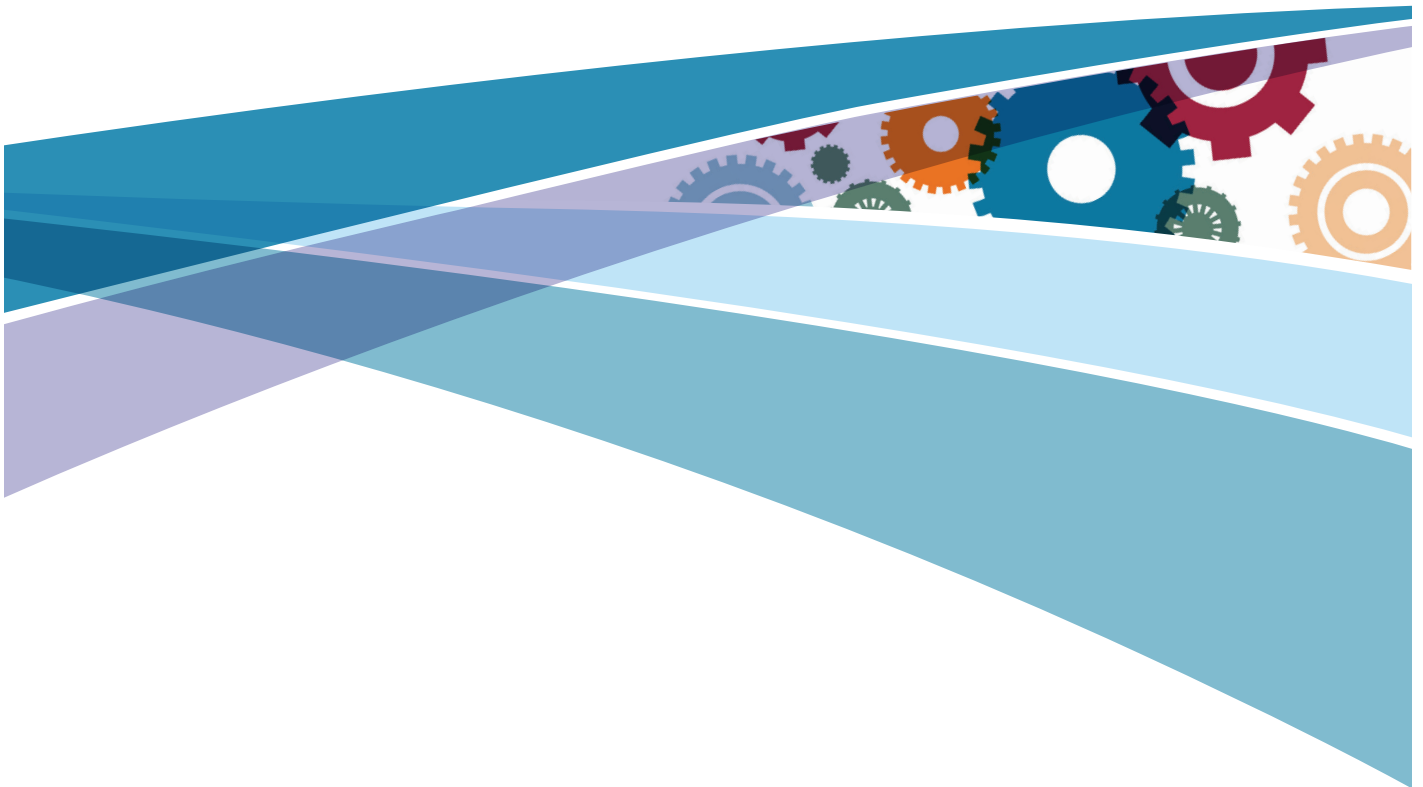




Intellectual
Property
Office

Penalty Fair?

Study of criminal sanctions for copyright infringement
available under the CDPA 1988



Research commissioned by the Intellectual Property Office, and carried out by:

Martin Brassell FRSA
Dr Ian Goodyer
Ingot Limited

This is an independent report commissioned by the Intellectual Property Office (IPO). Findings and opinions are those of the researchers, not necessarily the views of the IPO or the Government.

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In addition to its research and policy-related activities, Inngot provides online tools and specialist services to identify, value and manage intellectual property.

ISBN: 978-1-908908-87-2

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Published by The Intellectual Property Office
Feb 2015

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This publication is available from our website at www.gov.uk/ipo

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1. Executive Summary

This study was commissioned by the UK Intellectual Property Office (IPO) to provide an evidence-based view on whether the criminal sanctions for copyright infringement available under the Copyright, Designs and Patents Act 1988 (CDPA 1988) are currently proportionate and correct, or whether they should be amended.

The particular point of focus for the study is the difference in the sanctions that apply to online criminal activity – often referred to as ‘piracy’ - compared with those relating to physical goods. Its scope, has been to gather quantitative data from 2006-13 and qualitative views and evidence from stakeholders, and to set out the arguments for and against any change in the law.

What is the current situation?

A variety of sanctions are applicable to different IP offences. There are no criminal penalties applicable to patent infringement. The Trade Marks Act 1994 (TMA 1994) provides for a maximum custodial sentence of ten years (at s.92) and intentional copying of registered designs carries the same sanction since the law changed in October 2014¹.

The main ‘physical’ copyright offences (ss.107(1), 107(2), (107(3), 198(1), 296ZB, 297 and 297A of CDPA 1988) carry a ten-year maximum penalty but the provisions governing online infringement (ss. 107(2A) and 198(1A) of CDPA 1988), introduced using secondary legislation in 2003 in the course of implementing the Information Society Directive², provide for a maximum two-year sentence. The latter is equivalent to the maximum sanction available for a Summary offence, and therefore does not fall into the category of serious arrestable offences under the Serious Organised Crime and Police Act 2005.

In 2006, the Gowers Review of Intellectual Property³ drew attention to the discrepancy between the maximum penalties for physical and online offences and recommended that this be addressed. At the time, this recommendation was accepted, but following a subsequent consultation exercise⁴, the Government decided to focus on achieving parity by making more substantial financial penalties available to address online infringement. The reason given in the response to this consultation⁵ was that:

1 Enacted by s.13 of the Intellectual Property Act 2014 (<http://www.legislation.gov.uk/ukpga/2014/18/section/13/enacted>) which amends the Registered Designs Act 1949 by the insertion of s.35ZA to 35ZD

2 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. Available online at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0029&from=EN>.

3 Andrew Gowers, (2006), Gowers Review of Intellectual Property. Recommendation 36. Available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf

4 Taking Forward the Gowers Review of Intellectual Property. Penalties for Copyright Infringement. Available online at <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/consult-gowers36.pdf>.

5 Taking forward the Gowers Review of Intellectual Property: report on the outcome of consultation on penalties for copyright infringement, IPO. Available online at <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/consult-gowers36.pdf>

It is Government policy that prison should be used mainly for serious and dangerous offenders and that sentences should only be as long as necessary for punishment and public protection. It is worth noting that the Crown Courts already deal with the more serious IP cases under general law such as the Fraud Act 2006.

The consultation recommended increasing the maximum fine for all copyright offences, subsequently enacted in s.42 of the Digital Economy Act 2010 (DEA 2010), when it was changed to £50,000.

In the course of debating the Intellectual Property Bill (now the Intellectual Property Act 2014), the Government agreed to look again at this area, since industry stakeholders remain in no doubt that online infringement is a substantial problem that continues to evolve and grow, and that the discrepancy in penalties prevents it from being adequately addressed. The central argument for change was summarised by Mike Weatherley MP, IP adviser to the Prime Minister, who wrote recently:

*There is currently a disparity in sentencing between online and offline crime that needs to be harmonised. This sends out all the wrong messages. Until this is changed, online crime will be seen as less significant than traditional theft.*⁶

The views of industry bodies appear to be supported by a number of sources including statistics provided for Ofcom⁷, the recent examination of the business models behind copyright infringement conducted by PRS and Google⁸, and a study into the profits made by cyberlockers⁹.

Is there a case for change?

This study has reviewed the law as it stands, taken soundings from industry bodies and other stakeholders, looked at the key cases which have been brought, reviewed the available statistical data on prosecutions and sentences, and run a small survey to obtain the views of individual rights holders who have been victims of online copyright theft.

Opinions are divided. Many industry bodies argue that higher penalties are necessary and desirable and that there is no justification for treating physical and online crime differently. Other stakeholders suggest that these offences are in fact different, and raise concerns about a possible 'chilling effect' on innovation.

6 Weatherley, M. (2014) 'Follow The Money': Financial Options To Assist In The Battle Against Online IP Piracy. Paragraph 6.9. Available online from http://www.olswang.com/media/48204227/follow_the_money_financial_options_to_assist_in_the_battle_against_online_ip_piracy.pdf

7 Kantar Media (prepared for Ofcom), 2013, Online Copyright Infringement Tracker Wave 4 (Covering period Mar 13 – May 13) Overview and key findings. Available online at http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/online-copyright/w4/OCI_MAIN_REPORT_W4_FINAL.pdf.

8 BAE Systems Deltica (prepared for PRS for Music and Google), 2012, The six business models on copyright infringement. Available online at <http://www.prsformusic.com/aboutus/policyandresearch/researchandconomics/Documents/TheSixBusinessModelsofCopyrightInfringement.pdf>

9 Netnames (prepared for the Digital Citizens Alliance), 2014, Behind the cyberlocker door. A report on How Shadowy Cyberlocker Businesses Use Credit Card Companies to Make Millions. Available online at <http://www2.itif.org/2014-netnames-profitability.pdf>.

Following the 2002 changes to increase sentences for physical copyright infringement, prosecutions rose. This shows that the law was being used, but lends little weight to the argument that higher penalties provide a better deterrent.

The available court data from 2006-13 makes it clear that over the last few years, all prosecutions and convictions under CDPA 1988 have been going down. Online offences constitute a small, and apparently decreasing, fraction of copyright prosecution activity as a whole. Separate evidence provided by the Crown Prosecution Service and Trading Standards showed that neither have brought any cases at all under the online provisions of CDPA 1988.

While there have been prosecutions during recent years, these have either used alternative legislation (such as common law conspiracy to defraud) or been directed at clarifying the civil law position in the European Court. It is not clear that alternative legislation provides a satisfactory solution. By definition it does nothing to improve case law or understanding of the copyright issues (hence the importance of recent civil actions).

Rights holders have been focusing increasingly on practical measures, such as working with the Police Intellectual Property Crime Unit (PIPCU) to take down offending websites. Whilst a considerable number of sites appear to have been addressed through these measures, they may not lead to permanent removal, as 'proxy sites' are prone to appear soon afterwards.

Rights holders have also been setting up the Creative Content UK initiative, working with Internet Service Providers (ISPs) to put key provisions of DEA 2010 into practice as an industry-led initiative. However, this is targeted at consumer behaviour rather than organised criminal behaviour.

A small-scale survey was run alongside this study of copyright sanctions to assist in understanding and interpreting these features of the available data amongst small-scale copyright owners. These confirm the perception that criminal sanctions are not seen as effective or accessible at present but provide divergent views on what form the solution should take.

Overall, this study concludes that the current system is not working effectively owing to a chain of inter-related causes and effects. While there is no proof that higher sentences would act as a deterrent to online copyright crime, there is evidence to suggest that increasing the maximum sanction could be important in facilitating investigation and prosecution, now that there is a better foundation of civil cases on which courts can make decisions (in the absence of criminal case law precedents).

Are physical and online offences comparable?

Given that maximum sentences for online copyright infringement are so much shorter than those available for physical offences, it is not surprising to find significant differences in custodial sentence length. However, data from the Ministry of Justice also shows that custodial sentences are far more frequently applied to physical convictions (33%) than online convictions (20%) and that 90% of online cases have CDPA 1988 as their primary offence, compared with 69% of physical offences. So are they fundamentally different?

From the perspective of rights holders, the answer is 'no'. Both activities result in unauthorised access to the same copyright material and appear to cause a similar type of harm, namely lost

sales. This is perhaps easiest to demonstrate in areas such as sports broadcasting (where subscriptions are being circumvented).

However, other groups might answer 'yes' to the same question. 'Making available' is fundamentally different in the online world and requires minimal resources: it is no longer necessary to be a broadcaster to 'communicate to the public'. It is debatable whether provision of a clickable link is the same as an act of physical distribution, but as the law currently stands, it is an offence to make an item available (for example by providing a link to a download) - even if no one actually clicks on the link and no copying has taken place in order to provide the link.

What is not in doubt is that it is comparatively easy to distribute infringing material online without the need for any specialist infrastructure or assets. This lowers the barriers to crime, but also increases the risk that members of the public could be caught unwittingly.

The four policy options

This study has been asked to consider the available evidence in the light of four main policy options: namely, i) making no change, ii) increasing the penalties for online infringement to match those for physical offences, iii) reducing the physical offences to those currently applied to online offences, or iv) moving one or both sets of sanctions to a new, intermediate level.

The conclusions can be summarised as follows:

- i. The online criminal provisions of CDPA 1988 are hardly being used, if at all. There has been a lack of clarity over how they can be applied, and even if this is addressed, they will not provide access to appropriate and proportionate sentences for serious infringement cases. If no change is made, this problem will continue.
 - ii. There is a case for increasing sanctions relating to online offences, especially if the civil case law is believed to have developed to a point where prosecutions can now be brought successfully against criminal activity. Establishing the principle that online offences can be serious and arrestable would almost certainly facilitate domestic and international action being taken against the worst offenders. However, safeguards may be needed to ensure that ordinary members of the public and those whose copying is not motivated by a criminal intent are not inadvertently caught by any amended provision. Also, there must be a proportionate approach that permits legitimate experimentation.
 - iii. Custodial sentences in excess of two years have been used for physical copying offences. While no evidence was found of sanctions exceeding five years, the available data does not provide a basis for concluding that the level of physical penalties is inappropriate – it is rare to have the maximum sentence applied to any such crime, but important to have the means to establish a scale of offending.
 - iv. There is logic to placing serious online copyright offences into a more serious category, which soundings taken for this study equate with a maximum sentence of at least five years. The precedents within the IP landscape are either to leave offences outside the criminal justice system altogether (as in the case of patents) or to set a maximum offence on conviction at ten years. Fundamentally, either online copyright offences are capable of causing serious harm, or they are not.
-

2. The legislative regime and policy debate

2.1 Introduction

This chapter summarises the evolving legal position in respect of IP rights-related sanctions. It focuses on recent developments and policy discussion on copyright, then sets out the brief for this particular study.

There have been a number of changes to The Copyright, Designs and Patents Act 1988 (CDPA 1988) since it was first introduced. Amendments have affected the Act's scope (it did not originally include 'communication to the public') and increased both the maximum custodial sentence and the fines available. There have also been relevant developments in other areas of IP law since 1988, which now also provide recourse to significant sanctions where the offences in question are regarded as serious.

A brief analysis of these matters is helpful in placing the case studies, statistics and survey findings which follow into their legal context, and illustrating how the different provisions can be applicable to a 'typical' copyright infringement case – which may involve elements of physical as well as online activity.

2.2 Evolution of penalties in IP legislation

The following chart, based on the criminal law summary¹⁰ available from the Crown Prosecution Service, provides a brief summary of the way in which IP law has evolved since CDPA 1988 was first introduced:



10 Crime Prosecution Service, 2014, Legal Guidance: Intellectual Property Crime. Available online at http://www.cps.gov.uk/legal/h_to_k/intellectual_property_crime/

Originally, as set out in CDPA 1988, the maximum criminal sanction was a two-year custodial sentence. The Trade Marks Act 1994 (TMA 1994) was the first piece of legislation to set the seriousness of infringement at a much higher level. This is set out in section 92¹¹ of TMA 1994 which states that any sale or distribution of goods bearing a trade mark without the owner's permission is a criminal offence and provides for a ten year maximum prison sentence on indictment.

Unsurprisingly, given its date of introduction, online offences are not mentioned specifically in TMA 1994. Some stakeholders consulted for this study have suggested that there is an issue with this law's reference to 'goods' rather than services when trying to use it to address online crime. The data indicates that TMA 1994 has not been used successfully in any of the cases we have studied, nearly all of which have featured branded content. This point is considered in our conclusions.

In 2002, following lobbying from the British creative industries, a private members' bill introduced by Rt Hon Vince Cable MP increased the maximum physical copyright penalty from two years to ten years. At a recent conference¹², Vince Cable explained the rationale for this change as follows:

One of the reasons why my original legislation toughened up the sentencing from two years to ten years was because it was becoming apparent even then that serious criminals saw this as an easy way into organised crime. They would get a two-year sentence if they were ever caught and sentenced and this would be reduced to one year on remission – that was a risk worth taking. Increasing the maximum penalty to ten years, which we did, was a serious deterrent to the serious criminals who get into this business.

Vince Cable's private member's bill became law in the Copyright and Trade Mark Offences Act 2002 (offences in s.107(4)(b) – criminal liability for making or dealing with infringing articles etc; s.198(5)(b) – criminal liability for making, dealing with or using illicit recordings; s.297A(2)(b)).

Copying using online methods was first addressed by introducing an offence concerning unauthorised communication of works to the public in the Copyright and Related Rights Regulations 2003. Statutory Instrument 2498/2003¹³ utilised powers under the European Communities Act 1972 (ECA) to make changes to CDPA 1988 so as to comply with the Information Society Directive 2001/29/EC¹⁴ of the European Parliament and of the Council of 22 May 2001. This concerns the harmonisation of certain aspects of copyright and related rights.

11 <http://www.legislation.gov.uk/ukpga/1994/26/section/92>

12 Rt. Hon. Vince Cable MP speaking at the 2014 IP Enforcement Summit. 11th June 2014. Available online at https://sslrelay.com/switchnewmedia.com/internationalipenforcementsummit/VOD/Vince_Cable_MP_Video_Archive.php. See also comments from Nick Kounoupias on the motivation for the change in chapter 3.

13 The Copyright and Related Rights Regulations 2003. Available online at <http://www.legislation.gov.uk/uksi/2003/2498/contents/made>

14 Available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>

Given that this was introduced under the ECA via secondary legislation, the maximum penalty that could be set for this new online offence was two years. The offence relating to communicating unauthorised works to the public did not exist at the time of the assent of the Copyright and Trade Mark Offences Act referred to above.

This apparent inconsistency in penalties was highlighted by the Gowers Review 2006. Recommendation 36¹⁵ stated that there should be matched penalties for online and physical copyright infringement, and in 2008 the IPO launched a consultation exercise in relation to this recommendation¹⁶. No change in sentencing was advocated as a result: when the findings were published Government policy was to reserve imprisonment for serious and dangerous offences and that the emphasis would therefore be on making the financial penalties consistent. Subsequently, Parliament increased the maximum fine for both online and physical infringement to £50,000, a measure which was enacted by the Digital Economy Act 2010 (s.42)¹⁷.

Since this change the other notable development concerning intellectual property sanctions has been the introduction of criminal penalties for intentional copying of registered designs in the course of business by way of s.13 of the Intellectual Property Act 2014¹⁸. This also attracts a maximum sentence on indictment of ten years.

The accompanying Impact Assessment¹⁹ states that the changes to make intentional registered design copying a criminal offence are believed necessary to “punish and deter serious and deliberate design theft” and ensure that the inherent value of the protection is not undermined. Part of the justification offered for change is that many design right holders do not find the civil courts a viable route to pursue because of the cost, length and uncertainty of cases. The same may be found to apply in the case of copyright, which research indicates²⁰ is owned and relied upon by a far larger number of companies.

Of investment in IPRs in 2011, it was estimated that 10% was in assets protected by patents; 46% in assets protected by copyright; 3% in assets protected by design registration; 21% in assets protected by unregistered design rights; and 21% in assets protected by trademark.

From this brief analysis, there appears to be a general trend towards greater sanctions for IP infringement, most notably in the change introduced by Vince Cable as a private member’s bill in 2002 to increase copyright infringement penalties²¹, and in the recent move to introduce a ten-year maximum sentence for intentionally copying a registered design, effective from October 2014.

15 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf. Page 98

16 <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/pro-policy/policy-information/policy-notices/policy-notices-old/policy-notices-penalties.htm>

17 S42 DEA: <http://www.legislation.gov.uk/ukpga/2010/24/section/42#section-42-2>

18 <http://www.legislation.gov.uk/ukpga/2014/18/section/13/enacted>

19 Available online <http://www.parliament.uk/documents/impact-assessments/IA13-16M.pdf>

20 From *Estimating UK investment in intangible assets and Intellectual Property Rights*, Goodridge, Haskel & Wallis, IPO, 2014

21 <http://www.legislation.gov.uk/ukpga/2002/25/section/1#section-1-2-5>

However, this trend does not amount to a 'standard' penalty across IP rights in general. For example, patent infringement does not attract criminal sanctions. Whilst copyright law is not always straightforward, patent cases often involve particularly complex technical arguments which are most easily understood by specialist judges; this may be one reason why the use of civil law sanctions for patent infringement has broad support from both industry practitioners and businesses.

Also, whilst it is true that the two-year penalty associated with online copyright offences was set at the maximum available at the time and was (in that sense) not chosen deliberately, this does not demonstrate in and of itself that physical and online crimes are the same, or of equal severity. Nevertheless, Mike Weatherley MP, currently IP advisor to the Prime Minister, echoed views expressed by many industry practitioners and stakeholders when he remarked in a recent discussion document²²:

There is currently a disparity in sentencing between online and offline crime that needs to be harmonised. This sends out all the wrong messages. Until this is changed, online crime will be seen as less significant than traditional theft.

2.3 Sanctions available under CDPA 1988 (as amended)

CDPA 1988, which came into force on 1 August 1989, sets out the UK's copyright law. The main criminal offences relating to physical copyright infringement, which are also classed as criminal lifestyle offences under the Proceeds of Crime Act, are the following:

- making or dealing with an article, for sale or hire, in the knowledge that it infringes copyright (s.107(1))
- making or possessing an article specifically designed or adapted for making a copy of a copyright work (s.107(2))
- the unauthorised public performance of a literary, dramatic or musical work, or the playing or showing in public of a sound recording or film (s.107(3))
- making or dealing with an illicit recording (s.198(1))
- dealing with devices which are capable of circumventing technological measures, fraudulent reception of programmes, and dealing with or possessing unauthorised decoders (ss. 296ZB, 297 and 297A)

22 See Para 6.9 at http://www.olswang.com/media/48204227/follow_the_money_financial_options_to_assist_in_the_battle_against_online_ip_piracy.pdf

The primary criminal offences relating to online copyright infringement are:

- communicating a work to the public either in the course of a business or to an extent prejudicially affecting the copyright owner (s.107(2A))
- infringing a performer's making available right in a recording either in the course of a business, or to an extent prejudicially affecting the owner of such right (s. 198(1A))

The physical offences falling under sections.107(1), 107(2), 198(1), 198(2) and 297A are punishable on summary conviction by up to six months' imprisonment or a fine of up to the statutory maximum (or both); or, on indictment, by up to ten years' imprisonment or an unlimited fine (or both). The public performance of a literary, dramatic or music work, or the playing in public of a sound recording (e.g. a CD) or showing of a film (e.g. DVD) carries a maximum penalty of three months' imprisonment.

The online offences under sections.107(2A) and 198(1A) attract the same level of fine (as a result of the amendment introduced in the aftermath of consultation prompted by the Gowers Review 2006, and discussed above), but are punishable with the lesser sentence of up to three months' imprisonment on summary conviction or two years' imprisonment on indictment.

Communication to the public is defined in s.20 of CDPA 1988²³ which states:

*(1): The communication to the public of the work is an act restricted by the copyright in –
a literary, dramatic, musical or artistic work,*

a sound recording or film, or

a broadcast.

