

On the justifiability of criminal copyright provisions: a (harm) principled analysis



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Abstract

ON THE JUSTIFIABILITY OF CRIMINAL COPYRIGHT PROVISIONS: A (HARM) PRINCIPLED ANALYSIS

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Since their introduction, criminal copyright provisions have expanded in scope and severity. At the same time, rapid technological advancements and the dynamics of internet use have made copyright infringement easier and more widespread, raising questions about the legitimacy or justifiability of criminalisation in this domain.

This thesis critically examines the justifiability of the United Kingdom's criminal copyright provisions. It begins by exploring the historical context and rationale behind the introduction of these provisions. This is followed by the development of a normative framework based on the Harm Principle and supplemented by principles of proportionality, necessity, and other negative constraints designed to ensure the judicious application of criminal law.

The normative framework is then applied to assess the justifiability of the UK's current criminal copyright provisions and prosecutorial practices. In the analysis, the thesis critiques the historical rationale for introducing criminal copyright provisions, which overlooks the unique aspects of criminalisation and views criminalisation as merely another regulatory tool. It also identifies areas where the current provisions and prosecution practices align or fail to align with the normative framework. Finally, the thesis offers recommendations for reforming criminal copyright.

Table of contents

Acknowledgements.....	6
Table of Abbreviations.....	7
Table of Cases.....	8
Table of Legislation.....	14
Table of Diagrams and Tables	22
CHAPTER 1: INTRODUCTION	23
1.1. INTRODUCTION.....	23
A brief history of copyright.....	25
The gap in the literature.....	30
1.2. AIMS, METHODOLOGY AND SCOPE	35
1.3. STRUCTURE OF THIS THESIS	39
CHAPTER 2: THE HISTORY OF CRIMINAL COPYRIGHT PROVISIONS IN THE UK	44
2.1. INTRODUCTION.....	45
2.2. THE ‘PRE-HISTORY’ OF CRIMINAL COPYRIGHT	47
The Statute of Anne 1710	48
The Engraving Copyright Act 1735	61
Other developments in the 18 th century.....	63
2.3. THE 19 th CENTURY	65
The Dramatic Literary Property Act 1833.....	66
The Literary Copyright Act 1842.....	68
Fine Arts Copyright Act 1862.....	70
The Copyright (Musical Compositions) Act 1882 and The Copyright (Musical Compositions) Act 1888.....	78
International developments in the 19 th century	78
2.4. THE 20 th CENTURY	79
The birth of criminal copyright – Musical Copyright Act 1906.....	80
Imperial Copyright Act 1911	84
The Copyright Act 1956.....	87
The Copyright Act 1956 (Amendment) Act 1982, the Copyright (Amendment) Act 1983, and the Copyright (Computer Software) Amendment Act 1985	89
The Copyright, Designs and Patents Act 1988	92

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1995.....	95
2.5. THE 21st CENTURY.....	96
The Copyright, etc. and Trade Marks (Offences and Enforcement) Act 2002	96
Copyright and Related Rights Regulations 2003.....	97
Digital Economy Act 2010	98
Copyright, Designs and Patents Act 1988 (Amendment) Regulations 2010.....	100
Legal Aid, Sentencing and Punishment of Offences Act 2012 (Fines on Summary Conviction) Regulations 2015/664.....	101
Digital Economy Act 2017	101
2.6. CONCLUSION	105
CHAPTER 3: THE BASIS FOR CRIMINALISING COPYRIGHT INFRINGEMENTS	107
3.1. INTRODUCTION.....	107
3.2. THE HARM PRINCIPLE	108
i. Mill's Harm Principle	108
ii. Refining the key ideas	111
Harm	112
Deserving of moral stigma or criminal blame, and punishment.....	125
3.3. THE HARMS OF COPYRIGHT INFRINGEMENT.....	130
i. The interest that needs to be set back.....	130
ii. The serious and wrongful harm of copyright infringement	153
3.4. THE SUPPLEMENTARY PRINCIPLES.....	163
i. The 'faulty traits' in copyright infringements.....	163
ii. British society's moral standards	172
3.5. CONCLUSIONS	175
CHAPTER 4: NEGATIVE CONSTRAINTS AGAINST THE CRIMINALISATION OF COPYRIGHT INFRINGEMENTS	178
4.1. IS CRIMINALISATION PREFERABLE?	179
THE ALTERNATIVES TO CRIMINALISATION	180
Education	180
Administrative Remedies.....	183
Private Law Remedies.....	196
Effectiveness of the suite of alternatives.....	208
4.2. IS THE CRIMINALISATION UNFAIR OR DISPROPORTIONATE?	216
4.3. IS THE CRIMINALISATION PRACTICAL?	226
4.4. UNINTENDED CONSEQUENCES AND OTHER CONSIDERATIONS	228

Overdeterrence or chilling effects of criminalisation	228
Other crimes?	229
Inchoate Offences	230
4.5. CONCLUSIONS	231
CHAPTER 5: THE IMPLICATIONS OF THE NORMATIVE FRAMEWORK ON THE UK'S CRIMINAL COPYRIGHT REGIME	233
5.1. Section 107(1), CDPA 1988: offences involving making, possessing, or dealing with infringing copies	234
5.2. Section 107(2), CDPA 1988: offences in relation to articles designed for making copies of copyright works	250
5.3. Section 107(2A), CDPA 1988: communication to the public	252
Actus Reus	253
Mens rea.....	261
5.4. Section 107(3), CDPA 1988: offences in relation to public performance of works....	264
5.5. CONCLUSIONS	270
CHAPTER 6: THE PROSECUTION PRACTICE	274
6.1. Factors present in copyright prosecutions.....	275
Public Prosecutions.....	275
Private Prosecutions.....	280
Other cases	288
6.2. The case for reform	289
6.3. Should private prosecutions for copyright crimes be abolished or reformed?	290
CHAPTER 7: SO WHAT?	307
7.1. THE AIMS OF THIS THESIS.....	307
The Historical Context of Criminal Copyright Provisions	308
The Normative Framework: The Harm Principle and Its Application	308
Evaluation of the UK's Criminal Copyright Law	310
Prosecution Practices and Legislative Reform	310
7.2. BROADER IMPLICATIONS	310
7.3. RECOMMENDATIONS FOR REFORM	313
7.4. CONCLUDING THOUGHTS.....	315
Bibliography	318

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Table of Abbreviations

CDPA	:	Copyright, Designs and Patents Act 1988
DSM Directive	:	Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130
InfoSoc Directive	:	Directive 2001/29/EC 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 [2001] OJ L167/10
TRIPS Agreement	:	WTO Agreement on Trade Related Aspects of Intellectual Property Rights
UCC	:	Universal Copyright Convention
WIPO	:	World Intellectual Property Organisation

Table of Cases

United Kingdom

- Adams v Batley (1887) 18 QBD 625 ... 67, 68.
- Atcheson v Everitt (1775) 98 ER 1142 (KB) ... 53.
- Attorney General v Blake [2000] UKHL 45, [2001] 1 AC 268 ... 58.
- Barker v Corus [2006] UKHL 20, [2006] 2 AC 572 ... 207.
- Beckford v Hood (1798) 7 D & E 620 (KB) ... 51.
- Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors [2014] EWHC 3354 (Ch), [2015] 1 All ER 949 ... 202-204, 215.
- Cartier International AG & Ors v British Telecommunications Plc & Anor [2018] UKSC 28, [2018] 4 All ER 373 ... 204.
- Cartier International AG v British Sky Broadcasting Ltd [2016] EWCA Civ 658, [2017] 1 All ER 700 ... 204.
- Crown Estate Commissioners v Mark Andrew Tudor Roberts, Trelleck Estate Limited [2008] EWHC 1302 (Ch), [2008] 4 All ER 828 ... 55.
- D Ltd v A [2017] EWCA Crim 1172 ... 302.
- David Hoffman v Drug Abuse Resistance Education (UK) Ltd [2012] EWPCC 2 (Patents County Court) ... 164.
- Designers Guild v Russell Williams (Textiles) Ltd [2000] 1 WLR 2416 (HL) ... 139, 139
- Donaldson v Beckett (1774) 4 Burr 2408 (HL) ... 138, 197.
- Dramatico Entertainment Ltd & Ors v British Sky Broadcasting Ltd & Ors [2012] EWHC 268 (Ch), [2013] Bus LR D24 ... 202.
- EMI Records Ltd & Ors v British Sky Broadcasting Ltd & Ors [2013] EWHC 379 (Ch), [2013] Bus LR 884 ... 202.
- Ernest Turner Electrical Instruments, Limited v Performing Right Society, Limited [1943] Ch 167 (CA) ... 265.
- Fairchild v Glenhaven Funeral [2002] UKHL 22, [2003] 1 AC 32 ... 207.
- Federation Against Copyright Theft (FACT) v Broomhall and Others [2007] 4 Costs LR 640 (Supreme Court Costs Office) ... 274, 299.
- Federation Against Copyright Theft Limited v Stanley Richard Ashton [2013] EWHC 1923 (Admin), [2014] 1 WLR 1322 ... 299.
- Football Association Premier League Ltd (FAPL) v British Sky Broadcasting Ltd & Ors [2013] EWHC 2058 (Ch), [2013] ECDR 14 ... 202.
- French v Day, Gregory (1893) 9 TLR 548 (QB) ... 268.
- Gouriet v Union of Post Office Workers [1978] AC 435 (HL) ... 292, 294.

- Hamilton v Post Office Ltd [2021] EWCA Crim 577, [2021] Crim LR 684 ... 292.
- Hoover plc v George Hulme (Stockport) [1982] FSR 565 (Chancery Division) ... 238-239.
- ITV Broadcasting Ltd v TV Catchup Ltd [2011] EWHC 1874 (Pat), [2011] FSR 40 ... 254
- Ivey v Genting Casinos (UK) Ltd (t/a Crockfords) [2017] UKSC 67, [2018] AC 391 ... 129.
- Jennings v Stephens [1936] Ch 469 (CA) ... 265, 266.
- Jones v Whalley [2006] UKHL 41, [2007] 1 AC 63 ... 301.
- LA Gear Inc v Hi-Tec Sports plc [1992] FSR 121 ... 236, 240.
- Lee v Simpson (1847) 3 CB 871 ... 70.
- Lee v Taylor and Gill (1912) 77 JP 66 (Divisional Court) ... 238.
- Lyon v Knowles (1863) B & S 556 (Court of Exchequer) ... 267, 268.
- Marsh v Conquest (1864) 144 ER 169 (Court of Common Pleas) ... 268.
- Matchroom Boxing Ltd & Anor v British Telecommunications Plc & Ors [2020] EWHC 2868 (Ch) ... 202.
- Mexborough v Whitwood Urban DC [1897] 2 QB 111 (CA) ... 54.
- Millar v Taylor (1769) 4 Burr 2303, 98 ER 20 (KB) ... 138.
- Monaghan v Taylor (1886) 2 TLR 685 (Divisional Court) ... 268.
- Morjaria v Westminster Magistrates' Court [2023] EWHC 2936 (Admin), [2024] Crim LR 184 ... 303.
- Muhammad Asif v Adil Iqbal Ditta and Noreen Riaz [2021] EWCA Crim 1091, [2022] 1 WLR 285 ... 302, 304.
- Murphy v Media Protection Services Ltd [2008] EWHC 1666 (Admin), [2008] FSR 33 ... 273.
- Nouveau Fabrics Limited v Voyage Decoration Limited, Dunelm Soft Furnishings Limited [2004] EWHC 895 (Ch) ... 236.
- Paramount Home Entertainment International Ltd & Ors v British Sky Broadcasting Ltd & Ors [2013] EWHC 3479 (Ch), [2014] ECDR 7 ... 202.
- Pensher Security Door Co Ltd v Sunderland City Council [2000] RPC 249 (CA) ... 236.
- Phonographic Performance Ltd v Ellis (t/a Bla Bla Bar) [2018] EWCA Civ 2812, [2019] FSR 15 ... 199.
- Prince Ex p Graves, Re (1867-68) LR 3 Ch App 642 (CA) ... 58, 60, 74.
- R (on the application of Gujra) (FC) (Appellant) v Crown Prosecution Service (Respondent) [2012] UKSC 52, [2013] 1 AC 484 ... 293.
- R v Adam Jeffreys (Preston Crown Court, 19 December 2023) ... 277, 278.

- R v Adinga (Larry Ribadu) [2003] EWCA Crim 3201 ... 236.
- R v Anton Benjamin Vickerman (Newcastle upon Tyne Crown Court, 14 August 2012) (Indictment No T20097188) ... 165, 281, 294, 295.
- R (Bin Khalifa) v Ghadeer Alsaqabi [2024] 5 WLUK 570 (Crown Court) ... 301.
- R v Bow Street Metropolitan Stipendiary Magistrate Ex p South Coast Shipping [1993] QB 645 (Divisional Court) ... 302.
- R v Brian Thompson (Teesside Crown Court, 20 October 2017) ... 282.
- R v Closs (1858) Dears & Bell 460 (Court for Crown Cases Reserved) ... 71.
- R v Dooley [2005] EWCA Crim 3093, [2006] 1 WLR 775 ... 245.
- R v Elie Taktouk [2022] EWCA Crim 1254, [2022] 7 WLUK 642 ... 303.
- R v Elizabeth Forsyth [1997] 2 Cr App R 299 (CA) ... 236.
- R v Emmanuel Nimley [2010] EWCA Crim 2752, [2011] 1 Cr App R (S) 120 ... 221, 247.
- R (on the application of Ewing) v Davis [2007] EWHC 1730 (Admin), [2007] 1 WLR 3223 ... 302.
- R v Gilham [2009] EWCA Crim 2293, [2010] ECDR 5 ... 272.
- R v Gomez [1993] AC 442 (HL) ... 147.
- R v Gould (Mark) [2024] EWCA Crim 669 ... 283, 285.
- R v Griffiths (1974) 60 Cr App R 14 (CA) ... 239.
- R v Hinks [2000] UKHL 53 ... 147, 148.
- R v Ian Dukett [1998] 2 Cr App R (S) 59 (CA) ... 158.
- R v John Trevor Dodds and Jason Richards (aka Jason Richard Graham) (Newcastle Crown Court, 04 April 2018) ... 213, 282.
- R v John Williams (Ipswich Crown Court, 09 January 2024) ... 278.
- R (Kay) v Leeds Magistrates' Court [2018] 4 WLR 91 [2018] EWHC 1233, [2018] 4 WLR 91 (Admin) ... 302.
- R v Kennedy (No 2) [2007] UKHL 38, [2005] 1 WLR 3594 ... 269.
- R v King & others (Warwick Crown Court, 20 March 2019) ... 213, 283.
- R v Latif [1996] 1 WLR 104 (HL) ... 305.
- R v Manrico Toschi [2017] EWCA Crim 141 ... 234, 288.
- R v Mark Schofield (Bolton Crown Court, 09 June 2020) ... 286.
- R v Mohammed Abdi Godir [2018] EWCA Crim 2294, [2019] Lloyd's Rep FC 207 ... 239.
- R v Peter Ernest Wylie [2010] EWCA Crim 3110, [2011] LLR 586 ... 299.
- R v Peter Hunter, David Thomas Smith [2021] EWCA Crim 1785, [2023] QB 1 ... 238.

- R v Price [2023] EWCA Crim 1705 ... 288.
- R v Rafiq & others (Wolverhampton Crown Court, 14 December 2015) ... 213.
- R v Richard Carlile (1819) 3 B & Ald 161 (KB) ... 59.
- R v Richard Hutter (Bournemouth Crown Court, 04 April 2023) ... 279.
- R v Ross (William Keith) [2012] EWCA Crim 750 ... 285, 299
- R v Sleep (1861) 169 ER 1296 (Crown Court) ... 238.
- R v Stephen Millington (Chester Crown Court, 30 November 2021) ... 287.
- R v Suraj Singh (t/a Justt Vape Ltd) (Manchester Crown Court, 28 November 2023) ... 279.
- R v Telford Justices, Ex p Badhan [1991] 1 QB 78 (QBD) ... 303.
- R v Terrence O'Reilly and another (Nottingham Crown Court, 09 December 2016) ... 282.
- R v Toska (Albert) [2010] EWCA Crim 2187, [2011] 1 Cr App R (S) 102 ... 286.
- R v Wayne Evans [2017] EWCA Crim 139, [2018] 4 WLR 140 ... 226, 234, 299.
- R v Willetts [1906] 70 JP 127 (Central Criminal Court) ... 69, 82.
- R (on the application of Wyatt) v Thames Valley Police [2018] EWHC 2489 (Admin) ... 246, 296.
- R v Zaman (Qamar) [2002] EWCA Crim 1862, [2003] FSR 13 ... 245.
- R(G) v S [2017] EWCA Crim 2119 ... 303.
- Rookes v Barnard [1964] AC 1129 (HL) ... 58.
- Scopelight v Chief Constable of Northumbria [2009] EWCA Civ 1156, [2010] QB 438 ... 297.
- Serif Systems Ltd, Re [1997] 4 WLUK 151 (QBD) ... 302.
- Sherras v De Rutzen [1895] 1 QB 918 (QB) ... 54, 70.
- Springsteen v Flute International Limited and Others [1999] EMLR 180 ... 236.
- Taylor's Central Garages (Exeter) v Roper [1951] 2 TLR 284 (Divisional Court) ... 238.
- THJ Systems Limited & Anor v Daniel Sheridan & Anor [2023] EWCA Civ 1354, [2024] ECDR 4 ... 145.
- TuneIn Inc v Warner Music UK Ltd [2021] EWCA Civ 441, [2022] 2 All ER 35 ... 254.
- Twentieth Century Fox Film Corp & Ors v British Telecommunications Plc [2011] EWHC 1981 (Ch), [2012] 1 All ER 806 ... 202.
- Westminster City Council v Croyalgrange Ltd [1986] 1 WLR 674 (HL) ... 237, 239.
- Young Turks Recordings Ltd & Ors v British Telecommunications Plc & Ors [2021] EWHC 410 (Ch) ... 202.
- ZYX Music GmbH v Chris King and Others [1995] EMLR 281 ... 236.

European Union (European Court of Justice and the General Court)

BestWater International GmbH v Michael Mebes, Stefan Potsch Case C-348/13
ECLI:EU:C:2014:2315 ... 258.

Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury
Case C-393/09 [2010] ECR I-13971 ... 255.

Blue Air Aviation SA v UCMR – ADA Asociația pentru Drepturi de Autor a
Compozitorilor and Uniunea Producătorilor de Fonograme din România (UPFR) v
Societatea Națională de Transport Feroviar de Călători (SNTFC) 'CFR Călători' SA
Joined Cases C-775/21 and C-826/21 ECLI:EU:C:2023:307 ... 257

Football Association Premier League Ltd v QC Leisure Joined Cases C-403/08 and C-
429/08 [2011] ECR I-9083 ... 255, 256, 257.

G ST T Case C-655/21 ECLI:EU:C:2023:791 ... 217.

GS Media BV v Sanoma Media Netherlands BV and Others Case C-160/15
EU:C:2016:221 ... 169, 255, 256, 257, 258, 259.

ITV Broadcasting Ltd v TVCatchup Ltd Case C-607/11 EU:C:2013:147 ... 255.

Nederlands Uitgeversverbond v Tom Kabinet Internet BV Case C-263/18
EU:C:2019:1111 ... 255, 256, 257, 259.

Nils Svensson and Others v Retriever Sverige AB Case C-466/12 [2014] Bus LR 259
...24, 169, 255, 256, 258, 259.

Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon
Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireia Case C-
136/09 [2010] ECR I-37 ... 256.

Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für
musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)
Case C-117/15 EU:C:2016:379 ... 257.

Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA Case
C-306/05 [2006] ECR I-11519 ... 255, 256, 257, 295.

Società Consortile Fonografici (SCF) v Marco Del Corso Case C-135/10
ECLI:EU:C:2012:140 ... 255, 256, 257.

Stichting Brein v Wullems ('Filmspeler') Case C-527/15 EU:C:2017:300 ... 256.

Stichting Brein v Ziggo and XS4All Internet ('Pirate Bay') Case C-610/15
EU:C:2017:456 ... 169, 255, 257, 259.

UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH, Wega
Filmproduktionsgesellschaft mbH Case C-314/12 [2014] OJ C151/2 ... 202.

New Zealand

Recorded Music NZ Ltd v VOD052014-D-R-9242889 [2014] NZCOP 3 (The Copyright Tribunal) ... 184.

Recorded Music NZ v VOD052014-D-R-9288397 [2014] NZCOP 2 (The Copyright Tribunal) ... 184.

Recording Industry Association of New Zealand Incorporated v CAL2012-E000627 [2013] NZCOP 9 (The Copyright Tribunal) ... 184.

Australia

RCA Corporation v Custom Cleared Sales Pty Ltd [1978] FSR 576 (Supreme Court of New South Wales) ... 238, 239.

Roadshow Films Pty Ltd v iiNet Ltd [2011] FCAFC 23 (Federal Court of Australia) ... 188.

United States

United States v LaMacchia 871 F Supp 535 (D Mass 1994) (United States) ... 167, 168, 221.

easyDNS Technologies Inc v PDR Ltd (National Arbitration Forum, 06 January 2014) ... 195.

France

Decision no. 2009-580 DC of 10 June 2009 (The Constitutional Council, France) ... 186.

Table of Legislation

UK Statutes

Blasphemy Act 1697) ... 59.

Calico Printers Copyright Act 1787 ... 64.

Communications Act 2003 ... 185.

ss 124A-124N ... 185.

Continuance of Laws Act 1746 ... 64.

Continuance of Laws Act 1759 ... 64.

Continuance of Laws Act 1766 ... 64.

Continuance of Laws Act 1782 ... 64.

Continuance of Laws Act 1789 ... 64.

Continuance of Laws etc Act 1754 ... 64.

Continuance of Laws, etc Act 1774 ... 64.

Copyright (Amendment) Act 1983 ... 90, 91.

Copyright (Computer Programs) Amendment Act 1985 ... 92.

Copyright (Musical Compositions) Act 1882 ... 78.

Copyright (Musical Compositions) Act 1888 ... 78.

Copyright Act 1775 ... 64.

Copyright Act 1801 ... 65.

s 1 ... 66.

Copyright Act 1956 ... 87, 89, 90, 91, 92, 198, 235, 236, 240, 246.

s 5 ... 236.

s 5(4)(b) ... 246.

s 16(4)(b) ... 246.

s 17(3) ... 198, 198.

s 21 ... 88, 236, 240.

s 21(1) ... 88.

s 21(1)(b) ... 91.

s 21(1)(c) ... 91.

s 21(4A) ... 91.

s 21(2) ... 88.

s 21(2)(b) ... 246.

s 21(7) ... 89.

s 21(8) ... 89.
s 21(9) ... 89.
s 50 ... 88.
sch 9 ... 88, 88.

Copyright Act 1956 (Amendment) Act 1982 ... 91.

Copyright and Related Rights Regulation 2003 ... 97.

Copyright, Designs and Patents Act 1988 ... 24, 25, 37-38, 42, 90, 94, 95, 96, 97, 99, 100, 103, 104, 164, 198, 199, 202, 211, 212, 213, 233, 234, 235, 236, 237, 240, 242, 243, 244, 246, 249, 250, 251, 253, 260, 262, 264, 270, 271, 274, 275, 276, 277, 278, 279, 281, 286, 288, 289, 290, 295, 299, 307, 310.

s 1(1) ... 25.
s 19(2) ... 264.
s 19(2)(a) ... 264.
s 19(2)(b) ... 264.
s 20 ... 104, 253.
s 20(2)(a) ... 254.
s 20(2)(b) ... 254.
s 22 ... 236.
s 23 ... 236, 244.
ss 28-75 ... 242.
s 30 ... 242.
s 30A ... 242.
s 31 ... 242.
s 80 ... 249.
s 96(2) ... 198.
s 97(1) ... 164.
s 97A ... 202.
s 107 ... 37-38, 42, 93, 97, 98, 101, 103, 233, 234-250, 251, 253, 260, 270, 278, 286, 288, 307, 310.
s 107(1) ... 93, 234-250, 251, 260, 270, 278, 286, 288.
s 107(1)(a) ... 286, 288.
s 107(1)(c) ... 94, 244.
s 107(1)(d) ... 285, 288.
s 107(1)(d)(iv) ... 285.
s 107(1)(e) ... 234, 246, 270.
s 107(2) ... 94, 250-252, 270.
s 107(2)(a) ... 250.
s 107(2)(b) ... 250.
s 107(2A) ... 24, 97, 103, 104, 105, 234, 250, 252-264, 253, 260, 261, 262, 270, 271.
s 107(2A)(a) ... 104, 261.
s 107(2A)(b) ... 104, 262.
s 107(2A)(b)(ii) ... 262.

- s 107(2B) ... 103, 262.
- s 107(4A) ... 97, 103, 253.
 - s 107(4A)(a) ... 99.
- s 107(3) ... 94, 100, 264-270, 271.
 - s 107(3)(a) ... 93.
- s 107(4)(a) ... 99.
- s 107(5) ... 95, 100.
- s 107A ... 277.
- s 110 ... 94.
- s 178 ... 244.
- s 198 ... 38.
- s 296 ... 213.
- s 296ZA ... 213.
- s 296ZB ... 213.
 - s 296ZB(1)(c)(iii) ... 282.
- s 297(1) ... 37, 233.
- s 297A ... 37.
- Copyright, Designs and Patents Act 1988 (Amendment) Regulations 2010, SI 2010/2694 ... 100.
 - art 5 ... 100.
- Copyright, etc. and Trade Marks (Offences and Enforcement) Act 2002 ... 96, 97.
- Copyright, etc. and Trade Marks (Offences and Enforcement) Act 2002 (Commencement) Order 2002, SI 2002/2749 ... 97.
- Coroners and Justice Act 2009 ... 59.
 - s 73 ... 59.
- Criminal Attempts Act 1981 ... 230.
 - s 1 ... 230.
- Criminal Justice Act 1982 ... 91.
 - s 37 ... 91.
- Criminal Justice Act 1991 ... 91.
 - s 17 ... 91.
- Criminal Justice and Immigration Act 2008 ... 59.
 - s 79 ... 59.
- Criminal Law Act 1967 ... 59, 241.
 - s 4 ... 241.
 - sch 4 ... 59.
- Criminal Law Act 1977 ... 230.
 - s 1 ... 230.
- Criminal Penalties etc (Increase) Order 1984 ... 91.

- Criminal Procedure Rules 2020 ... 302.
r 1.2 ... 302.
- Digital Economy Act 2010 ... 98, 99, 185.
ss 3-16 ... 185.
s 42 ... 99.
- Digital Economy Act 2017 ... 101, 103, 185, 250, 253, 260.
s 32 ... 103, 250.
s 32(2) ... 260.
- Digital Economy Act 2017 (Commencement No. 1) Regulations 2017 ... 23.
s 3 ... 23.
- Dramatic Literary Property Act 1833 ... 66, 70, 267.
ss 1-2 ... 267.
s 2 ... 70
- Engraving Copyright Act 1735 (8 Geo 2 c 13) ... 61, 62.
s 1 ... 62.
- Engraving Copyright Act 1766 (7 Geo 3 c 38) ... 64.
- Engravers' Copyright Act 1777 ... 64.
- European Communities Act 1972 ... 97, 100.
sch 2, para 1(1)(d) ... 100.
- Explanatory Notes the Post Office (Horizon System) Offences Act 2024 ... 290, 291.
para 3 ... 290.
para 8 ... 291.
- Fine Arts Copyright Act 1862 ... 39, 47, 47, 58, 60, 65, 70, 72, 74, 74, 75, 77, 86, 88, 106.
s 7 ... 74, 75, 77, 86.
s 11 ... 74.
- Foreign Reprints Act 1847 ... 78.
- Fraud Act 2006 ... 171, 213, 229, 234, 262, 286.
s 2(1)(a) ... 262.
s 3(a) ... 262.
s 4(1)(b) ... 262.
s 6(1) ... 234.
s 11 ... 171.
- Imperial Copyright Act 1911 (1 & 2 Geo 5 c 46) ... 84, 86, 264.
- Importation Act 1739 ... 63.
- International Copyright Act 1838 ... 78.
- International Copyright Act 1844 ... 78.

International Copyright Act 1852 ... 78.

International Copyright Act 1886 ... 79.

International Copyright Act 1875 (38 & 39 Vict c 12) ... 78.

Legal Aid, Sentencing and Punishment of Offences Act 2012 (Fines on Summary Conviction) Regulations, SI 2015/664 ... 101.
sch 4, para 17 ... 101

Licensing Act 1662 ... 26, 29, 49, 49, 55, 57, 58, 59, 60, 137.
s 2 ... 49.
s 5 ... 57, 57.
s 6 ... 55.
s 15 ... 57, 58.

Literary Copyright Act 1842 ... 47, 68, 69, 267.
s 15 ... 69.
s 17 ... 69.
S 20 ... 267.

Metropolitan Police Act 1839 ... 76.
s 54(8) ... 76.

Musical (Summary Proceedings) Copyright Act 1902 ... 47, 81.

Musical Copyright Act 1906 ... 47, 83-85, 104, 209.

Obscene Publications Act 1964 ... 245.

Paper Duties Act 1794 ... 64.

Police and Criminal Investigation Act 1984 ... 76.

Police Act 1996 ... 76.

Policing and Crime Act 2017 ... 76.

Post Office (Horizon System) Offences Act 2024 ... 291.
s 1(1) ... 291.

Prevention of Corruption Act 1916 ... 293.

Prosecution of Offences Act 1879 ... 292.

Prosecution of Offences Act 1985 ... 292, 300.
s 6(1) ... 292.
s 10 ... 293.
s 17(1) ... 300.

Protection of Children Act 1978 ... 245.
s 1(1)(c) ... 245.

Regulation of Railways Act 1889 ... 171.

s 5(3) ... 171.

Representation of the People Act 1983 ... 32.

s 3 ... 32.

Sculpture Copyright Act 1798 ... 64.

s 2 ... 65.

Serious Crime Act 2007 ... 230.

ss 44-46 ... 230.

Statute of Anne 1710 ... 29, 47-51, 53, 57, 58, 58, 59, 61, 61, 63, 63, 64, 66, 66, 67, 68, 105, 106, 138, 148, 197.

s 1 ... 61.

s 2 ... 50, 58.

s 3 ... 58.

s 6 ... 58.

s 10 ... 58.

s 11 ... 50.

Theft Act 1968 ... 147, 236, 239, 241, 245.

s 1(1) ... 147, 245.

s 17 ... 245.

s 20 ... 245.

s 21 ... 245.

s 22 ... 236, 239.

s 22(1) ... 241.

Trade Marks Act 1994 ... 96, 245.

s 92 ... 245.

UK Decrees and Ordinances

A Decree of Starre-Chamber Concerning Printing 1637 ... 29, 55, 56, 60.

Ord 8-9 ... 56, 60.

Ord 31 ... 56.

Ordinances decreed for reformation of divers disorders in printing and uttering of

Bookes 1566 ... 29, 55, 55, 60.

ord 1 ... 55, 60.

ord 2-3 ... 55.

ord 4 ... 56.

The newe Decrees of the Starre Chamber for orders in printing 1586 ... 29, 55, 56.

ord 2-3 ... 56.

EU Legislation

Directive 2001/29/EC 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 [2001] OJ L167/10 ('InfoSoc Directive') ... 97, 100, 253, 254, 256, 295.

art 3(1) ... 253.

art 8(1) ... 253.

Recital 23 ... 254.

Recital 27 ... 256.

Recital 58 ... 253.

Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) [2006] OJ L 376/28 ('Rental and Lending Directive') ... 100.

art 8(2) ... 100.

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130 ('DSM Directive') ... 201, 202, 210.

art 17 ... 201, 210.

art 17(4) ... 201.

art 17(8) ... 202.

New Zealand Statutes

Copyright (Infringing File Sharing) Amendment Act 2011 ... 183.

Copyright Act 1994 ... 184-185.

s 122A ... 184.

s 122D ... 184.

s 122E ... 184.

s 122F ... 184.

s 122O ... 184.

s 122P ... 184.

S 122R ... 185.

French Legislation

Loi n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet (Law No. 2009-669 of June 12, 2009 on the Promotion of the Dissemination and Protection of Creation on the Internet) ('HADOPI') ... 183.

Intellectual Property Code ... 631.
art 335-7 ... 631.

Republic of South Korea

Copyright Act 1957, as amended up to Act No. 19597 of August 8, 2023 (Republic of Korea) ... 183, 186.
art 133-2(2) ... 186.

United States

17 US Code (Copyright Act 1976) ... 199.
§ 504 (c) (2) ... 199.

International Conventions and Treaties

Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299 ... 95, 221.
art 61 ... 95, 221.

Berne Convention for the Protection of Literary and Artistic Works ... 79, 85, 87, 95, 164.
art 5(2) ... 164.

Universal Copyright Convention (adopted 06 September 1952) ... 87.

Table of Diagrams and Tables

Description	Page
Table 1: A summary of the criminal penalties for online and physical copyright infringement – Gowers Review, p 89.	98
Diagram 1: The core and rings of copyright infringement	177
Diagram 2: Domain Suspension Requests by PIPCU (Graph)	192
Diagram 3: Convictions under the CDPA 1988	212
Table 2: Ministry of Justice Statistics on prosecutions under the CDPA 1988 (June 2017- June 2024)	213

1

Chapter 1: Introduction

1.1. INTRODUCTION.....	23
A brief history of copyright.....	25
The gap in the literature.....	30
1.2. AIMS, METHODOLOGY AND SCOPE	35
1.3. STRUCTURE OF THIS THESIS	39

1.1. INTRODUCTION

This thesis explores the relatively under-theorised intersection between criminal law and copyright law. It develops a normative framework based on the Harm Principle and applies the framework to evaluate the justifiability of the UK's current criminal copyright provisions and prosecution practice. The importance of this work is underscored by the limited academic reaction to the latest amendment to the UK's criminal offence of infringing copyright by communicating a copyright work to the public,¹ which came into force on 1st October 2017.² The amendment, *inter alia*, removed the requirement that an infringing communication falling within the scope of the offence must occur in the course of business or prejudicially affect the copyright

¹ The right to communicate a copyright work to the public grants copyright holders the exclusive right to authorise and prohibit any communication of their works to the public, including those via the internet. For a detailed discussion, see Chapter 5.

² Digital Economy Act 2017 (Commencement No. 1) Regulations 2017, s 3; Digital Economy Act 2017, s 32.

owner. And it increased the maximum custodial sentence from two years to ten years. It is now a criminal offence to communicate a copyright work to the public without authorisation if the communicator *knows* or *has reason to believe* that the communication will *expose* the copyright owner to a *risk of loss*, provided that the requisite *mens rea* is present.³ The act of communication to the public includes hyperlinking to a copyright-protected photograph or a journalistic article on a blog or social media account.⁴ Consequently, low-level copyright infringements that cause no actual harm to copyright owners appear to fall within the scope of the offence, at least on the face of it.

The government's consultation response regarding the amendment recognised the concern that the amendment could apply to low-level infringements and asserted that the policy intention was 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 are unaware of the impact of their behaviour.'⁵ The final text of the amendment does not, however, appear to achieve this policy objective.

Such questionable amendments are usually met with considerable resistance from civil society and academic commentators, not least because they carry significant jail time – the most severe encroachment on individual liberty in just, modern societies. The UK's current maximum imprisonment period of ten years for copyright

³ Copyright, Designs and Patents Act 1988 ('CDPA 1988'), s 107(2A).

⁴ Case C-466/12 *Nils Svensson and Others v Retriever Sverige AB* [2014] Bus LR 259.

⁵ UK Intellectual Property Office, *Criminal Sanctions for Online Copyright Infringement: Government Consultation Response* (UK Intellectual Property Office 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/517528/Government_Consultation_Response_Criminal_Sanctions_-_Accessi....pdf> accessed 10 January 2021.

infringement is, in fact, one of the highest in the world.⁶ Yet, few academics have considered the amendment directly so far.⁷

Before diving further into the subject of this thesis, it is worth briefly digressing and describing what copyright is and how it originated for the benefit of any reader who is unfamiliar with copyright law. Copyright is an intangible property right⁸ that protects specific expressive subject matter, such as original literary, dramatic, musical, and artistic works. The copyright owner of a work has a set of exclusive rights over it. This set of exclusive rights includes, among other rights, the right to copy a work, the right to adapt a work, the right to issue copies of a work to the public, and the right to communicate a work to the public.⁹

A brief history of copyright

The origins of copyright in the UK can be traced to the introduction of the movable-type printing press, the first of which was established in England by William Caxton in 1476.¹⁰ The movable-type printing press made it possible to print and copy

⁶ Faisal Daudpota and Tanya Aoki Caneiro, 'Criminal Enforcement of Copyrights: An Anthology for IP Practitioners' (International Trademark Association 2021) <www.inta.org/wp-content/uploads/public-files/advocacy/committee-reports/20220301-INTA-Criminal-Enforcement-of-Copyrights-2021.pdf> accessed 12 January 2023.

⁷ Felipe Romero-Moreno and James Griffin, 'The UK's criminal copyright proposals in an era of technological precision' *European Journal of Law and Technology* <<https://ejlt.org/index.php/ejlt/article/view/451/659>> accessed 20 December 2023; Eleonora Rosati, 'Unauthorised communication to the public in an online environment as a criminal offence in the UK?' (*The IPKat*, 22 October 2016) <<https://ipkitten.blogspot.co.uk/2016/10/unauthorised-communication-to-public-in.html>> accessed 10 January 2021.

⁸ CDPA 1988, s 1(1): 'Copyright is a property right which subsists in accordance with this Part in the following descriptions of work.'

⁹ *ibid*, s 16.

¹⁰ Lyman Ray Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press 1968) 20; Benedict Atkinson and Brian Fitzgerald, *A Short History of Copyright* (Springer 2014) 18; Gwilym Harbottle, Nicholas Caddick and Uma Suthersanen, *Copinger and Skone James on Copyright* (18th edn, Sweet & Maxwell 2022) 79; David Llewelyn and Tanya Aplin, *Intellectual Property: Patents, Copyrights,*

relatively large numbers of literary works inexpensively, reducing the time taken to bring new books and other texts to the market, and to copy existing texts.¹¹ Although English booksellers and those in related trades had been organised as a guild about 70 years before the printing press was introduced to the UK,¹² the guild rules or bylaws were not enforceable against non-members.¹³ The primary way for publishers and printers to protect themselves against non-members of the guild was to obtain printing privileges via royal prerogative,¹⁴ which granted the recipient of the privilege the exclusive right to print a specific text or a specific class of literary works.¹⁵ Those found violating such printing privileges were held to account at the Privy Council.¹⁶ But such printing privileges were not readily granted except to a favoured few.¹⁷ And they were expensive to obtain. In the decades that followed the introduction of the moving-type

Trademarks & Allied Rights (10th edn, Sweet & Maxwell 2023) 361; John Feather, *A History of British Publishing* (2nd edn, Routledge 2006) 4, 9, 15-16; British Library Board, 'William Caxton' (*British Library Board*, <www.bl.uk/people/william-caxton> accessed 02 November 2022).

¹¹ Eldar Haber, *Criminal Copyright* (CUP 2018) 121; Paul Goldstein, *Copyright's Highway: From the Printing Press to the Cloud* (2nd edn, Stanford University Press 2019) 25-26.

¹² Ronan Deazley, 'Commentary on the Stationers' Royal Charter 1557' in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_uk_1557> accessed 03 July 2022; Ian Gadd, 'The Stationers' Company in England before 1710' in Isabella Alexander and H Tomás Gómez-Arostegui (eds), *Research Handbook on the History of Copyright Law* (Edward Elgar 2016) 81.

¹³ Julie E Cohen and others, *Copyright in a Global Information Economy* (Aspen Law & Business 2002) 26.

¹⁴ Ronan Deazley, 'Commentary on early Tudor printing privileges' in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_uk_1518#_edn> accessed 02 July 2022; Cyndia Susan Clegg, *Press Censorship in Elizabethan England* (CUP 1997) 6-7, 14; Gadd (n 12) 83.

¹⁵ The privilege to print a specific class of work was commonly known as a printing patent: Deazley (n 14).

¹⁶ *ibid*; Clegg (n 14) 9.

¹⁷ Cohen (n 13) 26; Gadd (n 12) 86.

printing press, there was a growing need to protect publishers and printers from ‘pirate publishers’ who were undercutting the investments of publishers and printers primarily by not contracting with authors.¹⁸

Publishers’ and printers’ need for protection coincided with the Crown’s growing desire to censor seditious and heretical literature.¹⁹ To achieve the censorship goals of the Crown, King Henry VIII decreed on 16 November 1538 that all new books published in England had to be approved by the Privy Council before publication.²⁰ This was effectively renewed during the reign of his son, King Edward VI, via a Privy Council Order dated 13 August 1549.²¹ Queen Mary I, shortly after rising to power, proclaimed on 18 August 1553 that it was prohibited to print ‘any bookes, matter, ballet, ryme, interlude, processe or treaty se, nor to playe any interlude, except they haue her graces speciali licence in writynge for the same.’²²

¹⁸ Gadd (n 12) 82.

¹⁹ William Searle Holdsworth, ‘Press Control and Copyright in the 16th and 17th Centuries’ (1920) 29(8) *The Yale Law Journal* 841; John Feather, ‘Copyright and the Creation of Literary Property’ in Simon Eliot and Jonathan Rose (eds), *A Companion to the History of the Book* (Wiley & Sons Ltd 2019) 747-748; William Patry, *Copyright Law and Practice* (The Bureau of National Affairs, Inc. 1996) 6-7; Patterson (n 10) 20-29; Ronan Deazley, ‘Commentary on Henrician Proclamation 1538’ in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_uk_1538> accessed 20 November 2022.

²⁰ Deazley (n 19).

²¹ John Roche Dasent (ed), *Acts of the Privy Council of England: A.D. 1547-1550 (New Series)* (HM Stationery Office 1890) 312; Howard Winger, ‘Regulations Relating to the Book Trade in London from 1357 to 1586’ (1956) 26 *The Library Quarterly: Information, Community, Policy* 157, 179; Jean Mary Stone, *The History of Mary I, Queen of England as found in the public records, despatches of ambassadors in original private letters, and other contemporary documents* (Sands & Co 1901) 196.

²² William Carew Hazlitt, *The English Drama and Stage Under the Tudor and Stuart Princes, 1543-1664* (Printed for the Roxburghe Library 1869) 17; WG Clark and WA Wright (eds), *Shakespeare: Select Plays - Hamlet, Prince of Denmark* (2nd edn, Clarendon Press 1876) 143.

On 4th May 1557, Queen Mary I and King Philip II of Spain (who, following their marriage in July 1554, shared the British throne)²³ granted a Royal Charter to the Worshipful Company of Stationers of London (the Stationers' Company).²⁴ The Charter effectively gave the Stationers' Company a monopoly on printing books. Per the Charter, a person who was not a company member could only engage in the book trade if they had a privilege or patent granted by the Crown. Without such a privilege or patent, a printer had to enter the book into the company's register to obtain the right to print it. The self-regulated Stationers' Company was expected to implement the Crown's censorship policies in exchange for the monopoly over the book trade.²⁵ The company's monopoly and the role it played in censoring seditious and heretical books were confirmed by Queen Elizabeth I in 1559,²⁶ supported by the Star Chamber Decrees of

²³ George Girling, *Outline of the History of England: Part III* (Blackie & Son 1880) 30.

²⁴ Deazley (n 14); Deazley (n 12); Winger (n 21) 181-183.

²⁵ Harry Huntt Ransom, *The First Copyright Statute: An Essay on An Act for the Encouragement of Learning, 1710* (University of Texas Press 1956) 29. Control of printing via the Stationers' Charter, however, was not the sole means of control or censorship of the press. Other means included statutes and royal proclamations against treason and sedition: Clegg (n 14) 19. There is a divergence of views on the *primary* motive of the Charter – whether it was issued primarily to protect the interests of the stationers or to achieve the Crown's censorship goals: Deazley (n 12). Contemporaneous developments in Spain suggest that the primary aim may have been the Crown's censorship goals. In 1554, an order was issued in Spain vesting the power to license books and texts in the Royal Council. And in 1558, King Phillip II, banned, *under the penalty of death and confiscation*, the printing or giving to be printed any book without a licence and the sale of imported books that were not licensed: George Frederick Barwick, 'The Laws Regulating Printing and Publishing in Spain' (1898) TBS-4 The Library 47, 48.

²⁶ Patterson (n 10) 36.

1566, 1586, 1623, and 1637,²⁷ and cemented by the Licensing Act 1662.²⁸ The Licensing Act 1662 was renewed several times before it expired in 1695.²⁹

The modern form of copyright emerged with the enactment of the Statute of Anne 1710,³⁰ years after the Parliament allowed the Licensing Act 1662 to lapse.³¹ The Statute of Anne 1710 was the world's first copyright statute that granted the right to print books (that had not been printed before) to the authors of such work (as opposed to printers or publishers). Since the enactment of the Statute of Anne 1710, the range of subject matter protected by copyright, the scope of protection afforded to protected subject matter, and the remedies and 'penalties' for copyright infringement have continued to expand through piecemeal legislation. The protection of books that emerged as printing 'privilege[s] granted [to printers and publishers] at the caprice of officials'³² has now metamorphosed into a bundle of legal rights that protect a wide array of subject matter.

²⁷ *ibid* 6; Ronan Deazley, 'Commentary on the Licensing Act 1662' in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_uk_1662> accessed 20 November 2022); Holdsworth (n 19) 847.

²⁸ An Act for preventing the frequent Abuses in printing seditious treasonable and unlicensed Books and Pamphlets and for regulating of Printing and Printing Presses 1662 (13 & 14 Car 2 c 33) (Licensing Act 1662) (Licensing Act 1662).

²⁹ Patterson (n 10) 47.

³⁰ An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned 1710 (8 Ann c 21 or 8 Ann c 19) (Statute of Anne 1710).

³¹ Deazley (n 27); Llewelyn and Aplin (n 10) 362.

³² Brander Matthews, 'The Evolution of Copyright' (1980) 5 *Political Science Quarterly* 583, 591.

The gap in the literature

Since creative expression is widely acknowledged as cumulative – new works are derived from existing ones – the subject matter, scope, and duration of copyright have proved controversial. Throughout the development of copyright, there has been considerable commentary and normative arguments on its various aspects.³³ Several justifications or theories have been put forward as justifying a property regime protecting (intangible) creative works, including the Lockean labour theory, Hegelian personality theory, economic theories, and utilitarian arguments.³⁴ Moreover, treatises, books, and countless articles have been written on authorship, ownership, formalities, economic and moral rights, infringement, and the exceptions to infringement. The literature on each of the areas is extensive. Moreover, any standard textbook on copyright covers all these areas in considerable detail.³⁵

³³ Lord King, *The Life of John Locke, with Extracts from his Correspondence, Journals and Common Books*, vol 1 (Henry Colburn and Richard Bentley 1830); Robert Maugham, *A treatise on the laws of literary property comprising the statutes and cases relating to books, manuscripts, lectures, dramatic and musical compositions, engravings, sculpture, maps, &c. : including the piracy and transfer of copyright, with a historical view, and disquisitions on the principles and effects of the laws* (Longman, Rees, Orme, Brown, and Green 1828); Walter Arthur Copinger, *The law of copyright in works of literature and art including that of the drama, music, engraving, sculpture, painting, photography and ornamental and useful designs: together with international and foreign copyright, with the statutes relating thereto, and references to the English and American decisions* (Stevens and Haynes 1870); Robert Merges, *Justifying Intellectual Property* (Harvard University Press 2011).

