

COMMENCEMENT OF CRIMINAL JUSTICE AND PUBLIC ORDER ACT (CJPO) 1994 PROVISIONS RELATING TO COPYRIGHT

This guidance focuses on the commencement of section 165 of the Criminal Justice and Public Order (CJPO) Act 1994 which inserts sections 107A and 198A into the Copyright Designs and Patents Act 1988 (CDPA) and comes into force on 6th April 2007. These provisions will place a duty on local weights and measures authorities in Great Britain within their areas, and in Northern Ireland to enforce the criminal offences relating to copyright in sections 107 and 198 CDPA; and extend the powers of these authorities under sections 27-9 and 33 Trade Descriptions Act 1968 to the enforcement of these offences.

Previously the public enforcement of the offences in sections 107 and 198 has been a matter for the police alone; private prosecutions have also been brought. Carrying out these new duties gives Trading Standards Officers (TSOs) of local weights and measures authorities the powers to deal with offences relating to the counterfeiting and piracy of copyright material under sections 107 and 198 of the CDPA. These provisions complement the long established powers and duties of TSOs under the Trade Descriptions Act 1968 and Trade Marks Act 1994 to pursue and, in England and Wales, prosecute those who sell, manufacture or distribute counterfeit and pirated goods. In Scotland prosecutions will still be brought by the procurator fiscal and TSOs will not have the power to prosecute these offences. Instead they will report offences to the Crown Office and in doing so they will have to comply with the Crown Office's guidance for specialist reporting agencies.

The Chancellor announced as part of the pre-budget report in 2006, that additional money would be made available to local authorities for the purpose of enforcing these provisions.

The new powers relate to the following offences under the CDPA:

- Section 107 - makes it a criminal offence to make distribute, sell or distribute in the course of business an article which infringes the copyright of another – This covers items such as: CDs, DVDs, Video, publications, books and branded products (leisure and sportswear etc.)
- Section 198 – creates similar offences for recordings - this covers pirate or “bootleg” recordings, which infringe performers’ and owner’s rights.

Details of the legislation are available in Annex A.

An Aide-memoire notebook for Enforcers on IP Crime is published by the UK Intellectual Property Office and is available by contacting them at:

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The following provisions are hybrid offences for which a maximum sentence of ten years imprisonment and/or an unlimited fine are available by way of penalty on indictment:

Section 107, subsections (1)(a), (b), (d)(iv) and (e)
Section 198, subsections (1)(a), (b) and (d)(iii)

The remaining provisions are summary offences for which the maximum sentence is six months and/or a fine not exceeding the statutory maximum (currently £5000)

NOTES ON EVIDENCE REQUIRED:

In copyright related cases (unlike Trademark cases) it is necessary to prove that the suspect knew the goods in question were counterfeit or pirate.

It is necessary therefore to prove that the defendant was making or dealing with an article in a prohibited manner and evidence as to the mental state of the person charged. This may be done by providing:

(i) Evidence that a defendant made an article for sale or hire, e.g. by showing that the defendant had possession of or access to:

- manufacturing equipment;
- blank disks;
- master copies;
- price lists.

OR

(ii) Evidence that a defendant has dealt with the article in a prohibited manner, e.g.:

- by means of test purchase;
- observation at scene;
- admissions by defendant;
- inferences from circumstances of the seizure of goods.

AND

(iii) Evidence that the activity complained about took place in the course of a business, e.g.:

- multiple copies seized;
- commercial records;
- advertisements for the goods, including those advertisements which may appear on the Internet. This may result in the seizure of computer equipment;
- article(s) exhibited or exposed for sale on business premises.

AND

(iv) Evidence that the goods were infringing copies of copyright works:

- To obtain expert evidence enforcement officers should consult with rights owners.

AND

(v) Evidence that the copyright owner did not give permission in relation to the defendant's activity:

- To obtain expert evidence enforcement officers should consult with rights owners.

Note that in an interview a simple question such as "Has the owner of the copyright consented?" can also provide important evidence as to consent.

