie Mellon University (CMU) (to be described below). If it is the case that both the industry and the judiciary draw a number of conclusions from published research, then an examination of this research is called for.

3.4 Industry research

The most referenced published industry research is that carried out by Incopro, an online security and trade mark protection organisation based in London⁹⁴. Based upon its own research Incopro concludes:

- (a) ISP site blocks have had a significant impact on all blocked sites analysed for the UK, with all categories showing a significant decline in usage.
- (b) On average, sites in the UK lose 73.2% of their estimated usage following a site block and maintain those levels consistently over time.

⁹⁰ UPC Telekabel Wien, Case C-314/12, 27 March 2014

⁹¹ Scarlet Extended SA Vs SABAM Case C-70/10 24 November 2011.

⁹² Cartier International and Ors and British Sky Broadcasting and Ors [2014] EWHC 3353 (Ch). This belief was again stressed to the researcher during a personal interview.

⁹³ An informal interview with a former 'pirate' viewer suggests that such laws are really no more than PR on the part of the film industry and parliament in that they exist just to show that 'something is being done'.

⁹⁴ Site Blocking Efficacy Study (2014). It might be noted that the managing director of this organisation is the barrister used most frequently by MPAA companies to represent them at UK website blocking court hearings.

- (c) When compared to the global control, changes in estimated usage for blocked sites in the UK track higher in all categories and show an overall decline in usage.

Whereas the conclusions drawn from this study are interesting and apparently significant, they inform little about any actual decline in unauthorised viewing. The mere decline in the availability of websites does not necessarily mean that such viewing has itself declined; users may simply have switched to alternative sites. As will be noted below, the act of switching to new sites, or the re-appearance of blocked sites under another guise is commonplace. What the study *does* demonstrate is that the law is effective in restricting access to certain unlawful websites, though not necessarily in curbing unauthorised viewing.

Describing website blocking as the key legal provision for copyright enforcement, a similarly positive picture emerges from the MPA's own legal department research summary. Noting that, as of 2014, it had been successful in the blocking of 735 sites in the European courts, it also refers to the Incopro findings. Much is also made of CMU research (to be described below) which, according to MPA, 'found that the blocks caused a meaningful percentage of users of the blocked sites to switch to legal alternatives (20/30%)'. Both of the industry reports and studies mentioned above adopt what might be termed as 'descriptive' approaches; they do not extend to the level of actual effectiveness at the consumer level i.e. the effect of website blocking on consumer behaviour.

3.5 Academic studies

Evidence of potential effectiveness at the level of consumer behaviour may be gleaned from a number of studies carried out by academics in the USA. Danaher et al (2013) performed a meta-analysis of literature published prior to that point. The authors' overall conclusion from their analysis was that;

...anti-piracy interventions can...serve as effective in increasing sales in legal channels by reducing the convenience, reliability and usability of pirated content relative to content offered in legal channels.

More specific studies have been carried out.

Danaher and Smith (2014) examined the effect of the closing of, 'Megaupload', a cyber-locker, and its related URLs⁹⁵. Looking at the effect of the closure across 12 countries, the authors conclude that;

...digital revenues for three major motion picture studios increased by 6.5-8.5%' ...our results suggest that some consumers will turn to legal channels when a major file sharing site is shut down, and by extension that illegal file sharing displaces digital movie sales.

Whereas this study examined specifically the effect of the Megaupload closure on the sales of digital sales, a further study across the same 12 countries on the closure of Megaupload examined the effect of the closure on box-office revenue. Peukert et al (2015) studied the results of over 300 theatrical feature films that were in cinemas both before and after the closure. Their conclusions suggest that whereas, collectively, box office revenues did not increase, the results for major releases that were playing on a large number of screens did experience an increase in takings. Conversely, smaller films saw revenues fall.

In a further study concerning the consumer effects of website blocking, Danaher, Smith and Telang (2015) examined the effect of website blocking when (a) one major site is blocked and (b) when multiple sites are blocked simultaneously. Their results lead the authors to conclude that, in the case of (a) migration to legal sites only caused a small reduction in piracy activity, whereas in the case of (b) usage of legal sites increased by 12% on average. In other words, making life more difficult for the consumer inhibits unauthorised consumption. The extent to which such an inhibiting effect has any lasting value, though, cannot be answered by such research methods. This subject will be discussed further below.

3.6 Discussion of results

Again, it is not the function of this paper to critique the analytical tool (econometric analysis) employed in these studies; the three noted works all lead in general to the same conclusion – that the inability to access unauthorised websites leads to reduced usage of those sites, and, under some circumstances, encourages consumers to migrate towards

⁹⁵ Cyber-lockers are cloud-based storage facilities that allow users to store data and media files. Often termed 'one-click hosts' (OCH) their content may be both legal and illegal. In fact, the Megaupload site was closed, rather than blocked. However, the site, Megashare that actually facilitated the downloading of content from Megaupload was blocked in the UK in 2014. Notwithstanding, the example serves as a reasonable proxy since in any case consumers could no longer access it.

legal sites. However, all three are disparate pieces of work, un-replicated, and based solely upon electronic observation rather than on any observed and quantifiable behavioural change. Moreover, the research infers, rather than demonstrates, such behavioural change and thus might be deemed to represent a 'snapshot' in time. Drawing further conclusions might therefore be a tentative exercise.

A more useful topic of discussion might concern the degree to which any observable change in consumer behaviour (i.e. switching to legal channels after access to notable illegal sites has been curtailed) might represent a permanent or merely temporary phenomenon. A more independent study may be found in a recent paper from the European Commission's Joint Research Centre which concluded in 2015 that enforcement strategies, including website blocking, have a 'significant but short-lived decrease' in piracy levels' (p22). The authors although state that alternative sources quickly rush in to fill the space of a blocked website and that the post shutdown market 'was much more fragmented, thus making it potentially more resistant to any future interventions'. These comments echo those of Orme (2014) whose US study into the effectiveness of anti-piracy laws found that the majority of legal measures are ineffective in the long-term. The author also concluded that those few measures that do positively impact revenues in the short-term may harm, rather than help film studios in the long term⁹⁶. The extent to which such actions are materially effective over the long term, thus, is at present unclear.

3.7 Other issues arising concerning website blocking

Discussions concerning the use of website blocking orders are not confined to effectiveness. Other issues have arisen that add further discussions points and serve to inform current thinking regarding their value.

3.7.1 'Whac-a-Mole'

Interviews with industry legal department executives reveal that whilst website blocking is a highly useful tool in their copyright protection armoury, the concept of 'Whac-a-mole' is well recognised. Just as in the child's game where the objective is to hammer down a peg

⁹⁶ The author's suggestion is that legal protection measures potentially harm box office revenues in that they prevent consumers from accessing illegal content and thus reduce the word or mouth from such viewers. The evidence he quotes in support for this conclusion is though scant (one study) and controversial.

before another one pops up, the player finds herself in a continual battle with re-emerging pegs, never being able to completely clear the board, website blocking is dogged by the continual emergence of new sites; some may emerge to take the place of a closed one, others perhaps were planning to open in any case.

Although not a direct comparison, the site, *www.newzbin.co.uk*, was closed down by the courts in 2010 rather than blocked. It soon re-emerged as Newzbin2 which in turn was blocked in 2011 under a Section 97A order – the first such case in the UK. A more direct comparison may be seen in the case of a trade mark infringing website, *www.ukmontblancoutlet.co.uk*. As this had a UK domain name, the Police Intellectual Property and Crime Unit (PIPCU) were successful in requesting the UK domain name registrar to suspend the account – without a court order. The next day, the operators of the original site opened a new site, *www.montblancoutletonline.co.uk*. Such examples, suggests the head of PIPCU in an interview, do indicate that there is a sort of ‘Whac-a-Mole’ phenomenon at work. The challenge, he suggests, is to ‘hammer down the sites faster than the moles can recover’.

This is made clear in the Incopro report referred to earlier. Despite the fact that the UK has been successful in blocking access to 135 sites, the report estimates that there are a further 500+ sites to be tackled.⁹⁷

3.7.2 Website blocking and circumvention

By far the largest volume of comment from both within the industry and without relates to the ease with which dedicated users of infringing sites can circumvent blocked sites and access them via such technical means as virtual private networks (VPNs) and proxy servers that mask the users’ IP address and hence his or her domicile⁹⁸. The ease of such circumvention was underlined by an appeal court judge in the Netherlands who dismissed a previous judgment from the District Court which granted an order for ISPs to block access to The Pirate Bay site⁹⁹. Citing not only the ease with which users may access the target site via

⁹⁷ An interview with a leading QC suggests that there may be as many as 15,000 infringing sites available.

⁹⁸ Marsoof (2015) also describes the technical manner in which target websites may circumvent blocking orders via the changing of IP addresses and URLs.

⁹⁹ BREIN, a Dutch anti-infringement body funded by and working on behalf of the music and film industries, sought a blocking injunction against Ziggo, and other local ISPs in 2010. A number of full trials were held as each side appealed the decision made against them. BREIN was subsequently ordered to pay over €300,000 in legal fees.

other methods the court concluded that the blocking order was disproportionate and ineffective¹⁰⁰. Further, in a 2010 report, Ofcom comments on the ease of technical circumvention by users; ‘For all blocking methods by site operators, circumvention by internet users is technically possible and would be relatively straightforward for determined users’,¹⁰¹.

The extent to which this debate might continue in other European courts is unclear. For example, ISPs in other EU countries might begin to challenge such orders on the basis that they are ineffective. At present, such is the ease with which dedicated users may circumvent websites that have been legally blocked that, arguably, such protection is theoretical rather than real.

3.8 Opponents of website blocking as a copyright protection strategy

Whereas legislators, the creative industries and the courts believe that web blocking orders are at least partially effective in reducing infringing activities, a number of organisations remain unconvinced, either for practical or ideological reasons. Two such major organisations, one UK based and one internationally focused, agreed to be interviewed and their comments are described below.

3.8.1 Online Freedom Campaign Organisation A (OFC A)

Whilst not totally inimical to copyright protection itself, interviewee OFCA 1, a senior executive of the organisation, expressed serious doubts about the use and value of web blocking orders for two key reasons. It was suggested that circumvention of such orders is so simple as to render their intent undeliverable. Second, the interviewee suggested that such orders are ‘a sledgehammer to crack a nut’, and are dealing with an issue that is ‘not the most significant in the world’.¹⁰² Moreover, it was stated, the organisation is apprehensive as to where such orders may lead and any future potential effects they may have on the freedom of users to use the internet in a free and creative manner. The interviewee also pointed to potential errors that might lead to innocent sites being blocked

¹⁰⁰ A further appeal by BREIN to the CJEU subsequently had that judgment overturned.

¹⁰¹ Online Infringement of Copyright and the Digital Economy Act 2010.

¹⁰² Such a reference aligns with that of US Senator Ron Wyden who opposed early US attempts to bring in SOPA style laws. The Senator suggested that such laws were like using a cluster bomb rather than a precision-guided missile. Reported in wired.com, 20 Nov 2010.

by mistake, and that the process for amending such errors is time-consuming and potentially costly to the trader of an innocent site¹⁰³. Recent OFC A research into ‘overblocking’ discovered that of 100,000 sites tested, almost 20% were blocked. Such activities, it was noted, are ‘disproportionate’ and ‘create more harm than good’. A further comment was that, in the opinion of the interviewee, even though copyright infringement is an accepted problem for the creative industries and hard to control, ‘Hard cases make bad laws.’

A far better strategy for the industry, it was suggested, is to make legal content more accessible and fulfil consumer expectations. Digital production allows costs to fall and new revenue opportunities to be developed; providing easier and more timely access to content should not be a harmful economic matter¹⁰⁴. Equally, it was further suggested, cinemas should make themselves more attractive, user friendly and offer an environment that not only shows film, but offers its customers a unique experience¹⁰⁵. Such industry led strategies might be far more effective than web blocking orders, it was suggested.

3.8.2 Online Freedom Campaign Organisation B (OFC B)

A much less sympathetic position emerges from an electronic with a senior executive, OFCB 1, from this organisation. Whilst not wholly inimical to the concept of copyright protection, OFCB 1 regards infringement in the film industry as an activity of its own making. The practice of staggering the release of film in its various formats only serves to encourage film consumers to seek out pirate sites as their needs are not being met at the time they want them met. Given that much piracy is experienced either before or very close to the official release date of the film, it should make no difference to the industry if it makes all formats available simultaneously, the interviewee suggested; since the industry spends billions of dollars on producing and marketing films ‘it should not be surprised when people actually want to see them’ the interviewee commented.

Regarding website blocking, an equally unsympathetic view emerges. In discussing the closure and subsequent blocking of the Megaupload site, the interviewee commented that

¹⁰³ A recent example mentioned was the *Radio Times* experience of having its site blocked since it shared one of its IP addresses with an infringing sports site blocked by the Premier League.

¹⁰⁴ The whole matter of how the film industry ‘staggers’ the release of its content in various formats will be discussed in a later section

¹⁰⁵ A point which echoes the sentiment of cinema operators and will be again be discussed in the next chapter.

‘you catch a lot of dolphins in a tuna net’. Noting that this site has tens of millions of files, he added that if only 1% of the files were legitimate, then access to hundreds of thousands of legal works has been denied in order to punish pirates. In a further analogy, the interviewee noted that a major library does not get closed down because a large number of infringing acts may take place every day. To do so would represent an act of ‘wanton, depraved indifference’. A final comment was that ‘good laws don’t punish the innocent to get at the guilty’.

When considering the comments of both organisations, it might be argued that a number of apparent anomalies arise. First, whereas there may or may not be degree of merit in the comment that industry practices with release date strategies may encourage illegal viewing, such an assertion implies that because a piece of work exists then the consumer has not just the ‘right’ to view that work but to do so when he or she deems fit. In other words, if it exists then entitlement exists, notwithstanding the business plans of the copyright owner. Second, without any serious economic analysis it is not possible to determine the financial outcome under either a simultaneous or staggered release paradigm. The assumption made by the interviewees is that theatrical revenues would at least not be harmed, and overall revenue more likely to increase as the product is available at the time that potentially otherwise unauthorised viewers would actually pay for it. No evidence was referred to that might illuminate the interviewees’ case. Finally, the notion that a number of legitimate files are denied access due to web blocking requires further discussion. Whereas it is the case that Megaupload provided a storage facility for all types of content – legal or otherwise - the fact that ‘only 1%’ - or even 10% - of files might be legal clearly means that 99% (or 90%) are not, suggesting that the primary function of the site is to facilitate the storage and subsequent consumption of illegal content. It is also arguably the case that the uploaders of legal files might have placed their content into more clearly legal sites. Moreover, for the ‘1%’ notion to be valid, it would need to be demonstrated that the works were not available elsewhere¹⁰⁶.

¹⁰⁶ One organisation is currently actively engaged in an attempt to recover legal content that was uploaded onto the Megaupload storage facility by a particular individual. In 2012 the US Justice department stated that ‘...Mega clearly warned users to keep copies of any files they uploaded’. Unfortunately the individual concerned had lost the master copy. Whether other data uploaders of legal material kept copies of their work is not clear.

