Copyright Infringement Consultation

Response from the Libraries and Archives Copyright Alliance (LACA)

August 2015

The Libraries and Archives Copyright Alliance (LACA) is a UK umbrella group convened by CILIP (Chartered Institute of Library and Information Professionals). LACA brings together the UK’s major professional organisations and experts representing librarians and archivists to lobby in the UK and Europe about copyright issues which impact delivery of access to knowledge and information by libraries, archives and information services in the digital age.¹

LACA has submitted evidence to all the UK reviews of Intellectual Property and to EU consultations on copyright over the years to highlight and communicate to policy makers where it feels there are deficiencies in the current copyright framework in relation to the organisations that it represents.

Question: Should the maximum custodial sentence for online and offline copyright infringement of equal seriousness be harmonised at 10 years?

LACA believes that the maximum custodial sentence for online and offline copyright infringement of equal seriousness should not be harmonised and that the sentence for online copyright infringement should be left as it stands (i.e. a maximum sentence of two years). The reasons for this are set out below.

LACA agrees that copyright should be enforceable and that serious online infringement can inflict serious economic harm to rightsholders and in some cases may require criminal prosecution and attendant penalties. However, the criterion “affect prejudicially”, used in CDPA ss.107 (1)(e) and 107(2A)(b), is very broad and vague. When it comes to online copyright infringement it must be recognised that it does not automatically equate with analogue copyright infringement. Analogue infringement on a commercial scale requires access to resources not immediately available to ordinary citizens not of a criminal bent, however online infringement is not the same - it can be incredibly easy, especially since the CJEU’s ruling in Svensson (Case C-466-12) that a hyperlink is a communication to the public.²

¹ www.cilip.org.uk/laca

Chair Naomi Korn

Tel +44 (0)20 7255 0500 (CILIP)
Email policy@cilip.org.uk [CILIP]
Web site www.cilip.org.uk/laca

A more balanced approach is needed: penalties should be proportionate, taking into account the establishment beyond reasonable doubt of (1) the alleged perpetrator’s mens rea, i.e., intent to cause harm to the rightsholders, (2) the scale of the alleged infringement and (3) the extent of the harm actually done to the rightsholders. The Government should ensure criminal copyright infringement requires intent to cause serious financial or commercial harm. Mens rea (intent) is generally required elsewhere in UK common law in respect of other criminal offences. It is a very important legal principle and should also be required for criminal copyright infringement, yet CDPA s.107 (2A) contains no provisions for mens rea, only whether “he knows or has reason to believe that, by doing so, he is infringing copyright in that work”. Criminal copyright infringement should have the same safeguards and standard of evidence as other criminal offences.

Intent is important since infringing copyright under s.107 (2A)(b) “otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright” through communication to the public does not always involve criminal intent to defraud rightsholders of revenue: for instance it may knowingly be done for principled reasons, misguided or otherwise, yet lead to criminal prosecution as amply illustrated by the tragic case of Aaron Swartz in the United States. The UK’s criminal penalties for online infringement need to be more nuanced and should not be framed as a blunt instrument.

While, in most instances online copyright infringement is too minor to warrant even a civil prosecution, let alone a criminal one, we are concerned that the proposal would lead to ordinary internet users facing claims for unduly harsh penalties for breaching copyright law as had notoriously occurred in a number of file sharing cases in the United States and here including prosecution of children, teenagers and other ordinary people who did not profit from illegal file sharing. The consultation paper does not clearly set out how the legislation would be targeted to ensure that only criminals who cause intentional serious harm receive long sentences. Unless the offence requires evidence of intent to cause serious harm and evidence of having actually caused serious harm, long custodial sentences are inappropriate.

LACA is also concerned that other kinds of copying might be targeted, such as long quotations or incidental infringing use online, as there is no distinction in the s.107 (2A) offence between different kinds of infringement. Since 2014, an exception in UK copyright law allows for “a “fair” and proportionate part of a published work to be quoted in instances beyond simply being critiqued, commented upon or analysed for its merits”. Additionally, disproportionately long sentences being available for all kinds of online copyright infringement meriting criminal prosecution would impose a chilling effect on the use of copyright works and works protected by related rights.

---

3 [https://en.wikipedia.org/wiki/Aaron_Swartz](https://en.wikipedia.org/wiki/Aaron_Swartz)
4 [http://news.bbc.co.uk/1/hi/entertainment/3096340.stm](http://news.bbc.co.uk/1/hi/entertainment/3096340.stm)
online, even legitimately. Businesses and individuals may refrain from online user-generated utilisation of copyright works, such as the creation of non-profit derivative works: online innovation could be stifled for fear of breaching copyright and facing prison sentences if a criminal charge for illegal "communication to the public" were to carry a maximum sentence of ten years.

One of CILIP’s 12 ethical principles and values governing the conduct of members is “respect for, and understanding of, the integrity of information items and for the intellectual effort of those who created them” and the library and information profession, along with librarians, endeavours to educate library and archive staff and their patrons about copyright infringement. Many libraries and archives display LACA’s posters. Despite these efforts, library and archive patrons, responsible for their own actions, may nevertheless knowingly or intentionally infringe copyright by illegal communication to the public from time to time and we are concerned that institutions or their staff might unwittingly become implicated were secondary infringement to be argued in any criminal prosecution of the primary perpetrators relating to communication to the public. Libraries and archives should be afforded some protection against that, particularly where they make reasonable efforts to educate their patrons. This principle was established in common law by the Supreme Court of Canada’s unanimous ruling in CCH Canadian Ltd v Law Society of Upper Canada that the Law Society library’s practice of allowing self-service photocopying by library patrons came within fair dealing: one of the findings was that it should not be inferred that copyright infringement by library patrons took place with the library’s consent since the library had posted notices informing patrons they must not use the photocopiers to infringe copyright.

As the UK’s own paper presented to the 9th Session of WIPO’s Advisory Committee on Enforcement in March 2014 makes clear, there are already a range of criminal offences available in the UK to deal with serious organised criminal online copyright infringement, including offences under the Fraud Act 2006, and the common law offence of conspiracy to defraud carrying a maximum penalty of 10 years. Serious online infringement is already successfully prosecuted within such existing laws, so there is no reason to introduce the same 10 year maximum penalty in relation to criminal infringement of the communication to the public right, especially without the attendant safeguard available in common law for other criminal offences requiring mens rea. The penalty for offences under CDPA ss.107(2A) and 198(1A) should be left as it currently stands.

---

6 http://www.cilip.org.uk/cilip/about/ethics/ethical-principles
7 http://www.cilip.org.uk/cilip/advocacy-campaigns-awards/advocacy-campaigns/copyright/briefings-resources/copyright-poster