

**For and on behalf of The Chartered Institute of Trade Mark Attorneys
Law and Practice Committee**

Dear CJC Review

This short submission is in response to the CJC Review of Litigation Funding Consultation and is provided on behalf of the Chartered Institute of Trade Mark Attorneys (CITMA) by CITMA's Law & Practice Committee.

Background

A number of members of CITMA are entitled by qualification to act as litigators and to serve process in (and in some instances appear before) the English courts, including the High Court, in relation to intellectual property claims. A small but significant subset of such members routinely exercise those rights.

CITMA generally supports TPF as one of the means by which access to justice is facilitated. However, as with any developing innovation, TPF is open to abuse and CITMA is therefore also in favour of robust regulatory oversight.

Against this background, we confine what follows to questions 36(a) and (b) of the consultation with specific reference to IP causes of action.

CJC Questions

36. To what extent, if any, does the availability of third party funding or other forms of litigation funding encourage specific forms of litigation? For instance:

a. Do they encourage individuals or businesses to litigate meritorious claims? If so, to what extent do they do so?

b. Do they encourage an increase in vexatious litigation or litigation that is without merit? Do they discourage such litigation? If so, to what extent do they do so?

CITMA's response

It is said that TPF should be encouraged as it weeds out unmeritorious claims. However, what is "meritorious" for a claimant and its funder is only partly dependent on assessing how a court would find if the claim were pursued and defended through trial to a judgment. A claimant and its funder will also bear in mind the nature of the defendant, the depth of its resources, both financial and managerial, its public reputation and to what extent, it is likely to settle a claim which strictly might have little prospect of succeeding if fully defended.

For example, there has developed an "industry" for small IP rights holders either alone or more commonly aggregated via specialist agencies, to scour the internet for purported "infringements", typically of copyright in photographs or sound or video clips, and then to assert those rights, often with unworthy and inordinate claims to "additional" damages under Section 97(2) of the Copyright Designs and Patents Act 1988.

Commonly such claims have no proper foundation. Yet the persons at which such claims are aimed, whether they are large undertakings, SMEs or private individuals, will often seek to settle

the claim in question not on the basis of its intrinsic legal merit but to avoid the costs and the inherent risks involved in defending such a claim.

The likely reaction to a prospective claim (or the average reaction to series of claims) by the prospective defendant (or series of defendants), will be a factor which a claimant and its litigation funder will take into consideration aside from the strict legal merits.

The trade mark attorney profession has also seen similar activity. Several years ago, a small US law firm, thought to have been funded by a private individual, established a practice in threatening legal proceedings against legitimate UK businesses, on the basis of registered UK trade mark rights obtained for that purpose by shell companies set up by the funder. Numerous letters before action were sent out by the law firm in question. Those letters were typically accompanied by a without prejudice offer to settle the claim for a significantly lower sum than that demanded in the open letter. The claims had little or no legal merit and the registered rights on which the claims were based were probably invalid. However, it is assumed that the funder in this case expected, overall, a financial return. (It appears this particular iteration of such “trolling” was finally ended by the decision of the court in “Trump TV” – <http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Ch/2019/769.html>.)

In brief, CITMA is concerned that without full and robust regulation, the development of TPF will lead to an increase in what from a strict legal analysis, are unmeritorious claims and potentially abusive or vexatious litigation. That manifestly, would be against the public good.

Yours faithfully
Ian Bartlett
Litigation lead
CITMA Law & Practice Committee
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