AND

(vi) Evidence that either:

- the defendant knew that the goods were counterfeit; or
- a reasonable person would have known that the goods were counterfeit.

Note that suitable questioning of the defendant may provide important evidence, e.g.:

- Where did he buy the goods and from whom?
- How much did he pay for the goods?
- Does he have any paperwork relevant to the purchase of the goods?
- How can he sell the goods so cheaply?

The poor quality of the goods in question may also be relevant. If genuine goods are being sold alongside pirate or counterfeit goods, the genuine goods may also be seized as relevant evidence to underline that the defendant must have known the goods were pirate or counterfeit.

The above requirements also apply to circumvention practice ("chipping").

Disclaimers

Disclaimers at the point of sale or signs such as 'Brand Copies', amount to an admission that the seller knew that the goods were counterfeit. Accordingly, may be appropriate to seize such signs.

Note: The law of evidence is different in Scotland. For guidance on evidence and on taking statements from witnesses see the Crown Office guide for specialist reporting agencies. [Contact Kathryn Farrell at the Crown Office, Tel: 0131 247 2668, email: Kathryn.Farrell@copfs.gsi.gov.uk]

GUIDANCE ON ENFORCEMENT OF OFFENCES UNDER SECTIONS 107 AND 198 OF THE CDPA

Sections 107A and 198A of the CDPA apply the following powers of trading standards officers under the Trade Descriptions Act 1968 to:

- section 27 (power to make test purchases)
- section 28 (power to enter premises and inspect and seize goods and documents)
- section 29 (obstruction of authorised officers), and
- section 33 (compensation for loss, &c of goods seized)

In England and Wales, section 67(9) of the Police and Criminal Evidence (PACE) Act 1984 requires that “Persons other than police officers who are charged with the duty of investigating offences or charging offenders shall in the discharge of that duty have regard to any relevant provisions of a [PACE] Code.” Under section 67(11) of PACE any failure to comply with the conditions of the Code can be taken into account by the court in considering the admissibility of evidence.

Trading Standards Officers are therefore reminded to ensure that powers are exercised in accordance with the relevant PACE Codes of Practice, for example:

PACE Code B

- entering premises and / or seizing evidence on the basis of reasonable suspicion or belief (under section 28(1)(b) to (d) of the Trade Descriptions Act 1968).
- applying for and executing search warrants (under section 28(3) to (4) of the Trade Descriptions Act 1968)

PACE Code C

- questioning suspects

PACE Codes E and F

- recording interviews with suspects

Note – Paragraph 2.5 of PACE Code B states that “This Code does not apply to the exercise of a statutory power to enter premises or to inspect goods, equipment or procedures if the exercise of that power is not dependent on the existence of grounds for suspecting that an offence may have been committed and the person exercising the power has no reasonable grounds for such suspicion”. Therefore although the power of entry for inspection (under section 28(1)(a) of the Trade Descriptions Act 1968 is not covered by the PACE Codes officers should consider applying the provisions of PACE Code B to ensure that powers of inspection are exercised fairly and in a non-discriminatory manner. Supervisory officers should take particular care to ensure that powers of entry for inspection are exercised appropriately and should take positive action whenever they have concerns around an individual officer’s exercise of the powers.

Copies of the PACE Codes referred to above can be accessed on the Home Office PACE Codes web page at:

<http://police.homeoffice.gov.uk/operational-policing/powers-pace-codes/pace-code-intro/>

PACE does not apply in Scotland but the Crown Office guidance for specialist reporting agencies sets out some of the requirements for evidence which need to be borne in mind when gathering evidence or questioning suspects..

Related Legislation:

Section 92 of the Trade Marks Act 1994
Section 296Z of the Copyright Designs and Patents Act (CDPA) 1988
The Trade Descriptions Act 1988
The Video Recordings Act 1984.

Copyright, etc. and Trade Marks (Offences and Enforcement) Act 2002
which deals with:

- Penalties for criminal offences
- Search warrants
- Forfeiture: infringing copies, etc.
- Forfeiture: illicit recordings
- Forfeiture: unauthorised decoders
- Search warrants

Copyright Designs and Patents Act 1988

Drawn from an unofficial consolidation.