3.8.3 Discussion

In addition to the comments above, a number of legal commentators point to doctrinal issues with the legality of website blocking. Marsoof (2015) suggests that website blocking injunctions 'run counter to natural justice', whereas Husovec and Peguera (2015) raise concerns about the compatibility of such orders with the EU Charter of Human Rights. Whilst further discussions of these concerns are beyond the scope of this research, a number of comments on the opinions of the organisations interviewed above may be helpful.

Whereas a number of the comments made by the interviewed organisations possess a degree of cogency, others arguably do not. Comments regarding the ease with which determined users of illegal sites may circumvent blocked sites are valid and have been discussed earlier. However, the fact that cinemas should strive to make their offer as attractive as possible is equally valid. In fact, cinemas worldwide have over the past decade invested significant sums in the upgrade of their environment with, among other improvements, digital projection, 3D sound and stadium style seating. Comments and opinions about release patterns and the opportunities offered through digital distribution, though, are arguably less well informed. Interviewee OFCO 2 suggested that there is currently a *de facto* non-platform release plan (in that so many films are available illegally on or just before the official theatrical release date). However, to argue, in the absence of any significant supporting evidence, that a change in business practice (simultaneous release across all sales platforms) would reduce illegal viewing represents a high risk strategy and may, potentially, do more damage than the problem it seeks to address. Furthermore, the comment that some OCH sites (e.g. Megaupload) host legal as well as illegal content does not in itself represent a credible argument for the cessation of blocking orders. Arguably, further evidence is required to substantiate such an assertion. The notion that because a piece of desirable creative content exists then an interested consumer has a right to consume it at will is more an ideological than a rational statement and does little to advance any debate.

3.9 Graduated response strategies and consumer alert programmes

The practice, either provided for by relevant law or as a voluntary agreement between copyright holders and ISPs, of sending an electronic notice to the user of an infringing website has been adopted by a number of countries¹⁰⁷. Such notices alert the user that s(he) is visiting an illegal website and that there are legal consequences for so doing. After a number of warnings, the copyright holder, in certain markets, may then seek an order for the ISP concerned to release the details of the user so that appropriate action may be taken. The rationale is that by informing the user of his/her unauthorised viewing, such viewing will cease and that (s)he will instead seek out legal channels. To date, such a practice has yet to be adopted in the UK though will be discussed later in this chapter. As with the example of website blocking, the effectiveness and utility value of such a strategy to deter unauthorised viewing is unclear. In a review of the operation of such programmes in a variety of international markets operating the strategy as an anti-infringement measure, Giblin (2014) concludes that such programmes have little effect on reducing infringement and did little to increase sales in legal channels. More recently, in a more empirical, econometric study, McKenzie (2017) reaches broadly the same conclusion. Examining the results of Graduated Response Strategies in a number of countries, McKenzie finds no ‘compelling evidence of increasing revenue’ and comments that his findings ‘bring into question the efficacy of graduated response laws if one of the primary objectives is to increase sales in legitimate markets’ (p1). Similarly, commenting on the aims that graduated response strategies hope to achieve, Giblin states;

...their legitimacy is seriously thrown into question by the startling lack of evidence that graduated response helps achieve any of copyright law’s underlying aims.
(p208)

Whereas Giblin and McKenzie examine a number of examples of graduated response strategies adopted internationally, one stands out as useful and informative for further discussion.

¹⁰⁷ For example, the French practice is carried out under the so-called HADOPI law, whereas the practice in the USA is conducted via a voluntary agreement between MPAA and USA based ISPs.

3.9.1 HADOPI

Perhaps the most well-known international example of a graduated response scheme is the HADOPI law in France¹⁰⁸. Introduced as a measure to protect copyright online, the HADOPI law used a graduated response strategy for users of P2P networks in an attempt to alter infringing behaviour, the ultimate sanction for the offending user being the loss of the internet account and a possible fine. Initially hailed by the creative industries as an innovative approach to copyright protection, the disconnection measure was dropped in 2013 as the French Government decided that this sanction was disproportionate. (The authorities report that between 2009 and 2013 only one account had been suspended with the user fined €600). The extent to which the measure was in any way effective in reducing copyright infringement is unclear; a number of researchers have attempted to measure its effectiveness with varying conclusions. In addition to Giblin's (2014) negative findings, Arnold et al (2014) concluded that the HADOPI law had 'no substantial deterrent effect.' More importantly, these researchers found evidence that users who were better informed about piracy and the law changed their behaviour not by using legal channels but by seeking out P2P channels that were not monitored under the HADOPI strategy. Contrariwise, Danaher et al (2014) found that, with respect to music sales, the operation and consumer awareness of HADOPI 'increased sales of iTunes music by 22-25%'. However, further comment on this finding suggested that the causal relationship the researchers inferred between the law and consumer P2P behaviour was spurious. The French Newspaper Le Monde reran the study substituting the volume of internet searches for the word 'iPhone' with the volume of searches for sites monitored by HADOPI and found the same statistical relationship. Le Monde concluded that the increase in music sales could be equally due to the rise in iPhone sales and the subsequent use of the phone to download and store music legally¹⁰⁹. Evidence, thus, either way is at present inconclusive.

An internally produced HADOPI report claims that the number of second warnings sent as a result of non-compliance with the first was only 10%. The report goes on to claim that 0.7% of second warning letters had been reviewed for action, with the details of approximately

¹⁰⁸ Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet, 2009.

¹⁰⁹ This event triggered a stronger debate with a robust riposte being posted by the original researchers on the blog site *Infojustice.org*. This may be seen at <http://infojustice.org/archives/8891>.

22% of reviews ultimately sent to public prosecutors¹¹⁰. The implications of these data, though is not explained. One conclusion may be that the system was in fact achieving its objective of educating the public in matters of copyright. A less charitable conclusion might be that the original recipients of the warning notices letters had found ways to circumvent the HADOPI monitoring strategy. An even less charitable conclusion may be that the actual operation of the system was so time-consuming and expensive, that the operators could only deal with so much, and thus concentrated on the most serious, rather than all, cases. Perhaps the most informative evidence arising from the HADOPI law is that, ultimately, the programme was scaled back, is now hardly enforced, and a complete repeal of the Act is being sought by the French National Assembly¹¹¹.

3.9.2 Comments on the Graduated Response Strategy

If the underlying rationale for the use of a graduated response strategy is, through electronic notices and warnings of potential legal and operational consequences, to deter users from the illegal viewing of films, then the experience from markets that operate such a scheme is not encouraging. The results from a number of studies suggest that effects are initially positive, although short-lived; dedicated users are more likely to seek other unauthorised routes rather than be deterred by such actions (Adermon and Liang, 2014). Even where there is a clear threat of sanction to the user, as in France, the HADOPI law appeared not to be regarded by users as credible. It may be the case that unsuspecting users may be deterred, although the research suggests that the numbers are quite small and unlikely to make a material dent in the overall amount of illegal consumption.

A more compelling statement on the effectiveness of a graduated response programme was recently published by the US Center for Copyright Information (CCI) on the MPAA backed Copyright Alert System (CAS) in the USA. Announcing the cessation of the programme CCI stated;

After four years of extensive consumer education and engagement, the Copyright Alert System will conclude its work...CAS succeeded in educating many people about

¹¹⁰ https://www.hadopi.fr/sites/default/RA_RG_EUK.pdf

¹¹¹ See the Lescure Report (2013), commissioned by the French Government to examine the effectiveness of HADOPI and its possible future. www.communication.gou.fr/var/culture/storage_mag/rapport_lescur.

the availability of legal content, as well as about issues associated with online infringement...'¹¹²

This statement is interesting in that it may be interpreted in two ways. First, CAS was indeed successful in its mission of driving users of illegal sites to legal purchasing channels; second, CCI concluded that it was having no measurable effect on unauthorised viewing and decided to cease dedicating the required resource to its operation. One might assume that if CAS was achieving a measurable cessation in unauthorised viewing, then an earlier press release might have said so, together with the evidential back-up. One might also have reasonably expected the programme to continue. In the absence of any such evidence, it might appear reasonable to conclude that CAS was not having the desired effect and that further effort might prove fruitless. In fact, the website Ars Technica quotes a senior MPAA lawyer as saying that '...the program was simply not set up to deal with the hard-core repeat infringer problem'¹¹³. This statement encourages the conclusion that this attempt to curtail unauthorised viewing was not having the desired effect. This conclusion is similar to that drawn by Giblin (2014) in her discussion the effectiveness of HADOPI. '...the most likely...explanation [for ineffectiveness]is simply that it is not very well equipped to identify and process the most egregious repeat offenders'. p189.

3.9.3 Discussion

The apparent lack of effectiveness of HADOPI and the apparent failure of the US CAS programme, together with the conclusions drawn by Giblin (2014) and other authors suggests that copyright alert programmes have little effect in deterring unauthorised viewing. As with web blocking activities, the casual user may be deterred though they appear to be ineffective against the determined user. However, such a conclusion does not necessarily mean that such programmes should not be implemented at all. This is perhaps so for a number of reasons. First, they may indeed be having a positive effect, though present research methods may not be sensitive enough to detect one. Second, an alternative strategic and creative approach within such a programme may demonstrate an effect. Finally, as a stand-alone measure, the conclusions of ineffectiveness may be correct.

¹¹² Press statement January 27, 2017. Available at <http://www.copyrightinformation.org/statement/statement-on-the-copyright-alert-system/>

¹¹³ <https://www.arstechnica.co.uk/tech-policy/2017/01/rip-six-strikes-copyright-alert-system/>

However, as one among a package of measures it may have a role to play. Research to date has not addressed this possibility.

3.10 Industry generated protection measures¹¹⁴

The preceding sections have examined two legal strategies used by the industry to protect its product and have suggested that they may at best represent a partial solution to infringement. The following sections will describe a number of complementary industry generated measures ranging from the technical, operational, and to what the industry terms as 'voluntary arrangements' with third parties.

3.10.1 Technical and operational security measures

Whilst the rise in digital technology has presented challenges to the creative industries in terms of the ease by which content may be illegally obtained and viewed electronically, it has also presented a number of significant benefits that permeate the whole lifecycle of a film - from production to theatrical distribution and exhibition and to other revenue-generating sales platforms. This section will outline and discuss a number of technological advances made by the industry and their potential contribution towards content protection in order to assess their potential effectiveness as part of a package of protection measures¹¹⁵.

3.10.2 Production and post production security

The advent of a complete digital work flow encompassing production, post-production, distribution and exhibition has enabled a number of key safety and security measures to be adopted. Such digital work flows allow works to be digitally coded so that tracking may take place at any point along the process. The precise digital applications that major companies use may be slightly different, but all have the same objective. Digital tagging and tracking allow the film company to know at any point in time where a digital copy is, who is working on it and what data have been added or taken away. They also know if and when a further copy has been made, and by whom; processes are such that only authorised company personnel and contracted third parties are able to make such copies. Third party suppliers

¹¹⁴ This section is informed by interviews with exhibitors, distributors, industry technical consultants, trade bodies and FACT.

¹¹⁵ For a description of measures adopted by the industry in the earlier days of VHD and DVDs see Waterman et al, 2007.

themselves have internal security processes and these are regularly audited by the major production companies to ensure that all agreed safety protocols are being adhered to.

Once the product has been finalised it is then encoded (compressed) and encrypted prior to distribution to the cinemas contracted to play the film.

3.10.3 Distribution and exhibition

Once delivered to the cinema, either electronically or in hard copy, the encrypted product will only play out by means of an electronic 'unlock' key – a string of computer generated code that will only allow the data to be decrypted and played out at a designated cinema, for a designated period, at designated times and on designated projectors. Assuming the projector has been authorised, the film will then decrypt and decompress as the file as it plays out¹¹⁶. Whereas it is unlikely that a digital copy will be stolen from a cinema (which due to its encryption standard would in any case present difficulties to any further exploitation) cinemas remain vulnerable to the practice of 'camcording' in which an individual might attempt to record the presentation on an appropriate device¹¹⁷.

Whereas instances of 'camming' have severely reduced in recent years, all copies of a film contain a digital watermark which forensic examination will uncover. Thus, if an illegally obtained copy of such a film is discovered on a particular website, then its origin can be traced. According to the UK Federation Against Copyright Theft (FACT) it has been able to forensically trace some 60 illegal recordings over the past 10 years, with numbers of proven 'cams' falling from a high of 20 in 2001, to a low of 3 in 2015.

As mentioned, instances of discovered camcorder versions in the UK and all other 'westernised' countries are very low; according to FACT most discovered versions originate from such markets as China, India, Malaysia, the Philippines and other South East Asian countries.

¹¹⁶ The latest projection equipment decrypts the film twice before it plays out through the lens.

¹¹⁷ FACT reports that there have been no known cases of a hard copy digital cinema package being stolen from a UK cinema.

3.10.4 Security; Screeners and server 'hacking'

More prevalent now is the presence of high quality films copied from award screeners (i.e. digital hard copies sent to members of various academies prior to the voting season) or those lifted directly from studios' own servers and then uploaded onto unauthorised streaming sites. Cases that have reached wider notice include the 'Sony hack' of 2014 when the self-styled Guardians of Peace accessed and copied films, employee data and other internal files. Less widely known examples of films being illegally taken from studios servers and reported periodically by Variety include;

- Hulk (2003)
- Spiderman (2003)
- Star Wars: Attack of the Clones (2002)
- Matrix Reloaded (2003).
- X-Men Origins: Wolverine (2009)

Third party reports of such instances point to lack of password security, lax internal processes and, on occasions, rogue employees as the main causes of such security breaches. A more recent case, however, has been disclosed to the researcher by Studio Lawyer 3, the key details summarised as follows.

A lone individual, based in the UK, managed to gain entry to the company's main USA based server via password experimentation. The individual then observed much of the company's internal activity and communication over many months and discovered how films were transferred round the internal system, the passwords that protected them and the process by which a cinema could request a copy of a particular film. Accessing the server that dealt with distribution of films to cinemas the individual posed as a cinema owner, and requested a number of shortly to be released films to be delivered. Further, the individual suggested that he make a personal appearance at the third party distribution office and collect them on hard drives. Such permission was granted. For reasons that are as yet unknown, or at least undisclosed, one of the films was delivered in an unencrypted state. The individual

then contacted the company, described what had been done and demanded money. The first 15 minutes of the film was posted on a website as evidence that he actually had the film. Rather than agreeing any settlement, the company contacted a number of relevant agencies both in the UK and the USA. These included: The Department of Homeland Security, FBI, MI5, FACT and PIPCU. The individual was subsequently tracked down and arrested by the British police.

This, and previous examples, clearly demonstrate that despite the many billions of dollars invested by the major studios on digital technology and security, human error and poor password security have allowed determined and dedicated individuals to access systems and access films. Such a conclusion may also be indicative of the theoretical rather than real world value of copyright protection measures.

