Department for Business Energy & Industrial Strategy
1 Victoria Street
London
SW1H 0ET

23 March 2017

Dear Minister, Ladies, Lords and IPO,

Penalties for copyright infringement in the Digital Economy Bill

We are a group of campaigners, copyright academics and lawyers. We are writing to ask that the new definition of 'criminal online copyright infringement' is narrowed in order that it is foreseeable, proportionate and reduces risk of abuse.

The current state of Clause 28 of the Digital Economy Bill

Our particular concern is Clause 28 of the Digital Economy Bill entitled 'Offences: infringing copyright and making available right'.[1]

The clause defines criminal copyright infringement as 'making available', where a person knows or ought to know that they are infringing copyright; and are either doing so in the course of a business, or else are causing a 'loss' or creating a 'risk of loss' to the copyright owner. 'Loss' 'includes a loss by not getting what one might get'.

Lord Bourne's Statement of Compatibility of the Digital Economy Bill with the European Convention on Human Rights

Lord Bourne of Aberystwyth has stated that, under section 19(1)(a) of the Human Rights Act 1998, the provisions of the Digital Economy Bill are compatible with the European Convention on Human Rights.[2]

Arguably, however, as currently drafted, Clause 28 ie 'Offences: infringing copyright and making available', seems to be incompatible with the European Court of Human Rights/Court of Justice of the European Union foreseeability and proportionality principles. For this reason, the Bill could be in breach of both the European Convention on Human Rights and EU law.

[1] See the Appendix for the full text, or http://services.parliament.uk/bills/2016-17/digitaleconomy.html
[2] See https://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0045/en/17045en10.htm

Our assessment of compatibility of Clause 28 of the Digital Economy Bill with the European Convention on Human Rights and EU law

Following the European Data Protection Supervisor Opinion on the Anti-Counterfeiting Trade Agreement[3] (ACTA), the implementation of Clause 28 of the DEB, would require monitoring the internet usage of individuals to identify instances of alleged online copyright infringement.

The three parts of the ECtHR/CJEU non-cumulative test

That said, the legality of particular enforcement measures, which interfere with fundamental rights, needs to be assessed, in view of the conditions set out in Articles 8(2) and 10(2) of the ECHR[4] and Article 52 of the Charter[5]. Specifically, they require that any interference with such rights must be 'in accordance with the law/provided for by law' and necessary and proportionate to the legitimate aim pursued (see EDPS Opinion on ACTA 2012, 5-6).[6] Here, regardless of the fact that the DEB clearly pursues a legitimate aim, that is to say, the protection of intellectual property rights using criminal sanctions for online copyright infringement, a case can be made that, as it stands, Clause 28 of the DEB fails to satisfy the foreseeability and proportionality tests.

The foreseeability test

In terms of increasing the penalty for online copyright infringement, which may well include file-sharing cases, as currently drafted, the DEB seems to be incompatible with the ECtHR/CJEU principle of foreseeability. This principle requires that the law needs to be sufficiently clear and precise in its terms to afford individuals an adequate indication of the circumstances where, and the conditions upon which, online copyright infringement may attach criminal liability ie specifically in particularly serious or commercial-scale online copyright infringement cases.

According to the ECtHR's well-settled case law, a clause - such as, 28 DEB - is 'foreseeable' if it is formulated with sufficient precision to allow any citizen - including underage and retired individuals allegedly involved in unlawful file sharing - if need be with adequate advice to regulate their conduct - 'in accordance with the law/provided for by law' test see eg., Yildirim v Turkey App no 3111/10 (ECtHR, 18 March 2013) [57][7].

