

**14 August 2015**

Copyright Infringement Consultation 2015  
Copyright and Enforcement Directorate  
Intellectual Property Office  
Department for Business Innovation and Skills  
Room 1Y05 Concept House  
Cardiff Road  
Newport  
NP10 8QQ

*Submitted electronically via email: [enforcement@ipo.gov.uk](mailto:enforcement@ipo.gov.uk)*

**Re: Consultation on Changes to the Penalties for Online Copyright Infringement, dated 18 July 2015<sup>1</sup>**

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The Independent Film & Television Alliance (IFTA) welcomes the opportunity to provide written comments to the Intellectual Property Office (IPO) in response to the above-captioned matter regarding changes to the penalties for online copyright infringement under the Copyright, Designs and Patents Act 1988 (CDPA).

IFTA urges the Government to adopt and implement the proposals that will increase the sanctions for those who infringe the rights of copyright holders for large-scale financial gain by bringing the criminal penalties for online offences in line with equivalent offences relating to the infringement of physical goods.

### **About IFTA**

IFTA is the trade association for the independent motion picture and television industry worldwide that is dedicated to protecting and strengthening its members' ability to finance, produce, market and distribute independent films and television programs in an ever-changing and challenging global marketplace. Our organization represents more than 135 member companies from 22 countries, consisting of independent producers and distributors, sales agents, television companies, and institutions engaged in production finance.<sup>2</sup> IFTA has 23 member companies based in or with significant business operations in the United Kingdom<sup>3</sup>, all of which are active in film production, sales and/or

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<sup>1</sup> <https://www.gov.uk/government/consultations/changes-to-penalties-for-online-copyright-infringement>

<sup>2</sup> A complete list of IFTA members is available online at: <http://www.ifta-online.org/>.

<sup>3</sup> Altitude Film Sales, BFI - British Film Institute, Content Media Corporation International Limited, Distant Horizon, Embankment Films Limited, Entertainment One, Fortissimo Films, GFM Films, Goldcrest Films

distribution. Collectively, IFTA members produce about 400 feature films annually and countless hours of television programming, both of which are increasingly found on emergent online platforms throughout the world.

### **Consultation Question:**

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

Yes, the maximum custodial sentence available for online and offline copyright infringement of equal seriousness should be harmonised at 10 years.

Copyright infringement remains a real threat to rights holders in the UK and around the world. According to the City of London Police Intellectual Property Crime Unit (PIPCU), “Intellectual property crime is costing the UK economy hundreds of millions of pounds each year, with organised crime gangs causing significant damage to industries that produce legitimate, high quality, physical goods and online and digital content in an increasingly competitive climate.”<sup>4</sup> Specifically with respect to the online environment, the latest study commissioned by the IPO estimates that approximately 7.8 million UK Internet users are still accessing copyright infringing content online.<sup>5</sup>

New online digital platforms and distribution technology create opportunities for the independent film and television industry. Yet those same technologies also dramatically expand the ease with which a single act of infringement can rapidly spread online across multiple mediums and decisively undermine revenue expectations and future financing options. Therefore, it is imperative that the criminal penalties for online infringement reflect the massive damage that may be inflicted on rights holders and the emergent businesses offering legally acquired audiovisual content to consumers.

At present, under sections 107(2A) and 198(1A) of the CDPA, the main ‘physical’ copyright offences<sup>6</sup> carry a 10-year maximum custodial sentence, whereas dispositions governing online infringement<sup>7</sup> only provide for a maximum two-year sentence. The discrepancy fails to reflect the growing importance of online piracy on a commercial-scale and the two-year custodial term upper limit falls far short of establishing effective deterrence for such grave offences. The destructive impact of online piracy has been fully recognized by the UK High Court over the past three years, through a series of blocking orders issued to Internet service providers under Section 97A of the CDPA. The orders had the effect of terminating access to a variety of pirate websites offering huge volumes

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International, HanWay Films Ltd., Independent, K5 Media Group, LIONSGATE, Metro International Entertainment Limited, Metrodome International/Hollywood Classics, Mister Smith Entertainment Limited, Pathé, Phoenix Worldwide Entertainment Limited, Protagonist Pictures Limited, Reel One Entertainment, STUDIOCANAL, Umedia International and The Works.

<sup>4</sup> <https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/Pages/default.aspx>

<sup>5</sup> Online Copyright Infringement Tracker Wave 5 (Covering period Mar 15 – May 15): [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/449592/new\\_OCI\\_doc\\_29071\\_5.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/449592/new_OCI_doc_29071_5.pdf)

<sup>6</sup> CDPA Sections 107(1), 107(2), (107(3), 198(1), 296ZB, 297 and 297A.

<sup>7</sup> CDPA Sections 107(2A) and 198(1A).

of audiovisual works obtained by illegal means.<sup>8</sup> The CDPA must be amended to do away with this outdated discrepancy in penalties, by introducing a harmonized maximum custodial sentence of 10 years.

