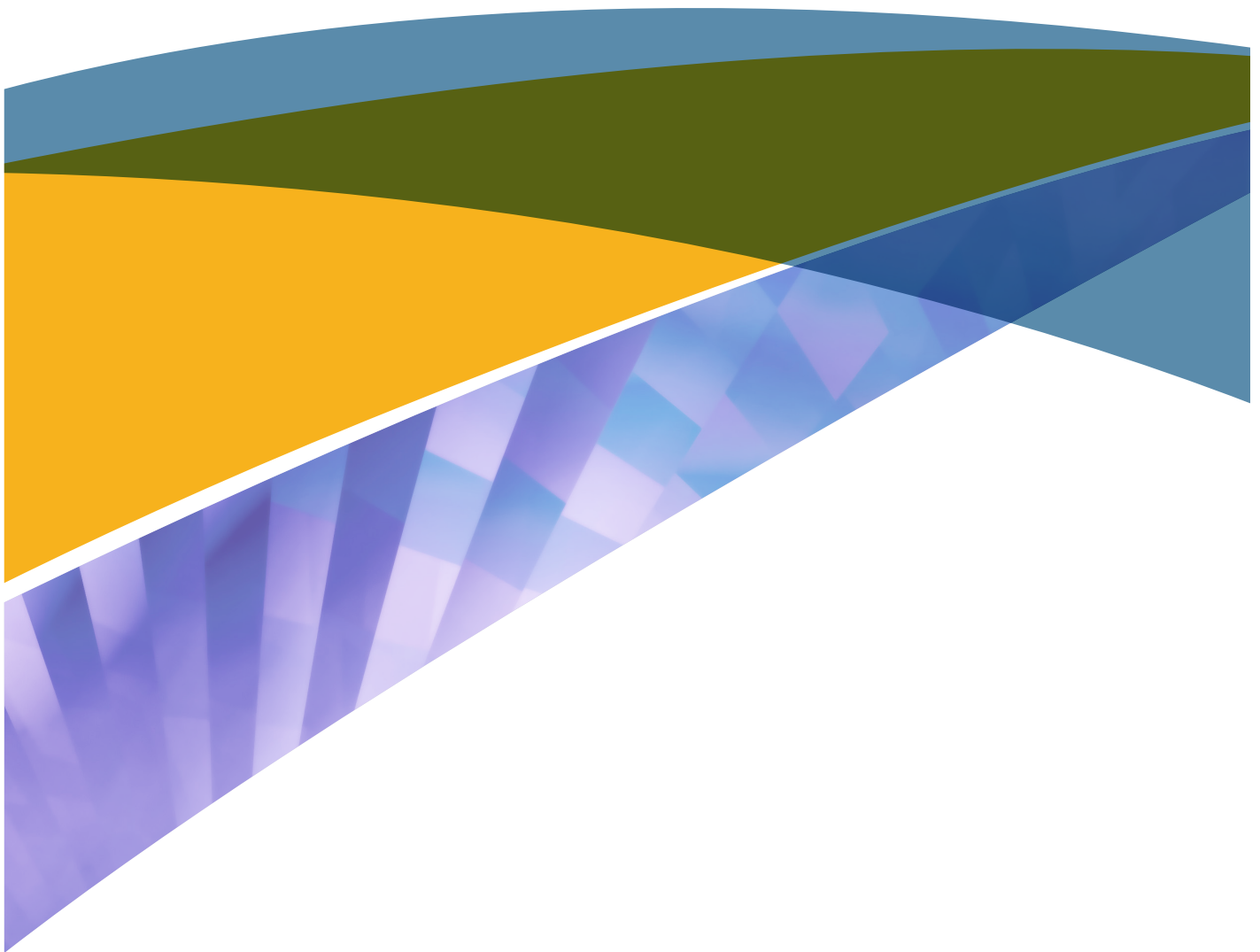




Intellectual  
Property  
Office

# Criminal Sanctions for Online Copyright Infringement

Government Consultation Response







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## Ministerial foreword



Just twenty years ago, few could have predicted that today we would be able to fit thousands of music albums into the palm of a hand, or be able to download books from a 'cloud'.

