

The UK's criminal copyright proposals in an era of technological precision

Felipe Romero-Moreno & James GH Griffin [1]

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ABSTRACT

There has been an increasing tendency to implement criminal IP provisions into UK law. This paper proposes that the current UK law should not be reformed so as to have increased criminal penalties, because such penalties when applied to information can be too blunt in an information society. This is particularly so in the information age where the UK system of economic IP rights is similarly becoming an increasingly blunt tool, where convergence of technologies may lead to overlapping and unexpected legal complexities, and where information is increasingly becoming a unit of exchange. It is important to work towards certainty in an environment of legal uncertainty and increasing criminal penalties should not be considered unless the legal situation is more certain. The proposals in their current form are not what we term 'appropriate', 'affordable', or 'feasible'.

Keywords: criminal; copyright; human rights; penalties; certainty

INTRODUCTION

This paper is an investigation into the UK's proposal for the reform of the criminal provisions relating to imprisonment of individuals for infringement of intellectual property rights. In this paper we suggest that the proposed penalties, which will see an increase in the number of potential years of imprisonment, are contrary to some of the basic principles of the information age. In order to make this argument our paper is split into several sections. We will begin by assessing the proposed provisions in terms of their relevance to an information society, and will then suggest that the proposed reforms are archaic and too rigid in the way in which they are being applied in an information age. We suggest that the proposals will also result in expenditure without result, and that they fall foul of existing rules and regulations. We propose that any attempts to prevent mass scale piracy should ensure that any proposed legislation is not only appropriate, affordable and technically feasible, but also human rights compliant.

THE PROPOSED CRIMINAL PROVISIONS

In December 2006, the review of Intellectual Property by Andrew Gowers^[2] noted that there was a discrepancy between the maximum penalties for online and offline criminal IP offences. The review suggested reform of the law, and the Government accepted that recommendation. The result was s.42 in the Digital Economy Act 2010^[3] which increased the penalty for all copyright offences to £50,000.^[4] From the Gowers Review through to the passing of the Act, there was a lack of clarity as to the reason for reform beyond removing a discrepancy, other than deterrence.^[5] Nonetheless, five years later in 2015 the UK Intellectual Property Office (UK-IPO) carried out a consultation into increasing criminal penalties into online copyright infringement.^[6] At the current moment in time, the Digital Economy Bill 2016 is before Parliament and being debated. In s.26 of the Bill, it is suggested that the criminal penalties for online copyright infringement should again be increased to be consistent with offline penalties.^[7] What our article is concerned about is whether an increase in the criminal law penalties of intellectual property are appropriate within an era of increased information communication. We suggest that the proposed penalties are too blunt and too broad, leading to law that is not appropriate in the sense that it will be unnecessary, overreaching, be too expensive and generally unworkable. Whilst it may be suggested that the proposals are aimed at placing users of digital content within a panoptical situation, the shortcomings of the proposals are such that the reforms are likely to have limited impact.

We suggest that regulation which influences the transmission of information would be more appropriate if such regulation was based around the nature of the information concerned, and that there are other means by which to compensate right holders rather than by imposing blunt criminal penalties. This already occurs to some degree with automated licensing systems, as discussed in the "Anti-Copyright Infringement measures" section, below. An example of that would be limitation to the ability to licence content or perhaps an additional charge on top of royalties in order to reimburse the original right holder. An exception to this might be where there is damage - physical, intangible or monetary - to the existing work. With these alternate possibilities in mind it is therefore possible to suggest that increasing criminalisation of the penalties for copyright infringement, in the manner proposed, is something that is somewhat archaic. In addition to this, the rise of the information era has meant that information itself is a central way in which individuals participate within society. Criminal provisions concerning information as construed in the

UK-IPO's proposals are too blunt to be an effective means to interface with the notion of information discourses [8] semiotic democracy,[9] or even proprietary discourses and thus are likely to lead to contempt of the law.[10] Such notions are not new - discourse was discussed by Derrida [11] and the application of this with regard to cultural works is present in the notion of semiotic democracy which was put forward by Fiske in 1987[12]. This notion of semiotic democracy follows on from the concept of proprietary democracy which was discussed by Max Weber in the 1900s.[13] That latter concept posits that individuals feel as if they are becoming involved within society through the ownership of property - and that ownership of property gives entitlement to becoming involved in societal discourse. So this notion of ownership of property, and that of legal property and ownership over semiotics and discourses of words, is hardly new and yet this is effectively ignored by the proposed criminal proposals. [14] However we submit this it is absolutely crucial to consider this in the relationship between criminal penalties and information because of the centrality of information to the development of the society.