3.11. Release pattern strategy

The staggered (platformed) manner in which the industry generally releases its content has been referred to earlier in this thesis and has been seen by many as a significant contributory factor to unauthorised viewing. Platforming refers to the release of film in two distinct ways; the timing of release between countries and the timing of certain release platforms within countries. The suggestion that industry release strategies are a major contributory factor is, though, not new, nor even unrecognised by the industry itself. McDonald (2015) notes that studios have always recognised that their modes of distribution – platformed within countries and staggered between countries – create vacuums where demand exists and that pirates will inevitably fill the gaps. The substantive, issue though, is the degree to which such practices might contribute to unauthorised viewing and whether a change in strategy might decrease unauthorised viewing opportunities. Research and knowledge here is limited; what limited information there is, and how the industry perceives the relationship between release strategy and unauthorised viewing is discussed in the next sections.

3.11.1 Release timing between countries

Typically, in the past a major US production would be released first in the USA and then sequentially round the world, the order depending on its perceived level of cultural appeal.

It was believed that the publicity emanating from the USA release would gradually travel round the world and instil a strong 'desire to see' among cinema goers. However, as publicity internationally has now become practically instantaneous via digital media, international windows have shortened and most major releases occur simultaneously. McKenzie and Walls (2016) note that the release gap between the US and Australian release dates might contribute to 'piracy' early in a film's life and use such a conclusion as a 'partial explanation for the industry's move towards coordinated worldwide releases.' (p25). Such a release practice, though, might be thought to have both benefits and drawbacks with respect to infringement potential.

A simultaneous, worldwide release suggests that opportunities for illegal copies sourced in one market and then transferred to others before that market's official release date are diminished. However, that same simultaneous release that includes, for example, China – a country known by MPAA for illegal activity with respect to film – potentially offers an almost instantaneous opportunity for illegal copies to be made available around the digital world. This dilemma is recognised by the industry and whereas there is no clear resolution, studio interviews suggest that the primary driver of any decision is what they believe to be best for the film overall i.e. a commercial rather than anti-piracy decision.

3.11.2 Release windows within countries

In brief, a film is released first in cinemas with the DVD and legal downloading or streaming of the film's release some months later. Other legal release platforms (pay TV for example) then follow. One of the key debates within the industry is whether, and if so how much, this staggered way of releasing films contributes to copyright infringement. Interviews with distributors and their trade bodies suggest that they see no danger to the industry in bringing forward the second release date to, say, 80 days rather than an average of 120 days in the majority of countries (certainly the USA and UK). As the director, Steven Soderbergh, noted in 2005:

Name any big-title movie that's come out in the last four years. It has been available in all formats on the day of release. It's called piracy. Peter Jackson's Lord of the Rings, Ocean's Eleven and Ocean's Twelve – I saw them on Canal Street [a popular

market location for the purchase of illegal DVD copies] on opening day.

Simultaneous release is already here. We're just trying to gain control over it.¹¹⁸

The subject of release dates and 'windows' is a highly controversial and political issue. As such, it will be discussed in depth in the Chapter 5.

3.12 Educational initiatives

Informing the public, especially younger members, of the economic, social as well as legal dangers of 'piracy' is a policy strategy, partially led in the UK by Creative Content UK (CCUK)¹¹⁹. Such an approach might be described as 'soft' and based upon the theoretical underpinning that if the public realised what damage it was causing via illegal viewing, then it would stop. It also suggests that the film industry (or indeed any other) has developed a commercial strategy that maximises revenue in such ways that more resources may be directed towards further production and maintain high levels of employment. Resources taken away from these objectives would thus have a deleterious effect.

Funded partially by government and partially by the film and other creative industries, CCUK seeks to disseminate the message that copyright has a value and should be protected. One of its current campaigns is '*getitrightfromagenuinesite.org*'. Apart from visiting schools and colleges, it spreads its message via cinemas, social media, TV and the press, often with endorsements from major public figures¹²⁰. A further UK organisation, The Industry Trust for IP Awareness, owns and operates the website *findanyfilm.com* that directs audiences to where and how any film can be obtained and viewed legally. Its most recent public awareness campaign, proffers a similar message, though aimed at an audience wider than just film, through its message 'Moments worth paying for' – suggested by some in the industry as a 'more impactful and widely supported strategy'¹²¹.

Although the effectiveness of such campaigns is not yet clear, an interviewee, Trade Body Exec 2, stated that (unpublished) internal research demonstrates a high degree of awareness among cinema-goers about the anti-piracy campaigns and a higher propensity to

¹¹⁸ Interview with Wired Magazine, January 2005.

¹¹⁹ An alliance of DCMS, film and music trade bodies and ISPs formed in response to the Digital Economy Act 2010.

¹²⁰ The trailer for the film *Life on the Road* contained a message from its star, Ricky Gervais, exhorting the audience not to steal his film.

¹²¹ Such comments illustrate a current tension in the UK industry as CCUK and The Industry Trust are seen as competitive rather than complementary.

seek out legal channels. At present, the degree to which such ‘ad hominem’ and softer strategies are, or can be, effective over the longer term is unclear. Various commentators have varying opinions.

The CEO of CreativeFuture stated;¹²²

Our idea – though now it is no more than that - is to build alliances with educational nonprofit groups that might enforce the notion that stealing an artist’s work online is just like lifting from a classmate’s desk. It’s as simple as this: One kid does a painting and another kid comes up and puts his name on it.¹²³

Conversely, a spokesperson for the organisation, Creative Commons, in response to a US educational initiative, suggests;

This message is way too simple... we should be teaching kids to be creative and take advantage of the web. Copyright, asking permission and all the other legal nuances should be seen as secondary...¹²⁴

Likewise, one writer for the blog ‘techdirt’, in a more personal attack, states;

Here’s a tip: any time you see someone insisting that the answer to dealing with widespread infringement is ‘more education’ you know that you’re dealing with someone who is either ignorant or not particularly serious concerning the issue.¹²⁵

Such opposing views may be representative of the ongoing ‘clash of ideologies’ between those that believe that in the right of copyright holders to exploit their works in what they perceive to be the most commercially effective manner and others who believe that the industry should accommodate itself to the needs of the audience and make its product available in a timelier manner. Initiatives supporting the former position can be seen equally as rational, commercially based and legally backed; or, they may be seen as propaganda defending a status quo that is no longer defensible in the age of the internet. Opposing views may similarly be seen as either a rational response to ‘failing’ business plans, or as a

¹²² The USA equivalent to CCUK.

¹²³ Interview with the *New York Times*, March 30 2014. Full article may be seen at

<https://www.nytimes.com/2014/03/31/business/demia/hollywoods-antipiracy-efforts-ass-new-voice.html?r=0>

¹²⁴ <https://creativecommons.org/2013/09/25/open-curriculum-alternatives-to-mpass-new-anti-piracy-campaign-for-kids/>

¹²⁵ <https://www.techdirt.com/articles/20140331/1732526756/hollywood-hires-new-person-to-make-same-ols-mistakes-fighting-against-future.shtml>

sideswipe against big business. At this stage, none of these statements can be said to have validity or not. In the absence of any supporting or contradictory research conclusions, the matter is open.

In addition to these classroom and social media based education initiatives, CCUK also believes that education and information should adopt a more direct strategy and aim its message at actual, as well as potential, users of illegal sites. As a result, the following programme has been agreed by the CCUK constituent members.

3.13 Voluntary Consumer Awareness Programme (VCAP)

The foregoing description of a softer approach to public awareness suggest that the public may, when presented with a sufficiently cogent argument, cease, or at least reduce, unauthorised viewing activities. CCUK, as part of its voluntary agreement with ISPs, is also planning to adopt the slightly harder approach of issuing warning notices (email alerts) to those it finds watching films unlawfully on the internet, whilst at the same time pointing users to legal sites. The programme might be described as only 'slightly harder' as, contrary to a number of graduated response programmes on other markets, no sanction is envisaged. Rather, the relevant ISP will send a further message in the event that the identified user appears to take no action after the receipt of the first message. Again, the theoretical basis of such a programme is that users of illegal sites will cease their activities once they realise that it is illegal and that there are legal sites for them to visit.

The degree to which VCAP might be influential in arresting certain illegal activities is not clear. Based upon the experience of and evidence from other markets with consumer alert programmes, the prospects do not appear to be encouraging.

3.14 Conclusions

This chapter began with the twin objectives of the description and evaluation of the use and effectiveness of a number of legal, non-legal and voluntary initiatives used by the industry in the protection of its product from unlawful use. The available evidence suggests that the effectiveness of all the measures described in this chapter have limited impact on infringing activity; website blocks are relatively easy to circumvent for dedicated infringers, although they may deter the casual, inexperienced or serendipitous user; studies of the effectiveness

of Graduated Response Programmes suggest similar limited real world utility. The industry generated 'softer' programmes of information, education and the steering of infringing users to legal sites have yet to be evaluated.

The question of why an industry continues to invest significant time and resources into apparently ineffective activities is thus raised. A clear question arises concerning the potential beneficial effect of the UK's VCAP since evidence of the effectiveness of similar programmes elsewhere is not encouraging. CCUK believes that, notwithstanding such evidence, its pursuit of VCAP has both a utilitarian and moral dimension; utilitarian in that the measures may at least stem the volume of infringing behaviour and keep it under control; moral in that, above any financial considerations, film-makers deserve to have their intellectual and creative endeavours protected from unlawful use. Economists might regard this final thought as an interesting example of what they term 'The Ultimatum Game'¹²⁶.

In an experiment conducted by economists two subjects are offered the chance to take a sum of money and split it between them. The first subject decides on the split and the second has the option of accepting or declining the split. Economic rationality suggest that the second subject should accept any amount due under the split on the basis that some money is better than none. However, experiments have demonstrated that if the split is perceived to be poor value then the subject will reject the offer and get nothing.

Researchers regard such findings as indicative of the fact that decisions and action are made on the basis of perceived justice and fairness as well as economic rationality. Thus, in the present context, although the investment in time, effort and other resource may not necessarily yield immediately desired results, they are regarded as fair and justifiable attempts to protect the intellectual and creative output of others. Additional theories of economic decision-making may also serve as possible explanatory factors.

Prospect Theory (Kahneman and Tversky, 1979), suggests that decision-makers attach different values to potential gains and losses and that losses provoke a greater emotional response than do gains of the same amount i.e. an aversion to losses. Thus, in the present context, it might be argued that the industry will spend time and resources to guard against losses, even though the potential gains of such actions are not known. Escalation Theory

¹²⁶ A widely reported experiment, although see Sanfey et al, 2003, for a full description.

(Drummond, 1996, Staw, 1981) suggests that decision-makers will continue to devote resources to a possibly failing course of action due to the social and psychological commitment they have made to it; the unwillingness to admit possible failure of the action thus serves to prolong it.

A more prosaic explanation may be that, although literature does not point to any significant agreement concerning the degree of effectiveness of a particular protection measure, this in itself does not mean that a particular measure is *not* effective; it may be the case that a sufficiently robust research paradigm has not yet been developed. Equally, a counterfactual argument might suggest that without such efforts, infringement may be even greater. Absence of positive evidence does not in itself imply absence of effect.

Whereas it may not be apparent to the industry, the measures described above and their industry-perceived utility value as a collective set of actions, might be recognised by military historians as representing an example of a Fabian Defensive Strategy. If indeed such actions do indeed, if unwittingly, represent such a strategy, then a number of interesting operational, management and interpretive implications arise. These will be described in Chapter 4.

Chapter 4

Copyright protection measures as an example of Fabian Defensive Strategy

4.1 Introduction

Copyright protection and the measures, legal and others, designed to meet this objective, have often been characterised as a 'war', posing the infringer as the enemy and the copyright holder and his partners as the defenders¹²⁷. The metaphor extends to the use of 'weapons' by both sides for use within the developed tactics and counter tactics in the 'battle' against copyright infringement. To date, much copyright literature and research has focused upon the doctrinal, economic, moral, theoretical and creative consequences of the subject matter. The literature concerning protection measures often focuses upon the examination of the operation and effectiveness of a single strategic activity - for example, website blocking or graduated response programmes - rather than on a combined, coherent set of measures designed to work as a strategic whole. That is, there has not been to date the advancement of a notion that such measures might be usefully viewed in a holistic rather than piecemeal manner. The purpose of this chapter is to suggest a framework within which such measures may be seen to be working as a complete strategy, rather than as a number of discrete, individual actions.

4.2 Fabian Defensive Strategy Described (FDS)¹²⁸

The use of Fabian Defensive Strategy as a novel and potentially useful descriptor of industry protection measures is suggested as a consequence of the 'war' metaphor. If, in military terms, it is suggested to be a valid and viable strategy, then it may have some relevance for the development and execution of copyright protection measures in the film and other creative industries.

¹²⁷ The term 'war' is used analogously by a number of industry bodies, authors and commentators. A particular example of the analogy is used by Cvetkovski (2013), *Copyright and Popular Media: Liberal Villains and Technological Change*, Ch. 6. A further use of the 'war' metaphor was used by James Murdoch when he named his attempt to create an online system to sell content generated by News Corporation to other media outlets 'Project Alesia' after the battle of Alesia in which Julius Caesar defeated the Gauls in 52BC. Similarly, the MPAA named their 2004 anti-piracy strategy in Asia 'Operation Eradicate' – a clearly militaristic framing.

¹²⁸ Named after Quintus Fabius, a Roman general tasked with the protection of Rome from invasion by Hannibal in the second Punic War.

The strategy as described by Professor Stanley Carpenter contains a number of key elements¹²⁹. These include;

- (a) Exhaustion of the enemy; make it difficult for them to make progress as you set up your own protection measures. Be disruptive and frustrate the enemy at every possible opportunity.
- (b) Ensuring that one's own lines are intact and make it hard for the enemy to penetrate them.
- (c) Attrition; continual disruption and frustration may cause the enemy to delay its attacking actions and risk losing support and the will to continue.
- (d) Ensure close (military) and political coordination; form appropriate alliances; maintain and seek further support from neutral parties through non-alienation.
- (e) Delay the enemy's progress whilst continuing the development of plans for a final, decisive, culminating blow; though in the meantime seek small, incremental victories.

The above strategic elements though, Carpenter explains, entail a degree of risk. First, they are expensive and difficult to maintain¹³⁰. Second, they run the risk of self-exhaustion prior to exhausting the enemy. Third, the luxury of time to 'wait and see' may not always be present. Finally, although the enemy may be hampered, slowed down and frustrated, there is no guarantee of final victory (Bettwy, 2014).

4.3 Similarities between FDS and film industry copyright protection measures

It may not be immediately apparent to the industry that the protection measures described earlier in this thesis have a strong degree of fit with the strategy described. However, it is, arguably, possible to frame the industry's actions as 'Fabian' and draw appropriate parallels. Such a framing may be as follows.

4.3.1 Frustration and delaying tactics

4.3.1.1 Legal tactics

¹²⁹ Based upon lecture notes and other data provided to the researcher by Stanley D Carpenter, Professor of Strategy and Policy, US Naval War College, Newport, RI.

¹³⁰ The reported costs to MPAA have already been mentioned.

