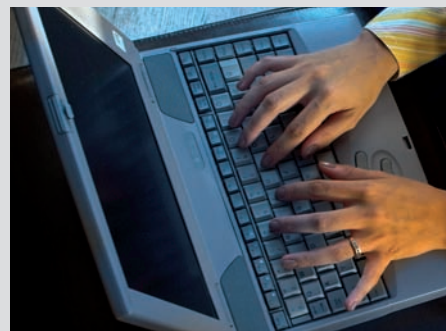


# Taking Forward the Gowers Review of Intellectual Property

## Penalties for Copyright Infringement



A consultation paper issued by the United Kingdom Intellectual Property Office on behalf of  
the Minister of State for Innovation Universities and Skills

UK Intellectual Property Office is an operating name of the Patent Office



## CONTENTS

<b>EXECUTIVE SUMMARY</b>	<b>3</b>
<b>BACKGROUND – GOWERS REVIEW OF INTELLECTUAL PROPERTY</b>	<b>5</b>
<b>RESPONDING TO THIS CONSULTATION</b>	<b>8</b>
<b>THE ENFORCEMENT FRAMEWORK</b>	<b>9</b>
<b>CHANGES TO CRIMINAL SANCTIONS IN COPYRIGHT, DESIGNS AND PATENTS ACT 1988</b>	<b>12</b>
<b>ANNEX A: LIST OF ORGANISATIONS TO WHICH THE CONSULTATION HAS BEEN SENT</b>	<b>15</b>
<b>ANNEX B: CABINET OFFICE CODE OF PRACTICE ON CONSULTATIONS</b>	<b>17</b>
<b>ANNEX C: PARTIAL IMPACT ASSESSMENTS</b>	<b>19</b>
<b>ANNEX D: LIST OF QUESTIONS</b>	<b>24</b>

## EXECUTIVE SUMMARY

1. The Gowers Review of Intellectual Property (“the Gowers Review”) reported in December 2006. The Government announced, as part of the December Pre Budget Report, its intention to take forward the recommendations in the report. “Creative Britain: New Talents for the New Economy” (published by the Departments for Culture, Media and Sports (DCMS), Business, Enterprise and Regulatory Reform (BERR), and Innovation, Universities and Skills (DIUS) on 22 February included a commitment to consult on introducing exceptional summary maxima (above £5,000) in Magistrates’ Courts for offences of online and physical copyright infringement. Scotland does not have Magistrates’ Courts, therefore the consultation considers introducing exceptional summary maxima for Scottish summary courts that deal with equivalent cases in Scotland.
2. This consultation sets out the case for introducing such exceptional summary maxima, and your views are sought on the specific questions contained in the consultation.



## BACKGROUND

### THE GOWERS REVIEW OF INTELLECTUAL PROPERTY

3. The Gowers Review was commissioned by the Chancellor and the Secretaries of State for Trade and Industry, and Culture, Media and Sport in 2005. The Review was led by Andrew Gowers (former editor of the Financial Times) with assistance from a team of civil servants. The terms of reference for the Review were to consider:
  - the way in which government administers the awarding of IP and its support to consumers and business;
  - how well businesses are able to negotiate the complexity and expense of the IP system, including licensing and enforcement issues; and
  - whether the current IP infringement framework reflects the digital environment, and whether provisions for 'fair use' by citizens are reasonable.
4. Andrew Gowers presented his report to the Government in December 2006. The Government welcomed the report and announced, as part of the December Pre Budget Report, its intention to take forward the recommendations made to it. The report and supporting documents can be viewed on the Treasury website: [http://www.hm-treasury.gov.uk/independent\\_reviews/gowers\\_review\\_intellectual\\_property/gowersreview\\_index.cfm](http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/gowersreview_index.cfm)
5. The Gowers Review found the IP system to be performing "broadly satisfactorily". While not in need of a radical overhaul, the Review did find that aspects of the IP system should be reformed to serve better the interests of all users (business and consumers included). A number of recommendations were made to:
  - make aspects of the IP system clearer and fairer for consumers and other users of IP, by amending a number of exceptions to IP rights;
  - improve the enforcement regime, with more focus on IP crime and looking at the way disputes are handled;
  - reduce costs for business, by introducing streamlined processes for obtaining IP rights, greater IP awareness and innovation support services and putting more emphasis on alternative dispute resolution; and
  - ensure that IP policy is strategically formulated (including the establishment of a new Strategic Advisory Board for IP Policy).
6. The Gowers Review examined the penalties for a copyright offence:
 

"The penalty for a copyright offence depends on whether the infringement occurred online or not. In relation to those who commercially deal in infringing goods or those who distribute goods other than in the course of business to an extent which prejudicially affects the rights holder the maximum penalty is ten years imprisonment. In contrast, those who commit online infringement by communicating the work to the public (whether commercial or otherwise) may be sentenced to up to two years imprisonment. Finally, the commercial showing or playing in public of a work carries a maximum of six months imprisonment or a level five fine.