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[3] https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2010/10-02-22_ACTA_EN.pdf

[4] http://www.echr.coe.int/Documents/Convention_ENG.pdf

[5] http://fra.europa.eu/en/charterpedia/article/52-scope-and-interpretation-rights-and-principles

[6] https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2012/12-04-24_ACTA_EN.pdf

[7] http://www.concernedhistorians.org/content_files/file/LE/437.pdf

As currently drafted, the DEB seems to be wide enough to encompass not-for-profit, small-scale online copyright infringement, which could lead to any individual spending ten years in prison for sharing a single file; or in fact any minor online copyright infringement where there is a 'loss by not getting what one might get' or cause a 'risk' of further infringement. In other words, Clause 28 of the DEB means that possibly any wrongful use where somebody has not paid a licence fee is a penal offence. Alarmingly, causing 'risk' to the copyright holder means almost by definition that ordinary peer-to-peer file sharing may be deemed a criminal rather than civil infringement.

In order to be compatible with the foreseeability principle, ie the ECtHR/CJEU 'in accordance with the law/provided for by law' test, there are two important things that must be set out in primary legislation, that is, the DEB. Pursuant to the European Court of Human Rights case of Yildirim v Turkey, the first thing that needs to be set out on the face of the Bill is a definition of the type of individuals and institutions being able to be criminally prosecuted (see particularly the minimum criteria for ECHR-compatible law on Internet technical measures). For example, domestic and foreign owners of torrent, direct download, and streaming sites, and initial uploaders (those individuals who first inject copyright protected content onto peer-to-peer file-sharing networks) to direct file sharers to such sites with a view to making a profit.

In this context, the Bill should explicitly state that criminal liability may attach only to commercial-scale or particularly serious copyright infringers. The second thing that must be set out on the face of the Bill is a description of the type of infringement, which might result in criminal prosecution. Again, in doing so, the Bill should expressly state that Clause 28 is aimed at only particularly serious or commercial-scale online copyright infringement. Notably, if this were to be incorporated into the Bill, this would mean that Clause 28 of the DEB would be in line with the intention of Parliament. Specifically, to criminally prosecute just commercial-scale online copyright infringers, but not individuals sharing files for personal and not-for-profit purposes.

The proportionality test

As currently drafted, the DEB also seems to be incompatible with the ECtHR/CJEU principle of proportionality.The European Data Protection Supervisor[8] has stressed that two factors are especially relevant to the evaluation of the proportionality of a measure directed at enforcing intellectual property rights on the internet: first, the depth and scale of internet usage monitoring; and second, the scale of the intellectual property rights infringements against which this monitoring is being carried out. In other words, in order to be compliant with the proportionality test, the scope of the monitoring of internet use and the scale of the online copyright infringement (commercial-scale versus small-scale), must also be taken into

[8]https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2010/10-02-22_ACTA_EN.pdf

account. In this regard, see generally the European Court of Human Rights decision in Neij and Sunde Kolmisoppi v Sweden App no 40397/12 (ECtHR, 19 February 2013)[9].

It is worth noting that pursuant to the commercial scale rule included in Article 8 of IPR Enforcement Directive 2004/48/EC[10], internet usage monitoring, which is conducted to detect online copyright infringement may be proportionate, in the context of restricted, individual, ad hoc cases, where strong suspicions of online copyright infringement on a commercial scale exist. However, the general or random monitoring of internet usage concerning not-for-profit, minor, small-scale online copyright infringement would be disproportionate and in breach of Article 8 of the European Convention on Human Rights, Articles 7 and 8 of the EU Charter of Fundamental Rights, and the Data protection Directive 95/46/EC[11] (see EDPS Opinion on ACTA 2012, 6-7[12]).

This is a view shared by the European Court of Human Rights in Case Barbulescu v Romania App no 61496/08 (ECtHR, 12 January 2016) [60][13], the Advocate General in her discussion[14] of Case 275/06 Productores de Musica de Espana v Telefonica de Espana SAU [2008] ECR I-271 [AG 119] as well as the Court of Justice of the EU in Case-70/10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) [2012] ECDR 4 [36][15] and Case-360/10 Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV [2012] ECR I-0000 [34][16].