(2) References in this Part to communication to the public are to communication to the public by electronic transmission, and in relation to a work include –

the broadcasting of the work;

the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them

23 See <http://www.legislation.gov.uk/ukpga/1988/48/section/20>

2.4 How the provisions may be applied

The following table provides a (hypothetical) illustration of how a typical sequence of copyright infringements, relating in this instance to an illicit recording, is covered by the existing legislation, and which aspects would be considered to be online in nature:

Step	Activity	Legislation
1	Covertly recording a film in a cinema or a live performance without permission	Civil offence – s.17, CDPA 1988
2	Copying the recording in 1 and putting on website for others to download	Civil offence – s.20, CDPA 1988 (“communication to the public” by “making available”) Online criminal offence – s.198(1A), CDPA 1988 Online criminal offence – s.107(2A), CDPA 1988
3	Creating a website that allows users to post links to the recording on website in 2	Depends on facts of the case: If website is found to be acting as a ‘mere conduit’ there may be a defence under s.17 of the Electronic Commerce (EC Directive) Regulations 2002 – as in TV-Links case If data is deliberately organised / catalogued then website “authorises” infringement, contravening s.16(2) CDPA 1988 as in the Newzbin and Dramatico (Pirate Bay) cases. It also “communicates to the public” by “making available” and falls foul of s.20 and s.107(2A), CDPA 1988
4	Copying recording made in 1 to DVDs and selling on market stall	Civil offence – s.18, CDPA 1988 Physical criminal offence – s.107 (1), CDPA 1988
5	Watching stream of movie on website in 2	No offence as long as only a temporary copy is made in cache of computer and on screen – s.28A, CDPA 1988. (PRCA v NLA in <i>Meltwater II</i>)

Step 1 above refers to “making any illicit unauthorised copy for personal use”, which at this point would not fall under the criminal provisions of the law. However, once the recording is communicated (at step 2), both of the provisions relevant to online copyright infringement could be triggered. These are subject to a maximum two-year prison sentence.

At step 3, when the website is set up, there may or may not be a possible defence that the website is simply acting as a conduit. This was successfully used in the TV-Links case though the position may have subsequently changed given the subsequent successful prosecution in the Newzbin case - (see chapter 4).

It is not until step 4 that the maximum penalties under CDPA 1988 become potentially applicable, with ten years theoretically available for sentence. However, various representations received suggest that the creation of physical copies of DVDs and CDs is on the wane and that “making available” via the internet is a much more likely course of action.

Step 5 could be an offence under s.17 CDPA if downloading were involved and a copy retained, but is unlikely to be an offence as described above because the act of streaming only involves creating temporary copies of the work on the screen and in the cache of the computer; this is allowed under s.28A of CDPA 1988.

2.5 Other related legislative developments

While it is not the subject of this study, mention should first be made of additional provisions of the Digital Economy Act 2010²⁴ (beyond those mentioned above), which anticipates the introduction (as yet not fully enacted) of sanctions against persons illegally obtaining content online. Creative Content UK, an industry coalition, is now taking some of these measures forward.

Copyright issues generally were last studied in detail in the Hargreaves Review²⁵ in 2011, which proposed a number of changes to copyright exceptions and a number of impact assessments²⁶. Some of the findings in relation to harm are summarised in chapter 3 of this study.

Following consultation, the Government has introduced a series of new exceptions in five statutory instruments²⁷, allowing:

- The making of private copies for private use
- Copies of materials for non-commercial research
- Quotations of work
- Caricature, parody & pastiche
- The making of accessible copies

24 <http://www.legislation.gov.uk/ukpga/2010/24/contents>

25 Professor Hargreaves, 2011, Digital Opportunity. A review of Intellectual Property and Growth. Available online at <https://www.gov.uk/government/publications/digital-opportunity-review-of-intellectual-property-and-growth>

26 Available online at <https://www.gov.uk/government/publications/changes-to-copyright-law>.

27 These instruments were i) The Copyright and Rights in Performances (Disability) Regulations 2014 (<http://www.legislation.gov.uk/ukdsi/2014/1384/contents/made>) ii) The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 (<http://www.legislation.gov.uk/ukdsi/2014/1372/contents/made>), iii) The Copyright (Public Administration) Regulations 2014 (<http://www.legislation.gov.uk/ukdsi/2014/1385/contents/made>), iv) The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 (<http://www.legislation.gov.uk/ukdsi/2014/9780111116036>) and v) The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (<http://www.legislation.gov.uk/ukdsi/2014/9780111116029>).

- Fair dealing for use in education
- Libraries to make works available on dedicated terminals
- Libraries to make copies for other libraries under certain circumstances and to make copies of works for preservation

Of these changes, the one with most relevance for this study is the first exception: this makes it clear (see amendments to CDPA 1988 in Appendix 1) that while sharing copyright materials with others without a licence remains an offence, non-commercial private copying is now permissible under specified circumstances.

2.6 European Commission activity

The European Commission (EC) has recently adopted a Communication²⁸ on an Action Plan aiming at renewing the consensus on the enforcement of IP rights, seeking to obtain better compliance with IP rights by all economic actors. Rather than penalising the citizen for infringing IP rights, the EC says its Action Plan paves the way towards a “follow the money approach”, seeking to deprive commercial scale infringers of the revenue flows that draw them into such activities. In this regard it has interesting resonances with the approaches described in other parts of this study.

According to the press release, the EC Action Plan sets out ten actions to focus the EC’s IPR enforcement policy on commercial scale infringements. It foresees:

- engaging in a dialogue with stakeholders (e.g. online advertising agencies and payment service providers) to reduce profits from commercial-scale infringements on the internet
- promoting due diligence among all actors involved in production of goods with a high degree of intellectual property, since responsible supply chain auditing and application of due diligence reduces the risk of IP infringements
- helping small businesses to enforce their IP rights more effectively by improving court procedures; to achieve this, the Commission will look for the first time at national schemes directly assisting SMEs in accessing justice systems
- improving cooperation between Member States and facilitating exchanges of best practices
- providing a comprehensive training programme for Member State authorities with a view to achieving faster preventive actions against commercial scale IP-infringing activities across the EC and identification of barriers to cross-border cooperation

28 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014DC0392>

2.7 Current Parliamentary discussion on copyright

During the passage of the Intellectual Property Bill through Parliament, an amendment was proposed by Lord Clement-Jones to address the perceived discrepancy between the penalties for physical and online copying²⁹. The case put forward was the following:

Amendment 31 inserts a new clause which will increase criminal penalties for digital copyright offences. Criminal offences for online copyright theft have maximum penalties of two years' imprisonment. Criminal offences for physical copyright theft have maximum penalties of 10 years' imprisonment. This discrepancy came about because the new offences were introduced by secondary legislation using the European Communities Act 1972 as part of the UK's implementation of the Copyright Directive in 2003...

I strongly believe that criminal sanctions should not be dependent on whether the offence is taking place in an online or physical environment. Intellectual property is still being stolen, whichever format is being used. The problem that this has created for law enforcement was seen recently in FACT's significant landmark private prosecution of Anton Vickerman. Vickerman was making £50,000 each month running a website which facilitated mass-scale copyright infringement. He was prosecuted and subsequently convicted on two counts of conspiracy to defraud and sentenced to four years' imprisonment. This sentence would not have been possible if he had been prosecuted under copyright law.

This amendment does not introduce any new offence. It is simply about addressing an anomaly in the level of penalties available. The maximum criminal penalties for IP offences are: trade mark, 10 years; physical copyright, 10 years; registered designs, 10 years proposed in the Bill; and online copyright, two years. The Government prosecutors are happier using fraud legislation to obtain convictions against online infringers. Given this, there is no appetite to amend the CDPA. Trade associations such as FACT and the BPI anti-piracy unit tell a different story. While they do use the Fraud Act in some instances, it would not be applicable to all cases and offences. Fraud legislation is used because, owing to this discrepancy, there is no other option. The Fraud Act is used as a work-around because of the leniency in the CDPA.

29 Lord Clement-Jones, 18 June 2013, Hansard record from the debate in the House of Lords at report stage during the passage of the Intellectual Property Bill through Parliament.

In the Vickerman case, had he not conspired with someone, conspiracy would not have been a possible charge, which would have left a serious offence subject to a disproportionately low maximum penalty. What law enforcement and prosecutors need is a full package of legislative options available to them so that they can consider each case individually and use the piece of legislation that will get them the best result. This discrepancy aids defendants. They are able to point to the fact that the maximum penalty for these offences is only two years, and therefore that they are minor offences and should not be viewed as serious. This is incredibly damaging. Modern copyright law should focus on having a content-neutral and platform-neutral approach to infringement.

The then IP Minister, Viscount Younger of Leckie, subsequently responded as follows³⁰:

Under the Copyright, Designs and Patents Act – CDPA – the current maximum penalty that can be incurred by online copyright infringement is two years, while for physical copyright infringement, the maximum penalty available is 10 years. This is not a new proposition. A similar recommendation was made by Andrew Gowers in the report he wrote for the previous Government. At the publication of the Gowers report, the previous Government indicated their intention to implement all of its recommendations. However, after a consultation, they decided to increase the financial penalties to £50,000 but left the maximum custodial sentence untouched. I am sure that they did not reach their conclusions on this matter lightly.

This issue is sometimes presented as if there is a gap in the fabric of criminal offences which apply in this area, and that this change will plug that gap. I am not entirely convinced. The statute in question is not the only way in which criminals can be charged for copyright infringement. There is already a range of options for prosecutors looking to obtain a conviction for such activities. Many of these require a lower evidential burden than copyright offences, require less specialist knowledge and offer the sort of sentencing options which my noble friend seeks to add to this offence. Indeed, I am told that prosecutors would usually prefer to charge under the Fraud Act 2006, which carries a maximum penalty of 10 years, or use “conspiracy to defraud”, which also carries a penalty of 10 years. The Fraud Act in particular seems to have met the challenges posed by developments in technology and internet crime, helping industry to report crime as fraud, and has garnered praise from the City of London Police, among others.

There is another issue here of sentence length, by which I mean convictions and sentences actually handed down, rather than those that are theoretically available. The average custodial sentence given for physical copyright infringement under CDPA offences in 2011 was 12.7 months, the highest for five years. So the questions that occur to me are these: is this a necessary change? Is it a useful change to make? I would like to reflect on this matter further, and perhaps have the benefit of views from experts and practitioners in the field. I therefore ask my noble friend if he would be prepared to withdraw his amendment in return for an assurance that I will set in hand a study of this question, the timing of which I will confirm following the Summer Recess.

30 Viscount Younger of Leckie, 23rd July 2013, Hansard record from the debate in the House of Lords at report stage during the passage of the Intellectual Property Bill through Parliament.

If there is a need for a change to the law then I will, of course, look for a suitable legislative opportunity.

This was subsequently confirmed by David Willetts in the House of Commons³¹:

We propose undertaking a study of the criminal sanctions available for copyright infringement. We will commission the study shortly, with the aim of its starting early in the new financial year and of publishing its findings before the end of 2014. The study will review the penalties for both physical and online infringement. There is the possibility of reaching an aligned, equal penalty for both online and physical infringement of somewhere between two and 10 years. That would be an option. The study will review the penalties. It will be informed by sentencing data and practitioner views. It will consider the impact of the Government's recent enforcement initiatives, such as the Police Intellectual Property Crime Unit, and my hon. Friend Lord Younger, the Minister for Intellectual Property, will lead the exercise.

Although timelines inevitably shift, we expect research and field work to be concluded by around September 2014, with a final report expected in December. Members of all parties recognise there is concern about the gap, and we understand the need to consider it.

31 Right Hon. David Willetts MP, 30th Jan 2014. Hansard record from the Public Bill Committee during the passage of the Intellectual Property Bill through Parliament.

3. Stakeholder views on online copyright crime

3.1 Introduction

This chapter places the problem of copyright infringement into its economic and social context. Recognising that ‘piracy’ is a subject on which there is a diversity of views, it examines the different stakeholder opinions on the nature, scale and consequences of copyright infringement, to understand the harm attributed to it and the potential for tougher sanctions to have unintended, negative consequences.

The first of the following sections sets the scene by briefly reviewing information presented in print over the past few years on copyright infringement. Subsequent sections report the findings of interviews with, and formal submissions to this study from, stakeholders: firstly, the police; secondly, industry bodies (including their reflections on current and prospective anti-piracy initiatives); thirdly, other parties with an interest in this area. Interviews have been used as the principal source as a means to enable qualitative data to be captured.

3.2 The infringement problem

The nature and scale of illegal activity

Discussions with the Police Intellectual Property Crime Unit (PIPCU) and other stakeholders suggest that there are two perceived categories of criminal activity:

- Those who set out intentionally to make money out of the illegal communication of copyright material
- Those who appear to be acting on the principle that some, or all, copyright material should be freely available and do not pay or charge for it

A concern expressed during interviews conducted for this study is that criminal sanctions are much more likely to be effective against the first group than the second. However, as will be seen, there are examples of so-called ‘idealists’ making substantial amounts of money from infringement. Accordingly, this distinction cannot be described as clear-cut, and is mostly to reflect the different justifications offered for the crime rather than the underlying motivation.

In terms of how infringement takes place, a recent report by Google and PRS for Music³² described six distinct business models that facilitate copyright infringement on the internet.

32 <http://www.prsformusic.com/aboutus/policyandresearch/researchandeconomics/Documents/TheSixBusinessModelsofCopyrightInfringement.pdf>

These can be summarised as follows:

- i. The Live TV Gateway. Streaming, often with download facilities: mainly funded by advertisements, some donations. Fast-growing
- ii. The Peer-to-Peer (P2P) Community. Downloadable content, mainly hosted in Europe, funded by advertising and donations, often featuring forums
- iii. The Subscription Community. Each user pays fees for content types, usually via card – there is little advertising. Content is downloaded via P2P or distributed servers
- iv. The Music Transaction site. Users buy downloadable tracks. Usually found by search, often based in Russia, and declining
- v. The Rewarded Freemium Model. Basic access is free (subsidised by advertising). Users pay for upgrades but are rewarded for content (mostly music)
- vi. The Embedded Streaming Model. This provides hosting for uploading and site embedding. It is advertisement-funded, with a reward model

This report's findings are based on an analysis of 153 sites from a total of 1,000 supplied by rights holders (which was subsequently validated by comparison with a further 104 sites).

The report reinforces the general sense, also evident in interviews, that P2P file sharing is on the wane and that streaming models are on the increase. As can be seen, all have a business model – often dependent to some degree on advertising – which tends to further undermine the assertion that any of these activities are in some way 'altruistic'. The PRS/Google report suggests that this advertising is normally not provided by recognised industry sources – or at least not knowingly (see below).

Separately, Ofcom recently commissioned Kantar to perform research to estimate the scale of the copyright infringement problem. Its report, "Online Copyright Infringement Tracker"³³, found that the number of illegal downloads was large and that in the three months from March - May 2013 the following were copied illegally:

- 200 million music tracks
- 54 million TV programmes
- 30 million films
- 9 million pieces of software
- 5 million video games
- 7 million ebooks

33 http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/online-copyright/w4/OCI_MAIN_REPORT_W4_FINAL.pdf

This equates to approximately 100 million illegal copies a month in the UK on average.

Kantar also quotes findings from The Digital Citizens Alliance report from February 2014, “Good Money Gone Bad”³⁴. This showed that 30% of pirate sites held advertisements for legitimate, well-known brands. The report suggests that the brand owners are often unaware of their presence on these sites, due to the complex affiliate structure of the online advertising industry, and makes recommendations to help legitimate businesses avoid advertising on these illicit websites.

Questions raised regarding harm levels

There does not appear to be a great deal of dispute over the fact that a very significant amount of illegal downloading takes place. However, there has been considerable disagreement regarding how prevalent criminal activity is, and in particular, how much financial damage arises as a consequence.

As an example, peer-reviewed academic research has shown that Canadians who use peer-to-peer (P2P) websites regularly to download music spend as much on legal music as non-P2P-using members of the public. Furthermore, those that use P2P a lot also purchase more legal content than their non-P2P contemporaries^{35,36}. However, it should also be noted that this research has been critically reviewed by a number of authors who disagreed with its findings³⁷. With respected academics on both sides of the debate it would appear that the level of harm caused by illegal file-sharing is a contentious matter.

The 2011 Hargreaves Review, which was mainly considering the impact of copyright infringement on economic growth, provoked considerable debate when it stated that³⁸:

The uncertain and disputed nature of the prevalence data makes it difficult to reach confident conclusions about the impact of copyright piracy on growth. This assessment is complicated further by a number of other relevant points:

- *Not all illegal downloads are lost sales – the user may not have paid a higher price for a legal copy in the absence of cheap or free illegal versions*

34 Digital Citizens Alliance. Good money gone bad – Digital Thieves and the Hijacking of the Online Ad Business. Available online at <http://www.digitalcitizensalliance.org/cac/alliance/content.aspx?page=FollowTheProfit>

35 Andersen, B. & Frenz, M. (2007), The Impact of Music Downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada. Available online at [https://www.ic.gc.ca/eic/site/ippd-dppi.nsf/vwapj/IndustryCanadaPaperMay4_2007_en.pdf/\\$FILE/IndustryCanadaPaperMay4_2007_en.pdf](https://www.ic.gc.ca/eic/site/ippd-dppi.nsf/vwapj/IndustryCanadaPaperMay4_2007_en.pdf/$FILE/IndustryCanadaPaperMay4_2007_en.pdf)

36 Andersen, B. and Frenz, M (2010). Don't blame the P2P file-sharers: The Impact of Free Music Downloads on the Purchase of Music CDs in Canada. Journal of Evolutionary Economics. Vol 20, No 5, Pp 715-740

37 Barker, George R. [Evidence of the Effect of Free Music Downloads on the Purchase of Music CDs](#) Social Science Research Network. January 23, 2012. Available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990153

38 Ian Hargreaves, 2011, Digital Opportunity. A review of Intellectual Property and Growth. See Paragraph 8.15. Available online at <https://www.gov.uk/government/publications/digital-opportunity-review-of-intellectual-property-and-growth>

- *Money not spent on legal copies is not lost to the economy – it may be spent on other purchases. This is of no comfort to the sector suffering losses, but the effects across the economy will not necessarily be problematic*
- *Even within the industry affected, purchases prompted by experience from an illegal copy (for example, concert tickets or other merchandise) can offset losses*
- *In business software, piracy has promoted the lock-in effect for the legal provider's software and helped to make that software the global standard*

Hargreaves pointed out that the UK music industry revenues overall continued to grow year on year during the period under review: to £3.9 billion in 2009, up five per cent on 2008 and that book sales had also grown or maintained their net value between 2004 and 2009. He also tried to estimate the economic harm of copyright infringement³⁹:

On these numbers, copyright infringement appears to account for just under 0.1 per cent of economic activity, whether this concerns the UK, the EU or the whole world. The total cost of IP crime amounts to between 0.1 per cent and 0.5 per cent of economic activity. This suggests that the cost of IPR infringement is neither negligible nor overwhelming in economic scale, even if we work from industry's own estimates of the problem.

3.3 The Police Intellectual Property Crime Unit (PIPCU)

The City of London Police Force is the national police lead for economic crime in the UK, hosting a number of dedicated fraud teams. In 2013, the Government announced that IPO would invest £2.56m over two years to set up and fund a dedicated intellectual property division, known as The Police Intellectual Property Crime Unit (PIPCU).

PIPCU officially launched in September 2013. It is dedicated to protecting UK industries that produce legitimate, high quality, physical goods and digital content from intellectual property crime, and importantly for this study has a specific focus on online crime.

PIPCU is a 21-person team (at the time of writing) consisting of detectives, police staff investigators, analysts, researchers, an education officer and a communications officer. The team also has secondees from the Intelligence sector and an Internet Investigator from the British Phonographic Industry (BPI) assisting them. Over the past year, PIPCU has been building working relationships with industry and law enforcement partners across the globe to develop integrated partnership working approaches.

39 Ian Hargreaves, 2011, Digital Opportunity. A review of Intellectual Property and Growth. See Paragraph 8.17 Available online at <https://www.gov.uk/government/publications/digital-opportunity-review-of-intellectual-property-and-growth>

As with all other crimes, police powers to investigate IP offences are subject to specific codes of practice. In 2002, when the increase in the maximum sanction for physical copying was introduced, the primary legislation was the Police and Criminal Evidence Act 1984 (PACE). Under s.24 and s.25 of PACE 1984, a serious arrestable offence was considered to be one where the offender was over 18 and could receive a custodial sentence of more than five years on a first conviction. The significance of changing the maximum sanction for physical copyright infringement from two to 10 years in 2002 was that it moved the offence into this serious arrestable category.

Since 2002 there has been new legislation, the Serious Organised Crime and Police Act 2005. In summary, the distinction regarding the perceived seriousness and arrestable nature of an offence now rests on whether it is indictable or not. The issue affecting the investigation of online copyright infringement is that with a maximum available sanction of two years, a crime will always initially be treated as if it were a Summary offence rather than a serious arrestable one (a finding supported by the data in chapter 5 following, subject to the caveats expressed therein)

Rob Stirling of PIPCU explains that this position has three consequences:

First, we want the public to consider illegal file sharing as being socially unacceptable, in the same way as they would other types of crime. However, it is difficult to stigmatise an activity when even the worst cases will be treated as if they were Summary offences. For example, whilst not wishing to diminish the importance of road traffic offences, some of these attract significantly longer custodial sentences than generating millions of pounds through an illegal website.

Second, Summary offences are normally tried by a magistrate and in practice tend to attract sentences of 12 months or less. At this level of tariff, it is more difficult to satisfy the Crown Prosecution Service that a criminal prosecution is in the public interest. The whole criminal justice system would regard online copying as a much more serious offence if the maximum sentence were greater.

The low maximum sentence also causes problems when we try to go after illegal websites that are hosted overseas, as is often the case. It is difficult to persuade a judge in another country to issue an overt enforcement warrant where you are pursuing a crime that is only punishable in the UK as a Summary offence.

As an alternative to court action, PIPCU is now managing Operation Creative, a five-phase integrated policing model aimed at cutting off the flow of funds to illegal websites. It combines elements of two earlier initiatives, Operation Tradebridge (which targeted advertising revenues) and Operation Leftbridge (targeting payment enablers). Its operation is briefly summarised by BPI below.

Whilst this operation is achieving results, with over 100 sites now targeted, Stirling cautions that their owners are becoming increasingly ingenious in finding ways to translate their traffic into profits and that ‘throttling the income’ can be challenging. As one example:

We have recently been investigating one case where, rather than use advertising, the website has been getting visitors to complete a survey before accessing the content and selling the data to retailers and other organisations.

3.4 Industry stakeholders

A number of industry bodies have been directly approached to provide views and evidence for this study. In some cases this has come from senior management, and in other cases we have spoken directly to independent legal experts working on behalf of these organisations. The latter has proved especially valuable, as it has enabled many of the practical difficulties concerning the prosecution of online offences to be explored in some detail.

A list of organisations approached for this study, who have supplied information by way of interview and/or by providing written submissions, is shown at Appendix 2.

Alliance for IP

The Alliance for Intellectual Property represents trade associations across the creative, branded and design industries concerned with ensuring that IP rights are valued in the UK and that a legislative regime exists which enables the value and contribution of these rights to be fully realised. Its members include representatives in the audio-visual, music, games and business software markets, together with sports industries, branded manufactured goods, publishers, retailers and designers.

The Alliance for IP decided to contribute to this study by facilitating connections with appropriate representatives at its various member organisations, who could provide information based on their own direct experiences. However, it also provided a summary of its own views on online copyright infringement sanctions:

The inconsistency between the criminal sanctions available for infringement of copyright in the physical and online worlds arose simply because of the way that criminal sanctions were introduced for online infringement. It is not appropriate that those seeking to prosecute should have to secure convictions under other legislation on offences that primarily relate to copyright infringement to ensure that prosecutions and sentences at an appropriate level can be achieved.