Several submissions have called for a change in the law to increase online infringement penalties to the levels of physical infringement. 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.”

7. The Gowers Review recommended (Recommendation 36) that the penalty for online commercial infringement<sup>1</sup> should be increased to ten years imprisonment to bring parity with commercially dealing (but not showing) in pirated works. It also proposed that the penalty for consumers infringing online<sup>2</sup> to an extent that prejudicially affects the rights holder should also be extended to ten years, again to bring parity with physical infringement. It should be noted that while the Gowers Review spoke of these offences in terms of ‘physical’ and ‘online’ offences the distinction in actual fact relates to the fact that the criminal implications that arise from infringing an exclusive right of a copyright owner varies according to the type of right that has been infringed rather than whether the work is in physical or online form as such. For example section 107(2A) of the Copyright, Designs and Patents Act 1988 which relates to the act of communicating to the public (one of the key rights relevant to the online world) has a lower sentence than the act of distributing copies of a work under section 107(1).
8. To follow up the publication of the Gowers Review the UK Intellectual Property Office (UK-IPO) and the Ministry of Justice have examined ways of taking forward Gowers Recommendation 36. In particular the investigations took account of current sentencing strategy. The Sentencing Guidelines Council was established by the Criminal Justice Act 2003, and its remit is to produce guidelines for all the courts in England and Wales.

These guidelines are intended to promote greater consistency in sentencing, to take into account cost and effectiveness in preventing re-offending. In response to Lord Carter of Coles’ prison review, Jack Straw set out current sentencing strategy (5 Dec 2007 <http://www.justice.gov.uk/news/newsrelease051207a.htm>):

“Prison is, and will remain, the right place for the most serious offenders. Custodial sentences, and therefore prison places, must also be available for less serious offenders when other measures have failed or are inappropriate.”

9. As recognised by the revised Magistrates’ Court sentencing guidelines, published on 12 May (see <http://www.sentencing-guidelines.gov.uk/docs/Magistrates%20Court%20Sentencing%20Guidelines.pdf> )

“Some offences are committed with the intention of gaining significant commercial benefit. .... In some of these cases, a fine based on the standard approach set out above may not reflect the level of financial gain achieved or sought through the offending. Accordingly:

- a. where the offender has generated income or avoided expenditure to a level that can be calculated or estimated, the court may wish to consider that amount when determining the financial penalty;”

1. *The offence under section 107(2A)(a) of the CDPA 1988*

2. *The offence under section 107(2A)(b) of the CDPA 1988*

10. Copyright offences are usually committed for financial gain, and the illegal profits can be substantial. However the CDPA 1988 currently restricts any fines awarded by the magistrates' courts to the maximum of level five fines (£5,000). Consequently our investigations concluded that introducing exceptional summary maxima fines would allow magistrates' courts to deal effectively with copyright offences as they would be able to award fines that took account of the illegal profits made from such offences. A proposal to consider the introduction of exceptional summary maxima was announced as part of Commitment 16 in "Creative Britain - New Talents for the New Economy" (published 22 February 2008 by DCMS, BERR and DIUS) which included:

"Copyright infringement is a serious economic crime. It is important that the penalties available are proportionate to the harm caused to UK industries and that they act as an effective deterrent. For this reason we intend to consult on introducing exceptional summary maxima (above £5,000) in the Magistrates' Courts for offences of online and physical copyright infringement."

11. The Gowers Review also looked at how the courts deal with IP cases:

"IP cases rarely come before magistrates and can raise novel points of law. Owing to the complexities of IP law, and increasing sophistication of the defence provided by IP infringers, judges and magistrates should have a good understanding of all aspects of IP law. Therefore, greater training specifically dedicated to this area would be beneficial."

**Recommendation 44: The Patent Office should consult with the Judicial Studies Board to determine the extent to which the complexity of IP law may give rise to a training need for judges and magistrates and their legal advisers."**

12. We are continuing to work with enforcement agencies and relevant interests to improve the training with regard to IP law provided. We need to ensure that the courts have a fuller appreciation of the complexities of IP law as well as ensuring they have appropriate offences to deal with IP crime.

### Scotland and Northern Ireland

13. The "Creative Britain – New Talents for the New Economy" stated that:

"Evidently, a number of the initiatives proposed here – such as the commitments designed to foster and protect intellectual property – will be implemented across the United Kingdom."

However there are significant differences in the legal frameworks, particularly between England and Wales, and Scotland.

14. The Sentencing Guidelines Council established by the Criminal Justice Act 2003 only extends to England and Wales. At present there is no equivalent system in Scotland or Northern Ireland. Also the Judicial Studies Board has no role outside of England and Wales. In Scotland the Judicial Studies Committee is the body responsible for judicial training in Scotland. The court structures in Scotland and Northern Ireland differ from those in England and Wales, but exceptional statutory maxima could be introduced for summary courts in Scotland and Northern Ireland as for England and Wales.