107¹ Criminal liability for making or dealing with infringing articles &c

- (1) A person commits an offence who, without the licence of the copyright owner –
- (a) makes for sale or hire, or
 - (b) imports into the United Kingdom otherwise than for his private and domestic use, or
 - (c) possesses in the course of a business with a view to committing any act infringing the copyright, or
 - (d) in the course of a business –
 - (i) sells or lets for hire, or
 - (ii) offers or exposes for sale or hire, or
 - (iii) exhibits in public, or
 - (iv) distributes, or
 - (e) distributes otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright, an article which is, and which he knows or has reason to believe is, an infringing copy of a copyright work.
- (2) A person commits an offence who –
- (a) makes an article specifically designed or adapted for making copies of a particular copyright work, or
 - (b) has such an article in his possession, knowing or having reason to believe that it is to be used to make infringing copies for sale or hire or for use in the course of a business.
- (2A) A person who infringes copyright in a work by communicating the work to the public –
- (a) in the course of a business, or

¹ ss.107(2A) & (4A) added by SI 2003/2498. Maximum sentence set by s.107(4)(b) increased from the original two years to ten by the Copyright, etc. and Trade Marks (Offences and Enforcement) Act 2002.

- (b) otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright, commits an offence if he knows or has reason to believe that, by doing so, he is infringing copyright in that work.
- (3) Where copyright is infringed (otherwise than by reception of a communication to the public) –
- (a) by the public performance of a literary, dramatic or musical work, or
 - (b) by the playing or showing in public of a sound recording or film,
- any person who caused the work to be so performed, played or shown is guilty of an offence if he knew or had reason to believe that copyright would be infringed.
- (4) A person guilty of an offence under subsection (1)(a), (b), (d)(iv) or (e) is liable –
- (a) on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both;
 - (b) on conviction on indictment to a fine or imprisonment for a term not exceeding ten years, or both.
- (4A) A person guilty of an offence under subsection (2A) is liable –
- (a) on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding the statutory maximum, or both;
 - (b) on conviction on indictment to a fine or imprisonment for a term not exceeding two years, or both.
- (5) A person guilty of any other offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale, or both.
- (6) Sections 104 to 106 (presumptions as to various matters connected with copyright) do not apply to proceedings for an offence under this section; but without prejudice to their application in proceedings for an order under section 108 below.

107A² Enforcement by local weights and measures authority

- (1) It is the duty of every local weights and measures authority to enforce within their area the provisions of section 107.
- (2) The following provisions of the Trade Descriptions Act 1968 apply in relation to the enforcement of that section by such an authority as in relation to the enforcement of that Act –
- section 27 (power to make test purchases),
 - section 28 (power to enter premises and inspect and seize goods and documents),
 - section 29 (obstruction of authorised officers), and
 - section 33 (compensation for loss, &c. of goods seized).
- (3) Subsection (1) above does not apply in relation to the enforcement of section 107 in Northern Ireland, but it is the duty of the Department of Economic Development to enforce that section in Northern Ireland.
- For that purpose the provisions of the Trade Descriptions Act 1968 specified in subsection (2) apply as if for the references to a local weights and measures authority and any officer of such an authority there were substituted references to that Department and any of its officers.
- (4) Any enactment which authorises the disclosure of information for the purpose of facilitating the enforcement of the Trade Descriptions Act 1968 shall apply as if section 107 were contained in that Act and as if the functions of any person in relation to the enforcement of that section were functions under that Act.
- (5) Nothing in this section shall be construed as authorising a local weights and measures authority to bring proceedings in Scotland for an offence.