Anti-Copying in Design (ACID)

Anti-Copying in Design (ACID) was recently engaged in a successful campaign lobbying for the introduction of a ten-year maximum penalty for the intentional copying of registered designs. The organisation introduced Nick Kounoupas of DMH Stallard, its chief legal counsel, who also has extensive experience in the music industry (for 16 years he ran the anti-piracy unit at MCPS, part of PRS for Music).

Nick knows the legislative history well, having been involved in the 2002 private members bill referred to above and the implementation of the Information Society Directive in 2003:

There is always a need for access to the criminal law to act as the ultimate deterrent to organised or persistent criminal behaviour. There were many reasons why in 2002 Parliament supported the extension of the maximum custodial sentence from two to 10 years, but one of the consequences was that copyright infringement was classified as a serious arrestable offence which therefore enabled the arrest of suspected offenders and the search of their property. This in turn helped disrupt criminal operations, which was probably a greater need at the time than putting people into prison and throwing away the key.

Nick supports the extension of the maximum penalty for online copyright crime to 10 years, but has also found that almost any length of sentence can benefit the central aim of disruption:

Around half the cases we tackled at MCPS involved piracy, and the other half concerned otherwise 'legitimate' businesses who were flagrantly infringing copyright law. A 'director, servant, officer or manager' of a company which is convicted under CDPA 1988 will also be convicted of the same offence if they are proven to have consented or connived in the infringements of the company. If the sentence is a suspended sentence, that only comes into effect if they repeat this type of offending, this is a very powerful deterrent against future infringing. Such a conviction attaches to the individual rather than to the company and will follow him or her about in any new dealings they have.

Artists' Collecting Society

Whilst the Artists' Collecting Society did not feel that the issue of online infringement was directly relevant to its activities as an organisation, Harriet Bridgeman (of Bridgeman Art Library) had a relevant professional experience to contribute:

At Bridgeman Images, we are obviously aware that infringement takes place, and that from time to time our images do get pirated. However we have a strict company policy of policing our site regularly and we do check newspapers and magazines daily for infringements as a matter of course. When we do discover infringing images and point them out, the publication is normally amenable to paying what they owe us together with a penalty fee where applicable.

We always issue take down notices and often find that the person who has breached copyright has only infringed through ignorance of copyright law, so the process of limiting infringement is largely one of education over punishment.

The only big case we have undertaken was the Bridgeman versus Corel case. This is well documented on Google and in Wikipedia. Unfortunately this was unsuccessful, established in the New York District Court as a judgement that there was no copyright in a photograph of a two-dimensional work of art, only in a three-dimensional. Fortunately, this has not been upheld elsewhere. We re-enacted this case in London with an English QC and top European IP lawyers from Germany and France. They overturned the New York judgment which had been seriously questioned when it was first delivered, as in the UK we feel strongly there is copyright in a photograph of a work of art, whether two-dimensional or three-dimensional.

BPI (British Phonographic Industry)

The BPI (British Phonographic Industry) is involved in bringing private prosecutions against websites that host or link to illicit content. At the moment, its biggest concern is with streaming sites.

BPI has used s.107(1)(e) rather than s.107(2A) to prosecute certain cases, as this carries a more serious 10-year maximum prison sentence. s.107(1)(e) states that it is an offence to make or deal with infringing articles “otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright”⁴⁰.

David Wood said:

Most of the cases we deal with have an international dimension - and whilst the BPI is a UK-focused body, we also support international enforcement efforts. If the works are being made available to the public in this country, the UK police has jurisdiction and can use a Mutual Legal Assistance Treaty (MLAT) to get cooperation and / or extradition warrants from police in other countries.

BPI also feels that the new initiative by PIPCU, Operation Creative (referenced above) is proving very successful. Under Operation Creative:

- An industry body reports a site as potentially infringing (by hosting or linking to predominantly illicit material) to PIPCU
- PIPCU investigates and if it believes the site is committing an offence, it will initially write to the website owners asking them to remove the offending material or shut the site down. The site owners will be given 14 days to comply
- If this is ignored, PIPCU will write to the main registrar of the domain asking for the domain name to be suspended. PIPCU is also beginning to write to the company hosting the domain asking that the hosting of the site be suspended

40 <http://www.legislation.gov.uk/ukpga/1988/48/section/107>

- If these actions are unsuccessful, the website is placed on the “Infringing Websites List” which is made available to advertisers, the International Advertising Bureau and brand protection agencies so that advertising revenue for these sites is severely curtailed. The Infringing Websites List is also shared with credit card companies, which affects the ability of the website to receive and process payments.

David Wood added:

In writing to registrars and hosting companies, it is problematic to cite s.107(2A) CDPA 1988 as the offence being committed because it only carries a two-year maximum prison sentence and so is not considered sufficiently serious to illicit a response. Increasing the penalty to 10 years would send all the right signals and allow this legislation to be used more frequently for these purposes.

The BPI also uses s.97A blocking orders⁴¹ extensively. A full list of sites blocked under s.97A CDPA88 is available at the time of writing from <http://www.ukispcourtorders.co.uk/>.

Copyright Licensing Agency (CLA)

The CLA is the collective licensing body set up in 1983 and owned by the Authors’ Licensing and Collecting Society (ALCS) and the Publishers’ Licensing Society (PLS) to perform collective licensing on their behalf.

Martin Delaney of the Copyright Licensing Agency said:

We see no reason why either civil or criminal sanctions should be different for physical and online infringement. We live in an online world, with the vast majority of infringement now occurring online and the penalties available should reflect that.

Federation Against Copyright Theft (FACT)

The Federation Against Copyright Theft (FACT) has been involved in bringing a number of high profile cases to court and has first-hand experience of the difficulties encountered in successfully prosecuting online infringers. It cites the relative lack of successful past prosecutions under s.107(2A) and s.198(1A) of CDPA 1988 as a particular challenge in the online environment. As a result, FACT has often had to lead, initiate and bring private criminal prosecutions itself.

Director-General Kieron Sharp explains:

Public prosecutors have been reluctant for years to take online cases, not wishing to be the first to attempt what might end in failure I guess. As a result there is no case law.

41 <http://www.legislation.gov.uk/ukpga/1988/48/section/97A>

We need to still prosecute these cases so we often take them forward as private criminal prosecutions. However, these are serious cases and the two-year maximum sentence available downgrades the case in the eyes of the court who in any event cannot impose a sentence reflective of the crime. We therefore follow other legislation and thus ourselves do not establish case law, which leads the prosecutor in the next case to again dismiss the chances of success.

Howard Lamb, Internet Industry Liaison Officer for FACT, said that:

We are convinced that high profile criminal prosecutions (such as the conviction of Anton Vickerman in the SurfTheChannel case) are essential, both to act as a deterrent to other would-be infringers and to educate the public that use of these websites is illegal.

FACT and other industry bodies have been working with the Police Intellectual Property Crime Unit (PIPCU) to alert mainstream advertisers to their presence on sites that host or link to predominantly infringing content. Whilst this has shifted the emphasis on these sites to online gambling and pornography, both can still be lucrative for the website owners. Accordingly, as Howard Lamb noted:

FACT is now working with the Gambling Commission and the Remote Gambling Association to encourage their members not to advertise on these sites.

FACT has also been using s.97A of CDPA 1988 to block access to infringing sites from the major UK Internet Service Providers (ISPs). This part of the law is now well tested and blocking orders can be obtained relatively easily. However, there is evidence that the law is finding it hard to keep up with technological change: although s.97A addresses the requirement to 'take-down' an infringing site, it is silent on the legality of proxy or mirror sites which host the same content as that blocked from another domain.

FACT has recently taken action against the owner of 31 proxy websites which allowed UK consumers to circumvent the s.97A order and access the well-known Pirate Bay site (and others) and consideration is currently being given to criminal prosecution as well as the possibility that there may have been a contempt of court.

FACT has also been involved in many of the high-profile cases referred to in chapter 4 following.

Federation Against Software Theft (FAST)

In the software sector, FAST indicates that the main problem relates to the sale of unlicensed copies of software: usually this is a question of offering an illegal copy of an authentic original product.

The online fraud trend has been exacerbated by the move to downloading software rather than purchasing it on CD or DVD: this partly explains the further move now being undertaken in the industry to offer cloud services on a subscription basis.

This type of crime is fraud because the user generally thinks they are buying the real thing (and the downloads sometimes involve impersonation of genuine sites).

FAST stressed that views in the industry about the best way forward to tackle online infringement vary, but legal director Julian Heathcote Hobbins summarised his personal views as follows:

- *In principle, there should be parity between off and online criminal offence maximum ramifications. In any event, consideration needs to be given if there is a move to reduce either, considering the low sentences I understand are being given out*
- *There is a need to define the word “article” at s.107 CDPA 1988.*
- *There is a continuing issue of trying to measure whether an online infringement somehow equates to a lost sale*
- *Challenges remain about those who make money from mass infringement on the internet but may claim it is not a “business”*

Independent film production

The infringement position is particularly difficult for independent film producers, as industry expert Bertrand Moullier explained. In the past, these producers have been able to obtain a theatrical (cinema) release and then benefit from strong initial DVD sales before earning revenues from television, both pay TV and free-to-air.

However, access to the theatrical market is increasingly competitive. Release costs (print and advertising) are continuing to climb in spite of the switch to digital prints and there is a growing volume of non-studio product competing for a limited number of screen slots. Where a theatrical release can be achieved it will often be a very short run, with no possibility to negotiate a holdover even, if the film is achieving good screen average.

The theatrical market is generally a loss-leader for independent films but it serves its purpose as a ‘signalling investment’ which may drive consumer purchases in other segments of the value chain. The additional challenge for independent films today is that the rest of this value chain is more precarious: DVD sales volumes are still reasonable despite relative decline but the price has fallen sharply owing to earlier and heavier price discounting; the market in TV for most independent films is no longer a growth area, while video on demand services (which did for a time provide a useful boost to industry incomes at the point when branded platforms were competing to enter this new market) are now seldom interested in pre-release rights purchases, partly because they are concerned about their ability to monetise any such investment because of online piracy. Accordingly Bertrand concludes:

Online may be the future, but it certainly isn’t the present. Online piracy is the straw that breaks the camel’s back for independent film producers and needs to be tackled.

Motion Picture Association (MPA)

The Motion Picture Association (MPA) is the international trade association working for major companies that invest in, produce, distribute and market film and TV content in the UK and globally. Its member companies include Disney, Sony Pictures, Warner Bros, Viacom, Universal and Fox. Members of the MPA – and the creators of the audio-visual content that they produce – are frequently targets for serious online piracy because their copyright material is internationally sought after by consumers.

There are a variety of different types of online piracy, including some which manifest in physical form (e.g. counterfeit DVDs which are sold via online shopping or auction sites) and those in digital form. These include illegal copies of content which are posted online and made available via P2P file sharing environments (often at no cost but sometimes for a fee); attractive web sites which are set up for the primary purpose of offering unauthorized content which may then be downloaded or streamed illegally; cyber lockers in which infringing copies of films and TV programmes are stored and may be accessed; and now also mobile applications.

Furthermore pirates may offer, at discounted prices, legitimate-looking DVDs with “add-on” digital copies or what appear to be directly accessible online film downloads which are then inaccessible because the digital access codes provided for them turn out to be bogus, have been used already or have expired. All of these illegal offerings and activities cause a reputational as well as a financial issue to MPA members as well as to other content producers and rights holders.

In court cases related to infringing activity, a key issue faced by MPA is to provide suitable evidence of harm that matches the descriptions in CDPA 1988 in terms of communicating to the public “in the course of a business” or in a manner that is “prejudicial”. Marianne Grant, a MPA senior vice-president, would like to see stronger sanctions available in order to deal with serious criminal activity (for example ensuring that the consequences of activity online are at least equivalent to those for activity in the physical world and making sure that those consequences are not hidden) - but notes also the importance of ensuring that there are good resources including sound education for consumers about the many options for obtaining content legally, so that there is a better understanding of what is and is not legitimate and less chance of consequences from unsafe online activity.

In this regard, MPA is an initiator and supporter of the new Creative Content UK initiative - along with BPI, other content industry bodies and the four leading UK internet service providers (BT, Sky Broadband, TalkTalk and Virgin Media). The emphasis of this programme, which will start in 2015, will be on educating consumers of all ages (including messages directed to those ISP account holders whose internet connections are being used to share infringing content via P2P networks) about how and where to obtain content legally, how to ensure that their internet connections are safe, secure and not open to malware or other abuse – and to provide information about the economic and innovation contributions made by the creators and workers in the industry as a whole.

Marianne believes that Creative Content UK, which effectively introduces the notification provisions provided for within the Digital Economy Act 2010 (but which surrounds those provisions with consumer awareness and education assets) is an important missing component in addressing online infringement. She says that bad online behaviour starts often at a young age (11-15 years) and may be, for some, born partly out of the fact that “people don’t know why it matters”.

She regards it as critical to underline the importance of teaching children, young people and those who influence them about the concepts and context of the issue before the behaviour starts. However she says it is important to address people engaged already in bad activity – which means using appropriate legal methods to deal with those, such as the publishers and posters of large volumes of unauthorised online content or those who operate rogue web sites, who are found to be engaged in serious criminal activity – using more educative measures such as those delivered by Creative Content UK to address the general public and casual infringers.

Newspaper Licensing Agency (NLA)

The NLA is a publisher-owned rights licensing and database business which provides access to and licenses the re-use of publishers’ content. It manages the rights of thousands of print and web titles on behalf of their publishers.

The NLA has been introducing systems to identify and tackle online infringement without recourse to the courts. Andrew J. Hughes, Commercial Director of the NLA, told this study:

Our “Online Article Tracking System” (OATS) tracks infringement of publisher websites, and contacts infringers, explaining the requirement for a licence. There are currently five participating national newspaper publishers, but the service will shortly be offered to regional newspapers and commercial magazines.

In a typical week over 13,000 articles from five major UK newspapers are cut and copied into other sites. These are often professionally run sites supported by advertising and ecommerce services. One site alone took 488 articles in one week. Combined action by NLA media access and the publishers identified and eliminated those using content legitimately and those not using the content for commercial advantage, and then pursued the remainder to take a licence, cease use or in some cases consider the potential for legal action, noting that this is impractical in many international territories and unlikely to be cost-effective in most instances.

The current success rate of the overall OATS service, without taking legal action, is averaging 75%, thus improving the controlled use of publisher content and helping to assure the publisher that their brand is not diluted.

Over the initial 6 months:

- *415 domains were contacted*
- *285 infringing domains took down content (69% success rate)*
- *Publishers have or are in the process of negotiating licences in some instances.*

PRS for Music

The Performing Rights Society (PRS for Music) is a collecting society dealing with large numbers of individual writers and performers rather than business owners of copyright material. Generally speaking, it has not brought criminal prosecutions for online offences, preferring to refer these to PIPCU (which it is actively doing) in order to obtain take-down orders.

While PRS for Music has had a number of successful criminal prosecutions relating to physical infringement in the past, its reasons for pursuing alternative routes are principally the costs of prosecution (and uncertainty of outcomes), the lack of clarity concerning whether financial gain is a precondition for a successful prosecution, and the low likelihood that a custodial sentence will be awarded if the maximum penalty is two years.

The concerns of PRS for Music are centred on the strong trend towards the online delivery of music content – in particular, the move to stream rather than download or purchase physical copies, and the use of the Internet as a ‘shop window’ where legitimate websites can be copied.

One of the key concerns for PRS for Music is what Simon Bourn termed the “nexus” between physical and online infringement, where the original infringement of copyright takes place online but is only punishable with the maximum sentence if physical copies are subsequently made and sold.

UK Interactive Entertainment

Mo Ali, IP Co-ordinator at UKIE, observes that online copyright infringement has historically been less of an issue for the gaming industry than for music or film, as consoles have built-in measures to prevent illegal copies being played and many game businesses have the ability to track and directly disable some of the features when someone tries to play an illegal copy.

However, Mo Ali said that:

Online infringement continues to be a problem across all formats but particularly in the PC environment. Illegal file sharing of games is often facilitated by “cyberlocker” sites which do not screen the content of what is being uploaded. Many cyberlockers offer rewards or payment to uploading infringers, which can become lucrative for the infringer. Some cyberlockers offer as much as US\$100 per 1,000 downloads, revenue which is generated via premium accounts offering fast and unlimited downloads.

We also see IP infringement evolving with the market. For example, with the increase in mobile gaming, there has been an increase in the number of cloned or spoofed games being offered within the app stores and also “mod” versions games which by-pass payment systems to give the player all the power ups and other extra content for free.

3.5 Other stakeholders

It is important to recognise that not all those who participate in the debate on online infringement are rights holders. In order to understand the other perspectives which exist on the question of infringement, a number of other bodies were contacted for this study. Two sets of responses which highlight the issues for consideration are provided below.

The Big Innovation Centre

Birgitte Andersen is director of the Big Innovation Centre, and a professor of the Economics and Management of Innovation at Birkbeck College, University of London. She has been called as a defence witness in a number of online copyright infringement and cyber crime prosecutions including the cases of Oink, SurfTheChannel and Matthew Wyatt’s personal case due to her research into the level of harm (market substitution versus new market creation) caused by online peer-to-peer filesharing and free downloads.

Birgitte suggested that a practice has been to simply arrest, and where the case against the accused is not strong to then drop the case just before it comes to trial, as happened in the case of Wyatt and also Filesoup, which results in personal loss. Birgitte expressed the following opinion in The Guardian in 2012⁴²:

Instead of entrepreneurial search engines and online registers being celebrated for their frontier thinking, they are hounded for upsetting the dominant position of existing market actors. Examples include the private prosecution pursued by the lobby group Federation Against Copyright Theft (FACT) against SurfTheChannel, in which the owner was sentenced to four years in prison; or the case of the Oink music site, which successfully defended itself from prosecution but never reopened; and more recently, the case of the Sheffield University student who paid an out of court settlement over the link site TVShack after being faced with extradition and a potential 10 year sentence. On top of the usual risks associated with start-up companies, today’s digital entrepreneurs also face the personal tragedy of all prosecuted inventors — divorce, financial ruin, job loss, exile from the internet, and more.

42 Knowledge Capitalism Gone Wrong: Overzealous protection of IP threatens to hobble innovation, and government reform is urgently needed, The Guardian, 18 December 2012

During these trials Birgitte was often asked to comment on FACT and BPI figures for the harm suffered by the music industry in lost sales based on her research^{43,44}. In her interview for this study, she makes the following observations:

The industry bodies tend to assume that every illegal download deprives the copyright holder of a full-priced sale of the item to that consumer. But research shows it is unlikely that all of the people illegally downloading material would have purchased an original copy; many are “trying before buying” and in fact make a legitimate purchase of the work at a future date. Consumers who fileshare do not purchase more or less than those who do not fileshare; those that fileshare a lot buy more legal content than those that fileshare less often.

Whilst not doubting that serious online infringement ought to be met with appropriate sanctions, Birgitte is concerned that the law should not be concerned with maintaining old business models at the expense of new ones which are often “edgy”. Based on her courtroom experience, she feels the legal community does not understand enough about the dynamics of the copyright system. In a highly dynamic global economy, innovation, business models, and consumer behaviour are radically reforming all the time. The regulatory regime, the courts and legal advice more generally must keep up with the transformations which are happening, she argues. The physical and online world faces different market and business opportunities and different market challenges and different market effects:

At present whenever and in whatever form material is placed online, it is often in line with a copyright breach and this, combined with a large penalty, will prevent people setting up new websites that provide content in innovative ways. There needs to be a charter or a list of rules on what is and what is not allowed to be done with private and public data, information and copyright materials. Europe should also introduce ‘fair use’ of personal and business data if you’re not competing with the owners of the data or harming their ability to monetise it. The fair use principle is also introduced in the USA copyright system.

She continues:

The Government must demonstrate an innovative approach by committing to reach out to innovative businesses, young people, consumers and creators to promote progressive management of IP and integrity in IP communities. Yet this commitment must be translated into an agenda for reforming the IP system, including its legal structures, so that it truly reflects the driving forces of the modern global economy. The Coalition government’s proposed limitations and exceptions to copyright ownership is in the right direction and it is essential that the government now pushes ahead with unleashing a new wave of digital entrepreneurship.

43 Andersen, B. & Frenz, M. (2007), The Impact of Music Downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada. Available online at [https://www.ic.gc.ca/eic/site/ippd-dppi.nsf/vwapj/IndustryCanadaPaperMay4_2007_en.pdf/\\$FILE/IndustryCanadaPaperMay4_2007_en.pdf](https://www.ic.gc.ca/eic/site/ippd-dppi.nsf/vwapj/IndustryCanadaPaperMay4_2007_en.pdf/$FILE/IndustryCanadaPaperMay4_2007_en.pdf)

44 Andersen, B. and Frenz, M (2010). Don’t blame the P2P file-sharers: The Impact of Free Music Downloads on the Purchase of Music CDs in Canada. *Journal of Evolutionary Economics*. Vol 20, No 5, Pp 715-740

For these reasons, Birgitte does not favour extending the maximum term for online infringement and feels that if it is extended, safeguards will need to be put in place to define serious offences more clearly so that low-level infringement will not be treated in an overly harsh manner.

Open Rights Group (ORG)

In its submission to this study⁴⁵, the Open Rights Group argues that online and physical copyright infringement are different things. It thinks that these fundamental differences in the characteristics of the two offences meant that online infringement is easier and therefore that more “ordinary citizens” could potentially be criminalised:

The formulation used in both EU and UK law - making available to the public - does not require that any actual copy is obtained by a member of the public, only that it is possible to obtain a copy. So one infringement involves an actual distribution, and the other a potential distribution of copyrighted goods. Most people would agree that these are not the same offences.

It is relatively easy to distribute large numbers of digital copies of a work online, while doing the same in the physical world would involve infrastructure clearly beyond the reach of ordinary citizens. The risk of members of the public being caught unwittingly in criminal online infringement is a lot higher. There is no need for profits to be made in any of these cases for the offence to take place.

The Open Rights Group also points out that serious copyright offences can be (and are) prosecuted using alternative legislation like the Fraud Act or common law conspiracy to defraud. The ORG argues that because of the use of the alternative legislation, no change to CDPA 1988 is necessary and such a change would not act as a greater deterrent as offenders are already facing a ten-year prison sentence via the alternative provisions.

ORG is also concerned that online offences are treated more harshly due to the large number of downloads (and hence the amount of harm calculated as a multiple of sales price x number of copies) and that relatively commonplace activities will be caught by any change in legislation, risking large prison sentence for a large proportion of the general populace. By way of an example, it cites the recent Anne Muir⁴⁶ case which was brought using the legislation highlighted earlier in this chapter by BPI:

The case gives some indication of the dangers of the proposed parity for ordinary people who do not act in the course of a business or a criminal conspiracy. Ms Muir was found in possession of some 32,000 audio files estimated to be worth £54,000. She pleaded guilty to infringement under section 107(1)(e) of the CDPA, by making them available to others via a peer-to-peer network. This was clearly incorrect, as that section of the Act applies to physical infringements, not to making available, but nevertheless the Scottish nurse was sentenced to three years' probation.

45 Full response viewable at <https://www.openrightsgroup.org/ourwork/reports/response-to-survey-on-raising-maximum-penalty-for-breaching-online-copyright-to-10-years-in-prison>

46 <http://www.bbc.co.uk/news/uk-scotland-glasgow-west-13603003>

Her case under the proper infringement of communication to the public would have entailed a maximum of two years in the current regime. But had the maximum penalty been raised to ten years, the outcome could have been very different. In her case the prejudice was calculated on the basis of the market value of the files she possessed. But a prejudice based on the value of the same files after they had been made available to millions of users could be deemed to be much higher. This could have triggered a much longer sentence.