INTERNATIONAL LAW - CONCERNS

Whilst the proposed provisions fail to recognise the inappropriateness in the manner of the application of such criminal penalties, at the international level there are also obligations which any proposed reforms are required to meet which these proposals also fail to meet. Criminal sanctions and the enforcement of IPR is dealt with by Article 61 of TRIPS (the WTO agreement on Trade Related Aspects of Intellectual Property Rights 1994). It requires members to 'provide for criminal procedures and penalties to be applied at least in cases of... copyright piracy on a commercial scale'. [15] Implementing these at the level of EU law, there are two main Directives, namely the Enforcement Directive (2004/48/EC)[16] and the Information Society Directive (2001/29/EC). [17] There was no overall agreement about the criminal sanctions and so there are no specific harmonisation measures for these; it is left up to the Member States to decide. With regard to this, TRIPS[18] sets out the minimum standards of protection of rights to be conferred by each member state. Under Article 1(1),[19] it is clear that member states are free to determine the appropriate approach in implementing the provisions of TRIPS within their own legal systems and practices. This is confirmed by *EC - Trademarks and Geographical Indications*. [20] Even though TRIPS sets minimum standards, it does not alter the territorial nature of IP rights, but that notwithstanding, we suggest that the proposals fall foul of the basic standards required.[21] In the UK, the primary copyright offences are in s.107(1)-(3), s.198, s.296ZB and s.297 and s.297A CDPA 1988. These carry a maximum 10 years in prison. Online infringement, per the implementation of the EU Information Society Directive, is dealt with in s.107(2A) and s.198(1A) CDPA 1988. These carry a maximum sentence of two years in prison. We suggest that the current Government proposal falls afoul of these international provisions, though we suggest that in any event, these international provisions are not appropriate.

In terms of the consultation document, the UK-IPO stresses that "there is no strong case for [the current situation of] treating online infringement any differently to physical infringement." [22] This is incorrect. The first reason is that legitimate means to tackle large scale commercial online infringement are not only already present, but also currently being used, so this proposal might be unjustified. The Fraud Act 2006 and common law offence of conspiracy to defraud are being deployed, as noted in the report itself.[23] In fact, the UK-IPO report "Penalty Fair?" explicitly recognizes that 'the Fraud Act 2006 has been successfully used in a number of occasions and that where the charge is brought it has a

high probability of success'.^[24] In addition, the National Fraud Intelligence Bureau have been sending letters alleging that offences are being committed under the Serious Crime Act 2007.^[25] This was in reference to the seeding of copyright material online (under s.107(1)(e) CDPA 1988) and by doing an act which is capable of aiding and encouraging communication to the public (s.107(2A) CDPA 1988). So, in actual fact it should be the case that these penalties that are being used should be altered in a manner compatible with an information society rather than there being the creation of new penalties that simply replicate existing laws.

The second reason that the UK-IPO statement that "there is no strong case for [the current situation of] treating online infringement any differently to physical infringement"^[26] is incorrect is that it has previously been the case that criminalization of IPRs has been a particularly contentious matter. The European Commission had originally intended to make criminal certain IP infringements and increase damages within the initial IP Enforcement Directive.^[27]

In addition, the Commission has been arguing for additional criminal measures in a further Directive. This was in 2005, a second IP enforcement Directive,^[28] the support of which was withdrawn by the European Commission because of public outcry at the extension of sentences from two years to four. It could therefore be argued that there should not be extension in duration for custodial sentences. Again, this is supported by a recent judgement where a pirate streaming site operator who put the film industry at risk of losing approximately £120m was handed a four year sentence, half of which is to be in jail.^[29] European Commission support for enhanced criminalisation is also apparent through their participation in the international Anti-Counterfeiting Trade Agreement (ACTA).^[30] Furthermore, it has also been considering again, in May 2016, the information from the Consultation on the Evaluation and Modernization of the Legal Framework for the Enforcement of IPRED.^[31] This seeks to identify the possible need for adapting those provisions and suggest amendments.^[32]

If the UK government nonetheless decide to implement the proposal to equate the maximum custodial sentence for physical copyright infringement with online infringement, it is suggested that this should never exceed four years' imprisonment. Indeed, this is especially the case when a maximum of four years in prison is the threshold included in: (i) the proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights; (ii) Joint action of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union; (iii) the proposal for a Council Framework Decision on the fight against organised crime; and (iv) the United Nations Convention against Organised Transnational Crime 2000. In any event, though, we submit that the proposed jail terms are simply an instrument that is too blunt in an information society.^[33]

During the debate of the Intellectual Property Act 2014,^[34] the coalition Government agreed to look at the issue of penalties again. Mike Weatherly, who was the IP advisor to the Prime Minister, stated that:

'There is currently a disparity in sentencing between online and offline crime that needs to be harmonised. This sends out all the wrong messages. Until this is changed, online crime will be seen as less significant than traditional theft'.^[35]

An independent review was undertaken, resulting in the publication during March 2015 of the report "Penalty Fair?" by the UK Intellectual Property Office.^[36] The conclusions of the report were that a) the criminal provisions in the CDPA 1988 are hardly being used, b) that there is a case for increasing sanctions subject to there being additional safeguards to protect those not acting with criminal intent, c) that custodial sentences in excess of two years have been used but not five - a scale of offending would be useful, and d) that serious copyright offenders could be considered more serious and thus that they should be capable of causing serious harm, and thus should lead to equate to a minimum sentence of five years.

Based on the findings, the UK-IPO expected that increasing the maximum sentences would have an enhanced deterrent effect, and would enable punitive penalties to deter criminal infringers.^[37] It would also send a clear message, it was thought, for right holders and infringers that criminal scale infringement will not be tolerated. However, even on this misplaced assumption that the provisions will act as a deterrent, the approach is flawed. There was only a small scale empirical survey to obtain the views of individual right holders who had been victims of online copyright infringement, rather than the views of right holders more broadly. The UK-IPO report focused on soundings from industry bodies and other stakeholders, key cases and reviewed available statistical data on prosecutions and sentences. Our approach in this article differs in terms of methodology and evidence used. In terms of approach, we have already suggested that a broader, holistic, approach to information regulation is required, and that even from an entirely ontological perspective it is the case that the proposed reforms are entirely inappropriate. We will analyse the specific proposals by questioning, in the following order:

1. What is appropriate?
2. What is affordable?
3. What is feasible?
4. What are the unintended consequences?
5. What is the compatibility of the proposal with the three-part Strasbourg Court non-cumulative test in balancing property interests with freedom of expression?