² s.107A added by the Criminal Justice and Public Order Act 1994

108 Order for delivery up in criminal proceedings

- (1) The court before which proceedings are brought against a person for an offence under section 107 may, if satisfied that at the time of his arrest or charge –
- (a) he had in his possession, custody or control in the course of a business an infringing copy of a copyright work, or
 - (b) he had in his possession, custody or control an article specifically designed or adapted for making copies of a particular copyright work, knowing or having reason to believe that it had been or was to be used to make infringing copies, order that the infringing copy or article be delivered up to the copyright owner or to such other person as the court may direct.
- (2) For this purpose a person shall be treated as charged with an offence –
- (a) in England, Wales and Northern Ireland, when he is orally charged or is served with a summons or indictment;
 - (b) in Scotland, when he is cautioned, charged or served with a complaint or indictment.
- (3) An order may be made by the court of its own motion or on the application of the prosecutor (or, in Scotland, the Lord Advocate or procurator-fiscal), and may be made whether or not the person is convicted of the offence, but shall not be made –
- (a) after the end of the period specified in section 113 (period after which remedy of delivery up not available), or
 - (b) if it appears to the court unlikely that any order will be made under section 114 (order as to disposal of infringing copy or other article).
- (4) An appeal lies from an order made under this section by a magistrates' court –
- (a) in England and Wales, to the Crown Court, and
 - (b) in Northern Ireland, to the county court; and in Scotland, where an order has been made under this section, the person from whose possession, custody or control the infringing copy or article has been removed may, without prejudice to any other form of appeal under any rule of law, appeal against that order in the same manner as against sentence.
- (5) A person to whom an infringing copy or other article is delivered up in pursuance of an order under this section shall retain it pending the making of an order, or the decision not to make an order, under section 114.
- (6)³ Nothing in this section affects the powers of the court under section 143 of the Powers of Criminal Courts (Sentencing) Act 2000, Part II of the Proceeds of Crime (Scotland) Act 1995 or Article 11 of the Criminal Justice (Northern Ireland) Order 1994 (general provisions as to forfeiture in criminal proceedings).

109⁴ Search warrants

- (1) Where a justice of the peace (in Scotland, a sheriff or justice of the peace) is satisfied by information on oath given by a constable (in Scotland, by evidence on oath) that there are reasonable grounds for believing –

³ References to the Powers of Criminal Courts (Sentencing) Act 2000 and Criminal Justice (Northern Ireland) Order 1994 inserted by those enactments, and reference to the Proceeds of Crime (Scotland) Act 1995 inserted by the Criminal Procedure (Consequential Provisions) (Scotland Act) 1995, in place of original references to earlier legislation.

⁴ Reference in s.109(1)(a) to ss.107(1) or (2) substituted by the Copyright etc. and Trade Marks (Offences and Enforcement) Act 2002 (replacing original reference to ss. 107(1)(a), (b), (d)(iv) or (e)). That Act also added the reference to s.107(2) in s.109(4), and the words “fixed or” before “moveable” in s.109(5). References to s.107(2A) in ss.109(1)(a) & (4) inserted by SI 2003/2498. ss.107(2A) & (4A) added by SI 2003/2498. Maximum sentence set by s.107(4)(b) increased from the original two years to ten by the Copyright, etc. and Trade Marks (Offences and Enforcement) Act 2002.

- (a) that an offence under section 107(1), (2) or (2A) has been or is about to be committed in any premises, and
 - (b) that evidence that such an offence has been or is about to be committed is in those premises, he may issue a warrant authorising a constable to enter and search the premises, using such reasonable force as is necessary.
- (2) The power conferred by subsection (1) does not, in England and Wales, extend to authorising a search for material of the kinds mentioned in section 9(2) of the Police and Criminal Evidence Act 1984 (certain classes of personal or confidential material).
- (3) A warrant under this section –
- (a) may authorise persons to accompany any constable executing the warrant, and
 - (b) remains in force for 28 days from the date of its issue.
- (4) In executing a warrant issued under this section a constable may seize an article if he reasonably believes that it is evidence that any offence under section 107(1), (2) or (2A) has been or is about to be committed.
- (5) In this section "premises" includes land, buildings, fixed or moveable structures, vehicles, vessels, aircraft and hovercraft.