³⁴ Michael Spence, 'Justifying Copyright' in Daniel McClean and Karsten Schubert (eds), *Dear Images: Art, Copyright and Culture* (Ridinghouse 2002) 389-403; Peter Drahos, *A Philosophy of Intellectual Property* (Dartmouth Publishing Company 1996); William Fisher, 'Theories of Intellectual Property' in Stephen R Munzer (ed), *New Essays in the Legal and Political Theory of Property* (CUP 2001) 168-199; Mala Chatterjee, 'Lockean Copyright versus Lockean Property' (2020) 12 *Journal of Legal Analysis* 136; Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77(287) *Georgetown Law Journal* 330; Mark A Lemley, 'Faith-based Intellectual Property' (2015) 62 *UCLA Law Review* 1328.

³⁵ See, for example, Tanya Aplin and Jennifer Davis, *Intellectual Property Law: Text, Cases, and Materials* (4th edn, OUP 2021), which dedicates three extensive chapters to copyright; and Lionel Bently and others, *Intellectual Property Law* (6th edn, OUP 2022), which has 12 chapters on copyright.

Yet, perhaps surprisingly, one particular area has ‘not caught much of scholars’ attention’³⁶ – the criminal enforcement of copyright.³⁷ This is not to say that scholars have completely ignored this area of law. As we shall see below, several important pieces of work already exist,³⁸ and a broader literature is emerging on various aspects of criminal copyright.³⁹ But, if we compare the body of literature on criminal copyright to the corpus on most other areas of copyright law, the quantitative differences are self-evident. The reason for this is unclear. Christophe Geiger opines that this could be down to intellectual property experts not being very familiar with criminal law and vice versa, or because of the mistaken perception that criminal enforcement involves ‘rather procedural aspects than fundamental theoretical’ issues.⁴⁰

³⁶ Christophe Geiger (ed), *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research* *Research Handbooks in Intellectual Property* series (Edward Elgar 2012) 1.

³⁷ *ibid.*

³⁸ *ibid*; Haber (n 11); Geraldine Szott Moohr, 'The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory' (2003) 83(4) *Boston University Law Review* 731; Cheng Lim Saw, 'The case for criminalising primary infringements of copyright – Perspectives from Singapore' (2010) 18(2) *International Journal of Law and Information Technology* 95; Irina Manta, 'The Puzzle of Criminal Sanctions for Intellectual Property Infringement' (2011) 24(2) *Harvard Journal of Law & Technology* 469; Benjamin Farrand and Helena Carrapico, 'Copyright law as a matter of (inter)national security? - The attempt to securitise commercial infringement and its spillover onto individual liability' (2012) 57 *Crime, Law and Social Change* 373; Christopher Buccafusco and Jonathan Masur, 'Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law' (2014) 87 *Southern California Law Review* 275; Thushara Kumarage, 'The Enforcement of Criminal Sanctions against Intellectual Property Rights' Infringement: Justification, Progression and Impediments in Developing Countries' (Doctoral Thesis, University of Aberdeen 2010); Steven Penney, 'Crime, Copyright, and the Digital Age' in Law Commission of Canada (ed), *What is a Crime? Criminal Conduct in Contemporary Society* (UBC Press 2004).

³⁹ Jane Helena Susan Foulser-McFarlane, 'Copyright Damages Need To Have a Sufficient Punitive Element To Successfully Deter Infringement' (Doctoral Thesis, University of Exeter 2023); Miriam Marcowitz-Biton, Orit Fischman-Afori and Hillel Billauer, 'The Future of Criminal Enforcement of Copyright: The Promise of Civil Enforcement' (2023) 30(2) *George Mason Law Review* 463; Laura Tammenlehto, 'Justified Criminalization of IPR Infringements - Focus on Copyright and Trademarks' (Doctoral, University of Eastern Finland 2023); Ali Abdel Mahdi Massadeh and others, 'Is criminalisation necessary for the enforcement of intellectual property rights in Jordan and the UAE? Criminal v commercial measures' (2023) 79 *Crime, Law and Social Change* 353.

⁴⁰ Geiger (n 36) 1.

Nevertheless, there are many reasons to care about the legitimacy or the normative justifiability of criminal copyright provisions. A key reason is this: copyright owners' rights have expanded over time.⁴¹ And at the same time, technological developments, like the development of the internet and online social networks, have made it easy to infringe copyright, especially in the online world.⁴² The expansion of copyright owners' rights and technological developments have made it possible to infringe copyright by, for example, publicly posting a hyperlink⁴³ to infringing content. Consequently, if criminal copyright provisions go beyond the justifiable scope, or if criminal copyright provisions fall below the standards of justifiability, there is a chance that someone who, perhaps recklessly but without any bad faith goals or intent, infringes copyright is held criminally liable. The consequences of a criminal conviction, in addition to the punishment for the conviction (primarily, a fine, imprisonment, or both), include other adverse legal consequences, such as restrictions on voting while serving a prison sentence,⁴⁴ and broader social consequences, such as difficulties in getting employment, housing, and even welfare benefits.⁴⁵ So, ensuring that criminal copyright stays within the justifiable scope and fulfils the standards of justifiability is essential.⁴⁶

⁴¹ For a reader familiar with the development of the law of copyright in the UK, this is an uncontroversial proposition. For a reader who is not, Chapter 2 of this thesis will prove this assertion.

⁴² The reader will observe this throughout my discussions in the subsequent chapters.

⁴³ I discuss this further at various points of this thesis. More specifically, see the discussion in Chapter 5 on the criminalisation of unlicensed communications of copyright works to the public on pp 252-264.

⁴⁴ Representation of the People Act 1983, s 3; More generally, see, Neil Johnston, *Prisoners' voting rights* (House of Commons Library 2023).

⁴⁵ Margaret Fitzgerald O'Reilly, *Uses and Consequences of a Criminal Conviction: Going on the Record of an Offender* (Palgrave Macmillan 2018) 203-206.

⁴⁶ Additionally, as we shall see below, if criminal law is not functioning in line with society's moral standards, whether it is because of over-criminalisation or under-criminalisation, the moral legitimacy

There are a few notable normative studies of criminal copyright law.⁴⁷ Moohr has used ‘harm’ and ‘morality’ to analyse whether non-commercial (personal use) copyright infringements cause ‘harms’ that could justify their criminalisation and whether the immorality of such infringements justifies their criminalisation.⁴⁸ She concludes that the harm rationale provides only an ‘equivocal basis’⁴⁹ for criminalisation and that the social consensus condemning personal use infringements is ‘far from robust.’⁵⁰ Haber took the analysis under the Harm Principle beyond non-commercial infringements and concluded that the criminalisation of copyright infringements would usually be supported under a natural-right approach to copyright, except where the efficiency of their criminalisation is considered, and that under the utilitarian or users’ rights theories of copyright, criminalising non-commercial infringements is not necessarily justified.⁵¹ Saw applied the Harm Principle to Singapore’s criminal copyright provisions relating to primary infringements to argue that it is appropriate to impose criminal liability on primary infringers of copyright, including where such infringements are committed online for private and non-commercial purposes.⁵² Manta sought to explain why patent infringements are not criminal, while *some* copyright and

of the criminal law more generally comes into question. So, if criminal copyright provisions fall below the justifiable standards or go beyond the justifiable scope, there can be broader implications on criminal law. See, further, pp 129-130.

⁴⁷ Geiger (n 36) 1.

⁴⁸ Moohr (n 38).

⁴⁹ *ibid* 783.

⁵⁰ *ibid*.

⁵¹ Haber (n 11) 255-256.

⁵² Saw (n 38).

trade mark infringements are criminal.⁵³ There, she also suggested that the justifiability of criminalising *non-commercial* (personal use) copyright infringements is questionable.⁵⁴ Buccafusco and Masur have analysed the criminalisation of copyright infringements using an economic analysis of the relative costs and benefits of criminal sanctions for intellectual property violations.⁵⁵ They forcefully argued, among other things, that civil sanctions are sufficient to deter all harmful copyright infringements, except infringements involving ‘massive reproductions of commercially valuable works.’⁵⁶ They concluded that there is a theoretical case for criminalising mass-scale reproductions of commercially valuable works.⁵⁷

This thesis, as noted earlier, will contribute to the under-theorised⁵⁸ intersection between criminal law and copyright law. It shares Moohr, Saw, and Haber’s interest in developing a normative argument based on notions of harm and wrong, which are key elements of the Harm Principle. But it will differ in several significant aspects. First, this thesis will not be limited to analysing ‘personal use’ copyright infringements. Second, the relevant ‘harm’ or ‘harms’ I shall identify as providing the basis for the criminalisation will be conceptually different from the ‘harms’ Moohr identified in her work. Third, the analyses in this thesis will go deeper into one of the approaches to the criminalisation of copyright infringements that Haber surveyed. Finally, this thesis will

⁵³ Manta (n 38).

⁵⁴ *ibid* 517.

⁵⁵ Buccafusco and Masur (n 38) 334.

⁵⁶ *ibid*.

⁵⁷ *ibid*.

⁵⁸ Geiger (n 36) 1; Kumarage (n 38) 78.

take the project further by applying the framework developed to the UK's current criminal copyright provisions and prosecution practice and comment on their justifiability.

1.2. AIMS, METHODOLOGY AND SCOPE

This thesis has two main goals: one general and one specific. The general goal is to contribute to the project of evaluating normative justifications for criminal copyright provisions. The specific goal is to assess the justifiability of the current laws criminalising copyright infringements in the UK and the prosecution practice using a normative framework based on the Harm Principle. To achieve these goals, the thesis will answer five main questions: (a) What are the 'harms' that can justify criminal copyright provisions under the Harm Principle? (b) What other principles weigh for or against the criminalisation of copyright infringements? (c) What is the justifiable scope of criminalisation, and what standards must a justifiable criminal copyright provision meet? (d) What does the normative framework say about the United Kingdom's current criminal copyright provisions? and (e) how does the normative framework relate to the United Kingdom's current prosecution practice of copyright crimes?

This thesis primarily adopts a normative methodology, supported by historical, philosophical, and doctrinal analyses. The historical analysis traces the evolution of criminal copyright and its broader socio-legal context and serves as the starting point of the inquiry. It provides insight into the rationales underpinning criminal copyright provisions and offences broadly related to copyright and helps explain the development of the current legal landscape.

The philosophical dimension forms the core of this thesis, with the Harm Principle serving as its central analytical tool. The Harm Principle is one of the most popular tools used in contemporary criminal theory,⁵⁹ so much so that it has been called the 'master principle'⁶⁰ of criminalisation.⁶¹ The centrality of the idea of preventing people from harming each other in the Harm Principle means that the principle transcends different notions of what constitutes a good life. This gives the principle a key advantage over most other theories because we can all agree that a state can legitimately regulate conduct to limit individual liberty to prevent its subjects from harming each other. Moreover, the Harm Principle provides robust tools to make moral claims about conduct. These, combined with the absence of a comprehensive evaluation of criminal copyright provisions under the Harm Principle, make it the obvious criminalisation theory for this project. In applying the Harm Principle to criminal copyright, the thesis undertakes an analysis of what constitutes 'harm' in this context. It asks whether copyright infringements produce the kind of harm that warrants criminalisation, or whether alternative legal or regulatory responses would be more appropriate. This philosophical evaluation provides the normative framework against which the UK's current legal framework is assessed.

The doctrinal analyses, which aim to explicate the scope of the criminal copyright offences before assessing their justifiability under the normative framework, will be limited to the criminal offences in section 107 of the UK's Copyright, Designs

⁵⁹ Tatjana Hörnle, 'Theories of Criminalisation' (2016) 10(2) Criminal Law and Philosophy 301, 301.

⁶⁰ *ibid.*

⁶¹ Note, however, that the Harm Principle applies to all forms of state action that inhibits liberty.

and Patents Act 1988 ('CDPA 1988').⁶² All subsections of section 107 are considered, including those addressing both direct acts of infringement (e.g., unauthorised copying or distribution) and ancillary conduct (e.g., possession of infringing articles).

There are two main reasons for limiting the scope of the analyses to section 107 offences. First, while some provisions criminalise copyright infringements *per se*, others are mere extensions of the core offences in section 107, or criminalise conduct that cannot, strictly speaking, be categorised as 'copyright infringements.' For example, section 110, CDPA 1988, which concerns the liability of corporate bodies and their officers, will not be examined independently because it does not create free-standing criminal offences but merely clarifies whether and how section 107 offences apply to corporate bodies and their officers. Provisions like sections 297(1) and 297A CDPA – offences concerning the unauthorised reception or decoding of broadcasts and encrypted transmissions – are excluded on the basis that they do not criminalise copyright infringement *per se* but rather target circumvention of conditional access systems or fraudulent receipt of services. Their underlying purposes may very well include the prevention of unauthorised communications of copyright to the public. Consequently, such offences may be functionally close to the core criminal offences. The decision to omit them is not based on a denial of that connection. Their exclusion is because they do not, strictly speaking, criminalise copyright infringements.

Secondly, limiting the analyses to section 107 offences allows for a more focused evaluation of the justifiability of the core criminal copyright provisions within the

⁶² CDPA 1988, s 107.

constraints of this work, while also setting a foundation for future inquiry into related offences, such as those in section 198, CDPA 1988 that relate to performers' rights.

I must emphasise that this thesis prioritises *one* philosophical framework or argument on the justifiability of criminal copyright provisions. It is not designed to be an exhaustive analysis of all such arguments or frameworks on the justifiability of criminal copyright. Furthermore, given that the key analysis is on the justifiability of *criminal* copyright provisions, it will generally be assumed that the recognition of copyright itself is justified because there is little point in an argument for or against *criminal* copyright provisions if copyright itself is not justified. This general assumption extends to the general structure of copyright law: that expressive works, such as original literary, artistic, musical, and dramatic works, ought to be protected; that the protection is primarily afforded to 'authors' of expressive works; and that there are limitations or exceptions to copyright infringement such as fair dealing with a copyright work for research or private study, the reporting of current events, and for criticism or review, among others. In other words, this thesis presumes, to an extent, that the contemporary legal institution of copyright is justified on at least one or more of the philosophical justifications for copyright provided for in the existing literature. In Chapter 3, this thesis will adopt one such philosophical justification (as justifying criminal copyright) and explain the reasons for choosing it. Despite the choices made, the reader will observe that the arguments in this thesis can be extended to or adapted to other models of criminalisation that are centred either on different bases for criminalisation generally or on different philosophical justifications for the recognition of copyright as a legal institution.

1.3. STRUCTURE OF THIS THESIS

This thesis is structured as follows. This introductory chapter establishes the research context, explains why the research is important, explicates the gap in the literature to which the thesis intends to contribute, and outlines the methodology adopted in this thesis.

In Chapter 2, I argue that criminal copyright provisions emerged relatively recently – in the 20th century – and are not an ‘entrenched’ feature of copyright law. Although some criminal provisions related to copyright law existed before the 20th century, I shall argue that those provisions were not ‘true’ criminal copyright provisions, as contemporaneous Parliamentary intentions reveal. To make this argument, I will describe the relatively short⁶³ legislative history of criminal provisions that broadly fall within the sphere of copyright law in the United Kingdom and analyse the reasons or justifications provided by the UK legislature (if any) for introducing such provisions and their subsequent amendments. Where the legislature did not explicitly provide reasons for enacting a particular provision, the reasons will be inferred from the circumstances and debates surrounding the provision at the time of its introduction if it is possible to do so. The historical analysis serves three primary purposes. First, it will help the reader understand the current state of criminal copyright law in the UK, how it came to be the way it is today, and why. Secondly, identifying the justifications for introducing and expanding criminal copyright provisions will enable us to critique

⁶³ The first criminal provision linked to copyright works is often said to be in ‘An Act for Amending the Law Relating to Copyright in Works of Fine Art, and for Repressing the Commission of Fraud in Production and Sale of Such Works 1862 (Fine Arts Copyright Act 1862)’. I will analyse whether this is accurate in Chapter 2.

those reasons (so far as they are applicable today) using the normative framework developed in Chapters 3 and 4. Finally, it will help us identify and distinguish ‘criminal copyright provisions’ and other criminal provisions related to copyright law. Chapter 2 will also establish that the introduction and the expansion of criminal copyright provisions were primarily justified on the basis that technological developments made civil remedies unreliable and ineffective.

In Chapter 3, I explain what the Harm Principle is and explicate the precise version of the Harm Principle I adopt in the thesis.⁶⁴ To justify the criminalisation of conduct under the Harm Principle, we need to identify both a wrongful harm (i.e. a setback to a welfare interest) that justifies state intervention, and a supplementary principle (or a faulty trait) present in the conduct that justifies state intervention *through criminalisation* as opposed to other forms of regulatory control. Additionally, the wrongful harm needs to be sufficiently serious to warrant criminalisation. It will also be explicated that, for effective criminalisation, society must generally believe that the conduct deserves the moral stigma associated with criminal conduct. As we shall see,

⁶⁴ There are other principles or theories of criminalisation that can be used, such as the utilitarian theories – the view that criminalising conduct in a particular manner is morally right if and only if, among all possible kinds of conduct, that criminalisation will promote the best consequences for, according to some theorists, well-being: Thomas Søbirk Petersen, *Why Criminalize? New Perspectives on Normative Principles of Criminalization* (Springer 2020) 115-116; Kantian and non-Kantian Dignity Theories – the view that criminalisation aims to defend the unique moral worth of every human being by criminalising acts that treat people, including oneself, as mere means and not ends in themselves: Dan-Cohen, ‘Defending Dignity’ in *Harmful Thoughts: Essays on Law, Self, and Morality* (Princeton University Press 2002) 150; and the class of principles or theories that we can fit loosely under the umbrella term Legal Moralism – in a general sense, a collection of theories that, while varying in the precise specification, essentially say conduct may justifiably be criminalised if they are morally wrong (See, for a modern account, R A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing 2007)). This thesis will *not* be a comprehensive study of how the criminalisation of copyright can be justified under all such theories. Instead, it focuses on the Harm Principle, which encompasses notions of *harm* and *wrong*. There may be analogies that one can draw from the discussions in this thesis to other theories of criminalisation, not least because some of the alternative theories use concepts of harm (e.g., utilitarian theories) or wrongfulness (e.g., theories of Legal Moralism).

this is because disagreements between society's moral standards and a criminal provision call into question the correctness of the moral assertion made by the criminal provision and *could* reduce the provision's moral credibility, though it is not necessarily fatal to the criminal provision's moral correctness or justifiability.⁶⁵

That will be followed by an analysis of the harms of copyright infringements to show which 'harms' can form the basis for the criminalisation of copyright infringements under the Harm Principle. It is assumed in the current literature that the relevant interests justifying the criminalisation of copyright infringements are the interests of copyright owners in authorisation rights, receiving royalties, licence fees, or the like. Such interests, however, only exist because of copyright law. I will argue that care needs to be taken when making arguments based *directly* or *solely* on such interests because it is the state that creates those specific interests stemming from copyright law, and it is the state that then seeks to criminalise harm to such interests. I shall then argue that the interests that *prima facie* justify the criminalisation of copyright infringements are (a) the interest in protecting authors' labour, and (b) the interest in the reliability of social institutions. These are, I shall argue, valuable welfare interests that exist independent of copyright law itself. Chapter 3 also looks at the different types of copyright infringements, supplementary principles or faulty traits, and the available empirical evidence on British civil society's views on the wrongfulness of copyright infringement. By the end of the chapter, we will have an understanding of the general

⁶⁵ This is discussed in detail under the subheading 'Deserving moral stigma or criminal blame, and punishment' on p 125.

categories of copyright infringements for which there is a *prima facie* case for their criminalisation under the Harm Principle.

Chapter 4 considers further factors or principles (which I shall call ‘negative constraints against criminalisation’) to refine the scope of justifiable criminalisation of copyright infringements. As Feinberg also points out, to apply the Harm Principle to legislative problems, it needs to be supplemented by an elaborate set of mediating maxims, constraints, principles of justice, and the like.⁶⁶ These maxims, constraints, and principles seek to prevent overcriminalisation and protect individual liberty. Chapter 4 assesses whether it is necessary, fair, proportionate, and practical to criminalise the categories of infringements identified in Chapter 3 as having a *prima facie* case for their criminalisation under the Harm Principle. In addition, I will look at the possible chilling effects of their criminalisation on legitimate uses of copyright works and other similar concerns. Finally, I shall summarise the normative framework developed in Chapters 3 and 4, which establishes both the justifiable scope of criminalisation and the standards that a criminal copyright provision must meet to be justifiable under the framework.

In Chapter 5, I describe the scope of the criminal copyright offences in section 107, CDPA 1988 and evaluate whether and to what extent the provisions are justifiable by testing them against the scope and standards of the normative framework developed in Chapters 3 and 4. The chapter will show that some of the current provisions extend beyond the justifiable scope or fail to meet the standards required by the normative framework.

⁶⁶ Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (Oxford University Press 1987) 188-189.

Similarly, Chapter 6 examines the UK's prosecutorial approach to copyright crimes using the normative argument or framework developed in this thesis. Comparisons will be made between the law on paper and the law in practice, as well as between public prosecutions and private prosecutions. I argue that even though the law on paper does not fully align with the normative framework, the prosecution practice does, or at least operates closer to the framework than the law on paper. This discrepancy between the law on paper and the law in practice will be used to support suggestions for legislative reform. I will also look at the justifiability of private prosecutions of copyright crimes.

The concluding chapter combines the various analyses in the thesis and summarises its key arguments and proposals.

2

Chapter 2: The history of criminal copyright provisions in the UK

2.1. INTRODUCTION	45
2.2. THE 'PRE-HISTORY' OF CRIMINAL COPYRIGHT	47
The Statute of Anne 1710	48
The Engraving Copyright Act 1735	61
Other developments in the 18 th century	63
2.3. THE 19 th CENTURY	65
The Dramatic Literary Property Act 1833.....	66
The Literary Copyright Act 1842.....	68
Fine Arts Copyright Act 1862.....	70
The Copyright (Musical Compositions) Act 1882 and The Copyright (Musical Compositions) Act 1888.....	78
International developments in the 19 th century	78
2.4. THE 20 th CENTURY	79
The birth of criminal copyright – Musical Copyright Act 1906.....	80
Imperial Copyright Act 1911	84
The Copyright Act 1956.....	87
The Copyright Act 1956 (Amendment) Act 1982, the Copyright (Amendment) Act 1983, and the Copyright (Computer Software) Amendment Act 1985	89
The Copyright, Designs and Patents Act 1988	92
Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1995.....	95
2.5. THE 21 st CENTURY.....	96
The Copyright, etc. and Trade Marks (Offences and Enforcement) Act 2002	96
Copyright and Related Rights Regulations 2003.....	97
Digital Economy Act 2010	98
Copyright, Designs and Patents Act 1988 (Amendment) Regulations 2010.....	100
Legal Aid, Sentencing and Punishment of Offences Act 2012 (Fines on Summary Conviction) Regulations 2015/664.....	101
Digital Economy Act 2017	101
2.6. CONCLUSION	105

2.1. INTRODUCTION

In this chapter, I argue that the criminalisation of copyright infringements is a relatively recent development, and that ‘true’ criminal copyright provisions emerged in the 20th century. Although there were some criminal provisions related to copyright law before the 20th century, I shall argue that those provisions cannot, strictly speaking, be classified as criminal copyright provisions. They had, I argue, a different basis and function. To establish this, I shall describe the development of criminal provisions related to copyright law in the United Kingdom and explicate the reasons or justifications provided by the UK legislature, if any, for introducing those provisions and their subsequent amendments. Where the legislature did not expressly provide reasons or justifications for their introduction or amendment, the reasons will be inferred from the debates or circumstances around the adoption of the provision, where possible. This chapter will not, however, be a comprehensive and conclusive study of the historical development of criminal copyright provisions.⁶⁷

This chapter aims to achieve three main objectives. First, it will help the reader understand the current state of criminal copyright law in the UK, how it came to be the way it is today, and why. Secondly, identifying the justifications for introducing and expanding criminal copyright provisions will enable us to critique those reasons in the subsequent chapters. Third, it will show that the criminalisation of copyright infringements is a recent phenomenon and not something we need to accept as an entrenched feature of copyright law. This chapter will also demonstrate that the

⁶⁷ Such a comprehensive study could very well constitute a separate doctoral thesis.

introduction and expansion of criminal copyright provisions were primarily justified using the argument that technological advancements rendered civil remedies insufficient and ineffective.

Three preliminary points are worth noting before we explore the history of criminal copyright. First, the development of criminal and civil copyright was not separate. Consequently, some developments in copyright law highlighted in this chapter may not be directly relevant to the purposes of this work. Where that is the case, I will only mention them in summary. Second, the distinction between civil remedies and criminal penalties in copyright law (at least) was not clear-cut until the early 20th century. So, in the early parts of this chapter, I will be dealing with some statutory provisions that appear *prima facie* to be functionally criminal to a modern reader but were never explicitly recognised by the courts as criminal provisions. Third, the basis for my characterisation of a provision as criminal is primarily a theoretical test that takes account of a plurality of factors, including the function, purpose, effect, and procedure. I will also take account of the provision's historic characterisation, though the courts' characterisation is not necessarily deemed decisive.

2.2. THE 'PRE-HISTORY' OF CRIMINAL COPYRIGHT

The Fine Arts Copyright Act 1862⁶⁸ is commonly (though not unanimously) acknowledged in the current literature as the statute containing the first 'criminal copyright' provision in the UK since the modern form of copyright⁶⁹ was created in 1710.⁷⁰ We will see that this acknowledgement is only correct as a matter of legal authority and principle if we are talking about criminal provisions that are generally related to copyright works, but not if we are talking about criminalisation of copyright infringements in the strict sense. The Fine Arts Copyright Act 1862 can only be considered as having criminal copyright provisions if we interpret the provisions in a

⁶⁸ Fine Arts Copyright Act 1862.

⁶⁹ Before the Statute of Anne 1710, privileges were granted to publishers or printers, while after 1710, copyright vested with authors of literary works: Ronan Deazley, *Rethinking copyright: history, theory, language* (Edward Elgar Publishing 2006) 13-14.

⁷⁰ Haber (n 11) 32, 34, 45: 'As further described in this chapter, the birth of criminal copyright occurred in 1862 under the Fine Arts Copyright Act 1862 while Parliament provided copyright protection for paintings, drawings, and photographs. ... Thus, while 1862 marks the birth of criminal copyright in the United Kingdom, criminalization was not extensive: The Fine Arts Copyright Act limited criminal copyright to certain types of works and set relatively low criminal sanctions, while excluding imprisonment. ... Since 1862, when United Kingdom introduced criminal copyright for the first time, its scope and sanctions have repeatedly increased.' Lionel Bently, 'R. v the Author: From Death Penalty to Community Service - 20th Annual Horace S. Manges Lecture, Tuesday, April 10, 2007' (2008) 32(1) Columbia Journal of Law & Arts 1, 11: 'Criminal penalties, first enacted under the 1862 Fine Arts Copyright Act, ...' Hayleigh Boshier, *Copyright in the Music Industry: A Practical Guide to Exploiting and Enforcing Rights* Elgar Practical Guides (Edward Elgar Publishing 2021) 132: 'However, the laws have been developed to criminalise copyright-infringing activities in certain circumstances. It was first criminalised in the UK in 1862.' See, also, HL Deb 13 June 2013, vol 745, col 391: Lord Clement-Jones stated that '[c]riminal sanctions have been available for copyright infringement since 1862 and for trade mark infringement since 1994.' This acknowledgement is not unanimous. For instance, in *Copinger* (n 10) 1772, the authors mention that the Fine Arts Copyright Act 1862 was held to create a criminal offence, but note that the 'criminal remedies similar to those of the present day were first introduced in the Musical (Summary Proceedings) Copyright Act 1902 (2 Edw 7 c 15) as amended by the Musical Copyright Act 1906 (6 Edw 7 c 36)'. Similarly, Isabella Alexander opines that criminal proceedings could be brought under the An Act to amend the Law of Copyright 1842 (5 & 6 Vict c 45) (Literary Copyright Act 1842) against someone who imported without the consent of the proprietor a book (or literary work) that had been written or first published in the United Kingdom but printed outside of it: Isabella Alexander, 'Criminalising Copyright: A story of publishers, pirates and pieces of eight' (2007) 66(3) Cambridge Law Journal 625, 631. Adrian Speck and others, *Laddie, Prescott & Vitoria: The Modern Law of Copyright* (5th edn, LexisNexis 2018) 1759 views the Musical (Summary Proceedings) Copyright Act 1902 as the first statute containing a criminal copyright provision.

manner that was not within the contemplation of the Parliament. Moreover, an analysis of provisions contained in copyright statutes enacted since the Statute of Anne 1710 but before the Fine Arts Copyright Act 1862 suggests the story is not as straightforward as it is sometimes accepted in the current literature on criminal copyright either. Some key copyright statutes enacted before the Fine Arts Copyright Act 1862 contained provisions that appear 'criminal' at first sight. I shall, therefore, start my analysis from when the modern form of copyright in the UK was born. References will, however, be made to earlier decrees, ordinances, or statutes where necessary.

The Statute of Anne 1710

As already noted, copyright, with a semblance of its modern form, was born with the enactment of the Statute of Anne in 1710. The Statute of Anne 1710 was the first Act of Parliament in the United Kingdom that provided for the regulation of copyright by the State.⁷¹ It was also the first statute⁷² granting copyright protection to authors rather than printers or publishers.⁷³ The Act was lobbied for by a consortium of

⁷¹ Ransom (n 25); Ronan Deazley, 'Commentary on the Statute of Anne 1710' in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_uk_1710> accessed 02 July 2022.

⁷² There was a Parliamentary decree issued by the Long Parliament on 29th January 1641 ordering 'the Master and Wardens of the Company of the Stationers ... to take special Order, that the Printers do neither print or reprint any thing **without the Name and Consent of the Author**: And that if any Printer shall, notwithstanding, print or reprint any thing **without the Consent and Name of the Author**, that he shall be proceeded against as both the Author and Printer thereof; and their Names to be certified to this House.' The Journal of the House of Commons: Volume 2, 402; Mark Rose, 'The Author in Court: Pope v. Curll (1741)' (1992) 10(2) Cardozo Arts & Entertainment Law Journal 475.

⁷³ Mark Rose, 'The Public Sphere and the Emergence of Copyright: Areopagitica, the Stationers' Company, and the Statute of Anne' in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and Property: Essays on the History of Copyright* (Open Book Publishers 2010) 82.

stationers⁷⁴ following twelve⁷⁵ unsuccessful attempts by various stationers to replace the Licensing Act 1662, which had lapsed in May 1695.⁷⁶ The Licensing Act 1662 forbade all private parties from printing or causing to be printed *any* books or pamphlets unless the book or pamphlet was registered at and licensed by the Stationers' Company, published under a royal patent, or licensed by the Secretary of State.⁷⁷ Because printing privileges or patents issued by the Crown or the State were relatively rare⁷⁸ and were usually granted for works which had no author for the purposes of copyright, such as religious texts or educational ABCs,⁷⁹ the Stationers' Company practically enjoyed a monopoly over what was published and who could publish.⁸⁰ But, the decision of the House of Commons to let the Licensing Act 1662 lapse⁸¹ meant that the stationers' monopoly over publishing and copying of literary work ended.

Following the twelve failed attempts to replace the Licensing Act 1662, which had focused primarily on the impact the lapse of the Act had on the stationers' economic interests, the stationers changed their approach and began focusing on the 'ruin' caused

⁷⁴ Namely, Henry Mortlock, Richard Chiswell, William Rogers, Daniel Brown, Thomas Horne, Jacob Tunsen, Timothy Goodwin, Benjamin Walford, Richard Sare, James Knapton, Benjamin Tocke, Robert Knaplock, Timothy Childe, Richard Mount, Daniel Midwinter, and John Sprint on behalf of themselves, other booksellers and printers in the City of London and elsewhere: *The Journal of the House of Commons*: Volume 16, 240a.

⁷⁵ Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695-1775)* (Hart Publishing 2004) 1-29.

⁷⁶ *ibid* 1.

⁷⁷ Licensing Act 1662, s 2.

⁷⁸ Patterson (n 10) 78-113.

⁷⁹ *ibid* 91.

⁸⁰ *ibid* 78-113.

⁸¹ Deazley (n 27).

to authors.⁸² The lobbyists petitioned the House of Commons that ‘divers[e] Persons have of late invaded the Properties of others, by reprinting several Books, without the Consent, and to the great Injury, of the Proprietors, even to their utter Ruin, and the Discouragement of all Writers in any useful Part of Learning.’⁸³ This approach, with the authors’ interests at the forefront, succeeded, leading to the enactment of the Statute of Anne 1710. The statute granted *authors* ‘the sole right and liberty of printing books,’⁸⁴ and the right lasted 14 years from the date of first publication.⁸⁵ If the author was alive at the end of that period, the right was renewed for another 14 years.⁸⁶

Of crucial interest are the remedies or ‘penalties’ in the Statute of Anne. Per the statute, those who infringed copyright in protected books were to (1) forfeit infringing copies of books (or sheets forming part of the books);⁸⁷ (2) forfeit one penny for every sheet found in the infringer’s custody (whether printed, published, or exposed to sale) where (a) one moiety (i.e. half) of the forfeited penny per sheet was to be paid to the

⁸² Ronan Deazley, ‘Commentary on the Star Chamber Decree 1566’ in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_uk_1566> accessed 02 July 2022.

⁸³ *ibid*; The Journal of the House of Commons: Volume 16, 240a; Harry Hunt Ransom, ‘The Date of the First Copyright Law’ (1940) 20 *Studies in English* 117, 119.

⁸⁴ Statute of Anne 1710, s 2.

⁸⁵ *ibid*.

⁸⁶ *ibid* s 11.

⁸⁷ *ibid* s 2.

person or persons suing; and (b) one moiety to the Crown.⁸⁸ Actions could be through an action of debt,⁸⁹ bill,⁹⁰ plaint,⁹¹ or information.⁹²

On the face of it, there is a distinction between remedies (1) and (2). Remedy (1) *directly* protects the rights and interests of the copyright owner by requiring forfeiture of infringing copies of books and sheets. Remedy (2)(a) is also capable of *directly* protecting the rights and interests of copyright owners, where the person suing is the copyright owner.⁹³ Remedy (2)(b), however, looks different. The forfeiture to the Crown does not fulfil the role of compensating the author whose rights were infringed. While remedy (2)(b) can *indirectly* protect copyright owners' interests by deterring copyright infringement in books, the forfeiture to the Crown looks like a fine, at least on the face of it. It is the nature of remedy (2) – whether it was civil or criminal – that I will turn my attention to.

⁸⁸ *ibid.*

⁸⁹ An 'action for debt' is a civil action to recover a specific sum of money owed to another party: Daniel Greenberg, Klara Banaszak and Yisroel Greenberg (eds), *Jowitt's Dictionary of English Law* (4th edn, Sweet & Maxwell 2015) 46.

⁹⁰ Historically, A bill or 'bill of complaint' was a formal statement or petition submitted to a court of equity: *ibid* 267-268.

⁹¹ Plaint is the cause for which the claimant complained against a defendant: Mick Woodley (ed), *Osborn's Concise Law Dictionary* (Sweet & Maxwell 2013) 318.

⁹² Information (in Chancery Proceedings) resembles a bill of complaint, except that it was not in the form of a petition. Information also refers to criminal proceedings before Justices of the Peace: *ibid* 230; *Jowitt's Dictionary of English Law* (n 89) 1247-1248.

⁹³ The Statute of Anne did not limit the right to sue for an infringement of copyright to the author or the author's assignees: Ronan Deazley, 'Commentary on *Beckford v Hood* (1798)' in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org/cam/commentary/uk_1798a/uk_1798a_com_107200712278.html#_ednref26> accessed 20 November 2023; *Beckford v Hood* (1798) 7 D & E 620 (KB). I will discuss this further below.

Unhelpfully, neither the Statute, the Journals of the House of Commons, and the House of Lords,⁹⁴ nor any available judgment⁹⁵ of a court appears to expressly state anything (in the context of the Statute of Anne 1710) on whether this remedy is civil or criminal. Given that the distinction between civil and criminal law was not clear-cut in the 18th century, conclusively determining its nature is beyond the scope of my work. I will, however, make some preliminary observations on the nature of the remedy based on the provision itself, its origins, and how such provisions were viewed at the time.

The first observation is that remedy (2) is a '*qui tam*' or 'common informer' provision. '*Qui tam*' is an abbreviation of the Latin phrase '*qui tam pro domino rege, &c.,⁹⁶ quam pro seipso in hac parte sequitur*,' which translates to 'who prosecutes this suit as well for the King, etc. as for himself.'⁹⁷ *Qui tam* actions were penal actions brought by private informers under a statute whose 'sanction' was a fine, penalty or forfeiture of which informers were entitled to a share.⁹⁸ The *qui tam* procedure, the origins of which

⁹⁴ HL Journal 16 March 1710, vol 19, 108-110; HL Journal 03 April 1710, vol 19, 138-140; HL Journal 03 April 1710, vol 19, 140-141; HC Journal 12 December 1709, vol 16, 240a.

⁹⁵ Sources looked at include Westlaw UK, Lexis+[®] UK, vLexJustis, and Primary Sources on Copyright 1450-1900.

⁹⁶ Although Blackstone includes the '&c' in his Commentaries, courts and commentators who quote him appear to have dropped the '&c' – *Rockwell International Corporation et al v United States* 549 US 457 (United States Supreme Court), footnote 2: '*Qui tam* is short for "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which means "who pursues this action on our Lord the King's behalf as well as his own"; J Randy Beck, 'The False Claims Act and the English Eradication of Qui Tam Legislation' (2000) 78(3) North Carolina Law Review 541, 551; Note, 'The History and Development of Qui Tam' (1972) 1972(1) Washington University Law Review 81, 83.

⁹⁷ William Blackstone, *Commentaries on the Law of England - Book III: Of Private Wrongs* (Oxford University Press 2016) 108.

⁹⁸ Allan W May, 'Qui Tam Actions and the Rivers and Harbors Act' (1971) 23(1) Case Western Reserve Law Review 173, 177; Robert W Fischer Jr, 'Qui Tam Actions: The Role of the Private Citizen in Law Enforcement' (1973) 20(4) UCLA Law Review 778; Note (n 96) 86; Dan D Pitzer, 'The Qui Tam Doctrine: Comparative Analysis of Its Application in the United States and the British Commonwealth' (1972) 7 Texas International Law Journal 415, 417; JH Baker, 'Criminal Courts and Procedure at Common Law 1550-1800' in JS Cockburn (ed), *Crime in England: 1550-1800* (Routledge 2016) 20; Owen Hood Phillips and Anthony Hugh Hudson, *A First Book of English Law* (7th edn, Sweet & Maxwell 1977) 265.

can be traced back to Roman and Anglo-Saxon law,⁹⁹ became a common feature of English statutes from the 14th century.¹⁰⁰ The reason for this was explained in the following words by Viscount Simon while debating the Common Informers Bill 1951, which ultimately abolished the *qui tam* procedure in England and Wales:¹⁰¹

If we go back to the old days when there was no efficient police force, when, indeed, in some parts of the country there was no police force at all, and consider the importance of enforcing the law against criminal offences, it would seem that it was not altogether unnatural for our ancestors, because they could not do any better, to set up the system of common informers. There may be another class of case where it would have been justified. If we lived in an age when the authorities could be suspected of refusing, out of favouritism or fear, to prosecute a particular kind of person, it might be a very useful thing to have this machinery of the common informer to secure that in proper cases a man would be brought to book.

I have defined *qui tam* actions as a penal action to recover a penalty or a part of a penalty under a statute. Statutes that required ‘forfeiture’ as a penalty ‘for transgressing provisions therein contained’ were considered ‘penal statutes.’¹⁰² The consequent implication is that the Statute of Anne 1710 was a penal statute. The word ‘penal,’ however, was not considered synonymous with ‘criminal’ in the 18th century.¹⁰³ In the 1775 case of *Atcheson v Everitt*,¹⁰⁴ after explicitly noting that ‘there is no distinction better known, than the distinction between civil and criminal law; or between criminal prosecutions and civil actions,’ Lord Mansfield stated that ‘[p]enal actions were never

⁹⁹ Beck (n 96) 566.

¹⁰⁰ Note (n 96) 86; Pitzer (n 98) 418.

¹⁰¹ HL Deb 05 June 1951, vol 171, cols 1049-56.

¹⁰² Blackstone (n 97) 108; David Lieberman, ‘Mapping Criminal Law: Blackstone and the categories of English Jurisprudence’ in Norma Landau (ed), *Law, Crime and English Society: 1660-1830* (CUP 2004) 151-152.

¹⁰³ Lieberman (n 102) 151.

¹⁰⁴ *Atcheson v Everitt* (1775) 98 ER 1142 (KB).

yet put under the head of criminal law, or crimes. ... No authority whatever has been mentioned ..., nor any case cited where it has been held that a penal action is a criminal case; and perhaps the point was never before doubted.¹⁰⁵ Penal statutes prohibit classes of acts that 'are not criminal in any real sense' but are prohibited 'in the public interest ... under a penalty.'¹⁰⁶

Penal provisions, therefore, provided for statutory (pecuniary) penalties and were not considered 'criminal.' And this was how it was understood more than a century after the Statute of Anne 1710.¹⁰⁷ So, the fact that remedy (2) was a *qui tam* provision indicates that it is penal but not necessarily criminal. What the exact distinctions between penal actions and criminal charges were at the time is, again, a question beyond the scope of this work,¹⁰⁸ not least because, as highlighted earlier, there has been little agreement among English historians about what 'crime' in the 18th century entailed.¹⁰⁹ What I *can* say is that penal provisions were not generally considered criminal provisions and were considered akin to statutory civil penalties.¹¹⁰

¹⁰⁵ *ibid* 1148. See, also, Society for the Diffusion of Useful Knowledge, *The Penny Cyclopaedia of the Society for the Diffusion of Useful Knowledge: Volume 13* (Charles Knight & Co 1839) 363: 'Penal law is not identical with criminal law; for an act or omission may be liable to legal punishment in consequence of an action instituted by a *private person*. The action in English law termed *qui tam* action is partly civil and partly penal, but is in no respect criminal.'

¹⁰⁶ *Sherras v De Rutzen* [1895] 1 QB 918 (QB) 922.

¹⁰⁷ *ibid* 1147-1148. *Mexborough v Whitwood Urban DC* [1897] 2 QB 111 (CA) (Lord Esher MR) 115: 'An action for a penalty is a civil action just as much as an action for a forfeiture.'

¹⁰⁸ See in this context, Kenneth Mann, 'Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law' (1992) 101(8) *Yale Law Journal* 1795.

¹⁰⁹ John Maurice Beattie, *Crime and Courts in England, 1660-1800* (Princeton University Press 1986) 3-4. For the different approaches to what a 'crime' constituted in the 18th century, see, James Sharpe, 'The History of Crime in Late Medieval and Early Modern England: A Review of the Field' (1982) 7(2) *Social History* 187; Douglas Hay and others (eds), *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Pantheon Books 1975) 13-15; and Douglas Hay, 'Crime and Justice in Eighteenth- and Nineteenth-Century England' (1980) 2 *Crime and Justice* 45.

¹¹⁰ Blackstone also classifies actions brought under penal statutes as private law actions. See, Blackstone (n 97) 108.

The second key observation is that when we consider the origin of the *qui tam* provision in the Statute of Anne 1710, it appears to have been derived from the penalties in the Licensing Act 1662,¹¹¹ the remedies of which are similar to those of the Star Chamber Decrees of 1637, 1586, and 1566 and their predecessors.¹¹² The Decree of 1566 explicated in the first paragraph of the decree that:¹¹³

[n]o person shall print, or cause to be imprinted, nor shall bring, or cause, or procure to be brought into this realm imprinted, any book or copy against the form and meaning of any ordinance, prohibition, or commandment, contained, or to be contained in any of the statutes or laws of this realm, or in any injunctions, letters patents, or ordinances, passed or set forth, or to be passed or set forth by the Queen's most excellent Majesty's grant, commission, or authority.

The decree also set out penalties for printing, binding, stitching, sowing, importing, selling, or offering for sale unlawful books. The penalties included imprisonment (for three months) without bail or mainprise,¹¹⁴ and a permanent ban from any 'feate of printing'.¹¹⁵ Moreover, those found violating the ordinance were to forfeit the unlawful books or copies, and 20 shillings or 10 pounds for every book, depending on the offender's circumstances and the offence committed.¹¹⁶ One moiety of the money

¹¹¹ Licensing Act 1662, s 6; Lyman Ray Patterson, 'The DMCA: A Modern Version of the Licensing Act of 1662' (2002) 10 Journal of Intellectual Property 33, 45.

¹¹² Ordinances decreed for reformation of divers disorders in printing and uttering of Bookes 1566; The newe Decrees of the Starre Chamber for orders in printing 1586; A Decree of Starre-Chamber Concerning Printing 1637; Edward Arber (ed), *A Transcript of the Registers of the Company of Stationers of London: Volume 4* (1875) 529-536.

¹¹³ Ordinances decreed for reformation of divers disorders in printing and uttering of Bookes 1566, ord 1.

¹¹⁴ Lewison J defines 'mainprise' as '[a] form of bail, allowing a person to remain at large on providing sureties (mainperners)': *Crown Estate Commissioners v Mark Andrew Tudor Roberts, Trelleck Estate Limited* [2008] EWHC 1302 (Ch), [2008] 4 All ER 828, Appendix I, Glossary. Mainperners undertook to produce the person at a future time.

¹¹⁵ Ordinances decreed for reformation of divers disorders in printing and uttering of Bookes 1566, ord 2-3.

¹¹⁶ *ibid.*

forfeited was for the Crown, and the other to the person who seized the books or made the first complaint that led to the seizure of the books.¹¹⁷ This is similar to remedies (2)(a) and (2)(b) I discussed above. The 1586 decree expanded the jurisdiction of the Star Chamber to books printed in contravention of the Stationers' Company's internal regulations. It also increased the severity of the punishments – including imprisonment for a year without bail or mainprise.¹¹⁸

The Star Chamber Decree of 1637 explicated that it was a criminal offence to 'print or cause to be printed'¹¹⁹ any books without a licence from the Stationers' Company.¹²⁰ Doing so was punishable by imprisonment,¹²¹ a fine,¹²² or other punishment that the Court of Star Chamber or the High Commission Court saw fit.¹²³ Moreover, the decree also required forfeiture of books, except (1) all seditious 'schismatical' books or pamphlets (which were to be burnt);¹²⁴ and (2) books for which forfeiture was granted by letters patent.¹²⁵ Half of the books forfeited under the Decree of 1637 were for the Crown, with the other half to be distributed as the Court of High Commission would find appropriate.¹²⁶

¹¹⁷ *ibid* ord 4.