## RESPONDING TO THIS CONSULTATION

### THE FOCUS OF THIS CONSULTATION

15. This consultation paper is solely concerned with recommendation 36 of the Gowers Review which was aimed at aligning the UK copyright penalties as proposed in 'Creative Britain: New Talents for the New Economy'

### HOW AND WHEN TO RESPOND

16. We welcome comments from interested parties on the issues, suggested options and specific questions identified. We are particularly interested to receive evidence (including financial information where relevant) in support of your views as this will assist us in assessing the impact of the proposed changes. It is essential that we ensure that the benefits outweigh the costs before adopting a particular option.
17. Please send responses by 31 October 2008 to:

#### **Gowers 36 Consultation**

Copyright and Intellectual Property Enforcement Directorate  
UK Intellectual Property Office  
Concept House  
Cardiff Road  
Newport  
NP10 8QQ

Email: [gowers36consultation@ipo.gov.uk](mailto:gowers36consultation@ipo.gov.uk)

Fax: 0044 (0) 1633 814922

Tel: 0044 (0) 1633 814729

### WHO IS BEING CONSULTED?

18. Copies of this consultation document have been sent to the organisations listed in Annex A. Further copies, including large print and Braille versions, may be requested from the UK-IPO by contacting tel: 0044 (0) 1633 814729; e-mail:

[gowers36consultation@ipo.gov.uk](mailto:gowers36consultation@ipo.gov.uk)

19. This consultation document has been prepared in accordance with the Government Code of Practice on Written Consultations. If you have any comments or complaints about how this consultation process is being handled, please contact the UK-IPO Consultation Co-ordinator. Information on the Code of Practice and contact details for the Consultation Co-ordinator are set out in Annex B.



## THE ENFORCEMENT FRAMEWORK

### England and Wales

20. The Copyright, Designs and Patents Act 1988 specifies a number of offences for copyright infringement :
- s.107 – criminal liability for making or dealing with infringing articles etc;
  - s.198 – criminal liability for making, dealing with or using illicit recordings;
  - s.296ZB – devices and services designed to circumvent technological measures;
  - s.297 – offence of fraudulently receiving programmes;
  - s.297A – Unauthorised decoders.

Offences under s.107 and s.198 deal with “direct” copyright infringement, whereas s.296ZB, s.297 and s.297A essentially deal with copyright infringements that arise from the abuse of technology or technical devices.

21. The provisions in these sections provide for summary sentences (in magistrates’ courts) with the option of a prison sentence or a statutory maximum fine, sentence on indictment (in Crown Court) again with the option of imprisonment and/or an unlimited fine.

22. The latest sentencing guidelines provided for Magistrates’ Courts include a guideline on trade marks, but not for copyright. When the Advisory Group reviewed the guidelines they gave active consideration to including copyright offences, but decided against including them given the small numbers of copyright cases dealt with by the Magistrates’ Courts. In 2006 the Magistrates’ Courts sentenced 69 offenders under ss.107 and 198 of the Copyright, Designs and Patents Act 1988, a slight increase on the previous year, with 16 cases dealt with by the Crown Court. By comparison 604 offenders were dealt with in a magistrates’ court under the Trade Marks Act 1994, hence trade mark offences are specifically covered in the guidelines.

23. The discrepancy between the number of copyright and trade mark cases is perhaps not surprising given that trade mark law is perceived as a simpler law to apply that trade marks are a registered right and consequently the evidential burden is usually smaller for trade mark offences.

Also the courts may use other laws to deal with offenders such as the Video Recordings Act 1984 or Trade Descriptions Act 1968.

24. On conviction for an offence that is deemed to show a “criminal lifestyle” under the Proceeds of Crime Act (POCA) 2002, all assets and income acquired in the six years preceding conviction that cannot be legitimately accounted for are deemed to have been a benefit of that criminal lifestyle and, on application, can be seized by the courts. POCA defines the following intellectual property offences as lifestyle offences:

