

## **BILETA Response to IPO Consultation on Changes to Penalties for Online Copyright Infringement**

(<https://www.gov.uk/government/consultations/changes-to-penalties-for-online-copyright-infringement>)

This is a collaborative submission from a group of academics based in the UK with expertise in Information technology law and related areas. The preparation of the response has been funded by the British and Irish Law Education Law and Technology Association (BILETA <http://www.bileta.ac.uk/Home/>). This response has been prepared by Dr. Felipe Romero Moreno (University of Hertfordshire) and Dr. James Griffin (University of Exeter). It has been approved by the Executive of BILETA and is therefore submitted on behalf of BILETA.

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## **BILETA Response to the UK IPO Consultation on Changes to Penalties for Online Copyright Infringement**

**Dr Felipe Romero-Moreno & Dr James GH Griffin<sup>1</sup>**

### **Consultation question:**

*‘Should the maximum custodial sentence available for online and offline copyright infringement of equal seriousness be harmonised at 10 years? Please justify your answer and support with evidence where possible’.<sup>2</sup>*

In December 2006, the review of Intellectual Property by Andrew Gowers<sup>3</sup> noted that there was a discrepancy between the maximum penalties for online and offline criminal IP offences. Whilst the Government accepted the recommendation of Gowers to remove the discrepancy, the result was that when the Digital Economy Act 2010 was passed it enacted s.42 which increased the penalty for all copyright offences to £50,000. During the debate of the Intellectual Property Act 2014, the coalition Government agreed to look at the issue of penalties again. This was also given impetus by the admission that the variation in penalties may have been in breach of EU law, thus potentially rendering the implementation of the 2001 Information Society Directive (2001/29/EC) void – which would have had considerable consequences upon UK copyright law. Nonetheless, Mike Weatherly, who was the IP advisor to the Prime Minister, stated that:

*‘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’.<sup>4</sup>*

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<sup>2</sup> Changes to penalties for online copyright infringement, UK-IPO, Newport (2015) available online from [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/446515/Changes\\_to\\_penalties\\_for\\_online\\_copyright\\_infringement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/446515/Changes_to_penalties_for_online_copyright_infringement.pdf) page 2.

<sup>3</sup> Gowers Review, HM Treasury, HMSO, London (2006) available online from [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228849/0118404830.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf) recommendation 36.

<sup>4</sup> M. Weatherley, Follow The Money: Financial Options To Assist In The Battle Against Online IP Piracy (2014) available online from [http://www.olswang.com/media/48204227/follow\\_the\\_money\\_financial\\_options\\_to\\_assist\\_in\\_the\\_battle\\_against\\_online\\_ip\\_piracy.pdf](http://www.olswang.com/media/48204227/follow_the_money_financial_options_to_assist_in_the_battle_against_online_ip_piracy.pdf) para 6.9.

An independent review was thus undertaken, resulting in the publication during March 2015 of the report “Penalty Fair?” by the UK Intellectual Property Office.<sup>5</sup> The conclusions of the report were that a) the criminal provisions in the CDPA 1988 are hardly being used, b) that there is a case for increasing sanctions subject to there being additional safeguards to protect those not acting with criminal intent, c) that custodial sentences in excess of two years have been used but not five – a scale of offending would be useful, and d) that serious online copyright offences should be considered capable of causing serious harm, and thus should lead to equate to a minimum sentence of five years.

Based on the findings, the UK-IPO expected that increasing the maximum sentences will have an enhanced deterrent effect, and enable punitive penalties to deter criminal infringers. It would also send a clear message, it was thought, for right holders and infringers that criminal scale infringement will not be tolerated. However, that approach is flawed. There was only a small scale survey to obtain the views of individual right holders who had been victims of online copyright infringement, rather than the views of right holders more broadly. The UK-IPO report focused on soundings from industry bodies and other stakeholders, key cases and reviewed available statistical data on prosecutions and sentences. Our approach differs in terms of methodology and evidence used. We will be utilising primary sources, namely mandatory, binding authority, such as treaties (e.g. the European Convention on Human Rights (ECHR), or the Charter of Fundamental Rights of the EU), Acts and Legislation (such as the Copyright, Designs and Patents Act (CDPA) 1988 and EU Directives), case law of the European Court of Human Rights (ECtHR) or the European Union Court of Justice (CJEU), as well as secondary (persuasive, non-binding authority) such as books, legal news, Government and industry reports, and statements by bodies such as OFCOM.