110 Offence by body corporate: liability of officers

- (1) Where an offence under section 107 committed by a body corporate is proved to have been committed with the consent or connivance of a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.
- (2) In relation to a body corporate whose affairs are managed by its members "director" means a member of the body corporate.

198⁵ Criminal liability for making, dealing with or using illicit recordings

- (1) A person commits an offence who without sufficient consent –
- (a) makes for sale or hire, or
 - (b) imports into the United Kingdom otherwise than for his private and domestic use, or
 - (c) possesses in the course of a business with a view to committing any act infringing the rights conferred by this Part, or
 - (d) in the course of a business –
 - (i) sells or lets for hire, or
 - (ii) offers or exposes for sale or hire, or
 - (iii) distributes, a recording which is, and which he knows or has reason to believe is, an illicit recording.
- (1A) A person who infringes a performer's making available right –
- (a) in the course of a business, or
 - (b) otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the making available right, commits an offence if he knows or has reason to believe that, by doing so, he is infringing the making available right in the recording.
- (2) A person commits an offence who causes a recording of a performance made without sufficient consent to be –
- (a) shown or played in public, or
 - (b) communicated to the public,

⁵ 122 s.198A added by Criminal Justice and Public Order Act 1994.

thereby infringing any of the rights conferred by this Part, if he knows or has reason to believe that those rights are thereby infringed.

- (3) In subsections (1) and (2) "sufficient consent" means –
- (a) in the case of a qualifying performance, the consent of the performer, and
 - (b) in the case of a non-qualifying performance subject to an exclusive recording contract –
 - (i) for the purposes of subsection (1)(a) (making of recording), the consent of the performer or the person having recording rights, and
 - (ii) for the purposes of subsection (1)(b), (c) and (d) and subsection (2) (dealing with or using recording), the consent of the person having recording rights.

The references in this subsection to the person having recording rights are to the person having those rights at the time the consent is given or, if there is more than one such person, to all of them.

(4) No offence is committed under subsection (1) or (2) by the commission of an act which by virtue of any provision of Schedule 2 may be done without infringing the rights conferred by this Part.

- (5) A person guilty of an offence under subsection (1)(a), (b) or (d)(iii) is liable –
- (a) on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both;
 - (b) on conviction on indictment to a fine or imprisonment for a term not exceeding ten years, or both.

- (5A) A person guilty of an offence under subsection (1A) is liable –
- (a) on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding the statutory maximum, or both;
 - (b) on conviction on indictment to a fine or imprisonment for a term not exceeding two years, or both.

(6) A person guilty of any other offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale or imprisonment for a term not exceeding six months, or both.

198A Enforcement by local weights and measures authority

(1) It is the duty of every local weights and measures authority to enforce within their area the provisions of section 198.

(2) The following provisions of the Trade Descriptions Act 1968 apply in relation to the enforcement of that section by such an authority as in relation to enforcement of that Act –

- section 27 (power to make test purchases),
- section 28 (power to enter premises and inspect and seize goods and documents),
- section 29 (obstruction of authorised officers), and
- section 33 (compensation for loss, &c. of goods seized).

(3) Subsection (1) above does not apply in relation to the enforcement of section 198 in Northern Ireland, but it is the duty of the Department of Economic Development to enforce that section in Northern Ireland.

For that purpose the provisions of the Trade Descriptions Act 1968 specified in subsection (2) apply as if for references to a local weights and measures authority and any officer of such an authority there were substituted references to that Department and any of its officers.

(4) Any enactment which authorises the disclosure of information for the purpose of facilitating the enforcement of the Trade Descriptions Act 1968 shall apply as if section 198 were contained in that Act and as if the functions of any person in relation to the enforcement of that section were functions under that Act.

(5) Nothing in this section shall be construed as authorising a local weights and measures authority to bring proceedings in Scotland for an offence.

199 Order for delivery up in criminal proceedings

(1) The court before which proceedings are brought against a person for an offence under section 198 may, if satisfied that at the time of his arrest or charge he had in his possession, custody or control in the course of a business an illicit recording of a performance, order that it be delivered up to a person having performers' rights or recording rights in relation to the performance or to such other person as the court may direct.