¹¹⁸ The newe Decrees of the Starre Chamber for orders in printing 1586, ord 2-3.

¹¹⁹ A Decree of Starre-Chamber Concerning Printing 1637; Arber (n 112) 529-536.

¹²⁰ A Decree of Starre-Chamber Concerning Printing 1637, ord 8-9.

¹²¹ *ibid*.

¹²² *ibid*.

¹²³ *ibid*.

¹²⁴ *ibid* ord 31.

¹²⁵ *ibid*.

¹²⁶ *ibid*.

The direct predecessor to the Statute of Anne 1710 was the Licensing Act 1662. Much of the 1662 Act was practically a re-enactment of the Star Chamber Decree 1637.¹²⁷ It was successively renewed up to 1679 and then for seven years in 1685.¹²⁸ Afterwards, the Act was renewed until May 1695.¹²⁹ Per the Licensing Act 1662, anyone who imported, caused to be imported, printed, caused to be printed, stitched, bound, or put up for sale any books or part of books without the appropriate licence (or a letters patent), or the consent of the owner(s) of such books (or parts thereof) were to forfeit such books or parts of books, and 'forfeit' six shillings eight pence for every book or part of such books, or copies of books.¹³⁰ Half the forfeitures (including the payment) were for the King, his heirs, and his successors. The other half were for owners who sued within six months of the offence being committed. If such a suit was not brought within six months, then the half 'shall be for the use and behoofe [i.e. benefit] of such other person or persons' who 'sue[d] for the same' within one year from when the offence was committed.¹³¹ Furthermore, section 15 of the Act stated that anyone infringing any section of the Act was to be 'disenabled' from exercising 'his respective trade' for three years for the first offence committed.¹³² If the offence is committed again, the offender was 'disabled to use or exercise the art or mystery of printing, or of founding letters for printing' and 'also receive such further punishment by fine, imprisonment, or other

¹²⁷ *ibid*; Karen Nipps, 'Cum Privilegio: Licensing of the Press Act of 1662' (2014) 84(4) *The Library Quarterly: Information, Community, Policy* 494.

¹²⁸ Deazley (n 27).

¹²⁹ *ibid*.

¹³⁰ Licensing Act 1662, s 5.

¹³¹ *ibid*.

¹³² Licensing Act 1662, s 15.

corporeal punishment, not extending to life or limb.¹³³ In sum, the predecessors of the *qui tam* provision in the Statute of Anne 1710 existed alongside fines, imprisonment, or other criminal punishment.

Based on these preliminary observations, one could argue that the use of the words ‘penalties’,¹³⁴ ‘indictments’,¹³⁵ ‘offender’,¹³⁶ and ‘offence’¹³⁷ in the Statute of Anne 1710 makes it arguable that the effect of at least one of the remedies in the Statute was meant to be criminal. Indeed, in *Re Prince ex p Graves*,¹³⁸ which recognised that the Fine Arts Copyright Act 1862 created a criminal offence, Sir CJ Selwyn LJ pointed out that the use of the word ‘penalty’ (and conviction) pointed to there being a criminal offence. One could also argue that Remedy (2)(b) asks for a considerable amount to be paid to the Crown in addition to the ‘penalty the prosecutor may recover’,¹³⁹ which suggests that the remedy fulfils the criminal law’s classic role of deterrence and retribution and not the compensatory role of civil remedies.¹⁴⁰

But two interrelated points are worth noting. First, there is a fundamental shift in the goals underlying the rights granted by the Statute of Anne 1710 to authors of texts

¹³³ *ibid.*

¹³⁴ Statute of Anne 1710, s 2, s 6.

¹³⁵ *ibid* s 10.

¹³⁶ *ibid* s 2.

¹³⁷ *ibid* s 3, s 10.

¹³⁸ *Re Prince Ex p Graves* (1867-68) LR 3 Ch App 642 (CA).

¹³⁹ *ibid.*

¹⁴⁰ It has to be pointed out in response to this that despite compensation being the key object of civil or private law, there are occasions in which ‘non-criminal’ punitive damages are awarded in civil cases: *Rookes v Barnard* [1964] AC 1129 (HL), *Attorney General v Blake* [2000] UKHL 45, [2001] 1 AC 268; Matthew Dyson, ‘Overlap, Separation and Hybridity Across Crime and Tort’ in Matthew Dyson and Benjamin Vogel (eds), *The Limits of Criminal Law: Anglo-German Concepts and Principles* (Intersentia 2020) 102-103.

compared to those underlying the Licensing Act 1662 and the pre-Anne decrees from which the *qui tam* provision appears to have originated. Underlying the Statute of Anne 1710 was the formal recognition of intangible *private* property rights of *authors* in literary works. In contrast, its predecessors were aimed at the regulation of the book trade and censorship or control of the spread of certain ideas. In other words, the rights and interests protected by the Statute of Anne 1710 were, by nature, private property rights of individuals, *unlike* its predecessors, which had a more 'public' purpose.¹⁴¹ Moreover, after the Licensing Act 1662 lapsed in 1695, there were separate developments in criminal law specifically aimed at achieving the Crown's censorship goals. These developments include the introduction of the Blasphemy Act 1697¹⁴² (though no prosecution is known to have been brought under the Act),¹⁴³ which was in addition to the common law criminal offence of blasphemy;¹⁴⁴ and developments in the areas of blasphemous libel, and seditious libel¹⁴⁵ – which have now all been abolished.¹⁴⁶ It is, therefore, submitted here that the nature of the remedies for the infringement of such private property rights should, in principle, be considered private law remedies or

¹⁴¹ Deazley (n 71).

¹⁴² Blasphemy Act 1697 (9 Will 3 c 35).

¹⁴³ The Law Commission, *Offences against and public worship* (Her Majesty's Stationery Office 1981).

¹⁴⁴ *R v Richard Carlile* (1819) 3 B & Ald 161 (KB).

¹⁴⁵ For a detailed look into the development of seditious libel and blasphemy after the expiry of the Licensing Act 1662, see: Philip A Hamburger, 'The Development of the Law of Seditious Libel and the Control of the Press' (1985) 37 Stanford Law Review 661, 716, 721, 726-762; Lois G Schwoerer, 'Liberty of the Press and Public Opinion: 1660–1695' in JR Jones (ed), *Liberty Secured? Britain Before and After 1688* (Stanford University Press 1992) 199, 208; Leonard Williams Levy, *Treason against God: A History of the Offense of Blasphemy* (Knopf Doubleday Publishing Group 1981); and NM Dawson, 'The death throes of the Licensing Act and the 'funeral pomp' of Queen Mary II, 1695' (2007) 26(2) The Journal of Legal History 119.

¹⁴⁶ Criminal Justice and Immigration Act 2008, s 79 (abolishing the common law offence of blasphemy and blasphemous libel); Coroners and Justice Act 2009, s 73 (abolishing the common law offence of seditious and seditious libel); Criminal Law Act 1967, sch 4 (repealing Blasphemy Act 1697 (9 Will 3 c 35)).

civil penalties *unless* it is apparent from the enactment or its stated goals that there is an intent to protect some public interest through criminal sanctions. When we consider the Statute of Anne 1710, the goal of the Act was to recognise private property rights in literary works *and* provide means for enforcing those rights while compensating authors for infringement of those private rights. No intent to criminalise conduct is apparent, either from the Act or from the purpose of the Act. The mere presence of a *qui tam* provision to support the enforcement of the rights recognised by the Statute of Anne 1710 does not necessarily indicate an element of criminality but simply that it is a penal statute.

Secondly, owing to the shift in the purposes underlying the rights granted by the Statute of Anne 1710, a fundamental and necessary feature of criminal punishment is missing in the Statute of Anne 1710 – stigmatisation of the conduct as deserving of punishment.¹⁴⁷ Because the Star Chamber Decrees¹⁴⁸ and the Licensing Act 1662 had the primary object of censorship, they stigmatised unlicensed publications of books as potentially treasonous or mutinous.¹⁴⁹ Similar stigmatisation was also apparent in the Fine Arts Copyright Act 1862. In *Graves*, Sir W Page Wood LJ noted that the Fine Arts Copyright Act 1862 distinctly stigmatises certain acts as ‘fraudulent.’¹⁵⁰ The Act aimed to protect the public from ‘fraudulent’ conduct. On the other hand, the Statute of Anne 1710 was an Act aimed at the ‘encouragement of learned men to compose and write

¹⁴⁷ This aspect of criminalisation is discussed further in Chapter 3. See, pp 125-130 (below).

¹⁴⁸ Ordinances decreed for reformation of divers disorders in printing and uttering of Bookes 1566, ord 1; The newe Decrees of the Starre Chamber for orders in printing 1586, Ord 2-3; A Decree of Starre-Chamber Concerning Printing 1637, ord 8-9.

¹⁴⁹ Deazley (n 27); Cyprian Blagden, *The Stationers Company: A History, 1403-1959* (George Allen & Unwin 1960) 148.

¹⁵⁰ *Graves* (n 138).

useful books'¹⁵¹ and to prevent the 'printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families.'¹⁵² While the Act acknowledges that infringing conduct is wrongful because it causes 'great detriment' and 'ruin' to authors and their families, these wrongful harms are harms to the private interests of authors. And the level of stigma attached to such harms is not comparable to the stigma attached to sedition or blasphemy, for example. The lack of that level or type of stigmatisation, I submit, stems from the shift from the Crown's goals of censorship and control to the intent of recognising intangible private property rights. These, combined with the facts that there were separate developments in the criminal offences of sedition and blasphemy following the lapse of the Licensing Act 1662; and that *penal actions*, such as *qui tam* actions, were not generally considered criminal prosecutions, tip the argument in favour of Remedy (2) being civil and not criminal.

The Engraving Copyright Act 1735

With the recognition of property rights in literary works came the inevitable lobbying efforts to recognise intangible property rights in other types of intellectual or expressive work. The first such statute modelled after the Statute of Anne 1710 was the Engraving Copyright Act 1735.¹⁵³ The Act, also known as Hogarth's Act, was enacted after a group of artists led by William Hogarth submitted a petition to the House of

¹⁵¹ Statute of Anne 1710, s 1.

¹⁵² *ibid.*

¹⁵³ Engraving Copyright Act 1735 (8 Geo 2 c 13) ('Hogarth's Act').

Commons.¹⁵⁴ The petition stated that artists of engravings were ‘oppress’d by the tyranny of the Rich’¹⁵⁵ – the print sellers. It was submitted that print sellers insisted ‘upon a most unreasonable share of the Profits for selling the Prints’ and that if a print were successful, they would make and sell the copies in place of the originals, undercutting the artists or engravers.¹⁵⁶ The artists proposed, *inter alia*, to ‘make it punishable ... for any one to copy the Designs of Another.’¹⁵⁷

The Act stated that ‘every Person who shall invent and design, engrave, etch, or work in Mezzotinto or Chiaro Oscuro ... any historical or other print’ had the ‘sole right and liberty of printing and reprinting’ such work for 14 years from the date of first publication.¹⁵⁸ Hogarth’s Act also protected anyone who ‘from own Works and Invention shall cause to be designed and engraved, etched or worked in *Mezzotinto* or *Chiaro Oscuro*, any historical or other Print or Prints.’¹⁵⁹ Anyone who copied, engraved, etched, printed, knowingly sold, or imported any such print was to forfeit the print(s) and pay a sum of five shillings for every print found in the infringer’s custody.¹⁶⁰ The forfeited plates, prints, or sheets would be destroyed. Half the money forfeited was for

¹⁵⁴ Ronan Deazley, ‘Commentary on the Engravers’ Act 1735’ in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_uk_1735> accessed 12 March 2023.

¹⁵⁵ — ‘The Case of Designers, Engravers, Etchers, &c., London (1735)’ in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org/cam/tools/request/showRepresentation.php?id=representation_uk_1735a> accessed 02 August 2023.

¹⁵⁶ Deazley (n 154).

¹⁵⁷ ‘The Case of Designers, Engravers, Etchers, &c., London (1735)’ (n 155).

¹⁵⁸ Hogarth’s Act, s 1.

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid.*

the Crown, and the other half was for the person who brought the action¹⁶¹ – another *qui tam* provision.

Although the petitioners proposed to ‘punish’ infringers, given that the Act was modelled after the Statute of Anne 1710, it would most likely have been made abundantly clear in the Act itself or the Parliamentary debates if the nature of any penal provisions in the Act were intended to be different. The Act's fundamental aim was to extend copyright protection to engravings. Nothing in the Act suggests the remedies differed from those in the Statute of Anne 1710. And there appears to have been no Parliamentary discussion on the nature of the remedies in the Act. So, it is submitted that the Engraving Copyright Act of 1735 also did not contain a criminal copyright provision for the same reasons as those explicated in discussing the ‘penalties’ in the Statute of Anne 1710.

Other developments in the 18th century

The Importation Act 1739 partially amended the Statute of Anne 1710 and prohibited the importation from abroad of any books first printed in England within twenty years of their original publication.¹⁶² The ‘penalty’ was the forfeiture of such books, payment of five pounds, and payment of double the value of each copy imported or knowingly sold. Half the money was for the Crown, and the other half was for the person suing. The nature of the remedies appears to be the same as the nature of those in the Statute of Anne 1710. Although the Importation Act 1739 was limited to seven

¹⁶¹ *ibid.*

¹⁶² An Act for the Prohibiting the Importation of Books reprinted abroad and first composed or written and printed in Great Britain and for limiting the Prices of Books 1739 (12 Geo 2 c 36) (Importation Act 1739); Deazley (n 75) xxv.

years, it was renewed until September 1795.¹⁶³ By then, the substance of the Act had been reproduced in the Paper Duties Act 1794.¹⁶⁴ Other key copyright statutes enacted during the 18th century included the Engraving Copyright Act 1766, which increased the duration of protection for engravings to 28 years;¹⁶⁵ the Copyright Act 1775;¹⁶⁶ the Engravers' Copyright Act 1777,¹⁶⁷ which allowed designers and proprietors of designs, engravings and etchings to sue for damages and double the costs of legal proceedings; the Calico Printers Copyright Act 1787;¹⁶⁸ and the Sculpture Copyright Act 1798, which granted copyright protection of 14 years from date of creation to sculptures that represented humans or animals, and provided for the recovery damages awarded by a jury along with costs of the suit.¹⁶⁹ None of these statutes or developments is directly relevant to the development of criminal copyright provisions. They were all directed at the recognition of new private property rights like those recognised by the Statute of Anne 1710, the provision of remedies for infringement of those private rights, or the extension of the duration of those rights.

¹⁶³ Continuation of Laws Act 1746 (20 Geo 2 c 47); Continuation of Laws, etc. Act 1754 (27 Geo 2 c 18); Continuation of Laws Act 1759 (33 Geo 2 c 16); Continuation of Laws Act 1766 (7 Geo 3 c 35); Continuation of Laws, etc. Act 1774 (14 Geo 3 c 86); Continuation of Laws Act 1782 (22 Geo 3 c 13); and Continuation of Laws Act 1789 (29 Geo 3 c 55); Deazley (n 75) 109.

¹⁶⁴ An Act for repealing the duties on paper, pasteboard, milleboard, scaleboard, and glazed paper; and for granting other duties in lieu thereof 1794 (34 Geo 3 c 20) (Paper Duties Act 1794).

¹⁶⁵ Engraving Copyright Act 1766 (7 Geo 3 c 38).

¹⁶⁶ Copyright Act 1775 (15 Geo 3 c 53).

¹⁶⁷ An Act for the Encouragement of the arts of designing, engraving, and etching historical and other prints, by vesting the properties thereof in the inventors and engravers, during the time therein 1777 (17 Geo 3 c 57) (Engravers' Copyright Act 1777).

¹⁶⁸ An Act for the Encouragement of the Arts of designing and printing Linens, Cottons, Calicoes, and Muslins, by vesting the Properties thereof, in the Designers, Printers and Proprietors, for a limited time 1787 (27 Geo 3 c 38) (Calico Printers Copyright Act 1787).

¹⁶⁹ An Act for Encouraging the Art of Making New Models and Casts of Busts, and other things therein mentioned 1798 (38 Geo 3 c 71) (Sculpture Copyright Act 1798), s 2. The reference to damages makes it abundantly clear that the remedy is civil, not criminal.

Notably, some copyright statutes enacted in the latter half of the 18th century did away with *qui tam* provisions and provided only for the recovery of damages and (double) the costs of the suit.¹⁷⁰ This shift further suggests that the *qui tam* provisions in the earlier Acts were not intended to be criminal because if they were, there would have been a need to justify ‘decriminalising’ the particular infringements and for having criminal provisions for some works and not for others. And there appear to have been no such discussions.¹⁷¹

2.3. THE 19th CENTURY

Several statutes related to copyright were passed in the 19th century, including, as I have already noted, the Fine Arts Copyright Act of 1862, which had the first recognised criminal provision broadly related to copyright. The courts also directly considered whether some of the provisions in copyright statutes were criminal.

The first quarter of the century primarily saw expansions in the scope of protection offered by the law of copyright and increases in the financial penalties for infringement, without much of an effect on the nature of such penalties. The first relevant development in the century was the enactment of the Copyright Act 1801. The Act was the first statute to use the word ‘copyright’,¹⁷² and it amended the ‘penalty’ for

¹⁷⁰ The first of these was the Engravers’ Copyright Act 1777. Other examples include the Calico Printers Copyright Act 1787 and the Sculpture Copyright Act 1798.

¹⁷¹ Ronan Deazley, ‘Commentary on the Calico Printers’ Act 1787’ in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_uk_1787> accessed 20 November 2023; Ronan Deazley, ‘Commentary on the Models and Busts Act 1798’ in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_uk_1798> accessed 20 November 2023.

¹⁷² Alexander Carter-Silk and Michelle Lewiston, *The Development of Design Law - Past and Future: From History to Policy* (The Intellectual Property Office 2012) 25.

infringing copyright in books from 1p per sheet to 3p per sheet.¹⁷³ It also provided for awarding damages as assessed or determined by a jury, along with double the costs of the suit.¹⁷⁴ The *nature* of the remedies in the Statute of Anne 1710 was not altered by the Copyright Act 1801.

Similarly, the Copyright Act 1814¹⁷⁵ provided, among other things, that those who infringed copyright were to ‘damask and make Waste Paper of’ the infringing material, pay ‘double costs of suit,’ and forfeit three pence¹⁷⁶ for every infringing sheet printed, being printed, published, or exposed to sale. Half the forfeited money was for the Crown, while the other half was for the person suing. The nature of the remedies was, however, the same as that of the Copyright Act 1801 and hence the Statute of Anne 1710.

The Dramatic Literary Property Act 1833

The Dramatic Literary Property Act 1833 was enacted to ‘amend the several Acts for the Encouragement of Learning, by securing the Copies and Copyright of printed Books to the Authors of such Books’ and extend the protection of copyright to dramatic pieces or dramatic works.¹⁷⁷ The protection was to last 28 years from the day of first publication, and if the author were alive at the end of the period, the work was to receive protection for the remaining life of the author. A person infringing copyright in a dramatic work was liable to pay not less than forty shillings for every infringing

¹⁷³ Copyright Act 1801 (41 Geo 3 c 107), s 1.

¹⁷⁴ *ibid.*

¹⁷⁵ Dramatic Literary Property Act 1833 (54 Geo 3 c 156).

¹⁷⁶ Under the Statute of Anne 1710, the fine was one penny in total with half being paid to the Crown and the other half to the claimant.

¹⁷⁷ Dramatic Literary Property Act 1833.

representation, or ‘to the full amount of the Benefit or Advantage arising from the Representation,’¹⁷⁸ or to the payment of the losses suffered by the copyright owner – whichever was greater. The infringer was also liable for double the costs of the suit.

The nature of the payment of not less than forty shillings for every infringing representation was expressly considered by the Queen’s Bench Division and the Court of Appeal in *Adams v Batley*.¹⁷⁹ Conflicting orders, made at chambers in two actions, were appealed to the Queen’s Bench Division and subsequently to the Court of Appeal. In one of the actions, Huddleston, B. had found that the provision was criminal, while in the other, Pollock, B. had found that it was not. The Queen’s Bench Division and the Court of Appeal unanimously held that the provision did not create a criminal offence.

In explaining the reasons for the Queen’s Bench Division’s judgment, Day J (with whom Wills J agreed) noted that the ‘Act creates property in dramatic compositions and provides for compensation to the owner of such property when his rights have been infringed.’¹⁸⁰ He further noted that the word ‘offender’ was used in the Act as ‘a convenient expression ... to designate any person who violates the private right of property ... created’ by the Act¹⁸¹ and that it was ‘in no way meant to designate a criminal.’¹⁸² This aspect of Day J’s reasoning is similar to my analysis of the ‘penalty’ in the Statute of Anne 1710 – the fact that the rights protected under the Dramatic Copyright Act 1833 were private property rights meant that the remedial provisions

¹⁷⁸ *ibid* s 2.

¹⁷⁹ *Adams v Batley* (1887) 18 QBD 625.

¹⁸⁰ *ibid*.

¹⁸¹ *ibid* 627.

¹⁸² *ibid* 627-628.

were to be viewed as civil remedies *unless* it was clear from the provision or other provisions of the Act or from that expressed intention of the Act that it was meant to be criminal. The mere use of the term ‘offender’ was found to be insufficient for the court to classify the provision as a criminal one. The Court of Appeal agreed.¹⁸³

The Literary Copyright Act 1842

The next relevant development was the enactment of the Literary Copyright Act of 1842.¹⁸⁴ The Act was primarily limited to consolidating Acts related to literary copyright. It was enacted to ‘afford greater encouragement to the production of literary works of lasting benefit to the world.’¹⁸⁵ The Act repealed the Statute of Anne 1710, the Copyright Act of 1801, and the Copyright Act of 1814, and consolidated much of those Acts.

The Literary Copyright Act 1842 introduced the first post-mortem term of copyright protection – copyright in literary works was to last for the author's lifetime plus seven years after the author's death or for forty-two years from the date of first publication, whichever was longer. It was also the first time the term ‘copyright’ had received a statutory definition as being personal property.¹⁸⁶

As far as the remedies for copyright infringement are concerned, section 15 of the Act explicated that a person infringing copyright by printing, selling, importing, offering for sale, or publishing a literary work ‘shall be liable to a Special Action on the

¹⁸³ *Adams* (n 179).

¹⁸⁴ Literary Copyright Act 1842.

¹⁸⁵ *ibid.*

¹⁸⁶ *ibid* s 25: ‘all copyright shall be deemed personal property, and shall be transmissible by bequest, or, in the case of intestacy, shall be subject to the same law of distribution as other personal property, and in Scotland shall be deemed to be personal and moveable estate.’

Case at the Suit of the Proprietor of such Copyright.¹⁸⁷ Section 17 provided that where a person knowingly sells, publishes, offers for sale or hire, or has in their possession for sale or hire any unlicensed literary work protected by copyright, the work were to be forfeited, and that such a work could be seized and destroyed by an Officer of Customs or Excise.¹⁸⁸ Similar to the remedies that had been available until that point, the section also stated that such an infringer was liable to forfeit 10 pounds and double the value of every copy of such a literary work which the infringer imported, knowingly sold, published, or exposed to sale or hire. Five pounds of that ‘penalty’ was to be paid to the ‘Officer of Customs or Excise’ and the remainder to the *copyright owner*.¹⁸⁹

Whether the Act created criminal offences was considered briefly in *R v Willetts*.¹⁹⁰ There, the Common Sergeant stated that the Literary Copyright Act 1842¹⁹¹ did not create criminal offences. This observation, as noted in *Copinger*,¹⁹² appears to be based on a concession by the prosecution and not based on a thorough analysis of the Act.¹⁹³

Isabella Alexander, however, believes that criminal proceedings could be brought under the 1842 Copyright Act, but only ‘against someone who imported a book that had been written or first published in the United Kingdom, but printed outside it.’¹⁹⁴

¹⁸⁷ *ibid* s 15.

¹⁸⁸ *ibid* s 17.

¹⁸⁹ *ibid*.

¹⁹⁰ *R v Willetts* [1906] 70 JP 127 (Central Criminal Court).

¹⁹¹ Literary Copyright Act 1842.

¹⁹² *Copinger* (n 10) 1772 [22-03].

¹⁹³ It is notable that in *Willetts* (n 190), the defendant was, nevertheless, found guilty of ‘conspiracy to defraud.’

¹⁹⁴ Alexander (n 70) 631.

Alexander's view appears to be based on the phrase '*being duly convicted* before Two Justices of the Peace' in section 17 of the Act.¹⁹⁵ A similar phrase – '*on conviction* before Two Justices of the Peace...' – also appears in section 10 of the Act, which specifies the penalties for defaults in delivering copies of books to libraries as specified in the Act. While the word 'conviction' implies that the provisions relate to a crime, that is not necessarily the case. In the second edition of *Copinger*, published in 1881, 'conviction' is used to describe the decisions made via summary proceedings by Justices of the Peace (or magistrates) against those who infringed copyright.¹⁹⁶ Such summary proceedings were described by Wright J in *Sherras* as being 'criminal in form' but 'really only a summary mode of enforcing a civil right.'¹⁹⁷ So, the reference to 'conviction' in section 17 (and section 10) may have been an indication of the nature of the summary proceeding before two Justices of the Peace ('JPs') provided for in the 1842 Act, and not necessarily an indication of there being a criminal provision.¹⁹⁸

Fine Arts Copyright Act 1862

I have already said much about the Fine Arts Copyright Act 1862.¹⁹⁹ The initiative for the Act came from the Artistic Copyright Committee of the Society of Arts,

¹⁹⁵ She refers only to section 17 of the Act.

¹⁹⁶ Walter Arthur Copinger, *The law of copyright in works of literature and art including that of the drama, music, engraving, sculpture, painting, photography, and ornamental and useful designs: together with international and foreign copyright, with the statutes relating thereto, and references to the English and American decisions* (2nd edn, Stevens and Haynes 1881) 152, 442-443, 649-650.

¹⁹⁷ *Sherras* (n 106). He uses *Lee v Simpson* (1871) 3 CB 871 as an example of a proceeding that was 'criminal in form' but 'really only a summary mode of enforcing a civil right.' In *Lee v Simpson* the defendant was held strictly liable for the statutory penalties in the Dramatic Literary Property Act 1833, s 2.

¹⁹⁸ Summary Courts outside London were manned by JPs. While JPs often dealt with violent criminal offences, JPs' summary jurisdiction expanded to both cases of civil and criminal nature: Peter King, 'The Summary Courts and Social Relations in Eighteenth-Century England' (2004) 183(1) *Past & Present* 125, 126.

¹⁹⁹ 25 & 26 Vict c 68.

established in November 1857.²⁰⁰ In 1858, the committee recommended the amendment of the laws of artistic copyright to protect original works of painters, designers, sculptors, and engravers for the life of the author, plus 30 years, among other things. Thereafter, two petitions were presented to the House of Lords – one by the Society of Arts and the other by members of the Committee and others interested in the protection of Fine Arts. A Select Committee was appointed to consider the petitions. But that attempt was not successful.

Solid progress was made in 1861 after the Artistic Copyright Committee of the Society of Arts met with the Attorney-General, Sir Richard Bethell. On 15th April 1861, leave was given in the House of Commons to prepare and present to the Commons a Copyright (Works of Art) Bill duly introduced to the Parliament by Bethell. The Bill he presented addressed the substantive elements of the Artistic Copyright Committee's recommendations.

One of the objectives of the Bill, and indeed a key recommendation of the Artistic Copyright Committee, was to address the issue of *fraudulent* production and sale of artistic works. The problem was laid bare by the decision in *R v Closs*,²⁰¹ where a dealer in paintings was charged with forgery for selling a copy of a painting by John Linnell as an original, by affixing the name 'J Linnell' to a corner of the painting. The Court for Crown Cases Reserved quashed Cross's conviction of forgery. Cockburn LJ

²⁰⁰ Elena Cooper and Marta Iljadica, 'Architectural Copyright, Painters and Public Space in Mid-Nineteenth-Century Britain' in Marie-Stéphanie Delamaire and Will Slauter (eds), *Circulation and Control: Artistic Culture and Intellectual Property in the Nineteenth Century* (Open Book Publishers 2021); Ronan Deazley, 'Commentary on Fine Arts Copyright 1862' in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_uk_1862> accessed 20 November 2022.

²⁰¹ *R v Closs* (1858) Dears & Bell 460 (Court for Crown Cases Reserved).

reasoned that the forgery needed to be that of ‘a document or writing’²⁰² and that affixing the name was merely for identification purposes. The Bill contained several provisions to remedy the consequences of *R v Closs*,²⁰³ which, as Blaine noted in the Copyright Committee’s Report, were in ‘respect of the interests of artists, of the purchaser’s of works of Art, and public morality, ... too apparent to need any comment.’²⁰⁴ The Solicitor General noted that one of the objectives of the Bill was to ‘put a stop to a considerable trade which had grown up in spurious pictures, the manufacturers of which counterfeited the marks and monograms of artists of eminence, whose reputation suffered from the fraud.’²⁰⁵ It was for this objective, per the Solicitor General, that the Bill proposed to make the offence a criminal misdemeanour.²⁰⁶

The long title of the Fine Arts Copyright Act 1862 was ‘An Act for amending the Law relating to Copyright in Works of the Fine Arts, and *for repressing the Commission of Fraud in the Production and Sale of such Works*.’²⁰⁷ The long title itself expresses that one of the objectives of the Act was to end the commission of *fraud* in the production and sale of artistic works. The Act expanded the protection offered by copyright to original paintings, drawings, and photographs (which the Act controversially²⁰⁸

²⁰² *ibid*; Ronan Deazley, ‘Breaking the Mould? The Radical Nature of the Fine Arts Copyright Bill 1862’ in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and Property: Essays on the History of Copyright* (Open Book Publishers 2010) 303.

²⁰³ *Closs* (n 201).

²⁰⁴ *Journal for the Society of Arts*, 6 (1857-58) 298; Deazley (n 202) 303.

²⁰⁵ HC Deb 27 February 1862, vol 165, cols 843-5.

²⁰⁶ *ibid*, col 844: ‘The Bill proposed to make that offence a misdemeanour and to protect artists against frauds.’

²⁰⁷ Fine Arts Copyright Act 1862.

²⁰⁸ Deazley (n 200); HC Deb 20 March 1862, vol 165, cols 1889-1893.

classified as fine arts). It also stated that original paintings, drawings, and photographs were to be protected for the life of the author, plus seven years post-mortem.

As for remedies and penalties in the Act, the Act detailed in section 6 that any person repeating, copying, colourably imitating, or otherwise multiplying for sale, hire, exhibition, or distribution or causing any of those acts, or importing an unlawfully made copy into any part of the UK, had to forfeit an amount not exceeding ten pounds to the copyright owner and also forfeit all such infringing copies to the copyright owner. Section 7 specified that no person was to (1) 'fraudulently sign or otherwise affix, or fraudulently cause to be signed or otherwise affixed to or upon any painting, drawing, photograph or the negative thereof, any name, initials, or monogram,' (2) 'fraudulently sell, publish, exhibit, dispose of, offer for sale, exhibition or distribution' a painting, drawing, or photograph, or the negative of a photograph, with the name, initials, or monogram of a person who did not make the work, (3) 'fraudulently utter, dispose of, or put off, or cause to be uttered or disposed of any copy or colourable imitation of any painting, drawing, or photograph, or the negative of a photograph as having been made or executed by the author or maker of the original work,' whether or not copyright subsisted in the work, or (4) knowingly sell, publish, or offer for sale, altered copies of paintings, drawings, photographs, or negatives of photographs, as if they were or in place of unaltered works of the original author. Such conduct was punishable with a fine not exceeding ten pounds or double the full price at which the copies, engravings, imitations, or altered copies were sold or were offered to be sold (if any), along with forfeiture of the goods. Section 8 clarified how the pecuniary penalties in the Act, and under any Act for the protection of copyright engravings, may be recovered by the persons empowered to do so by the Act or any other relevant Act. Section 11 of the Fine

Arts Copyright Act 1862 clarified that, in addition to the remedies or penalties mentioned in the Act, the copyright owner could also recover damages and enforce delivery of the infringing goods to him in a special action upon the case.²⁰⁹

The Act did not *explicitly* mention that it contained a *criminal* offence. It mentions the word ‘conviction’ in section 7, which suggests that the provision was of a criminal nature. But one key factor differentiating the provision from the provisions in the copyright statutes before it, and indeed the other provisions in the Act itself, is the intent expressed by the Solicitor General during the first reading of the Bill – to make fraudulent use of artists’ names on works of Fine Art a misdemeanour.²¹⁰ The Parliament had the clear intention of protecting the general public against fraudulent use of artists’ names and signatures by creating a misdemeanour. The purpose of section 7 of the Act went beyond the mere protection of private property rights. Moreover, as noted earlier, the fact that there was stigmatisation of the conduct as fraudulent, *along with* the use of the words ‘penalty’ and ‘conviction’ were the key reasons for the Court of Appeal concluding in *Graves*²¹¹ that section 7 of the Fine Arts Copyright Act 1862 did create a criminal offence.

If we read the provisions in section 7 carefully, however, it becomes apparent that the provisions were not criminalising copyright infringements *per se*. They concerned the fraudulent use of artists’ names, initials, monograms, signatures and such.²¹² The fact that the Fine Arts Copyright Act 1862 was followed by the enactment

²⁰⁹ Fine Arts Copyright Act 1862, s 11.

²¹⁰ Moral signalling of this type is a key feature distinguishing criminal provisions from their civil counterpart. This is discussed further on p 125 and p 172 (below).

²¹¹ *Graves* (n 138).

²¹² Fine Arts Copyright Act 1862, s 7.

of the Merchandise Marks Act 1862 (25 & 26 Vict c 88), which criminalised the imitation of a trademark ‘with the intent to defraud or to enable another to defraud’ (ss2-5), suggests that the provisions in section 7 were part of a broader legislative movement to tackle fraud in trade. While speaking against an amendment proposed by Lord Redesdale to include a provision equivalent to those in section 7 of the Fine Arts Copyright Act 1862 in the Copyright Act 1911, Lord Gorell explained that:²¹³

[I]t was not considered that [the provisions in section 7 and parts of section 8] had really any strict relationship to the law of copyright. They were to prevent frauds and punish fraudulent actions of the kinds indicated in the section—namely, fraudulently signing a painting, drawing, or photograph; fraudulently selling or distributing any work having the name, initial, or monogram, of the person who did not execute it; fraudulently issuing any colourable imitation; gelling an altered work as though it were an unaltered work, and so on. Your Lordships will see that those are cases dealt with by that Act in order to prevent fraud. They are not, strictly speaking, copyright matters, with which this Bill purports to deal. It was therefore considered, as I understand, that those two sections of the Act of 1862 were not properly part of the law of copyright, but that as they conferred a right in connection with such frauds it was not desirable that they should be repealed. Accordingly they are, in the schedule to which I have referred, left unrepealed, but it was not thought right in a Copyright Bill to extend those sections. If this matter is considered very carefully it will be seen that, strictly speaking, these provisions as they stand, and the extended ones, have no strict relationship to the law of copyright. They are to prevent people committing frauds by passing off goods as those of an author when they are not his at all, or where they have been altered or dealt with in some such way.

Viscount Haldane also commented that the ‘provisions in Section 7 of the Fine Arts Copyright Act 1862 ha[d] nothing whatever to do with copyright.’²¹⁴ So, while the provisions in section 7 were criminal, they did not criminalise copyright infringements

²¹³ HL Deb 15 November 1911, vol 10, cols 171-172.

²¹⁴ *ibid.*

per se. The fact that the provisions were in the Fine Arts Copyright Act 1862 is insufficient to conclude that they were criminal *copyright* provisions. Statutes from the 18th and 19th centuries (and even after) contained provisions that had little to do with the primary substance of the Act. For instance, the Metropolitan Police Act 1839, titled 'An Act for further improving the Police in and near the Metropolis,' was primarily aimed at enlarging the district and increasing the powers of the Metropolitan Police. But it also set out a list of 'nuisances by persons in thoroughfares,' which, among other things, prohibited rolling or carrying 'any cask, tub, hoop, or wheel, or any ladder, plank, pole, showboard, or placard, upon any footway, except for the purpose of loading or unloading any cart or carriage, or of crossing the footway.'²¹⁵ Although committing an act prohibited in the statute could trigger a response from the Police, the nuisances prohibited have, strictly speaking, nothing to do with improving policing or the powers of the police. That is why the provision prohibiting the nuisances is still in the statute, while the powers of the police contained in the statute are now replaced by modern statutes, like the Police and Criminal Investigation Act 1984, the Police Act 1996, and the Policing and Crime Act 2017. So, the mere fact that criminal provisions appear in a copyright statute does not mean that they are criminal *copyright* provisions.

There is, however, a different way of looking at section 7 of the Fine Arts Copyright Act 1862 that could make it a criminal copyright provision. That is to view the provision as akin to the contemporary moral right against false attribution,²¹⁶ or the moral right of integrity.²¹⁷ A case can be made for this interpretation, particularly in

²¹⁵ Metropolitan Police Act 1839, s 54(8).

²¹⁶ Deazley, 'Commentary on Fine Arts Copyright 1862' (n 200).

²¹⁷ *ibid*.

relation to the right against false attribution because section 7 deals with *fraudulently* signing or affixing a name to a painting, drawing, or photograph; *fraudulently* selling or distributing such works bearing the name of someone who did not create them; and *fraudulently* passing off copies or imitations as works by the original author, whether or not copyright exists.²¹⁸ The provisions in section 7 do protect artists from having their names, initials, or monograms appear in works that they did not make or license. But the Parliament had not intended the provision to be viewed as granting moral rights to authors. Instead, it is aimed at protecting consumers from being misled. This is clearer when we consider whether the provision granted artists something akin to a ‘right of integrity.’ The relevant part of the provision reads as follows:²¹⁹

Fourthly, where the Author or Maker of any Painting, Drawing, or Photograph, or Negative of a Photograph, made either before or after the passing of this Act, shall have sold or otherwise parted with the Possession of such Work, if any Alteration shall afterwards be made therein by any other Person, by Addition or otherwise, no Person shall be at liberty during the Life of the Author or Maker of such Work, without his Consent, to make or knowingly to sell or publish, or offer for Sale, such Work or any Copies of such Work so altered as aforesaid, or of any Part thereof, *as or for* the unaltered Work of such Author or Maker.” (emphasis added).

The phrase ‘as or for’ is key here. Here, ‘as’ means the altered copy cannot be passed off in a way that would imply it is the original work. ‘For’ means it cannot be sold in a way that substitutes it *for* the original work. So, if an altered copy is sold *as an altered copy* without misleading the buyer, with full disclosure about the alterations, the sale would not fall under this provision. This means that it is not the integrity of the work that is

²¹⁸ Fine Arts Copyright Act 1862, s 7.

²¹⁹ *ibid.*

being protected. Rather, it is the consumer who is being protected against fraudulent sales.

The Copyright (Musical Compositions) Act 1882 and The Copyright (Musical Compositions) Act 1888

Both Acts²²⁰ were enacted to protect the public from vexatious proceedings for recovery of damages for unauthorised performances of musical compositions.²²¹ Neither Act attempts to stigmatise the unauthorised representation or performance of musical compositions. Nor does there appear to be any discussion of criminalising such conduct in the Parliamentary debates.²²² While the Acts invoke the public interest of protecting the public from vexatious proceedings, this interest is irrelevant to the nature of the remedies for copyright infringement. If anything, the interest calls for the *limitation* of the remedies available for infringement of the copyright in Musical Compositions and not for their expansion from civil to criminal.

International developments in the 19th century

Several statutes²²³ were enacted in the 19th century to protect copyright works internationally and recognise works first printed or published in foreign jurisdictions.

²²⁰ Copyright (Musical Compositions) Act 1882 (45 & 46 Vict c 40); Copyright (Musical Compositions) Act 1888 (51 & 52 Vict c 17).

²²¹ HC Deb 05 April 1888, vol 324, cols 592-4.

²²² HC Deb 09 May 1882, vol 269, col 354; HL Deb 14 July 1882, vol 272, col 428-429; HC Deb 05 March 1888, vol 323, col 324; HC Deb 05 April 1888, vol 324, cols 592-4; HL Deb 24 April 1888, vol 325, cols 296-300.

²²³ An Act for securing to Authors, in certain cases, the Benefit of International Copyright 1838 (1 & 2 Vict c 59) (International Copyright Act 1838); An Act to amend the Law relating to International Copyright 1844 (7 & 8 Vict c 12) (International Copyright Act 1844); An Act to amend the Law relating to the Protection in the Colonies of Works entitled to Copyright in the United Kingdom 1847 (10 & 11 Vict c 95) (Foreign Reprints Act 1847); An Act to enable Her Majesty to carry into effect a Convention with France on the Subject of Copyright; to extend and explain the International Copyright Acts; and to

Moreover, the Berne Convention,²²⁴ an international treaty which sets minimum standards of protection of copyright works and the rights of authors, was adopted in 1886 and ratified by the United Kingdom on the 5th of September, 1887.²²⁵ But neither those statutes nor the Berne Convention contained anything related to criminal copyright.

2.4. THE 20th CENTURY

The 20th century saw a rapid expansion of the scope and availability of remedies and penalties for copyright infringement, including the introduction of the first criminal copyright provisions. The statutes themselves were also drafted in a manner that made the nature of the provisions abundantly clear. So, I do not need to conduct a detailed analysis of the provisions from this period onwards to determine whether the provisions are criminal or not. I will primarily be looking at the description and scope of the offences and the reasons for their introduction or expansion. I will skip the statutes that did not contain, introduce, or affect criminal copyright provisions.

explain the Acts relating to Copyright in Engravings 1852 (15 & 16 Vict c 12) (International Copyright Act 1852); International Copyright Act 1875 (38 & 39 Vict c 12).

²²⁴ Berne Convention for the Protection of Literary and Artistic Works (adopted 09 September 1886).

²²⁵ An Act to amend the Law respecting International and Colonial Copyright 1886 (49 & 50 Vict c 33) (The International Copyright Act 1886); Daniel Gervais, 'The Emergence and Development of Intellectual Property Law in Canada' in Rochelle Dreyfuss and Justine Pila (eds), *The Oxford Handbook of Intellectual Property Law* (OUP 2018) 267: 'The UK joined the Berne Convention for the Protection of Literary and Artistic Works 1886 (the Berne Convention) on 5 September 1887.'

The birth of criminal copyright – Musical Copyright Act 1906

In the early 20th century, the piracy²²⁶ of sheet music was rampant.²²⁷ This was primarily because of the invention of photolithography in 1855,²²⁸ and the increased accessibility to photographic equipment,²²⁹ which meant that sheet music could be photographed, printed, and sold by pirates quickly and cheaply. Moreover, in the late 19th and early 20th centuries, prices of pianos fell, and popular music was born.²³⁰ There was, therefore, a high demand for sheet music.²³¹ But the price of legitimate sheet music was high.²³² So, sheet music pirates capitalised on that gap in the market by offering cheap, illegitimate copies of sheet music.

In response to the growing sheet music piracy, music publishers issued several civil proceedings against hawkers selling pirated copies of sheet music.²³³ But these were ineffective. The hawkers did not have money, so the publishers could not even recover their costs, let alone damages.²³⁴ The structure of the sheet music piracy business, with middlemen between printers and hawkers, made it challenging to hold the printers to account.²³⁵ Obtaining injunctions was unhelpful because they were quickly breached.

²²⁶ In this thesis, piracy refers to intentional or reckless infringement of copyright with the intent to make a financial gain or infringement on a commercial scale.

²²⁷ Alexander (n 70) 629; *Copinger* (n 10) 1772-1773 [22-04].

²²⁸ Alexander (n 70) 629.

²²⁹ *ibid* 625-656, 629.

²³⁰ *ibid*.

²³¹ *ibid* 628-629.

²³² *ibid* 630.

²³³ *ibid*.

²³⁴ *ibid*.

²³⁵ *ibid* 631.

Consequently, music publishers no longer deemed private law remedies sufficient to combat the growing sheet music piracy.

Faced with this issue, David Day of the music publishing firm Francis, Day & Hunter approached the Select Committee of the House of Lords that was considering bills on literary and artistic copyright in early 1902 and proposed to criminalise the hawking of pirated music and to give publishers the power to search for and seize infringing copies in houses and shops.²³⁶ But the bills failed. Day then arranged a series of raids on places that his detective agency identified as storing pirated sheet music. He successfully seized nearly 50,000 infringing copies of sheet music throughout the raids.²³⁷

Because of the insufficiency of civil remedies to combat the widespread piracy of music sheets, the rise of 'self-help remedies' outside of the law by music publishers, and the music publishers' lobbying efforts, Parliament enacted the Musical (Summary Proceedings) Copyright Act 1902.²³⁸ The bill was introduced to the House of Lords by Lord Monkswell. The bill, which the House of Lords passed, included a penalty of £5 for every infringing copy and gave constables the power to seize infringing copies of musical copyright works without a warrant. But when the House of Commons considered the bill, they removed the penalty and the power, making the eventual Act ineffective. Because of the Act's failure, the Earl of Lytton introduced a bill to amend the 1902 Act in May 1903, stating that the 1902 'merely acted as an advertisement of the

²³⁶ *ibid.*

²³⁷ *ibid* 631-632.

²³⁸ *Copinger* (n 10) 1773 [22-05] (footnote 12).

very lucrative nature of the trade.²³⁹ The amending bill had penalties and search powers and passed the House of Lords. But the Commons did not pass the bill. The stumbling block was the supposed lack of public interest in the protection of musical copyright to the extent proposed, despite the lobbying efforts by music publishers. There was also a lack of governmental support for such a bill by Balfour's Conservative government. A new bill was introduced in 1904, but it faced the same outcome as the 1903 Bill.

In 1906, the decision in *R v Willetts*²⁴⁰ was issued. Willetts, also known as the 'King of Pirates,' was convicted of conspiracy to defraud copyright owners of musical works by illegally selling sheet music after reproducing them using photo-zinco block-making, a photographic method similar to photolithography.²⁴¹ The press covered his trial widely, resulting in considerable publicity for the music publishers' cause. There was also a General Election in 1906, which Labour won. Following these developments, the Irish Parliamentary Party's O'Connor introduced a new bill²⁴² with criminal penalties for infringements of musical copyright, including printing, reproducing, selling, exposing or offering for sale, or having in his possession for sale, any pirated copies of a musical work or having in his possession plates for printing or reproducing pirated copies of any musical work, 'unless he proves that he acted innocently.'²⁴³ This reversal of the burden of proof was subject to considerable discussion in the

²³⁹ HL Deb 19 May 1903, vol 122, col 1049.

²⁴⁰ *Willetts* (n 190).