Our response paper will cover the following sections:

1. What is acceptable?
2. What is affordable?
3. What is feasible?
4. Unintended consequences
5. Compatibility of the proposal with the three-part of the Strasbourg Court’s non-cumulative test
6. Recommendations

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<sup>5</sup> Penalty Fair?, UK-IPO, Newport (2015) available online from <https://www.gov.uk/government/consultations/changes-to-penalties-for-online-copyright-infringement>

Our conclusion is that there is no need to change the law as the proposal: (i) is not acceptable i.e. legitimate means to tackle large-scale commercial online copyright infringement are already available and currently being used, and the suggested sentence of 10 years seems disproportionate; (ii) is not affordable (i.e. prison costs); (iii) is not feasible (i.e. difficult to locate criminal infringers); and (iv) is incompatible with both the ECHR and the Charter. Moreover, we need to stress that in any case if the Government were to eventually implement it, the maximum custodial sentence available for online and offline copyright infringement of equal seriousness should never be harmonised at 10 years, but at a maximum of 4 years and so long as safeguards were provided to ensure its compatibility with both the ECHR and the Charter, in particular with the ECtHR's case-law and the CJEU's case-law.

### ***1. What is acceptable?***

At the international level, criminal sanctions and the enforcement of IPR is dealt with by Article 61 of TRIPS (the WTO agreement on Trade Related Aspects of Intellectual Property Rights 1994). It requires members to 'provide for criminal procedures and penalties to be applied at least in cases of... copyright piracy on a commercial scale'.<sup>6</sup> At the level of EU law, there are two main Directives, namely the Enforcement Directive (2004/48/EC) and the Information Society Directive (2001/29/EC). There was no overall agreement about the criminal sanctions and so there are no specific harmonisation measures for these; it is left up to the Member States to decide. In the UK, the primary copyright offences are in s.107(1)-(3), s.198, s.296ZB and s.297 and s.297A CDPA 1988. These carry a maximum 10 years in prison. Online infringement, per the implementation of the EU Information Society Directive, is dealt with in s.107(2A) and s.198(1A) CDPA 1988. These carry a maximum sentence of two years in prison.

In the consultation document the UK-IPO stresses that "there is no strong case for treating online infringement any differently to physical infringement."<sup>7</sup> This is incorrect. The first reason is that legitimate means to tackle large scale commercial online infringement are not only already present, but also currently being used, so this proposal might be unjustified. The Fraud Act 2006 and common law offence of conspiracy to defraud are being deployed, as noted in the report itself.<sup>8</sup> In addition, the National Fraud Intelligence Bureau have been sending letters alleging that offences are being committed under the Serious Crime Act 2007.<sup>9</sup> This was in reference to the seeding of copyright material online

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<sup>6</sup> Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) 1994, Art 61.

<sup>7</sup> Changes to penalties for online copyright infringement, supra 2, page 2.

<sup>8</sup> Ibid, page 1.

<sup>9</sup> Andy, UK Police launch campaign to shut down torrent sites (2013) available online from <https://torrentfreak.com/uk-police-launch-campaign-to-shut-down-torrent-sites-130604/>

(under s.107(1)(e) CDPA 1988) and by doing an act which is capable of aiding and encouraging communication to the public (s.107(2A) CDPA 1988).

The second reason is that the UK-IPO statement is potentially dangerous is that it has previously been the case that an increase in sentences led to withdrawal of a proposed Directive. This was in 2005, a second IP enforcement Directive, the support of which was withdrawn by the European Commission because of public outcry at the extension of sentences from two years to four. It could therefore be argued that there should not be extension in duration for custodial sentences.

## ***2. What is affordable?***

There is an ever increasing prison population, and the UK system currently holds over 84,000 people.<sup>10</sup> This is in a system that was designed to hold only around 50,000, and which has increased by more than 40,000 people between 1993 and 2014. The system has been overcrowded every year since 1994. Whilst the capacity has been increased, there is a continuing rise in the number of people being held in prison which continues to outstrip the number of places available. If the growth in the prison population is not reversed, further prisons will need to be built at considerable cost. Increasing the criminal IP custodial sentences will merely add to this.