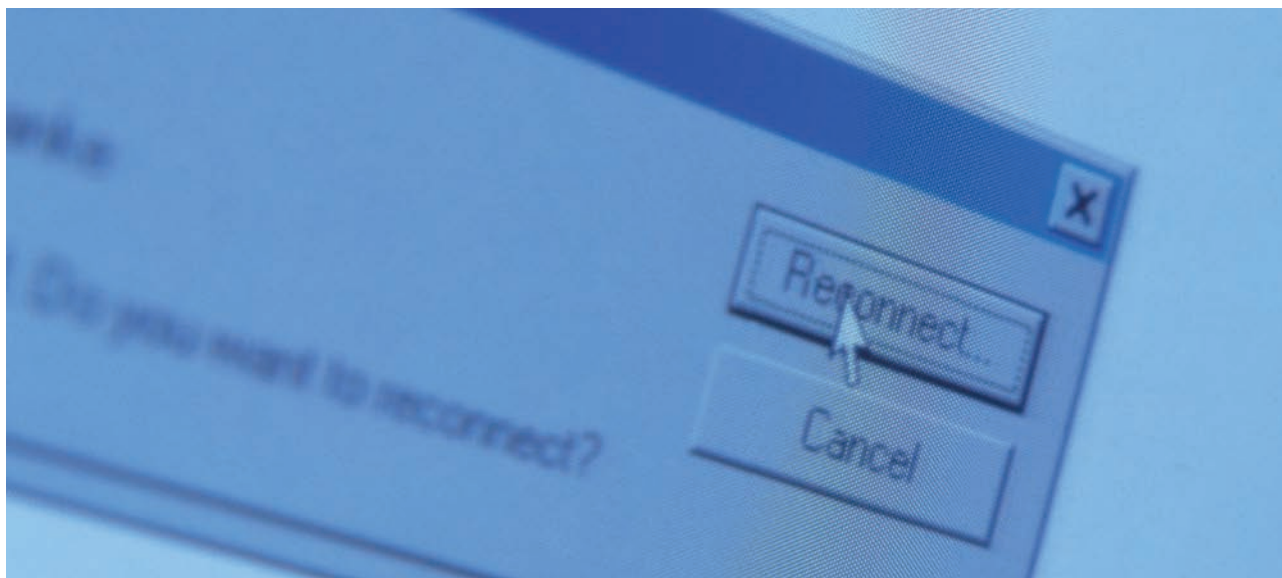
- CDPA 1988 s.107 (1) making or dealing in an article which infringes copyright;
- CDPA 1988 s.107 (2) making or possessing an article designed or adapting for making a copy of a copyright work;
- CDPA 1988 s.198 (1) making or dealing in an illicit recording;
- CDPA 1988 s.297A making or dealing in unauthorised decoders);
- TM Act 1994 s. 92(1), (2), (3) unauthorised use of trade mark.

## Scotland

25. The Copyright, Designs and Patents Act 1988 applies across the UK as does the Proceeds of Crime Act 2002, but Scotland has its own court structure. The lowest criminal courts in Scotland are the District/Justice of the Peace Courts. Their sentencing powers are limited to 60 days imprisonment or a Level 4 fine. Next in the hierarchy is the Sheriff court sitting as a court of summary jurisdiction. That court can impose imprisonment for up to 12 months or a fine not exceeding the statutory maximum of £10,000 (for triable either way offences). The Sheriff Court can also sit as a court of solemn jurisdiction, with a jury, in which case the sentencing powers are up to 5 years and an unlimited fine. The most senior court is the High Court of Justiciary, which can impose up to life imprisonment and an unlimited fine. Most copyright cases are dealt with by the Sheriff summary court.

## INTERNATIONAL AND EUROPEAN LAW

26. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) sets the essential standard for IP criminal sanctions. It includes an article on criminal procedures (Article 61):



Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.

27. Our law complies with the TRIPS agreement as does the laws of other member states in the European Community. The implementation (SI 2003no. 2498 The Copyright and Related Rights Regulations 2003) of the Information Society Directive (2001/29/EC) introduced two new offences (s.107(2A) and s.296ZB – see annex B). The European Commission have proposed a Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights (COM(2006) 168 Final). The European Parliament has adopted its First Reading report on this Directive and there has been some discussion in the relevant Council Working Group. However in their judgment in C-440/05 Ship Source Pollution the European Court of Justice confirmed our view that the present EC Treaty does not give the Commission the necessary powers to propose COM(2006) 168 Final. There has been no recent discussion of this proposed Directive in the relevant Council Working Group in Brussels.

## EUROPEAN CONVENTION ON HUMAN RIGHTS

28. Ministers will be required to make a statement in accordance with section 19 of the Human Rights Act 1998 that the provisions of any amending instrument are, in their view, compatible with the European Convention on Human Rights (“ECHR”). The primary relevant ECHR consideration is whether Article 1, Protocol 1 ECHR is engaged. We will need to consider this once the proposals are developed following this consultation and will comment further when we consult on the draft statutory instrument. The introduction of a £50,000 exceptional statutory maxima for all copyright offences (option 2) could be seen as a “one size fits all” approach. But this maxima is only intended as an upper limit and it is expected that the court will calculate the fine for a particular case based on illegal profits made from the offence.

## CHANGES TO CRIMINAL SANCTIONS IN COPYRIGHT, DESIGNS AND PATENTS ACT 1988

### RECOMMENDATION 36

#### THE PROPOSAL

29. As stated in “Creative Britain: New Talents of the New Economy” the proposal is to consult on the introduction of exceptional summary maxima (above £5,000) in the Magistrates’ Courts for offences of online and physical copyright infringement. The Copyright, Designs and Patents Act 1988 specifies a number of offences for copyright and related rights infringement:

- s.107 – criminal liability for making or dealing with infringing articles etc;
- s.198 – criminal liability for making, dealing with or using illicit recordings;
- s.296ZB – devices and services designed to circumvent technological measures;
- s.297 – offence of fraudulently receiving programmes;
- s.297A – Unauthorised decoders.