Lastly, the ORG makes the point that the introduction of a large custodial sentence for online copyright infringement may stifle innovation on the internet by preventing the development and commercialisation of innovative online services:

The proposals could have a larger effect on specific groups that operate at the limits of current copyright legislation, but are not mass infringers and would not be prosecuted under fraud. Many internet innovators, prosumers, online creative communities that create non-profit derivative works, fandom producers, etc. All these people – many of whom technically breach copyright in their activities – could find themselves facing prison sentences if making available carried a maximum sentence of ten years.

3.6 Conclusions

Not surprisingly, there is a general consensus apparent amongst industry bodies that the availability of stiffer sanctions for serious online infringement cases would be helpful. The argument is, perhaps, most persuasive when it comes from organisations such as FACT and BPI who have hands-on experience of the shortcomings of the existing CDPA 1988 provisions regarding online infringement (though they do of course represent organisations who are already convinced of the advantages of bringing prosecutions, and are funded in a manner that enables them to do so, at least occasionally).

The arguments advanced by other stakeholders highlight the divergence of views on whether physical and online infringement is really the same crime, or fundamentally different in nature. Concerns are raised about a possible “chilling effect” on innovation, as well as the criminalisation of activity that is relatively low-level.

The following chapter therefore examines the outcomes of the key cases which have sought to address online copying, before determining what insights are available from the data on prosecution and sentencing in chapter 5.

4. Sample cases involving online copyright infringement

4.1 Introduction

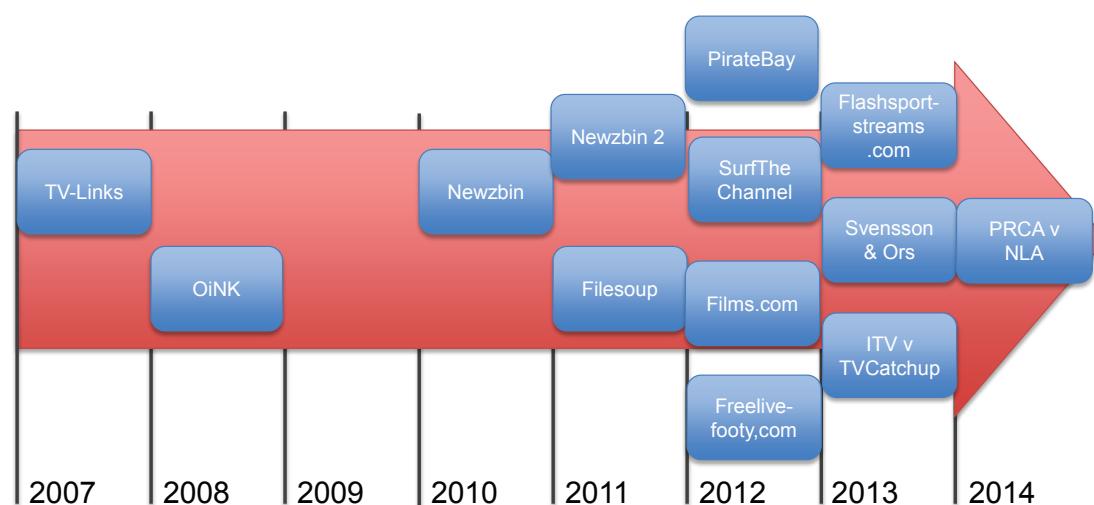
The statements gathered from stakeholders suggest that where serious cases of online copyright infringement are brought to court, they are likely to have two characteristics:

- The primary offence with which people are charged may not necessarily be that of copyright infringement
- The prosecutor is more likely to be an industry body (individually or in combination with others) than the Crown

In this chapter we summarise a number of the key cases in order to seek evidence of whether the online provisions of CDPA 1988 appear to be working as intended, so as to understand more about the potential case for change.

4.2 Timeline of key cases

Discussions with industry stakeholders have highlighted the existence of a succession of court cases. Between them, these have created different “templates” of how (or how not) to deal with serious instances of online copyright infringement through the courts.



A summary of each of the cases referred to here is contained in the following sections. Their sequence is also instructive:

- The first two cases (TV-Links and Oink) were both unsuccessful
- The third (Newzbin) was successful and helped to define for the first time what 'communication to the public' meant but it was in the civil and not criminal courts
- The fourth (Filesoup) was dropped
- The fifth (SurfTheChannel) was the first major site to be addressed using criminal proceedings (conspiracy to defraud)
- There followed a series of other cases successfully prosecuted in the criminal courts
- In parallel to this there were a series of court cases where the UK courts ruled that internet service providers could be ordered to block access to known illicit sites. The first such case was Newzbin 2 and this was quickly followed by the Pirate Bay case.
- Latterly the limits of this approach have been clarified by further decisions in the civil courts (including *ITV v TVCatchup*, *Svensson & Ors* and *PRCA v NLA*)

The TV-Links case (Rock & Overton, 2007)

TV-Links was a site where users submitted links to (mainly) pirated content. However, the content itself was not hosted on TV-Links: as its name suggests, it only held links to the infringing content.

This prosecution was brought using s.107(2A) of CDPA 1988. In essence, the judge ruled that:

- The Defendants did not "communicate the works to the public"; and
- In any event, the defendants had a complete defence under Regulation 17 of the E-Commerce Regulations, since their website was a "mere conduit"

This was seen very much as a test case and one which was breaking new ground⁴⁷.

There have been suggestions made in the press that Rock was charged under s.92 of TMA1994⁴⁸ and that this was "cutting edge". However, our investigations suggest that the TMA charges were not in fact used: the defendants were finally tried under s.107(2A) of CDPA 1988 and fraud, but unsuccessfully.

The industry view is that this verdict put a dampener on subsequent prosecution activity and that online prosecutions using CDPA 1988 stopped entirely until the successful prosecution of SurfTheChannel.

47 http://www.theregister.co.uk/2007/10/22/tvlinks_legal_test_case/

48 <http://www.theguardian.com/technology/2007/oct/25/piracy.intellectualproperty>

The Oink case (Ellis 2008)

Oink was a well-known music sharing service which provided access to lots of legitimate music and had prominent industry supporters including a number of artists who regularly posted to the site. The site also, however, hosted links to unlicensed material. When it closed in 2007 following the arrest of the founder, the site had 180,000 members and over 2.1 million music tracks had been downloaded.

The founder of the site, Allan Ellis, was charged with conspiracy to defraud, and the jury unanimously found him not guilty. Four other people involved pleaded guilty to copyright infringement and received community sentences and fines, but not custodial sentences; a fifth member of the group, Matthew Wyatt, pleaded not guilty to copyright infringement, but the case was dropped by CPS before coming to trial.

The Oink case showed that the use of fraud legislation to prosecute online infringement was not likely to be viewed as proportionate by juries in all cases. Commentary suggests that the jury saw fraud as an extremely serious charge which was inappropriate for a juvenile computer hobbyist.

Birgitte Andersen (referenced in chapter 3) gave evidence in both this and other cases regarding the lack of proven harm to the creative industries from the activities of their websites.

The discussion on Oink centres on whether Oink were an accessory to a crime. The Guardian newspaper reports that Ellis told prosecutors “All I do is really like Google, to really provide a connection between people. None of the music is on my website”⁴⁹.

Prosecutors from FACT claimed that Ellis made a lot of money from the website, but this was always disputed by Ellis.

The Newzbin case (20th Century Fox v Newzbin, 2010)

This case was brought by 20th Century Fox as a civil rather than a criminal case, but is important for a number of reasons. The basis was that the claimants made and owned copyright in a number of films and that the defendant, Newzbin, was providing illegal links via a website hosting the “Usenet” discussion forum.

The defendant argued that it was not making the works available to the public, as it was merely passive and acting purely as an intermediary. The High Court disagreed, holding that Newzbin was not remotely passive, helping to order the catalogue and make the illicit material accessible. Given its active role, it was held that it enabled a “new public” to see the work that would not have been able to access it, and therefore “communicated the work to the public”.

This case established for the first time that hosting links to pirated content is an offence and that a site does not have to actually “transmit” a work in order to make it available. It also indicated the importance of there being a “new public” to which communication is happening.

49 <http://www.theguardian.com/business/2010/jan/21/musicindustry-pirate-bay>

A full transcript of the case is available on Bailii⁵⁰. In this decision, there is more than one person making a work available to the public: intermediaries like Newzbin and the person doing the uploading. The ISP involved may also be caught by this ruling if it is deemed to have knowledge.

The judge in the Pirate Bay case⁵¹, referred to elsewhere in this chapter, followed this case and said that the facts with Pirate Bay were similar.

The Filesoup case

Even following the civil prosecution of Newzbin, the CPS appears to have been reluctant to prosecute this case of online infringement. Evidence for the prosecution was gathered by FACT and not the Crown, and the case against this long-established “torrent” website never came to trial as it was dropped by CPS in 2011.

Some reports have suggested that CPS was unclear whether under s.107(2A) of CDPA 1988 to prosecute Filesoup as a business, or to use the as yet untested provision “otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright”. In order to clarify this point, CPS was approached for this study and asked to comment on this case and the decision not to prosecute. The following response was received:

Prosecutions for this particular offence, as with all other offences, will be pursued in situations where cases meet the relevant tests set out in the Code for Crown Prosecutors (the Code). It might be helpful if I set out exactly what this means.

It is the police who are responsible for deciding whether a criminal investigation should be commenced and, thereafter, conducting the investigation. They may seek advice from a prosecutor before or during an investigation, but the decision to investigate is a police matter. Where the police decide not to investigate a case the matter may never be referred to the CPS.

The role of the CPS is to decide whether, following a police investigation, a prosecution should be brought. To reach this decision, prosecutors are required to review each case in accordance with the two-stage test as set out in the Code, when deciding whether or not to bring a prosecution. Prosecutors must first be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge (the evidential stage). If the case does not pass the evidential stage, it must not go ahead, no matter how serious or important it may be.

The CPS prosecutor told Bristol Crown Court that it was “neither necessary nor appropriate to continue to pursue the matter in a criminal court”. This is because the prosecutor in court, discharging his obligation to continuously review the case against the Code, determined that there were major evidential difficulties which required him to make the decision that the prosecution was no longer “appropriate”.

50 <http://www.bailii.org/ew/cases/EWHC/Ch/2010/608.html>

51 *Dramatico Entertainment v BSKyB* ([2012] EWHC 268; [2012] RPC 27)

This decision would have been required in any case where the prosecutor determines that the case does not meet the evidential test as set out in the Code. In addition, he also determined that the prosecution might not be “necessary” in the circumstances bearing in mind the judgment in Newzbin and R v Gillham [2009] EWCA Crim 2293 cases, where Lord Justice Stanley Burton held that a better forum for sanctions would be the business and property dispute jurisdiction under the Chancery Division.

In the end, the non-business nature of the site, the lack of any tangible gain from running the site for the site owner and the difficulty in proving that the site’s activities were prejudicial to the copyright holder appears to have made prosecution impossible, as anti-fraud legislation was not thought to be appropriate. Furthermore the CPS statement makes it clear that previous civil cases meant that prosecuting this case was not “necessary” and suggests that the CPS may, as Lord Justice Stanley did in the Gillham case, regard the civil courts as a more appropriate place to try this type of offence - especially given the level of maximum sanction it currently attracts.

This case was heavily reported^{52,53} and points to the difficulties in obtaining successful prosecutions where the website in question is not a business, where the owners are not making significant sums from the venture, and where the “prejudicial to the copyright owner” clause in S107(2A) has to be relied upon.

Newzbin 2

Following the successful civil prosecution of Newzbin, the US film corporations used the UK courts to force UK ISPs to block access to the Newzbin site, which was still operating despite the convictions. The court held that the safe harbour regulations encoded in the Electronic Commerce Directive (referred to in the TV Links case) that allowed ISPs to claim that they were mere conduits did not apply once the ISP had knowledge that the site was hosting infringing material.

The Newzbin 2 case did not use any of the criminal provisions of CDPA 1988 but did make use of s.97A of the Act. A full transcript of this case is available⁵⁴.

The Pirate Bay case

The notorious Bittorrent search website, Pirate Bay, has been the subject of court cases in many countries and its founders have been imprisoned in Sweden following a court case in their home country.

In the UK, following the Newzbin 2 case, Dramatico Entertainment and other copyright holders took the UKs largest internet service providers to court to force them to block access to the Pirate Bay website.

52 <http://www.theguardian.com/technology/2009/aug/04/file-soup-sharing-tv-movies>

53 <https://torrentfreak.com/court-drops-filesoup-bittorrent-case-administrators-walk-free-110224/>

54 Available online at <http://www.baillii.org/ew/cases/EWHC/Ch/2011/1981.html>

This also successfully used s.97A⁵⁵ of CDPA 1988, and a full transcript of this case is available⁵⁶.

The SurfTheChannel case (Anton Vickerman, 2012)

This was the first successful criminal prosecution of a link-sharing website. It took a private prosecution by FACT to reach the court as the CPS declined to prosecute, appearing to take the view that there was a low chance of success in the wake of the TV-Links, Oink and Filesoup cases (see above).

The SurfTheChannel site allowed users to access films, movies and cartoons – most of which infringed copyright. At the site's peak in mid-2009, it generated up to £50,000 per month in advertising revenue and was one of the most visited websites on the internet by traffic volume. Founder Anton Vickerman went to great lengths to keep his identity secret, hosting the website in Sweden and funnelling the advertising revenue to a Dominican company he owned via a bank in Latvia.

In this case, the jury found Vickerman guilty of conspiracy to defraud and the judge was scathing in his sentencing remarks⁵⁷, giving Vickerman four years in prison. Further information on reporting of this case can be found in various sources, including The Guardian⁵⁸.

Speaking about the initial difficulty in prosecuting these cases, and how the SurfTheChannel (STC) case has changed the landscape, FACT's Director General Kieron Sharp said:

The TV Links case caused no end of problems for a number of years. The judge threw out the case on an application by the defence and our members (mainly the Hollywood film studios) were not prepared to risk a voluntary bill of indictment. This meant that all cases were held up until we successfully prosecuted the SurfTheChannel case.

This is why there is so little evidence out there of copyright laws (or even other laws) being used for online cases. Fortunately we had success with SurfTheChannel and FreeLiveFooty and these have now set the scene for future serious infringement cases.

One complication with the SurfTheChannel case was that the defendant was convicted under conspiracy to defraud (common law) legislation and not CDPA 1988. This means that even though the prosecution was successful, it did not build up the body of case law around s107(2A).

55 www.legislation.gov.uk/ukpga/1988/48/section/97A

56 Available online at <http://www.bailii.org/ew/cases/EWHC/Ch/2012/268.html>

57 Available online at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/anton-vickerman-sentencing-remarks-14082012.pdf>

58 <http://www.theguardian.com/technology/2012/aug/16/surfthechannel-attack-anti-piracy-prosecution?newsfeed=true>

The Films.com and Legalmovies.tv case (the Saddiq brothers, 2012)

This was one of a number of illicit linking sites which either shut down or led to guilty pleas by the owners in the wake of the Newzbin and SurfTheChannel decisions.

In this instance, two brothers set up the website Films.com that allowed users to upload links or entire movies to their website. It became a very popular service with 125,000 visitors a day and earned over £20,000 in advertising revenue per year. The two brothers took measures to hide their identity and ownership of domains, but claimed that they thought what they were doing was legal. They even boasted about their enterprise on job applications and declared their income to HMRC.

This case was also prosecuted privately by FACT⁵⁹, and on this occasion, in the wake of the Newzbin and SurfTheChannel case, the defendants pleaded guilty to copyright offences under s.107(2A) of CDPA 1988. Both received a nine-month sentence suspended for two years.

To our knowledge this is therefore one of the first cases where an online clause of CDPA 1988 was successfully used, although the guilty pleas meant that the case was not tried in front of a jury.

The Freelifooty.com case (Gary Goodger, 2012)

In this case, a 16 year old, Gary Goodger, received live Premier League football from a satellite dish using a subscription to a Gulf-based sports channel, then used decoders to stream the live football games to his website. At the time, the legitimate broadcasters were unable to show the games live so this site proved very popular. He charged subscribers to watch the games, undercutting broadcasters, and earning £26,000 from the venture.

Goodger was charged under s.107(2A) CDPA and found guilty, receiving a six-month sentence suspended for two years, 200 hours community service and paying £1,750 towards the cost of the investigation. There was also a sentence of community service for an accomplice who provided the Paypal account and hence helped to launder the proceeds.

This case was reported by The Daily Mail⁶⁰.

59 <http://www.fact-uk.org.uk/brothers-sentenced-for-copyright-offences>

60 <http://www.dailymail.co.uk/news/article-2268348/freelivefooty-Gary-Goodger-spared-jail-illegally-streaming-Premier-League-football-matches.html>

The Flashsportstreams.com case (Kevin Broughton, 2013)

This case concerns a site similar to freelivefooty.com but involving an operation on a much larger scale. The owner of the site rebroadcast BSkyB Premier League football games through his website, charging his ten thousand subscribers £29.99 a year to watch a season's games – netting him nearly £300,000 a year.

Broughton deposited tens of thousands of pounds into an overseas bank account and set up an offshore company registered in the Central American country of Belize to launder his proceeds.

The owner of the site was charged under s.107(2A) of CDPA 1988 and s 6(1) of Fraud Act 2006 for possessing articles for use in fraud (a number of Sky boxes, decoders and computer equipment). He was found guilty and received a two-year prison sentence, a significant custodial sentence which probably reflects the organised nature of the crime, its sophistication and the sums of money involved.

An industry report of the case is available⁶¹.

ITV Broadcasting Ltd versus TV Catchup Ltd (CJEU Case C-607/11, 2013)

TV Catchup streamed ITV's free to air television broadcasts to individuals whom they had validated as possessing valid UK TV licenses. In the process they added their own adverts and removed ITV's, lowering viewing figures for ITV and earning significant advertising revenue for themselves.

ITV sued in the civil courts and TV Catchup argued that as everyone who received their service had a TV licence there was no "new public" that was being communicated to and therefore they were not communicating to the public and did not fall foul of s.20 of CDPA 1988.

The CJEU, however, held that this act was a new communication to the public because the content was broadcast by a new technological means (via the internet instead of through an aerial or satellite dish).

61 <http://www.ftbpro.com/posts/ian.stewart.palmer/487854/man-jailed-two-years-for-charging-300-000-to-watch-premier-league-matches-online>

Svensson & Ors v Retriever Sverige (CJEU Case C-466/12, 2014)

Svensson and Ors were reporters who wrote stories and placed them on a website without restrictions. They earned income from advertising on the site. Retriever Sverige set up a website which linked to these articles. When someone clicked on the link on the Retriever website they would see the article, but it would not be clear that it was showing an extract from the reporter's site. Svensson and Ors sued in the civil courts in Sweden and went to the EU Court of Justice for a final decision.

The CJEU held that it was legal to link to content that was freely available on the web, even if the internet users who click on the link have the impression that the work is appearing on the site that contains the link.

As members of public could freely access the same content from the original site, the court ruled that no "new public" was being provided with the content so no "communication to the public" was occurring (though if the links were overcoming a subscription firewall, this would have constituted communication to the public).

A full transcript of the case is available on the CJEU website, Curia⁶², and there is also commentary from the IP Kat⁶³. An industry report of the case is available⁶⁴.

PRCA v NLA

The Public Relations Consultants Association (PRCA) defended one of its members, Meltwater, who aggregated news stories and made them available to subscribers.

The Newspaper Licensing Association (NLA) already charged Meltwater a licence (the rate of which was agreed by a tribunal), but also wanted to charge Meltwater's customers to view the articles.

In this landmark case, the UK Supreme Court and subsequently the CJEU confirmed that web browsing is a legal activity and that the end user commits no offence by merely viewing content on a website. Much as it has never been an offence to read a "pirated" book, so it is not an offence to view material on the web. The offence would have been in making the content available to the public (for which Meltwater had a licence) and for making a copy of the works (which Meltwater's customer's did not do unless they printed or saved the articles in some way).

This case was heavily covered in the press and is widely seen to have far-reaching implications for the prosecution of end-users / viewers of pirated content. In effect, it defines the scope of the s.28A CDPA 1988 exception. The Supreme Court Judgement is available⁶⁵ and provides an

62 <http://curia.europa.eu/juris/liste.jsf?num=C-466/12>

63 <http://ipkitten.blogspot.co.uk/2014/02/early-thoughts-on-svensson.html>

64 <http://www.ftbpro.com/posts/ian.stewart.palmer/487854/man-jailed-two-years-for-charging-300-000-to-watch-premier-league-matches-online>

65 http://www.supremecourt.uk/decided-cases/docs/UKSC_2011_0202_Judgment.pdf

accessible summary of the current law in this area. The IP Kat story⁶⁶ on the case is instructive and also outlines the law in some detail.

The Supreme Court decision has subsequently been confirmed by the CJEU⁶⁷ and a press release⁶⁸ and video⁶⁹ from PRCA outline the significance that the PRCA attach to this case.

4.3 Conclusions from these cases

As can be seen, alternative legislation and common law (particularly concerning fraud) have made it possible to bring a successful prosecution against the owner of a site that authorises copyright infringement by allowing users to access illicit material under certain circumstances.

Although searches for official sentencing guidelines relating to copyright cases suggest that these are lacking in detail, it appears in practice that:

- If the website is organised and making a significant amount of money (as was the case with SurfTheChannel and Flashsportstreams.com), it is possible to use anti-fraud legislation, and substantial (two+ years prison sentences) may result
- When the operation is more amateur or “hobbyist” in nature, but still earns revenue, a guilty verdict and suspended sentence appears to be the norm (Films.com, Freelivefooty.com). Juries appear reluctant to convict on fraud charges in these cases
- The less obviously business-orientated the website is, the harder prosecution becomes (as with Filesoup). No cases have so far been successful
- Case law has also established that end users are not breaking the law by streaming illicit content via the web, as long as no copy is made (PRCA v NLA)

Most recently, the Svensson & Ors v Retriever Sverige and the ITV v TV Catchup cases have helped to further define how the courts interpret “communication to the public”. If there are new people who are enabled to see the content, or if the communication occurs via a new and different technological process, then there is a new communication to the public. If the communication is to the same group of people and it is via the same technical process, then there is no new communication to the public.

Lawyer Nick Kounoupas (referenced in chapter 2) sums up the direction of travel as follows:

Under section 20 of CDPA 1988, an online infringement occurs where there is a communication to the public without the consent of the copyright owner. It has always been the intention of the European Commission when introducing the Copyright Directive to define ‘communication to the public’ widely. However, there have been a number of important cases at the CJEU which have further clarified the scope of the infringing activity. This is unsurprising given the plethora of newer online services that have arisen and which distribute content through the internet.