Our conclusion is that, in addition to the broader issues concerning the failure to recognise the need to focus upon the centrality of information to regulation and all that implies, the proposed changes to the criminal provisions, even at a practical level, are also:

1. not appropriate because a) it is not appropriate to utilise such penalties in the information age in the manner being proposed, and b) the suggested sentence of 10 years seems disproportionate and is likely to fall afoul of international law;
2. not affordable (i.e. prison costs);
3. not feasible (i.e. difficult to locate criminal infringers);
4. will turn anti-piracy measures into a game of a 'Whack-a-Mole'; and
5. incompatible with both the ECHR (the European Convention on Human Rights 1950) and the Charter (the Charter of Fundamental Rights of the European Union 2000).

With regard to the latter two, it should be noted that there are substantive changes as a result of the Lisbon Treaty. The Charter is now legally binding under Art 6(1) although there is a derogation present for the UK and Poland.^[38] The European Union is also to accede to the ECHR, although the degree to which the CJEU accepts this will naturally be open to debate.

THE PROPOSED CRIMINAL PROVISIONS ARE NOT APPROPRIATE

The push for criminal provisions is largely based on the utilisation of such provisions in Continental Europe. However, there are different types of intellectual property systems in Continental Europe and the United Kingdom - and this is absolutely critical in understanding the utilisation of criminal penalties within the UK. We suggest that this difference is significant enough to mean that there should not be the implementation of the proposals in the UK on the assumption that what works in one system will work in another. In continental Europe, the system is based around authors rights rather than economic rights as in the UK.^[39] In continental Europe the systems are based around the protection of the author or the development of the person - as per the theories of Kant and Hegel.^[40] These philosophers both argued that protection was necessary to ensure that individuals could fully express themselves and therefore be able to develop themselves as a human being. In the UK, specifically in relation to copyright, trademarks and patents the right that is protected is an economic right,^[41] not the personal developmental interests of an author. Furthermore, that right in question, being over *legal* property, is distinct from the person and is also distinct (although courts sometimes forget to mention this) from the physical property that is owned by the individual. Instead the right relates to the legal right to be able to exploit intellectual property.

In addition to jurisdiction differences, as we suggest above,^[42] we exist within an information age and that therefore intellectual property law should be considered principally as a form of information regulation. Altering the fundamental balance within UK law by increasing criminal penalties would help to undermine this realisation, simply because the proposals are so blunt in nature. Regulators should be aware of the nuanced function of information within such a society rather than focusing on implementing aspects of alien IP systems.

THE PROPOSED CRIMINAL PROVISIONS ARE NOT AFFORDABLE

There is an ever increasing prison population, and the UK system currently holds over 84,000 people.^[43] This is in a system that was designed to hold only around 50,000, and which has increased by more than 40,000 people between 1993 and 2014. The system has been overcrowded every year since 1994. Whilst the capacity has been increased, there is a continuing rise in the number of people being held in prison which continues to outstrip the number of places available. If the growth in the prison population is not reversed, further prisons will need to be built at considerable cost. Increasing the criminal IP custodial sentences will merely add to this.

Currently, the average cost of a prison place per person is £36,237 and thus the rise in the prison population of 40,000 equates to an annual cost of £1.22bn - which equates to £40 per year for every tax payer. Furthermore, prison has a poor record in reducing reoffending for 45% of those released reoffend within one year of release. 68% of under 18s are reconvicted within one year. There is nothing to indicate that this would be different for IP related crime. Reoffending costs the UK between £9.5bn and £13bn a year.^[44]

By way of example of the costs inherent within the prison system, prisoners often have to be transferred between prisons for health care reasons. This adds additional costs in terms of administration, transport and guarding where necessary. If healthcare access is restricted, this could cost more money. As healthcare professions are keen to point out, prevention is invariably cheaper than after-the-event treatment.

Consequently, for cost reasons alone, it would be better to invest in means by which to reduce the incidence of IP crime in the first place, rather than merely increasing the penalties. Indeed, this is particularly the case when, as of September 2015, the UK government has expressly stated that 'it is worrying that despite the Government's efforts to supply sufficient prison places to meet demand, the proportion of prisons that are overcrowded is growing, and the proportion of prisoners held in crowded conditions remains at almost a quarter'.^[45]

THE PROPOSED CRIMINAL PROVISIONS ARE NOT FEASIBLE

In terms of commercial-scale online copyright infringement, the UK approach focuses on both initial uploaders (those users who first upload copyright protected content into file-sharing networks for financial gain)^[46] and also websites that provide and facilitate access to infringing material. However, there are practical issues when seeking to identify those initial uploaders and those who run and own large websites or services which facilitate copyright infringement on a criminal scale. To begin with, since initial uploaders are generally hosting companies located in France and Germany, it is difficult to identify the users behind such initial uploaders as their servers are hired by individuals residing in other countries.^[47] Moreover, the registration procedures for websites are not sufficiently verified. ICANN (The Internet Corporation for Assigned Names and Numbers) delegates the administration of top level domains to third party organisations which oversee domain name activity. Commercial companies may also allocate domains to individuals and organisations. The details are entered into the WHOIS database that can be queried to find out how owns a particular domain.^[48] However, the lack of verification, and the fact that individuals can opt out of displaying full contact details (i.e. for non-commercial purposes) limits the usefulness of the database, particularly for those who may own domains where criminal level infringement is taking place. Furthermore, it is possible to use privacy services who will register their own details in place of the intended registrant.

