Is IPR litigation good for the world?

"Copyers are no better than the Lowest of Robbers" – **William Hogarth & Ors 1735**

"Copyright is for losers" – **Banksy, 2006**

In the first part of our reflections on IP for world IP day, Michael Edenborough QC asked – "*are IPR good for the world*"? Another question, less frequently addressed head-on, is whether if the subsistence of IPR is good for the world, does it follow that enforcement of those rights is also good for the world? Whilst it may seem that the two questions must be answered together, the commercial reality is more nuanced and poses further questions. What might be the benefit of owning an IPR, but not bringing litigation against infringers? Does IP litigation only benefit a successful claimant (and the legal teams involved) or is there a greater good served by those proceedings?

It is not just lawyers who are interested in the questions of whether IP rights and IP litigation are "good". Online news and social media allows members of the public at large to have their views, which they express with varying levels of vitriol. More often than not, those views will not be based on an understanding of legal rights and wrongs but perceived moral ones. The desire to be on the right side of public opinion, as well as the right side of the legal merits of an IPR dispute, is not a new issue. In his campaign for a new copyright to protect engravings in the 1730s, Hogarth placed advertisements in newspapers seeking to rally public outcry at the fact that there was no legal recourse available to him to take down the "hacks" making cheap knock-offs of his works. Whilst not as instant as Twitter, it seemed to assist legislators in creating a new law to prevent such copying.

In the present day, it is increasingly common for companies to communicate directly with their customers on social media, including on the topic of IPR infringement. Whilst a potentially risky strategy, it is possible for a company to turn an infringement of their IPR into a beneficial PR exercise. One company who seems to have pulled this off to general public approval is TripAdvisor, with the publication of a "super gay"

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cease-and-desist letter to the organisers of a "Straight Pride" event who falsely alleged that TripAdvisor had endorsed them. Faced with an infringement, IPR owners may be increasingly tempted to seek this form of online "rough justice". However, before making any public statement, IPR owners must be careful not to put themselves at risk of threats, defamation and malicious falsehood action by the alleged infringer. What may seem like a cheap and simple solution could turn out to be anything but.

It must also be borne in mind that public perception of whether IPR owners or infringers occupy the moral high ground is not as clear-cut as it may have been in Hogarth's time. There has undoubtedly been an increase in anti-enforcement sentiment on the part of the public. Marks & Spencers recently found this out the hard way in relation to its claim against Aldi regarding Colin the caterpillar. Many members of the public expressed their views, not just on the perceived merits of the case, but whether infringement proceedings should have been brought even if meritorious. The somewhat unpredictable role of public opinion in the ultimate commercial result of an IPR action adds a tier of complexity for IPR owners. Hogarth may have been able to control his narrative and harness public condemnation of engraving copyists, but the world has moved on.

The only IPRs perhaps taking up more column inches in recent months than caterpillar cakes, are patents relating to vaccination or treatment of Covid 19. The majority of views expressed in relation to this issue go to subsistence rather than enforcement of patents which is not within the remit of this article. However, it is worth considering whether the issues raised above could in fact be harnessed to create a solution to patenting and Covid-19. If a pharmaceutical company made a public statement that it would not bring litigation proceedings in respect of patented Covid-19 medication in certain circumstances, it would no doubt be held to account by the public in the event of any attempt to bring proceedings contrary to that statement. Even if such a statement is not made, one need only imagine the public outcry if patent infringement proceedings were initiated seeking, for example, an injunction to prevent use of Covid-19 vaccination technology. The options for enforcement available to a patent owner, as a matter of law, may not align with the options available as a matter of commercial reality once public reputation is accounted for.

One IPR owner who has famously chosen not to enforce his rights is the elusive Banksy, who is unable to bring a copyright infringement claim without revealing his identity. He therefore never enforces copyright despite many copyists, and as a result has sent a message to the market that his copyright may be infringed without real risk of litigation. Having attempted, unsuccessfully, to obtain trade marks for some of his works, the incentive not to infringe Banksy's IPR has diminished further. Nonetheless, the lack of IPR enforcement does not seem to have seriously impacted Banksy's career or the value of his works. Through his persona and practice he has created a market that values authenticity, as controlled by Banksy's organisation Pest Control. Without their certification of authenticity, a work which may look identical to a Banksy is valueless. The fact that a purchaser of an authentic Banksy could not rely on the artist to take proceedings against an infringer of that work seems not to matter. In this fact there is an analogy between Banksy's analogue authentication process, and the rise of the recently booming NFT art market. An intangible asset of authenticity is created which is divorced from any value the artwork has by virtue of it being copyright-protected. Copyright appears to be far less valuable to contemporary artists than to 18th-century engravers.

Despite the above

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considerations, it is important not to lose perspective of the value which IPRs contribute to the economy. In a 2019 status report on IPR infringement, the EUIPO identified that IPR- intensive industries amounted to 42% of EU GDP. According to the analysis of the UK market, annual losses due to counterfeiting and piracy for 11 key sectors are estimated at GBP 5.98 billion, equivalent to GBP 92 per UK citizen per year. If enforcement actions are not taken, then more infringement will occur as the perceived risk of infringement reduces. This exposes individual IPR owners to financial harm if they do not police their rights, but there may also be a ripple effect; if less IPR litigation is brought as a whole, then the disincentive to infringe is less tangible. The result of a large-scale increase in IPR infringement will impact the market more widely which will inevitably pass on costs to consumers.

Litigation also creates precedent which helps shape the law and create legal certainty, which is itself economically valuable. For every IP Translator or Sky trade mark trial, there will be hundreds of SMEs who reach settlement without the expense of trials in reliance on those cases in pre-action correspondence. Where there is no judicial consideration on a point of law, there is a limit to the certainty with which a lawyer can advise upon the margins of risk for both IPR owners and users. The commercial result of this can be stagnation. The more legal uncertainty is narrowed through precedent, the more resources parties can invest in innovation and competition.

For the individuals considering bringing IPR litigation, there is an increasingly complex web of considerations and risks to weigh up in addition to the costs of legal fees and possibility of losing. However, whilst it may not be appreciated by the Twitter judges, juries and executioners, there is a trickle-down philanthropic effect of that litigation for the wider public. Those who proclaim to be anti-IP enforcement may well benefit from the very litigation they oppose.

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