The pace of technological change has been breath-taking, enabling all of us to access a large variety of content from anywhere at any time. The number of global internet users has increased threefold in the past 10 years to 3bn<sup>1</sup> and the number of UK citizens' now online stands at over 90%<sup>2</sup>. Every day we are seeing the new opportunities this has created for criminals with wide scale infringement of the valued rights of those who create content. Creative industries add £84.1 billion to the UK economy each year, and to ensure we can protect this investment, there must be effective and appropriately targeted laws.

In the summer of last year and following the publication of an independent report 'Penalty Fair?' and other supportive evidence, I made clear that the maximum sentence for online copyright infringement needed to be harmonised with physical infringement - at 10 years. The current disparity has existed for many years and, just as the range of legitimate content services online has grown, so too has there been an increase in infringement of content online. Because the specific intellectual property legislation is not suitable at the moment due to its low maximum sentence of two years, law enforcement agencies and prosecutors have had to use other mechanisms, such as using fraud legislation.

Last year the government consulted on increasing the maximum term to 10 years. We received over a thousand responses, which have played a significant part in helping to shape the discussion. As a result we are now proposing changes that include increasing the maximum sentence, but at the same time addressing concerns about the scope of the offence. The revised provisions will help protect rights holders, while making the boundaries of the offence clearer, so that everyone can understand how the rules should be applied.

The UK is frequently cited as the world leader in IP enforcement, and as Minister for IP I want to do everything I can to preserve this standing. The provision of a maximum ten year sentence is designed to send a clear message to criminals that exploiting the intellectual property of others online without their permission not acceptable.

A handwritten signature in black ink that reads "Lucy Neville-Rolfe".

Baroness Neville-Rolfe DBE CMG

**Parliamentary Under Secretary of State and Minister for Intellectual Property**

1 International Telecoms Union, 2015.

2 Office of National Statistics, 2015.

## Summary

Creative industries contribute over £84 billion to the UK economy<sup>3</sup> each year with intellectual property assets protected at over £60 billion<sup>4</sup>. The Government is committed to ensuring the legal framework supports the creators that produce the content that we all value, and who make a valuable contribution to the UK economy. An important part of that framework is to have provisions which deal with those who infringe on a criminal scale, and which provide for appropriate sentences to be levied.

As a result, in July 2015 the Government consulted on increasing the maximum custodial sentence for criminal online copyright infringement offences from two to ten years. The Government is very grateful to everyone who responded.

Online copyright infringement is dealt with under s107(2A) (communicating works to the public in the course of a business or to an extent prejudicially affecting the copyright owner) and s198(1A) (infringing a performer's making available right in a recording in the course of a business or to an extent prejudicially affecting the owner of such right) of the Copyright Designs and Patent Act 1988. These offences are currently punishable by a maximum of two years imprisonment (see sections 107(4A) and 198(5A)). By comparison, the maximum custodial sentence for infringement in respect of physical goods is ten years.

The rationale for the proposed changes originate from a number of areas including recommendations in the 2005 Gowers Review, debates on the IP Bill in 2014, 'Penalty Fair?'<sup>5</sup>, other unpublished research and ongoing exchanges with stakeholders. Feedback from enforcement agencies and prosecutors has also shed light on how the disparity between penalty provisions has resulted in other laws, such as the Fraud Act and common law conspiracy to defraud, being used in certain circumstances to fill the gap.

The Government believes that online offences should be treated no less seriously than their physical counterparts. Harmonising these will provide a deterrent effect to criminals and, where criminality continues, provide for tangible punitive action.