(2) For this purpose a person shall be treated as charged with an offence –
(a) in England, Wales and Northern Ireland, when he is orally charged or is served with a summons or indictment;
(b) in Scotland, when he is cautioned, charged or served with a complaint or indictment.

(3) An order may be made by the court of its own motion or on the application of the prosecutor (or, in Scotland, the Lord Advocate or procurator-fiscal), and may be made whether or not the person is convicted of the offence, but shall not be made –
(a) after the end of the period specified in section 203 (period after which remedy of delivery up not available), or
(b) if it appears to the court unlikely that any order will be made under section 204 (order as to disposal of illicit recording).

(4) An appeal lies from an order made under this section by a magistrates' court –
(a) in England and Wales, to the Crown Court, and
(b) in Northern Ireland, to the county court; and in Scotland, where an order has been made under this section, the person from whose possession, custody or control the illicit recording has been removed may, without prejudice to any other form of appeal under any rule of law, appeal against that order in the same manner as against sentence.

(5) A person to whom an illicit recording is delivered up in pursuance of an order under this section shall retain it pending the making of an order, or the decision not to make an order, under section 204.

(6)⁶ Nothing in this section affects the powers of the court under section 143 of the Powers of Criminal Courts (Sentencing) Act 2000, Part II of the Proceeds of Crime (Scotland) Act 1995 or Article 11 of the Criminal Justice (Northern Ireland) Order 1994 (general provisions as to forfeiture in criminal proceedings).

200⁷ Search warrants

(1) Where a justice of the peace (in Scotland, a sheriff or justice of the peace) is satisfied by information on oath given by a constable (in Scotland, by evidence on oath) that there are reasonable grounds for believing –
(a) that an offence under section 198(1) or (1A) (offences of making, importing, possessing, selling etc. or distributing illicit recordings) has been or is about to be committed in any premises, and

⁶ References to the Powers of Criminal Courts (Sentencing) Act 2000 and Criminal Justice (Northern Ireland) Order 1994 inserted by those enactments, and reference to the Proceeds of Crime (Scotland) Act 1995 inserted by the Criminal Procedure (Consequential Provisions) (Scotland) Act, in place of original references to earlier legislation.

⁷ Reference in s.200(1)(a) to s.198(1) substituted by the Copyright etc. and Trade Marks (Offences and Enforcement) Act 2002 (replacing original reference to ss. 198(1)(a), (b) or (d)(iii)). Words “possessing, selling etc.” in s.200(1)(a), and s.200(3A), added by that Act. References to s.198(1A) in ss.200(1)(a) & (3A) added by SI 2003/2498.

- (b) that evidence that such an offence has been or is about to be committed is in those premises,
- he may issue a warrant authorising a constable to enter and search the premises, using such reasonable force as is necessary.
- (2) The power conferred by subsection (1) does not, in England and Wales, extend to authorising a search for material of the kinds mentioned in section 9(2) of the Police and Criminal Evidence Act 1984 (certain classes of personal or confidential material).
- (3) A warrant under subsection (1) –
- (a) may authorise persons to accompany any constable executing the warrant, and
 - (b) remains in force for 28 days from the date of its issue.
- (3A) In executing a warrant issued under subsection (1) a constable may seize an article if he reasonably believes that it is evidence that any offence under section 198(1) or (1A) has been or is about to be committed.
- (4) In this section "premises" includes land, buildings, fixed or moveable structures, vehicles, vessels, aircraft and hovercraft.

201 False representation of authority to give consent

- (1) It is an offence for a person to represent falsely that he is authorised by any person to give consent for the purposes of this Part in relation to a performance, unless he believes on reasonable grounds that he is so authorised.
- (2) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale or both.

202 Offence by body corporate: liability of officers

- (1) Where an offence under this Part committed by a body corporate is proved to have been committed with the consent or connivance of a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.
- (2) In relation to a body corporate whose affairs are managed by its members "director" means a member of the body corporate.