The data entered on the WHOIS database is reportedly highly unreliable. It has been claimed that only up to 22% of entries on the system are correct. In one study only 46% of the registered information sampled was accurate and detailed enough to be able to contact the registrant. 28% had errors significant enough to prevent contact. These factors combined naturally make it difficult to rely on the database.^[49]

In the alternative to WHOIS, it is possible to utilise other Internet resources such as IP address blocks, which are administered by various regional agencies, with the UK one being RIPE NCC which covers Europe and the Middle East. This has its own searchable database. However, it is not a complete record of the allocation of IP addresses and again, verification is an issue. It is also not required for network operators to amend details in the event of transfer of ownership.

Ultimately, there are many shortcomings in being able to obtain information about initial uploaders and those who own a particular domain. This, combined with difficulties relating to jurisdiction (i.e. where assets are based abroad), serves to make the obtaining of information the exception rather than the rule when it comes to criminal level infringements. This point has been made by Mr. Justice Arnold in *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch).

'The first step which Richemont could take, and have taken, is to send cease and desist letters to the named registrants of the domain names as identified by a WHOIS search. Unsurprisingly, these letters were simply ignored. Since the registrants all gave addresses outside the United Kingdom, many in China, Richemont faced obvious difficulties of jurisdiction and/or enforcement if they were to attempt to bring proceedings against the registrants. Furthermore, the registrants may not be the actual operators of the Target Websites. Experience in the copyright context shows that it is frequently difficult to identify the real operators of offending websites and that attempts to bring proceedings against the operators are rarely effective.'^[50]

We suggest that if the UK government wishes to impose a system of prohibitions, then they should be lobbying in ensuring that any proposed legislation is not only appropriate, affordable and technically feasible, but also human rights compliant.

TURNING ANTI-COPYRIGHT INFRINGEMENT MEASURES INTO A GAME OF 'WHACK-A-MOLE'

In view of the shortcomings with regard to identification of criminal infringers and lack of resources if they are caught, there are two potential workarounds. The first method is to take control of the domain and available services. In the US, they are usually carried out with the co-operation of US DNS registry. Whilst these can be high profile cases, and receive much publicity, it is still possible to evade such orders. Alternate sites may run infringing content. The US Department for Homeland Security Immigration and Customs Enforcement seized domain names of six services - the content is now available via different domain names.^[51] The same has occurred in the UK with the attempted blocking of the Pirate Bay websites, which remain accessible.

Secondly, organizations such as ICANN and Nominet could be forced to implement verified details. Thus, it is not surprising that, in 2015, among other, the Recording Industry Association of America (RIAA), and the Motion Picture Association of America (MPAA) pressurized ICANN to take action against websites that facilitate online copyright infringement. In particular, these copyright lobby groups argued that the domain name system oversight body should be forced to implement verified details by changing appropriate terms and conditions. Understandably, however, ICANN did not accept such a request, stating that they were not willing to police the internet to protect the interests of the entertainment industry. Notably, it suggested that rather than allowing the domain name industry to determine what is permitted and what is not, right holders should take their battle against online piracy to the courts. ^[52]

Associated with this proposal is the notion to limit domain name privacy. Limiting the actions of companies who front for criminal infringers would deal with the issue of registration fronts.^[53] Nonetheless, it is possible to issue takedown notices - something

which is quite common in the United States under DMCA (Digital Millennium Copyright Act 1998)[54] notices. For instance, in July 2015 the RIAA issued a notice against DynaDot to obtain the personal details of a customer.[55] This was to establish the details of a music streaming site called Soundpiff.net. Oversight from a judge is not always required and a clerk of the court may issue the subpoena. The number of such subpoenas issued is large: Google for instance have received, as of 4th August 2015, 50,086,128 requests for URL removals from their search results.[56] In the UK, the equivalent route is to obtain a *Norwich Pharmacal* order, an action of discovery named after which enables a claimant to be able to obtain knowledge of a chain of distribution in order to bring a subsequent action. As stated by the Supreme Court in *Viagogo*[57] the correct approach to considering proportionality in such an instance is that neither Article 1 of the First Protocol to the ECHR/Art. 17(2) of the Charter, nor Art. 8(1) ECHR/Article 7 of the Charter and Art. 8 of the Charter had precedence over the other; where the values under the two Articles were in conflict, the 'proportionality test' must be applied to each.

