

**TAKING FORWARD THE GOWERS REVIEW OF INTELLECTUAL PROPERTY:
REPORT ON THE OUTCOME OF CONSULTATION ON PENALTIES FOR
COPYRIGHT INFRINGEMENT**

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APPENDIXES

- 1) Options and questions set out in the consultation document**
- 2) List of respondees**

INTRODUCTION AND SUMMARY

In August 2008 the UK Intellectual Property Office launched “Taking forward the Gowers Review of Intellectual Property: Penalties for Copyright Infringement” consultation. The consultation presented three options based on introducing exceptional summary maxima (above £5,000) in the Magistrates’ Courts for intellectual property (IP) offences:

Option 1 - Make no change to the law

Option 2 - Introduce exceptional statutory maxima of £50,000 for copyright offences.

Option 3 - Introduce exceptional statutory maxima of £50,000 for all IP offences.

The consultation ended on the 31 October 2008. Twenty two responses were received, mostly from representative bodies covering rights holder interests, legal and academic interests, small and medium-sized enterprises (SMEs) and individuals. Most of the responses endorsed Option 3 as a way forward. As such, proposals for the implementation of Option 3 are covered in the Next Steps section of this report.

BACKGROUND

In December 2006, Government commissioned a review of intellectual property (IP) led by Andrew Gowers examining all elements of the IP system. The Review found the system to be broadly satisfactory, but set out a range of recommendations for action which the Government agreed to take forward.

In relation to IP enforcement, the Review noted that a number of submissions received had called for a change in the law to increase online infringement penalties to the same levels as for physical infringement.

As a result, the Review proposed that the penalty for online commercial infringement should be increased to 10 years imprisonment, in order to bring parity with commercially dealing in pirated works. It also proposed that the penalty for online infringement that prejudicially affects the rights holder should be extended to 10 years, again in line with penalties for physical infringement.¹

However, it is Government policy that prison should be used mainly for serious and dangerous offenders and that sentences should only be as long as necessary for

¹ Gowers Review Recommendation 36: Match penalties for online and physical copyright infringement by amending section 107 of the CDPA by 2008

punishment and public protection. It is worth noting that the Crown Courts already deal with the more serious IP cases under general law such as the Fraud Act 2006.

AGREEING OPTIONS

Ministers in the Department for Innovation, Universities and Skills and the Ministry of Justice decided therefore to issue a consultation in relation to copyright infringement outlining options to introduce a new maximum level of financial penalty (referred to as 'exceptional statutory maxima') in order to propose suitable legislative changes.

THE CONSULTATION PROCESS

In line with both this Ministerial agreement and a commitment in Creative Britain (2008), the UK Intellectual Property Office in August 2008 launched a consultation document: "Taking forward the Gowers Review of Intellectual Property: Penalties for Copyright Infringement". The consultation invited responses based on three main options to introducing exceptional summary maxima (above £5,000) in the Magistrates' Courts for IP offences:

These Options were also accompanied by a number of specific questions, to which responses were invited (set out in **Appendix 1**).

The consultation ended on the 31 October 2008. A majority of responses were from representative bodies covering rights holder interests, legal and academic interests, SMEs and individuals.

SUMMARY OF THE RESPONSES

Many responses expressed some concern that the options put forward did not fully meet Gowers Recommendation 36 (matching custodial penalties for physical and online copyright offences). However most endorsed the proposal to introduce exceptional summary maxima with a few responses questioning the need for the measure. In summary:

- 14 respondents essentially supported Option 3 (introduce exceptional statutory maxima of £50,000 for all IP offences);
- 4 respondents (Chartered Institute of Patent Attorneys and 3 individual respondents) did not think that there was a need for a change;
- 4 respondents did not support any particular option (one was from a number of first year law students that expressed a variety of views);
- The Trading Standards Institute supported the need to deliver proportionate sanctions for criminals engaged in IP crime: it recognised that crime was not

included in the Regulatory Enforcement and Sanctions Act, which meant that the sanctioning provisions included within the Act were consequently unavailable². Most detailed comments were made with respect to Option 1 and in particular with respect to POCA (see below).

A list of those who responded is attached at **Appendix 2**.

VIEWS ON THE OPTIONS

Option 1: Make no change to the law

The existing legislation under the Proceeds of Crime Act 2002 (POCA) provides a powerful means of seizing the profits from IP crime and punishing offenders. All POCA offences already make provision for IP crime to be dealt with by summary conviction or conviction on indictment. However, the fines are restricted to the statutory maxima (£5, 000 in England and Wales and £10, 000 in Scotland). Option 1 therefore focused on what more could be done under current legislation and asked if POCA already provides an effective means of depriving offenders from the profits of IP crime.

Most respondents saw POCA as an effective piece of legislation although several suggested it needed updating. One common suggestion was that Schedule 2 of POCA, which lists 'lifestyle offences', should be extended to include new offences that have been added to the statute book since POCA was introduced, in particular s.296ZB and s.107(2A). The City of London Law Society made the most detailed comments on POCA and its effectiveness. In summary they said:

“POCA is clearly a formidable asset in the fight against IP crime. Our experience is that removing money and assets from criminals is considerably more effective than imprisonment or fines alone. As far as we know, the power to do so in the context of IP crime is unique to the UK. In our experience, gained working with clients internationally and from representation on international trade bodies, this power is viewed with considerable envy by law enforcement bodies, IP lawyers and IP rights holders in many other countries.”

