

By email to: enforcement@ipo.gov.uk

dacs.org.uk

Dear Sirs,

A consultation on changes to the penalties for offences under sections 107(2A) and 198(1A) of the Copyright Designs and Patents Act 1988 (Penalties for Online Copyright Infringement)

DACS is the representative for rightholders of visual works and welcomes the opportunity to contribute to this consultation on penalties for online copyright infringement. We support the submission of the Alliance for Intellectual Property (the Alliance), of whom we are a member and we believe that the maximum sentence for offences under s.107(2) and s.198(1A) of the Copyright Designs and Patents Act 1988 (CDPA) should be increased to ten years to match the current level of penalties for physical infringement of copyright works.

About DACS

Established by artists for artists, DACS is a not-for-profit visual artists' rights management organisation. Passionate about transforming the financial landscape for visual artists through innovative new products and services, DACS acts as a trusted broker for 90,000 artists worldwide. Founded over 30 years ago, DACS is a flagship organisation that has and continues to campaign for artists' rights, championing their sustained and vital contribution to the creative economy. In its support of artists and their work, DACS collects and distributes royalties to visual artists and their estates through Artist's Resale Right, Copyright Licensing, Artimage, and via Payback. More information can be found on the [DACS website](#), in particular our latest annual review [here](#).

Copyright infringement and harm

We support the statement made by the Alliance in their consultation response that online infringement of copyright works seriously damages the creative industry sector because of the ease of proliferation that is not possible with physical formats.

Additionally, there is an intrinsic notion of harm to the rightholder in the reproduction of copyright protected material in a digital format, which can be a perfect reproduction of the original without any loss of quality (compared with a physical copy of a physical work where quality is usually compromised). Not only does this make it more difficult for a consumer to differentiate whether a work is an infringing copy or not but it also creates the potential for lucrative business models for unlicensed digital reproductions: they are not 'knock-offs' but an identical copy of the original.

The Court of Justice of the European Union (CJEU) examined harm to a rightholder in *Art and Allposters v Pictoright* C-419/13, where images from licensed posters were transferred by a chemical process onto canvas and therefore 'format shifted' from one physical format to another. The CJEU found that format shifting creates a new production that prejudices an author's right to remuneration, even where shifting is physical and therefore may diminish quality. The concept of harm was also briefly visited in the recent judgment that quashed SI 2014/2361 (the 'private copying exception'),

giving scope for the Government to adequately investigate harm to a rightholder in digital format shifting.

An infringing digital reproduction could easily cause equal if not greater harm to a rightholder than a physical reproduction, and the penalty for online infringement should therefore match that of physical infringement of copyright.

Effective enforcement

In the UK artists earn on average £10,000 per annum¹ and therefore some artists feel that the risks of incurring any costs through litigation is prohibitive, even where they are capped². DACS operates an enforcement service for its members and, whilst this is a successful service that settled 178 cases in 2014 alone, it highlights to us how challenging this process may be to other rightholders. Individuals can use takedown notices on some websites, however this does not necessarily remunerate a rightholder for the infringement nor does it prevent future infringements. The remedy of injunctive relief against internet service providers under s. 97A CDPA has been successful for entertainment companies such as EMI Records Ltd³ to restrict consumer access to websites transmitting material that infringes copyright, however this is a prohibitively costly remedy for an individual rightholder.

Effective enforcement should entail an equal penalty for all types of infringing activity. The Intellectual Property Act 2014 introduced a maximum penalty for infringement of registered designs of ten years, which matches the maximum penalty for infringement of physical copyright works. The current lower penalty for online copyright infringement sends a message to infringers that digital copyright protected works are not as important or valuable as physical copyright protected works or design works. Criminal sanctions are by their very nature considered to act as a deterrent to engage in illegal activities by providing for a punishment for crimes. There is no apparent justification for a different treatment of online copyright infringements and physical copyright infringements.

Lobbying from the Open Rights Group

We have noted with interest that there is a significant online campaign set up by the Open Rights Group (ORG) (see [here](#)) that rejects proposals to extend the maximum sentencing for online infringement. We are concerned that ORG have built their campaign on either misinformation or a misunderstanding of the CDPA as they have argued:

'Criminal copyright infringement is unusual, as it does not require "intent" of causing harm'.

However this is contrary to the requirement in s. 107(2A)(b) CDPA:

'A person who infringes copyright in a work... commits an offence if he knows or has reason to believe that, by doing so, he is infringing copyright in that work'.

¹ Kretschmer, Martin, Lionel Bently et al, *Copyright contracts and earnings of visual creators: A survey of 5,800 British designers, fine artists, illustrators and photographers*, Bournemouth: CIPPM, 2011

² We are aware that the Intellectual Property Enterprise Court (IPEC) has operated successfully since its inception in providing access to justice for many copyright holders. Nevertheless, the litigation process can be time consuming and emotionally difficult for many individuals.

³ In *EMI Records Ltd & ors v British Sky Broadcasting Ltd & ors* [2013] EWHC 379 (Ch) the High Court approved an order to block internet users from accessing websites that facilitated the transmission of material that infringed copyright.



The campaign also implies that implementing a maximum 10 year sentence would be a 'harsher sentence than for other crimes', which appears to misunderstand the current penalties for physical infringement. We therefore consider that this campaign has not been built on the basis of legal accuracy.

ORG's online campaign prompts individuals to copy and paste such arguments into an online response to the consultation. We therefore expect the IPO will be receiving a significant number of responses that recycle the same misinformation and lack of understanding of the law. We understand that users of online content may be concerned about the potential for a long sentence, but in our opinion s. 107(2A) CDPA is sufficiently limited to serious cases of copyright infringements where there is a commercial gain.

The internet is often perceived as a rights-free environment, and an extension to the criminal sanctions for online infringements to equal the provisions for physical infringements is justified. DACCS would propose that in conjunction with the extension of the provisions in s. 107(2A) CDPA, an educational campaign should be initiated to clarify to users that creators have legitimate rights in digital versions of their work. This campaign could also educate the public on the requirements of commercial gain and intent to be sentenced under s. 107(2A) CDPA and allay any fears in this respect.

For further information please contact

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