²⁴¹ *ibid*; Alexander (n 70) 637.

²⁴² HC Deb 28 May 1906, vol 158, cols 101-102.

²⁴³ Alexander (n 70) 641, 644.

Parliament.²⁴⁴ Other phrases, such as ‘which he knows to be pirated,’²⁴⁵ and ‘as to any pirated copies that he had taken reasonable steps to ascertain whether the said copies were pirated, and did in fact believe that they were not pirated, and as to any plates that he had taken reasonable steps to ascertain whether the said plates were intended to be used for the purpose of printing or reproducing pirated copies, and did in fact believe that they were not intended for that purpose’²⁴⁶ were proposed and discussed. But the words ‘unless he proves that he acted innocently’ remained in the final Act.²⁴⁷ The Bill received Royal Assent on 4th August 1906.

The Musical Copyright Act 1906, thus, introduced the first criminal and the first imprisonment provisions specifically for copyright infringements.²⁴⁸ The Act stated that every person printing, reproducing, selling, exposing, offering, or possessing copies of musical works to sell, or possessing plates to print or reproduce pirated copies of musical works, was to be *found guilty of an offence punishable on summary conviction* by a fine up to five pounds.²⁴⁹ Second-time or subsequent offenders could be sentenced to a maximum of two months in prison with or without hard labour or fined up to ten pounds. The burden of proving lack of intent or knowledge was on the defendant.²⁵⁰

Criminal copyright provisions, therefore, originated because of a desire to protect the (musical) copyright regime from rampant infringements and because it was

²⁴⁴ HC Deb 16 July 1906, vol 160, cols 1452-1488.

²⁴⁵ *ibid* cols 1453-1463.

²⁴⁶ *ibid* cols 1464-1465.

²⁴⁷ Musical Copyright Act 1906, s 1(1).

²⁴⁸ *Copinger* (n 10) 1773 [22-04].

²⁴⁹ Musical Copyright Act 1906, s 1(1).

²⁵⁰ *ibid*.

felt that civil remedies were not sufficient to deter infringement. An analogy can be drawn between what happened then and how computers, mobile phones, the internet, and other technological developments of today have made reproducing and sharing most copyright works cheaper, easier, and faster. Like how private law remedies were seen as ineffective in combating the rise of music sheet piracy, private law remedies are now seen (at least by some) as inefficient in combatting online piracy.²⁵¹ I will return to this discussion in Chapter 4.²⁵²

Imperial Copyright Act 1911²⁵³

As we saw above, copyright in the UK was protected via several piecemeal statutes, which were amended several times. Because of this, there was a growing desire to consolidate the several copyright statutes into one, stemming back at least to 1837.²⁵⁴ A Royal Commission formed in 1875 wrote regarding the law of copyright that '[t]he law is wholly destitute in any sort of arrangement, incomplete, often obscure, and even when it is intelligible upon long study, it is in many parts so ill-expressed that no-one who does not give such study to it can expect to understand it.'²⁵⁵ Moreover, following the adoption of the Berne Convention in 1886 and its amendments in 1896 and 1908, the UK's domestic law had to be amended to comply with the requirements of the Convention. A committee was, therefore, appointed to report to the Parliament on any

²⁵¹ Penney (n 38) 63-67.

²⁵² See the discussion under the heading, 'Is criminalisation preferable?' on pp 179-216.

²⁵³ Imperial Copyright Act 1911 (1 & 2 Geo 5 c 46) (Copyright Act 1911).

²⁵⁴ Bill to consolidate and amend the Laws relating to Copyright in Printed Books, Musical Compositions, Acted Dramas and Engravings, to provide Remedies for the Violation thereof, and to extend the Term of its Duration HC Bill (1837); Catherine Seville, *Literary Copyright Reform in Early Victorian England: The Framing of the 1842 Copyright Act* (CUP 1999) 17, 49.

²⁵⁵ Copyright Commission, *Report of the Commissioners* (C 2036, 1878) vii.

amendments needed to bring domestic law in line with those mandated by the international regime.²⁵⁶ And they noted that the domestic law had to be amended. These appear to have been among the key reasons behind the Act.

The drafters of the Bill intended the remedial provisions, including the criminal penalties, in the Musical Copyright Act 1906 to be extended to all categories of copyright work.²⁵⁷ But, due to considerable opposition in Parliament, the Act had *new* criminal provisions for infringement of all copyright works, except for infringements falling within the scope of the Musical Copyright Act 1906.²⁵⁸ Per the Act, knowingly infringing copyright by selling or hiring, exhibiting in public, distributing, or importing for sale or hire was punishable by a fine up to 40 shillings for every copy, but not exceeding fifty pounds for the entire transaction. A second or subsequent offence was punishable by imprisonment, with or without hard labour, with a maximum sentence of two months.²⁵⁹ Furthermore, knowingly copying, making, or possessing any plate to make an infringing copy of a copyright work or knowingly causing an unlicensed, public, and for-profit performance was punishable by a fine not exceeding fifty pounds.²⁶⁰ In case of a second or subsequent offence, the penalty could be a fine or imprisonment with or without hard labour, for a term not exceeding two months.

There was, however, a conscious decision not to include the criminal provisions in section 7 of the Fine Arts Copyright Act 1862 in the 1911 Act.²⁶¹ The Act repealed all

²⁵⁶ HL Deb 31 October 1911, vol 10, col 41.

²⁵⁷ *Copinger* (n 10) 1773 [22-05].

²⁵⁸ Copyright Act 1911, s 11(4).

²⁵⁹ *ibid* s 11(1).

²⁶⁰ *ibid* s 11(2).

²⁶¹ Fine Arts Copyright Act 1862, s 7; HL Deb 15 November 1911, vol 10, cols 171-172.

provisions of the Fine Arts Copyright Act 1862 except for section 7 and parts of section 8. The parts of section 8 that were repealed were the phrases ‘and pursuant to any Act for the protection of copyright engravings,’ and ‘and in any such Act as aforesaid.’²⁶² Effectively, the Copyright Act 1911 repealed all parts of the Fine Arts Copyright Act 1862 relevant to copyright law in the strict sense and left the fraud provisions. In the earlier discussions, we saw Lord Gorell and Viscount Haldane’s comments regarding the unrepealed provisions.²⁶³

The inclusion of criminal penalties in the 1911 Act appears to have been driven by two desires. The first was the desire to consolidate the copyright regimes for different types of work.²⁶⁴ At that point, some copyright infringements already carried criminal penalties. And it would have made little sense to abolish those to achieve consolidation because there were legitimate reasons for their criminalisation. A second desire, albeit not expressly stated, is apparent from the circumstances surrounding the adoption of the 1911 Act – civil law remedies were not perceived to be enough of a deterrent to copyright infringement for all types of work protected by copyright.²⁶⁵ Infringement of copyright was widespread. Civil remedies were increasingly being seen as inadequate for one reason or the other.

²⁶² Copyright Act 1911, s 36, sch 2.

²⁶³ See, pp 70-78 (above).

²⁶⁴ HL Deb 31 October 1911, vol 10, cols 39-54; HL Deb 14 November 1911 vol 10, col 124.

²⁶⁵ HL Deb 15 November 1911, vol 10, cols 168-208; Haber (n 11) 35; Uma Suthersanen, ‘The First Global Copyright Act’ in Uma Suthersanen and Ysolde Gendreau (eds), *A Shifting Empire: 100 years of the Copyright Act 1911* (Edward Elgar Publishing 2013) xi, 1, 28.

The Copyright Act 1956²⁶⁶

Other areas of copyright law, especially with respect to cross-border protection of copyright works, had significant developments too. The Berne Convention was revised in 1928 and 1948.²⁶⁷ Additionally, the Universal Copyright Convention (UCC) was adopted in 1952. This convention was developed by UNESCO because some jurisdictions (primarily, the United States) disagreed with some provisions of the Berne Convention but were 'moved by the desire to assure in all countries copyright protection of literary, scientific, and artistic work'²⁶⁸ and were 'convinced that a system of copyright protection appropriate to all nations of the world and expressed in a universal convention, additional to, and without impairing international systems already in force, will ensure respect for the rights of the individual and encourage the development of literature, the sciences and the arts,'²⁶⁹ and were also 'persuaded that such a universal copyright system will facilitate a wider dissemination and increase international understanding.'²⁷⁰ Considering these developments and further technological advancements, the Gregory Committee was appointed to consider and report whether any changes to the UK's copyright law were desirable.²⁷¹

²⁶⁶ Copyright Act 1956 (4 & 5 Eliz 2 c 74).

²⁶⁷ Paul Abel, 'The Brussels Copyright Convention and Its Influence on Domestic Copyright Legislation (In Particular in the United Kingdom and in Austria)' (1954) 3(2) *The International and Comparative Law Quarterly* 330, 330; World Intellectual Property Organization, 'Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)' (*World Intellectual Property Organization*, <www.wipo.int/treaties/en/ip/berne/summary_berne.html> accessed 09 March 2024).

²⁶⁸ Universal Copyright Convention (adopted 06 September 1952), Preamble.

²⁶⁹ *ibid.*

²⁷⁰ *ibid.*

²⁷¹ HC Deb 10 April 1951, vol 486, col 65.

After the Gregory Committee made their recommendations, the 1956 Act was enacted to repeal and replace the Musical Copyright Acts of 1902 and 1906, the 1911 Act, and (most) other copyright legislations that had been in force until that point.²⁷² The Act also repealed the Fine Arts Copyright Act 1862 entirely.²⁷³ As for the criminal copyright provisions, section 21 of the Act substantially reproduced the criminal provisions in the 1911 Act. It did, however, expand the scope of the offences to include activities that were not necessarily commercial.²⁷⁴ Again, the motivation for this expansion was the perceived inadequacy of the 1911 Act and its remedies and penalties owing to technological and societal changes.²⁷⁵

Per the Copyright Act 1956, anyone who made for sale or hire, sold, let for hire, or offered or exposed for sale or hire, or exhibited in public by way of trade, or imported to the United Kingdom for any purpose other than that of private or domestic use,²⁷⁶ or distributed for purposes of trade, or for other purposes in a manner that prejudicially affected the owner of the copyright,²⁷⁷ any copyright work which he knew was an infringing copy, was punishable with a fine not exceeding forty shillings for each infringing article up to fifty pounds for the entire transaction if the offence was the person's first conviction for the offence.²⁷⁸ In other cases, the person could have been fined up to fifty pounds in respect of articles comprised in the same transaction or

²⁷² Copyright Act 1956, s 50, sch 9.

²⁷³ *ibid.*

²⁷⁴ Copyright Act 1956, s 21; Haber (n 11) 37.

²⁷⁵ Haber (n 11) 37; John Feather, *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain* (Mansell Publishing 1994) 7.

²⁷⁶ Copyright Act 1956, s 21(1).

²⁷⁷ *ibid* s 21(2).

²⁷⁸ *ibid* s 21(7).

imprisoned for a period not exceeding two months.²⁷⁹ Moreover, if a person made or had in their possession a plate, knowing that the plate was to be used to make infringing copies of copyright works, or caused a literary, dramatic, or musical work to be performed in public with the knowledge that the performance constituted copyright infringement, they could be fined up to fifty pounds for their first offence. They could be fined or imprisoned for up to two months for subsequent offences.²⁸⁰ Additionally, the court could order the infringing copies or the plates used to make such copies to be destroyed or delivered up to the owner of the copyright or otherwise dealt with as the court may see fit, regardless of whether the person charged was found guilty of the offence.²⁸¹

The Copyright Act 1956 (Amendment) Act 1982, the Copyright (Amendment) Act 1983, and the Copyright (Computer Software) Amendment Act 1985

Following significant technological developments in areas such as photocopying, sound recording and video recording, the Whitford Committee was appointed in August 1973 to consider and report on whether any changes to the copyright regime were needed.²⁸² In the context of criminal copyright provisions, the committee was told, among other things, that due to the difficulty in proving the knowledge of the infringer – the *mens rea* element required by the criminal copyright provisions in the Copyright Act 1956 – and because of the modest penalties the offences

²⁷⁹ *ibid* s 21(7).

²⁸⁰ *ibid* s 21(8).

²⁸¹ *ibid* s 21(9).

²⁸² HL Deb 31 March 1982, vol 428, col 1423; John Norman Keates Whitford, *Copyright and Designs Law: Report of the Committee to Consider the Law on Copyright and Designs* (Cmnd 6732, 1977) 1.

carried, the criminal copyright provisions in the Copyright Act 1956 were seldom used.²⁸³ Consequently, the Whitford Committee recommended, *inter alia*, that a new offence of possessing an infringing copy in the course of trade should be introduced.²⁸⁴ They also recommended placing on the defendant the burden of proving (a) a lack of knowledge that the conduct was infringing, and that (b) there were no reasonable grounds to believe that the conduct was infringing copyright.²⁸⁵ But none of those recommendations were immediately implemented.²⁸⁶

By 1981, there were rising concerns about piracy of sound recordings and videos, especially with technological advancements making it easier and cheaper to make infringing copies of such works.²⁸⁷ Consequently, the Copyright Act 1956 (Amendment) Act 1982²⁸⁸ and the Copyright (Amendment) Act 1983²⁸⁹ were enacted as interim measures²⁹⁰ until a full revision to the Copyright Act 1956 could be made.²⁹¹ The 1982 Act criminalised having in possession ‘by way of trade’ an infringing copy of a sound recording or a cinematograph film, with the knowledge that the copy is an

²⁸³ Whitford (n 282) 180-182, paras 708-714.

²⁸⁴ *ibid* para 711.

²⁸⁵ *ibid*.

²⁸⁶ *Copinger* (n 10) 1774 [22-06].

²⁸⁷ *ibid*.

²⁸⁸ Copyright Act 1956 (Amendment) Act 1982.

²⁸⁹ Copyright (Amendment) Act 1983.

²⁹⁰ HC Deb 09 July 1982, vol 27, col 590: ‘My Bill is an interim measure—a valuable interim measure, if I may say so, pending new comprehensive Government legislation on copyright—to provide a real deterrent against the piratical manufacture, sale and hire of sound recordings and video recordings. Video piracy causes losses amounting to an estimated £100 million a year to the legitimate sound recording, film and television industries as well as damage to the interests and livelihood of all concerned;’ and *ibid*: ‘Since then large numbers of people have been waiting and hoping for their comprehensive reform of copyright Law. As that has not yet been finalised, we have been forced to deal with the urgent matters in rather a piecemeal way. This is an interim measure.’

²⁹¹ This ultimately happened with the enactment of the CDPA 1988.

infringing one.²⁹² It was punishable by a fine not exceeding forty shillings for each infringing article, with a maximum of fifty pounds for the entire transaction for first-time offenders. In other cases, the person could be fined up to fifty pounds for the transaction or imprisoned for a period not exceeding two months.

The Copyright (Amendment) Act 1983²⁹³ amended the penalties for infringing copyright in a sound recording or cinematograph film. Per the amendment, anyone found guilty of selling, letting for hire, offering or exposing for sale or hire by way of trade,²⁹⁴ or of exhibiting a sound recording or cinematograph film by way of trade knowing that the article is an infringing copy,²⁹⁵ or of possessing by way of trade a sound recording or cinematograph film with the knowledge that the article was an infringing one,²⁹⁶ will be liable on summary conviction for a fine not exceeding level 5 on the standard scale (i.e. £1,000 at the time of enactment)²⁹⁷ or imprisonment not exceeding two months or both.²⁹⁸ Moreover, anyone found guilty of (a) making a sound recording or a cinematograph film for sale or hire knowing that the copy is infringing,²⁹⁹ or (b) importing into the United Kingdom, otherwise than for private and domestic use, a sound recording or a cinematograph film that he knows is an infringing article, or (c) distributing for the purposes of trade, or for other purposes to such an extent as to

²⁹² While the Copyright Act 1956 criminalised infringement of copyright in literary, artistic, musical, and artistic work, it did not extend to neighbouring works like sound recordings, and films.

²⁹³ Copyright (Amendment) Act 1983.

²⁹⁴ Copyright Act 1956, s 21(1)(b).

²⁹⁵ *ibid* s 21(1)(c).

²⁹⁶ *ibid* s 21(4A).

²⁹⁷ Criminal Justice Act 1982, s 37; Criminal Penalties etc (Increase) Order 1984 increased this to £2,000 on 1st May 1984, and then to £5,000 by the Criminal Justice Act 1991, s 17 on 01st October 1992.

²⁹⁸ Copyright Act 1956, s 21(7A).

²⁹⁹ *ibid* s 21(1)(b).

prejudicially affect the owner of the copyright, an infringing copy of a sound recording or a cinematograph film knowing that the copy is infringing,³⁰⁰ can be liable 'on summary conviction, to a fine not exceeding the statutory maximum,'³⁰¹ or 'on conviction on indictment, to a fine or to imprisonment for a term not exceeding two years or to both.'³⁰²

In 1985, the punishments that applied to criminal infringements of copyright in sound recordings or cinematograph films were extended to the offences concerning computer programs via the Copyright (Computer Programs) Amendment Act 1985.³⁰³ The Parliament's intent was 'to bite hard into piracy' of computer software, which was estimated to have caused losses totalling £150 million in 1983 and even higher in 1984.³⁰⁴ Underlying this amendment, therefore, was the desire to deter software piracy.

The Copyright, Designs and Patents Act 1988

As noted, the amendments to the Copyright Act 1956 were deemed 'interim' measures until the overall copyright regime could be revised in light of the developments in the international regime for copyright protection and technological developments. In their 1986 White Paper,³⁰⁵ the UK government stated that the increased penalties in the amended 1956 Act proved successful, especially with regard to piracy of films. So, they had proposed to extend the penalties to all categories of

³⁰⁰ *ibid* s 21(2).

³⁰¹ *ibid* s 21(7B)(a).

³⁰² *ibid* s 21(7B)(b).

³⁰³ Copyright (Computer Programs) Amendment Act 1985.

³⁰⁴ *ibid*, s 3; HC Deb 05 July 1985, vol 82, col 627.

³⁰⁵ Department of Trade and Treasury, *Intellectual Property and Innovation* (Cmnd 9712, 1986).

copyright works. They also proposed to make possession of any infringing copyright work in the course of trade a criminal offence, in line with the recommendations by the Whitford Committee. As highlighted above,³⁰⁶ the committee proposed the relaxation of the requirement of knowledge that the conduct was infringing because the committee had been ‘told by a number of interested organisations ... that because of the difficulties of proving ‘guilty knowledge’ the criminal copyright provisions in the 1956 Act were of ‘little use and little used.’³⁰⁷ Ultimately, the CDPA 1988, which repealed the Copyright Act of 1956 and implemented the government’s proposals, was enacted ‘to restate the law of copyright with amendments; ... to make provision with respect to devices designed to circumvent copy-protection of works in electronic form; to make fresh provision penalising the *fraudulent* reception of transmissions; ... and for connected purposes.’³⁰⁸ The criminal provisions in the CDPA 1988 were, therefore, underpinned by the desire to ensure the effectiveness of the copyright system, both in terms of the statutory protection offered and the enforcement, and to prevent fraud. The Copyright, Designs and Patents Act 1988 is the key copyright legislation in force today.

Not only did the 1988 Act extend the penalties in the 1982, 1983, and 1985 amendments to all categories of work, but it also expanded the scope of the existing offences and introduced new offences. Section 107(1) and section 107(3)(a), CDPA 1988³⁰⁹ criminalised the same conduct as the Copyright Act 1956 and expanded the scope of those offences by amending the *mens rea* element of those offences from

³⁰⁶ See, p 90 (above).

³⁰⁷ *Copinger* (n 10) 1775 [22-06]; Whitford (n 282) 181, at para 708.

³⁰⁸ CDPA 1988, introductory text.

³⁰⁹ CDPA 1988, ss 107(1), 107(3)(a).

*knowing to knowing or having a reason to believe.*³¹⁰ The Act also introduced the offences of (1) possessing an infringing copyright work in the course business, with a view to committing an infringing act;³¹¹ (2) making or possessing an article specifically designed or adapted for making copies of a particular copyright work;³¹² (3) the public performance of literary, dramatic, musical and artistic works and playing or showing in public a sound recording or a film, without the consent of the author and with knowledge or reason to believe that the performance is not authorised by the copyright owner.³¹³ Additionally, section 110, CDPA 1988 exposes to criminal liability directors, managers, secretaries, or other similar officers of corporate bodies, or persons purporting to act in such capacities, where a body corporate commits an offence with the consent or connivance of such persons.³¹⁴

The penalties for the unauthorised making for sale or hire of a copyright work, the unauthorised importing into the United Kingdom of a copyright work, and distribution of a copyright work in the course of business or distribution of a copyright work for other purposes to an extent that prejudicially affects the owner of copyright are: ‘on summary conviction ... imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both;’ and ‘on conviction on indictment, ... a fine or imprisonment for a term not exceeding two years, or both.’³¹⁵ Those found guilty of other copyright infringement offences were (and are) to be liable on summary

³¹⁰ *ibid* s 107.

³¹¹ *ibid* s 107(1)(c).

³¹² *ibid* s 107(2).

³¹³ *ibid* s 107(3).

³¹⁴ *ibid* s 110.

³¹⁵ *ibid* s 107(4).

conviction to imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale (which used to be £5000 until 12 March 2015 – it is now an unlimited fine), or both.³¹⁶

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1995.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (1995)³¹⁷ was the first international treaty that mandated criminal copyright provisions under international law. Article 61 of the Agreement requires member states to ‘provide for criminal procedures and penalties to be applied at least in cases of wilful ... copyright piracy on a commercial scale.’³¹⁸ It further provides that the remedies ‘shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity.’³¹⁹ It goes on to provide that in appropriate cases, remedies available shall include ‘the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence.’³²⁰

³¹⁶ CDPA 1988, s 107(5); Martin Brassell, Dr Ian Goodyer and Inngot Limited, *Penalty Fair? Study of criminal sanctions for copyright infringement available under the CDPA 1988* (Intellectual Property Office 2015) 11.

³¹⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299 (TRIPS Agreement). Following the enactment of TRIPS, the UCC became of limited importance not least because almost all countries are members of the WTO and hence obliged by the TRIPS Agreement to follow Articles 1 to 21 of the Berne Convention (except Article 6bis) and its appendices.

³¹⁸ *ibid* art 61; This is the current minimum requirement under international law for criminal copyright provisions.

³¹⁹ *ibid*.

³²⁰ *ibid*.

2.5. THE 21st CENTURY

The 21st century saw further expansion of criminal copyright provisions in terms of the scope of the offences and the severity of the punishment.

The Copyright, etc. and Trade Marks (Offences and Enforcement) Act 2002

There were two major driving forces behind the enactment of the Copyright, etc. and Trade Marks (Offences and Enforcement) Act 2002.³²¹ The first was the belief that the criminal penalties in the CDPA 1988 did not have a sufficient deterrent effect and that the protection would be enhanced by ‘strengthening and simplifying enforcement procedures.’³²² The second was the discrepancies between the penalties in the CDPA 1988 and the Trade Marks Act 1994.³²³ It was noted by Melanie Johnson, the then Parliamentary Under-Secretary of State for Trade and Industry, that lower maximum criminal penalties for copyright crimes (compared to trade mark crimes) made it seem like a ‘lesser theft’ (compared to criminal infringements of trade marks) although it can ‘cause equal harm,’ and that the Bill was ‘designed once and for all to give copyright theft equivalent standing to that of trade mark theft by copying into copyright law the better provisions on maximum penalties and forfeiture of infringing goods that already exist in trade mark law.’³²⁴ While the Act did not fully harmonise the criminal penalties of the copyright and trade mark regimes,³²⁵ the Copyright, etc. and

³²¹ Copyright, etc. and Trade Marks (Offences and Enforcement) Act 2002.

³²² *Copinger* (n 10) 1776 [22-10]; HC Deb 12 April 2002, vol 383, cols 285-293.

³²³ *Copinger* (n 10) 1775 [22-10]; HC Deb 12 April 2002, vol 383, cols 293-295.

³²⁴ HC Deb 12 April 2002, vol 383, col 289.

³²⁵ All offences in the Trade Marks Act 1994 are triable either way (in the Magistrates’ Court or the Crown Court) and carried a maximum of 10 years’ imprisonment, while many offences under the CDPA 1988

Trade Marks (Offences and Enforcement) Act 2002 amended the CDPA 1988 to increase the maximum penalty for making or trading infringing articles, and for making, trading, or using illicit recordings of copyright works from two years to ten years. The Act, which came into force on 20th November 2002,³²⁶ did not change the scope of any criminal offences in the CDPA 1988.

Copyright and Related Rights Regulations 2003

The Copyright and Related Rights Regulations 2003, which came into force on 31st October 2003,³²⁷ was enacted under the European Communities Act 1972³²⁸ to transpose the Information Society Directive³²⁹ ('InfoSoc Directive') into domestic law. The Regulation³³⁰ amended section 107, CDPA 1988 by inserting subsections (2A) and (4A). Subsection (2A) introduced the offence of infringing upon a copyright work by communicating it to the public 'in the course of business or to such an extent as to prejudicially affect the copyright owner,' with the knowledge that, or having reason to believe that the conduct is an infringement of copyright.³³¹ Section (4A) set out the penalties for the offence.³³² The provision explicated that those found guilty of the offence were liable '(a) on summary conviction to imprisonment for a term not

remained triable summarily (in the Magistrates' Courts), with some offences carrying a maximum of three months' imprisonment.

³²⁶ Copyright, etc. and Trade Marks (Offences and Enforcement) Act 2002 (Commencement) Order 2002, SI 2002/2749.

³²⁷ Copyright and Related Rights Regulation 2003, s 1.

³²⁸ European Communities Act 1972.

³²⁹ Directive 2001/29/EC 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 [2001] OJ L167/10 (InfoSoc Directive).

³³⁰ Copyright and Related Rights Regulation 2003, s 21.

³³¹ CDPA 1988, s 107(2A).

³³² *ibid*, s 107(4A).

exceeding three months or a fine not exceeding the statutory maximum, or both; and (b) on conviction on indictment to an unlimited fine or imprisonment for a term not exceeding two years, or both.³³³ The regulations also introduced criminal offences concerning circumvention of protection measures.³³⁴

Digital Economy Act 2010

In 2005, Chancellor of the Exchequer Gordon Brown commissioned Andrew Gowers to independently review the UK's intellectual property regime, focusing on copyright law, 'in response to profound global changes affecting the IP system.'³³⁵ The Gowers Review of Intellectual Property was published in December 2006. One of the 54 recommendations was to amend section 107, CDPA 1988 to match the criminal penalties for online copyright infringement with that of physical infringements because (1) the intention and impact of physical and online infringement are the same; and (2) it would make the law more coherent.³³⁶ The summary of the law as it then was represented in tabular form in the Review as follows.³³⁷

³³³ Copyright and Related Rights Regulation 2003, s 26. I will return to the discussion of this offence (as amended by the Digital Economy Act 2017) in Chapter 5.

³³⁴ Copyright and Related Rights Regulation 2003, s 24.

³³⁵ Andrew Gowers, *Gowers Review of Intellectual Property* (HM Treasury 2006) 3.

³³⁶ *ibid* 8, 98.

³³⁷ *ibid* 98.

	Online infringement	Physical infringement	
Nature of offence	Communicating to the public by electronic transmission in the course of a business or to an extent prejudicially affecting the right holder	Making infringing copies for sale or hire	Distributing infringing copies in course of business or to extent that prejudicially affects rights holder, importing infringing copy into UK other than for private or domestic purposes
Summary sentence (in magistrates' courts)	Up to 3 months in prison and/or statutory maximum fine	Up to 6 months in prison and/or statutory maximum fine	Up to 6 months in prison and/or statutory maximum fine
Sentence on indictment (in Crown court)	Up to 2 years in prison and/or unlimited fine	Up to 10 years in prison and/or unlimited fine	Up to 10 years in prison and/or unlimited fine

Source: Copyright, Designs and Patent 1988 Act (CDPA) (as amended), Patent Office analysis.

Table 1: A summary of the criminal penalties for online and physical copyright infringement – Gowers Review, p 89.

The Government, however, did not (at least immediately) implement the recommendation. Instead, after asserting that ‘prison is, and will remain, the right place for the most serious offenders’ and that ‘[c]ustodial sentences, and therefore prison places, must also be available for less serious offenders when other measures have failed or are inappropriate,’³³⁸ the government then proceeded to consult on introducing exceptional summary maxima (above £5000) in the Magistrates’ Courts.³³⁹ Ultimately, following the consultation, the government decided to introduce exceptional statutory maximum fines of £50,000 for all triable either-way copyright offences by amending sections 107(4)(a) and 107(4A)(a), CDPA 1988.³⁴⁰

³³⁸ UK Intellectual Property Office, *Taking Forward the Gowers Review of Intellectual Property: Penalties for Copyright Infringement* (UK Intellectual Property Office 2008) 6.

³³⁹ *ibid* 12-14.

³⁴⁰ Digital Economy Act 2010, s 42.

Copyright, Designs and Patents Act 1988 (Amendment) Regulations 2010

In 2010, the Secretary of State issued a subordinate legislation³⁴¹ to re-implement Article 8(2) of the EU Rental and Lending Directive,³⁴² which had been amended in 2001 by the InfoSoc Directive.³⁴³ The amendment to the Rental and Lending Directive narrowed the scope of permitted limitations or exceptions to the rights given by Article 8(2) of the Directive. To bring the CDPA 1988 in line with the Rental and Lending Directive, the Copyright, Designs and Patents Act 1988 (Amendment) Regulations 2010 repealed a couple of exceptions to copyright infringement – which also meant that some previously permitted acts fell within the scope of the criminal offence in section 107(3), CDPA 1988.³⁴⁴ The European Communities Act 1972 prohibited the creation via subordinate legislation of any new criminal offences punishable upon summary conviction with imprisonment of more than three months.³⁴⁵ Consequently, the Regulation also amended section 107(5), CDPA to replace the word ‘six’ with ‘three,’³⁴⁶ to ensure compliance with the European Communities Act 1972.

The result of the amendment to section 107(5), CDPA 1988³⁴⁷ was that except for the offences of (a) making for sale or hire, (b) importing into the United Kingdom for uses other than that of a person’s private and domestic use, (c) distributing in the

³⁴¹ Copyright, Designs and Patents Act 1988 (Amendment) Regulations 2010, SI 2010/2694.

³⁴² Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) [2006] OJ L 376/28 (Rental and Lending Directive), art 8(2).

³⁴³ InfoSoc Directive.

³⁴⁴ CDPA 1988, s 107(3).

³⁴⁵ European Communities Act 1972, sch 2, para 1(1)(d).

³⁴⁶ Copyright, Designs and Patents Act 1988 (Amendment) Regulations 2010, SI 2010/2694, art 5.

³⁴⁷ CDPA 1988, s 107(5).

course of a business, or distributing for another purpose to such an extent as to prejudicially affect the copyright owner, and (d) communicating a work to the public, a person summarily convicted of an offence in section 107, CDPA 1988 could be imprisoned for a maximum of three months only.

Legal Aid, Sentencing and Punishment of Offences Act 2012 (Fines on Summary Conviction) Regulations 2015/664

From 12th March 2015, the maximum fine for summary conviction for either way copyright offences became unlimited.³⁴⁸ This amendment was in line with developments across the criminal law.

Digital Economy Act 2017

A study commissioned by the UK Intellectual Property Office titled ‘Penalty Fair? Study of criminal sanctions for copyright infringement available under the CDPA 1988’ was published in 2015.³⁴⁹ The purpose of the study was to provide an ‘evidence-based view on whether the criminal sanctions for copyright infringement available under the CDPA’ 1988 were proportionate and correct, or whether they should be amended.³⁵⁰ A key area of focus was the difference between physical copyright infringement and online copyright infringement.³⁵¹ The study’s overall conclusion was that although ‘there was no proof that higher sentences would act as a deterrent to

³⁴⁸ Legal Aid, Sentencing and Punishment of Offences Act 2012 (Fines on Summary Conviction) Regulations, SI 2015/664, sch 4, para 17.

³⁴⁹ Brassell (n 316).

³⁵⁰ Brassell (n 316) 3.

³⁵¹ *ibid.*

online copyright crime, there was evidence that increasing the maximum sanction could be important in facilitating investigation and prosecution.³⁵²

Following the publication of the study's conclusions in February 2015, the government consulted on increasing the maximum custodial sentence for online criminal copyright infringements.³⁵³ The responses raised three main concerns about the government's proposition – (1) the lack of a requirement to prove that the infringer intended to cause harm, which meant that someone could be liable for an offence even if they did not intend to cause harm; (2) the vagueness of the phrase 'affect prejudicially,' and (3) the fact that a 10-year maximum custodial sentence could be the same as or higher than other more serious offences such as rape, rioting, child cruelty and some firearm offences.³⁵⁴ The government asserted in response that the mental element required for someone to be found guilty of an offence – the person knows or has reason to believe that the conduct is an infringement of copyright – ensures sufficient mental element would need to be demonstrated for successful prosecution.³⁵⁵ They, however, accepted the concerns that low-level infringements could be caught within the scope of the proposed amendment. And the government asserted that the policy intention was that criminal offences should not apply to low-level infringement that has minimal effect or causes minimal harm to copyright owners. The government also accepted that 'affect prejudicially' was ambiguous, but defended the 10-year maximum custodial sentence by asserting that '[c]apping the maximum available sentence at a lower level

³⁵² *ibid* 5.

³⁵³ UK Intellectual Property Office, *Copyright, Designs and Patents Act 1988 (as amended): A consultation on changes to the penalties for online copyright infringements* (UK Intellectual Property Office, 2015).

³⁵⁴ UK Intellectual Property Office (n 5) 3-6.

³⁵⁵ *ibid* 3.

would unnecessarily limit the ability of the courts to apply appropriate sentences in the more serious cases of copyright infringement.³⁵⁶ Furthermore, the government noted that they would re-word the offences to ensure they were effective at deterring criminals ‘while protecting innocent or unwitting infringers.’³⁵⁷

Following the consultation, the Digital Economy Act 2017 was enacted. It amended subsections (2A) and (4A)(b) of section 107, CDPA 1988³⁵⁸ and introduced subsection (2B). The provisions now read as follows: ³⁵⁹

(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.

...

(4A) A person guilty of an offence under subsection (2A) is liable—

³⁵⁶ *ibid* 4.

³⁵⁷ *ibid* 2.

³⁵⁸ Digital Economy Act 2017, s 32.

³⁵⁹ CDPA 1988, ss 107(2A), 107(2B), 107(4A).

- (a) on summary conviction to imprisonment for a term not exceeding three months or fine, or both;
- (b) on conviction on indictment to a fine or imprisonment for a term not exceeding ten years, or both.

The *actus reus* of the offence in section 107(2A) CDPA 1988 is infringing copyright by communicating the work to the public.³⁶⁰ Section 20 of the CDPA 1988 defines ‘infringement by communication to the public’ as communications by ‘electronic transmission,’ which *includes* ‘broadcasting’ a copyright work, and making a copyright work available by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.³⁶¹ So, posting video clips of protected works on YouTube would, for example, fulfil the *actus reus* of the offence. Section 107(2A)(a) and (b), CDPA 1988 sets out the *mens rea* of the offence. It requires that a person ‘knows or has reasons to believe that he is infringing copyright in the work,’³⁶² and either that the defendant intends to make a gain for himself or another, or ‘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.’³⁶³

Given that one could fall within the scope of the offence for *exposing* the owner of a copyright work to *a risk of loss*, the reworded offence in section 107(2A), CDPA 1988, appears to catch low-level copyright infringements. Consequently, as highlighted earlier, the reworded offence does not appear, *prima facie*, to meet the government’s

³⁶⁰ *ibid.*

³⁶¹ *ibid.*, s 20.

³⁶² CDPA 1988, ss 107(2A)(a).

³⁶³ *ibid.*, s 107(2A)(b).

purported policy of not criminalising low-level infringements.³⁶⁴ This does not necessarily mean that section 107(2A) is unjustifiable. I will discuss whether the provision is justifiable in Chapter 5.³⁶⁵

2.6. CONCLUSION

This chapter aimed to describe the historical development of criminal copyright to help the reader understand the current state of criminal copyright law in the UK and how it came to be the way it is today. It also aimed to show that the criminalisation of copyright infringements is a recent phenomenon and not something we need to accept as an entrenched feature of copyright law. In this chapter, we saw that the first modern copyright statute – the Statute of Anne 1710 – contained a *qui tam* provision that was penal but not necessarily criminal. We also saw that the pre-Anne Decrees and Licensing Acts, which criminalised conduct that violated them, also contained similar *qui tam* provisions. Nevertheless, I argued that there was a fundamental difference in the underlying goals of the pre-Anne Decrees and the Licensing Acts compared to those of the Statute of Anne 1710. The Decrees and the Licensing Acts were aimed at regulating the book trade and achieving the Crown's censorship goals. In contrast, the

³⁶⁴ One might wonder why the government had amended the scope of the offence. The recommendation in the Gowers' Review was to increase the criminal penalties, not the scope of the crime. This is also what the government consultation had focused on: UK Intellectual Property Office, *Copyright, Designs and Patents Act 1988 (as amended): A consultation on changes to the penalties for online copyright infringements*. It was, however, noted in the government's response to the consultation that it planned to alter the offence to 'to ensure the offences are effective at deterring and dealing with criminals while protecting innocent or unwitting infringers.' UK Intellectual Property Office, *Criminal Sanctions for Online Copyright Infringement: Government Consultation Response* (n 5). But we shall see that it is at least arguable that this purpose was not achieved successfully.

³⁶⁵ See, pp 252-264 (below).

Statute of Anne 1710 was aimed at recognising private property rights in literary work and providing means of compensating authors for their loss.

We also saw in this chapter that the first criminal provision contained in a copyright statute was in the Fine Arts Copyright Act 1862,³⁶⁶ and that it was introduced to tackle the problem of the fraudulent affixation of names, signatures, and monograms of artists in (some) artistic works. I noted that although the provision was in a copyright statute, it was not criminalising copyright infringements *per se* and hence cannot be classified as a criminal copyright provision. I further argued that the first criminal copyright provisions and the first imprisonment provisions for copyright infringements were introduced in the early 20th century with the enactment of the Musical Copyright Act 1906. ‘True’ criminal copyright provisions, I argued, originated as a response to rampant sheet music piracy, as a solution to music publishers opting for ‘self-help’ remedies, and because of the perception that civil remedies were ineffective. Since then, the criminal copyright provisions have expanded in scope and severity, primarily driven by a perceived need to combat the spread of piracy owing to technological developments, which have enabled wide-scale copyright infringements with little to no cost to the infringers and affect the viability of civil remedies. Simply put, the introduction and expansion of ‘true’ criminal copyright provisions were historically justified *primarily* on the argument that technological developments made civil remedies unreliable and ineffective.

³⁶⁶ Fine Arts Copyright Act 1862, s 7.

3

Chapter 3: The basis for criminalising copyright infringements

A. INTRODUCTION.....	107
B. THE HARM PRINCIPLE.....	108
i. Mill's Harm Principle.....	108
ii. Refining the key ideas.....	111
Harm.....	112
'Deserving moral stigma or blame, and punishment'.....	125
C. THE HARMS OF COPYRIGHT INFRINGEMENT.....	130
i. The interest that needs to be set back.....	130
ii. The serious and wrongful harm of copyright infringement.....	153
D. THE SUPPLEMENTARY PRINCIPLES.....	163
i. The 'faulty traits' in copyright infringements.....	163
ii. British society's moral standards.....	172
E. CONCLUSIONS.....	175

3.1. INTRODUCTION

This chapter lays the foundation of the normative framework developed in this thesis by explaining the basis for criminalising copyright infringements under the Harm Principle. I start by defining the Harm Principle and its component concepts. This will be followed by an analysis of the harms of copyright infringement – to show which harms can and cannot form the basis for criminalising copyright infringements under the Harm Principle. I shall argue that the primary interests that justify the criminalisation of copyright infringements are the authors' interests in protecting their

(creative) labour and the public interest in the reliability of the social institutions, like the social institution of copyright.³⁶⁷ This will be followed by an analysis of the supplementary principles justifying criminalisation and a brief review of empirical studies into British society's views on the morality of copyright infringement. Finally, the implications of my analysis will be elucidated in concluding that there is a *prima facie* case for criminalising some copyright infringements.

3.2. THE HARM PRINCIPLE

i. Mill's Harm Principle

The Harm Principle was first explicated by the 19th-century English philosopher John Stuart Mill in his philosophical essay *On Liberty*. In his essay, Mill argued, among other things:³⁶⁸

... that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized society, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right ... The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his body and mind, the individual is sovereign.

³⁶⁷ This presumes that the modern institution of copyright is justified in principle.

³⁶⁸ John Stuart Mill, *On Liberty* (2nd edn, John W Parker and Son 1859) 169-170.

Two points are worth highlighting. First, Mill's general argument, or the Millian Harm Principle, was not limited to criminalisation. It applies to all forms of state interventions that interfere with the 'liberty of action' of any subject of the state. Second, his argument was not that *any* 'harm to others' *always* justifies the regulation of conduct by the state to prevent the harm. It was that the prevention of 'harm to others' is necessary to justify any state intervention that limits liberty of action. 'Harm to others' alone, however, is not sufficient. Some legitimate activities that advance the well-being of society, such as legitimate competition among businesses, can cause 'harm to others.' So, we need to supplement the identification of such harm to others with additional principles, which may differ depending on the extent and scope of the interferences. Mill explained:³⁶⁹

[i]n many cases, an individual, in pursuing a legitimate object, necessarily and therefore legitimately causes pain or loss to others, or intercepts a good which they had a reasonable hope of obtaining. Such oppositions of interest between individuals often arise from bad social institutions but are unavoidable while those institutions last; and some would be unavoidable under any institutions. Whoever succeeds in an over-crowded profession, or in a competitive examination; ... reaps benefit from the loss of others, from their wasted exertion and their disappointment. But it is, by common admission, better for the general interest of mankind, that persons should pursue their objects undeterred by this sort of consequences. In other words, society admits no right, either legal or moral, in the disappointed competitors, to immunity from this kind of suffering; and feels called on to interfere, only when means of success have been employed which it is contrary to the general interest to permit – namely, fraud or treachery, and force.

³⁶⁹ *ibid.*

The Millian Harm Principle, therefore, sees harm to others as a necessary but insufficient reason to restrict someone's liberty. The principle requires the presence of additional factors, like fraud, treachery, or force, in conduct before a state can legitimately regulate or interfere with the conduct. Although Mill does not say this, it is apparent that fraud, treachery, and force are also key examples of 'supplementary principles' or 'traits' that may justify state coercion *via criminalisation* instead of other methods of regulatory control or coercion.³⁷⁰ Most conduct that ought to be criminal would fall within one or more of the three. Notably, however, Mill's list of faulty traits is not exhaustive. And Mill never intended it to be so. This is evident from Mill's identification of 'molestation' as a supplementary principle justifying the 'punishment' of certain forms of speech. He wrote:³⁷¹

[a]n opinion that corn-dealers are starvers of the poor ... may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard ... The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people. But if he refrains from molesting others in what concerns them, and merely acts according to his own inclination and judgment in things which concern himself, the same reasons which show that opinion should be free, prove also that he should be allowed, without molestation, to carry his opinions into practice at his own cost.

So, according to Mill's Harm Principle, a state can regulate conduct to prevent harm to others, mainly where the relevant conduct displays faulty traits such as fraud,

³⁷⁰ Such supplementary principles or traits can help us distinguish between harmful activities that ought to be regulated by the state via criminalisation, harmful activities that ought to be regulated by the state via other means, and activities that need not be regulated even though they cause 'harm to others.' For our purpose of developing a normative argument for the criminalisation of copyright infringements, we can focus on supplementary factors that justify regulatory control via criminalisation.

³⁷¹ Mill (n 368) 100-101.

treachery, and force. The seriousness of such supplementary traits helps determine whether state intervention should take the form of criminalisation or some other form of regulation.

ii. Refining the key ideas

Mill's account of the Harm Principle provides a helpful skeleton upon which I can flesh out my arguments on the criminalisation of copyright infringements. But, before examining the harms and the relevant supplementary principle(s) or traits that may justify the criminalisation of copyright under the Harm Principle, two key aspects of the principle need further exposition. The first is the meaning of the word 'harm.' This is necessary because, despite the centrality of 'harm' in the Harm Principle, Mill did not define the term sufficiently,³⁷² and its meaning is 'vague and ambiguous.'³⁷³ Moreover, the precise definition of 'harm' affects the scope of activities caught within the Harm Principle. If the definition is too broad, it would capture a wide range of activities, increasing the chance of unduly restricting individual liberty by restricting too many activities. On the other hand, if the definition is too narrow, the protection afforded to individuals and society would be inadequate. The second aspect worth refining is how one can distinguish conduct deserving of the moral stigma or blame associated with criminalisation and punishment by the state.

³⁷² Mill mentions in the context of boundaries of conduct towards others that appropriate conduct consists 'first, in not injuring the interests of one another; or rather certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights; and secondly, in each person's bearing his share (to be fixed on some equitable principle) of the labors and sacrifices incurred for defending the society or its members from injury and molestation.' Mill (n 368) 134. See also, Alex Steel, 'The Harms and Wrongs of Stealing: The Harm Principle and Dishonesty in Theft' (2008) 31(3) UNSW Law Journal 712, 713; Feinberg (n 66) 32.

³⁷³ Feinberg (n 66) 31.

Harm

As Joel Feinberg explained in his reformulation of Mill's Harm Principle in the context of criminalisation,³⁷⁴ the word 'harm' is commonly used in three senses: (a) damage to non-human objects or things – for example, if A damages a lock, A could be said to have harmed the lock;³⁷⁵ (b) thwarting, setback, or defeat of an interest;³⁷⁶ and (c) harm as wrongs. The first stretches the term 'harm' and is better captured by terms such as 'damaged.' It is 'harm' to objects and not to people. The Harm Principle is not concerned with damage to non-human objects or things *per se*.³⁷⁷ The harm to the owner's interest in the lock would fall within (b) identified above. So, (a) can be dismissed as forming part of the definition of harm captured by the Harm Principle.³⁷⁸

The second sense of harm, and one that is captured in the definition of harm in the Harm Principle, is the 'thwarting, setback, or defeat of an interest.' Understanding what it means requires us to first understand what an 'interest' means in this context. Here, interests refer to a person's long-term means and capacities³⁷⁹ on which the person relies to sustain or improve the person's life.³⁸⁰ They are the building blocks of a person's well-being. To explicate this in Feinberg's words:³⁸¹

³⁷⁴ Feinberg recognises that the Harm Principle is applicable to other forms of state intervention which affect liberty: Feinberg (n 66) 2-4.

³⁷⁵ Feinberg (n 66) 32.

³⁷⁶ *ibid* 33.

³⁷⁷ Feinberg (n 66) 32.

³⁷⁸ *ibid*.

³⁷⁹ Feinberg (n 66) 31-35; Andrew Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Bloomsbury 2011) 36.

³⁸⁰ Simester and von Hirsch (n 379) 37.