They made a number of detailed suggestions, including that:

- Accredited Financial Investigators (AFI) are needed to seek ancillary orders under POCA but it is not clear to what extent Trading Standards Departments have ready access to AFIs.
- Without an in-house AFI, Trading Standards will be discouraged from

2. This point was explored with relevant stakeholders when the Regulatory Enforcement and Sanctions Bill was introduced (see <http://www.ipo.gov.uk/policy.htm>). It was concluded that including IP crime in the Bill would complicate and confuse the handling of such offences.

pursuing POCA orders and will not benefit from the government's incentivisation scheme;

- POCA orders now have to be remitted to the Crown Court adding to costs and delays. They suggest that consideration should be given to restoring the power for Magistrates' Courts to hear POCA orders up to £10,000 by means of an amendment to s.97 of the Serious Organised Crime and Police Act 2005;
- Given the complications in the current POCA procedures, it is important that Trading Standards have the necessary expertise to use them;
- The four copyright offence (s.107(2A)(a), s.107(2A)(b), s.198(1A)(a) and s.198(1A)(b)) not currently listed in POCA as 'lifestyle offences' should be included.

A number of comments were to the effect that legislation should be updated to take account of changes in technology since POCA was passed and in particular s.296ZB and s.107 (2A) of the CPDA. This would enable instant orders to be made under POCA and secure illegal monies for confiscation the future.

Option 2: Introduce exceptional statutory maxima of £50, 000 for copyright offences

Introducing an exceptional statutory maxima of £50, 000 for copyright offences would only allow courts to take account of the profit that an offender has made from their crimes in a particular case. The questions under Option 2 focused on whether this level should be set for all offences, whether a one-level-fits all infringement approach was the right one and how this issue should be dealt with under Scottish legislation.

On the introduction of an exceptional statutory maxima, responses were generally positive, believing it would serve as a deterrent for would-be offenders. One respondent did comments that a £50,000 maximum might be insufficient to cover the illegal profits made by offenders.

There was concern that this level of penalty should be used with care and only when the case required it. A further point made was it may blur the distinction between the seriousness of cases heard in the Magistrates Court and the Crown Court.

It was generally felt there was no reason to distinguish between the copyright offences and some suggestions that this limit is too low. However, a few responses thought that exceptional statutory maxima should be set in accordance with the seriousness of the offence and the profit gained. Several noted that the courts would need to set a fine appropriate to the circumstances for each case.

There was some concern regarding the perceived lack of knowledge of IP and the application of copyright and trade mark law amongst Magistrates and whether IP

cases were dealt with consistently. As with Option 1, further judicial training was felt likely to help here.

Option 3: Introduce exceptional statutory maxima of £50, 000 for all IP offences

From the responses that supported change (14), all supported this option. These were to the effect that the same penalty should exist and be available for different IP offences; this would include on line and off line offences. If there was to be a difference, it was commented that a trademark offence could be seen as more serious than a copyright offence.

NEXT STEPS

A majority of the responses to the consultation supported the approach set out in Option 3. Government will therefore work to identify the suitable legislative options for taking this forward.

OPTIONS AND QUESTIONS SET OUT IN THE CONSULTATION DOCUMENT

Option 1 – Make no change to the law:

- Do you think that the Proceeds of Crime Act 2002 already provides an effective means of depriving offenders of the profit 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 or Sheriffs Courts (in Scotland) 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?

LIST OF RESPONDEES

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| UK FILM COUNCIL |
| PUBLISHERS ASSOCIATION |
| PERIODICAL PUBLISHERS ASSOCIATION |
| CITY OF LONDON LAW SOCIETY |
| ALLIANCE AGAINST INTELLECTUAL PROPERTY THEFT |
| UNIVERSITY OF LANCASHIRE – from 4 groups of law students in their first year of studies. |
| WEDLAKE BELL |
| PHONOGRAPHIC PERFORMANCE LIMITED |
| CHARTERED INSTITUTE OF PATENT ATTORNEYS |
| EDUCATIONAL RECORDING AGENCY |
| BRIT SH PHONOGRAPHIC INDUSTRY |
| ENTERTAINMENT AND LEISURE SOFTWARE PUBLISHERS ASSOCIATION |
| DESIGN AND ARTISTS COPYRIGHT SOCIETY |
| TRADING STANDARDS |
| SOCIETY FOR COMPUTERS AND LAW |
| BRITISH SCREEN ADVISORY COUNCIL |
| SCOTTISH LAW SOCIETY |
| LAW SOCIETY |
| ITV |
| MECHANICAL COPYRIGHT PROTECTION SOCIETY AND PERFORMING RIGHTS SOCIETY (NOW CALLED PRS FOR MUSIC) |
| BEN CHALLIS – Private citizen and magistrate |
| JONATHAN DRAIN – PRIVATE CITIZEN |
| LEE BRYANT – HEADSHIFT(SME) |