Breach of the European Convention on Human Rights and EU law

As it stands, the Bill appears to be incompatible with the foreseeability and proportionality tests, and as a result, it could be in violation of both the European Convention on Human Rights and EU law.

How to solve the problem

Thresholds can be introduced that are flexible enough to ensure that all criminal activity is encompassed, but also high enough to exclude the majority of non-commercial, low scale infringements.

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[9] http://hudoc.echr.coe.int/eng#{"itemid":["001-117513"]}
[10] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0048R(01)
[11] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML
[12]https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2010/10-02-22_ACTA_EN.pdf
[13] https://www.aranagenzia.it/attachments/article/7110/CASE-OF-BARBULESCU-v.-ROMANIA.pdf
[14]http://curia.europa.eu/juris/document/document.jsf?text=&docid=62901&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=338964
[15]http://curia.europa.eu/juris/document/document.jsf?text=&docid=115202&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=339311
[16]http://www.openmediacoalition.it/documenti/european-court-of-justice-case-c-36010-belgische-vereniging-van-auteurs-componisten-en-uitgevers-sabam-v-netlog-nv/

We suggest using the international standard of 'commercial scale'.

At the global level, the commercial scale criterion is expressly recognized in Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[17]. Specifically, this Article requires *"members to provide for criminal procedures and penalties [...] at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale"*. In Europe, the commercial scale rule is included in Article 8 and Recital 14 of the Enforcement Directive 2004/48/EC[18] as well as Recital 42 of the Copyright Directive 2001/29/EC[19]. It is for the domestic courts of Member States to decide whether activities satisfy this standard on a case by case basis (see EC Workshop on the economic rationale of referring to commercial scale or commercial purpose when referring to IP infringements).

As per Case 275/06 Promusicae v Telefonica[20], commercial scale would mean *"particularly serious cases such as [...] offences committed with a view to making a profit [...]. The intention that the enforcement of copyrights in the face of infringements on the internet should be geared specifically to serious impairments is also apparent from the ninth recital in the preamble to Directive 2004/48"* [AG 119].

Whilst this would include infringing websites and initial uploaders (those individuals who first upload copyrighted content in file-sharing networks) to direct file sharers to these websites for financial gain, e.g., through advertising, membership subscriptions, donations, VIP access for faster downloads etc., (ie making money); this would exclude actions performed by file sharers acting in good faith, as well as those performed for personal and not-for-profit purposes (EDPS 2012, 9–10[21]).

In terms of the latter, a relevant example may be the case of an individual uploading a music album onto a peer-to-peer file sharing network from which anyone could download. If this individual does not charge for the download or gains any other financial benefit from it, it is arguable that it is neither a commercial purpose nor commercial scale (see EC Workshop on the economic rationale of referring to commercial scale or commercial purpose when referring to IP infringements).

The commercial scale standard appears to be also supported in the US where the new Joint Strategic Plan for Intellectual Property Enforcement[22] has noted that *"an effective enforcement strategy against commercial-scale piracy and counterfeiting therefore, must*

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[17] https://www.wto.org/english/docs_e/legal_e/27-trips.pdf
[18] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:195:0016:0025:en:PDF
[19] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML
[20] http://curia.europa.eu/juris/document/document.jsf?text=&docid=62901&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=340543
[21] https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2010/10-02-22_ACTA_EN.pdf
[22] https://obamawhitehouse.archives.gov/sites/default/files/omb/IPEC/spotlight/eop_ipec_jointstrategicplan_hi-res.pdf

target and dry up the illicit revenue flow of the actors engaged in commercial piracy online. That requires an examination of the revenue sources for commercial-scale pirates."