³⁸¹ Feinberg (n 66) 34-35.

One's interests ... consist of all those things in which one has a stake ... [T]he things these interests are *in*, are distinguishable components of a person's well-being: he flourishes or languishes as they flourish or languish. ... [W]hat thwarts them is to his detriment or against his interest.

While connected, interests are different from wants or desires. One can have an interest in something and not be aware of it.³⁸² One can want or desire things that are not in one's interest.³⁸³ One can also fail to want something that is in one's interest.³⁸⁴ To borrow Feinberg's example, a patient might not want to take a bitter-tasting medicine that would help him recover from an illness. But taking the medicine is in his interest.³⁸⁵ It is also apparent that we may have interests that need not be protected by (criminal) law. Feinberg forcefully argues that only fundamental welfare interests, such as the interest in continued life, health, economic sufficiency, and political liberty, should be protected by criminal law. Given that criminalisation and criminal punishment impact personal liberty to an extent that no other branch of law does, the interests that criminal law should protect, and the scope of criminalisation should relate to fundamental interests that need protection and should be to the extent that it is necessary, reasonable, and proportionate. Basing criminalisation on welfare interests ensures that the conduct criminalised is within the scope of necessity and reasonableness.³⁸⁶

³⁸² *ibid* 38-39.

³⁸³ *ibid*.

³⁸⁴ *ibid*.

³⁸⁵ Feinberg provides a detailed analysis of the differences between an interest and a want: *ibid* 39-46.

³⁸⁶ This does not mean that it is necessary to criminalise all infringement of welfare infringements. What this means is that we can only justify criminalisation when there is an infringement of a welfare interest.

This leads us to the question of what a welfare interest is. Simply put, welfare interests are the ‘basic requirements of a person’s well-being.’³⁸⁷ Examples of welfare interests include the interest one has in personal health, the interest in not having to absorb pain and suffering, the interest in emotional stability, the interest in a bearable or tolerable social surrounding, the interest in having the capacity to engage normally in social discourse, the interest in financial security and a minimal income, and the interest in avoiding groundless anxieties and resentments.³⁸⁸ Welfare interests are necessary but grossly insufficient by themselves for a good life. They can be contrasted with more ulterior interests, such as the interest a person has in advancing a humanitarian cause, achieving political office, winning a World Cup, building a dream home, successfully raising a family, or achieving other goals or achievements one has in life.³⁸⁹ These ulterior interests are, of course, important. But they are different from welfare interests in that welfare interests are minimal and generalised interests, which form the necessary means to achieve a person’s ulterior or ultimate interests.³⁹⁰ Where one’s welfare interests are defeated, their whole network of interests, including their ulterior interests, are also defeated or at least set back. By contrast, a person’s ulterior interests can be blocked or defeated without significantly affecting their network of interests. For instance, the interest in building one’s dream home can be set back without affecting one’s interest in a minimal income. The opposite, however, is not true. If one’s interest in minimal income is set back, then the interest in achieving the dream home

³⁸⁷ Nicholas Rescher, *Welfare: The Social Issue in Philosophical Perspective* (University of Pittsburgh Press 1972) 6.

³⁸⁸ Feinberg (n 66) 37.

³⁸⁹ *ibid.*

³⁹⁰ Feinberg (n 66) 37-38.

is also set back, along with other ulterior interests. So, welfare interests are interests in the necessary *minimum* requirements that one needs to achieve a good life, without which one cannot achieve the ulterior goals or purposes. It is precisely because of their necessity for a good life that the law ought to protect welfare interests.

Welfare interests are not limited only to the interests of individuals. Some welfare interests may be of a shared character. Shared welfare interests can be of two main types – community interests and governmental interests. Community interests are the welfare interests of individuals that are so widely shared among members of society that they can be said to be an interest of the entire community, such as the interest in public peace and security, the interest in a healthy environment, and the interest in public health.³⁹¹ On the other hand, governmental interests are the interests ‘generated in the very activities of governing.’³⁹² Examples of governmental interests include the collection of various taxes, conducting trials or hearings at courts and tribunals, and immigration controls. As Feinberg also notes, these are the interests that form the basis for crimes like tax fraud and perjury. A single act of tax fraud, for example, may not set back the welfare interests of an individual or the community. But a widespread evasion of taxes would, for example, affect the welfare interest in public health, not least because various government functions vital to the maintenance and advancement of the welfare interest in public health are affected. In Feinberg’s words, setting back governmental interests ‘*threatens* direct harm [to individual or community welfare interests] insofar as it endangers the operation of government systems in whose efficient normal

³⁹¹ Feinberg (n 66) 63.

³⁹² Hyman Gross, *A Theory of Criminal Justice* (Oxford University Press 1979) 120.

functioning we all have a stake.³⁹³ Where such governmental systems are affected, there is an inevitable effect on individual or community welfare interests. Consequently, the law can justifiably intervene to protect the governmental systems. In sum, there are welfare interests in the proper and efficient functioning of governmental systems where the systems relate to, uphold, and protect individual and community welfare interests.³⁹⁴

A welfare interest must, of course, be thwarted, set back, or defeated to cause harm. Whether an interest has been thwarted, set back, or defeated can be determined by analysing whether the interest is in a worse condition than it otherwise would have been had the invasion of the interest or the conduct affecting the interest not occurred.³⁹⁵ If this 'but for' test is satisfied, then the interest is 'set back.'

Any acceptable formulation of the Harm Principle in the context of criminalisation must also capture the third sense of harm that Feinberg identified – *harm as a wrong*.³⁹⁶ Today, criminal law theorists almost unanimously support a 'wrongfulness' constraint in criminalisation,³⁹⁷ and they all generally agree that

³⁹³ Feinberg (n 66) 63-64.

³⁹⁴ In most cases, the setback to a welfare interest resulting from a setback to a governmental interest is indirect. So, the strength of the argument that a particular governmental interest must be protected by law will depend on how remote the impact on the welfare interest is, and the magnitude of the impact on the welfare interest that results from the set back to the governmental interest. If the connection between the interests is close, and the magnitude of the impact is likely high, then the argument that the specific governmental interest should be protected by law is stronger.

³⁹⁵ Feinberg (n 66) 34-35.

³⁹⁶ Feinberg (n 66) 34.

³⁹⁷ Michael S Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford University Press 1997) ch 16; Andrew Ashworth, 'Is the Criminal Law a Lost a Cause?' (2000) 116(2) *Law Quarterly Review* 225; Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* ch 4; Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2008) ch 2; Simister and von Hirsch (n 379) ch 2; Feinberg (n 66) ch 3.

‘wrongfulness’ is different from ‘unlawfulness.’³⁹⁸ Conduct could be ‘unlawful’ but not wrong where the law is not morally justifiable. Criminal law theorists, however, do not have an agreed-upon definition of what wrongfulness means.

For theorists like Moore, conduct is wrongful if it violates ‘primary norms of morality’ or ‘primary norms of moral obligation.’³⁹⁹ A norm, in this context, is an authoritative principle or guideline that guides the actions of moral agents. The norms of morality, which guide behaviour, can originate from abstract conceptions of what is good or from concrete evaluations of harm and culpability.⁴⁰⁰

Feinberg argues that *A*’s conduct is wrongful if *A* acts in violation of *B*’s rights in ‘a manner which is defective or faulty in respect to the risks it creates to *B* ... with the intention of producing the consequences for *B* that follow, or similarly adverse ones, or with negligence or recklessness in respect to those consequences’⁴⁰¹ and in a manner that is neither morally excusable nor justifiable.⁴⁰² So, central to his definition is the concept of another’s *right*. The type of right he is referring to is a *moral right*. He further explains that a moral right is ‘a claim backed by valid reasons and addressed to the conscience of the claimee or to public opinion.’⁴⁰³ *Welfare interests* generally form the core of such claims, though *ulterior interests* can also give rise to such claims. In other words, for Feinberg, a wrong is an inexcusable or unjustifiable invasion of an *interest*

³⁹⁸ *ibid.*

³⁹⁹ Moore (n 397) ch 9; Michael S Moore, ‘Prima Facie Moral Culpability’ (1996) 76(1-2) Boston University Law Review 319, 319, 330.

⁴⁰⁰ Moohr (n 38) 764.

⁴⁰¹ Feinberg (n 66) 105-107.

⁴⁰² *ibid.*

⁴⁰³ Feinberg (n 66) 106-111.

(excluding cruel, sadistic, morbid, sick, or wicked interests, if they indeed can be interests).⁴⁰⁴ The difference between a wrong and a harm, therefore, is that a wrong requires an inexcusable and unjustifiable *invasion* of an interest, whereas a harm requires a *setback* to a welfare interest. Feinberg also notes that there are special circumstances in which moral rights depend on legal ‘determinations’ that provide *the background* for subsequent criminal legislation.⁴⁰⁵ Such legal determinations are legal judgments that make findings or declarations of moral and legal rights possible and have the feature of balancing and ranking conflicting private interests.⁴⁰⁶ These background determinations are antecedent to legal (civil or criminal) prohibitions. For instance, a legal determination about the side of the road we should drive on creates both moral and legal rights regarding the side of the road people should drive on.⁴⁰⁷ Without the determination by the state, no declaration as to moral rights can be made (unless there are some exceptional circumstances involving prior use of the road).

For Simester and von Hirsch, conduct is wrongful when it is something that one should not do, all things considered.⁴⁰⁸ For them, a particular conduct is something one should not do, all things considered, when the morally relevant reasons *against* the conduct outweigh or defeat the reasons *for* the conduct. This consideration of ‘all things’

⁴⁰⁴ A justification would deny that the conduct was wrongful (e.g., where there is consent). Excuses, on the other hand, deny responsibility for a ‘wrong’ based on circumstances that interfere with one’s capacity to choose (e.g., insanity).

⁴⁰⁵ *ibid.*

⁴⁰⁶ Feinberg (n 66) 110-111.

⁴⁰⁷ *ibid.*

⁴⁰⁸ Simester and von Hirsch (n 379) 22-23.

requires an analysis of both first-order reasons (i.e. reasons for or against the conduct)⁴⁰⁹ and second-order reasons (i.e. reasons for acting for a reason, and reasons for refraining from acting for a reason).⁴¹⁰ Where this evaluation of morally relevant reasons gives a clear answer that the conduct is something one should not do, then it is wrongful. Simester and von Hirsch's definition recognises that the wrongfulness of conduct often depends on a complex interplay of moral considerations that can vary depending on the specific context and circumstances of the case. This allows for a more flexible and nuanced approach to evaluating the wrongfulness of conduct that can better balance individual rights and public interest. Their approach also recognises that moral considerations can evolve over time and that what is considered wrongful conduct may change as moral norms change. This has the advantage of being able to adapt to changing moral values and social norms. It can, thus, better reflect the values of a diverse and evolving society.

It is immediately apparent that the definitions above are generally compatible with or largely overlap with each other. Arguably, the practical differences between a fully laid out and defended argument on each of these definitions are unlikely to be *significantly* different from the others, will be symbiotic with each other, and may very well collapse into each other. At the very least, for this work, I can adopt any of the definitions above and reach the same conclusions.

Criticisms can also be levelled against each of the definitions. And further explanations can be given to account for such criticisms. For instance, one could argue

⁴⁰⁹ Joseph Raz, *Practical Reasons and Norms* (Oxford University Press 1999) 36.

⁴¹⁰ *ibid.*

that it is not clear from the 'Moorean' definition of wrongfulness what constitutes a 'primary norm of morality.' Where do these primary norms of morality come from, one might ask? And where *should* such a norm be derived from? Who determines them? The answers to these questions would differ depending on the theorist one asks. For some, religious texts or norms may form part and parcel of primary norms of morality, and may even be *the* central, authoritative guideline for the morality of action. For a secular theorist, religious norms may be entirely distinct from moral norms, with some overlaps. For a monistic theorist, the primary norms of morality can be derived from or justified in terms of one ultimate moral principle.⁴¹¹ For the pluralist, there are several incommensurable fundamental moral principles. The same criticism also can be aimed at Simester and von Hirsch's definition – *how* is one to determine what 'morally relevant reasons' should go into the 'all things considered' analysis? Consequently, both these definitions, at least without further exposition, could be too vague and subjective and fail to provide clear guidance for lawmakers or judges.

Some criticisms can also be levied against Feinberg's definition of wrongfulness. For instance, a critic could question whether there is a real difference between the concept of a 'harm' as a setback to interests, and 'harm' as a 'wrong' per the definitions. What is, after all, a 'setback' to a welfare interest if not an inexcusable or unjustifiable invasion of an interest? This requires a response from anyone who relies on the Feinbergian definitions of harm and wrong. I will return to this point shortly.

⁴¹¹ Jeffrey Brand-Ballard, 'Why One Basic Principle' (2007) 19 *Utilitas* 220, 221.

The purpose of specifying these criticisms is to point out that there is no complete definition of wrongfulness in criminalisation theory that I *must* adopt to analyse the justifiability of criminalising copyright infringements. I will, therefore, not be diving into a defence of all the theories or definitions of wrongfulness. Instead, this thesis will endorse a theory of wrongfulness based on the Feinbergian definition of wrongfulness and Simester and von Hirsch's definition of wrongfulness and defend it against the criticisms highlighted above.

The proposition of this thesis is that conduct is wrongful and something one ought not do, if there is an unjustified and inexcusable invasion of any moral interest; and that whether conduct is unjustified or inexcusable is to be determined by an 'all things considered' balancing of reasons. It is also proposed that the burden of establishing that a particular conduct is wrongful is on the person (i.e., theorist, lobbyist, or lawmaker) proposing the criminalisation of the conduct. If the evaluation of reasons, therefore, does not give a clear answer to the nature of the conduct, then the conduct should not be criminalised. Combining the two theories in this way provides us with a framework to determine the 'morally relevant' reasons that go into the 'all things considered' balancing of reasons to determine what one ought to do, or what one ought not to do – the reasons must relate to the moral *interests* of individuals.

Since I have adopted the Feinbergian definition within my definition of wrongfulness, I need to respond to the question of whether there is an actual difference between harm *as a setback to interests* and harm *as a wrong*. The response to this question is that we must distinguish between an *invasion* of an interest and a *setback* to an interest. While many invasions of welfare interests will usually set the interest back,

an invasion of a welfare interest does not *necessarily* always result in a setback to it. There are instances of an inexcusable and unjustifiable invasion of a welfare interest without leaving the interest worse off than it was before the invasion. These are what criminal law theorists call ‘harmless wrongs.’ Though they may be uncommon because most invasions of welfare interests would involve a setback to the interest, there *can* be instances of an invasion of a welfare interest without setting it back or leaving it worse off.⁴¹² Being mildly disrespectful to someone is one example – it may be wrongful because it invades, without excuse or justification, the welfare interest of individuals in emotional stability, among other interests. But it is unlikely to set back the interests of the person who was disrespected. What falls within the scope of criminalisation under the Harm Principle are those invasions of interests that also set back a welfare interest. Only if the *two* cumulative notions of harm – the notion of harm as a setback to welfare interests, and the idea of harm as an unjustifiable and inexcusable invasion of an interest – are present can we justifiably say that the conduct is a candidate for criminalisation under the Harm Principle.⁴¹³

Criminal law theorists, including Feinberg himself, have debated extensively on harmless wrongs, justifying the criminalisation of some harmless wrongs using alternative principles like the ‘offence principle.’ The offence principle and other similar

⁴¹² It is also worth noting here that conduct can be wrong independent of any harm to others. For some crimes, the harmfulness may not be definitionally characteristic of the crime on paper or practice, although harm to others will be a key element of the normative justification. The normative justification of behavioural offences, where proof of harm is not necessary for conviction, would still require the identification of a harm, even though harm or proof of it is not a necessary element for the conviction.

⁴¹³ Feinberg (n 66) 52.

alternatives are not within the scope of the arguments in this thesis since they are not based on the Harm Principle itself.⁴¹⁴ So, I will not explore this further.

Just like there can be harmless wrongs, there can be harm without a wrong. A criminalisation theory that fails to capture in its scope the wrongful setbacks to interests, or *one that fails to exclude harms that are not wrongs*,⁴¹⁵ would be unsuitable for a liberal society. There are several examples of harm (to others) without a wrong. For instance, an act of (lawful) self-defence that injures an assailant may harm the assailant by setting back a valuable welfare interest that would usually be protected. But the infliction of the harm is not wrongful because it is excused or justified.⁴¹⁶ A judge issuing a jail sentence within the ambit of the law is setting back the interest the convict has in his liberty, yet the harm is not wrongful.⁴¹⁷ Similarly, harms to which the ‘victim’ has consented will not be wrongful and should not generally be subject to criminal sanctions.⁴¹⁸

Moreover, the earlier discussion of the Millian Harm Principle gives another example⁴¹⁹ – ethical competition. Companies like Samsung and Apple thwart each other’s interests by advancing their interests through (ethical) competition. There is

⁴¹⁴ See, however, on this topic R A Duff, ‘Harms and Wrongs’ (2001) 5(1) Buffalo Criminal Law Review 13, 16: ‘a Feinbergian liberal should, and consistently could, stand firm on the claim that at least some “free-floating evils” are not the criminal law’s business, and thus generate no relevant reason for criminalization.’

⁴¹⁵ Simester and von Hirsch describes criminalizing conduct that are not wrongful as ‘moral defamation’ by the state because criminal conviction labels convicts as wrongdoers and if the conduct is not wrongful, the state is no longer telling the truth about the defendant’s conduct: Simester and von Hirsch (n 379) 20.

⁴¹⁶ Simester and von Hirsch (n 379) 39.

⁴¹⁷ *ibid.*

⁴¹⁸ Feinberg (n 66) 35-36.

⁴¹⁹ See, p 110 (above).

little question that they set back each other's interests. But such harms are not *wrongful* harms, all things considered. The reasons for advancing one's interests through legitimate means outweigh the reasons against it, not least because one could argue that the competitor has no right not to be subject to harms through ethical competition. In contrast, if Samsung (who, among other suppliers, supply the iPhone 15's displays)⁴²⁰ were to supply faulty displays for the iPhone 15 intentionally, they would be causing 'wrongful harm.' It is, all things considered, something Samsung should not do because the conduct does not *legitimately* advance their interest but thwarts the interest of the other. Fundamental moral values like honesty and fairness provide reasons that would outweigh or exclude⁴²¹ the reasons for such conduct, if any. So, it is apparent that this third sense should necessarily be captured in the definition of harm in the Harm Principle.⁴²²

To summarise the arguments thus far, the concept of harm in the 'Harm Principle' in the context of criminalisation comprises two notions of harm: (1) harm as a setback to welfare interests; and (2) harm as an unjustifiable or inexcusable invasion of an interest. Both notions need to be present in specific conduct for the conduct to be a candidate for criminalisation (and generally any state intervention) under the Harm Principle. Harmless wrongs and harms without a wrong are, therefore, excluded from the scope of the Harm Principle.

⁴²⁰ Jack Purcher, 'By Sidelineing BOE with Patent Infringement Lawsuits, Samsung is taking the Lion's Share of OLED Displays for the iPhone 15' <www.techradar.com/news/iphone-x-has-the-best-smartphone-display-ever-thanks-to-samsung> accessed 10 March 2024.

⁴²¹ Raz (n 409) 185.

⁴²² Feinberg (n 66) 35-36.

Deserving of moral stigma or criminal blame, and punishment

As highlighted earlier, before applying the Harm Principle to analyse the criminalisation of copyright infringements, we need to be able to identify conduct deserving of the moral stigma or blame associated with *criminalisation* and punishment by the state. Criminalisation is the state's moral condemnation of specific conduct. It is the state's (and implicitly society's) assertion that people engaging in criminalised conduct are culpable wrongdoers deserving of moral stigma, criminal blame, and punishment.⁴²³ It follows that conduct which should be criminalised should also deserve the moral stigma, blame, and punishment attached to and accompanying criminal convictions. Not all wrongful conduct deserves the moral stigma of criminal convictions or punishment, even if the conduct is wrongful and harms other people's welfare interests. Some wrongful harms can be dealt with through civil remedies. For example, repudiatory breaches of contracts may generally be wrongful and harmful, but it would be difficult to argue that repudiatory breaches of contracts should generally be criminalised. What helps us differentiate wrongful harms deserving of criminal punishment and the stigma associated with criminal convictions from wrongful harm for which a civil penalty or regulation would suffice are the 'supplementary principles' or 'faulty traits' (such as fraud, treachery, or force), the 'seriousness constraint,' and the 'negative constraints' against criminalisation. The negative constraints will be dealt with in Chapter 4.⁴²⁴

⁴²³ Simester and von Hirsch (n 379) 17; James Edwards and Andrew Simester, 'Crime, Blameworthiness, and Outcomes' (2019) 39(1) *Oxford Journal of Legal Studies* 50, 50-51; John Gardner, 'Wrongs and Faults' in *Appraising Strict Liability* (Oxford University Press 2005) 77; Victor Tadros, *Wrongs and Crimes* (Oxford University Press 2016) 160-162.

⁴²⁴ See, pp 178-231 (below).

I have already discussed what supplementary principles or faulty traits are in discussing Mill's Harm Principle. Nothing more needs to be added to that. But I need to elaborate on the 'seriousness constraint.' The 'seriousness constraint' requires wrongful harms to be serious or blameworthy enough to warrant criminalisation.⁴²⁵ Meeting the 'seriousness constraint' is necessary for criminalisation. We can decide whether a wrongful harm is 'sufficiently serious' by looking at the gravity, probability, and magnitude of the wrongful harm and, where necessary, comparing them to the social value of the conduct causing or creating the risk of the wrongful harm (if there is any).⁴²⁶ Where the gravity, probability, and magnitude of harm are low, then there is little reason for incurring the costs (including financial costs and the cost of the restriction of individual liberty) of criminalising the conduct. If the probability is low, but the magnitude or gravity is high, or if the magnitude is low, but the probability is high, then we must compare the harms and costs of prohibiting the conduct with the 'value' of the conduct.⁴²⁷

Ashworth, von Hirsch, and Jareborg propose another way of gauging the seriousness of harms.⁴²⁸ They propose a two-step process. The first step is to 'identify and separate out' the 'interest dimensions' involved in an offence or a proposed offence.

⁴²⁵ Andrew Simester and others, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (5th edn, Hart Publishing 2013) 647. See, also, p 115.

⁴²⁶ Feinberg (n 66) 191, 216.

⁴²⁷ *ibid*; The argument borrows from the economic theories of crime. Cooter and Ulen propose that 'Criminal law should minimize the social cost of crime, which equals the sum of the harm it causes and the costs of preventing it:' Robert Cooter and Thomas Ulen, *Law & Economics* (6th edn, Addison-Wesley 2012) 474.

⁴²⁸ Andrew von Hirsch, Andrew Ashworth and Nils Jareborg, 'Gauging Crime Seriousness: A 'Living Standard' Conception of Criminal Harm' in Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press 2005).

They suggest three broad interests or ‘generic interest dimensions’ that can be affected by a ‘criminal’ act: (a) physical integrity, (b) material support and amenity, and (c) privacy and freedom from humiliation.⁴²⁹ Ashworth, von Hirsch, and Jareborg note that the interest dimensions are not exhaustive and are not based on any ‘deep theory’ but on the authors’ impressions of the main types of interests or concerns involved in crimes with victims.⁴³⁰ Two further ‘interest dimensions’ can be added to them – governmental interests and collective welfare.⁴³¹ The second step in assessing seriousness is to apply the authors’ proposed living standard criteria successively to each dimension. This is to be considered over a temporal period long enough to assess not just the visible after-effects or actual duration of the ‘crime’ but the overall effect of the conduct on the person’s well-being.⁴³² The authors propose four living standard levels – (1) Subsistence (i.e. survival, but with the maintenance of no more than elementary human capacities to function); (2) Minimal well-being (i.e. a minimum level of comfort and dignity); (3) Adequate well-being (i.e. maintenance of an adequate level (but no more) of comfort and dignity); and (4) Standard wellbeing (i.e. maintenance of a full quality of life).⁴³³ These are in the order of seriousness and harm from the most serious – (1) subsistence – to relatively least serious – (4) adequate well-being. The authors recognise these levels are essentially a continuum and that conduct may fall between these living standard

⁴²⁹ *ibid.*

⁴³⁰ Gross (n 392) 119-122; Grant Hammond and others, *Maximum Penalties for Criminal Offences* (Law Commission of New Zealand 2013) 10-11.

⁴³¹ *ibid.*

⁴³² Von Hirsch, Ashworth and Jareborg (n 428) 201-202.

⁴³³ *ibid* 202-204.

levels.⁴³⁴ There are also conduct that marginally impact the quality of a person's life.⁴³⁵ Furthermore, some interests do not run through the entire scale of living standards. For example, interests based on privacy and freedom from humiliation cannot affect well-being to the level that it affects an individual's subsistence because, by definition, subsistence is limited to 'merely getting by'.⁴³⁶ So, if an offence or a proposed offence affects physical integrity to the level of affecting one's subsistence, it qualifies as extremely serious or gravely harmful.

Moreover, to criminalise a specific activity justifiably and effectively, we must evaluate whether society *believes* the conduct deserves such stigma or blame associated with criminal punishment, in addition to looking at supplementary principles, the seriousness constraint, and the negative constraints. For effective criminalisation, society must, *in general*, believe that the conduct is deserving of moral stigma and punishment. In other words, criminal laws must, *in general*, align with society's perception of the rightness or wrongfulness of conduct (i.e., society's moral standard). This is because a large disagreement between society's moral standards and criminal provisions calls into question the correctness of the moral assertion made by the criminal provision and could reduce the provision's and the criminal justice system's moral credibility. A reduction in the moral credibility of a criminal provision reduces its power to set authoritative standards of conduct to which people are willing to

⁴³⁴ *ibid* 203.

⁴³⁵ *ibid* 204.

⁴³⁶ *ibid* 207.

conform.⁴³⁷ In turn, this would reduce the effectiveness of the provision and may have broader effects on the credibility of the criminal law.

As Robinson and Darley also point out, a disagreement between society's moral standard and a (proposed) criminal provision is not fatal to its moral credibility or justifiability.⁴³⁸ After all, society's view on the nature of the conduct could be ill-informed. Or society may not have the experience or knowledge required to develop its moral standards of conduct.⁴³⁹ This may usually be the case with non-violent, financially motivated, harmful and wrongful conduct or 'white-collar' crimes.⁴⁴⁰ What such a disagreement points out is that we must carefully examine *why* there is a discrepancy – we must scrutinise the objective evaluation of reasons more carefully.⁴⁴¹ It may be that society is mistaken in its view or does not have the 'knowledge or experience to develop their moral intuitions.'⁴⁴² In such instances, the discrepancy simply points towards the need to educate society to eliminate the discrepancy, which can be a function of criminal law.⁴⁴³ In other words, criminal law can 'lead' and set moral standards.

⁴³⁷ Paul H Robinson and John M Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* (Westview Press 1995) 201-202.

⁴³⁸ *ibid* 2; See, also, Alison Jones and Rebecca Williams, 'The UK response to the global effort against cartels: is criminalization really the solution?' (2014) 2(1) *Journal of Antitrust Enforcement* 100, 113; Stuart Green, *Thirteen ways to steal a bicycle* (Harvard University Press 2012) 57.

⁴³⁹ Rebecca Williams, 'Criminal Law in England and Wales: Just Another Form of Regulatory Tool?' in Matthew Dyson and Benjamin Vogel (eds), *The Limits of Criminal Law* (Intersentia 2020) 224-225.

⁴⁴⁰ *ibid*.

⁴⁴¹ *ibid*.

⁴⁴² *ibid* 224-225.

⁴⁴³ *ibid*; Jones and Williams (n 438) 113; Gerard Lynch, 'The Role of Criminal Law in Policing Corporate Misconduct' (1997) 60(3) *Law and Contemporary Problems* 23, 52; *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords)* [2017] UKSC 67, [2018] AC 391 : 'On the contrary, it is an important, even crucial, function of the criminal law to determine what is criminal and what is not; its purpose is to set the standards of behaviour which are acceptable.'

Importantly, however, when using criminal provisions to set moral standards, the provisions should not deviate too far from society's moral beliefs. If they do, the provisions could lose their moral signalling ability and become 'just another regulatory tool.'⁴⁴⁴ So, ideally, criminal provisions that seek to set moral standards should be appropriately analogised to core criminal offences that society accepts as wrongful. Educational campaigns can also help build the strength of the analogy between the new provision and the core offence.⁴⁴⁵

To sum up, to justify the criminalisation of copyright infringement using the Harm Principle, we must identify sufficiently serious wrongful harms to others, which deserve moral stigma, criminal blame, and punishment. And the criminalisation must generally align with society's moral views on infringement of copyright.

3.3. THE HARMS OF COPYRIGHT INFRINGEMENT

i. The interest that needs to be set back.

When we think of the harms of copyright infringement, we usually look at the harms to interests created or protected by copyright law.⁴⁴⁶ Moohr,⁴⁴⁷ for example, identifies two key categories of harms that may justify the criminalisation of copyright infringements – (a) harm to copyright owners due to lost sales or because of lost

⁴⁴⁴ Williams (n 439).

⁴⁴⁵ Paul H Robinson, 'Criminalization Tensions: Empirical Desert, Changing Norms, and Rape Reform' in RA Duff and others (eds), *The Structures of Criminal Law* (OUP 2011) 202; Williams (n 439) 225.

⁴⁴⁶ Merges (n 33) 261; See also Dr Hudson's comments in Patrick Williams, 'Photos stolen and used by someone else on Facebook? This is what you can do about it' (ABC, 22nd January 2021) <www.abc.net.au/news/2018-04-23/what-to-do-when-someone-steals-your-photographs/9666580> accessed 23 January 2021.

⁴⁴⁷ Moohr (n 38) 731.

opportunities to authorise the use of the copyright material;⁴⁴⁸ and (b) direct harm to the national copyright policy of ‘encouraging the creation of works of original expression.’⁴⁴⁹ Similarly, Manta⁴⁵⁰ points to deprivation of the economic value of an IP owner’s goods, and the reduction in investment in the development and creation of IP goods as harms justifying the criminalisation of certain IP infringements (including copyright infringements). Dugas points to three types of harms we can attribute to copyright infringements – (1) harm to owners of copyright through lost revenue; (2) harm to owners of copyright through loss of control over their work; and (3) harm to society through the loss of an incentive to create works, which deprives the public of innovative and creative works.’⁴⁵¹ Kumarage⁴⁵² points to the (a) harms caused to the interests of the rights’ owners ‘in recouping investment and maximizing profits by exploiting the property rights;’⁴⁵³ (b) harms caused to consumers’ interests in enjoyment and possession of goods and chattels and their good condition;⁴⁵⁴ and (c) harms caused to interests of the state and society through (i) loss of investment into innovation, creation of (quality) work, and maintaining a reputation for quality work;⁴⁵⁵ (ii) subversion of ‘cardinal rules’ of the balance brought by the copyright regime between

⁴⁴⁸ *ibid* 753-754.

⁴⁴⁹ *ibid* 757.

⁴⁵⁰ Manta (n 38) 513.

⁴⁵¹ Maria Dugas, 'The Theoretical Case Against Criminalized Copyright Infringement in Canada' (LLM, Dalhousie University 2017) 65.

⁴⁵² Kumarage (n 38) 116.

⁴⁵³ *ibid* 117-118.

⁴⁵⁴ *ibid* 123.

⁴⁵⁵ *ibid* 126.

the interests of the general public and those of copyright owners;⁴⁵⁶ (iii) hindrance to the 'transaction structure the society has chosen';⁴⁵⁷ and (iv) loss of tax income.⁴⁵⁸

Depriving copyright owners of payments (royalties or licence fees) owed to them under copyright law or denying copyright owners their authorisation rights granted by copyright law are, no doubt, harms to copyright owners. They are setbacks to copyright owners' specific legal interests that are created by the legal institution of copyright. It is also true that a loss of investment into the creation of copyright works that results in a reduction of such works would harm society. Similarly, shifting the balance established by copyright law between the interests of copyright owners and those of society is a harm.

However, basing the justification for the criminalisation of copyright infringements *directly* on harms or setbacks to *legal interests directly created by the regime* of copyright without going deeper into the issue *may* be problematic, as some academics note,⁴⁵⁹ because it could result in a seemingly self-justifying argument. It appears self-justifying because it is the state that created the copyright system and thereby created the previously non-existent *specific* legal interests in copyright works that infringers can set back. The existence of harms to the *specific* legal interests created by a copyright regime is dependent on the state creating the copyright system and hence 'creating' the *specific* interests. But for the state directly creating those specific legal

⁴⁵⁶ *ibid* 126.

⁴⁵⁷ *ibid* 126.

⁴⁵⁸ *ibid* 125-126.

⁴⁵⁹ See, for e.g., Simester and von Hirsch (n 379) 41 in the context of tangible property.

interests by recognising certain expressive works as works protected by copyright, there can be no harm or setback to those interests. For instance, creators of expressive works will not generally have an interest⁴⁶⁰ in a *specific form* of control granted by copyright law over the work in the manner allowed for by the law of copyright, *but for* the copyright system creating those specific interests. For the state to say that a setback to those *specific interests per se* justifies their criminalisation *without more* appears self-justifying, at least on the face of it.

In responding to this issue, it must first be noted that because the creation of the legal regime of copyright is an intervention by a state that limits individual autonomy or liberty, its creation is justified only if it is consistent with the Harm Principle, regardless of the specific philosophical justification(s) adopted to recognise copyright as a legal institution.⁴⁶¹ The Harm Principle comes into play even at the point of recognition of the copyright regime and not merely at the stage of considering the criminalisation of copyright infringements. In other words, the establishment and maintenance of a copyright regime must prevent some wrongful harm to a fundamental welfare interest. Once we accept or assume (as we have done so far in this thesis) that the copyright regime is justified on one philosophical ground or the other, we also accept that it exists to prevent setbacks to some fundamental welfare interest. Specific philosophical justifications for granting property rights in intangible creative works

⁴⁶⁰ Some authors may have a desire to be paid in some way or a desire to control the exploitation of their works in the way copyright law currently allows even without the law of copyright. But such a desire does not necessarily become a socially valuable, fundamental welfare interest worth protecting.

⁴⁶¹ As noted in pp 108-111, the Millian Harm Principle applies to all forms of state intervention against conduct.

might lead to differently shaped copyright regimes.⁴⁶² However, the Harm Principle is the threshold for state intervention in the first place. The justificatory theories then affect the contours and content of that intervention. So, when we speak of harms to the specific rights or interests created under the copyright regime and base the argument for the criminalisation of infringement of those rights, we are implicitly and, perhaps, necessarily relying on fundamental welfare interests that justify the recognition of the copyright regime itself. We may, of course, also rely on other fundamental welfare interests to justify criminalising some forms of copyright infringement. But the key point here is that if we point at setbacks to some specific legal interests created by copyright as the basis for justifying criminal sanctions, then our argument is conceptually reliant (at least to an extent) on the interest justifying the regime itself.⁴⁶³ There is no problem with this, of course, so long as the regime is justified under the interest.

So far in this thesis, I have assumed that the legal regime of copyright is, in principle, justified. I have avoided taking a particular view on the philosophical justifications underlying it. It may very well be that different philosophical justifications

⁴⁶² A copyright system inspired by natural rights will place greater emphasis on moral rights, while one influenced by utilitarian principles will focus more on licensing, assignment, and defences that encourage the production of additional valuable works.

⁴⁶³ The reader might recall Feinberg's distinction between 'legal determinations' and 'declarations of legal and moral interests' from the discussion on wrongfulness (p 118) (above). Legal determinations form the background for the declaration of moral and legal interests. They are antecedents to declarations of moral and legal rights. It is, of course, necessary for the legal determination to be justified for any sanctions consequent to that determination to be justifiable. But, it is not necessary for the justification for a legal determination and a declaration of interests to be based on different interests – they may very well be the same. In the context of copyright infringements, legal determinations exist in the background of the legal recognition of copyright as a protectable legal interest.

underlie different aspects of today's copyright regime.⁴⁶⁴ My analysis, however, will be incomplete without an analysis of some specific welfare interests that ground criminal copyright provisions. So, I will propose two of them – one that aligns with a commonly known and accepted philosophical justification of copyright and one generic fundamental welfare interest.

The first interest I propose as providing a basis for criminal copyright provisions is the interest in protecting (authors') labour. This interest lies at the heart of the 'labour theory of copyright,' which is often relied upon in one form or the other as the philosophical justification or part of the philosophical justifications for the recognition of copyright as a legal institution. Before going further, it is worthwhile to briefly digress from the argument here and to look at what the 'labour theory' of copyright is.

The 'labour theory' of copyright originates from the writings of the 17th-century English philosopher John Locke. In his *Second Treatise of Civil Government*,⁴⁶⁵ Locke wrote:⁴⁶⁶

Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property ... for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.

⁴⁶⁴ Justin Koo, 'A Justificatory Toolbox: Constructing a Modern Approach to Justifying Copyright Law' (2020) 42(8) *European Intellectual Property Review* 469; Yoonmo Sang, 'Revisiting Copyright Theories: Democratic Culture and the Resale of Digital Goods' (2019) 29(3) *Communication Theory* 277.

⁴⁶⁵ John Locke, *Two Treatises of Civil Government* (George Routledge and Sons 1884).

⁴⁶⁶ *ibid* 204.

Per the Lockean labour theory of property, therefore, if we create an object by mixing our labour with common and freely available resources, we can have private property rights over that object because we are entitled to the fruits of our labour. We are entitled to the fruits of our labour over common and freely available resources because the person ‘owns’ the labour of a person’s body or the work of a person’s hands – it is an exercise of the person’s autonomy and a manifestation of a person’s self.⁴⁶⁷ Labour of this kind is a key step in preserving humankind,⁴⁶⁸ not least because ‘nature furnishes us only with the material, for the most part rough and unfitted to our use; it requires labour, art and thought, to suit them to our occasions.’⁴⁶⁹ The *value* such labour creates is the value in the preservation and flourishing of humankind, as opposed to the ‘economic value’ of the thing produced.⁴⁷⁰ Locke also notes some ‘provisos’ to the rights created by mixing labour with the unowned: (1) people can acquire private property by mixing labour with natural resources ‘... where there is enough, and as good [resources], left in common for others;’⁴⁷¹ (2) one must not acquire more than what one can use or

⁴⁶⁷ Merges (n 33) 44.

⁴⁶⁸ James Tully, *A Discourse on Property: John Locke and his Adversaries* (CUP 1980) 121.

⁴⁶⁹ Mark Goldie (ed), *Locke: Political Essays* (CUP 1997) 260-261.

⁴⁷⁰ As noted in Adam Mossoff, ‘Saving Locke from Marx: The Labour Theory of Value in Intellectual Property Theory’ (2012) *Social Philosophy and Policy* 29(2) 283, a lot of the critics assume that the ‘value’ Locke refers to is ‘economic value.’ This assumption is not correct. In his *Second Treatise of Government*, Locke (n 465) 209 wrote: ‘the intrinsic value of things ... depends only on their usefulness to the Life of Man.’

⁴⁷¹ Locke (n 465) 207.

enjoy;⁴⁷² and (3) in some circumstances, one may have a right to take and consume another's property.⁴⁷³

In the *Second Treatise of Civil Government*, Locke was not theorising about copyright, but about tangible property. Locke himself did not explicitly say anything about the application of his Labour Theory of Property to copyright. But his writings suggest that he would not have opposed the idea of property in intellectual creations for a limited period.⁴⁷⁴ In 1695, in an essay criticising a bill that had been presented to the Parliament to extend the stationers' monopoly over the publication of literary works in England granted by the Licensing Act of 1662, Locke wrote:⁴⁷⁵

That any person or company should have patents for the sole printing of ancient authors is very unreasonable and injurious to learning; and for those who purchase copies from authors that now live and write, it may be reasonable to limit their property to a certain number of years after the death of the author, or the first printing of the book, as, suppose fifty or seventy years. This I am sure, it is very absurd and ridiculous that anyone now living should pretend to have a propriety in, or a power to dispose of the propriety of any copy or writings

⁴⁷² *ibid* 206: 'As much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in. Whatever is beyond this is more than his share, and belongs to others.'

⁴⁷³ *ibid* 105: '... so "charity" gives every man a title to so much out of another's plenty as will keep him from extreme want, where he has no means to subsist otherwise.' For a complete discussion on how these provisos translate to the Lockean labour theory of copyright, see Lior Zemer, 'The making of a new copyright Lockean' (2006) 29(3) *Harvard Journal of Law and Public Policy* 891, 918-935.

⁴⁷⁴ Justin Hughes, 'Locke's 1694 Memorandum (and More Incomplete Copyright Historiographies)' (2010) 27 *Cardozo Arts & Entertainment Law Journal* 555, 557-558: 'neither the memorandum nor, apparently, any other published writing of Locke makes any express connection between rights (or their absence) in expressive works and Locke's property theory ... [T]he memorandum does hint that Locke would not have been opposed to the application of his labor theory of property to expressive works – with one exception. Locke was quite consciously opposed to the idea of perpetual exclusive rights in expressive works ... he objects to exclusive rights 'in any book which has been in print fifty years.'

⁴⁷⁵ Justin Hughes, 'Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson' (2006) 79(5) *Southern California Law Review* 993, 1012.

of authors who lived before printing was known or used in Europe.⁴⁷⁶

Irrespective of Locke's views on whether his Labour Theory of Property applies to copyright, the Lockean labour theory of copyright has become one of the most prominent ones in copyright jurisprudence.⁴⁷⁷ This is evidenced by the fact that, since the eighteenth century, judges have relied on Lockean arguments as conceptual justifications for copyright. For example, in *Donaldson v Beckett*,⁴⁷⁸ Blackstone J wrote:

There is still another species of property, which, being grounded on labour and invention, is more properly reducible to the head of occupancy than any other; since the right of occupancy itself is supposed by Mr Locke, and many others, to be founded on the personal labour of the occupant. And this is the right which an author may be supposed to have in his own original literary compositions: so that no other person without his leave may publish or make profit of his copies.

Similarly, in *Millar v Taylor*⁴⁷⁹ Aston J asserted '[t]hat a man may have property in his body, life, fame, labours, and the like' and that the case at hand was based upon 'the original right to the work, as being the mental labour of the author; and that the

⁴⁷⁶ *ibid*; Peter King, *The Life Of John Locke, With Extracts From His Correspondence, Journals And Commonplace Books: Volume 1* (Henry Colburn and Richard Bentley 1830) 387; Goldie (n 469) 336.

⁴⁷⁷ The Lockean labour theory is also used to justify other types of intellectual property too. See, for instance, Nicola Searle, 'The Criminalization of the Theft of Trade Secrets: An Analysis of the Economic Espionage Act' (2012) 2(2) IP Theory 33, 36-37; Merges (n 33) 31-37; Mossoff (n 470).

⁴⁷⁸ *Donaldson v Beckett* (1774) 4 Burr 2408 (HL).

⁴⁷⁹ *Millar v Taylor* (1769) 4 Burr 2303, 98 ER 20 (KB). This was a case in which the Court of King's Bench found that publishers had a perpetual common law right to publish works over which they had rights and that that right was not extinguished by the Statute of Anne. This finding was later overturned by the House of Lords in *Donaldson v Beckett*.

effect and produce of the labour is his.⁴⁸⁰ More recently, Lord Bingham, delivering the leading House of Lords judgment in *Designers Guild v Russell Williams*⁴⁸¹ noted that:⁴⁸²

[t]he law of copyright rests on a very clear principle: that anyone who by his or her own skill and labour creates an original work of whatever character shall, for a limited period, enjoy an exclusive right to copy that work. *No one else may for a season reap what the copyright owner has sown.*

In addition to the support for the theory by judges, theorists have also relied on Lockean arguments to justify copyright. Robert Merges, for instance, delves deep into the Lockean argument in Chapter 2 of *Justifying Intellectual Property* where he argues, among other things, that there is a close analogy between the ‘common’ resources of nature that Locke describes and the ‘public domain’ in intellectual property and that the Lockean labour theory of property is ‘less about the nature of the objects appropriated—whether they are tangible and rivalrous, or intangible and non-rivalrous—and more about human prospering through individual appropriation.’⁴⁸³ He further notes that it takes ‘effort to pick and choose [from the public domain], gather and collect, rework and reshape, extend and create’ and that ‘crowning the labour with property serves two ends: it honours the effort involved and calls forth more of it;’⁴⁸⁴ that ‘labo[u]r directed to a useful end justifies private appropriation’⁴⁸⁵ and that the ‘scope of the appropriation is determined by the extent of the labo[u]r.’⁴⁸⁶ Moreover, Merges notes that ‘applying

⁴⁸⁰ *ibid.*

⁴⁸¹ *Designers Guild v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416 (HL).

⁴⁸² *ibid.*

⁴⁸³ Merges (n 33) 38.

⁴⁸⁴ *ibid* 38.

⁴⁸⁵ *ibid* 47.

⁴⁸⁶ *ibid.*

labour to things’ rather than ‘mixing labour with things’ is a more accurate description of Locke’s argument.⁴⁸⁷

The gist of the Lockean labour theory of copyright is that if someone applies their intellectual labour over the ‘intellectual commons’ and creates some expressive work, the labour of the person in creating the expressive work justifies the protection of the expressive work in a manner that appreciates the creation of the work, respects the ‘author’s self,’ and respects their exercise of autonomy, provided that the ‘appropriation’ by the author of the expressive work leaves enough in the public domain. This ‘appropriation’ is justified for two reasons. First, labour is an external manifestation of the author’s self, and the exercise of labour is an exercise of autonomy; and there is a need to protect and respect the autonomy of individuals for human flourishing. Second, expressive works themselves help humans flourish through the expression of opinions, ideas, or views.

The prominence of the Lockean labour theory in copyright jurisprudence and theorisation is not surprising. There is an intuitive appeal in the ideas that one should be able to reap what one has sown and that ‘free riding’ on someone else’s labour or use of the products of someone’s labour without any return to the person or at least without the consent of the person who ‘applied’ the labour is wrong. The reason for their intuitive appeal is that they are founded upon respect for a person’s self, autonomy, and liberty. If a creator has by her labour created a particular intangible, affording her

⁴⁸⁷ *ibid* 14.

property in that work is a way to respect her property in her person, not least because one's labour is an exercise of one's liberty and autonomy. It ought to be protected.

One series of questions often posed at this point is, why should this protection be through the grant of property rights? Why not award a cash prize or some other form of award or prize for labour?⁴⁸⁸ The answer to these questions is two-fold: first, although a cash prize, award, or a similar reward shows appreciation for the effort or labour, none of those shows the appropriate respect or recognition for the fact that the labour is a manifestation of the individual's self, and that is an individual's exercise of autonomy. An individual state-backed claim (like property or something like property) over the fruits of his labour is, perhaps, the only appropriate way to appreciate the individual's labour while also recognising the nature of the labour as a manifestation of the self and as an exercise of autonomy. Second, a system based on cash prizes, rewards, or similar recognition is unlikely to be able to recognise all works that deserve it. Cash, prizes, or rewards are, by their nature, limited. Expressive works that deserve recognition will likely exceed the number of cash prizes or rewards available.

