



**CONSULTATION ON TAKING FORWARD THE GOWERS  
REVIEW OF INTELLECTUAL PROPERTY:  
PENALTIES FOR COPYRIGHT INFRINGEMENT**

**RESPONSE FROM THE ALLIANCE AGAINST  
INTELLECTUAL PROPERTY THEFT**

**October 2008**

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## Introduction

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Any acknowledgement of the seriousness of intellectual property crime and the need for significant penalties is welcome. However, we do not believe the proposal contained in this consultation document fulfils the government's obligation regarding Gowers Recommendation 36.

Gowers stated:

*The intention and impact of physical and online infringement are the same. Crimes committed in the online and physical world should not be subject to different sentences. Increasing the penalties for online infringement will therefore make the law more coherent.*<sup>1</sup>

On receiving the Gowers Report the government welcomed the review and said it will 'be taking forward the recommendations for which it is responsible to ensure that the UK IP regime is fit for the digital age'<sup>2</sup>.

In addition, the then Secretary of State for Trade and Industry, Alistair Darling MP, undertook to work with colleagues across government to, amongst other measures, increase penalties for online infringement of copyright to 10 years so that they are in line with penalties for physical infringement of copyright.<sup>3</sup>

Even the consultation document, *Taking Forward the Gowers Review of Intellectual Property: Penalties for Copyright Infringement*, itself states:

*The Gowers Review recommended (Recommendation 36) that the penalty for online commercial infringement should be increased to ten years imprisonment to bring parity with commercial dealing (but not showing) in pirated works. It also proposed that the penalty for consumers infringing online to an extent that prejudicially affects the rights holders should also be extended to ten years to bring parity with physical infringement.*

*Taking Forward the Gowers Review of Intellectual Property  
Penalties for Copyright Infringement p.5*

We therefore do not believe the measure being proposed – to increase the maximum financial penalty available in the Magistrates' Courts to £50,000 – meets the government's obligation under this recommendation, or, crucially, addresses the problem this recommendation was designed to resolve.

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<sup>1</sup> Gowers Review of Intellectual Property p98

<sup>2</sup> <http://www.ipo.gov.uk/press/press-briefings/press-briefings-gowers/press-briefings-gowers-govresponse.htm>

<sup>3</sup>

<http://nds.coi.gov.uk/content/detail.asp?ReleaseID=248943&NewsAreaID=2&NavigatedFromSearch=True>

## **Why penalties need to be harmonised**

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The unauthorised distribution of content, be it music, film, computer software and games software, publications or sports broadcasts, is against the law. In many ways, acquiring content online should be viewed as traditional shopping; just as someone would walk into a shop and buy a CD or book, similar payment needs to be made for material downloaded from a website. This is crucial in order for creators and rights holders to be assured of remuneration for their work and investment. Most people agree that it is a crime to help oneself to the property of another without payment or permission, and accessing content online must be viewed the same. This is a crucial principle if we are to ensure the creative industries survival as we go further into the digital age.

Criminal sanctions should not therefore, as Gowers stated, differentiate between whether the offence is taking place in an online or physical environment and online piracy should not be viewed as a lesser crime than physical piracy. Intellectual property and creative content is still being stolen whichever format is being used.

### ***Scenario 1***

A person has a 'business' making and distributing for sale physical copies of pirated DVDs, CDs, software, books etc. He has a website whereby copies can be ordered and purchased online. These pirated copies are then posted to the buyer.

### ***Scenario 2***

A person has a 'business' providing access to pirated DVDs, CDs, software, books etc. All this material is held on a server to which people pay to access and then download copyright-protected material.

There is clearly no difference in the crime being committed. Both sellers are selling pirated material. However, because in Scenario 2 no physical product is being produced the seller could only expect, if caught, to face a maximum penalty of two years in prison and £5000 fine. Seller 1, however, could expect a maximum penalty of ten years in prison and an unlimited fine.

This seriously reduces the ability of the courts to deal effectively with persistent offenders and serious organised criminals.