The practice of closing websites (for example Newzbin) and the subsequent blocking of access to unlawful sites outside one's jurisdiction is designed to achieve precisely these aims. The closure of *Newzbin* clearly frustrated both the owners and users meaning that they had to devote time and resource to the opening of the new site, *Newzbin2*. The subsequent blocking of this second site meant that the owners' endeavours were totally frustrated – at least as far as the UK was concerned. Similarly, the constant attempts by the industry to first, close the Pirate Bay site and second, to block access to it when it reappeared in an offshore location inevitably necessitated the devotion of further time and resource to its continuance. Industry and legal actions even resulted in the owners spending time in prison and losing large sums in fines. In the meantime, users need to spend time and effort in either finding new sites or in the employing of further technology to access sites that are legally blocked.

These and other examples suggest that closing and blocking user access to unlawful websites have a disruptive and frustrating effect on both the owners and users of such sites. They may also deter the casual user. However, they are not in themselves decisive. It has been noted that technological circumvention by users, even if disruptive, is quite a simple matter and the dedicated owners and operators of such sites may, if so chosen, either relocate to more favourable environments or continue their operations through the use of proxy sites. Such evasive actions by operators and users in turn provoke further protectionist steps by the copyright holder and so the 'battle' is circular. Nevertheless, the copyright holder may achieve small, incremental victories by such actions and keep the 'enemy' at bay.

Likewise, Graduated Response programmes may have the effect of deterring certain users, who ultimately may decide to visit legal channels for the purposes of film consumption; others find ways to hide their identities from those seeking to contact them. The programmes again are not decisive but are capable of producing small, incremental victories.

4.3.1.2 Enforcement strategies

PIPCU, on behalf of copyright holders, claims to have been successful in forcing the disruption and, in some cases the closure, of infringing sites, and in removing advertising

from many more - the so-called 'follow the money strategy'. According to PIPCU the formation of both formal and informal alliances with such intermediaries as Google, the operators of domain name registers and certain payment companies have been successful in their achievements to date though, again, cannot be said to have delivered a decisive blow to either the illegal site operator or the unauthorised viewer. Within the context of Fabian Strategy, however, such successes are incremental, frustrate operators and users and complement efforts made through legal channels.

The success of FACT in pursuing and bringing to court those who have been accused of illegally recording and uploading films for the purposes of unlawful viewing may also be seen as forming a major role with an overall Fabian Strategy. A number of films that might have reached the illegal market have been intercepted and decisive results are apparent as illegal 'cammers' have been apprehended and imprisoned¹³¹.

4.3.2 Non-alienation and the importance of communication

Maintaining the support, or at least the lack of antipathy, of both individuals and appropriate organisations is an important, though softer, element of an overall defensive strategy. Industry efforts in this regard focus predominantly on the educational initiatives described in the previous chapter. The extent to which such an approach is or can be successful has been discussed though, within an overall strategy, is arguably a useful and positive step. As discussed, the approach has met the approval of some, though not all, interested organisations. For it to be regarded as forming a successful strategic strand it does not need to claim any absolute or decisive success. Rather, it just needs to demonstrate its value in representing a deterrent factor for some of the people in its target group.

The manifestation of a non-alienation policy may also be seen in the industry's general reluctance to legally pursue infringing viewers¹³². Recognising that the publicity emanating from such an interventionist policy would be reputationally damaging and potentially alienate more than just the individuals being pursued, film companies, and their

¹³¹ Ironically, the MPAA has decided to cease funding this organisation, replacing it with a new, more film-focused one of its own, the Film Content Protection Agency. Discussions with FDA suggest that MPAA wanted a more centralised protectionist structure that concentrated solely on film rather than on creative content in general.

¹³² HADOPI may be an exception.

representative bodies, have maintained the softer approach of Graduated Warning notices (with little threat to sue) and attempts to put illegal users in touch with legal opportunities to view¹³³. The potential beneficial outcome of such softer policies, however, can be easily undone.

An example of the outcome of the failure of non-alienation is witnessed by the current antipathy towards industry copyright protection measures demonstrated by such organisations as those interviewed in Chapter 3, together with such commentators as Robert Lessig. The extent to which the industry has attempted to approach such organisations with a view to explaining the value of their actions is not known. For example, one of the key points that such organisations espouse is the danger the industry inflicts upon itself by the use of 'outmoded' release patterns (the sequential window model). This point was again made by Lessig (2008, p48); 'If you don't want your stuff stolen, make it easily available'. The industry's counter position with respect to the different nature of consumption nature of film to, for example, music, its production value and big screen necessity, and the need to operate a business plan that maximises revenues for producers and studios alike, has arguably not been sufficiently articulated. Whether such arguments might hold sway with those holding opposing views is unclear, though an attempt would fit within a Fabian model and might be in the industry's interests.

A more important example of the failure to successfully disseminate a positive message and gain support from important third parties may be seen in the USA and the failure of the proposed SOPA and PIPA acts. As noted earlier, the lack of a credible message from the creative industry to a number of politicians, internet and related organisations, and the population at large, spelled doom for these proposals. A number of industry insiders suggest that the proposed bills were badly explained, poorly drafted and in fact wasted a generational opportunity to follow its European partners in the availability of a legal framework that included website blocking. Whether such a law would have been materially

¹³³ This approach contrasts with earlier actions in the USA by the Recording Industry Association of America (RIAA). The pursuit of large sums of money from infringing individuals led to significant PR damage, whilst going little to halt the spread of copies available via Napster. According to lawyers Bernstein and Janofsky (2004) RIAA created a potential public relation 'nightmare' when it filed 261 lawsuits against individuals, one of them a 12-year-old girl. Perhaps in recognition of the PR consequences of seeking out and suing individual infringers, it changed its approach in 2008 and sought redress from ISPs instead.

effective is not known but the episode underlined the need for adequate, persuasive and broad-based communication.

4.3.3 Protecting one's own position

In the context of the film industry, the protection of one's position lies in the prevention of content theft in the first place. The technical and operational measures that the industry takes in this regard have been described. Whereas the industry, with existing technology, can do little to prevent the copying of DVDs by the technically proficient once they are legally available, steps taken to prevent and disrupt the activity of 'camming' in cinemas have been highly successful. However, the unlawful availability of a film prior to its actual official release is perhaps the most revenue-threatening event. Despite the efforts made, reference has been made to examples of 'studio leakage'. Whilst with lesser security measures many more instances might occur, the known leakage of a number of high budget films suggests that even stronger measures are required.

It has been argued that one of the external benefits of 'piracy', especially in the digital age, lies in the development of new technology and processes, the rationale being that firms will improve and adapt to new threats via innovation and more investment in IT and research and development¹³⁴. Whereas to date, the film industry has developed to a point at which its content is encrypted throughout the whole process from production to exhibition, with various additional safety levels built in (e.g. double decryption prior to playout on digital projectors), it would appear that it has yet to develop server security to adequately resist external attacks. Examples of films that have been 'stolen' from major companies have been given; no doubt there are further, unreported, instances. The extent to which major corporations are able to develop full protection is not known, although recent examples of attacks on major IT systems abound, suggesting that the film industry is not alone in its vulnerability.

4.3.4 The formation of alliances

It has been noted throughout this thesis that a number of organisations exist whose primary function is the protection of the industry's product and, presumably, its revenue position.

¹³⁴ See, for example, Banerjee and Chatterjee (2010) for a discussion on how 'piracy' has influenced technological changes in the creative industries.

Such organisations are both worldwide (MPAA) and countrywide (for example, CCUK in the UK and Creative Futures in the USA)¹³⁵. Although the UK industry has been successful in the establishment of like-minded structures, a number of comments might be made.

The number of organisations in the UK concerned with copyright protection and enforcement for film and other screen entertainment product has increased markedly over the past decade and include: Film Distributors' Association; UK Cinema Association; local MPAA representation; the Industry Trust; the Federation Against Copyright Theft; Police Intellectual Property Unit; British Association of Screened Entertainment; and, most recently, Creative Content UK. (As noted earlier, MPAA has also decided to create a new organisation to replace FACT, the Film Content Protection Agency). Whereas the presence of such a large number of organisations, all with the aim of protecting industry content, might be deemed a successful outcome of negotiations within a highly complex and politically charged industry, a number of key executives note that process, decision-making and intra-industry communication has suffered and that a clear, integrated and coherent focus has been attenuated. For example, a degree of tension has been noted by interviewees between two organisations currently running different educational strategies aimed at public awareness of the danger of 'piracy' and the direction to legal sites. The fact that two different, though arguably complementary messages, are live suggests that a fully integrated approach to copyright protection has not yet been achieved and that there is no real body that might be considered as leading the various initiatives and in representing its interests to Government¹³⁶. As CCUK is partly funded by Government it might be expected that it would be the natural lead body, although as it represents both film and music companies it might not be expected to represent film as much as the industry might wish. Notwithstanding any existing tensions within the industry as each sector strives to promote the primacy of its own position and message, the presence of such alliances arguably fits

¹³⁵ McDonald (2016) describes how 'Big Copyright' has been formed through an alliance between Film, Music, Television and Software trade bodies.

¹³⁶ Up to 2009, the UK's lead body for film, the UK Film Council, might have been the appropriate organisation to lead in this area. However, its closure by the Coalition Government left a void that has yet to be filled. Nominally, the BFI is regarded by the Government as its replacement lead body, although, according to one trade body CEO, a adequate BFI interface with the commercial sector has not yet become apparent.

well as a strand of Fabian Strategy in playing a continuing attritional role and might be expected to have small, though incremental successes¹³⁷.

4.4 Summary of measures representing Fabian Strategy

Each of the measures described above might not, individually, be expected to represent an adequate response to copyright infringement. However, collectively, they might arguably be regarded as a range of measures with varying degrees of difference and complementarity that form a more comprehensive approach. Visually, the individual measures might contribute to an overall strategy as described in Table 4

4.5 Conclusions

The above elements and industry corollaries may all be seen as a coherent strategy against copyright infringement, until, that is, a decisive strategy can be developed. At present, such a strategy does not exist. Whether a decisive legal, technological, or operation response is ever possible is at present unclear. At present, therefore, all the industry is able to do is to prevent and reduce infringement as much as possible with the tools available and maintain

Although the industry may well recognise the measures it adopts and the objectives thereof, it may not appreciate that it has developed strategies that might legitimately be regarded as classically Fabian. Might such a recognition, though, be of value and, if so, how? A number of benefits of such recognition might be suggested as a holding pattern unless or until such a solution is developed. First, the Fabian concept might help to contextualise the general direction in which actions are taken; it might act as a cognitive 'organiser' when deciding whether a particular action has potential value, and where it might be positioned within a comprehensive protection strategy.

¹³⁷ Government has contributed £3.5 million towards the CCUK educational initiative.

Table 4. Industry copyright protection measures as a Fabian Strategy

Elements of Fabian Strategy	Industry Copyright Protection measures
<ul style="list-style-type: none"> • Actions to disrupt and frustrate; and make small, incremental gains • Gradually wear enemy down through continual attritional actions 	Close Illegal Websites Block access to illegal websites Slow down internet speed Send warning messages to continuing offenders Disrupt payments systems and advertising revenues
<ul style="list-style-type: none"> • Self-protection • Stay ahead of the enemy 	New technology and innovation in security measures Adjust release plans where appropriate
<ul style="list-style-type: none"> • Gain public support • Non-alienation 	Education and 'awareness' programmes 'Star' endorsements and messages Publicise successes Non-pursuit of individual infringing viewers
<ul style="list-style-type: none"> • Communication • Develop alliances 	Creative Content UK (Creative Futures in USA) Lobby Governments
<ul style="list-style-type: none"> • Develop and deliver decisive blow when ready 	Not yet developed

Second, it helps to ensure that a particular strategy has a clear objective and works complementarily, rather than competitively with others; an appreciation of the Fabian nature of present policies and actions, may assist in the provision of a coherent framework that guides future thinking. Third, it encourages intellectual effort towards the design of new and innovative measures that add value to the current strategic paradigm. Finally, it clearly informs that, no matter the level of success of present measures and actions, the industry will always be fighting a defensive battle until it develops more decisive strategies. If the latter, for whatever reason, is neither forthcoming or even possible, then the indications for any significant reduction in infringing activity are not encouraging.

Chapter 5

Cinemas Revisited: Windows of Opportunities or Threats?

5.1 Introduction

This thesis has suggested, (as have others, cited in Chapter 2) that cinemas may not only be regarded as central to the creative intentions behind the making of a film, but also as filling a social space. If this suggestion is correct then any negative copyright infringement effects might be materially damaging in both economic and cultural terms. The academic evidence and data presented in this thesis has uncovered conflicting conclusions regarding the extent of potential revenue effects. At the same time, this thesis has discussed evidence designed to assess the effectiveness of legal content protection measures and has commented upon their limitations. Technological and operational measures have also been discussed and issues with internal content security have been described. More positively, the examination of reliable industry data has demonstrated a healthy upward trend in terms of film production quantum and diversity and an increased cinema establishment. Furthermore, recent and current mergers, acquisitions and investment activities in the UK and elsewhere appear to underline the faith that the financial world retains in cinemas as a secure business for the foreseeable future.

The generally positive emergent picture described above suggests that cinemas have not at present been materially damaged by unauthorised activities and retain their primacy as the place to see a film. However, there are current industry murmurings that may serve to undermine such a position. These murmurings revolve around the vexed issue of the industry's historical temporal manner of releasing its films, a practice normally referred to as 'windows'¹³⁸. Assiduously protective of their prime position within the release chain, cinemas are now facing pressures to relent and allow a more compacted release pattern, a

¹³⁸ The present window between the theatrical and DVD/Digital releases reflects the 1970/1980s historical staggered theatrical releases in which many cinemas could not play a film until quite late into its run. To protect such late cinemas from the competition of the VHS release, a 'window' was agreed by both distributors and exhibitors. The current trend of mass, simultaneous theatrical releases renders this argument slightly redundant, although the need for a period of exclusivity is still defended by exhibitors.

pattern which operators regard as a threat to their and the industry's overall sustainability¹³⁹.

This Chapter will examine and discuss the 'window' issue and assess the potential future implications for cinemas. Importantly, in keeping with the central theme of this thesis, it will attempt to discuss this subject within a copyright infringement framework¹⁴⁰. It will be recalled that in Chapter 3, comments were made by a number of parties regarding the possible role played by the current windows system in encouraging 'piracy'; the present level of unauthorised activity, it was suggested, was a function of the industry's own practices. Thus, to what extent, if at all, might the pressures currently being experienced by cinema operators be driven by infringement fears?

Unsurprisingly, interviews with both distributors and exhibitors, and their respective trade bodies, yield opposing perspectives and reflect the current tension that exists between the two sectors¹⁴¹.

