

Response to UK Intellectual Property Office Consultation

- Taking Forward the Gowers Review of Intellectual Property: Penalties for Copyright Infringement

UK Film Council

October 31, 2008

Executive Summary

1. The UK Film Council is the Government-backed lead agency for film in the UK ensuring that the economic, cultural and educational aspects of film are effectively represented at home and abroad.
2. The UK Film Council welcomes the opportunity to respond to the UK-Intellectual Property Office's consultation on Penalties for Copyright Infringement.
3. The UK Film Council's overall role is encapsulated in its goal, "to help make the UK a global hub for film in the digital age, with the world's most imaginative, diverse and vibrant film culture, underpinned by a flourishing, competitive film industry."
4. We work with government, the film industry and other interested parties to help protect and promote copyright in our industry.
5. All copyright infringements, whether online or offline, direct revenue away from production, distribution, exhibition and retail – reducing income from legitimate sales.
6. In 2006 the audio visual sector lost an estimated £459 million due to copyright infringements, with film losing £338 million. The estimated loss of £102 million in cinema admissions equates to 13.4% of the legal market in the UK. An estimated loss of £238 million DVD retail sales equates to 15% of the legitimate market.¹
7. In the consultation document the UK Intellectual Property Office (UK-IPO) states that it welcomes comments on the "issues and suggested options and specific questions identified." In this response, we focus on the issues and suggested options. We support Option 2 – the introduction of exceptional statutory maxima of £50,000 for copyright offences.

Background

8. Penalties for commercial copyright infringement must provide an effective deterrent to address the problems being caused by commercial piracy. The consultation by the Department for Business Enterprise and Regulatory Reform (BERR) on legislative options to address illicit peer-to-peer (PSP) file-sharing considers the best ways to address this activity as opposed to the issue of websites dedicated to unlawful copying or the hosting of such websites.² The BERR Consultation recognises the later activity as "commercial piracy". It

¹ Source: <http://www.ukfilmcouncil.org.uk/copyrighttheft>

² <http://www.berr.gov.uk/files/file47139.pdf> The UK Film Council has submitted a response to this consultation to BERR.

involves online infringement and is just as potentially damaging to film owners as more traditional physical piracy.

9. The Gowers Review – Recommendation 36 proposed:
“Match penalties for online and physical copyright infringement by amending section 107 of the CDPA by 2008”.³
10. The subsequent report “Creative Britain: New Talents for the New Economy” (published by the Department for Media, Culture and Sport (DCMS), BERR and the Department for Innovation, Universities and Skills (DIUS) in February 2008 rightfully highlighted that “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”.⁴
11. The disparity in the current maximum penalties available for online copyright offences and physical copyright infringement fails to take account of the commercial damage that flows from both types of offence.
12. It is noted that the current UK IPO Consultation only addresses a part of what was proposed by Recommendation of the Gowers Review. The Gowers Review proposed that the penalty for online commercial infringement (offence under s. 107(2A)(a) CDPA) should be increased to ten years imprisonment (and/or unlimited fine) to bring parity with commercial dealing (but not showing) pirated works. It also proposed that the penalty for consumers infringing online (offence under s.107 (2A) (b) CDPA) to an extent that prejudicially affects the rights holder, should also be extended to ten years (and/or unlimited fine), again to bring parity with physical infringement.
13. The current Consultation, whilst welcome, only picks up on the commitment in the Creative Britain report to consult on introducing exceptional statutory maxima (above £5,000) in the Magistrates’ Courts for offences of online and physical copyright infringement.

Comments on the Options

14. The deterrent effect of costs and complexity of proceedings to address copyright infringement has been well documented. Steps which can help to reduce both costs and complexity are therefore welcome. In particular allowing the magistrates’ courts to deal effectively with copyright infringements in ways that take account of the illegal profits made from such offence is important.
15. Maximum penalties are important benchmarks and provide deterrence for would be offenders. However, we would agree that introduction of different levels of exceptional summary maxima for all offences, with a ceiling of £50,000 as

³ <http://www.ipa.gov.uk/policy/policy-issues-gowers-enforcement>

⁴ <http://www.culture.gov.uk/images/publications/CEPFeb2008.pdf>, paragraph 5.11.

proposed, should provide the best degree of flexibility for the courts to assess the “economic gain” to an offender and to award an appropriate fine in specific cases.

16. For the desired deterrence to be achieved, it will be important that the same level of exceptional maximum fine is recognised in England and Wales, Scotland and Northern Ireland.
17. The greatest complexities and challenges to bringing action for intellectual property infringements currently affect copyright more than trademarks. As the consultation paper recognises, the evidence requirements for taking forward a case of trademark infringement are less than those currently necessary for copyright infringements. For this reason the solution put forward as Option 2 in the Consultation Paper is supported. One level of £50,000 as the exceptional statutory maxima at summary level would best improve the effectiveness of magistrates’ courts and sheriffs’ courts (in Scotland) dealing with copyright infringements at summary level.