The Lockean labour theory of property has its critics. The main criticisms include the arguments that the Lockean labour theory of property is a theory of 'first labour',⁴⁸⁹ that Locke made a category mistake because 'labour' cannot metaphysically be 'mixed with objects',⁴⁹⁰ and that the 'mixing' of property does not justify private

⁴⁸⁸ Merges (n 33) 293.

⁴⁸⁹ Jeremy Waldron, *The Right to Private Property* (Oxford University Press 1991) 176.

⁴⁹⁰ Jeremy Waldron, 'Two Worries About Mixing One's Labour' (1983) 33(130) *The Philosophical Quarterly* 37.

property rights.⁴⁹¹ We can look at how or whether these objections apply to the Lockean labour theory of copyright and the counterarguments to the objections, where relevant.

Mala Chatterjee helpfully points out that the strongest of these objections against the Lockean labour theory of property (i.e. the ‘first labour objection’) does not apply to the Lockean labour theory of copyright.⁴⁹² The ‘first labour objection’ can be summarised as follows: The key idea of the Lockean labour theory of property is that the ‘labour’ entitles one to its fruits. So, suppose Labourer A comes to a pile of wood and applies labour to the pile to make a table. Suppose also that Labourer B would have come across the same pile of wood and made a chair but for their removal or use by Labourer A. Is the timing morally relevant or significant enough under the Lockean labour theory of property, such that timing is what wholly determines who is entitled to property rights? Morally, Labourer A and Labourer B are identical. The difference is simply timing or luck.⁴⁹³ Does being first in time make one more ‘morally worthy’ to have property entitlements than the other? There is a second element to this objection. If labour is the true basis of property rights, why can Labourer D not gain property rights by labouring on Labourer C’s property and exercising even greater labour than Labourer C did? In such a case, why is Labourer C entitled to absorb the increase in value because of the labour put in by Labourer D? They cannot both own it. And if labour justifies private property rights over the ‘fruits,’ then they should both, in theory, be entitled to it. The objection is strong.

⁴⁹¹ Robert Nozick, *Anarchy, State, and Utopia* (Blackwell Publishers 1999) 174-176.

⁴⁹² Chatterjee (n 34) 163-165.

⁴⁹³ *ibid* 147-149.

But I do not need to deal with this objection in the context of copyright because the objection does not apply to intellectual creations or expressive works. That is because of the non-rivalrous and transformative nature of intellectual creations. The key difference between intellectual creations and physical property is that the creation of physical property or its transformation *necessarily* ‘consumes, extinguishes, and replaces,’⁴⁹⁴ whereas in the case of intellectual creations, there is no consumption, extinguishing or replacement of the raw materials used for its creation. If a labourer takes a pile of wood and makes a table, the pile of wood is no longer available for someone else. If a labourer takes a table and ‘transforms’ it into a stand, the table is no longer there. But if an author applies his labour to ‘raw materials’ in the ‘intellectual commons’ and creates an expressive work, the ‘raw materials’ remain available for others. Moreover, copyright can (and does) recognise independent creation. If two authors work on the same ‘raw materials’ and make identical works, they can both be entitled to the fruits of their labour to the extent of their labour. Similarly, it is possible for copyright to recognise copyright in transformative uses of existing copyright works, such as the creation of parodies, commentaries, or critiques, without affecting the rights of the author of the existing work. This eliminates the ‘first labour’ objection.

The second and third objections can be dealt with relatively easily. Waldron’s argument that Locke made a category mistake’ because ‘labour’ cannot metaphysically be ‘mixed with objects’ and that only objects can be mixed with objects⁴⁹⁵ rests on a misreading of what Locke was trying to say. The essence of his theory and argument is

⁴⁹⁴ *ibid* 162.

⁴⁹⁵ Waldron (n 490) 40-41.

that labour is being applied to 'objects.' It is not a 'literal' mixing, but a metaphorical mixing. It is more accurate, as Merges also points out,⁴⁹⁶ to say that labour is applied 'to' things. So, this objection does not hamper the Lockean labour theory of copyright.

Nozick's objection is that the 'mixing' property *per se* does not justify private property rights.⁴⁹⁷ He famously asked:

[W]hy isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't? If I own a can of tomato juice and spill it in the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?⁴⁹⁸

This objection takes away from Locke's true assertions and the nature of 'labour.' Locke's argument was not that adding a small amount of something I own (like tomato juice) to a massive amount of matter that I do not own gives me property rights over the massive amount of matter. That was not his point nor the essence of Locke's argument. When Locke said, 'the labour of his body, and the work of his hands, we may say, are properly his,' he was not talking about 'labour' as just 'a thing' like a can of tomato juice I own. Labour cannot be equated with any object or chattel that a person owns. As highlighted throughout my summary of the Lockean labour theory of copyright, 'labour' is unique because it is an exercise of one's autonomy. It is 'an external manifestation' of a person's self.⁴⁹⁹ This element of 'labour' differentiates it from a can of tomato juice, and allows the grounding of private property claims when applied to or

⁴⁹⁶ Merges (n 33) 14.

⁴⁹⁷ Nozick (n 491).

⁴⁹⁸ *ibid* 174-175.

⁴⁹⁹ Merges (n 33) 44.

‘mixed with’ unowned resources. Nozick’s objection disregards this unique status of labour. So, it is not an objection that debilitates the Lockean labour theory of copyright.

Accepting the Lockean labour theory as a foundational philosophical justification for copyright does not necessarily entail accepting that all creative labour should *necessarily* be protected. There should be boundaries to what one can claim, considering *other* pragmatic or theoretical considerations. As mentioned, Locke made it clear that under the Lockean theory of property, one can make a property claim ‘...where there is enough, and as good [resources], left in common for others,’⁵⁰⁰ and that there are circumstances in which taking another’s property may be permissible. Other rules can ensure that the claim of copyright is within acceptable bounds. For example, the idea-expression dichotomy accepted in copyright ensures that the boundaries of copyright are within acceptable limits. Similarly, the ‘originality’ requirement in copyright limits copyright protection to the correct *type* of labour.⁵⁰¹ Someone with fidelity to the Lockean labour theory of copyright can accept such limits without any objections. So, while (creative) labour provides a starting point for what one can claim private property rights over, *prima facie*, it is not necessary for a copyright regime based

⁵⁰⁰ Locke (n 465) 105.

⁵⁰¹ *THJ Systems Limited & Anor v Daniel Sheridan & Anor* [2023] EWCA Civ 1354, [2024] ECDR 4 [15]-[16]: ‘In Case C-5/08 Infopaq International A/S v Danske Dagblades Forening [2009] ECR I-6569 the Court of Justice held at [37] that “copyright ... is liable to apply only in relation to a subject-matter which is original in the sense that it is its author’s own intellectual creation” ... The Court of Justice has elaborated upon the requirement that the work be its author’s own intellectual creation in a number of subsequent judgments. What is required is that the author was able to express their creative abilities in the production of the work by making free and creative choices so as to stamp the work created with their personal touch This criterion is not satisfied where the content of the work is dictated by technical considerations, rules or other constraints which leave no room for creative freedom.’

on the Lockean labour theory to recognise that claim if other considerations or factors defeat or exclude that claim.⁵⁰²

Having explicated what the Lockean labour theory of copyright is, we can now return to the argument that we digressed from. As my reader is likely to recall, before delving into an explanation of the Lockean labour theory of copyright, I had proposed that the interest in protecting authors' labour provides a basis for justifying criminal copyright provisions. An author's labour in producing an expressive work is an external manifestation of the author's self. And the author's labour is an exercise of the author's autonomy. They should, in general, have at least some entitlements to the fruits of their labour and some element of protection if someone else chooses or wants to benefit from their labour. As Stephen Buckle notes, 'labour is the improving, value-adding activity required by the duty to preserve oneself and others.'⁵⁰³ Preserving and enhancing oneself and autonomy *are* 'basic requirements of a person's wellbeing.' Preservation and enhancement of oneself require the protection of both tangible and intangible property that one creates.⁵⁰⁴ Consequently, there is a fundamental welfare interest in protecting authorial labour (and any form of (non-evil) labour). And this fundamental welfare interest is 'pre-copyright' and 'pre-legal.' It does not need recognition of the law to exist.

⁵⁰² See, in the context of the precise boundary, Merges (n 33) 45.

⁵⁰³ Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Clarendon 1993) 151; Mossoff (n 470) 297-298.

⁵⁰⁴ Zemer (n 473) 945; Locke (n 465) 213: 'From all which is evident, that though the things of Nature are given in common, man (by being master of himself, and proprietor of his own person, and the actions or labour of it) had still in himself the great foundation of property; and that, which made up the great part of what he applied to the support or comfort of his being, when invention and arts had improved the conveniencies of life, was perfectly his own, and did not belong in common to others.'

This focus on protecting authors' labour from exploitation finds an intriguing analogue in the evolution of the criminal law of theft – dishonest appropriation of property belonging to another with the intention to permanently deprive the other of it.⁵⁰⁵ The House of Lords' decisions in *R v Gomez*⁵⁰⁶ and *R v Hinks*⁵⁰⁷ reflect a judicial shift away from defining theft strictly in terms of proprietary entitlements. In *Gomez*, the House of Lords held that an appropriation could occur even with the owner's consent where the consent is obtained through a false representation. *Hinks* took this logic further. There, the House of Lords held that a person could be guilty of theft even where an indefeasible title to property had been transferred to them as a *prima facie* valid gift under civil law. One can, therefore, be convicted of theft regardless of whether the transaction is voidable on the grounds of mistake or fraud under civil law. Alan Bogg and John Stanton-Ife have argued that these decisions of the House of Lords are better understood as signalling a broader normative turn in the criminal law of theft.⁵⁰⁸ According to their account, theft is no longer to be seen as a crime that is merely about property rights – it is also about wrongful gain achieved through exploitation, particularly in contexts where there is an imbalance of power or a vulnerability that has been manipulated.

This reconceptualisation of theft resonates with the normative underpinnings of copyright under the Lockean labour theory of copyright. After all, the Lockean account

⁵⁰⁵ Theft Act 1968, s 1(1).

⁵⁰⁶ *R v Gomez* [1993] AC 442 (HL).

⁵⁰⁷ *R v Hinks* [2000] UKHL 53.

⁵⁰⁸ Alan L Bogg and John Stanton-Ife, 'Protecting the vulnerable: legality, harm and theft' (2003) 23(3) *Legal Studies* 402.

of copyright is concerned with the moral and personal significance of the labour invested in their expressive work. When someone exploits that labour without authorisation, the wrong may be understood not only as the infringement of a statutory entitlement, but as the unjust extraction of value from another's efforts or labour, at least in some circumstances. This is conceptually akin to the kind of wrong addressed in *Hinks* – not just appropriation of property but taking advantage or exploitation.

The second welfare interest I propose as a basis capable of justifying the criminalisation of copyright infringements is the interest in the dependability or reliability of social institutions⁵⁰⁹ – specifically, the dependability of the social institution of copyright. To understand this argument, it may be helpful to distinguish a legal framework from the social institution that it supports or creates. Some statutes create legal frameworks that support and develop existing social institutions. Others create legal frameworks that society *may* accept and, over time, lead to the creation of new social institutions. In the case of copyright, whether the legal framework supports an existing social institution or creates a new social institution is likely to be jurisdiction-specific. As far as the UK is concerned, the social institution(s) supported by copyright existed before the recognition of copyright in the Statute of Anne 1710, albeit in different forms,⁵¹⁰ as evinced by the private rules of the Stationers' Guild, printing privileges, and arguably 'common law copyright.'⁵¹¹ The Statute of Anne 1710 recognised

⁵⁰⁹ i.e. patterns of beliefs, rules, behaviours, and relationships that organise social life.

⁵¹⁰ The group directly protected by most social institutions in place before the Statute of Anne 1710 were the booksellers or printers and not authors themselves, perhaps with the exception of 'common law copyright.' But the point here is that social institutions concerning the printing and publication of literary works existed even before the Statute of Anne 1710.

⁵¹¹ See, footnote 683 (below) on 'common law copyright,' however.

and supported existing social institutions about the use or exploitation of literary works while also reformulating key aspects of it, such as who held the rights, the scope of the rights, and the remedies which were accepted by the UK society. Subsequent legislation also amended the legal framework. Many of these amendments were accepted by the UK society. Some were not,⁵¹² leading to further amendments to the legal framework. Today, the legal framework of copyright lies at the foundation of several billion-dollar industries, such as the music industry, the film industry, the video game industry, and the publishing industry, that are valuable both for the UK economy,⁵¹³ the public (both directly in having the possibility to use or exploit countless types and amounts of copyright work for educational, entertainment, cultural, or other purposes, or in indirect ways such as through employment opportunities),⁵¹⁴ and authors of copyright work. The *basic* rules of copyright have been accepted into people's lives and have become fundamental to the livelihoods of many. People have organised their lives around the rules. Patterns of behaviour and business have been adopted. If the entire

⁵¹² For instance, we saw in Chapter 2 that music publishers helped themselves to 'self-help' remedies as the legal framework was not in a state acceptable to them. See, pp 80-84 (above).

⁵¹³ The government estimates that the creative industries (including but not limited to IT, software, computer services, publishing, film, TV, radio, and photography) contributed £124.6bn in Gross Value Added to the UK Economy in 2022: Department for Culture, Media & Sport and Department for Science, Innovation & Technology, 'DCMS Sectors Economic Estimates Gross Value Added 2022 (provisional)' (GOV.uk, 15 February 2024) <www.gov.uk/government/statistics/dcms-and-digital-sector-gva-2022-provisional/dcms-sectors-economic-estimates-gross-value-added-2022-provisional> accessed 25 February 2024.

⁵¹⁴ According to a study published by the UK Intellectual Property Office in 2022, between 2017 and 2019, 10.3% (3.1 million) of the total UK employment in the UK is attributable to industries that fall under the World Intellectual Property Organisation's classification of copyright intensive industries, with core copyright industries (i.e. industries wholly engaged in the creation, production and manufacturing, performance, broadcast, communication and exhibition, or distribution and sales of works or other protected subject matter) accounted for 6.4% (1.9 million): UK Intellectual Property Office, 'Use of Intellectual Property rights across UK industries 2017 to 2019' (UK Intellectual Property Office, 2022) <www.gov.uk/government/publications/use-of-intellectual-property-rights-across-uk-industries/use-of-intellectual-property-rights-across-uk-industries-2017-to-2019> accessed 20 May 2024.

regime of copyright were to suddenly disappear today, it would not just affect the lives of the authors or owners of copyright works, but it would also impact the lives of millions⁵¹⁵ whose lives depend on copyright-based industries. There is, therefore, at least now (even if it did not exist at the stage of recognition of copyright as a legal institution), a public welfare interest in ensuring that the social institution that copyright law supports is dependable. Over the past three centuries, legitimate expectations have formed among authors, artists, and others in the copyright-based industries that they can depend on the institution. Consequently, harm to the dependability of the institution justifies interventions by the state, whether in the form of civil, administrative, or criminal sanctions.⁵¹⁶

This second interest has an element of dependency on the law of copyright. The general interest in having dependable social institutions becomes a specific interest in having *a dependable social institution of copyright, after* the society adopts the legal framework and establishes patterns of behaviour envisaged by the legislation protecting copyright works. While the key event that creates the specific interest is the society's *acceptance* of the specific mechanisms created by law and adoption of patterns of behaviour, the acceptance may not have happened (at least in some jurisdictions) but for the state's creation of the legal framework of copyright. And where the social institution or elements in the institution of copyright did not exist before the enactment of the legal framework of copyright, acceptance of the institution may often (though not necessarily) be triggered by copyright law. The justifiability of criminal copyright

⁵¹⁵ *ibid.*

⁵¹⁶ I shall in Chapter 4 consider if civil and administrative remedies suffice to effectively protect the interests identified.

provisions under the welfare interest of having dependable social institutions can still be dependent on the state's determination or recognition of copyright if we rely on the *specific interest* in having a dependable social institution of copyright. The question is, is this dependence fatal to my arguments? The simple answer is that it would only be fatal to my arguments if, and only if, the recognition of copyright as a legal institution is not justified.

The summary of my argument here is that criminal copyright provisions can be justified on two key grounds: (1) the interest in protecting authorial labour, and (2) the interest in having a dependable social institution of copyright. These interests are, of course, not exhaustive. There may be additional grounds or interests that provide justifications for criminal copyright provisions under the Harm Principle. These interests may also be reinterpreted and applied differently, depending on what one believes is the strongest justification for the 'legal determination' that copyright ought to be recognised as a legal right.

A Kantian, for instance, could argue that an expressive work is the 'speech' of the author,⁵¹⁷ that the medium (for example, a book) is the mute instrument for delivering the speech,⁵¹⁸ that copyright facilitates such authorial speech, and aids an

⁵¹⁷ Immanuel Kant, 'On the wrongfulness of the unauthorized publication of books' in Mary J Gregor (ed), *Practical Philosophy: The Cambridge Edition of the works of Immanuel Kant* (CUP 1996) 30-35.

⁵¹⁸ *ibid* 30; When Kant first expressed the idea in his 1785 essay 'On the wrongfulness of unauthorised publication of books' he appears to have distinguished literary works from artistic works suggesting that the former is speech and latter is simply a 'work'; *ibid* 34: '[W]orks of art, as things, can be copied... Anyone who possesses [a work of art] can, if he knows how, copy it and put it up for sale, without the [artist] being able to complain... For [art] is a work (*opus*, not *opera alterius*), which anyone who possesses it can alienate without even having to mention the name of the [artist]; hence he can also copy it and make use of the copies for public trade in his own name... But another's writing is the *speech* of the person (*opera*), and one who publishes it can speak to the public only in the name of [the author].'

However, the distinction that he appears to have drawn is not well-founded. Much like words are the speech of the author, art is the 'speech' of the artist. (And music is the 'speech' of the musician, and so

author in representing herself to the world in the manner she wants to be represented,⁵¹⁹ and that publishing or communicating the ‘speech’ or expression without the author’s authority is, therefore, akin to forcing the author to speak against her will.⁵²⁰ There can be little doubt that the public has a fundamental welfare interest in protecting autonomy, including that of authors. This includes an interest in members of the society not being forced to speak in circumstances they do not wish to. If we accept that by producing an expressive work, the author is ‘speaking’ to its target audience, there is a welfare interest in protecting the author from being forced to speak.

I will, however, limit my arguments to the two interests I identified above. This is because the object of this thesis is to provide *an* argument on the justifiability of criminal copyright provisions under the Harm Principle – not to provide an exhaustive collection of *all* arguments on the justifiability of criminal copyright provisions; and because the interests that I have identified are the interests that I believe are the strongest ones that align, at least to a general extent, with the practical reality of copyright as it is today. Additionally, given that my goal here is finding interests that can justify the *criminalisation* of copyright infringements under the Harm Principle, I need to ensure

on). Kant himself recognised as much in Immanuel Kant, *Critique of Judgment* (JH Bernard tr, MacMillan & Co 1892) 209, which was originally published in 1790. Writing about ‘pictorial arts,’ which included ‘plastic arts’ and ‘painting,’ he stated: ‘Both express ideas by figures in space... [T]he spirit of the artist supplies these figures a bodily expression to his thought and its mode, and makes the thing itself as if it were speak in mimic language.’ Moreover, Kant’s distinction was made at a time when producing exact or near-exact copies of books or other literary works was easier than that of artistic works. The artistic expression in copies would have been altered somehow, added to, or revised at the time. So, it would be morally ‘wrong to pass it off [the replica] in the name of the [original] author.’ In the case of books, however, the author’s expression (*opera*) could easily be severed from the work (*opus*) and required no artistic know-how to reproduce, only time. The idea that artistic work cannot be copied without artistic know-how is no longer true today.

⁵¹⁹ Kant (n 517) 30.

⁵²⁰ *ibid* 31.

that my arguments generally align with how copyright functions (taking account of its general structure, such as the existence of limitations and exceptions) and not end up with an argument that redefines the regime of copyright *entirely*, or one that applies to an entirely hypothetical copyright regime. For instance, at the risk of sounding dismissive of a potential argument that has not been explored in full, it is likely to be extremely difficult to account for why there are and can be and should be acceptable 'limitations' or 'fair dealing exceptions to copyright infringement,' such as private use or educational uses, under the Kantian argument highlighted above. One could ask, for instance, how 'forced speech' is justifiable even for private study.⁵²¹ And much would need to be said on this.

Having identified welfare interests that need to be set back to justify the criminalisation of copyright infringements, I will look at the serious and wrongful harms of copyright infringement below.

ii. The serious and wrongful harm of copyright infringement

Suppose an individual makes an unauthorised communication of a copyright work to the public for commercial purposes by posting a picture (protected by copyright) on a monetised blog without the author's permission. In that case, his conduct is 'wrongful' under both interests identified above. If we accept that the key interest justifying the criminalisation of copyright infringement is the interest in the reliability of social institutions, then the conduct is wrongful because bypassing the

⁵²¹ We have seen above that the Lockean labour theory allows for 'transformative use' and similar exceptions or limitations to ensure the availability of sufficient resources for the public. The public's interests are an important part of the Lockean labour theory – the Lockean proviso calls to ensure that there is enough left in the commons. We can analogise from the proviso to justify the existence of further limitations or exceptions to copyright protection.

socially accepted mechanism for using, adopting, or communicating copyright works to the public is a direct attack on the social institution of copyright – something, all things considered, one should not do. It is also an unjustified and inexcusable invasion of the interest in the stability or reliability of the social institution, not least because such an attack shows disregard for the patterns that people have accepted and built their lives around, and consequently, to the public's interests in the institution.⁵²² An individual's wrongful attack on the copyright system by infringing copyright *might* not, of course, *set back* the dependability of the social institution of copyright.⁵²³ In other words, a single wrongful infringement of copyright may not harm the interest. But the *accumulation* of such individual infringements could.⁵²⁴ That is, where many individuals (collectively or separately) engage in copyright infringement, the cumulative effects of the individual attacks can harm or restrict copyright owners' (and others') abilities to plan their lives, relying on their expectations from the social institution of copyright.⁵²⁵

As Feinberg notes, whether such wrongs *are* widespread to the extent that they cause harm to the interest is primarily an empirical matter that legislators should

⁵²² Copyright infringement is wrongful under most moral theories too. For instance, under utilitarianism, copyright infringement is wrongful because the short-term gains for the wrongdoer (and others) are likely less than the society's long-term losses consequent, for example, from the loss of incentives to create copyright work: Julia Driver, 'The History of Utilitarianism' (*The Stanford Encyclopedia of Philosophy*, 22 September 2014) <<https://plato.stanford.edu/entries/utilitarianism-history>> accessed 01 January 2021.

⁵²³ Simester and von Hirsch (n 379) 42; This is true even for other property offences like theft.

⁵²⁴ *ibid*; There is no way to determine the exact quantity of harm needed for criminalisation: Kyle Lucas, 'Does the Harm Principle Justify Criminal Drug Statutes Against Drug Use' (2014) 7(1) *The Hilltop Review* 33, 39. It is a matter of drawing a line somewhere along the continuum of wrongfulness and the nature and seriousness of the harm: Dennis J Baker, *The Right Not to be Criminalized: Demarcating Criminal Law's Authority* (Ashgate Publishing 2011) 75. That is not a precise science and can be done using comparative cases.

⁵²⁵ *cf* Moohr (n 38) 757.

carefully examine.⁵²⁶ There is evidence that suggests the rate of copyright infringement (even with the criminal copyright provisions in place) in the UK is high. Data from the UK IPO's 12th wave of the Online Copyright Infringement Tracker (February 2023) shows that in the context of online copyright infringements in the UK, the overall infringement level among consumers of digital content was at 32%, with infringement levels for digital magazines (41%), software (38%), and live sports (36%) being above the overall average.⁵²⁷ If we compare that to the infringement levels of the previous years, the overall level of infringement across the years remained the same (25%) from the 6th wave (March – May 2016) to the 9th wave (March 2019).⁵²⁸ The research methodology changed with the 9th wave of the study,⁵²⁹ so we need to exercise caution when comparing the data across the years. In the 10th wave (March 2020), the overall level of infringement (excluding digital visual images) dropped to 23%⁵³⁰ but increased back to 25% in the 11th wave (December 2021).⁵³¹ So, the average level of online infringement of digital works since May 2016 (at least) appears to have remained high.

⁵²⁶ Feinberg (n 66) 245.

⁵²⁷ UK Intellectual Property Office, 'Executive summary Online copyright infringement tracker survey (12th Wave)' (UK Intellectual Property Office, 03 February 2023) <www.gov.uk/government/publications/online-copyright-infringement-tracker-survey-12th-wave/executive-summary-online-copyright-infringement-tracker-survey-12th-wave> accessed 01 February 2024. Much of the research took place 'when the restrictions around the Covid-19 pandemic had been loosened, but the financial impact of political events and the cost-of-living crisis were starting to be felt.'

⁵²⁸ UK Intellectual Property Office, *Online Copyright Infringement Tracker: Latest wave of research (March 2019)* (UK Intellectual Property Office 2019) 16.

⁵²⁹ *ibid* 26.

⁵³⁰ UK Intellectual Property Office, *Online Copyright Infringement Tracker: Latest wave of research (March 2020)* (UK Intellectual Property Office 2020) 3.

⁵³¹ UK Intellectual Property Office, *Online Copyright Infringement Tracker: Wave 11* (UK Intellectual Property Office 2021) 3.

Similarly, MUSO's Piracy by Industry Data Review for 2023⁵³³ shows that copyright piracy is growing globally, with 229.4 billion visits to piracy websites in 2023, a 6.7% increase compared to 2022.⁵³⁴ The UK ranked 3rd in the world in terms of the number of visits to piracy websites that provide unlicensed TV content (3,949,859,540 visits),⁵³⁵ 11th in terms of the visits to websites providing unlicensed film content (554,753,754 visits),⁵³⁶ and 13th in terms of the visits to websites with unlicensed literary content (1,237,474,520 visits).⁵³⁷

Studies by the EU Intellectual Property Office ('EU IPO') into the trends in music, film, and TV piracy found, among other things, that the average UK internet user unlawfully accessed copyright content 9.13 times per month between January 2017 and September 2018.⁵³⁸ Although the overall access to pirated content in the EU, including the UK, had halved between 2017 and 2020, with access to unlicensed musical works dropping by 81%, films by 68%, and TV content by 41%, this decreasing trend reversed across the EU at the end of 2020.⁵³⁹ The EUIPO's latest study into the trends published in 2023, which uses the UK's piracy access data in the descriptive part of the report, shows that the UK's 'average' access per user per month in the year 2022 was

⁵³³ Andy Chatterley, *Piracy by Industry Data Review: The annual report on digital piracy by industry sector for year ending 2023* (MUSO 2024).

⁵³⁴ *ibid* 3.

⁵³⁵ *ibid* 4.

⁵³⁶ *ibid* 7.

⁵³⁷ Andy Chatterley, *Year in Publishing and Manga Piracy* (MUSO 2024) 6.

⁵³⁸ European Union Intellectual Property Office, *Online copyright infringement in the European Union: Music, films and TV (2017-2018), trends and drivers* (EUIPO 2019) 53.

⁵³⁹ European Union Intellectual Property Office, *Online Copyright Infringement in the European Union: Films, Music, Publications, Software and TV (2017-2022)* (EUIPO 2023) 74.

equal to the 'average' across the EU (at just above 10 per average user per month), and the overall trends were similar to the countries of the EU.⁵⁴⁰ Since the end of 2020, piracy of publications (literary works), TV content, and films has been increasing,⁵⁴¹ while music and software piracy has been flat or slightly increasing.⁵⁴²

Furthermore, technological developments have made the creation and distribution of copyright works much cheaper, faster, and easier. The internet – social media platforms, in particular – is modelled on 'sharing.' The entire infrastructure of the digital world promotes the idea of copying, distributing, and building on other people's works for comment, humour, and similar reasons.⁵⁴³ Moreover, people have the capability and means to infringe copyright by communicating copyright works to the public through the internet.⁵⁴⁴ And people show a tendency to do so because the internet gives them the impression that they are anonymous and because of the deeply rooted, but erroneous, belief that we have the freedom to receive and impart all information and ideas.⁵⁴⁵ In Moohr's words, '[w]hen individuals use information products, a powerful and competing social norm is implicated – that information, knowledge, and ideas are free for all to use and enjoy.'⁵⁴⁶ Consequently, there is *at least* a high likelihood

⁵⁴⁰ *ibid* 36, 37, 41.

⁵⁴¹ *ibid* 74.

⁵⁴² *ibid* 74.

⁵⁴³ Alexander Peukert, 'Why do 'good people' disregard copyright on the Internet?' in Christophe Geiger (ed), *Criminal Enforcement of Intellectual Property* (Edward Elgar 2012) 162; Paul Sugden, 'The power of one! The failure of criminal copyright laws (piracy) to blend into the greater cultural consciousness!' (2014) 36(6) *European Intellectual Property Review* 363.

⁵⁴⁴ Peukert (n 543) 162; John Tehranian, *Infringement Nation: Copyright 2.0 and You* (Oxford University Press 2011) 145-146.

⁵⁴⁵ Peukert (n 543) 162, 166.

⁵⁴⁶ Moohr (n 38) 771.

of widespread infringement.⁵⁴⁷ And the high probability of widespread infringement *at least* risks causing harm to the copyright institution.⁵⁴⁸ Such a risk of harm resulting from the wrong is sufficient to fulfil the requirements of the Harm Principle,⁵⁴⁹ at least at this stage because, as Duff has argued, ‘a law that condemned and punished actually harm-causing conduct as wrong, but was utterly silent on attempts to cause such harms, and on reckless risk-taking with respect to such harms, would speak with a strange moral voice.’⁵⁵⁰

If one accepts that the interest justifying the criminalisation of copyright infringements is the interest in protecting authors’ labour, the wrongful harm of the copyright infringement is more apparent because the wrongfulness and harm here are closely interrelated. Such copyright infringement shows disrespect to the author’s labour and consequently to the author’s self, as well as the author’s autonomy. Since the author’s labour is a manifestation of the author’s self and autonomy, which supports both the flourishing of the author and society, disrespecting the author’s labour and free riding on it is something one should not do, all things considered. Moreover, all wrongful invasions of the interest in protecting authors’ labour, autonomy, and selves are setbacks to the interest. One cannot invade the interest without setting it back

⁵⁴⁷ The Court of Appeal recognised this in *R v Ian Dukett* [1998] 2 Cr App R (S) 59 (CA) 60, in the context of physical copyright piracy.

⁵⁴⁸ cf Williams (n 446): ‘Dr Hudson said just because there was widespread infringement, it did not mean there was widespread harm;’...‘When one thinks about all the photographs that are available online, I imagine a plausible argument that only a small percentage are the subject of any harmful infringement. But I also suspect that where harm occurs, it can be significant.’

⁵⁴⁹ There are several crimes that we accept as justified that are designed to safeguard against the creation or increase of risks harm to fundamental welfare interests. The prime examples are inchoate offences such as attempted murder and encouraging or assisting theft.

⁵⁵⁰ R A Duff, *Criminal Attempts* (Clarendon Press 1996) 134.

because of the nature of the interest and its direct link to individual autonomy and the self.

The key to determining whether a conduct is *wrongful* in this context may ultimately depend on whether the conduct amounts to an infringement per the law. This is because whether a particular act of disregard for the social institution of copyright or disregard for the author's labour is *excusable* or *justifiable* (therefore, not wrongful in the Feinbergian sense) depends on a balance between the interests in protecting the work and the interests in having access to expressive and cultural works. This is where fair dealing exceptions or copyright limitations set by the Parliament play a key role. Determining where the balance lies is not easy, and there may be legitimate disagreements between reasonable people on the approach to use,⁵⁵¹ and the scope of the exceptions and limitations.⁵⁵² With changes in social norms or practices, further amendments to the limitations and exceptions will be necessary to ensure the balance is struck appropriately. That is the nature of such legal determinations that aim to balance interests. Even with any flaws, by determining exceptions or limitations, Parliament is making 'legal determinations' on where the balance of interests between

⁵⁵¹ The US has a broad fair-use defence to copyright infringement. The UK, on the other hand, has a limited number of 'fair dealing' exceptions. Note that although the 'fair use' defence may seem flexible in theory, empirical evidence suggests that courts apply the four statutory factors – (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work – in a mechanical manner: Barton Beebe, 'An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005' (2008) 156(3) University of Pennsylvania Law Review 549, 561-564, 622; Barton Beebe, 'An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978-2019' (2020) 10(1) NYU Journal of Intellectual Property and Entertainment Law 1, 4.

⁵⁵² For a discussion of an alternative model that does not require an overhaul of the UK's current copyright regime, see Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (CUP 2005) 276-310.

the author and the public lies. If the Parliament has determined a particular exception or limitation, then the Parliament is saying that the conduct is, in that circumstance, excusable or justifiable and so, not wrongful.

As far as the seriousness is concerned, there is arguably *some* social value in copyright infringements. It sometimes fills a gap between what consumers demand from the market – affordability and accessibility – and what the market offers.⁵⁵³ For instance, instead of spending 30 minutes every day travelling to and from the Bodleian Library to research for this thesis, I could have downloaded the books I wanted from a digital shadow library. That would have saved cost and time. Moreover, I may even be able to access books unavailable at the Bodleian. Copyright infringements may have some value in giving access to the inaccessible. However, there is a greater social value in the stability of social institutions and the protection of authors' labour. If the stability and reliability of such institutions were lost, it would affect the well-being of a significant part of society, not least because people would lose the ability to plan their lives around them. There is also the risk that society will lose at least some valuable work. That may be because of the loss of incentives to create since their investments have lower returns – authors do not get the fruits of their labour.⁵⁵⁴

Moreover, other ways exist to fill the void between consumer demand and market supply. Infringers could, for example, focus their efforts on creating a platform

⁵⁵³ Annemarie Bridy, 'Why Pirates (Still) Won't Behave: Regulating P2P in the Decade After Napster' (2009) 40(3) Rutgers Law Journal 565, 610-611; Gilbert B Rodman and Cheyanne Vanderdonckt, 'MUSIC FOR NOTHING OR, I WANT MY MP3: The regulation and recirculation of affect' (2006) 20(2-3) Cultural Studies 245.

⁵⁵⁴ Green (n 438) 251; We can use the same sort of argument for theft as well – theft has 'social value' because it *can* help provide the poor with the means of surviving.

that allows authors and owners of copyright works to publish their works in different formats through subscription-based models,⁵⁵⁵ ad-based models, or something similar and incentivise copyright owners to use the platform.⁵⁵⁶ Not only will that fill the void between consumer demand and the market supply, but it would do so without causing harm to the interests identified. The point is that copyright infringement is not the *only* way to achieve the ‘values’ it seems to hold. We will not lose those values entirely simply because we prohibit or criminalise some forms of copyright infringement. Nor does copyright infringement necessarily promote such values: even with *free* streaming of some TV shows, pirates still upload them on their streaming websites or distribute them through other unlawful means. So, the probability of people infringing copyright and the magnitude of harm to the interests in the copyright system are likely to outweigh any such social value. Thus, the harm of copyright infringements is *sufficiently serious*, at least generally speaking.

If we apply the living standard analysis by Ashworth, von Hirsch, and Jareborg, the applicable general interest dimensions would primarily be ‘material support and amenity’ and ‘collective welfare,’ based on the fundamental welfare interests I have identified (i.e., the interest in protecting authorial labour, and the interest in the dependability of the social institution of copyright, respectively). Material support and amenities include all types of ‘material’ interests. ‘Material’ need not necessarily be

⁵⁵⁵ Bill Rosenblatt, 'Subscription Services for E-Books: Like Netflix, Like Spotify, or Not at All?' (*Forbes*, 24 April 2015) <www.forbes.com/sites/billrosenblatt/2015/04/24/subscription-services-for-e-books-like-netflix-like-spotify-or-not-at-all/#539aa33e7123> accessed 03 January 2024.

⁵⁵⁶ Mark Jefstovic, 'An Open Letter to Bittorrent and File Sharing Sites' (*EasyDNS*, 11 February 2015) <<https://easydns.com/blog/2015/02/11/an-open-letter-to-bittorrent-and-file-sharing-sites/>> accessed 20 June 2024.

tangible materials. Protecting the fruits of one's labour, whether physical or creative, tangible or intangible, forms a necessary part of material support and amenity, especially for authors whose income or livelihoods depend on those 'fruits.' There is little question that the interest in the dependability of the social institution of copyright maps onto 'collective welfare,' based on my previous discussions of the interest.

The next step is to apply the living standard criteria to these interests. Subjectively speaking, some authors of copyright work (like freelance photographers, for example) will rely on the income generated from copyright works created by their labour for survival. They are likely to suffer the most serious harm from the denial of their income due to copyright infringements. Their 'subsistence' is likely to be affected by copyright infringements, especially if their works are infringed on a mass scale, irrespective of whether the infringement is committed by an individual or the mass-scale infringement is due to several unrelated individuals or groups infringing it over a period of time.⁵⁵⁷ Even in the case of those authors who do not necessarily rely on exploiting their copyright works for mere subsistence or survival, infringements will likely deny them the 'minimal' level of well-being or, at the very least, an adequate level of well-being. For some, it may affect them less and simply deny them a standard level of well-being. So, authors are likely to suffer harms ranging from the most serious (i.e. grave harm) to lower harms, depending on their personal or subjective circumstances.

⁵⁵⁷ It is difficult, at least, at this stage to *categorically* exclude individual infringements of copyright from the scope of criminalisation, given the possibility of harm to both interests identified resulting from the accumulation or aggregation of such separate individual infringements. I will deal with this issue when I consider the negative constraints against criminalisation, in Chapter 4.

The living standard analysis requires us to view this from the point of a hypothetical standard author⁵⁵⁸ who has some resources to subsist and not based on the subjective situations of authors. Such an author will likely suffer harm at the 'minimal well-being' level, at least. This is a substantial level of harm. The collective interests of standard people (including authors and non-authors) who rely on the social institution of copyright to plan their lives are likely to be a setback in a manner that affects them to a level somewhere between minimal well-being and adequate well-being, which again, is a substantial level of harm. So, the harm to the interests of authors and non-authors alike due to copyright infringements is (at least generally) sufficiently serious. I will return to the blameworthiness of specific types of copyright infringements in Chapter 4.⁵⁵⁹

3.4. THE SUPPLEMENTARY PRINCIPLES

i. The 'faulty traits' in copyright infringements

What the argument so far has established is that there may be a general case for the criminalisation of copyright infringements to protect the fundamental welfare interests in having dependable social institutions and protecting authors' labour. The second key task is the identification of supplementary principles or faulty traits, such as fraud, treachery, or force, present in at least some copyright infringements that can make those infringements deserving of criminal punishment.⁵⁶⁰

⁵⁵⁸ Von Hirsch, Ashworth, and Jareborg (n 428) 201.

⁵⁵⁹ See, pp 216-226 (below).

⁵⁶⁰ Conduct without such faulty elements is not suitable for criminalisation: Grant Lamond, 'What is a Crime?' (2007) 27(4) Oxford Journal of Legal Studies 609, 623, 629-630.

At the outset, I can exclude a type of copyright infringement in which a supplementary principle that identifies conduct deserving of criminal blame is never present – innocent copyright infringements. Copyright protection is automatic, does not require registration, and is protected for the life of the author and 70 years post-mortem.⁵⁶¹ Consequently, it is sometimes difficult to determine whether a work is protected by copyright. This is especially the case online.

Copyright can, therefore, be infringed in instances where the infringer did not know and did not have any reason to believe that copyright subsisted in the work.⁵⁶² The CDPA 1988 recognises this in section 97(1).⁵⁶³ The provision explicates that if a defendant shows that the defendant did not know and had no reason to believe that copyright subsisted in the work at the time of the infringement, the owner is not entitled to the remedy of damages.⁵⁶⁴ The owner could, however, sue for an account of profits and obtain an injunction against further infringement.⁵⁶⁵ The recognition in the CDPA 1988 that infringing copyright innocently is less serious compared to other instances of infringements has a solid basis. In such cases, the infringer is unaware and has no reason to be aware that their actions are unlawful. It would be difficult, if not impossible, to present a proper case for criminal punishment and to attach the moral stigma or blame

⁵⁶¹ Berne Convention for the Protection of Literary and Artistic Works (adopted 09 September 1886), art 5(2).

⁵⁶² *David Hoffman v Drug Abuse Resistance Education (UK) Ltd* [2012] EWPCC 2 (Patents County Court) (Birss J).

⁵⁶³ CDPA 1988, s 97(1): 'Where in an action for infringement of copyright it is shown that at the time of the infringement the defendant did not know, and had no reason to believe, that copyright subsisted in the work to which the action relates, the plaintiff is not entitled to damages against him, but without prejudice to any other remedy.'

⁵⁶⁴ *ibid.*

⁵⁶⁵ *ibid.*

associated with criminalisation to such infringements, not least because innocent infringements do not display *mens rea* elements or faulty traits akin to fraud, treachery, or force.

Once we exclude innocent infringements, the remaining forms of infringement can be broadly classified into two major categories of infringements – (1) copyright infringements with the intent to make a financial or commercial gain (I will refer to these as ‘commercial gain infringements’);⁵⁶⁶ and (2) non-commercial copyright infringements.

An infringer who intentionally or recklessly infringes copyright with the intent – whether direct or indirect – of making a financial gain from the infringement without any form of a licence from or compensation to the creator (or owner) of the work shows morally blameworthy traits. Such a person shows ‘deliberate dishonesty’⁵⁶⁷ because he is ‘not contributing a penny to [copyright owners’ or authors’] investment’ and ‘merely exploiting it for [his] own ... gain.’⁵⁶⁸ He is also unethically and dishonestly competing with copyright owners in the commercial or financial exploitation of the work. Intentional or reckless copyright infringements with the intent to make a financial gain display dishonesty and fraud, which are faulty traits that typically justify criminalisation. These faulty traits act both as second-order negative reasons that

⁵⁶⁶ Note that Category (1) excludes pure ‘personal use’ infringements. It is not because intentional ‘personal use’ infringers do not make a ‘gain’ in some senses (as highlighted below). The ‘commercial gain’ referred to here is of a different degree and goes beyond the ‘gain’ made purely by failing to pay licence fees *for personal use*.

⁵⁶⁷ *R v Anton Benjamin Vickerman* (Newcastle upon Tyne Crown Court, 14 August 2012) (Indictment No T20097188) (HHJ John Evans).

⁵⁶⁸ *ibid.*

exclude any reasons in support of such infringements, making the conduct objectively wrongful, and act as supplementary principles for intentional infringements with the additional intent to make a financial gain.

The second category of infringements – non-commercial infringements can be further divided into three subcategories: (a) copyright infringements with the intent to cause harm or loss; (b) non-commercial infringements that primarily involve supplying a copyright work ('supplying infringements'), and (c) infringements that primarily involve consuming a copyright work (or *personal use* copyright infringements). I will consider each of these in turn.

Those who infringe copyright with the intent to cause loss or harm often act on the belief that some or all copyright material should be freely available.⁵⁶⁹ They often reject the idea of copyright entirely or partially. Some oppose the social institution created by society's acceptance of the legal framework of copyright, purporting that 'piracy = freedom.'⁵⁷⁰ Their conduct is targeted at disrupting copyright. While it is relatively harder to point to an element of fraud, such conduct is nevertheless worthy of the blame or stigma associated with criminal punishment because it is a malicious betrayal of and a direct attack on society's acceptance of the legal framework of copyright and, thus, of society's adherence to the social institution of copyright. It is 'treacherous' to society to directly attack accepted patterns of behaviour, business, and conduct (especially those backed by legislation) that members of society have built their

⁵⁶⁹ Brassell (n 316).

⁵⁷⁰ *ibid*; David Newhoff, 'TorrentFreak Still Selling Piracy as Ideology' (*The Illusion of More*, 12 January 2018) <<https://illusionofmore.com/torrentfreak-still-selling-piracy-as-ideology/>> accessed 28 June 2024.

lives around. Moreover, a forceful violation of an individual's autonomy by free-riding on authorial labour is blameworthy. The mere fact that the infringer believes all (copyright) material should be freely available does not provide sufficient justification for attacking the social institution, violating the autonomy of authors, or free-riding on their work.

In the case of the most clear-cut cases of infringement that fall into the second subcategory – non-commercial infringements that involve supplying a copyright work – the faulty traits are easy to discern. The most clear-cut cases are those who upload copyright works for public access without a licence but without an intent to make a gain or cause a loss. Despite the lack of an intent to make a commercial gain or to cause a loss, the conduct of such infringers *generally* shows recklessness as to whether the authors may suffer harm. Their disregard for the authors' labour in creating copyright works and their disregard for the established social patterns (backed by legislation) for the supply or distribution of such works is blameworthy, albeit to a lesser extent than those with intent to make a gain or cause harm or loss. The facts of the United States District Court for the District of Massachusetts' *United States v LaMacchia*⁵⁷¹ make the blameworthiness plain. There, a 21-year-old MIT student named David LaMacchia had created and operated a bulletin board system that he called 'Cynosure,' using pseudonyms and an encrypted address.⁵⁷² He encouraged users of the bulletin board to upload popular software (such as Excel 5.0 and WordPerfect 6.0) and computer games

⁵⁷¹ 871 F Supp 535 (D Mass 1994) (United States)

⁵⁷² *ibid.*

(such as *Sim City 2000*).⁵⁷³ He then transferred the uploaded software to a second encrypted address (*Cynosure II*) where users (with the *Cynosure* password) could download the software for free. If the licence fees had been paid to the rights holders, they would have amounted to over USD\$1 million.⁵⁷⁴ But these were unlicensed distributions. Although *LaMacchia* tried to avoid detection, the heavy worldwide traffic to his addresses drew the attention of both the university and the federal authorities.⁵⁷⁵ He was charged with conspiring with unknown people to violate the US wire fraud statute. Though the case was ultimately dismissed because it was brought under the US wire fraud statute and because the criminal copyright provisions of the US copyright statute did not criminalise infringements that did not have a commercial purpose, the judge noted the following:

[i]f the indictment is to be believed, one might at best describe his actions as heedlessly irresponsible, and at worst as nihilistic, self-indulgent, and lacking in any fundamental sense of values. Criminal as well as civil penalties should probably attach to willful, multiple infringements of copyrighted software even absent a commercial motive on the part of the infringer.

So, despite the lack of a commercial motive, wanton infringements of copyright work, especially wilful, mass-scale infringements of works (especially those created for commercial distribution), are still malicious. Such infringers also compete with the authors, but in a different sense compared to commercial-gain infringements, by ‘supplying’ the copyright work to others for free.