66 http://ipkitten.blogspot.co.uk/2013/04/breaking-news-uk-supreme-court-refers_17.html

67 <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=360/13&td=ALL>

68 <http://news.prca.org.uk/prca-beats-nla-at-court-of-justice-of-the-eu/>

69 <https://www.youtube.com/watch?v=MR3Ntumst04&feature=youtu.be>

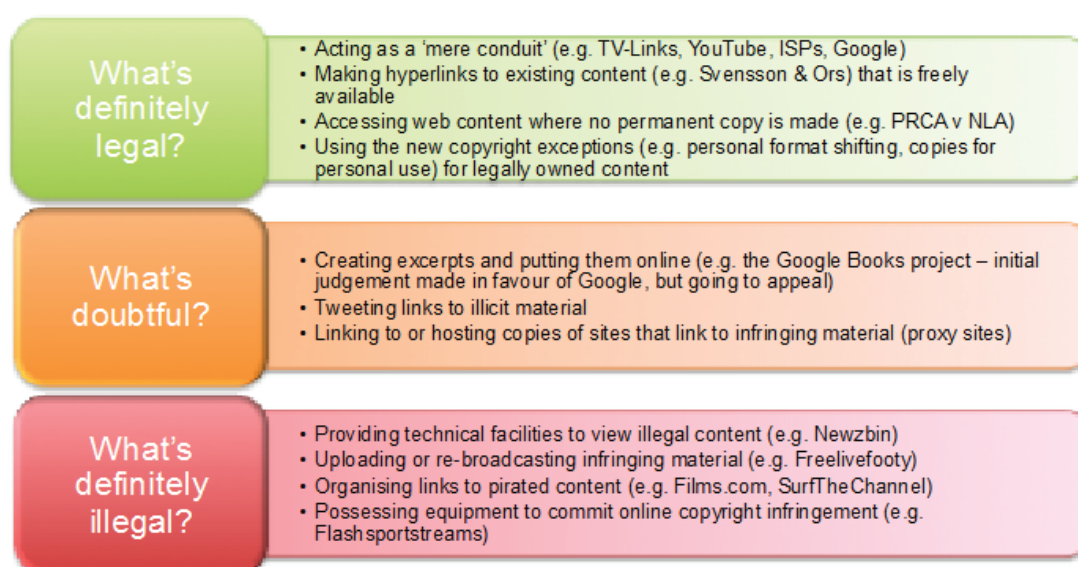
The main issue has been what constitutes the 'public'. Civil proceedings have for example shown in a number of cases that if the communication is to a 'new' public it will be an infringement (so that simply linking to content already freely available on the web is unlikely to constitute an offence). In the case of TV Catchup, for example, content is being intercepted from an existing audience, which would have primarily viewed the content on television (TV) and communicated to a new one that could access it via a PC, laptop, smartphone or tablet.

In the recent past, these difficulties have led rights owners to sidestep CDPA 1988 pending the clarification of what the scope of the 'public' was and to prefer to prosecute for fraud or conspiracy to defraud instead. Now that we have clarity, I would expect charges under s.107(2A) to become much more common – though the low maximum sentence will continue to present a barrier.

It is clear that comparatively few, if any, serious cases have been brought to date using s.107(2A) of CDPA 1988. As a result, the above instances have not added materially to the body of case law for s.107(2A) of CDPA 1988 because they have relied on other legislation.

In terms of the activities themselves, these cases have assisted in defining which types of behaviour are likely to lead to conviction, and which are not. All of them could be characterised as having started in the 'amber' area of the graphic below, and have moved to green or red.

However, as the summary shows, an area of uncertainty remains, and while these specific instances may well be resolved, others are likely to arise as innovators push the boundaries.



5. Prosecution and sentencing data

5.1 Introduction

In parallel with investigation of individual cases involving online infringement, sets of quantitative information have been obtained by this study relating to the overall number and nature of prosecutions brought under CDPA 1988 (and, where possible, have also involved other offences). These have been drawn from three sources:

- The Ministry of Justice (which is aggregated using returns from individual courts). This was the most detailed source available and is regarded as the “official” data set for England and Wales
- The Crown Prosecution Service (which only relates to cases which have been brought by CPS itself)
- Trading Standards (which also relates only to cases it has brought)

In addition to the primary data supplied for the specific purpose of this study, findings of other recent work in the area of copyright crime, have also been studied. These include the IP Crime Report (the relevant sections of which also draw on data from the Ministry of Justice) and the IP Intelligence Hub, which receives reports of IP infringements from Trading Standards.

In examining the data, the primary questions that we have been posed are as follows:

- Are online prosecutions and convictions on the increase?
 - Are the patterns of prosecution and sentencing consistent with the industry assertion that online copyright infringement is a serious problem?
 - What conclusions can be drawn from the patterns of sentencing and prosecution applied to physical and online copyright offences?
 - How widespread is the use of alternative legislation to address physical and online infringement, and which Acts are typically involved?
 - How often is copyright the main offence, and does this vary depending on whether the offence is physical or online?
 - Are online offenders, on average, younger than people convicted of a physical copyright offence?
-

5.2 The Ministry of Justice source data

Information supplied

Two files were supplied by the Ministry of Justice for this study. The first provided a listing of every case recorded on its systems that involved an offence under CDPA 1988 for the years 2006-2013, broken down by the main section(s) of the Act involved where possible⁷⁰. The second provided a separate look-up of all other recorded offences relating to the unique case identifiers associated with the CDPA 1988 records.

The first of these files, which forms the baseline for this element of the study, contained a total of 9,062 prosecution records and 6,189 sentence records, all under CDPA 1988. This figure includes instances of multiple counts of the same offence against one individual; also, where multiple individuals are co-defendants in a case and prosecuted or sentenced for the same offence, each will have their own unique identifier.

Data limitations

Whilst it provides the most comprehensive dataset available on court cases, it is apparent that there are some limitations to the data Ministry of Justice can supply. These arise from the data gathering methods available, and from the nature of the area under study.

The key aspects are as follows:

- The data is aggregated from two different systems (the Libra system for Magistrates courts and the Crest system for the Crown court) and if a case is transferred from one to the other, it will result in a new record. This means two different years, geographical locations and unique identifiers could potentially relate to the same case
- The coding applied to individual offences within the Ministry of Justice data set does not have the same level of granularity as the provisions of CDPA 1988. There are only three different types of offences recorded in the data set (and a fourth set that does not have an offence recorded, which the MoJ explained were summary offences). The three classifications are “ss.107(1)(a), (b), (d)(iv) & (e) & 198(1)(a), (b) & (d)(iii)” which are called “physical” offences below, “s.107(2A) & (4A)” which have been called s.107(2A) or “online” offences below and “s.198(2A) & (5A)” which are referred to as s.198(2A) offences below
- Certain criminal copyright offences, specifically the online offence covered by s.198(1A) and the physical offences covered in s.107(2), do not seem to be separately listed or represented in the dataset – this is commented on in more detail below

⁷⁰ It should be noted that this level of granularity is not available for summary offences: it is therefore not possible to determine which type(s) of copyright infringement(s) is/are involved. Other caveats regarding data segmentation are explained elsewhere in this chapter.

- A distinction cannot be made between the physical and online offences covered by s.198 of CDPA 1988. However, the number of prosecutions is so small that this is of little significance
- There is a potential for further discrepancies to arise from changes of offence, such as charge reductions
- The information which has been made available only shows the primary ‘disposal route’ (i.e. sentence passed): where there has been a prison sentence and a fine, only the more serious custodial element is held in the record.
- Interpreting the data is made more difficult by the many examples of multiple counts of a similar charge which inevitably exist within it (though the second data set provided does include a marker which indicates the primary offence, and this has been used in delivering the analysis set out in this chapter)
- The data can only be cross-matched with other types of offence if at least one of the charges brought relates to copyright (i.e. it is not possible to identify cases where no charge was brought under CDPA 1988 at all – which is known to have happened in some high profile cases)

It is important to remark that this data set differs from that provided by the Ministry of Justice for the purpose of compiling the IP Crime Report⁷¹, because the data for the IP Crime Report focuses solely on instances where copyright is the primary offence (a point explained further in the relevant section below).

Processing applied to the source data

In processing the data set, the main decision that needed to be made was the selection of an appropriate level of granularity. The decision was taken to perform most of the analysis at the level of the individual person (subject to the caveat that there could be a low level of “double-counting” where cases are transferred). There were three reasons for this:

- Looking at the data at a per charge or per conviction level quickly proved unsatisfactory. The data confirmed that people are often charged under the same section of an Act multiple times (e.g. if they copied films 1, 2 and 3, this may translate into three different charges). Instances were found where there was a whole succession of identical repeat convictions – over 60 in one case – giving rise to concerns that this would skew the data
- On studying the data further it became apparent that aggregating the data at a per court case level would exclude a substantial amount of the data available. It is not uncommon to find multiple defendants, or for the different people to be charged with different offences and/or to receive different penalties depending on their level of involvement in the crime. When looking at the data on a per case level, it became difficult on occasion to determine which offender would provide most relevant and representative data

- On studying the 2013 IP Crime Report (the latest version available at the time of our data analysis), it was noted that this had also looked at Ministry of Justice data on a per person level, which was considered to be an appropriate precedent

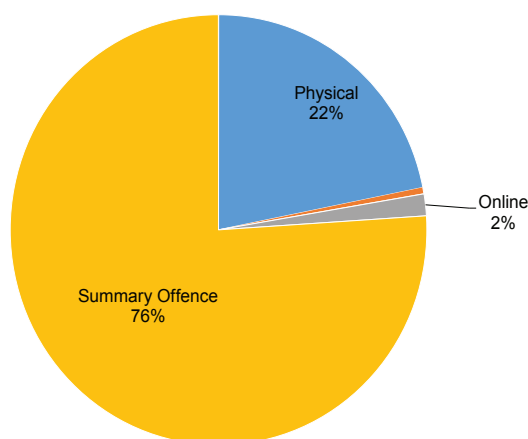
It was possible to confirm that the populations of the two sets of data received from the Ministry of Justice were identical. A small amount of cleansing on the records was subsequently performed on the second set of data, as preliminary screening identified 21 occasions where the same unique identifier had appeared for people of different ages and sexes. Discussions with the Ministry of Justice suggested that this was due to corruption in the source data and so this was corrected by referring back to the first dataset supplied.

Number and distribution of CDPA 1988 convictions

The first set of data from the Ministry of Justice was used to baseline the total number of copyright infringement offenders and offences, the volume of offences for each of the main sanctions available within CDPA, the success rates and the severity of the sentences handed down.

Between 2006 and 2013, the data held records of 6,189 individual convictions under CDPA 1988. These involved 2,808 people, successfully prosecuted in 2,338 different court cases. This means that there were on average 3.39 copyright convictions per convicted person, and 1.2 people successfully prosecuted per court case involving a copyright infringement charge.

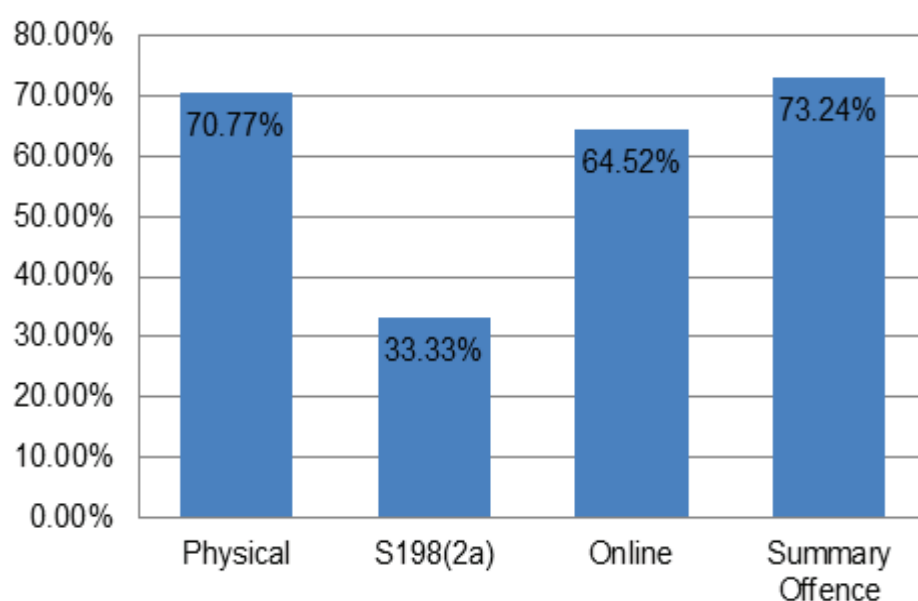
For indictable offences under CDPA 1988, the data includes the section of the Act that was used both for prosecution and to pass sentence. Unfortunately, and as noted above, when the offence was a Summary offence, no further information on the section(s) of the Act used is given.



The vast majority, 76%, of offences were Summary: while it is possible to conclude that these were not serious offences (because they were not indictable), it is not possible to determine whether the nature of the crime was physical or online.

Of the remaining 24% the vast majority were prosecuted under physical infringement legislation, outnumbering online offences by around 12 to 1. Within the key online infringement provisions of CDPA 1988 it is also apparent that s.107(2A) prosecutions (as classified on the Ministry of Justice systems) are much more common than s.198(1A) prosecutions⁷².

There are interesting variances between rates of convictions for each of the sections described above under CDPA 1988, shown in the following chart (on a per person basis):



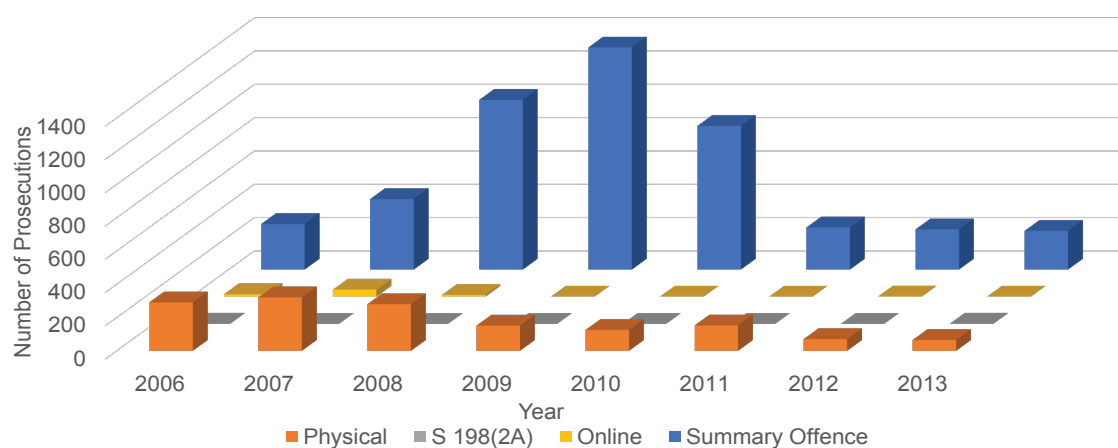
Whilst there is likely to be a small margin of error in this comparison⁷³, the variances appear potentially significant, in that:

- 71% of physical infringement cases led to a successful conviction
- 73% of prosecutions for a Summary offence were successful
- 65% of s.107(2A) online offences were successfully prosecuted
- Just 33% of s.198(2A) offences led to a successful prosecution - but this was a very small sample (2 out of 6)

⁷² s.198 offences are concerned with making, dealing or using illicit recordings. It has some physical offences which attract a maximum prison sentence of 10 years and other clauses (s.198(1A)) which are digital in nature and attract a maximum prison sentence of 2 years. The Ministry of Justice data does not distinguish between the online and physical offences.

⁷³ This graph has been produced on the basis that if a prosecution is not successful, it will not appear in the sentencing data. This is broadly correct, but will contain a small measure of error (in addition to the points raised in section 6.2 above) since some prosecutions at the end of 2013 will be ongoing, and some sentences in 2006 will relate to prosecutions from the prior year.

Overall, the comparatively low level of prosecutions associated with s.107(2A) and the lower rates of success in prosecution terms appear in line with information from industry bodies. However, when the data on successful prosecutions is plotted over the eight-year timespan, further questions emerge:



	2006	2007	2008	2009	2010	2011	2012	2013	Total
Physical	132	164	123	47	50	38	24	25	603
S198(2a)	1	0	0	0	0	0	0	1	2
Online	13	32	10	1	1	0	2	1	60
Summary offence	164	252	446	567	400	117	101	96	2143
Total Sentences	310	448	579	615	451	155	127	123	

Examining the trends

The trends presenting online prosecutions and convictions are difficult to explain. Given the clear and growing movement towards online content consumption, and the expert evidence from the industry on the difficulties of bringing successful prosecutions under s.107(2A), it appears anomalous on two counts to find that a historical peak in these cases back in 2007, at a point when there was little or no case law, and to see that these appear to have virtually stopped since 2008.

The Ministry of Justice has confirmed from checking its court source data that the records provided on online offences appear to be accurate. However, it is possible that mis-classification could have occurred at the time of entering data onto the court systems.

As noted above, we find it surprising that no information is recorded under s.107(2) physical offences and our suspicion is that some of these may historically have been bundled together with s.107(2A). Unfortunately it is not possible to prove the extent to which these have happened, as the original court records for the period where most offences are recorded have been archived and could not be retrieved within the reporting timeframes of this study.

In summary, we think it very likely that all s.107(2A) prosecutions and convictions are included within the section characterised as online offences, but cannot exclude the possibility that some non-digital offences are also being counted under this heading.

Assuming that the data is at least broadly correct, what could explain the downward trend in prosecutions? Looking at the initiatives occurring around 2008-9, it seems a little early for the debate around DEA 2010 (concerning illegal downloading activity) to have had any effect on criminal behaviour, and it does not look likely to be a reaction by criminals to high profile cases brought to court at that time, since these were all unsuccessful. It may coincide with a greater trend towards 'offshoring' of criminal activities or with more widespread use of legal sources for copyright material, reducing the criminal incentive, but this is hard to verify.

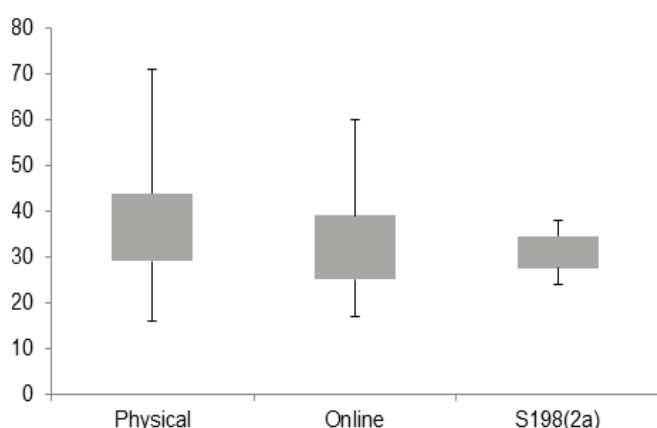
The most likely explanation would seem to be the one provided by organisations representing rights holders, which is that the unsuccessful prosecutions relating to TV-Links and Oink in 2007-8 led industry bodies to pursue alternative criminal and civil routes through the courts (where they decided to use legal remedies at all) and to prioritise practical measures to facilitate site take-downs. Assuming that the data correctly refers to online cases, it has also been suggested that some of the earlier charges relate to actions taken against individuals rather than business activities, and that the industry may have changed its strategy on CDPA 1988 prosecutions as better targeted measures to tackle infringements by individuals were under consideration.

During the period since 2011-12, it is apparent that activity from industry bodies has focused on the civil courts. There have also been some changes which may have facilitated this emphasis, such as changes to the Patents County Court (subsequently the IP Enterprise Court).

The records also show that Summary prosecutions peaked in 2010, while physical prosecutions peaked in 2007. From evidence provided by stakeholders, we think the substantial rise in Summary offences from 2006-2009, and continued presence of Summary convictions up to the present (albeit at a lower level from 2011 onwards), is unlikely to be an anomaly. It may well reflect policy changes relating to the availability of legal aid for cases heard in the Crown Court, which could be a factor in the decline of cases reaching this stage across the board.

Offender age profile

Subject to the caveats above, the age profile of offending can also be studied using Ministry of Justice data. The findings show that those convicted of an online offence are likely to be younger than those convicted of physical offence by a modest but statistically significant margin.



This appears consistent with a recent survey which looked at the demographics of people who illegally download illicit material. It found that:

Across all content types, those who downloaded or streamed illegally were skewed towards males (60%), those under 34 (70%), and ABC1s (59%). Although the age and social grade balances reflect those who consumed digital content online in general (whether lawfully or not), there were noticeable differences for non-infringers – they were more likely to be female (51%), over 34 (52%), and were even more likely to be ABC1s (68%) than were infringers.⁷⁴

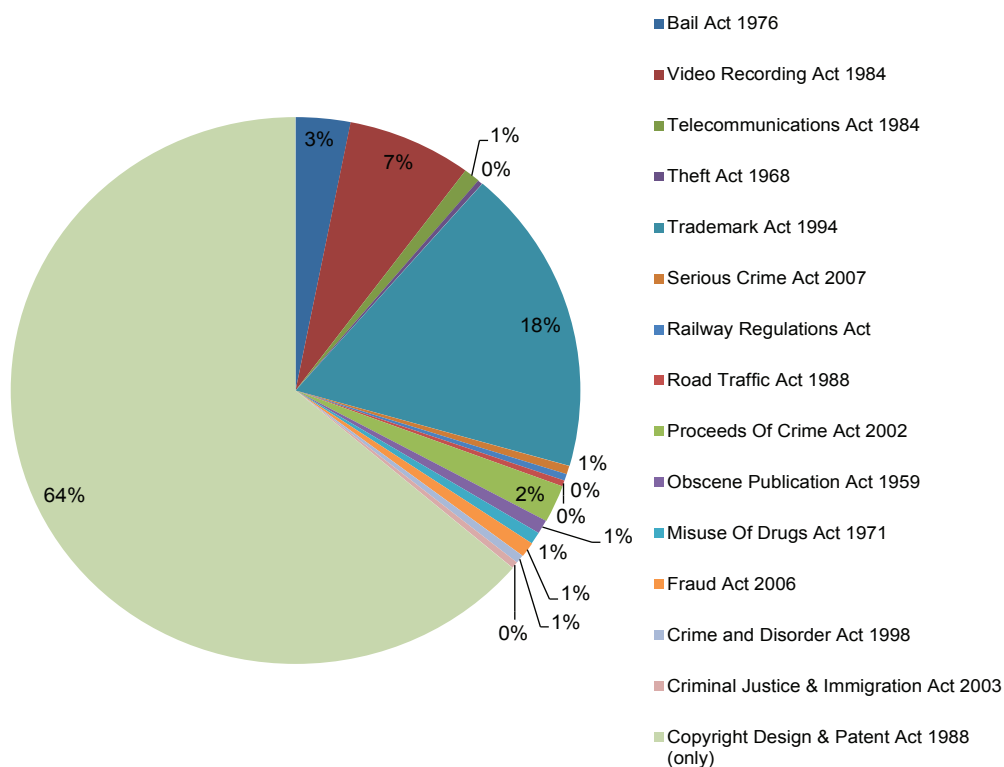
Use of other legislation alongside CDPA 1988

The first set of Ministry of Justice data identified 2,808 people convicted of a copyright offence over the period. Of these 2,808 people, 2,100 were convicted of Summary offences and 708 were indictable offences.

The second set of data made it possible to establish how frequently those charged and convicted of a copyright offence were also charged and convicted of offences under other Acts. As observed above, it is not possible to use this method to determine cases where alternative legislation was used to pursue copyright offenders to the exclusion of any charges under CDPA 1988.