Currently, the average cost of a prison place per person is £36,237 and thus the rise in the prison population of 40,000 equates to an annual cost of £1.22bn – which equates to £40 per year for every tax payer. Furthermore, prison has a poor record in reducing reoffending for 45% of those released reoffend within one year of release. 68% of under 18s are reconvicted within one year. There is nothing to indicate that this would be different for IP related crime. Reoffending costs the UK between £9.5bn and £13bn a year.<sup>11</sup>

By way of example of the costs inherent within the prison system, prisoners often have to be transferred between prisons for health care reasons. This adds additional costs in terms of administration, transport and guarding where necessary. If healthcare access is restricted, this could cost more money. As healthcare professions are keen to point out, prevention is invariably cheaper than after-the-event treatment.

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<sup>10</sup> Prison: the facts: Bromley Briefings Summer 2015 (2015) available online from

<http://www.prisonreformtrust.org.uk/Portals/0/Documents/Prison%20the%20facts%20May%202015.pdf> page 1.

<sup>11</sup> Focus Prisoner Education, The cost of Prisons (year unknown) available online from <http://www.fpe.org.uk/the-cost-of-prisons>

Consequently, for cost reasons alone, it would be better to invest in means by which to reduce the incidence of IP crime in the first place, rather than merely increasing the penalties.

### ***3. What is feasible?***

There are practical issues when seeking to identify those who run and own large websites or services which facilitate copyright infringement on a criminal scale. To begin with, the registration procedures for websites are not sufficiently verified. ICANN (The Internet Corporation for Assigned Names and Numbers) delegates the administration of top level domains to third party organisations which oversee domain name activity. Commercial companies may also allocate domains to individuals and organisations. The details are entered into the WHOIS database that can be queried to find out how owns a particular domain.<sup>12</sup> However, the lack of verification, and where individuals have opted out of displaying full contact details (i.e. for non-commercial purposes) limits the usefulness of the database, particularly for those may own domains where criminal level infringement is taking place. Furthermore, it is possible to use privacy services who will register their own details in place of the intended registrant.

The data entered on the WHOIS database is reportedly highly unreliable. It has been claimed that only up to 22% of entries on the system are correct. In one study only 46% of the registered information sampled was accurate and detailed enough to be able to contact the registrant. 28% had errors significant enough to prevent contact. These factors combined naturally make it difficult to rely on the database.<sup>13</sup>

In the alternative to WHOIS, it is possible to utilise other Internet resources such as IP address blocks, which are administered by various regional agencies, with the UK one being RIPE NCC which covers Europe and the Middle East. This has its own searchable database. However, it is not a complete record of the allocation of IP addresses and again, verification is an issue. It is also not required for network operators to amend details in the event of transfer of ownership.

Ultimately, there are many shortcomings in being able to obtain information about who owns a particular domain. This, combined with difficulties relating to jurisdiction (i.e. where assets are based abroad), serves to make the obtaining of information the exception rather than the rule when it comes to criminal level infringements. This point has been made by Mr. Justice Arnold in *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch).

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<sup>12</sup> <https://who.is/>

<sup>13</sup> OFCOM, 'Site Blocking' to reduce online copyright infringement: A review of sections 17 and 18 of the Digital Economy Act (2010) available online from <http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf> page 20.



‘Action against the operators. The first step which Richemont could take, and have taken, is to send cease and desist letters to the named registrants of the domain names as identified by a WHOIS search. Unsurprisingly, these letters were simply ignored. Since the registrants all gave addresses outside the United Kingdom, many in China, Richemont faced obvious difficulties of jurisdiction and/or enforcement if they were to attempt to bring proceedings against the registrants. Furthermore, the registrants may not be the actual operators of the Target Websites. Experience in the copyright context shows that it is frequently difficult to identify the real operators of offending websites and that attempts to bring proceedings against the operators are rarely effective.’<sup>14</sup>

#### ***4. Unintended consequences***

In view of the shortcomings with regard to identification of criminal infringers and lack of resources if they are caught, there are two potential workarounds:

1. Organisations such as ICANN or Nominet could be forced to implement verified details. Naturally there are jurisdictional issues but it would be desirable to request them to implement a verified system. This would require changes to appropriate terms and conditions, and naturally there could be issues both legal and practical with retroactive application. Nonetheless, failure to update or maintain details might be used to deny withdraw a domain registration. Due to jurisdictional issues, this is likely to be able to only apply to ‘.uk’ domains, though blocking could be used within the UK to restrict direct access through UK ISPs.