⁵⁷³ *ibid.*

⁵⁷⁴ *ibid.*

⁵⁷⁵ *ibid.*

However, there are some infringements that fall into this subcategory where a faulty trait cannot be found. The paradigm cases of such infringements fall near the border of the protection afforded to copyright owners or near the border of the statutory exceptions or limitations. Some rights of copyright owners have become so broad in scope that it is often unclear if an act is infringing or not. One need only look at the expanded scope of the ‘communication to the public right’ in the UK (primarily stemming from a series of decisions⁵⁷⁶ by the European Court of Justice (ECJ)). For example, if a university provides hyperlinks to a student’s project containing an unlicensed copyright work, they may technically infringe copyright. But it is difficult to point to a faulty trait in such infringements, except perhaps some degree of carelessness. But even with the utmost care, there may be instances where a university infringes copyright in a similar circumstance.

Likewise, it is challenging to identify a faulty trait in scenarios where the infringers genuinely attempt to comply with the requirements of a statutory exception or a licence but fail to do so because of some misunderstandings or oversight, thus infringing the rights of the author. Such non-commercial, ‘borderline’ infringements lack the faulty traits, such as fraud, malice, or force, that would typically attract criminal blameworthiness.

When we look at the third subcategory – *personal use* infringements – in one sense, a person who infringes copyright for personal use would inevitably ‘make a gain’ because he does not pay the licence fee for the use. There is also a denial of remuneration

⁵⁷⁶ *Svensson* (n 4); Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV and Others* EU:C:2016:221; Case C-610/15 *Stichting Brein v Ziggo and XS4All Internet* (‘Pirate Bay’) EU:C:2017:456

and disrespect to the author's labour. But there is an inherent difference between merely consuming a copyright work without a licence and exploiting a copyright work without a licence with the object and intent to make commercial gains.⁵⁷⁷ The gain or intended gain in this subcategory of cases is of a different 'type' or degree. Unlike someone infringing a copyright work to make commercial gains, for example, an end-user who downloads a musical work without a licence is not *directly competing* with the owner's right to exploit the work by sharing or distributing it. Consequently, the moral content of an intentional personal use infringement is typically of a lesser degree than an intentional infringement with an additional intent to make a gain or cause a loss.⁵⁷⁸

This does not mean, however, that personal use infringements are not blameworthy. An intentional infringement of copyright for personal use where the infringer knowingly avoids paying for access to copyright material demonstrates an intent to benefit at the expense of the copyright holder.⁵⁷⁹ This intent reflects a disregard for the value and rights associated with creative work, the authorial labour, and society's established patterns that others depend on, potentially qualifying as dishonesty. The faulty traits present in such infringements are similar to those present in criminal fare

⁵⁷⁷ Haber (n 11) 223.

⁵⁷⁸ Moohr (n 38) 780.

⁵⁷⁹ It is, however, crucial to recognise that not all personal use infringements equate to a lost sale for the copyright owner. In many cases, individuals who consume copyright work without paying might not have made a purchase even if they had not been able to access it for free. This suggests that the direct economic impact of personal use infringements can vary widely and does not always result in a financial loss equivalent to the value of the unlicensed use.

evasion⁵⁸⁰ or fraud of services.⁵⁸¹ The intent to circumvent payment may not always stem from a desire to harm the copyright holder but rather from a perception that the cost is unjustifiable, for example. Students or individuals with limited financial resources may download academic papers or books without a licence to do so, believing that the knowledge should be accessible without financial barriers. Others may justify their actions by perceiving the pricing of digital media as unfair or excessive. But such ‘justifications’ do not change the nature of the intent to circumvent the payment obligation. They are not ‘entitled’ to the expressive or creative labour of authors. And there is a growing public domain of expressive and creative labour.⁵⁸²

Like the second subcategory, ‘borderline’ cases can also exist in this subcategory. This would primarily be where the infringer genuinely (but incorrectly) believes their conduct falls within the scope of a statutory limitation or attempts to comply with the requirements of a statutory exception or a licence but fails to do so. As a result, there is an observable lack of a ‘faulty trait’ that is *necessarily* present in all personal use infringements, making them less uniformly culpable compared to those with the intent to make a gain or infringements with the intent to cause harm.

⁵⁸⁰ Regulation of Railways Act 1889, s 5(3): ‘If any person— (a) Travels or attempts to travel on a railway without having previously paid his fare, and with intent to avoid payment thereof; or (b) Having paid his fare for a certain distance, knowingly and wilfully proceeds by train beyond that distance without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof; or (c) Having failed to pay his fare, gives in reply to a request by an officer of a railway company a false name or address, he shall be liable on summary conviction to a fine not exceeding level 3 on the standard scale, or, in the case of a second or subsequent offence, either to a fine not exceeding level 3 on the standard scale, or in the discretion of the court to imprisonment for a term not exceeding three months.’

⁵⁸¹ Fraud Act 2006, s 11.

⁵⁸² I will consider the ‘need for entertainment’ under the ‘fairness and proportionality’ constraint in Chapter 4. See, pp 216-226 (below).

In sum, there are no faulty traits in innocent infringements. So, they are excluded from the scope of criminalisation. On the other hand, there are observable faulty traits in infringements for commercial purposes and infringements with the intent to cause a loss or harm. The presence of the faulty traits means that such infringements are blameworthy enough – there is a *prima facie* case for their criminalisation. While the degree of blameworthiness may be slightly lesser, the same is still true for non-commercial infringements that primarily involve supplying a copyright work, and infringements that primarily involve consuming a copyright work. The key exceptions in the case of the latter two types of infringements are ‘borderline’ cases of infringement.

ii. British society’s moral standards

As explained earlier in this chapter,⁵⁸³ to justifiably criminalise conduct, we must also evaluate whether society believes the conduct deserves the moral stigma and blame associated with criminal punishment. However, empirical evidence on British society’s views on the wrongfulness of copyright infringement in the UK is limited. Extrapolating from studies from other jurisdictions is unhelpful because societies’ legal cultures, beliefs, and community standards differ, even if they are in the same or similar states of socio-economic development.

One of the few analyses that directly looked at British society’s views towards copyright infringements was by the UK Intellectual Property Office (‘UK IPO’) in the 2018 edition (8th wave) of its tracking study into the extent of online copyright

⁵⁸³ See, p 129 (above).

infringements, digital behaviours, and attitudes towards copyright infringements.⁵⁸⁴ In the 8th wave study, 5034 internet users aged 12 and above were asked, *inter alia*, whether they agreed that ‘it is wrong to access content online without the creator or artist’s permission.’⁵⁸⁵ 56% agreed that it is wrong. The numbers for those who neither agreed nor disagreed and those who disagreed were not explicated in the report.⁵⁸⁶ The latest available dataset containing that information dates to the 6th wave of the study – 2016. There, it was found that 52% of those surveyed (4670) agreed that it is wrong to access content without the creator’s permission, while 28% neither agreed nor disagreed. Only 10% disagreed with the statement.⁵⁸⁷ The remaining 10% answered that they did not know.⁵⁸⁸ Since the proportion of those who agreed with the statement increased (slightly) between the 2016 and 2018 studies, it is unlikely that the proportion of those who disagree with the statement has increased. A paywalled study conducted by MUSO in 2018, which surveyed 1000 UK adults, supports the findings of the UK IPO’s tracking

⁵⁸⁴ Kantar Media, *Online Copyright Infringement Tracker: Latest Wave of Research (March 2018)* (Intellectual Property Office, 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/729184/oci-tracker.pdf> accessed 07 May 2021. The study changed its methodology starting from the 9th wave in 2019.

⁵⁸⁵ *ibid* 45.

⁵⁸⁶ The question does not appear to have been asked in the subsequent waves of surveys: AudienceNet, *Online Copyright Infringement Tracker: Latest Wave of Research (March 2019)* (Intellectual Property Office, 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/867708/oci-tracker-2020.pdf> accessed 07 May 2021; AudienceNet, *Online copyright infringement tracker survey (10th Wave) executive summary* (Intellectual Property Office, 2020) <www.gov.uk/government/publications/online-copyright-infringement-tracker-survey-10th-wave/online-copyright-infringement-tracker-survey-10th-wave-executive-summary> accessed 07 May 2021.

⁵⁸⁷ Kantar Media, *Online copyright infringement tracker W6 datasets (March - May 2016)* (Intellectual Property Office, 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/546203/oci-tracker-wave6.xls> accessed 07 May 2021.

⁵⁸⁸ *ibid*.

study.⁵⁸⁹ The survey found that 53% of users of piracy services agreed that accessing copyright works through such services was wrong.⁵⁹⁰ If 53% of users of *piracy services* agree that it is wrong to do so, it is likely that a more significant percentage of the UK population, in general, would believe that intentional or reckless copyright infringements are wrongful.

The available studies suggest that a majority believe copyright infringements are wrongful. The studies, however, have notable limitations. The sample sizes are small. They relate primarily to online copyright infringements. And the surveys do not distinguish between different types of infringements. An empirical study that looks at British society's views on the various categories of infringements would likely show that society exhibits greater belief in the wrongfulness of larger-scale infringements of copyright compared to personal use infringements. But this is hypothetical and needs further empirical evidence. Similarly, more evidence is required before we can conclusively say that there is no conflict between society's moral standards and the criminalisation of the key categories of infringements identified. Further, as I

⁵⁸⁹ Todd Spangler, '53% of People Who Access Pirated Content Agree It's Wrong to Do So (Survey)' (*Variety*, 6 June 2018) <<https://variety.com/2018/digital/news/piracy-survey-illegal-content-muso-1202829757/>> accessed 07 May 2021.

⁵⁹⁰ Stuart Green's empirical work in Green, *Thirteen ways to steal a bicycle* (n 438) suggests a similar trend among first-year law students (in Fall of 2008) at Rutgers-University-Newark, United States. They were asked whether illegally taking a fifty dollar physical book or illegally downloading a fifty dollar computer file was more blameworthy. 56% found taking the physical book more blameworthy, 3% said downloading the computer file was more blameworthy, and 41% said there was no difference. Moreover, on a scale of 1-9, the average blameworthiness score for taking a physical book was 7.65, while the score for the illegal download was 6.30; suggesting that while a majority believe that illegal downloading is not as blameworthy as stealing a physical book, a significant percentage believe that it is still blameworthy and wrong.

highlighted earlier,⁵⁹¹ a discrepancy between the society's moral beliefs is not necessarily fatal to a legal provision's justifiability. Criminal law can lead and set moral standards.

3.5. CONCLUSIONS

This chapter introduced the Harm Principle and used the basic structure of the principle that Mill used to lay the foundations of the normative arguments advanced in this thesis. Feinberg's reformulation of the Harm Principle in the context of criminalisation formed a key part of my definition of the Harm Principle and its constituent concepts. I proposed that the harms justifying the criminalisation of copyright infringements are the setbacks to the interest in protecting authors' labour and the interest in the stability or dependability of the social institution of copyright.

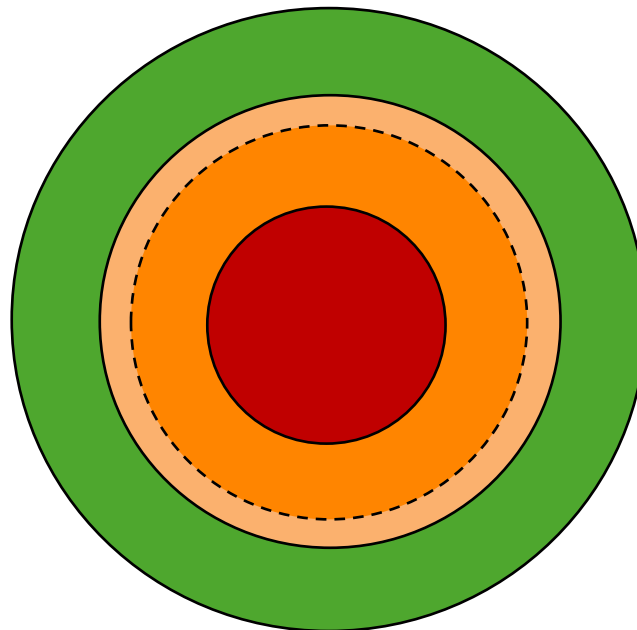
Copyright infringements are *wrongful* because they involve attacks on social institutions upon which people organise their lives and transactions, denial of someone the fruits of their labour, and disregard for their labour, their self, and their autonomy – things that involve invasions of moral rights that are generally inexcusable or unjustifiable; and things one should not generally do, all things considered. And they cause *serious* harms because the 'social value' of copyright infringement does not outweigh the magnitude and probability of the harm to the *welfare interests* identified above, and because the social values 'promoted' by copyright infringement can be achieved through legitimate means. I also applied Ashworth, von Hirsch, and Jareborg's living standard analysis to copyright infringements and concluded that the harms of wrongful copyright infringements are serious.

⁵⁹¹ See, pp 129-130 (above).

As for the supplementary principles or faulty traits in copyright infringements, I started by excluding ‘innocent infringements’ because they do not contain a *mens rea* element or a ‘faulty trait’ required for their criminalisation. This was followed by an analysis of intentional infringements with a commercial purpose and non-commercial infringements. I argued that intentional infringements with the intent to make a commercial gain show fraud and dishonesty, which are faulty traits that make the conduct deserving of moral blame. Similarly, intentional infringements with an intent to cause a loss or harm are, I argued, malicious and ‘treacherous’ to society’s acceptance of the social institution of copyright around which people have built their lives and show ‘gross disregard’ for the authors’ labour, self, and autonomy. I also concluded that, except for ‘borderline’ cases of infringement, non-commercial infringements that primarily involve supplying a copyright work, and infringements that primarily involve consuming a copyright work, also display faulty traits sufficient to ground a *prima facie* argument for their criminalisation.

This was followed by an analysis of empirical studies on the UK society’s moral beliefs about the wrongfulness of copyright infringements. While noting the lack of robust empirical studies, the available ones suggest that the majority believe copyright infringements to be wrongful. They do not, however, distinguish between competitive or large-scale copyright infringements and other types of copyright infringements. I concluded that further evidence is needed before we can conclusively say there is no conflict between society’s moral standards and the criminalisation of copyright infringements.

What we have at this point, therefore, is a *prima facie* case for the criminalisation of copyright infringements that display the intent to make a commercial gain or an intent to cause a loss, and for non-commercial copyright infringements, with the exception of ‘borderline’ infringement cases. A rough visual depiction of my argument is as follows. Innocent copyright infringements displayed in the green ring and the borderline, non-commercial copyright infringement cases in the peach ring are excluded from the scope of potential criminalisation at this stage, and the infringements within the orange and maroon rings have sufficient faulty traits and thus are candidates for criminalisation, at least at this stage.



Note: The sizes do not reflect the number of infringements

	Infringements with a commercial purpose or an intention to cause loss
	Non-commercial infringements (supplier and consumer)
	Non-commercial infringements (supplier and consumer) that are on the borderline of infringement
	Innocent Copyright Infringements

Diagram 1: The core and rings of copyright infringement

4

Chapter 4: Negative Constraints against the Criminalisation of Copyright Infringements

4.1. IS CRIMINALISATION PREFERABLE?	179
THE ALTERNATIVES TO CRIMINALISATION	180
Education	180
Administrative Remedies.....	183
Private Law Remedies.....	196
4.2. IS THE CRIMINALISATION UNFAIR OR DISPROPORTIONATE?	216
4.3. IS THE CRIMINALISATION PRACTICAL?	226
4.4. UNINTENDED CONSEQUENCES AND OTHER CONSIDERATIONS	228
Overdeterrence or chilling effects of criminalisation	228
Other crimes?.....	229
Inchoate Offences	230
4.5. CONCLUSIONS	231

In Chapter 3, I excluded from the scope of justifiable criminalisation (a) innocent infringements, and (b) non-commercial infringements that fall on the borderlines of infringement. I also established that there is a *prima facie* case for criminalising copyright infringements where the infringer has the intent to make a commercial gain, non-commercial copyright infringements where the infringer has the intent to cause a loss, and other non-commercial infringements that are not ‘borderline’ cases of infringement. In this chapter, I will examine whether there are reasons *not* to criminalise such copyright infringements despite the *prima facie* case for their criminalisation. I will do so by analysing whether their (a) criminalisation is

preferable over other methods of control or regulation for the prevention of the wrongful harms I have identified, (b) criminalisation is unfair or disproportionate, and (c) criminalisation is practical.⁵⁹² I will also consider whether there can be unintended consequences of criminalising the copyright infringements for which we have a *prima facie* case, along with other related considerations. The analysis in this chapter will be limited to the categories of infringements for which we have a *prima facie* case.

At this stage, we must remind ourselves why these ‘negative constraints’ against criminalisation need to be examined.⁵⁹³ Because criminalisation is the strongest and strictest method of regulation available to the state, and because criminalisation encroaches on personal liberty, we need to ensure that criminalisation is minimal and only utilised when necessary. Moreover, there is a need to ensure that the allocation of public resources is appropriate, with more resources being allocated for more harmful wrongs.⁵⁹⁴ This helps us avoid what Douglas Husak calls ‘overcriminalisation.’⁵⁹⁵

4.1. IS CRIMINALISATION PREFERABLE?

To justify the criminalisation of the categories of copyright infringements for which we have a *prima facie* case, we must show that their criminalisation is *preferable* to the other methods of control or regulation available to the state. This means that if other methods of control or regulation are equally as *effective* in protecting the

⁵⁹² Simester and others (n 425) 658-664; Simester and von Hirsch (n 379) 189-190.

⁵⁹³ See, pp 125 (above).

⁵⁹⁴ Simester and others (n 425) 644, 658-664; Husak (n 397) 73.

⁵⁹⁵ Husak (n 397); Nils Jareborg, 'What Kind of Criminal Law Do We Want?' in Nils Jareborg (ed), *Scraps of Penal Theory* (Iustus Förlag 2002) 89.

fundamental welfare interests⁵⁹⁶ at stake – (a) the interest in the dependability of the social institution of copyright, and (b) the interest in the protection of authors' labour, then their criminalisation is not justifiable.⁵⁹⁷

THE ALTERNATIVES TO CRIMINALISATION

There are three main 'alternatives' to the criminalisation of copyright infringements: (1) educating the public, (2) utilising administrative or quasi-judicial measures and remedies, and (3) introducing or developing private law remedies. Here, I will examine what each of these might look like (or looks like) in practice. I will also examine the effectiveness of each and then analyse the effectiveness of the entire 'suite of alternatives.'

Education

One 'alternative' to criminalisation is education. There is strong evidence that educating the public can help reduce copyright infringements.⁵⁹⁸ The IPO Counterfeit Goods Research (July 2020),⁵⁹⁹ for example, shows that messaging initiatives that focus on how consumers may be contributing to the funding of criminal activity, such as terrorism and exploitation of children, or the safety issues that counterfeit goods pose,

⁵⁹⁶ Simester and others (n 425) 643; Haber (n 11) 236; Douglas Husak, 'The Criminal Law as a Last Resort' (2004) 24(2) *Oxford Journal of Legal Studies* 207; Andrew Ashworth, *Principles of Criminal Law* (5th edn, Oxford University Press 2006) 31.

⁵⁹⁷ *ibid.*

⁵⁹⁸ Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (Department for Business, Innovation & Skills 2011) 78-79; Miriam Bitton, 'Rethinking the Anti-Counterfeiting Trade Agreement's Criminal Copyright Enforcement Measures' (2012) 102(1) *Journal of Criminal Law and Criminology* 67, 115-116; Brett Danaher and others, 'The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an event study in France' (2014) 62(3) *The Journal of Industrial Economics* 541, 551; Williams (n 439) 228, 234.

⁵⁹⁹ UK Intellectual Property Office, *IPO Counterfeit Goods Research* (UK Intellectual Property Office 2020) 30-35.

are highly effective at convincing consumers not to purchase counterfeit goods. Of 1010 participants in the particular segment of the study, 63% stated that they would not purchase counterfeits after viewing the messaging.⁶⁰⁰ Only 5% would continue buying counterfeits at the same rate or more frequently, while 10% would still buy counterfeit goods, but less often.⁶⁰¹ Moreover, 81% stated they would not be open to receiving such goods as gifts.⁶⁰² So, the IPO's Counterfeit Goods Research shows that education and proper messaging can be highly effective in reducing copyright infringements, at least where physical goods that infringe copyright are concerned.

Similarly, the 12th wave of the Online Copyright Infringement Tracker found that messaging initiatives that come from a 'human' angle and show real impact on human lives were seen to be more impactful, along with messages about the potential risks of using unauthorised sources for copyright works – such as the risk of malware (i.e. malicious software) infections and similar cyber dangers.⁶⁰³ It was also found that the participants were more willing to engage with the creative industry if approached with an 'understanding' tone, as opposed to messaging initiatives with an authoritative tone (in contrast with the findings of the previous waves).⁶⁰⁴ Several other studies support the UK IPO's findings in both studies.⁶⁰⁵

⁶⁰⁰ *ibid* 42.

⁶⁰¹ *ibid*.

⁶⁰² *ibid*.

⁶⁰³ UK IPO (n 527).

⁶⁰⁴ *ibid*.

⁶⁰⁵ See, for example, Bong-Keun Jeong and Moutaz Khouja, 'Analysis of the effectiveness of preventive and deterrent piracy control strategies: Agent-based modeling approach' (2013) 29(6) *Computers in Human Behavior* 2744, which used an agent-based modelling approach and found that 'when consumers

An example of a copyright awareness initiative in the UK is the partly government-funded 'Creative Content UK' – an industry-led initiative involving the UK's creative industries, four major Internet Service Providers (ISPs), and the government.⁶⁰⁶ Creative Content UK aims to send educational notices to those found to be infringing copyright through unlawful file sharing,⁶⁰⁷ and carry out other public awareness campaigns, such as the 'Get it Right from a Genuine Site,' by partnering with influencers, creators, and small business owners, among others.⁶⁰⁸ According to the UK government, by 19 January 2017, the campaign had reached 21% of the UK population,

are resistant to piracy control efforts and budgets for combating piracy are low,' an educational strategy is more effective than a legal strategy.

Sulaiman Al-Rafee and Kamel Rouibah, 'The fight against digital piracy: An experiment' (2009) 27(3) *Telematics and Informatics* 283, which reports the findings of an experiment carried out in the Gulf region to assess the effectiveness of three factors in deterring digital piracy – (1) whether a religious ruling/edict (fatwa) will help in deterring the digital piracy behaviour; (2) whether awareness about the dangers of piracy deters the digital piracy behaviour; and (3) whether new regulations/enforcement regarding piracy help in deterring the digital piracy behaviour. They found that both the religious factor and the awareness factor were significant in reducing an individual's intention towards piracy. While, as the authors note, people of different cultures may act differently to different factors, when the study is read in conjunction with the aforementioned ones, it supports the conclusion that increased awareness of the negative implications of piracy deters online copyright infringements.

See, also, Sanjeev Sahni and Indranath Gupta, *Piracy in the Digital Era: Psychosocial, Criminological and Cultural Factors* (Springer 2019) 21-31 (for a discussion in the Indian context); Bong-Keun Jeong, Tom Yoon and Sarah Khan, 'Improving the Effectiveness of Anti-Piracy Educational Deterrence Efforts: The Role of Message Frame, Issue Involvement, Risk Perception, and Message Evidence on Perceived Message Effectiveness' (2021) 16(3) *Journal of Theoretical and Applied Electronic Commerce Research* 298 (on ways to improve the effectiveness of messaging campaigns).

⁶⁰⁶ UK Intellectual Property Office, 'Get It Right from a Genuine Site copyright campaign update' (UK Intellectual Property Office, 19 January 2017) <www.gov.uk/government/news/get-it-right-from-a-genuine-site-copyright-campaign-update> accessed 02 June 2024; PRS for Music, 'Get It Right - Safeguarding the UK's Creative Industries' (PRS for Music, 23 October 2015) <www.prsformusic.com/press/2015/get-it-right-safeguarding-the-uks-creative-industries> accessed 20 June 2024.

⁶⁰⁷ *ibid.*

⁶⁰⁸ *ibid.*

and that 'whilst piracy levels remain[ed] constant, it ha[d] decreased significantly among those exposed to the campaign.'⁶⁰⁹

It would be difficult, however, to make a case that educational initiatives can be an effective standalone remedy to copyright infringements.⁶¹⁰ They can be used alongside private law remedies, administrative measures, and/or copyright crimes (if or where justifiable) and are likely more effective when implemented with other remedies or sanctions.⁶¹¹

Administrative Remedies

A second alternative to criminalisation is the use of administrative or quasi-judicial measures to police and counter copyright infringements. One example is the graduated response or the three-strikes policy against illegal online file sharing, which countries like South Korea,⁶¹² New Zealand⁶¹³ and France⁶¹⁴ have legislated for. These are primarily targeted at consumers of unlawful copyright content.⁶¹⁵ The precise implementation of graduated response policies varies across jurisdictions. Some jurisdictions have an administrative/judicial hybrid regime, and others have opted for a purely administrative regime. How graduated response measures generally operate

⁶⁰⁹ UK Intellectual Property Office, 'Get It Right from a Genuine Site copyright campaign update' (n 606).

⁶¹⁰ Brassell (n 316) 80.

⁶¹¹ Simester and von Hirsch (n 379) 194; Williams (n 439) 228, 234.

⁶¹² Copyright Act 1957, as amended up to Act No. 19597 of August 8, 2023 (Republic of Korea).

⁶¹³ Copyright (Infringing File Sharing) Amendment Act 2011 (New Zealand).

⁶¹⁴ Loi n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet (Law No. 2009-669 of June 12, 2009 on the Promotion of the Dissemination and Protection of Creation on the Internet) (HADOPI) (France).

⁶¹⁵ Nicolas Suzor and Brian Fitzgerald, 'The Legitimacy of Graduated Response Schemes' (2011) 34(1) University of New South Wales Journal 1, 12.

can be briefly summarised using New Zealand's hybrid regime as an example. Under the regime, when a copyright owner finds an internet user engaging in illegal file sharing,⁶¹⁶ the rights owner can notify the Internet Service Provider ('ISP') of the conduct. The ISP would then send up to three notices – a detection notice,⁶¹⁷ a warning notice,⁶¹⁸ and an enforcement notice,⁶¹⁹ provided that the infringing conduct continues after each notice. If the account holder does not stop the infringing activity even after the three notices, the rights owner can take their claim to the Copyright Tribunal, which would generally determine the proceedings on paper. The Tribunal can impose a maximum penalty of NZ\$15,000 on the account holder.⁶²⁰ The law also contains a provision allowing copyright owners to apply to the District Courts to order the suspension of an internet account for up to six months.⁶²¹ The suspension provision, however, is not in force as it requires the Governor-General to issue an 'Order in

⁶¹⁶ Copyright Act 1994 (New Zealand), s 122A(1): 'file sharing is (a) where material is uploaded or downloaded from the internet using an application or a network that enables the simultaneous sharing of material between multiple users; and (b) uploading and downloading may, but need not, occur at the same time.'

⁶¹⁷ *ibid* s 122D.

⁶¹⁸ *ibid* s 122E.

⁶¹⁹ *ibid* s 122F.

⁶²⁰ *ibid* s 122O(4). In practice, however, the fine amounts have been considerably low. See, for example, *Recorded Music NZ Ltd v VOD052014-D-R-9242889* [2014] NZCOP 3 (The Copyright Tribunal (NZ)) (the total amount awarded was NZ\$617.17, of which NZ\$7.17 was the cost of purchasing the works legally, NZ\$50 was a contribution towards the ISP/IPAP fees, NZ\$200 was a reimbursement of the applicant's fee for the Tribunal claim, and NZ\$360 (NZ\$120 per infringement) represented a deterrent sum); *Recorded Music NZ v VOD052014-D-R-9288397* [2014] NZCOP 2 (The Copyright Tribunal (NZ)) (where the total amount awarded was NZ\$738.96, of which NZ\$8.96 was the cost of purchasing the works legally, NZ\$50 was a contribution towards the ISP/IPAP fees, NZ\$200 was a reimbursement of the applicant's fee for the Tribunal claim, and NZ\$480 (NZ\$120 per infringement) represented a deterrent sum); and *Recording Industry Association of New Zealand Incorporated v CAL2012-E000627* [2013] NZCOP 9 (The Copyright Tribunal (NZ)) (where the total amount awarded was NZ\$803.62, of which NZ\$11.95 was the cost of purchasing the works legally, NZ\$91.67 was the ISP/IPAP fees, NZ\$200 was a reimbursement of the applicant's fee for the Tribunal claim, and NZ\$500 (NZ\$100 per infringement) representing a deterrent sum).

⁶²¹ *ibid* s 122P.

Council' (a type of secondary legislation) that sets a date after which the suspension provision can be used. Such an order has not been issued to date.⁶²²

The UK also legislated for a graduated response regime in 2010.⁶²³ However, the provisions inserted into the Communications Act 2003,⁶²⁴ require an 'Initial Obligations Code' to be in place before the provisions can be applied. Although a draft of the Code was circulated by Ofcom for public consultation in 2010,⁶²⁵ such a Code is not in force. And it now appears that the plans to introduce one have been scrapped because of the government's view that the regime would not be effective,⁶²⁶ though the provisions in the Communications Act 2003 have not been repealed. The Digital Economy Act 2017, which was enacted after those developments, did not mention the graduated response regime.

Graduated response measures are not without controversy or criticism. For one, graduated response models that are purely administrative raise issues of due process and fairness because of the lack of judicial oversight.⁶²⁷ In South Korea, for example, there is no involvement of a Tribunal or a Court, and the infringing 'account' (excluding an exclusive email account) can be suspended for up to six months by online service

⁶²² *ibid* s 122R.

⁶²³ DEA 2010, ss 3-16.

⁶²⁴ Communications Act 2003, ss 124A-124N.

⁶²⁵ Ofcom, *Online Infringement of Copyright and the Digital Economy Act: Draft Initial Obligations Code* (Ofcom 2010).

⁶²⁶ Kevin Rawlinson, 'Plans to block illegal file-sharing websites scrapped' *The Independent* (03 August 2011) <www.independent.co.uk/news/uk/crime/plans-to-block-illegal-filesharing-websites-scrapped-2331188.html> accessed 10 May 2024.

⁶²⁷ Suzor and Fitzgerald (n 615) 24; Rebecca Giblin, 'Evaluating Graduated Response' (2014) 37 *Columbia Journal of Law & Arts* 147, 181.

providers upon recommendation either by the Korean Copyright Commission or the Minister of Culture, Sports, and Tourism.⁶²⁸ The French HADOPI law also contained a similar provision. The provision gave the 'High Authority for the Diffusion of works and Protection of copyright on the Internet' (or 'HADOPI') – an independent administrative body – the power to impose the penalty of 'suspension of access to the Internet for a period of between two months and one year, accompanied by the impossibility for the subscriber to contract with any other operator for access to online public communication services.'⁶²⁹ But, the highest constitutional authority in France – the Constitutional Council – held the provision to be unconstitutional.⁶³⁰ Following the decision of the Council, France legislated to permit courts to order the suspension of access to the Internet for a maximum period of one year, accompanied by a ban on subscribing to similar services during the period of the sentence, provided there is a finding of criminal copyright infringement.⁶³¹

There are also questions about the effectiveness of graduated response measures in deterring infringements.⁶³² In Hargreaves' review of intellectual property and growth, he noted that such measures were recent developments at the time of the review and that the evidence available then did not provide robust evidence on whether

⁶²⁸ Copyright Act 1957, as amended up to Act No. 19597 of August 8, 2023 (Republic of Korea), art 133-2(2).

⁶²⁹ Decision no. 2009-580 DC of 10 June 2009 (The Constitutional Council, France).

⁶³⁰ *ibid*; Suzor and Fitzgerald (n 615) 21.

⁶³¹ Intellectual Property Code (France), art 335-7.

⁶³² Gregor Urbas and Kendra Fouracre, 'Obligations and Liability of ISPs as Guardians of Internet Content: Comparative Perspectives' (2010) 11(2) *Computer Law Review International* 33, 38; Michael Ho, Joyce Hung and Michael Masnick, *The Carrot or the Stick?* (Copia Institute 2015) 2-3; Suzor and Fitzgerald (n 615) 15; Giblin (n 627).

or not such measures were effective.⁶³³ The difficulty, perhaps, of measuring the success of such measures is the fact that effectiveness at stopping or deterring infringing activities cannot easily be measured. We cannot, for instance, look at whether there is an increase in the revenue from legal sources or whether there is an increase in the number of legal sales, not least because previous infringers who have stopped their infringing conduct may not necessarily obtain or access the content from legal sources. The provisions do not necessarily have to increase legal sales to be an effective deterrent.

A few surveys and studies have, nevertheless, attempted to measure the effectiveness of graduated response measures. In October 2010 and March 2011, the French HADOPI carried out two surveys, each consisting of 1500 internet users, to study the impact of the HADOPI law on online copyright infringements, among other things. It found that the number of respondents who decreased or stopped illegal downloading of copyright content increased from 25% to 41% between the two surveys carried out five months apart, and that half of the 100 respondents who had received a warning or knew of someone who had received a warning letter had ceased illegal downloading.⁶³⁴ Given the relatively small sample size and the fact that the survey was done by HADOPI, it is difficult to draw conclusions from those surveys alone. One relatively recent paper by American and French researchers concludes that 'graduated-response approaches do reduce an individual's level of illegal activity over time.' They also found that 'specific policy parameters such as increasing the probability of

⁶³³ Hargreaves (n 598) 78-79.

⁶³⁴ HADOPI, *Hadopi, cultural assets and internet use: practices and perceptions of French internet users* (HADOPI 2011); Alexis Koster, 'Fighting Internet Piracy: The French Experience with the Hadopi Law' (2012) 16(4) *International Journal of Management & Informations Systems* 327, 329.

detection' under graduated response measures may have unintended consequences,⁶³⁵ and that only increased punishment unambiguously deterred illegal activity.⁶³⁶ So, there is some evidence that suggests that graduated response measures *are* effective at deterring infringement.

Other key concerns with graduated response measures include the disproportionate costs of such regimes,⁶³⁷ concerns about privacy,⁶³⁸ concerns about the harshness of disconnecting users from internet access,⁶³⁹ and concerns about the fairness of holding the internet account holder responsible for actions of hackers or other malicious third parties, especially in the case of libraries or similar free public Wi-Fi providers.⁶⁴⁰ Most, if not all, such concerns can be addressed in a well-drafted graduated response law that establishes a quasi-judicial regime with proper safeguards to ensure the system is fair and the sanctions are proportionate.⁶⁴¹

⁶³⁵ Michael Arnold and others, 'Digital Piracy under a Graduated Response Policy' (2019) 175(2) *Journal of Institutional and Theoretical Economics* 372, 390; Éric Darmon, Sylvain Dejean and Thierry Pénard, 'Has Hadopi's Graduated Response Helped to Reduce Music and Movie Piracy? An Empirical Study of Online Consumption Patterns' (2016) 67 *Revue économique* 181, 199.

⁶³⁶ Arnold (n 635) 390.

⁶³⁷ *Roadshow Films Pty Ltd v iiNet Ltd* [2011] FCAFC 23 (Federal Court of Australia) [205]-[211] (Emmett J); Giblin (n 627) 169.

⁶³⁸ Ofcom, "Site Blocking" to reduce online copyright infringement: A review of sections 17 and 18 of the *Digital Economy Act* (Ofcom 2011) 50.

⁶³⁹ UNHRC, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue* (2011) UN Doc A/HRC/17/27 UNHRC, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue' (2011) UN Doc A/HRC/17/27; Kevin O'Sullivan, 'Industry strategy for the enforcement of copyright online: a spectre of private regulation for the EU?' (2018) 40(10) *European Intellectual Property Review* 641, 642; Giblin (n 627) 181.

⁶⁴⁰ Adrienne Muir, 'Online copyright enforcement by Internet Service Providers' (2012) 39(2) *Journal of Information Science* 256, 264-265.

⁶⁴¹ Michael Boardman, 'Digital Copyright Protection and Graduated Response: A Global Perspective' (2011) 33(2) *Loyola of Los Angeles International and Comparative Law Review* 223, 242, 253; See also, Williams, 'Criminal Law in England and Wales: Just Another Form of Regulatory Tool?' (n 439) 230, which argues that if stigma and moral signalling is not at issue, procedural protections in relation to

Administrative measures can also be adopted to disrupt websites used to infringe copyright or the sale of physical goods that infringe copyright.⁶⁴² For example, in the UK, the City of London Police Intellectual Property Crime Unit (PIPCU), funded by the UK Intellectual Property Office, has at least two major ongoing operations to disrupt copyright infringements – ‘Operation Creative’ and ‘Operation Ashiko’.⁶⁴³

Operation Creative, officially launched in April 2014, is an initiative aimed at disrupting and preventing websites from providing unauthorised access to copyright works.⁶⁴⁴ Under the operation, copyright owners or rights holders would identify and report websites that infringe copyright, along with evidence of such infringement. The PIPCU would then investigate the reported websites to verify whether they are engaged in infringing activities.⁶⁴⁵ If a website is confirmed to be engaging in infringing activities, PIPCU officers would contact the site owner to offer the opportunity to correct the behaviour and operate the website legitimately.⁶⁴⁶ If the site owner fails to comply, the PIPCU would then seek to use tactics such as contacting the domain name registrar to seek suspension of the website,⁶⁴⁷ replacing advertisements, notifying

serious fines need to be rigorous, but not necessarily equivalent to procedural protections afforded to the accused in criminal law.

⁶⁴² Here I will look at a few examples in the context of online copyright infringements. But, similar approaches can be used for offline infringements.

⁶⁴³ WIPO Advisory Committee on Enforcement, *Arrangements to address online Intellectual Property Infringements* (WIPO 2019) WIPO Doc WIPO/ACE/14/8, 15-16.

⁶⁴⁴ IP Crime Group, *IP Crime Annual Report 2013/14* (IP Crime Group 2014) 42.

⁶⁴⁵ *ibid.*

⁶⁴⁶ *ibid.*

⁶⁴⁷ Police Intellectual Property Crime Unit, 'Police shut down domains that illegally hosted copyrighted content by YouTube supergroup' (*City of London Police*, 27 February 2023) <www.cityoflondon.police.uk/news/city-of-london/news/2023/january/police-shut-down-domains-that-illegally-hosted-copyrighted-content-by-youtube-supergroup-the-sidemen/> accessed 09 December 2023.

payment system providers,⁶⁴⁸ and adding the website to an 'Infringing Websites List (IWL)'.⁶⁴⁹ The IWL is accessible to partners of Operation Creative and those involved in the creative and digital advertising business so that advertisers and their intermediaries can voluntarily stop placing advertisements on the websites on the list.⁶⁵⁰ White Bullet, a company specialising in anti-piracy and brand safety solutions and one of PIPCU's partners in Operation Creative, estimated that between June 2020 and May 2021, piracy websites earned over US\$1 billion in advertising revenue (or 'ad revenue'), and piracy apps generated over US\$250 million worldwide.⁶⁵¹ They based the estimate on ad impressions across 6194 piracy websites and 884 piracy apps.⁶⁵²

PIPCU claims, based apparently on research data by White Bullet, that between January and December 2022, there was a 58% decrease in UK advertising on websites on the IWL and that the total estimated ad revenue from UK traffic that the website received dropped by £6 million.⁶⁵³ Although there is little independent research that verifies these figures, measures that disrupt the advertising revenue generated by copyright pirates will likely be significant and effective because websites and

⁶⁴⁸ Peter Ratcliffe, 'Police Intellectual Property Crime Unit (PIPCU): Combatting IP Crime – United Kingdom' (Presentation, Retsudvalget 2016-17, Bilag 203, Folketinget, 2017) 11.

⁶⁴⁹ *ibid.*

⁶⁵⁰ *ibid.*; Some question why the list is not publicly accessible. See, for e.g., Maxine Chng, 'Answers needed from the Copyright Police' (*Open Rights Group*, 28 July 2015) <www.openrightsgroup.org/blog/answers-needed-from-the-copyright-police/> accessed 13 June 2024. Perhaps, the obvious answer to this is that if the list were publicly accessible, members of the public could use the list as a source to figure out where to find infringing content. And it would increase the profiles of such websites.

⁶⁵¹ White Bullet and Digital Citizens Alliance, *Breaking (B)ads: How Advertiser-Supported Piracy Fuels A Booming Multi-Billion Dollar Illegal Market* (2021) 5-6.

⁶⁵² *ibid.*

⁶⁵³ Police Intellectual Property Crime Unit, 'News Operation Creative blocks £6 million of UK advertising revenue from funding illegal websites' (*City of London Police*, 06 February 2023) <www.cityoflondon.police.uk/news/city-of-london/news/2023/january/operation-creative-blocks-6-million-of-uk-advertising-revenue-from-funding-illegal-websites/> accessed 09 December 2023. office

applications that host or provide access to⁶⁵⁴ copyright-infringing content are primarily driven by ad revenue.⁶⁵⁵

Operation Ashiko is similar to Operation Creative, but targets online sales of goods that infringe copyright and trade marks.⁶⁵⁶ The operation primarily targets websites that use the .uk country code top-level domain (ccTLD).⁶⁵⁷ To achieve the operation's goals, the PIPCU works with Nominet, which maintains the domain name registry for the .uk, .wales, and .cymru domains, to suspend domains that infringe Nominet's terms and conditions. The terms require registrants not to infringe

⁶⁵⁴ Peer-to-peer filesharing websites (like BitTorrent websites) generally do not host the content shared. They are conduits that provide links or access to the final content.

⁶⁵⁵ Michail Batikas, Jörg Claussen and Christian Peukert, 'Follow the money: Online piracy and self-regulation in the advertising industry' (2019) 65 *International Journal of Industrial Organization* 121, 127; BAE Systems Detica, *The six business models for copyright infringement: A data-driven study of websites considered to be infringing copyright* (PRS Music, Google Inc, 2012) <https://docs.google.com/file/d/0Bw8Krj_Q8UaENDhEOG1LVFRhVkU/view?resourcekey=0-31banEDCabfUEqTynvwR_Q> accessed 20 November 2023, 3; IP Crime Group, *IP Crime and Enforcement Report 19/20* (IP Crime Group 2020) 47.

⁶⁵⁶ Police Intellectual Property Crime Unit, *Operation Ashiko Suspension Policy* (version 1.2 - 20 edn, City of London Police 2020) 6.

⁶⁵⁷ *ibid* 5-6.

intellectual property rights.⁶⁵⁸ Nominet's statistics show an interesting trend highlighting the effectiveness of the operation.

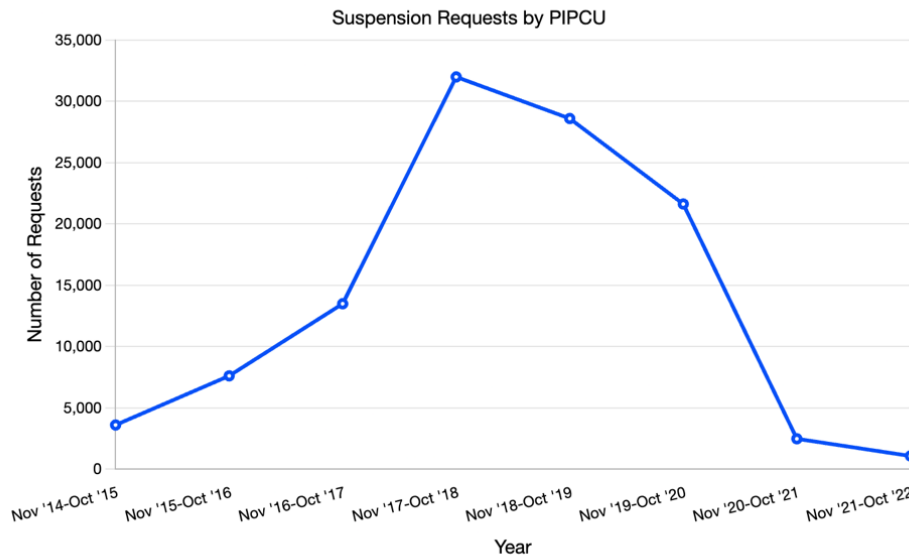


Diagram 2: Domain Suspension Requests by PIPCU.
Data Source: Nominet⁶⁵⁹

⁶⁵⁸ Nominet, *Terms and Conditions of Domain Name Registration* (Nominet, 2020) <<https://nominet.uk/wp-content/uploads/2020/04/Terms-and-Conditions-of-Domain-Name-Registration-24-04-2020-v1.pdf>> accessed 19 January 2024: p 5 (specifically Clause 6.1.3).

⁶⁵⁹ Nominet, *Tackling online criminal activity: 1 November 2014 - 31 October 2015* (Nominet, 2017) <<https://media.nominet.uk/wp-content/uploads/2016/02/Tackling-online-criminal-activity.pdf>> accessed 19 June 2024: 3610 requests by PIPCU; Nominet, *Tackling online criminal activity: 1 November 2015 - 31 October 2016* (Nominet, 2016) <<https://nominet.uk/wp-content/uploads/2016/11/Tackling-online-criminal-activity-v3a.jpg>> accessed 19 June 2024: 7617 requests by PIPCU; Nominet, 'Collaboration keeps .uk safe with record 16,000 domains suspended' (Nominet, 2017) <www.nominet.uk/collaboration-keeps-uk-safe-with-record-16000-domains-suspended/> accessed 19 June 2024: over 13,500 requests by PIPCU; Nominet, '32,000 .uk domains suspended as law enforcement and industry keep .uk safe' (Nominet, 2018) <www.nominet.uk/32000-uk-domains-suspended-as-law-enforcement-and-industry-keep-uk-safe/> accessed 19 June 2024: over 32,000 requests by PIPCU; Nominet, 'Over 28,000 domains suspended as law enforcement and industry keep .UK safe' (Nominet, 2019) <www.nominet.uk/over-28000-domains-suspended-as-law-enforcement-and-industry-keep-uk-safe/> accessed 19 June 2024: 28,606 requests by PIPCU; Nominet, 'Over 22,000 domains suspended as law enforcement and industry keep .UK safe' (Nominet, 01 December 2020) <www.nominet.uk/law-enforcement-and-nominet-thwart-criminal-activity-online/> accessed 19 June 2024: 21,632 requests by PIPCU; Nominet, *Tackling online criminal activity: 1 November 2020 - 31 October 2021* (Nominet, 2021) <www.nominet.uk/wp-content/uploads/2024/09/Criminality-Report-2021.pdf> accessed 19 June 2024: 2,487 requests by PIPCU; Nominet, *Tackling online criminal activity: 1 November 2021 - 31 October 2022* (Nominet, 2022) <www.nominet.uk/wp-content/uploads/2024/09/criminality-report-2022.pdf> accessed 19 June 2024: 1,083 requests by PIPCU.

The number of rejected requests (which includes requests from other agencies) remained consistently and considerably low throughout the period.⁶⁶⁰ So, we can reasonably say that the above trend applies to *successful* requests by PIPCU. What we see is that from the start of the operation until the year between 01 November 2017 and 31 October 2018, there was a rapid increase in the number of requests sent by PIPCU to Nominet. But since then, the number of requests steadily declined until '01 November 2019 to 31 October 2020,' following which there was a rapid drop in the number of requests, with the requests reaching record lows. The PIPCU attributes this drop entirely to the reduction in 'counterfeit sites' using the .uk domain,⁶⁶¹ which suggests that the operation is successful in significantly decreasing the number of websites selling counterfeit goods using .uk domains. The website operators may, of course, simply have moved the websites to other domains.