Gowers Recommendation 36 referred to matching the penalties for online and physical copyright infringement. This was a response to the offences arising from “online communication of copyright material to the public”. However this consultation is taking a somewhat broader approach by considering whether consistent and appropriate sentences are provided for intellectual property offences by the Magistrates’ Courts or Sheriffs’ Summary Courts in Scotland.

30. Offences to deal with counterfeiting are provided by s.92 of the Trade Marks Act 1994, a person guilty of such an offence is liable to:
- on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both;
  - on conviction on indictment to a fine or imprisonment for a term not exceeding ten years or both.

31. Although there is variation in the penalties for the various offences in the CDPA 1988 and TMA 1994, the Proceeds of Crime Act 2002 (POCA) does provide a means for courts to deprive offenders of the profits from such crimes which are usually committed for economic gain. When applying fines the courts do not usually have the powers to investigate what assets an offender has. However POCA does provide such powers although it carries the overhead of an additional court procedure over and above proceedings to deal with the IP offence. As reported in our Intellectual Property Crime Report 2007, trading standards are making increasing use of POCA. There is a Government incentivisation scheme in which one third of all the assets seized under POCA go back to the investigating authority for reinvestment in further appropriate enforcement activities. POCA work does need to be supported by an Accredited Financial Investigator. A key aspect of POCA is establishing whether a person has a criminal lifestyle. This determines whether the defendant is subject to the confiscation of the benefit from his criminal conduct. The criminal lifestyle regime is based on the principle that an offender who appears to be living off crime should be required to account for his assets, and that these should be confiscated if he is unable to account for their lawful origin. A person has a criminal lifestyle if he satisfies one or more of the tests set out in POCA:

- s.297A – Unauthorised decoders.
- convicted of an offence specified in POCA which include s.107(1), 107(2), 198(1) and 297A of the CDPA 1988 and s.92(1),(2),(3) of TMA 1994;
- convicted of an offence of any description, provided it is committed over a period of at least six months and he obtained not less than £5,000 from that offence and/or any others taken into consideration by the court;
- that the defendant is convicted of a combination of offences amounting to “a course of criminal activity”.

POCA enables the courts to seize the profits of IP crime whereas courts have very limited powers to seize assets when they award fines under the CDPA 1988 or TMA 1994. If the offences are dealt with by the Magistrates Court, then the case must be sent to the Crown Court to activate the POCA authority.

### **OPTION 1 – MAKE NO CHANGE TO THE LAW**

32. POCA provides a powerful means to seize the profits from IP crime and to punish the offenders. However not all the offences in the CDPA 1988 are listed as lifestyle offences for the purposes of POCA, in particular s.107(2A) and s.198(1A) are not included which deal with online offences. Penalties do not need to be listed as lifestyle offences for POCA to apply.

### **QUESTION**

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

33. All of these offences make provision for it to be dealt with by summary conviction or conviction on indictment. The summary convictions allow for imprisonment and/or a fine, but the fines are restricted to the statutory maxima (£5,000 in England, Wales and Northern Ireland, and £10,000 in Scotland). All of these offences are usually committed for economic gain and the courts need to take account of the “economic nature” of copyright offences when awarding sentences.

### **OPTION 2: INTRODUCE EXCEPTIONAL STATUTORY MAXIMA OF £50,000 FOR COPYRIGHT OFFENCES**

34. The thrust of recommendation 36 of the Gowers Review was to match penalties for online and physical copyright infringement, and introducing exceptional statutory maxima for all offences in the CDPA 1988 would provide a common basis for the courts to deal with copyright crime. Setting the maxima at £50,000 for all offences in the CDPA 1988 which are tried summarily would allow courts to take account of the “profit” that an offender has made from his crimes. However many fines are likely to be well below £50,000 and an alternative approach would be to set more than one level of fine for the various offences.

## QUESTION

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

35. Setting the exceptional statutory maxima at £50,000 for all the offences would allow the courts the scope to take full account of the profits made from the offence. We can see no particular reason for setting varying levels of exceptional statutory maxima for the different offences in the CDPA, but we expect the courts to set the fine based on the facts of the case (particularly the profit made or expected from the offence committed). Varying exceptional statutory maxima could be set for the different offences, but there is no particular need to do this given we expect the fine awarded by court to be based on the facts of the case ie. what profits were made.

## QUESTION

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

36. The aim of this consultation is to consider the introduction of exceptional summary maxima to improve the effectiveness of copyright offences currently included in the CDPA. However it would be useful to have any general comments on the effectiveness of the copyright offences and the sentences awarded by the courts to deal with such crimes.