Associated with this proposal is the notion to limit domain name privacy. Limiting the actions of companies who front for criminal infringers would deal with issue of registration fronts.<sup>15</sup> Nonetheless, it is possible to issue takedown notices – something which is quite common in the United States under DMCA (Digital Millennium Copyright Act 1998) notices. For instance, in July 2015 the RIAA (Recording Industry Association of America) issued a notice against DynaDot to obtain the personal details of a customer.<sup>16</sup> This was to establish the details of a music streaming site called Soundpiff.net. Oversight from a judge is not always required and a clerk of the court may issue the subpoena. The number of such subpoenas issued is large: Google for instance have received, as of 4<sup>th</sup> August 2015, 50,086,128 requests for URL removals from their search results.<sup>17</sup> In the UK, the equivalent route is to obtain a Norwich

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<sup>14</sup> *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch) at paragraph 198.

<sup>15</sup> Ernesto, RIAA wants domain registrar to expose ‘pirate site’ owner (2015) available online from <https://torrentfreak.com/riaa-wants-domain-registrar-to-expose-pirate-site-owner-150728/>

<sup>16</sup> Ibid.

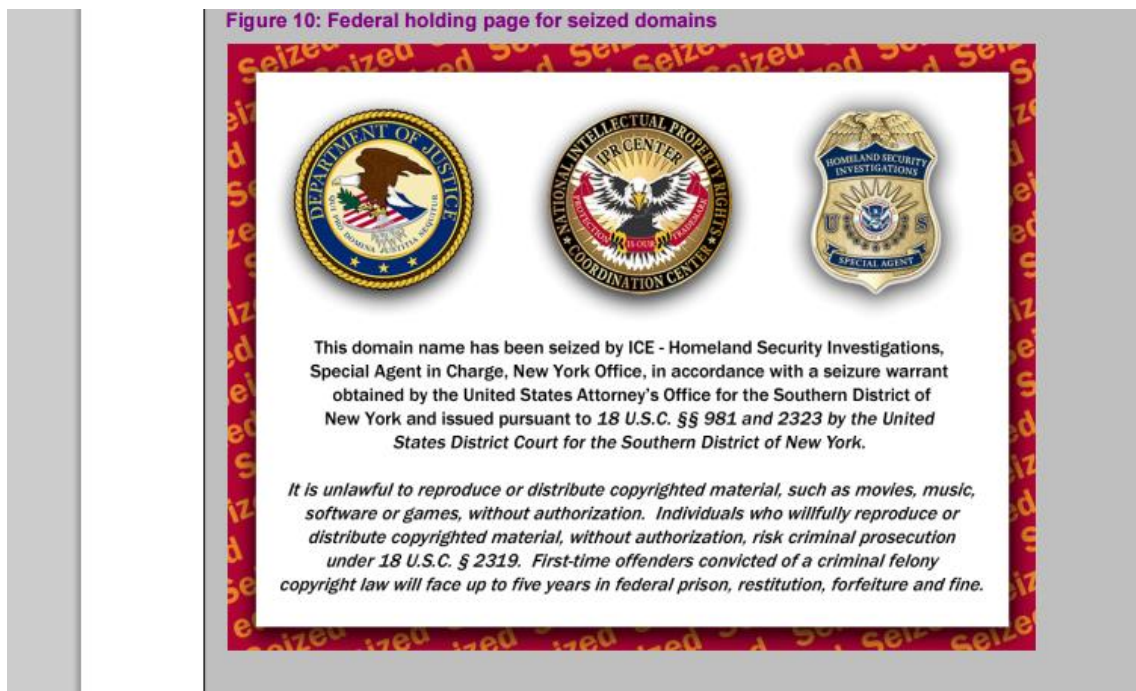
<sup>17</sup> Up to date records available at <http://www.google.com/transparencyreport/removals/copyright/>

Pharmaceutical order, an action of discovery named after which enables a claimant to be able to obtain knowledge of a chain of distribution in order to bring a subsequent action. In the online context, this has been applied in *Golden Eye (International) Ltd & Anor v Telefonica UK Ltd* [2012] EWHC 723 (Ch). The action requires balancing:

“...the Norwich Pharmaceutical order was a pre-requisite to any claim and so the judge was faced with the question of whether it was proportionate to make the order. This required him to balance against the need to protect the intellectual property rights of the claimants the fundamental rights and freedoms of the internet users in relation to privacy and data protection.”<sup>18</sup>

2. The second method is to take control of the domain and available services. In the US, they are usually carried out with the co-operation of US DNS registry. This could be obtained via a court order and it is then for the affected party to challenge the order. This may push criminal infringers out into the open if they feel they stand a chance of challenging the order; it also encourages legitimate users to update their details to prevent such a scenario.