The Report has added that *"the operators of direct illicit download and streaming sites enjoy revenue through membership subscriptions serviced by way of credit card and similar payment-based transactions, as is the case with the sale and purchase of counterfeit goods, while the operators of torrent sites may rely more heavily on advertising revenue as the primary source of income."*

Moreover, the commercial scale criterion seems to have been also endorsed by the European Commission. It explained that in practice, in order to assess whether or not commercial scale copyright infringement takes place, the starting point in this assessment would be both, the business model of the infringer, and the degree of harm caused to the rightholder. In terms of the latter, it is worth pointing out that expert research shows that approximately 100 initial uploaders publish 67% of all content, which is in breach of copyright law. Whilst this represents 75% of all downloads, in assessing the extent of harm caused to the rightholder, it is important to mention that these initial uploads trigger billions of downloads[23].

Our proposal

Taken together, and in view of the above considerations, our proposal is to set a threshold of 'commercial scale loss', and revising 'risk of loss' to 'serious risk of commercial scale loss'. This change will ensure that individuals infringing copyright are normally dealt with through civil courts and civil copyright action. In fact, it will help deliver the expected outcome of Clause 28. Namely, to criminally prosecute only commercial-scale copyright infringers.

In particular, what we are requesting is as follows:

- Clause 28, page 28, section 2A (b)(ii) leave out 'loss' and insert 'commercial scale loss'
- Clause 28, page 28, section 2A (b)(ii) leave out 'risk of loss' and insert 'serious risk of causing commercial scale loss'.

It is important to stress that this amendment would introduce thresholds for criminal liability to avoid prosecution of minor, small-scale, non-commercial copyright infringers such as file sharers.

As the AG has highlighted in Case 275/06 Promusicae v Telefonica, *"it is […] not certain that private file sharing, in particular when it takes place without any intention to make a profit, threatens the protection of copyright sufficiently seriously […] To what extent private file sharing causes genuine damage is in fact disputed."* [AG 106]

[23] http://www.it.uc3m.es/acrumin/papers/TON_2013.pdf

Our changes would give the courts, lawyers, and the public a clear indication that trivial acts of file sharing or unlicensed online publication would be unlikely to meet the thresholds of 'serious risk' or 'commercial scale' losses. Crucially, in addition to being compatible with both, the European Convention on Human Rights and EU law, this would protect individuals who received threatening letters from speculative invoicing copyright extortionists.

Yours faithfully,

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Appendix

Current state of the Digital Economy Bill, Clause 28

(1)The Copyright, Designs and Patents Act 1988 is amended as follows.

(2) In section 107 (criminal liability for making or dealing with infringing articles, etc), for subsection (2A) substitute—

"(2A) A person ("P") who infringes copyright in a work by communicating the work to the public commits an offence if P—

(a)knows or has reason to believe that P is infringing copyright in the work, and

(b)either—

(i) intends to make a gain for P or another person, or

(ii)knows or has reason to believe that communicating the work to the public will cause loss to the owner of the copyright, or will expose the owner of the copyright to a risk of loss.

(2B) For the purposes of subsection (2A)—

(a)"gain" and "loss"—

(i)extend only to gain or loss in money, and

ii)include any such gain or loss whether temporary or permanent, and

(b)"loss" includes a loss by not getting what one might get."

(3)In subsection (4A)(b) of that section, for "two" substitute "ten".

(4) In section 198 (criminal liability for making, dealing with or using illicit recordings), for subsection (1A) substitute—

"(1A) A person ("P") who infringes a performer's making available right in a recording commits an offence if P—

(a)knows or has reason to believe that P is infringing the right, and

(b)either—

(i)intends to make a gain for P or another person, or

(ii)knows or has reason to believe that infringing the right

will cause loss to the owner of the right, or expose the owner of the right to a risk of loss.

(1B) For the purposes of subsection (1A)—

(a)"gain" and "loss"—

(i)extend only to gain or loss in money, and

(ii)include any such gain or loss whether temporary or permanent, and

(b)"loss" includes a loss by not getting what one might get."

(5)In subsection (5A)(b) of that section, for "two" substitute "ten".

(6)The amendments made by this section do not apply in relation to offences committed before this section comes into force