In this context, it should be noted that in *C-314/12 UPC Telekabel v Constantin Film*[58] at paragraph 62, the CJEU explained that in assessing whether technical measures such as, website-blocking orders were compatible with the proportionality principle, the quantitative assessment of the foreseeable success of the injunction was one fundamental factor to consider. The CJEU found that these measures had to be 'sufficiently effective' to ensure genuine protection of copyright ie., 'they must have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users... from accessing the subject-matter'.[59]

The question remains, however, as to what is meant by 'sufficiently effective'. Whilst the UK High Court takes the view that it is the lazy, casual or inexperienced users who stop visiting pirate sites and determined users bypass the injunctions per *Cartier* [2014] EWHC 3354 (Ch) at para 236. EC's research has confirmed that once an illegal website is blocked; proxies, mirrors and clones quickly appear, turning a simple website-blocking endeavour into a game of Whack-a-Mole.[60]

COMPATIBILITY OF THE PROPOSAL WITH THE THREE-PART OF THE STRASBOURG COURT'S NON-CUMULATIVE TEST

Notwithstanding the general inappropriateness of the proposals in an information age, if the UK wishes to implement new legislation for custodial sentences, then these should be compatible with the three parts of the European Court of Human Rights non-cumulative test. Each part needs to be met, otherwise a breach will have occurred. These parts are that the provision should be "prescribed by law", that there is a "legitimate aim", and finally that the "necessity" and "proportionality" conditions be met.

With regard to the notion of 'prescribed by law' - any proposed legislation should be compatible with the freedom of expression. With regard to Article 10, the article guaranteeing freedom of expression, in *Neij and Sunde Kolmisoppi v Sweden*, the Court explained that sharing files over the web, was covered by the right to 'receive and impart information' under Article 10 even if they contained copyrighted content with a view to the making of a profit. [61] Indeed, the Court has stressed that Article 10 of the ECHR not only guarantees the right to impart information, but also the public's right to receive it.[62] The court has confirmed that in order to satisfy this principle, domestic legislation must

expressly set out, the following procedural safeguards: firstly, the scope of the ban;^[63] secondly, a judicial appeal process against anti-copyright infringement measures; ^[64]thirdly, the requirement to lay down a specific duty for the national courts to assess, whether the introduction of anti-copyright infringement measures is necessary.^[65]

By contrast, it is not difficult to meet the 'legitimate aim' condition. Legislation would probably aim for the prevention of crime or disorder, and the protection of the reputation or rights of others. This was confirmed in *Sunde Kolmisoppi v Sweden*^[66]. However, with regard to the 'necessity and proportionality' conditions, the freedom of expression may be interfered with if there is a "pressing social need" and is proportionate to the legitimate aim pursued. For domestic legislation to be compliant with Article 10 of the Convention, it must satisfy three principles: the principle of necessity; ^[67] the principle of proportionality;^[68] and the principle of adequacy.^[69] With regard to necessity, under the ECHR the least restrictive alternative should always be initially tried.^[70] The fact that technical measures were easily circumvented, also violated the principle of necessity.^[71] This is consistent with the UK case *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors* ^[72] - 'it is evident from the CJEU's judgment in *UPC v Constantin* that the applicable criterion of efficacy is whether the measures required by the injunction will at least seriously discourage users from accessing the target website'. With regard to proportionality, in *Neij and Sunde Kolmisoppi v Sweden*, the ECtHR found that the nature and severity of the penalties imposed had to be taken into consideration. ^[73] Domestic legislation should also take into account the nature and severity of the sanctions. With regard to adequacy in *Yildirim* Mr. Justice Pinto de Albuquerque observed that in order to comply with the principle of adequacy, under Article 10 ECHR, if there were exceptional circumstances justifying the block of unlawful material, it was essential to direct the measure to the material that was unlawful.^[74] This is consistent with the CJEU's judgment in *UPC*^[75], where in paragraph 56 the Court held that '*the measures... must be strictly targeted, in the sense that they must serve to bring an end to a third party's infringement of copyright or of a related right but without thereby affecting internet users who are using the provider's services in order to lawfully access information*'. That judgment is further supported by *Cartier*^[76]. Moreover, in *Scarlet Extended*^[77] and *Netlog NV*^[78], the CJEU held that whether these measures were legitimate also depended upon their impact on exceptions to copyright, public domain content and free material.

CONCLUSIONS

The convergence between digital technology and information is significant as it has meant that information has the potential to be increasingly precise. ^[79] An information society, in particular an online information society, is one where information is becoming a key commodity - a commodity which relies upon precision and detail. This underlying change in commoditisation has an impact upon the penalties to be imposed for those who happened to transgress the regulatory laws. We submit that the proposed criminal penalties with increased jail sentences are simply too blunt as a tool by which to regulate an online information society. There are alternate systems available. An example of this in operation is YouTube. YouTube will allow individuals to *potentially* infringe certain copyrights, for instance in relation to music on a video, as a licensing fee can be paid - enabled by the collection of advertising revenues through the display of adverts before the commencement of the playing of the video. So, there is evidence that this genre of economic penalty system can take place and operate effectively and efficaciously, in place of instituting a system of copyright infringement with enhanced criminal penalties.^[80] A technical solution such as