5.2 Windows; the distributors' perspective

Reasonably enough, distributors (as effectively the producer's representative) wish to maximise revenues and ensure sufficient revenue returns materialise in order that funds are available for investment in further production. One way of assisting the maximisation of revenue, it is believed, is to reduce the time between the theatrical release date and that of other sales platforms. This might also have the dual effect of speeding up revenue generation *and* reducing the opportunities for unauthorised activity. Interviews with distributors and trade body representatives underline this belief. When asked whether a shorter window might be effective in reducing infringement, Trade Body Exec 3 stated; 'We certainly think so, although such a move is unlikely to find favour with NATO [exhibitors]'. Responding to the same question, interviewee Studio Exec 1 was more forthright. 'It's ridiculous to think that shortening the window [between the theatrical and DVD release]

¹³⁹ The recent industry 'murmurings' have been reflected in such headlines as '*Changes to Hollywood Release Windows Are Coming Fast and Furious*'. Forbes.com, April 8, 2015. More recently, Screendaily.com asked; '*Are much shorter theatrical windows around the corner?*' January 2, 2017.

¹⁴⁰ The focus here is on the UK theatrical market, which unlike a number of its EU counterparts operates its windows policies within a consultation and agreement, rather than legal, framework. For a discussion of windows within a legal framework see a study prepared in 2012 for the European Commission by iMinds.

¹⁴¹ The question of windows is but one of the extant tensions. Trading terms, contributions by exhibitors towards advertising costs and the tendency of distributors to crowd the market place with films at certain times of the year whilst leaving other parts effectively quiet are common debates.

from the present 12 or so weeks to eight weeks would in any way damage theatrical revenue. It would reduce piracy and so everyone would win.’ The interviewee went on to suggest that; ‘I can’t imagine that the cinema-goer would not go to see a Bond film in the cinema because it might be available on DVD/Blu-Ray in eight weeks’. Dismissive of the concerns of exhibitors, a senior member of the distribution sector, trade body exec 4, commented to the researcher that any piece of piracy research that does not discuss the windows issue with respect to exhibitors would be incomplete. More forthrightly, the President of the Film Distributors’ Association and Oscar winning producer, Lord David Puttnam, said in a recent interview that the current windows regime insisted upon by exhibitors was ‘nonsense...mad beyond bonkers’ and that the industry shouldn’t be surprised if piracy occurs¹⁴².

5.3 Windows; the exhibitors’ perspective

In a report published in 2016, the UKCA stated;

The cinema sector believes that the interests of the film industry and – more importantly- the customer...are generally best served by the existence of a clear and sustainable ‘window’ between the release of a film in a cinema theatre and on any other platform...the sector strongly believe (sic) that a wholesale move to an unacceptably short (or even no) window would put hundreds of cinemas up and down the country at risk, along with the jobs and local services they support, leading to less rather than more film choices for the public¹⁴³.

The exhibitors’ perspective contrasts with the distributors’ perspective with the that a shortening of the window will not only increase the amount of unauthorised viewing but damage the whole landscape of legitimate film viewing. Trade Body executive 5 put it thus.

We know from research that the level of piracy spikes at two distinct phases; first at the point of theatrical release, and then when the DVD becomes legally available. Shortening the window would effectively squash all this illegal activity into a more intense space.

¹⁴² Interviewed by Alex Stolz, May 4 2017, for the podcast series ‘Film Disruptors’.

¹⁴³ <https://www.cinemauk.org.uk>key-issues>. 24 November, 2016.

Reflecting the same position, at a recent industry conference, the CEO of USA trade body NATO stated that idea that windows were to blame for piracy was ... 'completely crazy'¹⁴⁴. He continued; '...the vast majority of piracy happens when a film is released in theaters and when it is made available digitally. All you're doing is accelerating the second wave of piracy'.¹⁴⁵

Interviews with actual operators reveal a slightly softer stance. Exhibitor 2 commented that although 'piracy' was a problem his company, a major international circuit, did not concern itself too much about a shorter window and suggested that it would be smaller cinemas that might suffer more¹⁴⁶. In contrast, Exhibitor 3 from a smaller though growing, independent cinema company commented that he was not overly concerned about piracy and/or windows. His company policy was to provide the customer with the best in comfort, presentation, service and value for money. In so doing, he suggested, his company would prosper under any trading conditions¹⁴⁷.

5.4 Interpretation and discussion

The duality of opinion and policies espoused by the trade bodies interviewed for this research together presents a *prima facie* case that there is indeed an underlying copyright protection agenda – although the infringement argument is used differently by the two sectors. However, such a conclusion may not be totally clear cut; it is difficult to disentangle an economically driven argument from one that is truly protectionist. Distribution apparently wishes to speed up revenue generation, whilst exhibition wishes to protect its primacy in the release chain. It is quite possible that both arguments are economically driven, though cloaked within the rhetoric of copyright protection. Indeed, the converse may also be true.

Evidence that might enlighten the subject is sparse. In fact, a literature search yielded only two papers dealing with the so-called 'window effect'. Within the industry itself, there have

¹⁴⁴ The same CEO once referred to the possibility of shortened windows as a 'death threat'. The constant battle between the two sectors is described in Scott Kirsner's *Inventing the Movies; Hollywood's Epic Battle Between Innovation and the Status Quo, from Edison to Steve Jobs*, 2008. CinemaTech Books.

¹⁴⁵ Reported in the LA Times, March 28, 2017.

¹⁴⁶ Although not specifically mentioned by the interviewee, the implication of a shorter window is that those smaller cinemas that do not play a film until weeks 5,6, or later would be disproportionately affected.

¹⁴⁷ It may be recalled that such an approach coincides with the comment made by organisation A, reported in Chapter 3.

been a small number of examples of simultaneous releases, although these involved smaller films and, according to industry interview information, no research on the releases was ever undertaken. Regarding published evidence, an analysis performed for the UK Film Council (UKFC) in 2007 reached one key, though tentative conclusion:

There is no statistically significant relationship between box office returns and window length, suggesting that the cannibalisation of box-office revenue has been limited - at least to date (Bakhshi 2007, p1).

A further study carried out at the same time reached the opposite conclusion. Sattler and Eggers (2007) concluded that:

Under the conditions of our study, we find that simultaneous release of movies in theatres and on [video] generates maximum revenue for movie studios in the US while having devastating effects on other players such as theatre chains (p63).

The extent to which such findings are helpful in informing the debate in the present market, though is moot. First, the intervening decade has witnessed a dramatic rise in the use of the internet for the legal and illegal viewing of films; the DVD market, which was strong a decade ago, has now been supplanted by digital platforms. Second, it is doubtful whether either sector is actually aware of these studies – at least no mention was made by any interviewee during the course of the present research. However, even if either party was aware of the research findings, they would be unlikely to alter their respected stated positions. The fact that individuals and organisations maintain a strongly held position in the face of contrary evidence is a well-known phenomenon and described by decision-making psychologists and economists as the ‘disconfirmation bias’¹⁴⁸. A further perspective on the tendency to maintain a view or stick to a particular course of action is described by Drummond (1996) as a ‘myth’. Drummond examined decision-making in large organisations and describes how myths are created based upon prior notions and then maintained despite any evidence to the contrary. Such ‘myths’, the author suggests, will remain until a much stronger ‘myth’ arrives to take its place. Any evidence to dislodge the two sectors’ present positions has yet to be evinced. Thus, the question remains unanswered.

¹⁴⁸ See, for example, Edward and Smith, 1996, for a comprehensive discussion of this phenomenon.

5.5 Current window developments

‘We have to think about these crazy hold-backs that theatre-owners put in place – these – blackout periods – we have to think about, and do something about windowing’. So commented James Murdoch, CEO of 21st Century Fox¹⁴⁹. Other studios are increasingly suggesting that the window *status quo* is becoming unsustainable and have stated that a number of alternative release strategies are currently under consideration.

A draft business plan was put to studio managers from the developers of a home streaming service – The Screening Room. Under this proposal major feature films would be available for home viewing at a premium price during the first week of theatrical release. A number of key directors backed the idea, although to date no further action has been noted¹⁵⁰. More developed substantive discussions are continuing between a number of studios regarding a premium home streaming service two to three weeks after the theatrical release date. Although more details have yet to emerge, serious discussions are currently taking place between studios and major US exhibitors¹⁵¹. However, it is notable that such discussions are not new. In 2010, studios were discussing a shortened window for a planned Video-on Demand platform that would see films being made available at about 45 days after the theatrical release¹⁵². This was reportedly a clear response to the collapsing DVD market, although whether that market itself was collapsing due to illegal internet activity is moot and leads to a circular argument.

The extent to which the current developments are driven by copyright protection concerns, or for pure economic reasons is again unclear. In the Variety article referred to below, Warner Bros’ President of Worldwide Marketing and Distribution stated:

Everyone in this room is facing a challenge, but also an opportunity. Streaming services and new technologies are giving consumers more choices for where and

¹⁴⁹ Quoted by the Hollywood Reporter and repeated in The Guardian. Available at <https://www.theguardian.com/2016/sep/22/james-murdoch-failure-fox-has-to-make-better-movies/>

¹⁵⁰ A full outline of the proposal and the ensuing comments may be seen at <http://www.variety.com/fil/new/screenin-room-parker-national-association-of-theatre-owners-1201792108/>

¹⁵¹ The basic proposals may be seen at <http://www.variety.com/film/news/warner-bros-kevin-tsujihara-1201981417/>. The fact that discussions are already taking place between the studios and major US exhibitors was revealed to the researcher during an interview with a major trade body. This information was subsequently confirmed by a recent article in Variety (March 29, 2017). It might also be appreciated that due to anti-trust legislation in the USA, studios are forbidden to act *en bloc* commercially. Each studio is obliged to negotiate with each exhibitor separately.

¹⁵² ‘In this war, Movie Studios Are Siding with your Couch’. New York Times, Sep 25, 2010.

how they consume our content...where there is demand somebody is going to step in and fill that void. We have to be innovative.

This statement is interesting in that it might be interpreted as referring to both content protection and new revenue building business strategies. Although it directly avoids any reference to copyright infringement, the mention of consumer choice and danger of the filling of voids, it is arguably a clear indication that without new strategies, consumers will be driven to unauthorised viewing.

5.6 Conclusions

This chapter began with the question of whether the cultural tradition of ‘going to the movies’ might be under threat as a result of copyright infringement. Although it has been noted that the film and cinema industries appear to be strong and indeed growing, it was suggested that copyright infringement and copyright protection interest may express themselves in subtler ways. In this regard, the current protection that cinemas receive due to existing release practices (windows) has been discussed and the tensions surrounding the matter between distribution and exhibition have been described. Despite the paucity of evidence to inform the ‘windows’ debate, both sides of the industry maintain their clear positions. The extent to which these positions have their root in infringement fears, or are pure business strategies is unclear; evidence based upon interviews with relevant trade bodies presents an equivocal picture and arguments can be made both ways.

Recently, however, movements by studio and distributors to experiment with alternative window strategies have begun to emerge. The extent to which these are prompted by copyright or economic concerns is again unclear, since certain statements made by senior industry members may be interpreted either way. A further consideration that has yet to be discussed, at least in public, is whether the making available of certain high profile films on a premium streaming platform might encourage the expectation among cinema-goers that *all* films should be available on demand. Whether such an expectation might produce a further incentive to seek out unauthorised viewing opportunities is a question yet to be addressed.

The question of the long term sustainability of certain cinemas is thus open.

Notwithstanding the differing perspectives between the two sectors, larger cinema

companies may have the resources to adapt their business plans accordingly. Smaller cinemas, especially those in localised communities and who form part of the cultural and social landscape may not. If there is a danger posed by a change in release strategies, it is likely to be felt more acutely in this sub-sector. However, as noted earlier in this thesis, cinemas have faced significant threats throughout their existence; from television, to VHS and DVD, from the arrival of the multiplex and from the emergence of the internet as a competitive delivery platform. In each case, the cinema industry has responded and subsequently thrived. Investment levels in customer care and experience are at their highest for decade and the industry believes that the cinema is still the pre-eminent way to see a film. In this, they have powerful allies - major film-makers who wish their product to be seen as it was designed to be seen – on the big screen and in a social environment. On this basis they will survive. As Sue Kroll, Warner Bros President of Worldwide Marketing and Distribution recently noted: ‘The movie theater stands alone. It is and always be the cathedral and the temple of this art form’¹⁵³.

¹⁵³ Statement made at the industry’s annual conference, CinemaCon, Las Vegas, March 2017.

Chapter 6

Summary and conclusions

6.1 Introduction

The guiding theme of this thesis has been an examination of the extent to which copyright infringement is damaging the film industry in a material way. Evidence has been sought to quantify any potential revenue effects of illegal and unauthorised viewing, as well as any potential effects on the industry's creative and cultural output. Central to the analysis has been an examination of the effect of such activities on cinemas. It has been suggested that cinemas might be regarded as important for two reasons. First, cinemas have been at the heart of the industry for the past one hundred years and still represent the destination chosen by the creative community for the most effective, satisfying and exciting exhibition of their product. Their value is both economic and creative. Second, it has been suggested that cinemas contain value in socio-cultural terms and are often viewed as community assets, alongside such establishments as pubs, libraries and post offices. It would seem to follow, therefore, that any material damage experienced by cinemas due to copyright infringement might have consequences that transcend the mere economic. This thesis set out to examine these issues via the examination of industry generated research as well as the result of academic studies. The two key questions asked in this thesis were; first, what does the available evidence have to say about the scale of potential revenue losses experienced by the industry as a result of illegal and unauthorised activity; and second, how effective are current legal and non-legal strategies at protecting copyright and revenues. The main findings were as follows.

6.2 Main research findings

6.2.1 Revenue and output effects

Industry and academic attempts to quantify the potential revenue effects of unauthorised viewing outlined in Chapter 2 have yielded mixed and possibly unreliable results. Revenue effects estimated by the industry itself include the MPA's \$6.1 billion worldwide and the UK's £500 million 'loss' across all sales platforms, (including £216 million at the box office). Academic studies suggest box office 'losses' ranging from \$40 million for a major feature

film to no measurable effect from unauthorised viewing. In questioning the reliability of research findings, this thesis has commented upon a number of methodological drawbacks, questionable assumptions and the general lack of experimental replication underlying the conclusions drawn by the relevant authors. In a meta-analysis conducted by Hardy (2015), the author noted that of 71 published and working papers on the subject of infringement revenue effects, in both the music and film industries, 41 yielded negative conclusions, 17 were inconclusive and 13 found no effect. Thus, almost 40 % of published work found no clear-cut evidence of negative revenue effects due to copyright infringement.

Further sources were also consulted to examine this question. The examination of reliable, third party data suggests that over the past decade revenues have continued to rise, and film output has increased, not just in total quantity, but in its diversity. No evidence was discovered to suggest that any material damage was being experienced by the industry.

However, the researcher is not able to conclude from the findings of others that revenue effects do not exist at all, although a reliable research paradigm to assess them has yet to be developed. The counterfactual question of what the industry might look like economically if there were no illegal activity at all cannot therefore be answered with any degree of reliability.

6.2.2 Effectiveness of legal and non-legal content protection measures

Examination of the conclusions of a number of academic studies assessing the effectiveness of such legal measures as website blocking and graduated response programmes yields an equally equivocal picture. The evidence discussed in Chapter 3 suggests that such measures may be effective in the short term, although there is no evidence to suggest any long term alteration in infringing behaviour. Evidence also suggests that the effectiveness of such measures may serve to deter the casual user, though the more determined user will always find an additional technical route to preferred illegal websites. Indeed, the ease with which dedicated infringers can bypass legal blocks has been discussed by a number of European courts, and represents a major objection to the implementation of such blocks in the view of certain organisations.