It emerged that 62% of those convicted of an offence under CDPA 1988 are only convicted under this legislation and no other legislation is involved. Of the remaining 38%, the following chart illustrates the distribution of other offences:

74 <http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/online-copyright/Kantar-Media.pdf>



On closer examination of the “outliers” present within the data set, it became apparent that in some of the cases where other legislation was involved, the overall sentencing data could be skewed by offences where copyright was not the primary offence⁷⁵. For example one individual received a four-year prison sentence for the following offences:

Cannabis and cannabis resin, Cannabinol and Cannabinol derivatives	Misuse of Drugs Act 1971	S.4(3)
Cannabis and cannabis resin, Cannabinol and Cannabinol derivatives	Misuse of Drugs Act 1971	S.5(3)
Summary offences under	CDPA 1988	Summary Offence
Concealing or transferring proceeds of criminal conduct	Proceeds of Crime Act 2002	SS.327 & 334(1)
Concealing or transferring proceeds of criminal conduct	Proceeds of Crime Act 2002	SS.327 & 334(1)
Concealing or transferring proceeds of criminal conduct	Proceeds of Crime Act 2002	SS.327 & 334(1)
Concealing or transferring proceeds of criminal conduct	Proceeds of Crime Act 2002	SS.327 & 334(1)
Concealing or transferring proceeds of criminal conduct	Proceeds of Crime Act 2002	SS.327 & 334(1)
Concealing or transferring proceeds of criminal conduct	Proceeds of Crime Act 2002	SS.327 & 334(1)

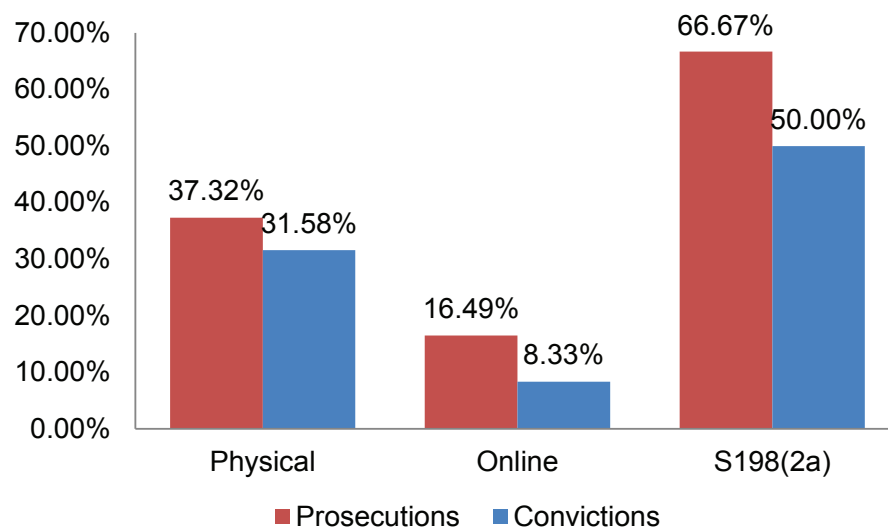
⁷⁵ This arguably lends weight to the approach taken in the IP Crime Report, which focuses on the primary offence only.

It is apparent that the length of the prison term was based on drugs-related offences and the Summary copyright offence was subsidiary to the primary offence.

Accordingly our detailed analysis focused on areas where there was likely to be direct relevance between the other Act used to convict them and the charge under CDPA 1988. These are:

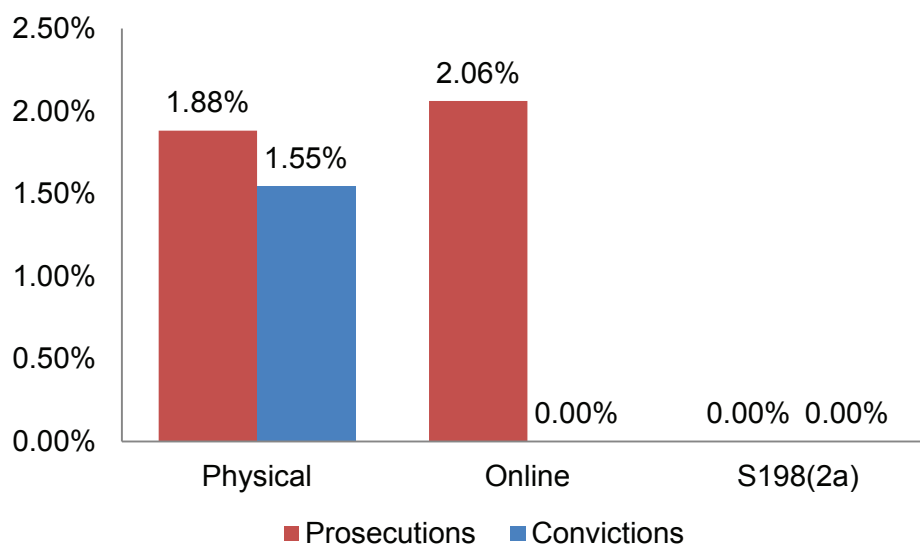
- The Trade Marks Act 1994
- Proceeds of Crime Act 2002
- The Fraud Act 2006

Examining the 708 individuals convicted of non-Summary offences in more detail, the data indicates that the percentage of people that were also convicted of a trade mark offence was high. However, there is a clear discrepancy between the number of people charged and successfully convicted of trade mark offences in physical and online form, as the following chart shows:



The finding that less people are prosecuted and convicted using both a trade mark offence and s.107(2A) appears consistent with the evidence gathered when investigating the Filesoup case. It is known to be more difficult to use trade mark offences against online copyright infringement, primarily (in the view of the legal practitioners interviewed) because the Trade Marks Act 1994 refers specifically to goods. This is of relevance to the central question behind this study because, as explained in an earlier chapter, the Trade Marks Act 1994 provides for a maximum ten year custodial sentence. In fact, the presence of any successful prosecutions in the online category lends weight to the suggestion that the Ministry of Justice data sample may include some physical offences.

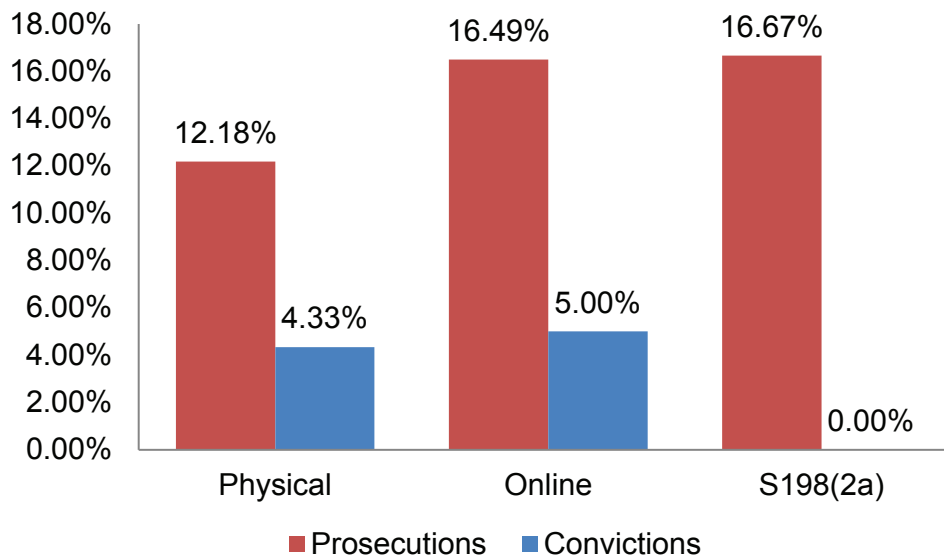
The data also indicates that the Fraud Act 2006 has been successfully used in conjunction with physical offences on a small, but potentially significant, number of occasions and that where the charge is brought it has a high probability of success. However, there were no instances at all in the data where the Fraud Act 2006 has been successfully used in conjunction with s.107(2A) to prosecute a digital offence, as the chart below indicates:



When looking at the relative size of the bars on the chart above it is, of course, important to bear in mind that 2% of the much smaller number of s.107(2A) cases brought is a very small number indeed (only 1 case). It is also necessary to reiterate that cases where no CDPA 1988 charge has been made at all will not appear in this data sample: the successful prosecutions of Anton Vickerman who ran SurfTheChannel, and Kevin Broughton who ran Flashsportstreams.com, relied primarily on the common law conspiracy to defraud provision, and are not present in this data set because there was no concurrent conviction under s.107(2A) of CDPA 1988.

However, it remains a little surprising that if fraud charges are an effective alternative remedy, they are not more in evidence here. It is also clear that there have been cases brought to court which have used the law regarding fraud to seek to bring prosecutions against owners of illicit websites, but they have been found not guilty by the jury (most notably the prosecution of Alan Ellis who ran the website Oink).

Money laundering legislation provides a further opportunity to bring charges that are relevant to online copyright infringement. The picture in terms of the Proceeds of Crime Act 2002 is as follows:

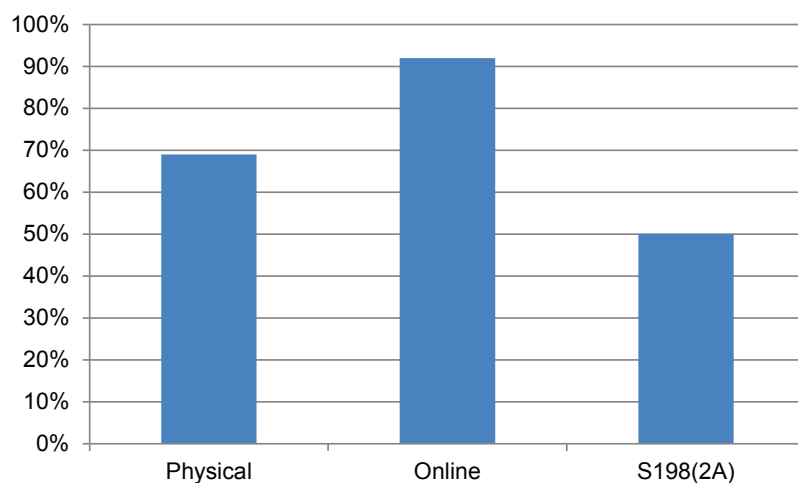


Unlike trade mark and fraud legislation, it appears that the Proceeds of Crime Act 2002 is used just as often for s.107(2A) cases as for physical infringement cases. In both cases, however, the percentage rate for successful prosecution is low by comparison.

Arguments have been put forward that online infringement sometimes occurs for reasons other than making money. However, the fact that anti-money laundering legislation can be used successfully for online cases tends to suggest that this may not be the case.

Primary offences

Having established that alternative legislative routes do not, on the face of it, provide a satisfactory alternative route to secure prosecutions for online copyright infringement, a count was made of the number of occasions on which one of the offences under CDPA 1988 ultimately proved to be the primary offence of which each individual was convicted of. As with the previous section, it is only possible to determine the distinction between online and physical infringement where the offence is not a Summary offence, so Summary conviction data is omitted from the following chart:



When an online digital offence is committed and convicted under s.107(2A) CDPA 1988, it is the main offence in over 90% of occasions. By contrast for physical copyright offences, copyright is the main offence in only 69% of occasions.

Whilst it is important to reiterate the comments made earlier in this chapter about possible corruption in the online data sample, this apparent reliance on s.107(2A) suggests that leading with alternative legislation is seen as less viable or less appropriate when the crime in question is being committed online – it appears to be very much an ‘all or nothing’ charge.

Primary disposal route for CDPA 1988 convictions

The next question which arises, and which can be answered to a degree using the data from the Ministry of Justice, relates to the sentences typically handed down for convictions under CDPA 1988 (as opposed to any other legislation also used). As previously outlined, the data concentrates on the “primary disposal route”, i.e. the most serious sentence for each CDPA 1988 conviction, and other different types of penalties imposed are not available for analysis. Consequently, this study only looks at the most serious outcome for each successful CDPA 1988 conviction.

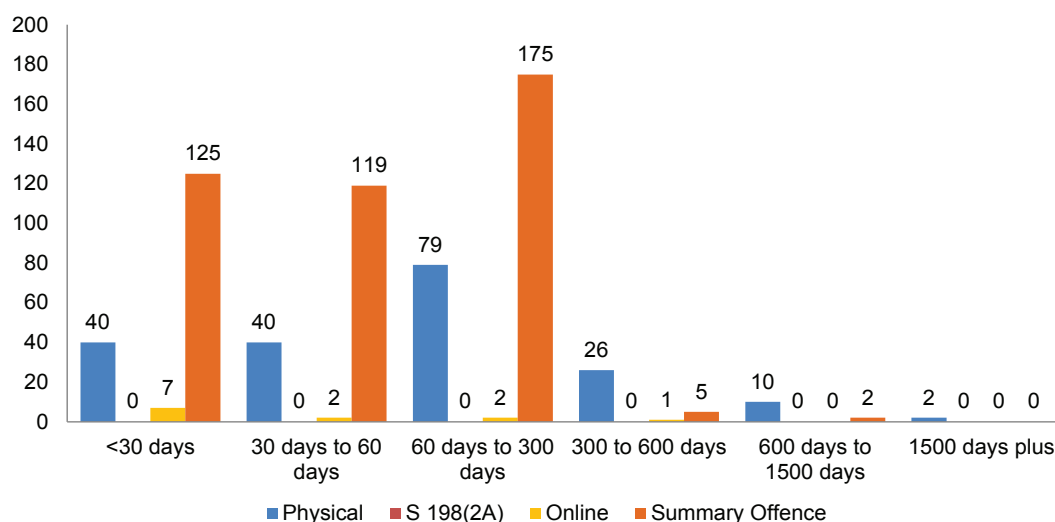
	S107(2A) Online	Summary offence	Physical
Fine	38%	46%	17%
Prison	20%	20%	33%

The position can be summarised as follows:

- The vast majority of online (s.107(2A) offence) convictions result in a fine (38%). Only 20% of these convictions result in a prison sentence. 24% of those convicted receive a suspended sentence or a conditional or absolute discharge

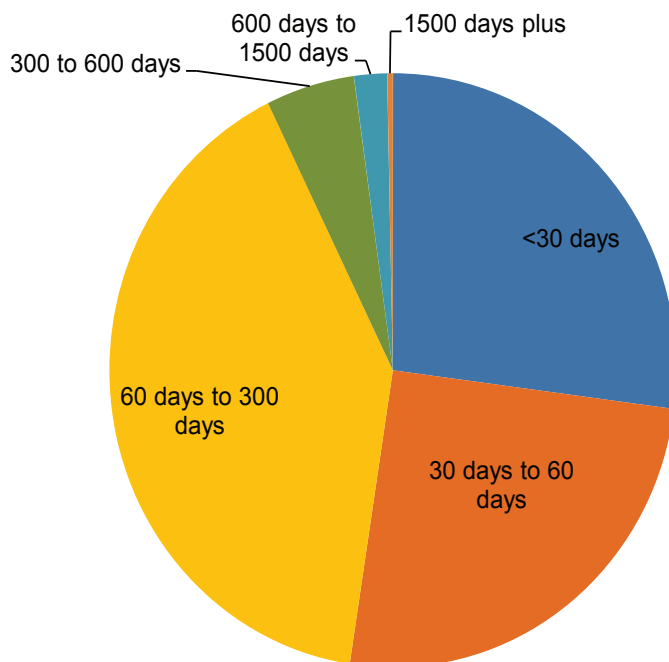
- Summary offences' primary disposal routes are very similar to those applied to a s.107(2A) offence and result in a fine on nearly half of all occasions
- Physical cases are more likely to result in a prison sentence (or a suspended sentence) than online or summary offences. Conversely, fines are less likely

In order to study sentencing in more detail, the number of convictions that resulted in a non-suspended custodial sentence on a per conviction basis was also studied. In performing this analysis, an assumption was made that multiple counts in the same case and on the same individual are likely to be served concurrently and so the data has been pooled on a per person level. In some cases, some sentences are longer for certain counts than others and it has also been assumed that the shorter sentences have been served concurrently, although this may not always be the case.



This analysis found that:

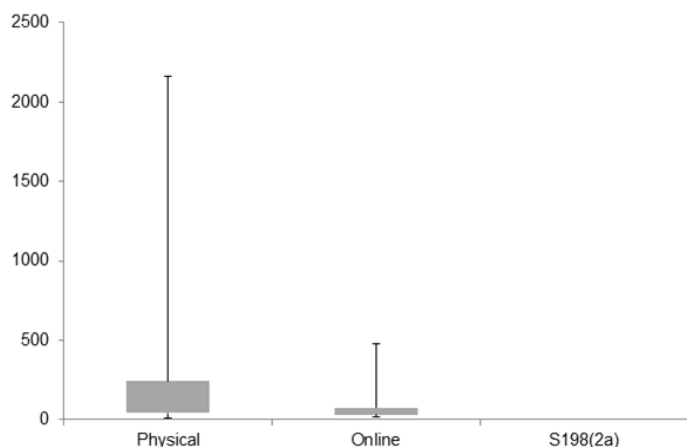
- Most prison sentences for Summary and physical offences are between 60 and 300 days (2 months to 1 year) in length
- A significant proportion of sentences for physical infringement offences are for between 300 and 600 days (one to two years)
- Online offences are most commonly less than 30 days in length
- Very few sentences approach the two-year maximum for digital offences or (for that matter) the ten-year maximum for physical offences. This was a point made by Viscount Younger of Leckie in the Hansard quote cited in the Introduction



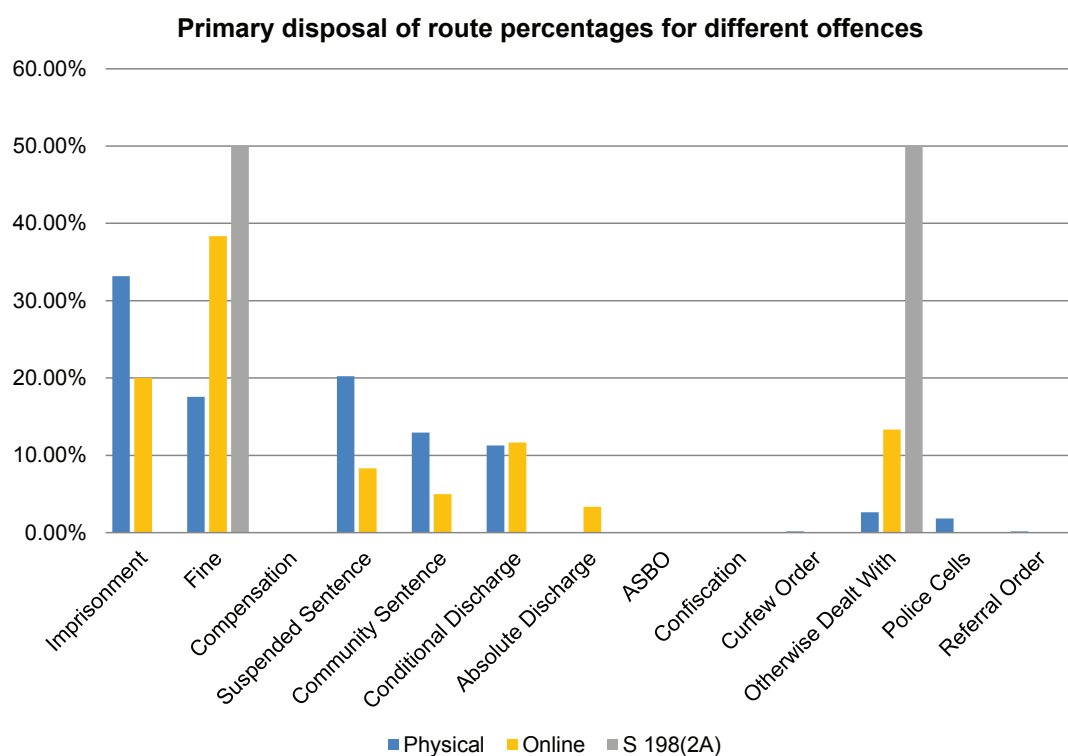
The accompanying chart, which takes all sentences handed down into consideration, looks in more detail at the length of sentence handed down for a CDPA 1988 offence under s.107(2A). In the vast majority of cases, the length of the sentence is less than 30 days, with only a very small fraction of cases receiving close to the maximum two-year sentence.

This conviction analysis was rerun on an individual basis, only including people where a CDPA 1988 offence was the main offence. The results confirmed that people convicted for an online offence were significantly more likely to receive a fine and less likely to receive a prison sentence (or a suspended prison sentence) than someone convicted of a physical s.107(1) or s.107(2) offence (assuming that the latter have not been inadvertently captured alongside s.107(2A) offences). Prison sentences were also longer for the physical offences.

This whisker chart shows the distributions and points of concentration for physical and online offences in terms of prison sentence duration:



The following chart shows the frequency with which each of the individual primary offence codes appears within the sample:



Clearly, it is not possible from this high-level data analysis to determine how far this difference in sentencing simply reflects the severity of the crimes involved, or is attributable to the perception of their severity that arises from the maximum sanctions available to penalise offenders. However, the facts show that the jail terms for six out of the ten offenders categorised as having committed online crimes were for less than thirty days.

The relatively small sentences involved in the online data sample may also lend weight to the suggestion that s.107(2A) was being used for relatively minor offences, referenced at section 5.2.5 above.

5.3 Insights from Crown Prosecution Service (CPS) data

A data set was also provided by the Crown Prosecution Service (CPS). In providing their information, the CPS stressed that the official statistics are held by the Ministry of Justice and that their data only contains cases that:

- Have been brought by the CPS – other organisations, including FACT and Trading Standards bring prosecutions: if the CPS are involved then these cases will be in their statistics, but if they are not then these cases will be absent
- Only show offences that (as a minimum) reach a hearing at a Magistrates Court

Other limitations of the data are that some of the records will relate to charges that have not been proceeded with, and that there is no indication in the CPS data about the final outcome of the charge. The information provided by CPS is also not directly comparable with the data from the Ministry of Justice because it is only available between 2009 and 2013 and can only be provided on a “per charge” level (it is not possible to aggregate the data on a per person or per case basis).

Despite all these limitations, the CPS data does allow the prosecutions brought to be broken down by the section of CDPA 1988 involved, and one aspect of the data was particularly telling. The CPS has not brought any charges at all using s.107(2A) or s.198 since 2009: all the copyright cases brought in the last four years by the CPS have been for physical offences.

S107(1)	S107(2)	S107(2A)	S198	S296ZB / S297
1190	20	0	0	62

An indication as to why no s.107(2A) cases have been brought may be found in the CPS comments on the Filesoup case (see chapter 4). The CPS only prosecute if it is in the public interest and this determination is based on a number of factors including the availability of civil sanctions, the value for money for the public purse and the chances of a successful conviction.

Given that the maximum sentence available for s.107(2A) offences is consistent with that available for Summary offences, it is unsurprising (in the light of explanations from PIPCU and others) that the police are unlikely to refer many such cases to the CPS. This is also reflected in responses from small and medium enterprises to the survey conducted for this study, in which they indicated that they did not feel that it was worth reporting online infringement to the police, and that on the occasions when they had done so, the police did not pursue the matter (see chapter 6).

5.4 Insights from Trading Standards data

In that many prosecutions under copyright infringement have been brought in the past by Trading Standards, it was seen as important to obtain data from the Trading Standards E-Crime unit to understand the organisation's knowledge of, and involvement in, copyright infringement prosecutions.

Whilst system switchovers made extraction of the data somewhat complex and time-consuming, Trading Standards has records of 6,512 copyright-related charges brought between 2006 and 2013. Unfortunately detailed data is not available on many of the historic cases (shown in the following table as 'various sections of the Act'), and there are no central records held of the alternative legislation used in individual instances, or whether the charges under CDPA were the primary ones:

Act Section	No. of prosecutions
s.107(1)	2255
s.107(2)	199
s.107(2A)	0
s.107 (unspecified)	267
s.110	7
s.198(1)	115
s.198(1A)	0
s.202	4
s.296ZB	353
s.297	27
s.300	2
Various sections of the Act	3282

It is clear that the sample includes some records that were not contained within the sample supplied by CPS, as there is evidence of activity under s.198.

As with the CPS data, the fact that there are no charges whatsoever under s.107(2A) or s.198(1A) of CDPA 1988 appears revealing. Mike Andrews of the eCrime Team at National Trading Standards was asked about the lack of prosecutions for online digital copyright offences under s.107(2A) or s.198(1A) of CDPA:

Although this area of legislation is one of the priorities of the National Trading Standards eCrime Team, I am not surprised to find a lack of prosecutions to date, given that this team has only been in existence for a couple of years and its focus so far has primarily been in relation to online scams. No such cases have yet been referred to our unit, probably because the larger national cases will be initially investigated privately by FACT or BPI, and then the police may become involved rather than Trading Standards, particularly with the recent establishment of PIPCU.