this is significant as well, because what it means is that there is a system of simple licensing that takes place as opposed to a very complicated and often labyrinthine approach towards copyright infringement. There are issues in relation to the licensing of content though, in that sometimes it is the case that these sorts of licences or contract will presuppose that there might be infringement that would otherwise have taken place, whereas in reality there would not be a finding of infringement - and sometimes right holders will invoke copyright in an attempt to silence, for instance, critics in a situation where copyright would not ordinarily be applicable.^[81] What this means is that fees for licensing may be levied which otherwise should not have been levied, and this naturally poses a challenge for effective regulation of content. However, what is undeniable is that we have a system that is moving away from proprietary concepts and which instead is moving towards a system that is economically based, and which seeks to compensate right holders for potential infringements ideally on a reasonably automated basis. Criminal provisions that seek to put individuals within jail for infringement seem to be anathema and alienation towards the direction of the economics of copyright law, and in particular copyright law based around the notion of exploitation. What is being suggested in this article is that the direction of copyright law will move towards a more economically based, capitalist based, approach towards financially compensating right holders. Information is becoming increasingly precise units of exchange, in contrast to an increasingly blunt criminal IP law. The proposed penalties cannot match the intricacies and nuances that some technologies, in particular digital technologies, can facilitate in the transfer of content. No longer is information simply stored within a single place - it is everywhere now, and that is exemplified by the notion of the 'Cloud'.^[82] If ever a concept dispels the notion that criminal law is relevant to information penalties, then this must surely be it. An economic loss, in particular one that can be compensated through technological means, should be achieved in a manner that is appropriate in terms of nuance. It should be the most efficacious form of penalty and it should be true to the aforementioned purpose of information regulation. As we argue below, the proposed criminal provisions do not meet any of those core requirements, for these are aimed at physical imprisonment of the individual and they in no way concern the involvement of the individual within information discourse.

We argue that a more appropriate solution in terms of the criminalisation of IP penalties is to remove those penalties because they are not appropriate in an information society. "Much of the current criminalization trend is simply about transferring wealth from the taxpayers, in the form of ex officio police investigations and prosecution, to the cultural industries."^[83] This is an inward looking approach that does not take into account the nature of an information society, where societal growth can be achieved by means other than reinforcing existing proprietary boundaries. The proposal to equate the maximum custodial sentence for physical copyright infringement with online copyright infringement therefore:

- Is not acceptable i.e. there should be a focus on the dissemination of information and that this should be through intervention at the level of domain name registration.
- Is not affordable i.e. whilst the prison capacity has been increased, there is an ongoing rise in the number of people being held which continues to outstrip the number of places available.
- Is not feasible i.e. in addition to difficulties relating to jurisdiction there are practical issues when seeking to identify both initial uploaders and those who run and own large website or services which facilitate copyright infringement on a criminal scale. In any event, they remain inappropriate in an information society.

- Would require an assessment of compatibility with the right to freedom of expression included in Article 10 ECHR under the three-parts of the ECtHR's non-cumulative test.

However, if the UK government nonetheless decided to implement the proposal to equate the maximum custodial sentence for physical copyright infringement with online copyright infringement, it should observe the following key recommendations:

- Any penalties regarding imprisonment should be focused around nuanced consideration of information dissemination rather than blunt application of physical imprisonment.
- Due to difficulties relating to jurisdiction, and practical issues when seeking to identify initial uploaders and those who run and own large website or services which facilitate copyright infringement on a criminal scale, the UK government should acknowledge that the implementation of this proposal may prove to be practically unfeasible. For this reason, the UK alone cannot prevent infringement (given the practical issues concerning UK level blocking orders).
- If in the future organizations such as ICANN or Nominet were forced to implement verified details, the UK government should require the involvement of State authorities (i.e. the courts or the data protection authority, the Information Commissioner Office - ICO). Moreover, if in the future, the UK government proposed legislation to take control of the domain and available services, it should initially assess the risk of circumvention and over-blocking of this anti-copyright infringement measure.
- Finally, any proposed legislation, be that the UK criminal proposals or any international initiative applied within the UK, should be compatible with the right to freedom of expression contained within Article 10 of the ECHR under the three parts of the ECtHR's non-cumulative test. With regard to the 'prescribed by law' condition, any proposed legislation should: (i) expressly set out the scope *ratione personae*, the scope *ratione materiae*, and the scope *ratione temporis* of anti-copyright infringement measures; (ii) explicitly establish by law a judicial appeal process against anti-copyright infringement measures; and (iii) also expressly set out a specific obligation for the UK courts to assess whether the introduction of these measures is necessary. As to the 'necessity', 'proportionality' and 'adequacy' conditions, any proposed legislation should: (i) always try minimally invasive means initially and should not be easily circumvented; (ii) take into account the nature and severity of the sanctions; and (iii) only target copyright infringing content.

[1] Dr Felipe Romero-Moreno (School of Law, Hertfordshire University, UK) and Dr James GH Griffin, (School of Law, University of Exeter, UK) would like to take this opportunity to thank all those who gave comments on the draft, in particular Abhilash Nair, University of Strathclyde, and Professor Christian Witting, University of Exeter. We would also like to extend our thanks to the anonymous reviewers. We would also like to thank all those in the international press who have discussed our findings. There are too many people to mention here but we are particularly grateful to TorrentFreak who broke the story, as well as to Ars Technica and The Register.