However, following the consultation it became clear from the responses that in order to achieve this aim, some wider changes were also required to the offence provisions. The Government is now proposing to introduce re-worded offence provisions which address the wider changes necessary to ensure the offences are effective at deterring and dealing with criminals, while protecting innocent or unwitting infringers.

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3 DCMS (2015), Creative Industries Economic Estimates, Statistical Release [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/494927/Creative\\_Industries\\_Economic\\_Estimates\\_-\\_January\\_2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/494927/Creative_Industries_Economic_Estimates_-_January_2016.pdf)

4 <https://www.gov.uk/Government/publications/estimating-uk-investment-in-intangible-assets-and-ip-rights.html>

5 <https://www.gov.uk/Government/publications/penalty-fair>

## Responses received

The consultation attracted 1,032 responses, which were summarised in the 'Summary of Responses' document published on 12 January 2016, and available [here](#).

Below are three main issues that the Government considered were the most prevalent amongst the responses received and warranted further consideration, along with the Government response on each. It is important to note that every concern raised was considered thoroughly, regardless of the number of comments attributed to it.

### 1. Strict liability

#### Summary of responses:

A large percentage of respondents were concerned that there is currently no requirement to prove an infringer had intent to cause harm in order for them to be considered culpable of the offence. This, respondents felt, suggests that the offence contains an element of strict liability and may result in a person being liable for an offence where they had no intent to cause any harm.

#### Government position:

The current offence requires that the person knows or has reason to believe that there is an infringement of copyright and therefore ensures that a sufficient mental element would need to be demonstrated in order to bring a successful prosecution. Furthermore, the Government is not aware of any cases where the existing legislation has been used to prosecute someone where there was only a very minor infringement. There are already a range of safeguards in place which would limit the risk of a very low level infringer being subjected to a high penalty in practice. In particular:

- infringement must be proven to the criminal standard, beyond reasonable doubt
- enforcement agencies and private prosecutors have a staged response system, encompassing education, "cease and desist" notices, and domain suspension
- the level of penalty should meet the scale of the crime

However, the Government accepts that there are concerns and the policy intention is that criminal offences should not apply to low level infringement that has a minimal effect or causes minimum harm to copyright owners, in particular where the individuals involved are unaware of the impact of their behavior.

## 2. Prejudicially affect

### Summary of responses:

Many respondents felt that the term “affect prejudicially” is too vague when determining the extent to which a copyright owner needs to be affected before an offence is committed. It was argued that a single infringing file could fulfil this requirement in some circumstances (if widely shared subsequent to the infringement for example) therefore setting an unacceptably low threshold for committing the offence.

### Government position:

The Government is not aware of existing cases where a very minor infringement has resulted in a criminal prosecution and therefore does not consider there to be a high risk of this happening. However, the Government agrees that the undefined term ‘affect prejudicially’ could give rise to an element of ambiguity.

## 3. Maximum custodial sentence

### Summary of responses:

Concerns were also raised about the proposed increase in maximum sentence, which was criticised for being the same or higher than other serious offences such as rape, some firearms offences, rioting and child cruelty.

### Government position:

The Government believes that a maximum sentence of 10 years allows the courts to apply an appropriate sentence to reflect the scale of the offending. An example where copyright infringement was deemed to warrant longer than a 2 year sentence is where five defendants received sentences totalling 17 years for releasing more than 2,500 of the latest films onto the internet. They were prosecuted under the Fraud Act, where the highest sentence was four and a half years<sup>6</sup>. Capping the maximum available sentence at a lower level would unnecessarily limit the ability of the courts to apply appropriate sentences in the more serious cases of copyright infringement.

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6 <http://www.fact-uk.org.uk/online-movie-release-group-sentenced-to-over-17-years/>





## Next steps

The Government intends to introduce to Parliament at the earliest available legislative opportunity re-drafted offence provisions which address issues 1 and 2 above, in relation to sections 107(2A) and 198(1A), in addition to increasing the maximum custodial sentence to ten years in sections 107(4A) and 198(5A).





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