Andrews also said that this area of the law is unlikely to be heavily used by the local trading standards officers for a number of reasons including a lack of expertise in relation to investigating cases involving illegal downloads or streaming media and/or familiarity with the law and more importantly the relatively large amount of resource required to investigate an online offence compared with a physical offence.

When asked whether increasing the criminal penalty to 10 years for S107(2A) or S198(1A) offences would make this a higher priority for trading standards, he said that he doubted it would, on its own, have that effect. Andrews said:

Trading standards need to prioritise where there is the potential for serious consumer harm or where there is the risk of physical injury to members of the public. For this reason counterfeit products which may be unsafe are always likely to take priority over digital offences,

5.5 Secondary research: the IP Crime Report

The IP Crime Report⁷⁶ was first produced in 2007 and provides a wide-ranging overview of IP-related offending, providing insights into the types of crime and offering commentary on the goods most regularly counterfeited (typically tobacco, CDs/DVDs and cosmetics). It includes a section on copyright infringement which also uses prosecution and conviction data obtained from the “official” records held by the Ministry of Justice.

The statistics used in the IP Crime Report do not address the central question behind this study because offences are not analysed according to the legislation used to address them. However, it provides an important opportunity to cross-check the manner in which data has been processed for this new study.

The key difference in the processing applied to copyright infringement data is that the IP Crime Report uses a Ministry of Justice data extract which only takes into account instances where copyright is recorded as the primary offence. This makes quite a significant difference to the total number of offences studied, as the table below illustrates (based on the 2013 IP Crime Report which uses data up to end 2012):

	2006	2007	2008	2009	2010	2011	2012
IP Crime Report	249	362	478	563	366	97	92
This Study	310	448	579	615	451	155	127

76 <http://www.ipo.gov.uk/ipcreport12.pdf>

In order to ensure that there was no underlying discrepancy between the figures, a comparison was performed by extracting from the records supplied for this study all those where the CDPA 1988 offence was not the primary one. After adjusting for the examples of duplicates found in the sample used for this study, the totals were virtually identical: just two additional records were present in the data used above, indicating that there is no material difference between the two data sets as far as primary offences are concerned⁷⁷.

Some of the wider characteristics about copyright infringement which are apparent from both analytical approaches include the following:

- The number of people proceeded against and sentenced increased during the years up to 2010 and since then has fallen away
- The number of males prosecuted and sentenced far outweighs the number of females
- Most people prosecuted or sentenced were between 21-40; the next most common age group is 41-50

5.6 Conclusions

From the analysis provided above, it will be apparent that despite their limitations (most of which are reasonably well understood), the Ministry of Justice records do provide some helpful insights into the types of offences which are coming to court, the proportion which are successfully prosecuted and the penalties which are being handed down. It is not possible to cross-correlate the information provided by CPS and Trading Standards but both of the two sources provide a useful overlay.

Whilst it is not possible to be certain that all the offences identified in the Ministry of Justice data sample do in fact relate to online activity, it is clear that the number of prosecutions and convictions is relatively low compared with physical offences. The fact that there are no records that confirm the existence of online prosecutions within the CPS and Trading Standards data sets appears to go some way towards explaining this anomaly, as these are two important routes through which other forms of copyright offence are regularly brought to court. This is also consistent with information gathered from industry bodies suggesting that they, rather than the Crown, have taken the lead in bringing offences to court.

Variances are also apparent between physical and online offences relating to the rate of conviction, the profile of offenders, the likelihood of the CDPA 1988 offence being the primary offence, the nature of the primary disposal route and the length of custodial sentences handed down. There also appear to be different patterns in terms of the alternative Acts that are used in conjunction with CDPA 1988 and their success rates.

⁷⁷ The findings set out in this chapter suggest that selecting primary offences only for analysis can be justified by the fact that copyright offences prove to be subsidiary to other offending in a significant number of cases. However, for this study, it was necessary to investigate the use of other Acts in order to understand the extent to which these may have been used to substitute for perceived inadequacies in CDPA 1988, as some commentators have suggested.

In considering the gap between the industry-reported trends and the prosecutions brought relating to online activity, there appear to be a number of possible reasons why the level of online prosecutions is so low:

- There are many online offences which are not being brought to the attention of public prosecutors (because those suffering losses through online infringement may lack confidence that an offence will be seen as serious; they may not be aware that it is possible to bring a criminal prosecution; or they may be actively discouraged from doing so). They may also see alternative remedies, (e.g. seeking damages through the threat of a civil action, take down or delisting of the site) as a more effective remedy
- Public prosecutors are being made aware of the offences but do not see them as sufficiently serious to attract criminal penalties (because much of what they are presented with is relatively low level; the evidence of harm is not compelling; or their perception is that the crime is not inherently serious)
- Public prosecutors do think that the crimes are potentially serious, but believe that they are better suited to remedies through the civil courts
- Public prosecutors do think that the crimes may be sufficiently serious but are not confident about the prospects of obtaining a successful conviction (because they are less familiar with the crimes involved; they are unsure how the applicable legislation can be used or interpreted; or they do not think that the penalties available under the applicable law are appropriate)
- The chances of conviction for a s.107(2A) or s.198(1A) offence are relatively low and, given the lack of case law, uncertain. With the very high-expense of bringing a prosecution, action is only brought in the most clear-cut and serious cases and where there is over 95% chance of success. In these cases fraud may appear to be an appropriate remedy and easier to prosecute as it is better understood by the prosecutors, judge and jury

Whilst there is less evidence of the use of the Fraud Act than might have been expected, this may be due to two factors:

- The cases studied show use of the common law conspiracy to defraud provision, which would not be shown in the second data set supplied by the Ministry of Justice
- Where fraud legislation is involved, it may have been used instead of any provisions within CDPA 1988, making it impossible to detect the linkage.

The combination of the stakeholder views and following survey findings enable some conclusions to be reached on the plausibility and relative weightings of these explanations, in order to articulate appropriate arguments for and against change in the law.

6. Survey Results

6.1 Introduction

Previous chapters of this study have reported the views of industry bodies, academics, pressure groups, government advisors and politicians. The purpose of conducting a survey was to determine what additional insights might be gathered by capturing the views of individual content creators, content users and, small and medium enterprises (SMEs) in the creative sector.

A short survey was devised, directed principally at this group, to understand the experiences of individual copyright owners in dealing with online infringement. While the respondent numbers were modest, they came from a number of different constituencies within the creative industries (illustrators, artists, graphic designers, musicians, photographers, games companies, software engineers and others who place their digital materials online).

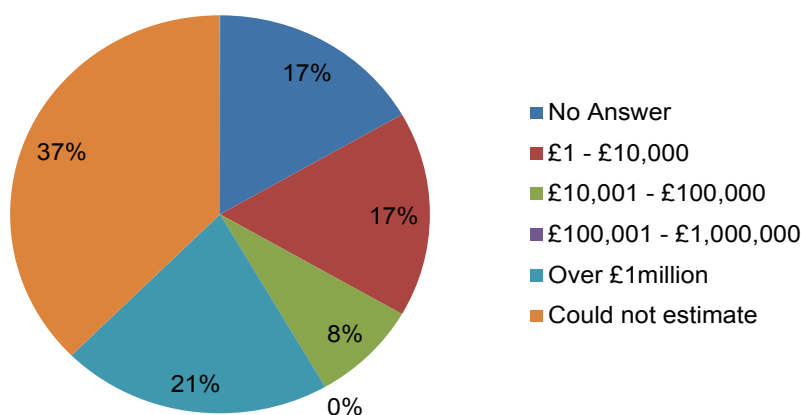
The survey questions also provided opportunities for individuals to quote personal experiences. Profiling questions on the size and activity of the organisation were followed by a series of questions asking whether the organisation had been the victim of copyright infringement and if so, what were the scale of their losses and the eventual outcome. Respondents were then asked for their views on the effects of increasing the maximum custodial sentence for online copyright infringement. The survey was reviewed and approved by the IPO Economics, Research & Evidence (ERE) team prior to distribution.

SurveyMonkey was used to collect the responses and the survey was kindly promoted by the Creative Knowledge Transfer Network (KTN) and a small number of professional and industry bodies. The full list of questions can be found in Appendix 3.

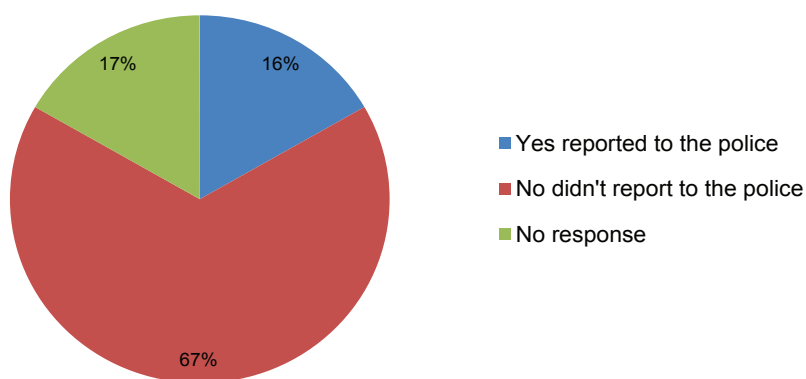
6.2 Statistical analysis

The survey exercise yielded 40 valid responses. The comparatively modest number may say something about respondent appetites to comment, reflect the extent to which the offences are generally regarded as serious, or confirm that many of those affected regard criminal prosecution as a “lost cause”. Nevertheless, some interesting trends emerged, including the following:

- 37% of organisations who said that they had incurred a loss due to copyright infringement couldn't estimate the amount. Of the remaining ones that could, a significant proportion estimated that they had incurred losses in excess of £1m
-

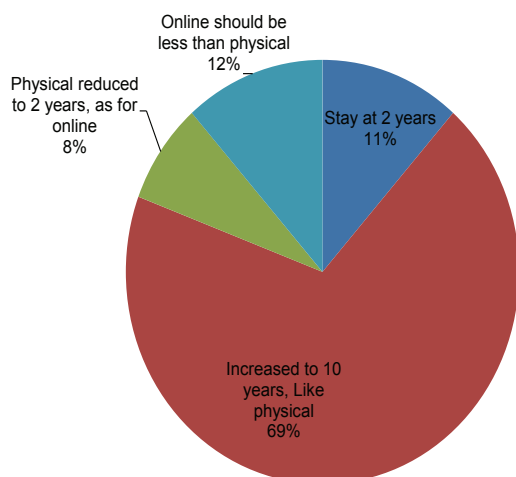


- Over 70% of respondents said that 76-100% of their loss was due to online activities and 18% said losses were between 51% and 75% attributable to online activities. No-one who responded had losses of less than 10% attributable to online activities
- Just 16% of organisations who claimed to have been the victim of copyright infringement said that they reported the crime to the police



- These 16% of reported cases led to charges in 11% of cases. This resulted in 1 prison sentence, 1 fine, 1 suspended sentence and 3 other convictions
- Where the police were not involved, the most common reason was lack of time/money to pursue (40%) and the next most common reason was a decision to pursue as a civil matter (20%). Quite a few respondents thought that the police would not take the matter seriously and would not pursue

- Of the respondents who answered, 69% thought the penalty for online infringement should be increased to ten years. As this is a small sample, the finding is texturally interesting, but not statistically significant



6.3 Specific responses

Respondents to the survey were also invited to make comments on their experiences of online copying. These provided an additional insight into the issues and a range of views that had not been heard during the rest of this study. The views of representatives from several key groups are summarised below.

The view from musicians

One respondent claimed to have suffered loss from copyright infringement with 75%-100% of that due to online activities. He decided not to report the offence to the police or Trading Standards but instead to request the search engines to delist the offending sites. The respondent said that:

The high costs / long time frame and lack of adequate compensation deterred me from bringing a court case. We decided to have the sites removed instead, but this is only part of the solution because although the sites are removed by search engines / ISPs, they reappear under a different name.

This respondent did not think, in his experience, that increasing penalties would have any effect.

The basis for this concern is apparent when studying the Pirate Bay, a prime example of a website that has been taken down and yet has ‘phoenixed’ into a number of other sites which are still available. A UK High Court case⁷⁸ in 2012 ordered major ISPs in the UK to block access to www.thepiratebay.org and www.thepiratebay.se under s.97A CDPA. Unfortunately, despite this, dozens of mirrors of the site are still freely available and a search on Google for “The Pirate Bay” brings up websites like <http://proxybay.info/> which list a large number of alternative locations for the site.

78 <http://www.bbc.co.uk/news/technology-17894176>

A Dutch court has recently ruled that ordering ISPs to block offending websites is ineffective and ISPs should therefore not have to block such sites⁷⁹. This is an evolving area of law but it appears that take down measures are only partially effective at best, and do not offer a complete solution to the problem of online piracy.

Another musician (a sole trader business) said that:

I'm a musician/composer with music released on various record labels, including my own. Since 2000 I have seen an estimated 75% drop in sales and income. I have no doubt whatsoever that the well-known practice of downloading from pirate sites is the cause. Despite numerous takedown notices sent, invariably the same material reappears on these sites within days. I have now almost given up releasing music "for the consumer" and concentrate entirely on writing music for media (i.e. film, TV, commercials, etc). Increasing copyright sanctions would only (be) useful if applied globally. Most of the sites making material available are NOT based in the US or Europe, and if higher penalties are applied, those wishing to do it will simply relocate, as many have already done.

One respondent pointed out that the damage to their business was not purely financial. They said:

The pirate copies / downloads damage the real world promotion. We had over 7,000 illegal downloads - had those been through iTunes (or similar) we would get a chart entry.

Another musician was against increasing the online copyright sanctions thinking it would have no effect. They added:

Prison sentences wouldn't work with the very big companies as some poor stooge would be the scapegoat and the company would restart under another name. I would prefer being compensated financially. Heavy fines far more of a deterrent than prison sentences. At least it hurts the culprit.

View from an online publisher

An online publisher employing over 250 employees estimated that they had suffered losses in excess of £1m due to infringement with 75% to 100% of these losses being online. They said that instead of reporting the online infringement to the police as a crime, they have pursued infringers in the civil courts. When asked about the criminal sanctions for online copyright infringement they said:

79 <http://www.wired.co.uk/news/archive/2014-01/28/the-pirate-bay-blockade-lifted-in-Holland>

I believe that there is insufficient deterrence for copyright infringement as there is little risk of a criminal prosecution and so it falls to companies like ours to pursue civil recourse which is very expensive and only deals with a small proportion of misuse. I believe that there needs to be a change so that the theft of intangible property is dealt with no differently to the theft of tangible assets (e.g. we would have more support from the police if someone stole a PC worth £500 than the data on it which could be worth £500k).

The view from photographers

A small photography firm employing 2-10 people said that they had suffered losses of £10K-£100K through online infringement, a figure similar to their turnover. As with other respondents, they decided not to report the infringement to the police and said:

For photography it's an epidemic. When online use and social media sites were in their infancy it was easier to track, trace and challenge infringers. However the sanctions available to rights holders such as photographers and their representatives is not adequate enough. Take down notices require a lot of time and are not always effective, there is the UK Small Claims Court, but for the value of the claim compared with the cost and time in administration, it's not worth pursuing for one image. Larger infringements would require greater legal representation which most individuals and SMEs such as ourselves simply cannot afford.

We do feel more responsibility taken by online technology companies would be the best way forward and having open discussions with such organisations. Having further criminal sanctions could help those within our creative sector but it should go hand in hand with education, and directing legitimate users towards licensing for use. We have stories of photographers seeing their images used in advertising in countries around the globe which still show the watermarks placed over the images. For countries further afield it is almost impossible to deter without better collaboration with technology companies in finding solutions.

Whilst I think increasing the duration of an online penalty should be the same whether online or offline, as it could deter those infringing and encourage individual and SMEs to take action against copyright infringement, it isn't the full solution. As mentioned before there must be a greater realisation with online technology companies using business models that support the sharing of photographs and yet take no responsibility for educating users, nor preventing infringed content from being uploaded and commercially exploited. Any solution must be in tandem with extending legal sanctions

A second photographer company that employs between 11 and 50 staff and a turnover of over £1m disagreed. They believed that they had suffered losses due to online infringement but thought that the online sanctions should stay at two years, as increasing the length of the maximum sentence would have no effect. They chose to pursue the infringer as a civil matter and ended up licensing the materials to the infringer. This respondent added:

A great deal is ignorance rather than flagrance. Metadata stripping of images is key in this. Images are shared and re-shared and can often end up on social media sites in an assumed orphan work status. Apart from further dissemination from semi-commercial enterprises these can be picked up by more mainstream companies who may publish without proper diligence. It would be much better to safeguard the dissemination. Google for example is caching all images it finds without rights holder permission. It is the biggest facilitator of illegal sharing but it does not seem to have any liability.

A third photographer essentially agreed with the second. They employed 11 to 50 staff, had a turnover in excess of £1m and believed that they had lost in excess of £1m from copyright infringement. They have not reported the infringement to the police as they did not think that the prosecution would be successful. They also thought that the level of online sanction should remain at two years but did not give a reason.

A number of our respondents echoed the Hargreaves' report and stressed the need for better education to prevent copyright infringement. This photographer's comment is typical:

There should be more education about copyright in schools. Children are not educated and this leads to copyright infringements through their whole life. We are discussing here criminal sanctions but are not focusing on the real problem.

6.4 Overall findings from survey

Whilst surveys of this nature will generally gather a range of contradictory views, it is clear that there is considerable scepticism amongst individual rights holders about the ability or willingness of the police or Trading Standards to tackle online copying as a criminal offence. Accordingly, most small business victims of copyright theft either take no action, seek a civil action or take alternative measures such as take down or site blocking.

The finding was discussed with Rob Stirling of PIPCU, who was not greatly surprised by it:

I imagine these comments relate to the reaction of local police. Would online copyright infringement be at the top of their agenda? I suspect not, given that police have to focus on the most serious offences that cause physical harm.

There were mixed views on whether the penalty for online copyright offences should be increased with a number who said that they shouldn't, doubting that a change would be effective. A number of respondents blamed Google and the other big search engines for cataloguing their images or providing links to infringing material and therefore making them easy to find by ordinary members of the general public. A number of respondents thought that education of the public was a large part of the solution to online copyright infringement.

7. Conclusions and Recommendations

7.1 The findings

Whilst there are some question marks over the manner in which the available data has been categorised, as set out in chapter 5 above, it is clear from the statistics provided by Ministry of Justice that the levels of prosecution and conviction for online copyright infringement are not following a growth pattern, as might reasonably have been expected. In fact, prosecutions of any kind for online infringement appear to have currently stalled.

Either no offences are now occurring - which does not seem to be the case; they are all comparatively minor - which runs counter to a number of the submissions received for this study; or a conscious decision is being made not to use CDPA 1988 to pursue them in the criminal courts - which seems most likely.

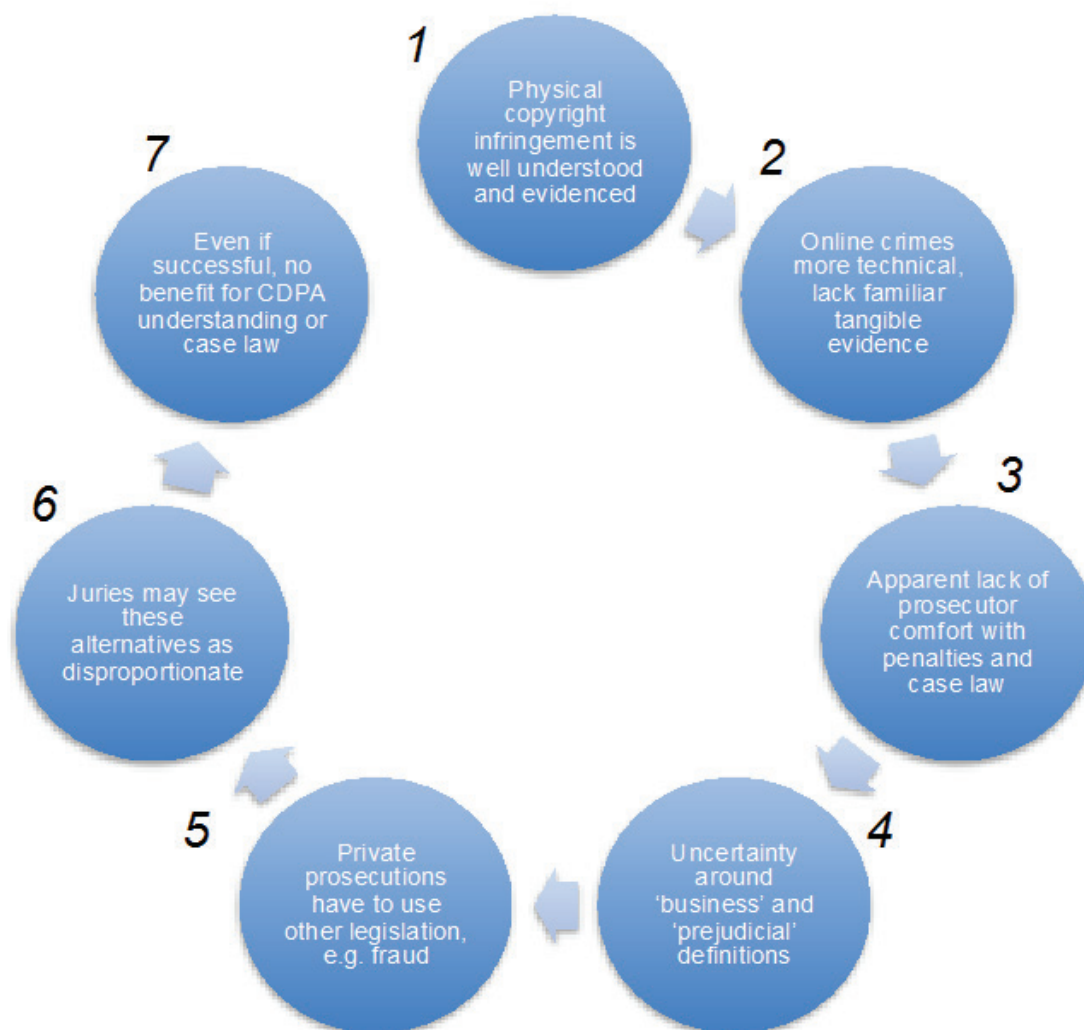
There are a number of direct causes behind the third of these points:

- Public prosecutors are not taking on CDPA 1988 s.107(2A) cases
- Criminal court proceedings are seen as too uncertain and/or costly for private prosecution at present
- Practical steps to address infringing websites (such as Operation Creative) and tackle the education issue (Creative Content UK) are being prioritised instead because they are seen as offering better value for money (and seem to be regarded as positive developments)
- Where the law is used it is likely to be the civil law, in part because any fines awarded will directly benefit the person bringing the case.

Whilst a detailed investigation of the civil law is beyond the scope of this study, it is notable that an additional motivation for pursuing cases through the civil courts could include access to specialist judges, as would be assigned to cases brought in the IP Enterprise Court (formerly the Patents County Court) or the Chancery Division of the High Court.

Most recently, there are indications that the cases brought before CJEU using the civil law have been beneficial in clarifying the concepts that underpin s.107(2A), which were in turn taken from the Copyright Directive. This means that it may now be much more viable from a technical perspective to bring a successful prosecution under s.107(2A) than has been the case in the past. But will the limited sanctions available continue to have an effect in curbing prosecutor appetite?

Taking all the evidence as a whole: in terms of the current operation of the sanctions available under CDPA 1988, there appears to be a sequence of issues at work, which are summarised in the diagram below. The sections which follow seek to amplify each of these points.