The government was very supportive and receptive to our campaign to increase the maximum penalties for copyright infringement from two years to ten years. We agree with Parliament that having different levels of penalties was exploited criminals and damaged UK businesses. Indeed, reassurance was even given in the House of Commons that such a move would not lead to a proliferation of new offences or sentences given the crime of copyright theft already existed. All the measure sought to do was address an anomaly criminals were exploiting and align the penalties with similar comparable offences.

The fact that different penalties exist for online and physical infringement, as the above example demonstrates, is an equally bizarre anomaly. We are, therefore, unsure as to why the government is not similarly supportive of this and looking to implement the recommendation as originally accepted.

## **Damage to industry**

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Online infringement is having a significant financial impact on businesses which rely on intellectual property rights to generate revenue for reinvestment in new creative works, consumer services etc.

- The audio-visual industry estimates it lost over £150m in 2007 from digital piracy, up from £129m in 2006.
- The music industry estimates it will lose £180m in 2008; £1.2bn 2007 – 2012.
- 26% of software on UK PCs is illegal or unlicensed, costing the software industry nearly £1bn a year.
- It is calculated that a 10% drop in software piracy could:
  - Create over 13,000 new jobs
  - Contribute £4.4bn to the UK economy
  - Increase tax revenue by over £1bn.

## **Response to questions**

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*Do you think that POCA already provides an effective means of depriving offenders of the profits from IP crime?*

The Proceeds of Crime Act (POCA) is proving to be an effective piece of legislation. IP crime is an economic crime and POCA provides an economic solution and deterrent. Some IP offences are also Schedule 2 'lifestyle offences' which places the onus on the defendant to prove his income and assets have been achieved legitimately.

By enabling prosecutors to take away the proceeds of criminal activity, not only has a powerful deterrent been created but resulting actions which goes to the heart of sustainable enforcement – taking away a criminals ability to reoffend. Cumbria Trading Standards achieved a POCA order of £60,635 against an MP3 music pirate and counterfeiter of other copied digital media; North Yorkshire Trading Standards achieved a POCA order of £115,000 against a seller of counterfeit DVDs and CDs; Assets Recovery Agency obtained order for £60,000 against two sellers of counterfeit jewellery and handbags who were selling the goods on eBay.

We do believe, however, that additions need to be made to this list, as new offences have come onto the Statute Book (via the implementation of the EU Copyright Directive) since POCA was passed, in particular S296ZB and S107(2A) of the CPDA.

Offenders who have their own web sites use technology to hide their activities. When they are discovered and searches are carried out by enforcement agencies, nearly always all the evidence of sales is found on their computers, which then must be forensically examined to establish this evidence. This can take up to three months before the evidence of a criminal lifestyle can be established under Section 75 and restraining orders on bank accounts sought. With the large sums of money that is made

by these criminals, speedy action is vital to prevent monies being moved and hidden. Classifying s107(2A) and s296ZB CDPA as lifestyle offences will enable instant orders to be made and secure illegal monies for confiscation in the future. It will also send out a message to the criminal fraternity that this offence is a serious one and will act as a further deterrent.

Making certain summary only IP offences actionable under POCA would also increase POCA's effectiveness as a crime-fighting tool against IP theft. Offences for the possession of infringing copies and their sale or hire under s107(1) CDPA and, s297(1) which provides an offence for dishonest reception of programmes in a broadcast service with intent to avoid payment of a charge are summary only. As such POCA cannot be used against convicted criminals in respect of these offences. We recommend this is changed and such offences brought under POCA.

Extending the incentivisation scheme to trading standards has also proved hugely beneficial and has greatly assisted in placing the need to tackle IP crime forefront in many trading standards departments. Any extension of this scheme i.e. TS as lead agency being able to claim a greater percentage of the assets recovered, would deliver, we believe, even greater results in combating IP crime and increase its effectiveness as a crime-fighting tool.

In addition, given that POCA work needs to be supported by an Accredited Financial Investigator, greater funding should be made available for the training and accreditation of financial investigators. A detailed financial investigation is critical to the success of a POCA action and, as half of proceeds recovered are returned to the Treasury (with the other half being shared between the investigating and prosecuting bodies), the Alliance maintains this would be a good investment for the government.