Evidence was also presented to suggest that the industry's own internal security measures are only partially successful. Whereas the practice of illegally recording a film within the cinemas has all but disappeared in mature markets, cyber-attacks on studio servers and the removal of content appear to be an important source of illegally available films.

Industry strategies of consumer 'education' and 'communication' are among softer approaches to copyright infringement. Opinions regarding the effectiveness of such a strategy were presented in Chapter 3 and found to range from positive, to mixed and to outwardly hostile. Whereas the industry plans to carry out research in this area, there are presently no indications of the potential effectiveness of an 'education' approach. Evidence, however from studies examining the effectiveness of an 'information' approach contained with graduated response strategies (e.g. Hadopi in France and the USA's consumer alert programme do not inspire confidence).

The suggestion that the industry's 'platformed' release strategies might act to encourage unauthorised viewing was also examined and discussed. A number of authors have suggested that the making of its product 'difficult' to access at times and in formats desired by the public, is at the heart of infringing behaviour. Consequently, a change in business practice might act to reduce such behaviour. Evidence to inform such a position is scarce and inconclusive. Discussions thus take place in a dialectic rather than empirical and informed manner. However, evidence suggesting that the exclusivity currently enjoyed by cinemas in the early period of a film's commercial life cycle might be under threat as major studios discuss the possibility of making certain films (presumably major films) available on a premium video on demand (PVOD) platform. The extent to which such discussions are motivated by a copyright protection agenda, or purely as a strategy to increase revenues is currently being debated by the studios and by cinema owners who, with a certain amount of support from major film-makers, believe that not only will their revenues be affected, but the value of film as a cultural commodity will be weakened.

6.3 Discussion

Once again, the researcher is presented with an anomalous picture. The effectiveness of both legal and non-legal have been challenged academically, and by a number of organisations who take a more negative view of overly harsh legal actions. The conundrum

faced is that, in the absence of persuasive evidence of the effectiveness of current content protection measures, one might expect to see evidence of a declining market. Further, one might expect to see evidence especially at the level of the box office as so many films are available either prior to or at the point of the theatrical release date. The fact that one does not see such evidence suggests a number of explanations.

First, those that are engaged in unauthorised viewing are either those who would not pay to see a film in the first place (i.e. 'all-weather infringers') or are those that do pay for some films, but on occasions find it more convenient, to stream or download a film illegally (i.e. 'fair-weather infringers'). Any potential revenue loss is thus both theoretical and contextually based. Second, protection measures are in fact effective, even if a reliable method of measuring such effectiveness has yet to be developed. This is perhaps a possible conclusion from the Fabian perspective outlined in Chapter 4. The effectiveness of any single measure may not be apparent, although as a package, they may indeed be effective in stemming potential revenue losses and keeping the number of unauthorised users at bay; without such measures, potential revenue effects may be even greater. Finally, the industry just may be robust enough to withstand any revenue pressure put upon it by illegal activity – at least at the box-office.

6.4 Good news for cinemas?

If, in the face of significant amounts of unauthorised viewing, and in the face of the apparent ineffectiveness of protection measures, cinemas appear to be thriving, investing heavily in technology and new stock, then one might be forgiven for concluding that their future is secure and that any concerns about cinema-going culture are overstated. However, such a conclusion may be premature.

The question of whether cinema will continue to enjoy a period of exploitation exclusivity has already been discussed and it has been noted that an underlying copyright agenda cannot be ruled out. The challenge to this exclusivity is real although the actual effects of such a move cannot be predicted. The extent to which such changes in business strategy will be felt equally across the cinema landscape, or whether the smaller, locally-based, generally independently owned cinema will experience greater stress is equally unknown. However, a further existential threat is on the horizon.

6.4.1 New Technology

The advent of new technology has always represented a threat to cinemas. As noted in Chapter 5, VHS, DVD and Blu-ray, and internet sales and delivery technology have been of concern to exhibitors, especially with their implications for illegal activity. However, such concerns have always been overcome and businesses have adjusted and thrived. Overall, such technologies have helped film-makers increase their revenues, with a resulting re-investment in the quantity and production value of their films. This in turn has benefited cinemas. A new technology, though, might represent a greater threat. Internet protocol television (IPTV) using the latest technology in media access boxes promises to be as big a problem today to the industry as did the illegal 'duping' of VHS cassettes in the 1980's. Such access technology, when loaded with the correct, though illegal, software, promises to take the strain from the user when accessing film and television via the internet, whether the content is legal or not¹⁵⁴. Involving just a few simple instructions, with no sophisticated knowledge required, a user is presented with a long list of content that the software will access as requested. Bypassing web blocks, early uses of the technology were highlighted with its use for the unauthorised live viewing of Premier League football matches. More recent uses have involved the streaming of subscription television programmes and of major feature films¹⁵⁵. The ease of use and relative ease of purchase of such technology raise important legal issues.

6.4.2 Legal implications of new technology

Whereas the unauthorised downloading of copyrighted content has always been illegal, the *streaming* of the same content has been a legal grey area due to the nature of a 'copy'. CPDA S16 does not include the term 'streaming' in the list of restricted acts. However, note must be taken of S17 in which the nature of a copy is more fully defined. Section 17(6) states that infringement takes place when 'copying in relation to any description of work includes the making of copies which are transient or are incidental to some other use of the work'. From this, it might be concluded that since streaming involves the transient caching

¹⁵⁴ The most popular software, KODI, is legal, as are the media interface boxes loaded with the software. However, according to FACT, there has been a proliferation in the sale of boxes with a software add-on that facilitates the search for both legal and illegal content.

¹⁵⁵ According to recent unpublished industry research referred to by a trade body executive interviewee the technology facilitated almost instant access to a large number of TV and feature films of which 60% and 65% respectively had yet to be released.

of a small part of the work (even just a frame) then streaming content is illegal. However, Article 5(1) of EU Directive 2001/29 contains a number of exceptions with respect to transient copies, including;

‘Temporary acts of reproduction...which are transient or incidental, which are an integral and essential part of a technological process and whose sole purpose is to enable:

- (a) a transmission in a network between third parties by an intermediary, or
- (b) lawful use of a work or other subject matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2’.

Article (5) however, goes on to state that the exemptions provided in 5(1) shall only be applied in certain cases which ‘do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the ‘rightsholder’. From this, it might be reasonable to conclude that the streaming of certain content e.g. an audio visual work is illegal. (It is interesting to note that the reference to the ‘transient’ nature of a copy in this context was made in the 2001 Directive and later included in the 2003 amended CPDA. At that time the concept of streaming a significant audio-visual work was in its infancy and few users had either the technology or bandwidth to stream (or download) a significant file size. One might thus ascribe a high degree of prescience to the lawmakers or their technical advisors). However, in the first case dealing with the nature and legality of transient copies, CJEU ruled that Article 5 of Directive 2001/29/EC;

‘...must be interpreted as meaning that the copies on the user’s computer screen and the copies in the internet ‘cache’ of that computer’s hard disk made by an end-user in the course of viewing a website, satisfy the conditions that these copies must be temporary or incidental in nature and that they must constitute an integral and essential part of a technological process, as well as the conditions laid down in Article5(5) of that directive and that they may therefore be made without the authorisation of the copyright holders.’¹⁵⁶

This interpretation was made within the context of general user access to news articles collated by a commercial agency (Meltwater) and subsequently sold to subscribing

¹⁵⁶ Judgment of the Court (Fourth Chamber) in Case C-360/13. Public Relations Consultants Association Ltd Vs Newspaper Licencing Agency Ltd and Others, 5 June 2014. Paragraph 63.

organisations. In this case the Court recognised that the files that the general user could access were legal in that the agency had paid a licence fee for the use of the raw material and so the extent to which such a ruling might have wider significance – e.g. to the streaming of a film - is moot. Whereas some commentators have taken the ruling to apply to *all* streaming¹⁵⁷ a more considered interpretation might be that streaming content for which a licence fee has not been paid remains illegal, notwithstanding the broader ruling of CJEU. This latter consideration was confirmed recently in a number of both EU and UK cases arising in the light of the increasing availability and use of multi-media boxes and illegal software.

A recent CJEU judgment held that ‘the temporary reproduction in a multimedia player of copyright protected work obtained by streaming is not exempt from the right of reproduction’¹⁵⁸. Such a ruling suggests that the media access boxes, when configured to facilitate access to and the streaming of copyright-protected content therefrom is illegal. In the UK, Arnold J granted an injunction to block a number of websites that facilitated the unlicensed streaming of live football matches. Referring to the legality of streaming by the users of such sites, Arnold J stated that; ‘In the case of films of matches, copying of a substantial part is likely to occur if users stream footage of any appreciable segment of the match.’¹⁵⁹ It is again reasonable to conclude from these cases that the legality from the users’ perspective is partially dependent upon the legality of the source material *and* the amount of material streamed.

6.4.3 Legal consequences

The extent, however, to which a resolution of the matter might have a material impact on the behaviour of users is arguably at present academic in that the propensity of copyright holders in the film industry to pursue individual alleged infringers has historically been low. More recently though, the enforcement body FACT has indicated that it may be minded to commence proceedings against alleged infringing users. As well as seeking action against

¹⁵⁷ (a) Chris Smith. ‘Pirating copyrighted content in Europe is legal, if done correctly’. BGR. BGR Media. 5 June 2014.

(b) David Meyer. ‘You can’t break copyright by looking at something online, Europe’s top court rules’. Gigacom.com. June 5 2014.

(c) ‘Good news for everyone: after 5 years, we now know that what we do every day is legal...No, seriously’. Copyright for Creativity. June 13 2014.

¹⁵⁸ Stichting Brein v Ziggo BV, 26 April 2017. Case C-527/15.

¹⁵⁹ Football Association Premier League Limited V British telecommunications PLC and Others. 13 March 2-17. Case N0: HC-2-17-000458.

the manufacturers and importers of media boxes loaded with illegal software, the organisation's Director General commented that it '...will be looking, at some point, at the end user. The reason for end users to come into this is that they are committing criminal offences'¹⁶⁰. Whether such a statement marks the beginning of a new initiative against infringing users by copyright holders is yet to be seen.

6.5 What next?

This thesis has made the suggestion that a more coherent and reliable research paradigm might be regarded as a major objective of trade body leaders and academic researchers alike. Such a suggestion, though, resides in an *ex post* arena, since it proposes research activity into something that has already happens. A more interesting subject to explore is whether there might be any fruitful *ex ante* actions that the industry might develop in an attempt to prevent or at least significantly reduce illegal and unauthorised activities in the first place. Chapter 4 discussed the concept of a 'decisive blow' with a Fabian perspective. Any such decisive action might be considered to reside in one of the following domains.

6.5.1 Are new laws required?

Although a very plausible question to ask, interviews with senior legal executives within three major studios and with executives from related organisations revealed no significant desire to lobby for new laws – at least in Europe¹⁶¹. (The FPRG survey referred to earlier asked the following question; 'How, if at all, does the intellectual property regime need to be changed to support future growth and innovation in the British film industry?' Of the responses received, only 10.5% suggested a need for tougher anti-piracy legislation). Despite the ease of circumvention, website blocking appears to satisfy most needs, whereas little appetite was shown for more onerous penalties for unauthorised users. In this, the industry maintains its belief that the adverse publicity emanating from legal actions against individuals mitigates against the use of such actions¹⁶². Nor are there any apparent desires to lobby for additional legal powers over internet intermediaries and the question of

¹⁶⁰ Interviewed by *The Independent* June 26 2017.

¹⁶¹ USA trade bodies maintain a desire to continue lobbying for a SOPA type law, however. It has also been suggested to the researcher by a UK trade body leader that politicians do not regard further action against piracy is not a popular thing to do with voters. Lobbyists thus have had the experience of doing more and more in the hope of additional support only to be told that their efforts are insufficient.

¹⁶² It will be recalled that the music industry experienced such adverse publicity and gradually ceased actions against individual users.

adherence to 'take down' notices. A barrister consulted during the course of this research referred the writer to Google's own internal policy regarding such requests, noting that Google complied with 90% of copyright related 'take down' notices, suggesting that new laws were not necessary¹⁶³. More significantly, the judge interviewed during this research suggested that the limits of the existing laws had yet to be tested and that at present there existed no clear case justifying the seeking of new ones. (Clearly, the judge was correct. In the Premier League case discussed earlier, the judge was able to determine that the unauthorised streaming of copyright-protected content was illegal within the existing provisions of CPDA, 1988). The judge also suggested that further attempts to work with ISPs and other intermediaries on a voluntary basis might be more preferable¹⁶⁴.

If new laws are not deemed necessary in the context of the delivery of a decisive Fabian blow, then a discussion of other methods is called for. Arguably, technology might represent the best means.

6.5.2 The role of new technology

The barrister interviewed for this thesis suggested that the industry should concentrate more on technological measures than of any change in business practices in the protection of its content. Whereas certain technical measures have been shown to be effective (e.g. in the stemming of 'camming' activities in cinemas, this thesis has suggested that the primary source of illegal films is likely to be found via cyber-attacks on studio servers. Greater security against such attacks would appear to be a matter of crucial importance. In this though the studios are not alone. The UK has experienced a high number of such attacks; TalkTalk, Vodafone, and Carphone Warehouse are well publicised examples. In the USA, cyber-attacks have disrupted such high profile organisations as the FBI, the Pentagon and the US Personnel management offices. Whereas it is beyond the scope and competence of this thesis to discuss technological advances in this area, it is reasonable to suggest that the

¹⁶³ A similar defence of intermediaries acting as a responsible internal 'police force' is made by Lessig (2008) in which he suggests that YouTube flags content that breaks its rules and takes them down. He comments, perhaps quaintly, that; 'Like neighbours in a well-kept community, the users clean up after one another and take pride in the place they built'. p195

¹⁶⁴ Although not explicitly stated, the judge may have had in mind the development of voluntary arrangement plans between CCUK and ISPs, as encouraged by DEA, 2010. It might also be noted that at the time of finalising this thesis, Google and Bing have signed a voluntary agreement with the IPO to make it harder for users to locate illegal films and sports programmes via their search engines (although, their efforts may be hampered by the availability of the illegal software mentioned in section 3 above).

industry might consider partnering with relevant cyber security experts to examine this area¹⁶⁵.

If indeed it is the case that the studios themselves are a major leakage point, then the advent of the media interface and software technology discussed above suggests an even greater imperative to improve cyber security.

However, as Christensen (1997) has noted, new technologies and processes can themselves be disruptive – that is, have unpredictable and performance related consequences that have the power to shake up not just an industry, but those who might seek to compete with it. Such an analysis suggests that any innovations an industry might develop will be closely followed by competitors – in this case those who seek to access films illegally. This view might be shared by Schumpeter (1942) who characterises technological innovation as a ‘critical dimension of economic change’ and whose benefits would ‘soon be competed away by rivals and imitators’. The value of technological solutions might always thus be time limited.