Physical infringement offences have important differences from online ones

Physical infringement of copyright is generally comparatively well understood by public prosecutors, who include CPS and Trading Standards. There will be some hard evidence of the fact that an offence has taken place. Because this form of fraud is often associated with other types of wrong-doing (as evidenced by the 31% of occasions in which copyright infringement is not the lead offence), it may well be part of a “basket” of offences which can help to secure a conviction.

The scale of offending with physical infringement is not overly difficult to demonstrate and the harm caused is clear because sales of illegal copies are directly replacing those of legitimate ones.

By contrast, it is perfectly possible for very few, or none, of the above statements to be true in the case of online infringement.

Online crimes are harder to understand

As well as the lack of tangible evidence (except to the extent that computer records of activity are, in a sense, “tangible”), the nature of online crime is in many cases harder to grasp and to explain.

In the physical world there is often a need for tangible assets to be used to perpetrate an act of actual copying, and there is an evidence trail of money changing hands. In the online world the key assets are all digital and (depending on the nature of the offence) may involve the genuine article, obtained from an illegal source. Most confusingly the goods may not be being “sold” but rather monetised using advertising.

All of this makes it harder to demonstrate how harm has been done – even if it seems fairly clear that a person has acted illegally. This leads to more complication and cost for the prosecution, and more uncertainty as to whether a jury will understand the issues (another possible motivation for bringing civil cases).

Not all prosecutors appear confident in bringing charges

The non-Ministry of Justice data clearly indicates that the CPS and Trading Standards are not presently taking forward any cases relating to online infringement at all (and no one else is currently stepping in to fill this gap). There are several possible explanations for this, but from the evidence provided by interviewees the most likely ones are:

- A perception that the offence itself is not serious, which might be reinforced by the comparatively low level of maximum penalty available (and the likelihood that sentences will seldom be passed at the maximum level under any statute)
- A lack of confidence in the prospect of a successful conviction because of an absence of case law
- A perception that a CDPA 1988 charge is inappropriate because of the low level of maximum penalty available
- A lack of resource, or budget, to investigate (which could also be exacerbated by perceived seriousness, or lack of it)

It seems very likely that these uncertainties would also have an effect on other actors in the criminal justice system, including the police.

The law is not as clear as it could be

The key section of CDPA 1988 in respect of online infringement is s.107(2A). As several interviewees have pointed out, for there to be an offence, it must be proved that the infringer was acting “either in the course of a business or to an extent prejudicially affecting the copyright owner”.

Given the indirect methods used to monetise certain types of online IP infringement, and the fact that very large volumes of downloads can result from a comparatively small number of links (which might not be monetised in and of themselves at all), there is insufficient certainty that the provision “in the course of a business” can be used on every occasion, and the alternative requirement to prove that what has been done is “prejudicially affecting” the rights holder seems largely untested.

These are different tests from those applied to physical copyright infringement, where the act of making or dealing with an illicit recording (for example) is an offence in itself under s.198(1).

As noted above, recent cases may have served to address some of the uncertainties around the interpretation of the law, though these have been civil rather than criminal – so there may be scope to break the spiral at this point, if there is appetite to do so.

Private prosecutions have used alternative legislation

In the face of these difficulties it is perhaps not surprising that when confronted with a serious online infringement case, private prosecutors such as FACT have used alternative legislation such as that relating to fraud. This has a number of theoretical benefits:

- It provides access to a higher maximum sentence and is therefore more likely to be seen as serious
- Where there is genuine criminality in copyright infringement, there is often by definition a conspiracy. Quite often (but not always) the digital goods on offer will be being passed off as legitimate when they are not – which is a form of fraud
- A prosecution can be brought without the need for a jury to understand the (potentially) complex technical copyright issues involved

Juries appear reluctant to return guilty verdicts on fraud charges

Clearly, jury deliberations are confidential and are not recorded. However, other than in cases where a significant amount of money has demonstrably been made, the case studies suggest that juries are apt to find reliance on fraud charges questionable, where this is used instead of charges under CDPA 1988.

Several interviewees have also questioned whether it is appropriate in principle to have to rely on alternative charges when the central offence is the act of “communicating” or “making available”.

Even where an alternative approach works, CDPA 1988 does not benefit

A further, serious problem is that even on the occasions when use of common law conspiracy to defraud or charges brought under The Fraud Act 2006 have been successful, the case has not improved confidence in, or understanding of, the online provisions within CDPA 1988. Clearly, when the provisions were first introduced, there would be no case law, but more than ten years later, there appears to be very little now – at least, not in the criminal courts. As already discussed, there has recently been some movement in terms of the civil law that may clarify some of the underlying concepts.

7.2 Should the law be changed?

The evidence gathered by this study suggests that there are problems with the operation of the law and that these do require fresh consideration.

The argument put forward by the Open Rights Group and others, that physical and online offences are not the same, is persuasive. However, the fact remains that these two offences end up having a very similar detrimental effect on the rights holders, and the question remains whether the maximum penalties are set at an appropriate level.

Whilst it is true to say that a consumer (or ‘prosumer’) can rapidly distribute content internationally without any criminal intent, it is also true that the logistical barriers to criminal activity are much lower online; the amount of investment a criminally-minded person needs to make in order to generate a serious level of disruption and harm is far lower.

The absence of a suitable penalty for serious cases of online infringement (which are likely to be very much in the minority) is currently creating a distortion because it results in alternative legislation being used. Alternatives may be justifiable under the circumstances, but appear less well suited to the crime.

7.3 How should criminal sanctions change?

Police, industry practitioners and legal experts interviewed for this study have highlighted the fact that there are significant enforcement implications where a crime is regarded as an arrestable offence rather than a Summary offence. Whilst there is a provision for a custodial sentence of up to two years on indictment for online copyright offences, the fact that this is the same provision as exists for a Summary offence clearly affects the seriousness with which infringements are perceived.

Historically, the division was set at five or more years: now the criteria are that the offence must be indictable on a first conviction. Moving the worst online offences into an arrestable category would provide additional powers, leading to greater disruption of criminal activity, and send a message throughout the criminal justice system that these are not necessarily trivial crimes.

If a maximum sentence is to be set at a new level, the case for change appears most persuasive if this is set at ten years. This makes it consistent not only with other copyright offences but also with the recently introduced legislation in relation to registered designs, and with the long-standing ten-year penalty for infringement under TMA 1994.

Whilst this study is focused on online copyright sanctions, it is important at this point to highlight the data and case studies which have been identified suggesting that use of TMA 1994 in an online context is problematic. It appears that the use of the term “goods” may require reconsideration in the light of changing patterns of consumption and use.

7.4 Will this change make a difference to criminal activity?

One argument that is frequently advanced for changes in sentencing levels is that such moves are necessary in order to establish a suitable deterrent to criminal activity. One of the motivations referenced by Vince Cable when introducing the new 10-year penalty for physical copying was that it was necessary in order to deter criminal activity, as quoted in chapter 2.

If deterrence were the justification for a change to online sanctions, the available data suggests it might be misplaced. The level of copyright offences prosecuted and sentenced under CDPA 1988 rose following the change in question in 2002 before falling away from 2008 onwards, and the data available on recent online offending is at such a low level that there is no deterrent case that can be made from it.

It is also clear from the views expressed to this study that the alternatives to bringing criminal prosecutions, in terms of take down initiatives, appear to be quite well regarded (see following section). This raises the possibility that the law could be changed, but make very little difference to offending and prosecuting levels.

However, legal professionals consulted for this study have argued persuasively for an increase in sanctions on the basis of the additional investigative powers it would provide (as discussed above) and the access to a higher tariff that would only be applicable to serious offending.

7.5 Are there alternatives to changing the law?

A considerable body of activity not related to legal recourse is already under way within the industry. Several bodies are focusing on take down measures (such as the BPI's delisting programme: the most recent IP Crime report showed more than 1m links removed at February 2013) and the liaison under way between PRS for Music, PIPCU and others.

Some of the measures appear to be bearing fruit. Also, an important new initiative will come into effect next year when Creative Content UK (CCUK) starts to send out messages to regular consumers of illegal content in order to raise awareness of the fact that this activity is not permissible in law. It is understood that this will be accompanied by a public education campaign helping consumers to identify illegal content.

Whilst the success of such measures could in theory affect the industry's appetite to pursue legal routes even if sanctions are increased, they do not appear to provide a complete solution. For example, permanent removal of infringing websites is very difficult when proxy sites have a habit of re-emerging very quickly. Also, when working across jurisdictions, it is important to have the necessary legal backing in order for investigations to be taken seriously.

It is also significant that those parties engaged in the alternative measures are almost universally in favour of a change in the law in order to provide the necessary "signal" that online copyright theft is a crime and that serious penalties are available to address serious misdemeanours.

7.6 Assessing the risks of a change in the law

The risks of change

Based on the available evidence, there are three main risks. These need to be managed carefully in order to avoid unintended consequences that could arise if online penalties were increased in isolation. They are also necessary in order to avoid the risk that the legislation is changed but fails to have any measurable impact in terms of successful prosecutions (or deterrence):

- The first is to ensure that comparatively minor online copyright infringement cases do not start to receive a much more serious sanction than would have been the case prior to the change. No one interviewed is interested in criminalising "consumers" (though many want them to be better educated). To some extent, this has (arguably) already happened with the recent introduction of additional copyright exceptions
- The second is to ensure that steps are taken alongside any change that make it possible to apply higher sanctions to the crimes which deserve them. In particular, there is a need to assess whether recent cases have created precedents which enable a sufficiently clear line to be drawn between what is and is not permissible in law
- The third is to ensure that clearer guidance on what is and is not permissible is available to those experimenting with new business models, so that market-makers and the creators of new technologies are not discouraged from innovating, but the rights of copyright owners are respected

Industry discussions have indicated that the wording of s.107(2A), the clause which is at the centre of this issue, took considerable time and effort to agree. It does appear to be sufficiently broad to be able to accommodate developments in markets or technologies that are likely to be most harmful for rights owners. Legislators may wish to ensure that, when taken together with civil and criminal case law, it is not so broad that it captures activity that does not have a criminal intent.

As was also noted in chapter 2 above, the European Commission is currently preparing an action plan relating to digital copyright and one risk of changing UK law now is that the EC project may lead to subsequent re-working of it.

Lastly, there are many agencies involved in bringing criminal prosecutions. All will need to be kept abreast of any proposed change and its implications for their activities.

The risks of no change

A step is needed to break the spiral described above and make it possible to pursue serious offenders effectively, while having safeguards for some experimentation.

Increasing the maximum sentence available (with appropriate safeguards) could influence perceptions of the potential seriousness of online copyright infringement, address the absence of an appropriate level of copyright-related sanction (which will also affect the appetite for bringing cases, given the considerable costs which can be involved) and create a basis for developing helpful criminal case law.

It could be argued that the current “grey areas” on what has been demonstrated through the courts to be permissible might benefit innovators. However, it could equally be argued that the current absence of clarity on the definitions of online crime could be reducing rather than increasing the propensity of innovative companies to experiment, for fear of falling foul of the law.

For the industry, cost becomes even more of an issue if the prospects of a successful conviction are low and the penalties (and therefore the wider “signalling effect”) modest.

Lastly, and in more general terms, IP protection relies on the availability of sanctions to act as a deterrent. If those sanctions are ineffective, or not used as is the case now, it gives rise to a situation which could have serious and broad consequences.

7.7 Assessment of impact

If change is introduced with the appropriate clarifications and safeguards, it appears likely to have the following effects.

High impact

A substantial impact will be felt by those responsible for bringing prosecutions, who will have recourse to additional means to bring charges in cases of serious infringement, but may need to understand the practices better. This is capable of having a large and positive impact on rights holders but the scale of the educational task should not be underestimated.

Existing criminal activities should also be substantially impacted, by virtue of being able to bring more effective arrest and enforcement measures to bear on them.

Potential criminals might also be deterred from embarking on what currently looks like a comparatively low-risk form of IP crime (though given the data on post-2002 changes to physical penalties, this is at best uncertain).

Low impact

Provided there is confidence that civil case law has clarified the boundaries between clearly legal and clearly illegal activity to a sufficient degree, the change would be expected to have a low impact on companies and individuals seeking to experiment with new business models. However, this is an important test that should be met.

Some consumers will find it harder to access illegal content but since most content is available from alternative (legitimate) sources, this appears likely to represent a modest cost and a modest educational benefit.

No change

There is no evidence to suggest that the costs to rights holders associated with prosecution of serious offences will change materially until public prosecutors become motivated to take on more cases, which may take some time (and may only happen after some successful prosecutions have been brought).

Appendix 1

Changes to CDPA 1988, allowing for private copying

28B *Personal copies for private use*

(1) The making of a copy of a work, other than a computer program, by an individual does not infringe copyright in the work provided that the copy—

(a) is a copy of—

(i) the individual's own copy of the work, or

(ii) a personal copy of the work made by the individual,

(b) is made for the individual's private use, and

(c) is made for ends which are neither directly nor indirectly commercial.

(2) In this section “the individual's own copy” is a copy which—

(a) has been lawfully acquired by the individual on a permanent basis,

(b) is not an infringing copy, and

(c) has not been made under any provision of this Chapter which permits the making of a copy without infringing copyright.

(3) In this section a “personal copy” means a copy made under this section.

(4) For the purposes of subsection (2)(a), a copy “lawfully acquired on a permanent basis”—

(a) includes a copy which has been purchased, obtained by way of a gift, or acquired by means of a download resulting from a purchase or a gift (other than a download of a kind mentioned in paragraph (b)); and

(b) does not include a copy which has been borrowed, rented, broadcast or streamed, or a copy which has been obtained by means of a download enabling no more than temporary access to the copy.

(5) In subsection (1)(b) “private use” includes private use facilitated by the making of a copy—

(a) as a back up copy,

(b) for the purposes of format-shifting, or

(c) for the purposes of storage, including in an electronic storage area accessed by means of the internet or similar means which is accessible only by the individual (and the person responsible for the storage area).

(6) Copyright in a work is infringed if an individual transfers a personal copy of the work to another person (otherwise than on a private and temporary basis), except where the transfer is authorised by the copyright owner.

(7) If copyright is infringed as set out in subsection (6), a personal copy which has been transferred is for all purposes subsequently treated as an infringing copy.

(8) Copyright in a work is also infringed if an individual, having made a personal copy of the work, transfers the individual's own copy of the work to another person (otherwise than on a private and temporary basis) and, after that transfer and without the licence of the copyright owner, retains any personal copy.

(9) If copyright is infringed as set out in subsection (8), any retained personal copy is for all purposes subsequently treated as an infringing copy.

(10) To the extent that a term of a contract purports to prevent or restrict the making of a copy which, by virtue of this section, would not infringe copyright, that term is unenforceable.

Remedy where restrictive measures prevent or restrict personal copying

296ZEA. (1) This section applies where an individual is prevented from making a personal copy of a copyright work, or is restricted in the number of personal copies of it which may be made, because of a restrictive measure applied by or on behalf of the copyright owner.

(2) That individual, or a person being a representative of a class of such individuals, may issue a notice of complaint to the Secretary of State.

(3) Following receipt of a notice of complaint, the Secretary of State may give to the owner of that copyright work or an exclusive licensee such directions as appear to the Secretary of State to be requisite or expedient for the purpose of—

(a) establishing whether any voluntary measure or agreement relevant to the copyright work subsists, or

(b) (where it is established there is no subsisting voluntary measure or agreement) ensuring that the owner or exclusive licensee of that copyright work makes available to the complainant or the class of individuals represented by the complainant the means of benefiting from section 28B to the extent necessary to benefit from that section.

(4) In deciding whether to give such directions, the Secretary of State must consider whether the restrictive measure unreasonably prevents or restricts the making of personal copies, in particular having regard to—

(a) the right of the copyright owner to adopt adequate measures limiting the number of personal copies which may be made, and

(b) whether other copies of the work are commercially available on reasonable terms by or with the authority of the copyright owner in a form which does not prevent or unreasonably restrict the making of personal copies.

(5) The Secretary of State may also give directions—

(a) as to the form and manner in which a notice of complaint in subsection (2) may be delivered,

(b) as to the form and manner in which evidence of any voluntary measure or agreement may be delivered, and

(c) generally as to the procedure to be followed in relation to a complaint made under this section,

and shall publish directions given under this subsection in such manner as the Secretary of State thinks will secure adequate publicity for them.

(6) Subsections (5) to (8) of section 296ZE—

(a) apply to directions under subsection (3)(a) or (b) as they apply to directions under section 296ZE(3)(a) or (b), and

(b) apply to directions under subsection (5) as they apply to directions under section 296ZE(4).

(7) This section does not apply to copyright works made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

(8) In this section—

“restrictive measure” means any technology, device or component designed, in the normal course of its operation, to protect the rights of copyright owners, which has the effect of preventing a copyright work from being copied (in whole or in part) or restricting the number of copies which may be made;

“personal copy” means a copy of a copyright work which may be made under section 28B;

“voluntary measure or agreement” has the same meaning as in section 296ZE, except that the reference to carrying out a permitted act is to be read as a reference to making a personal copy.

(9) Subsections (1) to (8) apply with any necessary adaptations to—

(a) rights in performances, and in this context “personal copy” refers to a copy of a recording of a performance which may be made under paragraph 1B of Schedule 2 without infringing the rights conferred by Chapter 2 of Part II (rights in performances), and

(b) publication right.”

(3) In Schedule 2, after paragraph 1A(3) insert—

“Personal copies of recordings for private use

1B. (1) The making of a copy of a recording of a performance by an individual does not infringe the rights conferred by this Chapter provided that the copy—

(a) is a copy of—

(i) the individual’s own copy of the recording, or

(ii) a personal copy of the recording made by the individual,

(b) is made for the individual’s private use, and

(c) is made for ends which are neither directly nor indirectly commercial.

(2) In this paragraph “the individual’s own copy” is a copy of a recording which—

(a) has been lawfully acquired by the individual on a permanent basis,

(b) is not an illicit recording, and

(c) has not been made under any provision of this Schedule which permits the making of a copy without infringing the rights conferred by this Chapter.

(3) In this paragraph a “personal copy” means a copy made under this paragraph.

(4) The rights conferred by this Chapter in a recording are infringed if an individual transfers a personal copy of the recording to another person (otherwise than on a private and temporary basis), except where the transfer is authorised by the rights owner.

(5) If the rights conferred by this Chapter are infringed as set out in sub-paragraph (4), a

personal copy which has been transferred is for all purposes subsequently treated as an illicit recording.

(6) The rights conferred by this Chapter in a recording are also infringed if an individual, having made a personal copy of the recording, transfers the individual's own copy of the recording to another person (otherwise than on a private and temporary basis) and, after that transfer and without the consent of the rights owner, retains any personal copy.

(7) If the rights conferred by this Chapter are infringed as set out in sub-paragraph (6), any retained personal copy is for all purposes subsequently treated as an illicit recording.

(8) To the extent that a term of a contract purports to prevent or restrict the making of a copy which, by virtue of this paragraph, would not infringe any right conferred by this Chapter, that term is unenforceable.

(9) Expressions used but not defined in this paragraph have the same meaning as in section 28B."

Appendix 2

Data providers, industry stakeholders and other organisations approached during this study

Alliance for IP
Anti-Copying in Design
Anti-Counterfeiting Group
Artists' Collecting Society
Big Innovation Centre
British Phonographic Industry
British Copyright Council
British Library
British Screen Advisory Council
Copyright Licensing Agency
Crown Prosecution Service
Federation Against Copyright Theft
Federation Against Software Theft
Ministry of Justice
Motion Picture Association
Newspaper Licensing Association
Open Data Institute
Open Rights Group
Police Intellectual Property Crime Unit
PRS For Music
Publishers Association
Trading Standards
UK Music
UK Interactive Entertainment

Appendix 3

Questions used for the survey (see Chapter 6)

SECTION A. ABOUT YOU

1. Which of the following best describes your organisation (please choose one)?

- Private limited company
- Sole trader or partnership
- Public company
- Consultancy
- Professional body
- Academic institution
- Government agency

2. Please select all the creative industry sectors with which you are involved.

- Performing Arts
 - Arts & Antiques
 - Crafts
 - Architecture
 - Design
 - Fashion
 - Advertising
 - Radio & TV
 - Film & Video
 - Photography
 - Music
 - Publishing
-

- Video Games
- Software
- Other (please specify)

3. How many people does your organisation employ (please choose one)?

- 1
- 2 – 10
- 11-50
- 51-250
- 250+

4. Approximately how much income did your organisation derive from copyright works last year (please choose one)?

- £0
- £1 - £10,000
- £10,001 - £100,000
- £100,001 - £250,000
- £250,001 - £500,000
- £500,001 - £1,000,000
- Over £1 million

SECTION B. HAS INFRINGEMENT OCCURRED?

5. Has your income and/or business been affected by copying of your original works?

- Yes
- No

IF Answer to Q5 is Yes Go to Section C otherwise go to Section D.

SECTION C. WHAT HAPPENED?

Tell us a little more about the copyright infringements that have occurred, how much it affected your business and what action you have taken, if any.

6. If you are able to do so, please estimate the amount you believe copyright infringement has cost your business (please choose one).

- £0
- £1 - £100
- £101 - £1,000
- £1,001 - £10,000
- £10,001 - £100,000
- £100,001 - £250,000
- £250,001 - £500,000
- £500,001 - £1,000,000
- Over £1 million
- I believe losses have occurred, but am unable to estimate a figure for them

7. What proportion of these losses would you estimate have been caused by having your material being made available online (please choose one)?

- 0%
- 1-10%
- 11-25%
- 26%-50%
- 51%-75%
- 75%-100%

8. Have you ever reported online copyright infringement to the police or to trading standards?

- Yes
 - No
-

9. If you have reported online copyright infringement to the police or to trading standards: has it ever resulted in a prosecution and criminal charges being brought?

- Yes
- No

10. Where criminal charges have been brought, what outcomes have you seen (please select all that apply)?

- The infringer received a custodial sentence
- The infringer received a fine
- The infringer received a suspended sentence
- The alleged infringer was found not guilty and acquitted
- Other (e.g. community sentence or conditional discharge). Please specify

11. If there have been occasions when you have not reported online copyright infringement to the police, why did you decide not to do this (please select all that apply)?

- Decided that the copying was not really criminal in nature
- Decided to pursue as a civil matter and pursued for damages / injunction
- Did not have money or time to pursue
- Did not think a prosecution was likely to be successful
- Did not think the available penalties were adequate
- Other (please specify)

12. If you are willing to expand on your experiences of online copyright infringement and how it has affected your business, please do so using the box provided.

13. Are you prepared to be contacted about your experiences of prosecuting online copyright infringement?

- Yes
- No

If yes, please provide your email address in the space below.

SECTION D. ARE THE AVAILABLE PENALTIES CORRECT?

Lastly, please give us your views on the appropriateness of the sanctions which are currently applicable to online copyright infringement.

14. At present, the maximum penalty for online copyright infringement (making copyright materials or performance available to the public via the internet) is 2 years imprisonment and a fine, compared with ten years imprisonment and a fine for copying offences involving physical goods.

- What do you think the online penalty should be?
- It should stay at 2 years
- It should be increased to 10 years, like physical infringement
- The physical infringement penalty should be reduced to 2 years, as for online infringement
- The penalty for online infringement should be more than for physical infringement
- The penalty for online infringement should be less than for physical infringement

15. If penalties were to be increased, what do you think the effects would be? Please select as many as apply.

- It would have no effect
- It would help to discourage online copyright infringement
- It would encourage victims of copyright infringement to take action
- It would have a detrimental effect on innovation by copyright users
- Other (please specify)

16. If you would like to expand on your views on penalties, please do so using the box provided.

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