## QUESTION

**Do you have any general comments on how the magistrates' courts or sheriffs' courts (in Scotland) deal with copyright offences?**

37. Different levels of exceptional statutory maxima could be introduced for the various offences in the CDPA 1988. However this could be an unnecessary complication given that one level of exceptional summary maxima for all offences would allow courts to assess the "economic gain" to an offender from a particular offence and to award an appropriate fine.

## QUESTION

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

**OPTION 3: INTRODUCE EXCEPTIONAL STATUTORY MAXIMA OF £50,000 FOR ALL IP OFFENCES**

38. Many prosecutions are often against goods that both incur copyright and trade mark offences. It can also be easier and more effective to apply trade mark offences rather than copyright offences. Given that trade marks are a registered right, the evidence requirements to take forward a case are often more straight-forward. This is reflected in the statistics (see para 22). Again for this option it might be appropriate to apply different maxima for different offences. However setting a maxima of £50,000 for all offences will allow the courts to take full account of the "profits" made by an offender from his crimes and award an appropriate fine.

## QUESTION

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

## ANNEX A

### LIST OF ORGANISATIONS TO WHICH THE CONSULTATION HAS BEEN SENT

Advertising Producers Association	British Music Rights
	British Screen Advisory Council
Alliance Against IP Theft	British Sky Broadcasting
	British Telecommunications PLC
Alternative Investigations Management Ltd	British Video Association
Anti Copying in Design	British Web Design and Marketing Association
Anti-Counterfeiting Group	Broadcasting, Entertainment, Cinematograph & Theatre Union
Arts Council of England	Business Application Software Developers Association
Arts Council of Northern Ireland	Business in the Community
Arts Council of Wales	Business Software Alliance
Association for Learning Technology	Cabinet Office
Association of the British Pharmaceutical Industry	Channel Four Television
Association of Chief Police Officers	Channel 5 Broadcasting
Association of Chief Police Officers Scotland	Chartered Institute of Journalists
Association of Learned and Professional Society Publishers	Christian Copyright Licensing International (Europe)
Association of Online Publishers UK	Cinema Exhibitors Association
Association of Photographers	Confederation of British Industry
Association of United Recording Artists	Consumers Association
Authors' Licensing & Collecting Society	Convention of Scottish Local Authorities
Bar Council	Copyright Licensing Agency
BECTA	Copyright Promotions Licensing Group
BPI ( British Music Industry) Ltd	Crown Prosecution Service
Bridgeman Art Library	Crown Office and the Procurator Fiscal Service
British Academy of Composers & Songwriters	CyMAL
British Art Market Federation	Defence Procurement Agency
British Association of Picture Libraries & Agencies	Department for Business, Enterprise & Regulatory Reform
British Association of Record Dealers	Department of Culture Media & Sport
British Broadcasting Corporation	Design & Artists Copyright Society
British Chamber of Commerce	Digital Content Forum
British Computer Society	Directors & Producers Rights Society
British Copyright Council	Doshisha University, Japan
British Equity Collecting Society	Educational Recording Agency Ltd
British Interactive Media Association	Educational Software Publishers Association
British Library	Entertainment & Leisure Software Publishers Association
British Literary and Artistic Copyright Association	European Informatics Market

European Publishers Council	Open Rights Group
Federation Against Copyright Theft	Palan Music Publishing
Federation Against Software Theft	Periodical Publishers Association
Federation of Small Businesses	Phonographic Performance Ltd
Film Distributors Association	Producers Alliance for Cinema & Television
Freshfields, Bruckhaus, Deringer	Public Lending Right Office
Guild HE	Publishers Association
HE Academy	Publishers Lending Society
Her Majesty's Revenue & Customs	REACT Services (UK) Ltd
Her Majesty's Treasury	Rivers Consultancy
Incorporated Society of Musicians	Scotland Office
Information & Communications Industry Association	Scottish Art Council
Institute of Practitioners in Advertising	Scottish Consumer Council
Intellect	Scottish Executive
Intellectual Property Institute	Society of Chief Officers of Trading Standards in Scotland
International Visual Communication Association	The Advertising Association
Internet Service Providers Association (UK)	TIGA
ITV	
Joint Information Systems Committee	Trading Standards Institute
Law Society of England & Wales	UK Film Council
Law Society of Northern Ireland	UK Media Monitoring Association
Law Society of Scotland	Universities UK
Library & Archive Copyright Alliance	University and College Union
Local Government Association	University for Industry
Mechanical-Copyright Protection Society –Performing Right Society Alliance	Video Performance Limited
Macrovision UK Ltd	Welsh Local Government Association
Motion Picture Association	Welsh Assembly Government
Motion Picture Licensing Company (International) Ltd	Writers Guild of Great Britain
Museum Documentation Association	
Museums Copyright Group	
Music Publishers Association	
Music Users Council of Europe	
Musicians Union	
National Consumer Council	
Newspaper Licensing Agency	
Newspaper Society	
Office of Public Sector Information	