6.6 Wider relevance

Whereas this thesis has concentrated on major, mature markets, its findings may be of relevance to smaller, nascent markets as they develop their production and distribution infrastructures and processes whilst facing *contemporaneously* major threats from illegal activity. The emerging market of Nigeria (Nollywood) is an example. According to criminologist Oludayo Tade, the Nigerian industry generates annual revenues of \$590 million per annum. However, this is dwarfed by estimated losses due to illegal activities of \$2 billion. Tade describes such piracy as representing ‘... a menace that has eaten deep into the industry and may grind it to a halt’¹⁶⁶. Such a sentiment is amazingly close to those described earlier in this thesis and replicates the metaphor of an illness threatening to destroy a body unless appropriate action is forthcoming. The key causes of illegal activity in Nigeria, Tade suggests are the poor implementation of copyright laws, a near lack of prosecution of offenders and corruption in governance agencies. It would appear

¹⁶⁵ As most studies are vertically integrated organisations containing music, TV as well as film divisions, such a venture would benefit all these creative industries simultaneously.

¹⁶⁶ Tade writing in *The Conversation*, April 20, 2016.

reasonable to suggest that any actions taken by the Nigerian authorities might be informed by the experiences of more mature markets over the past decades.

6.7 Conclusions

This thesis has attempted to uncover convincing evidence that the film industry, especially cinemas, is being materially damaged by the apparent high rate of unauthorised viewing of its product. It has also attempted to find evidence that the content protection measures used by the industry are effective in the significant reduction such activities. It has struggled to find persuasive and reliable evidence on both counts. Rather, examination of reliable published data suggests that, whatever else may be occurring in the market place, the industry is growing, and is predicted to continue to grow. Further, evidence has been produced to suggest that, far from being concerned about illegal activity and potential revenue effects, it is investing strongly in its infrastructure. This picture of the industry holds for both production and exhibition.

However, this thesis has not been able to conclude that potential revenue effects due to illegal activity do not occur; rather their measurement has proved elusive in the absence of appropriate research tools and paradigms. Neither has it been able to conclude that current content protection measures are ineffective; rather, it has been suggested that viewed as a package of measures through the lens of Fabian Defensive Strategy, they may well be effective in at least stemming potential revenue losses. It may be that the tools to measure such effectiveness are not presently available and sufficiently sensitive. However, the Fabian analysis yields the plausible conclusion that unless or until the industry develops one or more decisive measures, its product will continue to be a target for illegal product access and unauthorised viewing.

Whether such measures may be found within the legal, technological or business practice domains is unclear. This thesis has revealed little appetite for new laws either within the industry or within the legal profession. As the head of the USA based Freedom of the Press Foundation has suggested; 'The answer to piracy is innovation, not new laws'.¹⁶⁷ On the technology question, the industry would appear to acknowledge that its current security arrangements are inadequate to deal with cyber-threats and that improvements are

¹⁶⁷ Trevor Tim, quoted in the *New York Times*, 21 February, 2012.

needed. How such innovations might unfold is as yet unknown. Where activities appear to most advanced is within the area of business practice. This thesis has described current attempts by a number of major studios to interpose a new release 'window' between the theatrical and DVD/digital release dates. The extent to which such a move is motivated by a copyright agenda, an attempt to increase revenues, or merely a response to changing consumer demand is unclear, although Frosio (2016) notes that '...piracy becomes the symptom of market inefficiency that should be used by meeting by users' demand rather than heavy-handed enforcement approaches...'p 11.

Whatever new approach might be forthcoming, however, does not in itself signify the safety of industry players. In addition to any 'piracy' threats, competition for consumers is increasing in other, legitimate, areas. Major internet-based companies are now becoming producers in their own right and developing content for their own sales channels. Such companies as Amazon and Netflix have the financial resources to attract talent away from 'Hollywood', with announcements that both Woody Allen and Martin Scorsese have signed production contracts¹⁶⁸. Such announcements have already provoked defensive comments from exhibitors. Writing in *The Guardian* recently, the CEO of UKCA was moved to respond that with the record breaking box office levels in both the UK and the USA, 'Netflix poses no mortal threat to cinemas.'¹⁶⁹ However, in contrast, the financial analysts, Bloomberg, have recently noted that the combined stock market value of the top four USA cinema operators has fallen by \$1.3 billion. Attributing this to a dearth of product in the latter half of 2017, Bloomberg suggests that 'the tried-and-true formula of churning out big-budget sequels and cinematic universes populated with superbeings seems to wearing on filmgoers'¹⁷⁰. Cinemas may thus be faced with challenges from both legal and illegal activities.

In this way, the film industry, including cinemas, may need to regard any activities, legal and illegal, that potentially detract from revenues, along with marketing costs and other expensive overheads, as an inevitable cost of doing business with a highly desirable product in a digital world.

¹⁶⁸ Story by Ellen Jones, *The Guardian*, March 23, 2017.

¹⁶⁹ Letters page, *The Guardian*, March 27, 2017. It is perhaps interesting to note the use of the word 'mortal'. Not only does it extend the somatic metaphor permeating the infringement debate, it also suggests that *there is* a perceived threat.

¹⁷⁰ Hollywood Might Not Bounce back from Theatre's \$1.3 billion stock collapse. August 4 2017, <https://www.Bloomberg.com/news/articles2017-08-03>.

Appendix 1

Interview Rationale and Methodology

1. Introduction

The decision to adopt an empirical approach via the use of interviews with experienced, senior industry and related organisational executives as an additional research tool for this thesis was prompted by the relative lack of any significant industry presence within the prevailing literature. It was felt that interviews would assist in the preparation of this thesis in two ways. First, interviews would serve to provide basic background information on the industry itself, what measures it undertook itself to protect its product, how decisions were reached and how it actually perceived and interpreted the core issues involved in copyright infringement. At the same time, interviewees might be prepared to provide data and other research findings that were not in the public domain. Second, the gathering of a number of pertinent quotes to punctuate and add value to certain aspects of analysis and discussion might add a further level of colour to the analysis. In short, the value of any existing data and information might be enriched via the addition of personal testimony and experience, and in such a way that can never be expressed in documentation alone. For example, in a highly complex, political and diversified industry, published data yields little insight into internal tensions, institutional constraints and other factors that may detract from co-ordinated and unified actions. The reliance on documents alone as a guide to present and historical actions has presents interpretive drawbacks; reliance on interview data alone in the present research would be equally as incomplete a research strategy¹⁷¹.

Importantly, one never knows beforehand where the interviews might lead and what serendipitous opportunities might arise from the various interviewees. In fact, a number of alternative avenues were followed up as a result of suggestions from a number of such interviewees, opportunities that might not have been anticipated at the outset. Often personal introductions were made, and meetings were arranged by the referring individual.

¹⁷¹ The historian E.L. Carr suggests that study with reference to documents alone is not necessarily 'scientific'. Documents have to be selected and the process of selection involves a degree of subjectivity, as does the process of interpretation.

2. Selection of companies and organisations

In a simplistic sense, the target companies and organisations were self-selecting. Those that were in any way concerned with or affected by infringement would clearly be the relevant stakeholders to approach. These would include: **film distributors**¹⁷², who acting on half of the film's owner bear a significant responsibility for ensuring a film's security as it goes through its distribution cycle; **exhibitors** (cinema owners) who generally are the first to make a film available to the public and are responsible for its security and safety whilst under their care¹⁷³; the various domestic and international **trade bodies** that represent the interests of their members (including copyright protection); **law firms** that undertake legal and court work for copyright owners when infringement has been detected; **enforcement agencies** that seek to protect the copyright of not just film owners but that of a range of creative industries; and, those organisations that, whilst not necessarily opposed to the notion of copyright and its protection, are basically critical of a number of current legal measures adopted by the creative industries.

Distributors and exhibitors are not homogenous groups and are largely segmented as follows. Distributors represent both large studios and smaller independent producers, the former referred to as 'majors', the latter as 'independents'. Whereas in general the majors deal with films with very large production and marketing budgets¹⁷⁴, and whose films are largely the target of copyright infringement, the independents handle those films of lesser budgets, but whose films on many occasions become very financially successful in their own right and often displace their larger rivals in box office charts¹⁷⁵. Within the exhibition sector, similar divisions apply. Generally owned by either large financial institutions or major shareholders, major exhibitors (circuits) are those which have large numbers of cinemas nationwide and generate the majority of UK admissions. Smaller circuits are generally independently owned, often family businesses, and regionally located. In many instances, though by no means all, they exist on their own and without competition from their larger

¹⁷² The FDA describes the practice of distribution as the "highly competitive business of launching films in the market place." Key activities include; audience identification; arranging release dates and negotiating with cinemas; and, the development of an advertising and publicity strategy that will appeal to and maximise audiences in the target market.

¹⁷³ For example, in the prevention and detection of illegal recording activities within their premises.

¹⁷⁴ E.g. *Skyfall* and the recent *Star Wars* whose production budgets are estimated at \$200m and \$300m respectively

¹⁷⁵ E.g. *Billy Elliot* and *The Inbetweeners* with estimated production budgets of \$5m each were both highly successful commercially.

rivals. Finally, there are smaller, often single-screen cinemas that are mainly privately owned, though in some cases by local authorities, charities and trusts. As with distribution it was important to understand the operational differences between the various sectors.

3. Selecting and targeting individuals

3.1 Distribution and exhibition

The decision as to which individual(s) within each organisation to approach for an interview was not straightforward. Within the larger distribution companies, roles are quite specialised although often cross-cutting. Thus, legal executives would frequently interface with their distribution colleagues, who, in turn, would often require assistance and input from technical department colleagues. In any case, all relevant departments are acutely aware of and collaborate closely to minimise the chance of any infringement occurring via the adherence to company policy and processes aimed at minimising infringing activities by third parties. Given that it would not be possible to see individuals from all the various departments in all the larger companies due to time constraints, interviewee availability etc. the decision to meet with at least two representatives from each relevant department across the major distributors was adopted. Collectively, these individuals worked for companies whose films generated an average of 70% of UK box office receipts annually. In all cases, senior individuals would be targeted, meaning those of departmental director positions or above.

A similar approach was adopted with respect to the larger exhibitors. Again, due to various specialisms within the companies (operational, sales, general management, etc.) the individuals with the most synergistic roles were targeted. In this case, these were the operational directors. Their roles place them at the nexus of senior management policy and its implementation at cinema level and, especially with regard to the safety and security any film that may temporarily be in their safekeeping.

For smaller circuits, the most senior individual to target would be the managing director who would have the broadest view of both operational, security and other day-to-day management matters.

3.2 Trade bodies

Although these organisations are not in the daily front line of various industrial activities, their importance lies in the fact that they represent their members' collective interests with government departments, policy making bodies and others. One of their primary roles is to develop industry wide anti-infringement strategies and best practice models for their members. Most bodies are nationally based, although some take on a wider international role and can thus bring the experiences of many markets to bear on the development of such practices. They are generally responsible for the provision of outward facing spokespersons for the industry and give the industry its public profile and persona.

Interestingly, though perhaps understandably, national trade bodies tend to be quite small in size although their roles are quite wide ranging. The international bodies by contrast are large organisations with strategically located offices with responsibilities for a wide geographic region¹⁷⁶. From a research perspective, they are valuable in that they have wide-ranging experience and able to provide significant information and statistical data in the way of international comparisons. For the local bodies, the CEO was targeted. For the international bodies, the targets were the most senior individuals in with responsibilities for research, legal affairs and policy formation.

With reference to serendipitous referrals, the trade bodies might also be instrumental in directing the researcher to other relevant individuals and in the provision of statistical data that might not otherwise be openly available.

3.3 Other organisations and individuals

Within other organisations, e.g. legal and enforcement, either the known relevant individual was targeted or advice on the most appropriate individual was sought. Only one interviewee for each relevant organisation was approached, although in some cases, alternatives and/or additions were suggested. In either case, an appropriately qualified and experienced person individual was reached.

¹⁷⁶ E.g. MPAA with The Americas, Europe Middle East and Africa, Asia Pacific and offices in USA, Belgium and Singapore.

4. Key interview considerations

In addition to the identification of relevant organisations and individuals to interview, the researcher had one significant factor to consider. As a long-serving industry executive, a number of the interviewees were personally known to the researcher. This personal knowledge raised many questions in the researcher's mind as it was considered to potentially impact on a number of key interview factors. The researcher's experience within and knowledge of the way the industry worked held some intrinsic dangers.

First, it is difficult to either be, or appear to be, totally neutral on various issues. One might appear to be sympathetic to the concerns of the industry when discussing the amount of infringing activity in the wider market; conversely, one might appear to be unsympathetic to the views of those who do not hold with such legal actions as website blocking: or vice versa; neutrality is not an easy position to adopt.

Second, the mere fact of familiarity and knowledge (of both individuals and particular positions) on copyright infringement may itself bias the researcher in both the documents selected for study and the questions posed to individuals during an interview. This factor may be considered to inject an element of subjectivity into the research to a greater or lesser degree.

However, being aware of such dangers goes some way towards mitigating their influence, though perhaps inevitably, not entirely. The most the researcher might hope to achieve is a balanced review of all data sources.

4.1 The nature of the interviewees

All the interviewees were senior executives within the industry and relevant organisations and ranged from departmental directors to managing directors and beyond of major commercial companies and to the CEOs and senior vice presidents of national and international trade bodies. Within other related sectors, all interviewees were professionally qualified and highly experienced individuals, for example, a senior QC, a high court judge, a detective chief superintendent of police and a director-general of a major enforcement body. The seniority of the interviewees involved raised a number of questions regarding such issues as the development of sufficient rapport with and respect from the relevant

interviewees, most notably those whom the researcher had not met before and those sectors within which the researcher had no particular expertise. How much pre-research might be required by the researcher to present as knowledgeable and professional? Questions such as these are examined within a body of literature that deals with what is described as 'elite' interviewing.

Authors of research into the interviewing of 'elites' do not present a clear-cut definition of what actually constitutes an elite person (Welch et al, 2002; Harvey, 2011). However, a number of key descriptors emerge from a number of authors. Giddens (1972) characterises 'elites' as belonging to groups characterised by power, talent and privilege, whereas Welch defines an elite interviewee as one who 'occupies a senior or middle management position; has functional responsibility...has considerable industry experience and has long tenure with the company' (Welch et al, 2002, p613). Similarly, Harvey defines elites as 'those who hold senior management and board level positions with organisations' (Harvey, 2011, p433). Whereas such individuals may be found in both the business, public and political domains, 'average' member of society, Bygnes (2008) suggests that what does and does not constitute an 'elite' is socially and scientifically constructed. Job titles are therefore not always a reliable indicator that an interviewee is 'elite'. Harvey (2010) agrees that job titles can be misleading and do not necessarily indicate elite status.

Notwithstanding the relative lack of a clear-cut set of attributes, within the definitions suggested above it would appear to be reasonable to conclude that the interviewees described for this research fall broadly into an 'elite' band. This in turn suggests that the structure and style of the interviews would need to be carefully planned.