An increase to the criminal penalty for online copyright infringement to 10 years is a serious deterrent to committing mass scale piracy. It will also raise this form of crime into the category of a serious arrestable offence under the Serious Organised Crime and Police Act 2005 and would likely facilitate domestic and international enforcement efforts. It is important to bear in mind that harmonizing such sanctions will support greater efficiency and effectiveness in dealing with criminal piracy but will not be deployed against individual end users who make use of pirate websites (often without being necessarily aware that they are being offered infringing content). There are other legal avenues through which to prosecute those who deploy pirate websites and cases have been brought successfully to court under common law offences such as conspiracy to defraud or trademark theft. However, the existence of those somewhat bootstrapped alternatives does not in any way diminish the need to reinforce the CDPA through harmonizing criminal sanctions. The CDPA is the first point of reference on copyright issues and must be the main tool in the legislative arsenal to be deployed against criminal infringement.

### **A Unique Perspective on Online Copyright Infringement and its Damage to Independent Film and Television Production**

Due to unique financing and distribution models, independent producers and distributors must rely, not only on a strong legal framework for copyright protection, but also on effective criminal enforcement worldwide.

Independent producers regularly secure financing and distribution for each project on a territory-by-territory basis by means of exclusive licensing arrangements with local distributors who, prior to production, contractually commit to pay a minimum guaranteed license fee in exchange for the exclusive right to distribute the finished product to the public in their particular territory. Those minimum guarantees provided in each distribution agreement are then collateralized by banks which loan the funds to support the production. Once revenue is generated from exploitation, the production loan is repaid and the parties endeavor to recoup their investment. High-end independent British films typically cover between 30 to 60% of their budget through such pre-agreed license fees (pre-sales), the balance coming mostly from public incentive funds, equity and tax credits. A significant proportion of high-end UK television dramas also rely on pre-agreed license fees from foreign broadcasters in order to close their substantial budgets, the UK broadcasters' license fee falling most often far short of covering the entire cost of production.

Online copyright infringement, often on a massive commercial-scale, threatens the balance of this creative and business ecosystem, which relies on the legal security that local distributors or television broadcasters need in order to protect their high risk investments in new film and television projects.

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<sup>8</sup> Twentieth Century Fox Film Corporation & Ors v Sky UK Ltd & Ors [2015] EWHC 1082 (Ch) (28 April 2015); and Dramatico Entertainment Limited et al. v British Sky Broadcasting et al. [2012] EWHC 268 (Ch) (9 February 2012).

As consumers increasingly demand delivery of content in digital formats via the Internet, online piracy poses the biggest threat to the independent film and television industry. Stronger criminal deterrents are needed in the “click and stream” digital environment where even one illegal upload of a copy of a film or television program online can be commercially and creatively devastating. Online piracy is particularly damaging when it occurs before or during the critical initial release of a project, effectively voiding the copyright owner’s exclusive right to put into commerce a film or television program. The rise of infringing copies available on the Internet damages the ability of all rights holders throughout the distribution chain to recoup their investment and thwarts the development of legitimate online distribution services.

Commercial-scale copyright infringement, both of physical goods and in the online environment, undercuts a film or television program’s economic expectations, reducing the advance minimum guarantees and effectively limiting the funds available to independent producers to finance their productions. Consequently, such infringements not only reduce the anticipated revenues from exploitation of a particular project, they also severely impact the ability of independent producers to secure financing for future productions.

### **Support of the Proposed New Measures**

IFTA is pleased that the Government has recognized that online infringement is capable of causing serious harm to rights holders<sup>9</sup> and supports the proposals to harmonise the criminal penalties for online and physical copyright infringement. These proposals will clarify that copyright infringement that occurs online is equally as serious as physical infringement. They are also consistent with the Government’s March 2015 report entitled *Penalty Fair?*<sup>10</sup> and support PIPCU’s efforts toward “tackling intellectual property crime, with a focus on offences committed online.”<sup>11</sup>

### **Conclusion**

IFTA expresses its gratitude to the IPO for actively seeking to expand the criminal penalties for online copyright offences in the UK and would like to express its sincere interest in being part of industry and governmental discussions on this topic or voluntary industry programs with respect to content protection.

### **Submitted by the Independent Film & Television Alliance**



Jean M. Prewitt, President & CEO  
10850 Wilshire Blvd., 9<sup>th</sup> Floor  
Los Angeles, CA 90024-4321  
U.S.A.

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<sup>9</sup>[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/446515/Changes\\_to\\_penalties\\_for\\_online\\_copyright\\_infringement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/446515/Changes_to_penalties_for_online_copyright_infringement.pdf)

<sup>10</sup> <https://www.gov.uk/government/publications/penalty-fair>

<sup>11</sup> <https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/Pages/default.aspx>