## ANNEX B CABINET OFFICE CODE OF PRACTICE ON CONSULTATIONS

### THE SIX CONSULTATION CRITERIA

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation coordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

### COMMENTS ABOUT THE CONSULTATION PROCESS

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation is being conducted, please contact the Office's Consultation Co-ordinator, who is:

**Geoff Miller**  
Consultation Co-ordinator  
UK Intellectual Property Office  
Concept House  
Cardiff Road  
Newport  
South Wales  
NP10 8QQ

E-mail: [consultations@ipo.gov.uk](mailto:consultations@ipo.gov.uk)  
Fax: 0044 (0)1633 814232  
Tel: 0044 (0)1633 811195

## Important note regarding publication of responses

Information provided in response to this consultation will be dealt with in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations (2004). Please refer to the accompanying Guidance on the Code of Practice on Consultation <http://www.berr.gov.uk/regulation/consultation/index.asp> for more information.

According to the requirements of the Freedom of Information Act (2000), all information contained in the responses including personal information may be subject to publication or disclosure. Where respondents request that information given in response to the consultation be kept confidential, this will only be possible if it is consistent with freedom of information obligations.

A request for confidentiality from a respondent will not be enough to guarantee confidentiality. Where respondents specifically request confidentiality, this can only be agreed if it is consistent with the Secretary of State for Constitutional Affairs' Code of Practice on the Discharge of Public Authorities' Functions under Part 1 of FOIA <http://www.foi.gov.uk/reference/impref/codepafunc.htm> .

ANNEX C -  
PARTIAL IMPACT ASSESSMENTS

Summary: Intervention & Options		
Department /Agency: UK Intellectual Property Office	Title: Impact Assessment of Penalties for Copyright Infringement	
Stage: Consultation	Version: 1	Date: 2008
Related Publications: The Gowers Review of Intellectual Property; Creative Britain: New Talents for the New Economy		

Available to view or download at:

[http://www.hm-treasury.gov.uk/independent\\_reviews/gowers\\_review\\_intellectual\\_property/gowersreview\\_index.cfm](http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/gowersreview_index.cfm)

Contact for enquiries:

Telephone: 01633 814729

**What is the problem under consideration? Why is government intervention necessary?**

Copyright infringement is a serious economic crime. It is important that the penalties available are proportionate to the harm caused to UK industries and that they act as an effective deterrent. The Gowers Review pointed to the inconsistencies in the current penalties for online and physical copyright infringement.

**What are the policy objectives and the intended effects?**

To ensure that the courts award effective penalties in particular for online copyright offences given the increased opportunities that technology offers. Copyright offences are usually committed for economic gain and we need to ensure that the courts have effective remedies to deny offenders the profits of their crimes.

**What policy options have been considered? Please justify any preferred option.**

1. No change to copyright law.
2. Introduce exceptional statutory maxima for all copyright offences in the Copyright, Designs, and Patents Act 1988 (CDPA). This would provide the means for magistrates' courts to deal appropriately with such offences by awarding fines that punish the profit made from copyright offences.
3. Introduce exceptional statutory maxima for all IP offences.

**When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?**

As policy development is at an early stage, no date for review has been set.

**Ministerial Sign-off** For consultation stage Impact Assessments:

*I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.*

**Signed by the responsible Minister:**

.....Date:

## Summary: Analysis & Evidence

Policy Option:

Description: Penalties for Copyright Infringement

COSTS	ANNUAL COSTS		Description and scale of <b>key monetised costs</b> by 'main affected groups' As set out in "Creative Britain – New Talents for the New Economy", IP infringement is a significant cost to the creative economy (and other sectors): -The British Video Association estimated that the cost of pirate audio-visual goods and illegal downloads amounted to £460million in 2006; -The International Federation of Phonographic Industries estimated the trade in pirate discs was worth \$4.5 billion globally in 2005 with almost 20 billion tracks illegally swapped or downloaded in 2005; -The OECD reported that approximately \$200 billion worth of counterfeit goods were seized across national borders in 2005. But the actual trade value of these goods is likely to have been several hundred billion dollars more; -A recent study by Centre for Medicines in Public Interest forecasts global sales of counterfeit prescription drugs is set to reach \$75 billion by 2010.
	One-off	Yrs	
	£		
	Average Annual Cost (excluding one-off)		
£		<b>Total Cost (PV)</b>	£
Other <b>key non-monetised costs</b> by 'main affected groups'			
BENEFITS	ANNUAL BENEFITS		Description and scale of <b>key monetised benefits</b> by 'main affected groups' The Business Software Alliance and International Data Corporation Software Report for 2006 estimated that a 10% reduction in software piracy in the UK would generate 30,000 jobs and contribute £11 billion to the official economy.
	One-off	Yrs	
	£		
	Average Annual Benefit (excluding one-off)		
£		<b>Total Benefit (PV)</b>	£
Other <b>key non-monetised benefits</b> by 'main affected groups'			