Authors also suggest that the interview process for 'elites' should be approached with a number of considerations aimed at building trust, rapport and respect. Interviewers are advised to do their homework and understand the subject and the interviewee's expertise in his/her particular domain so as to present with sufficient credibility. Questions should be open-ended to avoid 'boxing in' since 'elites' like to be to express themselves in their own words rather than meeting the perceived expectations of a particular interview process. Likewise, the electronic recording of interviews with such individuals might prove to be inhibitive and make them feel somewhat uncomfortable and thus less forthcoming with

their responses and detract from fuller engagement. However, such authors are not prescriptive and recognise that all circumstances are different and that adaptability will always be required. Ultimately, it might be considered that the style, approach and generalised skill and experience of the interviewer might be the paramount factor in determining whether the interviews have been successful in yielding the required information and whether a number of useful insights have been forthcoming.

4.2 Approaching the interviewees

Interviewees were contacted either by email or phone with a request for a meeting. The nature and context of the meeting were described. Once an interviewee has signalled willingness to meet, further email exchanges took place in an attempt to settle a date. The meeting was confirmed a day prior to the appointed date to ensure that the interviewee was still available. In the case where the interviewee had been called away or for some reason was not available, further dates were set and again confirmed. Of all the approaches made, no rejections were experienced. However, due to scheduling difficulties, two meetings were abandoned.

5. Interview methodology, structure and style

The identification of the interviewees as 'elite' suggested that an appropriate interview style and methodology needed to be constructed. Harvey (2011) suggests a number of considerations: the building of trust and rapport; personal presentation; homework and the understanding of the subject matter; questioning style (open vs closed questions); recording method; and, interview length. The question of the 'power' relationship, in which the interviewer is cast as a 'suppliant' within the interview situation has also been raised by a number of authors (Cochrane, 1998; Thomas, 1993), together with risk of overestimating the value and knowledge base of what the interviewee imparts (Ostrander, 1993). This issue this required a degree of thought and preparation.

5.1 Interview structure and style

A number of qualitative interviewing methods have been proposed by social science researchers (Mason 2002; Flick, 2014). The degree to which interviews should be structured, semi-structured or unstructured were considered. A key consideration was that the

researcher did not want the interviewees to feel that they being 'interrogated' or 'put on the spot'. The interviews, it is suggested, needed to be goal-driven, though friendly. Such an approach has been characterised as a 'conversation with a purpose' (Burgess, 1984 p104). A more recent approach to interview style may be discerned in the work of Sabot (1999) in which the author describes her 'semi-structured interview' approach, together with a checklist, though styled in a manner that 'mined' information with a conversational approach, p329). In the present research, each interview sector was chosen to provide specific pieces of information. On this basis it was decided to use a semi-structured interviews in which the researcher had a list of subjects to cover that were specific to that interviewee. (The list of key questions for each sector is shown at the end of this Appendix). Such as approach, it was felt, might allow the development of a friendly, relaxed conversation without any particular restrictions. Moreover, gaining the trust and co-operation of the interviewee might result in further introductions and referrals, together with data and internal documents that might assist provide further details for the overall research project.

5.2 Preparation

The advice offered by Harvey (2011) was considered and the appropriate preparation was carried out. For those interviewees that the researcher knew well and had interacted with over many years, preparation was mainly limited to the generation of those questions that would guide the interview. It was not felt that considerations of power, the building of trust and rapport were necessary in these cases. However, the researcher planned to present a detailed introduction to the research project and invite the interviewees to read and sign a Participant Information and Consent Form (reproduced in Appendix 2).

For those interviewees that were not known to the researcher and that worked outside the core industry, a more formal approach towards interview preparation was undertaken. Time was spent in understanding the interviewees' businesses, roles, recent activities, common contacts within the industry, recent court cases in the case of legal professionals, and how long the interviewees might wish to dedicate to the interview. It was believed that such preparation would assist the researcher in presenting as knowledgeable, professional and efficient. Moreover, the researcher believed that the greater level of knowledge,

confidence and preparation made apparent to the interviewee would assist in equalisation of the balance of power between the two parties.

Overall, the approach to each sector (and sometimes the approach to interviewees within each sector) was adapted on the basis of prior knowledge, area of specialism and researcher's perception of a particular interviewee's willingness to engage.

5.2 Recording

Having chosen the interview style, thought was given to the recording of the conversation and the emerging verbal information. To be consistent with the chosen style, a digital recording of the interview was not considered appropriate as it might potentially detract from the collegiate and conversational atmosphere that the researcher was attempting to create. Recording was thus performed manually and full notes of the interview compiled as soon as practicable after the interview. However, manual recording can always be flawed and perhaps may miss an important point that the researcher does not note, or maybe forgets to write up afterwards. A balance needed to be drawn following an assessment of the costs and benefits of either recording method. The fact that a discussion, unencumbered or uninhibited by the interviewees' reactions to a device, was deemed to provide the most useful and usable data was the key consideration. Finally, at a pragmatic level, the researcher did not consider that the majority of interviewees would actually allow the spoken words to be electronically recorded. This was deemed to be a risk too far.

6. Conclusion

This appendix has outlined the value of including interview data in this thesis. It has described the chosen interview methodology and has also explained the various factors underlying the chosen methodology. However, it is perhaps important to recognise that such a methodology has a number of limitations.

First, there is no guarantee that, in the light of any emerging circumstances, any single approach will yield the required information more productively than another; there is no 'one size fits all' approach and different personalities may well respond differently depending on circumstances. That is, although any responses might be regarded as valid - in that they address the issue being discussed and represent the personal and professional

views and understanding of the various respondents - there is no clear way to demonstrate their utter reliability; different interviewers using different styles on different days and under different circumstances might elicit either different responses or, indeed, different levels of willingness to co-operate. However, in order to mitigate any possible lack of data integrity, the researcher was always careful to assess responses in the light of his previous knowledge of a number of respondents, their published company positions and, unempirically, an assessment of the attitude adopted by the respondent during the interview itself.

Second, the interview approach adopted here i.e. open-ended, discussion-based and without a rigorous structure can only produce qualitative data; it is not possible, neither was it the intent, to group responses in any systematic manner so that rigorous qualitative analyses may be carried out. However, as the research was designed to elicit information, thoughts and insights, rather than the production of raw data that might produce e.g. inter-company or inter-organisation comparisons, or an average 'concern about infringement' score etc., such a concern was not deemed overly relevant to this research project. Future research may well address more quantitative aspects during any interview process and as such will likely impact on the chosen approach and rationale.

Broad discussion areas for various industry sectors

1. Broad questions for distribution interviewees

How high does piracy rank on your agenda?

How much potential revenue do you think you lose to piracy?

What security measures do you take internally and externally to protect your product?

Do you think the current window dates contribute to piracy?

If so, what would you like to see happen?

2. Broad questions for exhibition interviewees

How high does piracy rank on your agenda?

How much camcording goes on now? Is it still a major problem?

What do you do within your company to protect your digital content?

As distributors are expressing a strong desire towards shortening the window, what are your views on how this might affect your business?

What is your company policy on continual technology upgrades and customer service and experience?

3. Broad questions for exhibitor/distributor trade bodies

How high does piracy rank on your agenda?

How much revenue do you think the industry loses due to piracy?

How do you measure this?

What research do you have to back this up?

Given the current tensions between distribution and exhibition on the windows issue, what are your views? For example, what might be the effect on exhibitors'/distributors' businesses?

What are your thoughts on education programmes and the establishment of CCUK? Can these programmes have any measurable effect?

4. Broad questions for studio lawyers, and other legal interviewees

How effective do you think current legal approaches to piracy are. For example, section 97A?

What about other approaches e.g. going after consumers? Is this something you would ever consider?

How about current and future education programmes e.g. CCUK. How do you feel these might work as a reduction measure?

Do you think that new laws are either required or desirable?

What about current industry tensions e.g. windows? Do you feel that any changes to the status quo might be useful as reduction measures?

5. Broad questions for technical industry experts

Many films are available illegally before release. How secure are studios in the care of their product?

How easy/difficult is it for an informed person to circumvent web blocks?

Is it ever possible for an expert to penetrate studio server security? How might this be achieved?

What else can studios do? Where are they deficient?

6. Broad questions for enforcement bodies

What does your organisation do and how does it interface with the industry at large?

What are your views on current legal tools? E.g. 97A. How effective do you think they are?

What specific measures have you taken that have shown results?

Do you think new laws might be required?

7. Broad questions for anti-legal lobbyists to the reduction of piracy?

You are known to be anti a number of the legal approaches taken by the industry, especially web blocking and take downs. Why do you feel this?

What other approaches should the industry adopt, if not legal? For example, what do you feel about the current windows issue? Might this be a contributory factor?

Appendix II

Ethical considerations

1. Introduction

This research was approved by the Ethics Committee of the University of Sheffield. The approval letter is reproduced at the end of this appendix.

The terms of the ethical approval meant that a number of constraints were encountered in the execution of this research. These, along with the implications and solutions are described below.

2. Participant Information and Consent Form (consent form)

All interviewees were informed of the purpose of the research and invited to read and sign a consent form before the interview commenced (reproduced at the end of this Appendix).

They were verbally informed that neither they, nor their company would be cited without prior permission. In fact, all interviewees were prepared to sign the consent form and accept its terms and conditions with the exception of a small number of interviewees that worked for major studios. They stated that would not sign such a form without it first being passed to their legal department. Rather than wait for this to happen, the researcher decided to continue the interview, although any information given would be treated solely as background and would not be used in any way that might identify the interviewee or company. (Ironically, the studio-lawyer interviewees were all willing to sign the consent form). These were subsequently defined as 'informal' interviews, the information from which would be treated in the same manner as that obtained from colleagues in casual discussions.

3. Confidentiality

All interviewees were given a code. Two sets of transcripts were produced by the researcher; one with the interviewees name and company, another one with the interviewees code. A list of interviewees together with their respective code was lodged with the researcher's supervisor for secure storage. However, such coding might not assure total confidentiality. As the number of companies and senior executives in the film industry is relatively small, most people tend to know each other. This is true both nationally and internationally. Thus, in referring to an interviewee as a 'representative of major UK cinema trade body' or 'trade body executive 1' almost immediately another person within the industry will know who that person is based upon the information so attributed. Likewise, reference to an experienced 'barrister' or 'judge' will immediately identify that individual. Equally, it is difficult, nigh impossible, to use that interviewee's information without suggesting the identity to the alert reader. Although the consent form stresses that it is possible that an individual's company might be identifiable from certain information used in the thesis, a dilemma is nevertheless faced about its use. The dropping of certain identifiable comments might detract significantly from the richness and contextual importance of certain aspects of the thesis - and of course the purpose of the interview strand was exactly that. A partial solution to this dilemma was two-fold.

First, might a comment made by a particular interviewee already be in the public domain (via, for example, press releases or interviews, or company reports?). If so, then they could be used with reference to the particular source. Second, specific permission would be requested to either quote an interviewee by name, or less obvious reference, with respect to a particular passage from the interview. Third, if neither of the above approaches were successful, then the information would not be used, other than in a collated, anonymised manner.

Any direct references or quotes ascribed to an identifiable interviewee, either directly or indirectly, appearing in this thesis only do so as a result of the above process. In fact, little information was lost.

4. Data storage and retention

During the writing up process, all data were retained by the writer for reference purposes. Once the research project has been completed and approved, all data will be destroyed.

Ethics Approval Letter

Downloaded: 01/09/2017

Approved: 25/11/2015

Stephen Perrin

Registration number: 150114552

School of Law

Programme: LLM by Research

Dear Stephen

PROJECT TITLE: Copyright Infringement in the Film Industry

APPLICATION: Reference Number 006947

On behalf of the University ethics reviewers who reviewed your project, I am pleased to inform you that on

25/11/2015 the above-named project was **approved** on ethics grounds, on the basis that you will adhere to

the following documentation that you submitted for ethics review:

University research ethics application form 006947 (dated 23/11/2015).

Participant consent form 1013683 version 1 (23/11/2015).

The following optional amendments were suggested:

This is much improved on the basis that consent is actually being sought now and you have considered

the ethical challenges posed by this research. However, you still need to think about whether you can guarantee the confidentiality you are promising the research participant in the consent form. If lack of anonymity is an ethical problem and it is impossible to guarantee anonymity in your research, then your

consent form should inform subjects that you make not be able to guarantee the anonymity of their responses. In addition we suggest that you review the formatting of the PIS/Consent Form, to ensure a professional presentation. It should also carry the logo of the University of Sheffield. You may find it helpful to look at the wording and formatting of the Example Consent Form available on the following

University of Sheffield webpage: <http://www.sheffield.ac.uk/ris/other/gov-ethics/ethicspolicy/furtherguidance/universityprocedure2>

If during the course of the project you need to [deviate significantly from the above-approved documentation](#)

please inform me since written approval will be required.

Yours sincerely
Ann Charlett-Day
Ethics Administrator
School of Law

Participant Information and Consent Form

Research Title; Copyright Infringement in the Film Industry

1. About the Researcher

Name; Stephen R Perrin

Contact Details; (academic) srperrin1@sheffield.ac.uk, (personal)
stephenperrin@hotmail.com

+44 7791 048979

Institution; School of Law, University of Sheffield, UK

Academic path; LLM by Research

Funding source; this research project is funded by the Researcher

2. Background to the Research

Global film industry revenue losses amount to many billions of dollars annually due to illegal consumption, generally though not exclusively via streaming on bit torrent type websites. Whereas the legal actions open to copyright owners are known and frequently used (e.g. court injunctions for ISPs to block access to certain sites that have been shown to host, or act as a portal to, illegal content) what is less known is what the industry internally does to protect its product. This research aims to examine such non-legal measures that the industry, from points of distribution to exhibition, may adopt from time to time to assist in reducing illegal consumption of its product.

3. Use of the research

The research will in the first place be used to write an LLM thesis. This, it is hoped, will for the first time paint a picture of the preventative measures adopted by the global film industry to protect its product. Following that aspects of the project that might be of

interest and value to the industry and that might lead to further discussion will be presented either in talks or further publications. These might include academic journals, industry journals and relevant industry conferences.

4. Confidentiality

Any information you give to the researcher during the interview or in subsequent communication with the researcher will constitute your data. You will be offered the opportunity to review what you have said and to amend or add as you see fit. Your data will be anonymised and combined with that of other interviewees and presented as a collective whole. It is not the aim of the research to make company by company comparisons or to present information in such a way as to allow an individual or company to be identified. As described above, you will be sent a copy of what you have said so as to check that there is nothing of a personally or commercially confidential nature that cannot be revealed in a report. At the same time, given the small number of major global companies in this industry, there is some small chance that what you say may mean others can know of your or your company's participation in the research.

5. Consent

- I understand the purposes of the research described to me here;
- I understand I can seek further clarification on any matter by asking the researcher;
- I understand that I can withdraw from the project at any time;
- I understand that any information I provide will be confidential and that neither I nor my company will be cited without my permission;
- I agree to be interviewed for the project as outlined above.

Name

Signature

Date

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