[2] Gowers Review, HM Treasury, HMSO, London (2006) available online from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf (last accessed on 28th October 2015)

[3] For a human rights analysis of the Digital Economy Act 2010 see Romero-Moreno, F., 'The three strikes and you are out challenge' 3 *European Journal of Law and Technology* (2012), Romero-Moreno, F., 'Unlocking the Digital Economy Act 2010; human rights issues in the UK' 27 *International Review of Law Computers and Technology* 18 (2013), Romero-Moreno, F., 'Incompatibility of the Digital Economy Act 2010 subscriber appeal process provisions with Article 6 of the ECHR' 28 *International Review of Law Computers and Technology* 81 (2014), Romero-Moreno, F., 'The Digital Economy Act 2010; subscriber monitoring and the right to privacy under Article 8 of the ECHR' (forthcoming) *International Review of Law Computers and Technology* (2016)

[4] S.42 Digital Economy Act 2010 (c.24)

[5] For details see <http://services.parliament.uk/bills/2013-14/intellectualproperty/documents.html> (last accessed on 28th October 2015) ; 'Changes to penalties for online copyright infringement', UK-IPO, Newport (2015) available online from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/446515/Changes_to_penalties_for_online_copyright_infringement.pdf page 1 (last accessed on 28th October 2015)

[6] 'Changes to penalties for online copyright infringement', *ibid*

[7] S.26(3) - "In subsection (4A)(b) of that section, for "two" substitute "ten".

[8] Derrida, J., 'Lies Inc' (trans. Weber, 1977), Northwestern University Press, Illinois (1972) at p.13; Derrida, J., "Difference" in Derrida, 'Margins of Philosophy' (trans. Bass, 1982) The Harvester Press, Hemel Hempstead (1982) p.1-p.27 and Kamuf, P., 'A Derrida Reader: Between the Blinds', Columbia University Press, New York (1991), Austin, J., 'How To Do Things With Words', OUP, Oxford (1962; 1976 edition). See also Gadamer, H., 'Truth and Method' (trans. Sheed & Ward Ltd., London, 1975) Second Part & Third Part

[9] Fiske, J., 'Television Culture' Methuen, London (1987) at 239. For development of this see Fisher, W., 'Promises to Keep' Stanford University Press, California (2004), at p. 28 -9; Vaidhyathan, S., 'The Anarchist in the Library' Basic Books, New York (2004), at p.77-8. See also Katyal, S., 'Semiotic Disobedience', *Washington University Law Review* 84 (2006): 489. In relation to structure, see Benkler, Y., 'From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access', *Federal Communications Law Journal* 3 (1998): 561; Lessig, L., 'Code and Other Laws of Cyberspace' Basic Books, New York (1999) and for interpretative analysis of the link between the layers, see inter alia Murray, A., 'The Regulation of Cyberspace' Routledge-Cavendish, Abingdon (2007), chap. 4. On passive re-use, see Hughes, J., "'Recoding" Intellectual Property and Overlooked Audience Interests', *Texas Law Review* 77 (1999): 923

[10] Consider for instance liability for user-generated content. For details see <http://www.out-law.com/page-9742> (last accessed on 7th September 2016)

[11] Derrida, J., 'Lies Inc' (trans. Weber, 1977); Derrida, J., "Difference" in Derrida, 'Margins of Philosophy' *supra* 19

[12] Fiske, *Television Culture*, *ibid.* at 239

[13] Weber, M., *The Protestant Ethic and the Spirit of Capitalism* (1930) Routledge, London (1992), Sherman B., & Bently, L., *The Making of Modern Intellectual Property Law* CUP, Cambridge (1999) at p. 43

[14] Though we do need to note such seminal works such as Fisher, W., 'Promises to Keep' (2004). However, we still believe that the notion of semiotic democracy has not been as central to the information society as it could have been - note also discussion on the edge of making this point about the nature of the Internet - Stallman, R., *Free Software Free Society*, GNU Press, Boston, (2002) throughout. The very likely rise of the more semiotic and participatory 'Web 3.0' will probably change this

[15] Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) 1994, Art 61

[16] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights OJ L 157/45

[17] Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167/10

[18] Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, 15th December 1993, 33 *ILM* 81 (1994)

[19] *Ibid*

[20] 'In accordance with Article 1(1) the European Communities is free to determine the appropriate method of implementing the provisions of the Agreement within its own legal system and practice - EC - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (WT/DS174/R, Mar. 15, 2005) at paras. 7.746 & 7.682

[21] Sende, M., "*Cross-border Enforcement of Patent Rights: An Analysis of the Interface Between Intellectual Property and Private International Law*" (New York, Oxford University Press, 2002) at 9. For comments on this part, we are grateful to OManu, T., of the School of Law, University of Hertfordshire

[22] Changes to penalties for online copyright infringement, UK-IPO, Newport (2015) available online from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/446515/Changes_to_penalties_for_online_copyright_infringement.pdf page 2 (last accessed on 28th October 2015)

[23] Changes to penalties for online copyright infringement, *ibid.*, page 1

[24] Penalty Fair?, UK-IPO, Newport (2015) at page 57 available online from <https://www.gov.uk/government/consultations/changes-to-penalties-for-online-copyright-infringement> (last accessed on 28th October 2015)

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- [29] The Guardian, Social recluse jailed for £300,000 internet piracy scam (2015) available online from <http://www.theguardian.com/technology/2015/sep/08/social-recluse-jailed-300k-internet-piracy-scam> (last accessed on 28th October 2015)
- [30] http://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/index_en.htm
- [31] European Commission public consultation on the evaluation and modernization of the legal framework for the enforcement of intellectual property rights available online from http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8580 (last accessed on 7th September 2016)
- [32] BILETA response to EC consultation on the evaluation and modernization of the legal framework for the enforcement of IPRED http://researchprofiles.herts.ac.uk/portal/files/10104866/BILETA_Response_to_EC_Consultation_on_the_Evaluation_and_Modernization_of_the_Legal_Framework_for_the_Enforcement_of_IPRED.pdf
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- [34] Intellectual Property Act 2014 (c.18)
- [35] Weatherley, M., Follow The Money: Financial Options To Assist In The Battle Against Online IP Piracy (2014) available online from http://www.olswang.com/media/48204227/follow_the_money_financial_options_to_assist_in_the_battle_against_online_ip_piracy.pdf para 6.9. (last accessed on 28th October 2015)
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[38] *Protocol On The Application Of The Charter Of Fundamental Rights Of The European Union To Poland And To The United Kingdom* OJ C 306/156 (2007)