**However, the effectiveness or otherwise of POCA should not impact on any decisions regarding criminal sanctions. The Alliance, therefore, supports an increase in financial penalties available in Magistrates' Court.**

Should exceptional statutory maxima be introduced for all copyright offences in the CDPA?

Yes, exceptional statutory maxima should be introduced in the Magistrates' Courts for all copyright offences in the CDPA.

Do you agree that one level (not to exceed £50,000) of exceptional statutory maxima should be set for all offences in the CDPA?

Yes, we agree.

Do you think that different levels of exceptional statutory maxima should be set for the various copyright offences?

We do not think that different levels of exceptional statutory maxima should be set.

Do you have any general comments on how the magistrates' courts deal with copyright offences?

Anecdotal evidence supplied by Alliance members suggest there is great disparity in the application and knowledge of copyright and trade mark law amongst magistrates, leading to inconsistent results and a lack of confidence in the criminal justice process.

For example, District Judge Prowse commented during a prosecution for a S.297(1) offence (which outlines the criminal offence of dishonesty) that he could not “*ignore that this is all about money*” and for “*what is essentially a civil case and not what I would call a real crime*”.

A comment such as this from a Magistrate is very worrying. Such an offence is a real crime with people facing prosecution often involved in other criminal activity.

*Do you think exceptional statutory maxima should be introduced for all IP offences and should different levels be set for the various IP offences?*

The Alliance strongly believes that the same penalty options should be available for different IP offences. We maintain that a dangerous precedent would be set if infringing a trade mark was seen or perceived to be a less serious offence than copyright infringement. A similar anomaly was dealt with previously via the Copyright, and Trade Mark (Offences and Enforcement) Act 2002. It would be extremely unwise to recreate one here.

There should be one level of exceptional statutory maxima.

## **Conclusion and recommendations**

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The Alliance:

- Supports an increase in financial penalties in the Magistrate’s Courts but does not believe this meets the government’s obligation under Gowers 36.
- Believes there should be a single level of exceptional statutory maxima.
- Strongly believes any increase needs to apply to copyright and trade mark offences.

And therefore:

- **Supports Option 3: Introduce exceptional summary maxima in the Magistrates’ Courts of £50,000 for all IP offences**

And calls on the government to:

- Introduce legislation designed to properly implement Gowers 36 and increase penalties for online offences to a maximum of ten years in prison to match those for physical offences.
- Amend Schedule 2 of POCA to include ss296ZB and 107(2A).
- Provide additional funding for the training and accreditation of financial investigators.
- Increase the amount trading standards can receive under the incentivisation scheme.

## **About the Alliance**

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Established in 1998, the Alliance Against Intellectual Property (IP) Theft is a UK-based coalition of 21 trade associations and enforcement organisations with an interest in ensuring intellectual property rights receive the protection they need and deserve. With a combined turnover of over £250 billion, our members include representatives of the audiovisual, music, games and business software, and sports industries, branded manufactured goods, publishers, retailers and designers.

The Alliance is concerned with ensuring intellectual property rights are valued in the UK and that a robust, efficient legislative and regulatory regime exists, which enables these rights to be properly protected. Our Members work closely with trading standards and local police forces to reduce the harm caused by intellectual property crime in local communities and ensure legitimate businesses and traders are able to operate fairly.

We work closely with the Department for Innovation, Universities and Skills and the UK Intellectual Property Office to raise awareness of the harm caused by IP theft. We are also participants in the IP Crime Group, which facilitates cross departmental dialogue and joint working amongst the relevant enforcement bodies and organisations.

## **Alliance members**

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Anti-Counterfeiting Group  
British Brands Group  
BPI (British Recorded Music Industry)  
British Video Association  
Business Software Alliance  
Cinema Exhibitors Association  
Copyright Licensing Agency  
Design and Artists Copyright Society  
Entertainment and Leisure Software Publishers Association  
Entertainment Retailers Association  
Federation Against Copyright Theft  
Federation Against Software Theft  
Film Distributors Association  
Institute of Trade Mark Attorneys  
Motion Picture Association  
Premier League  
Publishers Licensing Society  
UK Music

### **Associate members:**

Anti-Copying in Design  
British Jewellery, Giftware & Finishing Federation  
Video Standards Council