### Key Assumptions/Sensitivities/Risks

Price Base	Time Period	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £

What is the geographic coverage of the policy/option?	UK			
On what date will the policy be implemented?	2009			
Which organisation(s) will enforce the policy?	Magistrates Courts, Sheriffs courts			
What is the total annual cost of enforcement for these organisations?	£			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	Yes/No			
What is the value of the proposed offsetting measure per year?	£			
What is the value of changes in greenhouse gas emissions?	£			
Will the proposal have a significant impact on competition?	Yes/No			
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A

**Impact on Admin Burdens Baseline (2005 Prices)**

(Increase - Decrease)

Increase of £                      Decrease of £                      Net Impact £

Key:	Annual costs and benefits:	(Net) Present
------	----------------------------	---------------

## Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

### **Background**

The Gowers Review identified that the Copyright, Designs and Patents Act 1988 (“CDPA”) currently does not provide fair and adequate penalties for copyright offences. In relation to those who commercially deal in infringing goods or those who distribute goods other than in the course of business to an extent which prejudicially affects the rights holder the maximum penalty is ten years imprisonment. In contrast, those who commit online infringement by communicating the work to the public (whether commercial or otherwise) may be sentenced to up to two years imprisonment. The commercial showing or playing in public of a work carries a maximum of six months imprisonment or a level five fine. In response to several submissions, the Gowers Review proposed that penalties for online and physical copyright infringement should be consistent. “Creative Britain- New Talents for the New Economy” (published on 22 Feb 2008 by the Department for Culture, Media and Sport, the Department for Business, Enterprise and Regulatory Reform, and the Department for Innovation, Universities & Skills) referred to our intention to consult on introducing exceptional summary maxima (above £5,000) in the Magistrates’ Courts for offences of online and physical copyright infringement.

### **The Problem**

The current law does not provide consistent penalties to deal with online and physical copyright infringement. Copyright infringement is a serious economic crime. It is important that the penalties available are proportionate to the harm caused to UK industries and that they act as an effective deterrent.

### **The Policy Objective**

The intended effect of these changes is to allow the courts to deal effectively with copyright infringement (particularly online infringement). Copyright offences are usually committed for economic gain and the courts need to be able to award appropriate fines to deprive offenders of the profits from such offences.

### **Impacts**

Three distinct groups would be affected by such changes:

- 1. Rights owners**
- 2. Consumers**
- 3. Courts**

### ***Specific Impact Tests***

The Gowers Review provided the basic evidence for revising the IP offences dealing with online infringement. Further evidence from the various stakeholders will be requested as part of the consultation.

### **Request for evidence**

As policy development is at a preliminary stage it is not been possible to prepare a comprehensive impact assessment or to estimate quantitatively the costs and benefits of the proposals. We seek evidence as part of the consultation.

## Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

**Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.**

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
<b>Competition Assessment</b>	<b>No</b>	<b>No</b>
<b>Small Firms Impact Test</b>	<b>No</b>	<b>No</b>
<b>Legal Aid</b>	<b>No</b>	<b>No</b>
<b>Sustainable Development</b>	<b>No</b>	<b>No</b>
<b>Carbon Assessment</b>	<b>No</b>	<b>No</b>
<b>Other Environment</b>	<b>No</b>	<b>No</b>
<b>Health Impact Assessment</b>	<b>No</b>	<b>No</b>
<b>Race Equality</b>	<b>No</b>	<b>No</b>
<b>Disability Equality</b>	<b>No</b>	<b>No</b>
<b>Gender Equality</b>	<b>No</b>	<b>No</b>
<b>Human Rights</b>	<b>No</b>	<b>No</b>
<b>Rural Proofing</b>	<b>No</b>	<b>No</b>

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

## ANNEX D LIST OF QUESTIONS

### **OPTION 1 – MAKE NO CHANGE TO THE LAW**

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

### **OPTION 2- INTRODUCE EXCEPTIONAL STATUTORY MAXIMA OF £50,000 FOR COPYRIGHT OFFENCES**

Should exceptional summary maxima be introduced 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?

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

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

### **OPTION 3- INTRODUCE EXCEPTIONAL STATUTORY MAXIMA OF £50,000 FOR ALL IP OFFENCES**

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

Concept House  
Cardiff Road  
Newport  
NP10 8QQ

Tel: 08459 500 505  
Minicom: 08459 222 250  
Fax: 01633 817777

[www.ipo.gov.uk](http://www.ipo.gov.uk)

For copies in alternative formats please  
contact our Central Enquiry Unit.

**When you no longer need this booklet, please recycle it.**

Revised: August 08