[39] See e.g. Kant, E., *The Metaphysic of Morals* (1797), ed. Gregor, M., Cambridge University Press, Cambridge (1996) at 6:444, Hegel, G., *Philosophy of Right* (1821) trans. S Dyde, Prometheus Books, (1996) see also Radin, M., "Property and Personhood", 34 *Stanford Law Review* 957(1982) at 990, Stillman, P., *Property, Freedom and Individuality in Political Thought*, NOMOS XXII, New York University Press, New York (1980), at 132

[40] Kant, E., *The Metaphysic of Morals* (1797), ed. Gregor, M., Cambridge University Press, Cambridge (1996) at 6:444, Hegel, G., *Philosophy of Right* (1821) trans. S Dyde, Prometheus Books, (1996) see also Radin, M., "Property and Personhood", 34 *Stanford Law Review* 957(1982) at 990

Stillman, P., *Property, Freedom and Individuality in Political Thought*, NOMOS XXII, New York University Press, New York (1980), at 132

[41] This means that the right is alienable, i.e. transferrable as a property right, see s.1(1) CDPA 1988; s2(1) TMA 1994 and s30(1) Patents Act 1977

[42] Refer to the previous paragraph.

[43] Prison: the facts: Bromley Briefings Summer 2015 (2015) available online from <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Prison%20the%20facts%20May%202015.pdf> page 1 (last accessed on 28th October 2015)

[44] Focus Prisoner Education, *The cost of Prisons* (year unknown) available online from <http://www.fpe.org.uk/the-cost-of-prisons> (last accessed on 28th October 2015)

[45] Government response to the Justice Committee's ninth report of session 2014-15; prisons: planning and policies, Ministry of Justice, London (2015) available from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/458375/response-to-justice-committee-report.pdf page 4 (last accessed on 28th October 2015)

[46] For instance such initial uploaders use platforms such as the Pirate Bay to attract millions of BitTorrent users to their websites for financial gain by displaying the embedded URL to them at different moments of the download

[47] Le Blond et al., 'Angling for big fish in BitTorrent' 2010, page 6

[48] <https://who.is/> (last accessed on 28th October 2015)

[49] OFCOM, 'Site Blocking' to reduce online copyright infringement: A review of sections 17 and 18 of the Digital Economy Act (2010) available online from <http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf> page 20 (last accessed on 28th October 2015)

[50] *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch) para. 198

[51] OFCOM, 'Site Blocking' to reduce online copyright infringement: A review of sections 17 and 18 of the Digital Economy Act (2010) supra [49] page 24

[52] TorrentFreak 'ICANN refuses to play piracy police' <https://torrentfreak.com/icann-refuses-to-play-piracy-police-150612/>

[53] Anon, RIAA wants domain registrar to expose 'pirate site' owner (2015) available online from <https://torrentfreak.com/riaa-wants-domain-registrar-to-expose-pirate-site-owner-150728/> (last accessed on 28th October 2015)

[54] 'The Digital Millennium Copyright Act', Pub. L. 105-304, October 28th 1998, 112 Stat. 2860

[55] Supra [53]

[56] Up to date records available at <http://www.google.com/transparencyreport/removals/copyright/> (last accessed on 28th October 2015)

[57] [2012] UKSC 5 5 [para 44]

[58] C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft GmbH* [2013] (not yet reported, as of October 2015)

[59] *Ibid.*, at 62

[60] European Commission's Joint Research Centre 'Online Copyright Enforcement, Consumer Behavior, and Market Structure' <https://ec.europa.eu/jrc/en/publication/euro-scientific-and-technical-research-reports/online-copyright-enforcement-consumer-behavior-and-market-structure>

[61] *Neij and Sunde Kolmisoppi v Sweden* App no 40397/12 (ECtHR, 19 February 2013)

[62] *Yildirim v Turkey* App no 3111/10 (ECtHR, 18 March 2013)[50]; *Guerra and others v Italy* (1998) 26 EHRR 357, para 53; *Observer and Guardian v the United Kingdom* (1992) 14 EHRR 153, para 59

[63] *Association Ekin v France* (2002) 35 EHRR 35, para 58

[64] Concurring opinion in *Yildirim v Turkey* supra 19, page 28

[65] *Yildirim v Turkey* App no 3111/10 (ECtHR, 18 March 2013) at paragraph 66

[66] *Neij and Sunde Kolmisoppi v Sweden* App no 40397/12 (ECtHR, 19 February 2013)

[67] Concurring opinion in *Yildirim v Turkey* App no 3111/10 (ECtHR, 18 March 2013) page 28

[68] *Neij and Sunde Kolmisoppi v Sweden* App no 40397/12 (ECtHR, 19 February 2013)

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- [79] Anderson, C., *Makers - The New Industrial Revolution* (Random House, 2012)
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