An example of taking control of a domain:



<sup>18</sup> *Golden Eye (International) Ltd & Anor v Telefonica UK Ltd* [2012] EWHC 723 (Ch) at paragraph 15.



Whilst these can be high profile cases, and receive much publicity, it is still possible to evade such orders. Alternate sites may run infringing content. The US Department for Homeland Security Immigration and Customs Enforcement seized domain names of six services – the content is now available via different domain names.<sup>19</sup> The same has occurred in the UK with the attempted blocking of the pirate bay websites, which remain accessible.<sup>20</sup>

### ***5. Compatibility of the proposal with the three-part of the Strasbourg Court's non-cumulative test***

If the UK wishes to implement new legislation for custodial sentences, then these should be compatible with the three parts of the European Court of Human Rights non-cumulative test. Each part needs to be met, otherwise a breach will have occurred.

1. 'Prescribed by Law' – any proposed legislation should be compatible with the freedom of expression. With regard to Article 10, the article guaranteeing freedom of expression, in *Neij and Sunde Kolmisoppi v Sweden*, the Court explained that sharing files over the web, was covered by the right to 'receive and impart information' under Article 10 even if they contained copyrighted content with a view to the making of a profit.<sup>21</sup> Indeed, the Court has stressed that Article 10 of the ECHR not only guarantees the right to impart information, but also the public's right to receive it.<sup>22</sup> The court has confirmed that in order to satisfy this principle, domestic legislation must expressly set out, the following procedural safeguards: firstly, the scope of the ban;<sup>23</sup> secondly, a judicial appeal process against anti-copyright infringement measures;<sup>24</sup> thirdly, the requirement to lay down a specific duty for the national courts to assess, whether the introduction of these measures is necessary.<sup>25</sup>

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<sup>19</sup> OFCOM, 'Site Blocking' to reduce online copyright infringement: A review of sections 17 and 18 of the Digital Economy Act (2010) supra 13, page 24.

<sup>20</sup> See for example <https://unblocked.pw/>

<sup>21</sup> *Neij and Sunde Kolmisoppi v Sweden* App no 40397/12 (ECtHR, 19 February 2013).

<sup>22</sup> *Yildirim v Turkey* App no 3111/10 (ECtHR, 18 March 2013) at paragraph 50; *Guerra and others v Italy* (1998) 26 EHRR 357, at paragraph 53; *Observer and Guardian v the United Kingdom* (1992) 14 EHRR 153, at paragraph 59.

<sup>23</sup> *Association Ekin v France* (2002) 35 EHRR 35, at paragraph 58.

<sup>24</sup> Concurring opinion in *Yildirim v Turkey* supra 22, page 28.

<sup>25</sup> *Yildirim v Turkey* supra 22, at paragraph 66.

2. The ‘legitimate aim’ condition

This would not be difficult to meet, since the legislation would probably aim for the prevention of crime or disorder, and the protection of the reputation or rights of others. This was confirmed in *Sunde Kolmisoppi v Sweden*.<sup>26</sup>

3. The ‘necessity and proportionality’ conditions

The freedom of expression may be interfered with if there is a “pressing social need” and is proportionate to the legitimate aim pursued. For domestic legislation to be compliant with Article 10 of the Convention, it must satisfy three principles: the principle of necessity;<sup>27</sup> the principle of proportionality;<sup>28</sup> and the principle of adequacy.<sup>29</sup>

Necessity:

Under the ECHR the least restrictive alternative should always be initially tried.<sup>30</sup> The fact that technical measures were easily circumvented, also violated the principle of necessity.<sup>31</sup> This is consistent with the UK case *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch) at [175] - ‘it is evident from the CJEU’s judgment in *UPC v Constantin* that the applicable criterion of efficacy is whether the measures required by the injunction will at least seriously discourage users from accessing the target website’.

Proportionality:

In *Neij and Sunde Kolmisoppi v Sweden*, the ECtHR explained that the nature and severity of the penalties imposed had to be taken into consideration.<sup>32</sup> Domestic legislation should also take into account the nature and severity of the sanctions.

Adequacy:

In *Yildirim* Mr. Justice Pinto de Albuquerque observed that in order to comply with the principle of adequacy, under Article 10 ECHR, if there were exceptional circumstances justifying the block of

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<sup>26</sup> *Neij and Sunde Kolmisoppi v Sweden* supra 21.

<sup>27</sup> Concurring opinion in *Yildirim v Turkey* supra 22, page 28.

<sup>28</sup> *Neij and Sunde Kolmisoppi v Sweden* supra 21.

<sup>29</sup> Concurring opinion in *Yildirim v Turkey* supra 22, page 29.

<sup>30</sup> *Ibid*, page 28.

<sup>31</sup> *Ibid*.

<sup>32</sup> *Neij and Sunde Kolmisoppi v Sweden* supra 21.

unlawful material, it was essential to direct the measure to the material that was unlawful.<sup>33</sup> This is consistent with the CJEU's judgment in Case C-314/12 *UPC Telekabel Wien GmbH v Constantin FilmVerleih GmbH and Wega Filmproduktionsgesellschaft GmbH* [2013], where in paragraph 56 the Court held that '*the measures... must be strictly targeted, in the sense that they must serve to bring an end to a third party's infringement of copyright or of a related right but without thereby affecting internet users who are using the provider's services in order to lawfully access information*'. That judgment is further supported by *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch) at [196]. Moreover, in Case C-70/10 *Scarlet Extended SA v Societe belge des auteurs, compositeurs et editeurs SCRL (SABAM)* [2012] ECDR 4 at [52] and Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] ECR I-0000 at [50], the CJEU held that whether these measures were legitimate also depended upon their impact on exceptions to copyright, public domain content and free material.

## **6. Recommendations**

We argue that there is no need to change the existing law. The proposal to equate the maximum custodial sentence for physical copyright infringement with online copyright infringement:

- **Is not acceptable** ie legitimate means to tackle large-scale commercial online copyright infringement are not only already available, but also currently being used. Moreover, the proposed maximum custodial sentence of 10 years in prison seems disproportionate.
- **Is not affordable** ie whilst the prison capacity has been increased, there is a continuing rise in the number of people being held which continues to outstrip the number of places available.
- **Is not feasible** ie in addition to difficulties relating to jurisdiction there are practical issues when seeking to identify those who run and own large website or services which facilitate copyright infringement on a criminal scale.
- **Would require an assessment of compatibility with** the right to freedom of expression included in **Article 10 ECHR** under the three-parts of the ECtHR's non-cumulative test.

However if the UK government nonetheless decided to implement the proposal to equate the maximum custodial sentence for physical copyright infringement with online copyright infringement, it should observe the following **key recommendations**:

- On the basis of the threshold included in: (i) **the proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement**

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<sup>33</sup> Concurring opinion in *Yildirim v Turkey* supra 22, page 29.

of intellectual property rights; (ii) Joint action of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union; (iii) the proposal for a Council Framework Decision on the fight against organised crime; and (iv) the United Nations Convention against Organised Transnational Crime 2000, the maximum custodial sentence for large-scale commercial online copyright infringement **should never exceed four years' imprisonment.**

- Given that there is a continuing rise in the number of people being held in prison which continues to outstrip the number of places available, the UK government **should invest in means by which to reduce the incidence of IP crime in the first place**, rather than merely increasing the penalties.
- Since as well as difficulties relating to jurisdiction there are practical issues when seeking to identify those who run and own large website or services which facilitate copyright infringement on a criminal scale, the UK government **should acknowledge that** the implementation of **this proposal may prove to be practically unfeasible.**
- If in the future, organizations such as ICANN or Nominet were forced to implement **verified details**, the UK government **should require the involvement of State authorities** (eg the courts or the data protection authority ie the Information Commissioner Office - ICO). Moreover, if in the future, the UK government proposed legislation to **take control of the domain and available services**, it **should initially assess the risk of circumvention and over-blocking** of this anti-copyright infringement measure.
- Finally, any proposed legislation **should be compatible with the right to freedom of expression contained within Article 10 of the ECHR** under the three-parts of the ECtHR's non-cumulative test. With regard to the 'prescribed by law' condition, it should: (i) expressly set out the scope *ratione personae*, the scope *ratione materiae*, and the scope *ratione temporis* of anti-copyright infringement measures; (ii) also explicitly establish by law a judicial appeal process against these measures; and (iii) expressly lay down a specific obligation for the UK courts to assess whether the introduction of such measures is necessary. As to the 'necessity' and 'proportionality' condition, it should: (i) always try minimally invasive means initially and should not be easily circumvented; (ii) also take into account the nature and severity of the sanctions; and (iii) only target copyright infringing material.

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