Furthermore, in 2017, the UK IPO helped broker a voluntary agreement to a Code of Conduct between the creative industries (British Phonographic Industry, Motion Picture Association and some members of the Alliance for Intellectual Property⁶⁶²) and two of the largest search engines – Google and Microsoft Bing.⁶⁶³ The

⁶⁶⁰ *ibid.*

⁶⁶¹ Nominet, 'Record low for number of .UK domains suspended by law enforcement' (*Nominet*, 09 December 2021) <www.nominet.uk/record-low-for-number-of-uk-domains-suspended-by-law-enforcement/> accessed 19 June 2024.

⁶⁶² Namely, the Anti-Copying in Design (ACD), Anti-Counterfeiting Group (ACG), Association of Authors' Agents British Association for Screen Entertainment (BASE), British Brands Group (BBG), BSA, Design and Artists Copyright Society, Entertainment Retailers Association, Educational Recording Agency, Film Distributors Association (FDA), Professional Publishers Association (PPA), Premier League Publishers Association, PRS for Music, Publishers Licensing Society (PLS), The Software Alliance, UK Interactive Entertainment (UKIE), and the UK Cinema Association.

⁶⁶³ UK Intellectual Property Office, 'Search engines and creative industries sign anti-piracy agreement' (*UK Intellectual Property Office*, 20 February 2017) <www.gov.uk/government/news/search-engines-and-creative-industries-sign-anti-piracy-agreement> accessed 15 June 2024.

Code, which came into force on 09 February 2017, aims to reduce the visibility of websites with copyright-infringing content in search results. According to Google, by November 2018, both search engines had passed all quarterly effectiveness tests carried out independently, scoring under the thresholds agreed with the UK IPO.⁶⁶⁴ De-indexing or reducing the visibility of websites with copyright-infringing content can be helpful in reducing copyright infringements because even though search engines do not drive most of the traffic to piracy websites,⁶⁶⁵ search engine traffic is still a significant one.⁶⁶⁶

Administrative measures, however, have their limits. If we consider domain name suspensions and seizures, for instance, the same website can quickly reappear under a different domain name.⁶⁶⁷ Moreover, although Nominet and UK-based domain registrars have cooperated with PIPCU, other domain name registrars, especially those outside the UK's jurisdiction, may not be as cooperative. A prime example is EasyDNS,

⁶⁶⁴ Google Inc., *How Google Fights Piracy* (Google Inc. 2018) 16, 40.

⁶⁶⁵ Millward Brown Digital, *Understanding the Role of Search in Online Piracy* (Motion Picture Association of America 2013) 3: 'Compete observed that on average, approximately 20% of all visits to infringing content were influenced by a search query from 2010-2012'; Matt Schruers, *The Search Fixation: Infringement, Search Results, and Online Content* (Computer & Communications Industry Association 2013) 1: 'Infringing sites receive limited traffic from search'; Andy Chatterley, *The Film and TV Piracy Report 2022* (MUSO 2023) 8: 'Only 25.8% of film and TV piracy traffic comes from search engines, with 66.4% being direct traffic, indicating that a significant proportion of users have established preferred piracy sites for content.'

⁶⁶⁶ Andy Chatterley, *Tackling Piracy in Film & TV* (MUSO 2023) 9 (30.3% of the global traffic for film and TV content piracy between 01st April 2022 and 31st March 2023 is from search engine; while 21.2% of the global traffic for piracy in the publishing sector is from search engines); European Union Intellectual Property Office, *Online Copyright Infringement in the European Union: Films, Music, Publications, Software and TV (2017-2022)* 9: '... one quarter of accesses coming via search engines.'

⁶⁶⁷ Benton Martin and Jeremiah Newhall, 'Criminal Copyright Enforcement against File-sharing Services' (2013) 15(1) *North Carolina Journal of Law and Technology* 101, 103; Andy Maxwell, 'ExtraTorrent Threatens Legal Action Over Police-Ordered Domain Seizure' (*TorrentFreak*, 10 October 2013) <<https://torrentfreak.com/extratorrent-threatens-legal-action-over-police-ordered-domain-seizure-131010/>> accessed 15 June 2024; ExtraTorrent.com was suspended and taken down, but quickly moved to ExtraTorrent.cc before its sudden shutdown in 2017.

a Canadian service provider that supplies DNS and web hosting services, which publicly refused to comply with the PIPCU's requests.⁶⁶⁸ EasyDNS questioned the legitimacy of such administrative action and raised due process concerns.⁶⁶⁹ In addition, some websites (e.g., maxalbums.com, emp3world.com and full-albums.net) that were suspended, unsuspended, and subsequently locked from being transferred upon the PIPCU's requests by the then Registrar on Record, Public Domain Registry ('PDR Ltd'), were transferred to and restored via EasyDNS. This was following a finding by the National Arbitration Forum that, per the ICANN's⁶⁷⁰ Registrar Transfer Dispute Resolution Policy, a Registrar on Record could not refuse a transfer of a domain name to a 'Gaining Registrar' in the circumstances, given the lack of an order by a court of competent jurisdiction.⁶⁷¹ EasyDNS, while recognising that not all filesharing site operators have legitimate business models,⁶⁷² clarified that their concerns lay with the lack of due process, that they would not act as a 'safe refuge' for copyright pirates, and

⁶⁶⁸ Mark Jeftovic, 'Whatever Happened to "Due Process"?' (*EasyDNS*, 08 October 2013) <<https://easydns.com/blog/2013/10/08/whatever-happened-to-due-process/>> accessed 15 June 2024; Mark Jeftovic, 'City of London PIPCU Sending "Notices Of Criminality" To Registrars' (*EasyDNS*, 29 August 2014) <<https://easydns.com/blog/2014/08/29/city-of-london-pipcu-sending-notices-of-criminality-to-registrars/>> accessed 15 June 2024; Chng (n 650).

⁶⁶⁹ Jeftovic (n 668).

⁶⁷⁰ The Internet Corporation for Assigned Names and Numbers or ICANN is a non-profit organisation incorporated in California that took over from the US government various administrative tasks associated with running the Internet, which includes overseeing top-level domains, maintaining the directory of domains, and resolving disputes over domain names, among other things: Internet Corporation for Assigned Names and Numbers, 'The History of the Internet Corporation for Assigned Names and Numbers (ICANN) (English)' (*ICANN*, 22 May 2020) <www.youtube.com/watch?v=e23H5vua6bU> accessed 12 June 2024.

⁶⁷¹ *easyDNS Technologies Inc v PDR Ltd* (National Arbitration Forum, 06 January 2014).

⁶⁷² Mark Jeftovic, 'RIAA to .ORG Registry: Take down ThePirateBay' (*EasyDNS*, 06 June 2016) <<https://easydns.com/blog/2016/06/06/riaa-to-org-registry-take-down-thepiratebay/>> accessed 15 June 2024: 'Ahead of that day, if I were a filesharing site operator I'd be using my time wisely in concentrating my efforts on legitimizing my operations. This could include negotiating blanket licensing agreements with mechanical rights agencies.'

that they do not view the issue of illegitimate filesharing as an issue of free speech or whistleblowing.⁶⁷³ As they themselves note, 'due process across borders' is catching up with technology, and when that happens, it would be 'relatively quick, easy and painless for a law enforcement agency in one country ... to have the requisite order issued in another country ... and cause any domains that have been found guilty of violating copyright and freeriding on content creators' efforts to be shut down.'⁶⁷⁴ Similar due process concerns exist with respect to administrative measures taken to disrupt payment systems used by copyright pirates. So, the effectiveness of such administrative measures is limited. And steps need to be taken to address due process concerns and to ensure that such measures do not go beyond their legitimate scope.

Private Law Remedies

The key 'alternative' to criminalisation available to the state for the regulation of copyright infringements is the creation of a (statutory) tort, enabling private enforcement of copyright. A tort is a civil wrong for which the law will provide a remedy to the victim.⁶⁷⁵ Where a tort is committed, courts aim to compensate the aggrieved party for the losses suffered because of the wrong and for conceivable future losses the aggrieved may suffer.⁶⁷⁶ Where appropriate, courts also allow equitable remedies, like 'accounts of profits'⁶⁷⁷ or 'injunctions',⁶⁷⁸ and exceptionally 'punitive

⁶⁷³ *ibid.*

⁶⁷⁴ *ibid.*

⁶⁷⁵ Nicholas McBride and Roderick Bagshaw, *Tort Law* (6th edn, Pearson 2018) 7-8.

⁶⁷⁶ *ibid* chapter 23.

⁶⁷⁷ *ibid* chapter 25.

⁶⁷⁸ *ibid* chapter 27.

damages.⁶⁷⁹ So, if creating a (statutory) tort suffices to effectively prevent or reduce the harms to the interests I have identified caused by copyright infringements, then criminalisation is unnecessary.⁶⁸⁰

When looking at the development of criminal copyright in the United Kingdom in Chapter 2,⁶⁸¹ we saw that copyright infringement in its modern form originated in the UK as a statutory wrong – the commission of which gave the copyright owner the right to civil penalties⁶⁸² and/or remedies.⁶⁸³ The UK has had private law remedies for copyright infringements for over three centuries, which have evolved with time.⁶⁸⁴ As the law of the UK currently stands, copyright owners can recover compensatory

⁶⁷⁹ *ibid* chapter 23.

⁶⁸⁰ Simester and others (n 425) 659; Hirsch, Ashworth, and Jareborg (n 428) 89.

⁶⁸¹ See the discussions on the Statute of Anne from p 4848.

⁶⁸² For a period of time, this right also extended to common informers.

⁶⁸³ Some (if not most) believe that there was a ‘common law copyright’ before the Statute of Anne, and that the effect of the statute was to ‘extinguish the common law copyright in published works while leaving the common law copyright in unpublished works unaffected.’ Kevin Garnett, Jonathan Rayner James and Gillian Davies, *Copinger and Skone James on Copyright* (14th edn, Sweet & Maxwell 1999) [2-16]. See, also, David Brennan and Andrew Christie, ‘Spoken Words and Copyright Subsistence in Anglo-American Law’ (2000) 4 *Intellectual Property Quarterly* 309, 317; Hugh Laddie, Peter Prescott and Mary Vitoria, *The Modern Law of Copyright* (1st edn, Butterworths 1980) 8, and H Tomás Gomez-Arostegui, ‘Copyright at Common Law in 1774’ (2014) 47(1) *Connecticut Law Review* 1.

However, Ronan Deazley has forcefully argued that this view is based on a misreading or misunderstanding of *Donaldson v Beckett* stemming from giving undue weight to advisory opinions of the judges from the Courts of Common Pleas, the Exchequer and the King’s Bench who had, per the procedure of the time, given their opinions on the issue to the House of Lords over the decision of the Lords and the views expressed by the Lords who spoke. See, Ronan Deazley, ‘The Myth of Copyright at Common Law’ (2003) 62(1) *The Cambridge Law Journal* 106, and Ronan Deazley and Elena Cooper, ‘What is the Point of Copyright History? Reflections on Copyright at Common law in 1774 by H. Tomás Gómez-Arostegui’ CREATE Working Paper 2016/04 <www.create.ac.uk/publications/what-is-the-point-of-copyright-history-reflections-on-copyright-at-common-law-in-1774-by-h-tomas-gomez-arostegui/> accessed 17 September 2023, See, also, Howard B Abrams, ‘The Historical Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright’ (1983) 29(3) *Wayne Law Review* 1119, 1128-1171.

⁶⁸⁴ Haber (n 11) 260.

damages, injunctions, accounts of profits and any similar relief available in respect of any other property right.⁶⁸⁵

Moreover, courts also have the power to award ‘additional damages’ after considering the circumstances of the infringement, including the flagrancy of the infringement and any benefits gained by the infringer from the infringement. ‘Additional damages’ was first introduced into UK copyright law by the Copyright Act 1956. Section 17(3) of the Act empowered the courts to award ‘additional damages’ where a court is ‘satisfied that effective relief would not otherwise be available to the plaintiff’,⁶⁸⁶ having regard to the ‘flagrancy of the infringement’ and ‘any benefits shown to have accrued to the defendant by reason of the infringement.’ The nature of additional damages was considered ‘controversial’ by the Law Commission in 1997,⁶⁸⁷ although some guidance was available even at the time of the Law Commission’s Report from the 1952 Gregory Committee Report, and the 1977 Whitford Committee Report. The Gregory Committee recommended ‘that the Court should be given discretionary power to impose something equivalent to exemplary damages in cases where the existing remedies give inadequate relief.’ Section 17(3) of the Copyright Act 1956 was, therefore, an implementation of this recommendation. Moreover, in the Whitford Committee Report 1977, the provision was referred to as providing ‘exemplary damages.’⁶⁸⁸ Though this suggests that the nature of ‘additional damages’ is the same as

⁶⁸⁵ CDPA 1988, s 96(2).

⁶⁸⁶ Copyright Act 1956, s 17(3).

⁶⁸⁷ Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 1997) para 1.105.

⁶⁸⁸ Whitford (n 282) para 704: ‘No one has submitted that exemplary damages in cases of flagrant infringement should be abolished, and we are of the opinion that this provision should undoubtedly be retained. The condition that such damages shall only be awarded if the court is satisfied that effective

that of ‘exemplary’ or ‘punitive damages,’ the Court of Appeal has, relatively recently, authoritatively ruled that the ‘additional damages’ introduced by the 1956 Act and which features in the CDPA 1988 are *sui generis* to copyright law.⁶⁸⁹ The Court of Appeal further explained that they may, either in whole or in part, be exemplary damages, or may, either in whole or in part, be restitutionary or disgorgement damages, depending on the circumstances in which it is awarded.⁶⁹⁰ The court further noted that the object of the award of ‘additional damages’ is to punish or deter.⁶⁹¹ While the Court of Appeal has clarified the nature and purpose of ‘additional damages,’ some uncertainties remain regarding their quantification.⁶⁹²

Similar ‘punitive’ private law remedies for wilful copyright infringements exist in other jurisdictions too. One example is the United States, where courts can increase statutory damages to \$150,000 per work wilfully infringed.⁶⁹³ So, there is a wide range

relief would not otherwise be available to the plaintiff has, we understand, been interpreted as referring to relief which might be obtained outside copyright law. It is our view that the provisions for exemplary damages should if anything be strengthened and that the power of courts to award additional damages if there has been a flagrant infringement should not be fettered by any requirement that the plaintiff must show some particular benefit which has accrued to the defendant or that the plaintiff must satisfy the court that effective relief could not otherwise be available. In the case of flagrant infringement, the court should be left with a complete discretion to make such award of damages as may seem appropriate to the circumstances, so that the existence of this provision will act as a deterrent if the existing deterrent of conversion damages is removed.’

⁶⁸⁹ *Phonographic Performance Ltd v Ellis (t/a Bla Bla Bar)* [2018] EWCA Civ 2812, [2019] FSR 15 [25], [36]-[37].

⁶⁹⁰ *ibid* [36].

⁶⁹¹ *ibid*.

⁶⁹² See, in this context, Phillip Johnson, ‘Compounding uncertainty: the need for guidelines in the assessment of additional damages for copyright infringement’ (2019) 2 Intellectual Property Quarterly 136.

⁶⁹³ 17 US Code (Copyright Act 1976), § 504(c)(2): ‘[i]n a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000.’

of private law remedies currently available to copyright owners, including additional damages. Such remedies can be further developed or improved.

Another key development over time has been the introduction and development of tools and technologies that help copyright owners enforce their rights privately. Automatic Content Recognition (ACR) technologies, especially those based on Machine Learning and Artificial Intelligence technologies, are a notable example. ACR technologies scan digital media formats to see if a match can be found in a database of reference files.⁶⁹⁴ These technologies are generally used by intermediary platforms like YouTube to moderate the content uploaded by users onto their servers.⁶⁹⁵ Some ACR tools automatically make decisions on the content being uploaded.⁶⁹⁶ Some give the copyright rights holder the choice to make decisions. Others are simply used for monitoring the digital ecosystem for infringing activity.⁶⁹⁷ Such tools, unsurprisingly, have their problems and criticisms. At least at present, ACR tools that make automatic decisions lack sufficient due process safeguards,⁶⁹⁸ and it may be difficult or impossible to analyse the reasons for the decision because automated

⁶⁹⁴ Joanne Elizabeth Gray and Nicolas P Suzor, 'Playing with machines: Using machine learning to understand automated copyright enforcement at scale' (2020) 7(1) Big Data & Society <<https://doi.org/10.1177/2053951720919963>> accessed 20 March 2024.

⁶⁹⁵ Youtube Creators, 'YouTube Content ID' (Youtube, 28 September 2010) <www.youtube.com/watch?v=9g2U12SsRns> accessed 17 November 2024; European Union Intellectual Property Office, *Automated Content Recognition: Discussion Paper – Phase 1 'Existing technologies and their impact on IP'* (EUIPO 2020); European Union Intellectual Property Office, *Automated Content Recognition: Discussion Paper – Phase 2 'IP enforcement and management use cases'* (EUIPO 2022).

⁶⁹⁶ Gray and Suzor (n 694).

⁶⁹⁷ One example of an AI-based monitoring tool is White Bullet's Intellectual Property Infringement Platform ('IPIP').

⁶⁹⁸ *ibid*; Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World' (2001) 54(1) Current Legal Problems 103, 143; Dianne Leenheer Zimmerman, 'Copyright and Social Media: A Tale of Legislative Abdication' (2014) 35(1) Pace Law Review 260, 273.

decision-making processes often happen in a ‘black box,’ or because the algorithms or rules upon which the ACR systems are trained are kept secret.⁶⁹⁹ They are not error-free and may, for example, block content that the rights holders would be fine with.⁷⁰⁰ They may also block content falling under fair dealing exceptions. But even with their flaws, they are valuable tools that will only grow in sophistication. They can aid in the enforcement and protection of at least some types of copyright work.

In fact, more content-sharing platforms are likely to adopt ACR technologies (at least in Europe, but most likely platform-wide) because Article 17 of the Digital Single Market Directive (‘DSM Directive’)⁷⁰¹ makes most for-profit online content-sharing service providers directly liable for copyright infringing content uploaded by their users, unless (a) the service provider obtains authorisation from the copyright owner, or (b) made ‘best efforts’ to obtain authorisation, and makes diligent ‘best efforts’ to block unauthorised content about which rightsholders have provided them the relevant and necessary information, and acts expeditiously to disable access to and remove from their websites infringing works upon receipt of a sufficiently substantiated notice, and makes ‘best efforts’ to prevent future uploads of the content.⁷⁰² Though the Directive prohibits Member States from requiring such platforms to have a ‘general

⁶⁹⁹ Frank Pasquale, *The black box society: The secret algorithms that control money and information* (Harvard University Press 2015) 39, 95, 217; Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* (Yale University Press 2018) 124.

⁷⁰⁰ Gray and Suzor (n 694); Benjamin Boroughf, ‘The Next Great YouTube: Improving Content ID to Foster Creativity, Cooperation, and Fair Compensation’ (2015) 25(1) *Albany Law Journal of Science and Technology* 95, 108-109.

⁷⁰¹ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130 (DSM Directive), art 17.

⁷⁰² *ibid*, art 17(4).

monitoring obligation,⁷⁰³ platforms are likely to adopt ACR technologies to try to ensure they are not liable under the DSM Directive and also use ACR systems for general monitoring.⁷⁰⁴

An additional development was the introduction of injunctive remedies against service providers who have actual knowledge (which includes knowledge obtained upon notification by the copyright owner) of another person using their service to infringe copyright.⁷⁰⁵ Such injunctions are usually obtained against Internet Service Providers (ISPs) to block access by their subscribers to websites containing or giving access to infringing content.⁷⁰⁶ This includes their subdomains, IP addresses and any other URLs notified to the ISPs that enable access to the website.⁷⁰⁷ Injunctions have also been obtained against ‘stream ripping’ websites – websites through which audio or video content on streaming services (like YouTube)⁷⁰⁸ are converted by their users into permanent audio or video files, which can be downloaded, stored or shared with others,

⁷⁰³ *ibid*, art 17(8).

⁷⁰⁴ Although the UK is not bound by the Directive, platforms offering content-sharing services across Europe have to comply with the requirements. So, practically, the requirements of the DSM Directive impact the UK as well.

⁷⁰⁵ CDPA 1988, s 97A (inserted by the Copyright and Related Rights Regulations 2003 on 31st October 2003); *Young Turks Recordings Ltd & Ors v British Telecommunications Plc & Ors* [2021] EWHC 410 (Ch) [87]-[88] (on knowledge and notice).

⁷⁰⁶ See, for example, *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch), [2015] 1 All ER 949; *Matchroom Boxing Ltd & Anor v British Telecommunications Plc & Ors* [2020] EWHC 2868 (Ch); *EMI Records Ltd & Ors v British Sky Broadcasting Ltd & Ors* [2013] EWHC 379 (Ch), [2013] Bus LR 884; *Dramatico Entertainment Ltd & Ors v British Sky Broadcasting Ltd & Ors* [2012] EWHC 268 (Ch), [2013] Bus LR D24; *Twentieth Century Fox Film Corp & Ors v British Telecommunications Plc* [2011] EWHC 1981 (Ch), [2012] 1 All ER 806; *Football Association Premier League Ltd (FAPL) v British Sky Broadcasting Ltd & Ors* [2013] EWHC 2058 (Ch), [2013] ECDR 14; and *Paramount Home Entertainment International Ltd & Ors v British Sky Broadcasting Ltd & Ors* [2013] EWHC 3479 (Ch), [2014] ECDR 7. See, also, the ECJ’s decision in *Case C-314/12 UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH* [2014] OJ C151/2.

⁷⁰⁷ *FAPL* (n 706) [58].

⁷⁰⁸ *Young Turks* (n 705)

effectively bypassing the technological protection measures (TPMs) in place on streaming services to prevent or limit downloads of the content.⁷⁰⁹ Injunctions against service providers do not *require* a finding of liability for the infringement on the part of the service provider.⁷¹⁰ But service providers are held accountable, regardless of fault, because they had been causally implicated in the infringement.⁷¹¹

Arnold J (as he was then) considered the effectiveness of such injunctions against service providers in relative detail in *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors*.⁷¹² There, based on evidence of UK and global internet traffic to websites subject to (previous) section 97A orders, Arnold J noted that the UK data showed a ‘marked and sustained drop in traffic’ to such websites after section 97A orders were implemented (mostly between January 2013 and July 2014),⁷¹³ whereas the global data (excluding the UK) did not show anything like that.⁷¹⁴ The evidence in *Cartier* also showed that for the period between January 2013 and May 2014, while there was a significant decrease in UK traffic (-71.2%) to blocked websites in the top 100 illegal video streaming link websites on the Incopro Database,⁷¹⁵ there was also a greater increase in UK traffic (146%) to non-blocked websites compared to the rest of

⁷⁰⁹ *Young Turks* (n 705).

⁷¹⁰ Martin Husovec, *Injunctions Against Intermediaries in the European Union: Accountable but not liable?* (CUP 2017) 10, 14. Although a finding of liability is not required, they may, in some circumstances, be jointly liable. See, *ibid*.

⁷¹¹ Husovec (n 710) 10, 14.

⁷¹² *Cartier* (n 706).

⁷¹³ *ibid* [221].

⁷¹⁴ *ibid*.

⁷¹⁵ *ibid* [59]: ‘Incopro maintains a regularly updated database of almost 10,000 websites which provide access to copyright-protected content. This database is used to identify IP addresses and domain names for targeted websites when the application is filed.’

the world (67.6%) suggesting that a significant percentage of those who had been accessing blocked websites simply moved to different websites that were not blocked.⁷¹⁶ The court did note this but concluded that section 97A orders had resulted in a decrease in the overall level of infringement in this sector in the UK because the overall *increase* in the UK in the use of such websites for the period was lower (10.6%) than for the rest of the world (51%).⁷¹⁷

The court also pointed out that the fact that section 97A orders can be easily circumvented did not necessarily mean such *injunctions* were ineffective. In Arnold J's words, '[n]o doubt it is the casual, inexperienced or lazy users who stop visiting those websites, whereas the experienced and determined users circumvent the blocking measures; but that does not mean that it is not a worthwhile outcome.'⁷¹⁸ Arnold J's conclusions on these points were supported by the Court of Appeal⁷¹⁹ and were not appealed to the Supreme Court.⁷²⁰ What is, therefore, clear from Arnold J's decision is that injunctions against service providers are accepted by the courts to be effective in reducing infringements, at least in the case of 'casual, inexperienced or lazy users.'

A paper by the European Commission's Joint Research Centre *partially* supports the view that such injunctions are effective, at least in the context of

⁷¹⁶ *ibid* [228].

⁷¹⁷ *ibid*.

⁷¹⁸ *ibid* [236].

⁷¹⁹ *Cartier International AG v British Sky Broadcasting Ltd* [2016] EWCA Civ 658, [2017] 1 All ER 700 [179]-[181].

⁷²⁰ *Cartier International AG & Ors v British Telecommunications Plc & Anor* [2018] UKSC 28, [2018] 4 All ER 373 [5].

unlicensed streaming websites.⁷²¹ The research found that the 2011 shutdown of Germany's most popular illegal streaming website (kino.to) led to a 'significant but short-lived decrease' in the use of unlicensed video streaming websites.⁷²² They also found that the 'existence of alternative sources of unlicensed consumption ... resulted in relatively limited substitution into licensed consumption' and that 'the rapid emergence of new copyright-infringing platforms let the movie streaming piracy market to recover quickly' from the shutdown.⁷²³ So, web-blocking injunctions are effective if we consider the short-term effects. But, without further steps being taken to either block other sources of infringing content or to convert the consumers to licensed sources, the long-term effectiveness of such injunctions is questionable.

The availability of private law remedies will undoubtedly affect the number of instances of copyright infringements, as the discussion on injunctions against service providers showed. Private law remedies may usually be effective where the infringement involves one identifiable infringer who is pecunious or a few identifiable infringers who are pecunious, and the infringement relates to a work or several works of a copyright owner on a low scale, even where it is done intentionally.⁷²⁴ The copyright owner could sue the infringer(s), obtain damages, or an account of profits, along with an injunction to prevent future infringements. They may also recover 'additional

⁷²¹ Luis Aguiar, Jörg Claussen and Christian Peukert, *Online Copyright Enforcement, Consumer Behavior, and Market Structure* (European Commission 2015) 4, 22.

⁷²² *ibid* 22.

⁷²³ *ibid* 22-23.

⁷²⁴ Owner here captures joint owners as well.

damages.’ This will especially be true where the infringer infringes copyright by mistake of fact.⁷²⁵

However, where an infringer intentionally communicates *several* copyright works of different copyright owners, the viability or effectiveness of private law remedies is less clear. Persons distributing works of several different copyright owners are likely to have ulterior motives (e.g. gaining a profit) or have some moral flaw or belief (e.g. a form of disrespect to copyright owners, or the copyright system) that civil remedies may not effectively remedy.⁷²⁶ In fact, private law remedies may not suffice to cover the losses because such an infringer may be impecunious. He may not make enough money from the infringements or otherwise.⁷²⁷ Even where he makes money from copyright infringements, it may be hard to distribute the money fairly amongst the different copyright owners, especially because such wrongdoers are unlikely (assuming if it were possible) to keep records of how much they made from each work or the precise amounts of infringements that took place. Additionally, where a copyright pirate is motivated by things other than money (e.g., fame or some type of Robin Hood complex), private law remedies may not be a sufficient deterrent. Moreover, even if an injunction is issued against service providers (who are, in most cases, ‘innocent intermediaries’), copyright infringers are likely to simply change their

⁷²⁵ This will, however, not include ignorance of law.

⁷²⁶ This is not to say that an individual person distributing works of a single copyright owner may not have an ulterior motive like financial gain. But it is *more likely* that such a person may do it by mistake, unlike someone who distributes works of different authors.

⁷²⁷ Buccafusco and Masur (n 38) 310.

domain, or hosting, or create proxies or other methods of giving access infringing content precisely because they have ulterior motives in carrying out the infringements.

Additionally, just as recent technological developments have aided the enforcement of copyright and related rights, such technologies are also utilised by bad-faith actors and cybercriminals. For instance, soon after the launch of ChatGPT came its malicious cousins, WormGPT and FraudGPT – generative AI tools created specifically for malicious activities without the ethical limitations placed on ChatGPT (which can be circumvented with the ‘right’ prompts).⁷²⁸ Such tools can teach cybercriminals more techniques to prevent the detection of their unlawful activities and develop additional tools for similar purposes.⁷²⁹ In the context of copyright infringements, using such sophisticated techniques to hide infringers' identities or remove digital watermarks can seriously hamper private law and administrative remedies (and even criminal ones), especially where copyright owners do not have much financial or technical resources.

The feasibility of using private law remedies becomes even less clear when several people separately infringe the works of a single copyright owner or collectively infringe the works of different copyright owners. Where multiple wrongdoers are concerned, there may be considerable evidentiary difficulties regarding who caused how much harm.⁷³⁰ And, not every claimant will have the resources (i.e. money, time,

⁷²⁸ Intellectual Property Crime Project, *Generative Artificial Intelligence: The impact on intellectual property crimes* (European Union Agency for Criminal Justice Cooperation (Eurojust) 2023) 22-25.

⁷²⁹ *ibid.*

⁷³⁰ We can observe the difficulties the law faces in awarding damages where there are multiple wrongdoers, but no evidence on who caused how much harm or risk, in popular tort law cases like *Barker*

or energy) to go after *everyone* communicating their works to the public without authorisation. It is not fair to expect them to do so.⁷³¹ Furthermore, even if a claimant or several claimants sue some key figures who are involved in the infringement of their copyright works, it is unlikely that they will get an appropriate remedy because those who are not targeted are likely to continue the activity. Civil remedies are, thereby, insufficient to deter such instances of copyright infringement.⁷³²

So, there are cases of copyright infringements where private law remedies *can* be sufficient. And there are cases where civil remedies *cannot* suffice. There may also be cases where one could *plausibly* argue both ways because they lie on the borderline. We should criminalise conduct only if private law remedies and the other alternatives discussed above *clearly* do not suffice.

Effectiveness of the suite of alternatives

As we saw when looking at the development of criminal copyright provisions in the UK, many of the criminal copyright provisions were introduced and extended because of technological developments, such as photolithography, photography, videography, sound recording, the invention of computers, and the internet, that made it cheaper, faster, and easier to copy and distribute copyright works *at scale*, which in

v Corus [2006] UKHL 20, [2006] 2 AC 572 and *Fairchild v Glenhaven Funeral* [2002] UKHL 22, [2003] 1 AC 32.

⁷³¹ Baker, *The Right Not to be Criminalized: Demarcating Criminal Law's Authority* 75: 'There is also a continuum of fairness of enforcement, because in some cases as a matter of justice and/or practicality it would be unfair to ask individuals to take action to police harm that affects our collective interests more than it does our personal interests.'

⁷³² Trotter Hardy, 'Criminal Copyright Infringement' (2002) *William & Mary Bill of Rights Journal* 305, 314.

turn reduced the effectiveness of the available civil remedies.⁷³³ Technological advancements made it easier for almost anyone to copy someone else's work without incurring the same costs as the author of the work. This meant that almost anyone could easily infringe someone else's copyright. We saw that with the invention of photolithography, the piracy of sheet music became common.⁷³⁴ Copyright owners attempted to respond to this through injunctions and other private law remedies. But, as we saw, these remedies were not perceived to be effective. Injunctions were quickly breached, and the infringers were often impecunious. We also saw that the consequence of the ineffectiveness of the civil remedies was the decision of music publishers to resort to 'self-help' remedies outside the law, resulting in the Parliament ultimately enacting the criminal copyright provisions in the Musical Copyright Act 1906.⁷³⁵

Lessons can be learned, and analogies can be drawn from such events of the past. Today, almost any copyright work can be copied and distributed by anyone at less than a fraction of the cost, if any cost is involved at all, using everyday technologies. The possibility of infringement is undoubtedly high.

This leads us to the key question: Is the suite of private law remedies and tools, together with the administrative actions in the UK today, effective in protecting the authors' labour and the reliability of the copyright system? In other words, is the recognition of a copyright tort or copyright torts⁷³⁶ and providing private law

⁷³³ See the discussion on pp 80-87, 89-101 (above).

⁷³⁴ See, p 80 (above).

⁷³⁵ *ibid.*

⁷³⁶ Patrick R Goold, 'Unbundling the "Tort" of Copyright Infringement' (2016) 102(8) *Virginia Law Review* 1833.

remedies⁷³⁷ alongside administrative measures and educating the public an effective solution to protect the fundamental welfare interests at stake? The difficulty in answering this question is that we already have criminal copyright provisions in force. And disentangling the impacts of one or two from the others is impossible.

There is no doubt that the suite of alternatives reduces infringements and can be highly effective against some types of infringements. For example, the requirements in Article 17 of the DSM Directive⁷³⁸ would certainly lead to the reduction of infringements on content-sharing websites, such as Facebook, YouTube, and the like, that intend to comply with the law in good faith. But even with the existence of criminal copyright provisions, a suite of private law remedies and tools, administrative measures that are growing in sophistication, and educational campaigns, copyright infringements occur at a relatively high rate in the UK, as the studies and surveys discussed in Chapter 3 showed.⁷³⁹ We saw that in the 12th wave of the online infringement tracking study, the average level of online copyright infringement among consumers of digital copyright works in the UK was 32%.⁷⁴⁰ We also saw that by the end of 2022, the average internet user in the UK accessed unlicensed content at least

⁷³⁷ *ibid*; Kamiel Koelman and Bernt Hugenholtz, *Online Service Provider Liability for Copyright Infringement* (WIPO 1999) 9-10; Patrick R Goold, 'Is Copyright Infringement a Strict Liability Tort?' (2015) 30(1) *Berkeley Technology Law Journal* 305; Shyamkrishna Balganesh, 'Copyright as Market Prospect' (2018) 166 *University of Pennsylvania Law Review* 443, 446.

⁷³⁸ DSM Directive, art 17. See, p 201 (above).

⁷³⁹ The discussion on pp 153-163 showed that the rate of online copyright infringements in the UK is high.

⁷⁴⁰ UK IPO (n 527).

ten times a month through streaming, downloading, torrenting or stream ripping.⁷⁴¹

The majority of this is likely to be via pirate platforms.

Specific statistics on the rate of ‘physical’ or non-digital copyright infringements in the UK are limited primarily because statistics that relate to physical goods that infringe copyright are often combined with those of physical goods that infringe trade marks, together referred to in most statistical publications and studies as ‘counterfeit’ goods.⁷⁴² The data available, therefore, is largely unhelpful. But what we can say is that the OECD and the UK IPO estimated that the value of counterfeit and pirated goods imported into the UK in 2016⁷⁴³ accounted for as much as £13.6 billion.⁷⁴⁴ This suggests that the rate of physical copyright infringements may also be high.

⁷⁴¹ European Union Intellectual Property Office, *Online Copyright Infringement in the European Union: Films, Music, Publications, Software and TV (2017-2022)* (n 539) 36.

⁷⁴² UK Intellectual Property Office, *IPO Counterfeit Goods Research* (n 599): ‘Throughout the surveys the following definition was used when asking about counterfeit (i.e. “fake” or “replica”) products: By this we mean items that look very much like the original product but are not made by the brand itself’; This is understandable since such goods may infringe both copyright and trade mark.

⁷⁴³ This is the latest assessment available at the time of writing.

⁷⁴⁴ IP Crime Group, *IP Crime and Enforcement Report 19/20* (n 655) 1; OECD and UK Intellectual Property Office, *Trade in Counterfeit Products and the UK Economy 2019 Update* (OECD 2019) 4.

When we look at the Ministry of Justice's statistics on the conviction rates under the criminal copyright provision in the CDPA 1988, which have applied to various intentional or reckless 'supplying' infringements (whether with a commercial purpose or not) since the enactment of the CDPA 1988, we see the following trend between 2002 and 2023.

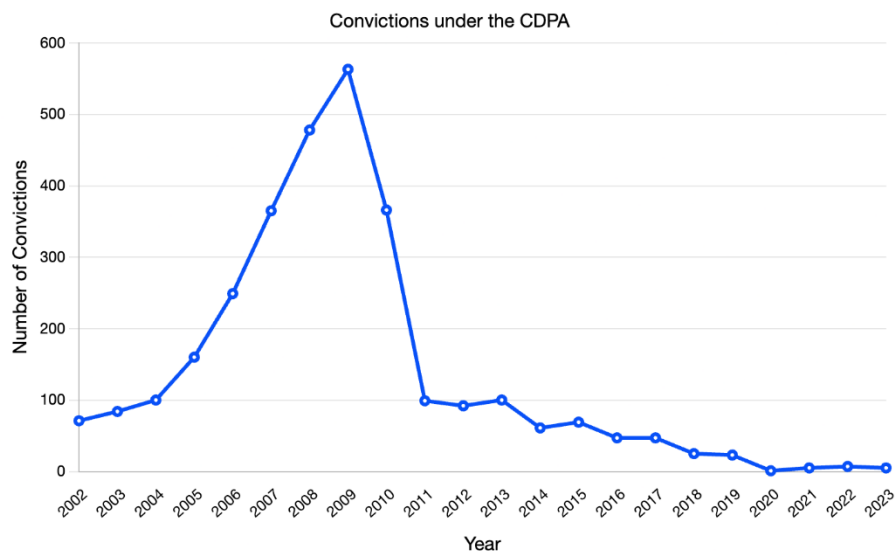


Diagram 3: Convictions under the CDPA 1988
Data Sources: IP Crime Group,⁷⁴⁵ and the Ministry of Justice⁷⁴⁶

While the conviction of just 1 in 2020 is an outlier and a consequence of the impact of COVID-19 on the processing of legal proceedings and the ability to mount investigative operations,⁷⁴⁷ what seems apparent is that since 2020, convictions under the CDPA

⁷⁴⁵ IP Crime Group, *IP Crime Annual Report 2013/14* (n 644) 19; IP Crime Group, *IP Crime Report 2015/16* (IP Crime Group 2016) 12; IP Crime Group, *IP Crime and Enforcement Report 19/20* (n 655) 14.

⁷⁴⁶ Ministry of Justice, 'Criminal Justice System Statistics: Outcomes by Offence data tool - Year ending June 2010 to year ending June 2024' (*Ministry of Justice*, 2024) <<https://assets.publishing.service.gov.uk/media/673dc6296d3c337b80acc483/outcomes-by-offence-june-2024.xlsx>> accessed 10 December 2024.

⁷⁴⁷ *ibid* 21.

1988 have been low. In fact, the number of proceedings brought under the copyright offences in the CDPA 1988 has been notably low since July 2020. A look at the Ministry of Justice's statistics shows the following:⁷⁴⁸

	Year Ending	Total number of prosecutions for copyright crimes	Convictions
1	June 2017	53	41
2	June 2018	48	36
3	June 2019	20	13
4	June 2020	19	13
5	June 2021	3	1
6	June 2022	4	2
7	June 2023	5	5
8	June 2024	4	3

Table 2: Ministry of Justice Statistics on prosecutions under the CDPA 1988 (June 2017- June 2024)

Note: The table excludes offences such as making for sale or hire, importing, possessing or distributing articles which circumvent technological measures for copyright (e.g. unauthorised decoders).⁷⁴⁹

The aforementioned statistics may only tell part of the story, as conduct amounting to criminal copyright infringement in the UK may not necessarily have been prosecuted under the CDPA 1988.⁷⁵⁰ Some copyright crimes are prosecuted in the UK under the Fraud Act 2006,⁷⁵¹ and the common law crime of conspiracy to defraud.⁷⁵² When we look at the conviction data itself, the statistics suggest that after peaking in 2009, the

⁷⁴⁸ Ministry of Justice (n 746) – using HO Offence codes 19588 (summary offences under the CDPA); 08410 (other triable either way offences under the CDPA); 08412 (infringing copyright by communicating the work to the public).

⁷⁴⁹ CDPA 1988, ss 296, 296ZA, 296ZB.

⁷⁵⁰ Brassell (n 316) 5, 15-16, 34, 37-38, 41, 46, 57, 67, 78.

⁷⁵¹ UK Intellectual Property Office, 'Guidance: Intellectual property offences' (UK Intellectual Property Office, 01 October 2017) <www.gov.uk/government/publications/intellectual-property-offences/intellectual-property-offences> accessed 06 June 2024.

⁷⁵² See, for examples of cases prosecuted alleging conspiracy to defraud in the context of copyright crimes, *R v Anton Benjamin Vickerman* (n 567); *R v Rafiq & others* (Wolverhampton Crown Court, 14 December 2015), *R v John Trevor Dodds and Jason Richards (aka Jason Richard Graham)* (Newcastle Crown Court, 04 April 2018), *R v King & others* (Warwick Crown Court, 20 March 2019).

conviction rates under the CDPA 1988 rapidly dropped until 2011, and have been on a steady decline since. During the same period, the scope of criminal copyright provisions, the scope of private law remedies, the sophistication of enforcement tools, and the scope of administrative measures taken to counter copyright piracy have increased. And so has the complexity of the methods and tools utilised by infringers. The IP Crime Group of the UK, in its IP Crime and Enforcement Report 2020-21, notes that there were 'successful street-level operations and prosecutions, but they were more difficult to deliver and consequently, there were less of them.'⁷⁵³ They further note that '[t]he pandemic can be regarded almost as a reset button, in which the integration of online trading and activity into all aspects of IP crime was completed.'⁷⁵⁴ So, the decline in the number of convictions, per the IP Crime Group, can be attributable to the move by physical infringers to online mediums,⁷⁵⁵ and the consequent difficulties in detecting infringements and investigating them.

Additionally, criminal copyright provisions have had to be used to counter some copyright infringements or to support administrative remedies. This suggests that the suite of alternatives currently being used would not be equally *as effective* in protecting authors' labour or interest in the reliability of the social institution of copyright generally if the criminal copyright provisions did not exist. The precise type or category of infringement makes little difference to this suggestion.

⁷⁵³ IP Crime Group, *IP Crime and Enforcement Report 2020-2021* (IP Crime Group 2021) 21-22.

⁷⁵⁴ *ibid* 22.

⁷⁵⁵ IP Crime Group, *IP Crime and Enforcement Report 2016/17* (IP Crime Group 2017) 17.

While some alternatives can be expanded or improved upon, such as through adopting a quasi-judicial graduated response regime in the UK, there is little evidence available from jurisdictions that have such regimes to suggest that they will be equally as effective as criminal copyright provisions in targeting intentional infringers of copyright or copyright pirates.⁷⁵⁶ Some alternatives, such as the PIPCU's various operations, depend on the criminal copyright provisions, though this can be remedied through legislation empowering the PIPCU to take administrative measures even without criminal copyright provisions. But how effective they would be without the threat of criminal punishment is debatable.

The suite of alternatives is perhaps only likely to be effective against some consumer infringements and some 'supplying' infringements. The 12th wave tracker survey by the UK IPO split consumer infringers into three groups: (a) those with moral concerns about using unofficial (unlicensed) sources; (b) those with malware-related concerns; and (c) those with no substantial concerns about using unofficial sources.⁷⁵⁷ The alternatives may effectively deter consumers with moral concerns and some consumers with malware-related concerns. As for non-commercial 'supplying' infringements, the intentions behind such infringements may vary widely. The suite of alternatives is likely to be effective against those without 'bad faith intents.' To borrow Arnold J's phrase, '[i]t is the casual, inexperienced or lazy users'⁷⁵⁸ against whom the

⁷⁵⁶ Primavera De Filippi and Danièle Bourcier, "'Three-Strikes' Response to Copyright Infringement: The Case of HADOPI" in Francesca Musiani and others (eds), *The Turn to Infrastructure in Internet Governance* (Palgrave-Macmillan 2016) 138. See also, the discussion from p 186 (above).

⁷⁵⁷ UK Intellectual Property Office, 'Executive summary Online copyright infringement tracker survey (12th Wave)'.

⁷⁵⁸ *Cartier* (n 706) [236].

alternatives are likely to be effective. The corollary is that the suite of alternatives is unlikely to be effective against ‘experienced and determined’⁷⁵⁹ consumers of infringing works, nor against infringers ‘supplying’ infringing content with ‘bad faith intents,’ nor against infringers intending to make a commercial gain or intending to cause a loss because such infringers have other goals, determinations, or motivations. The suite of alternatives will likely drive such infringers to find alternative ways to continue their conduct.⁷⁶⁰ With this in mind, I will now move on to analysing the fairness and proportionality of criminalising the infringements under consideration.

4.2. IS THE CRIMINALISATION UNFAIR OR DISPROPORTIONATE?

In this context, fairness refers to whether it is fair or just to impute to the infringer’s conduct the harms to the fundamental welfare interests.⁷⁶¹ We are looking to see whether the consequences to the interests resulting from the infringer’s conduct can be fairly attributed to the infringer’s actions.⁷⁶² Proportionality, which is distinct but closely related, refers to whether the criminalisation corresponds approximately to the wrongdoer’s blameworthiness.⁷⁶³ The CJEU, in dealing with a Bulgarian criminal provision on repeated trade mark infringements that provided for a prison sentence of

⁷⁵⁹ *ibid.*

⁷⁶⁰ Filippi and Bourcier, “‘Three-Strikes’ Response to Copyright Infringement: The Case of HADOPI” (n 756) 138.

⁷⁶¹ Andrew von Hirsch, ‘Extending the Harm Principle: ‘Remote’ Harms and Fair Imputation’ in Andrew Simester and Anthony Terry Hanmer Smith (eds), *Harm and Culpability* (Oxford University Press 1996) 265, 269; Simester and von Hirsch (n 379) 59.

⁷⁶² *ibid.*

⁷⁶³ Tadros, *Wrongs and Crimes* (n 423) 161-162; R A Duff and others (eds), *The Trial on Trial: Volume 3 - Towards a Normative Theory of the Criminal Trial* (Bloomsbury Publishing 2007) 191-194.

five to eight years, along with a fine of between BGN 5000 to BGN 8000 and confiscation orders, commented on the importance of proportionality of criminal punishment. The court noted that ‘the punitive measures permitted under national legislation must not go beyond what is necessary in order to attain the objectives legitimately pursued by that legislation’⁷⁶⁴ and that ‘[t]he severity of the sanctions must be commensurate with the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely deterrent effect, while not going beyond what is necessary to attain that objective.’⁷⁶⁵ Though the decision itself is not binding on the UK now, the principles that underlie it – that of proportionality of the punishment to the offender’s conduct – are relevant to the normative framework developed in this thesis. Here, I consider whether attaching criminal liability to the categories of infringements under consideration is fair and proportionate.

Copyright infringements that intend to make commercial gains or cause losses involve deliberate efforts to exploit or free-ride on authorial labour for financial benefits or to harm authors and the reliability or dependability of the social institution of copyright. Such infringements are ‘wrongs that manifest a disrespect for the value[s] violated’ and show an ‘unwillingness to be guided by the value[s] violated.’⁷⁶⁶ When we consider the interest in protecting authorial labour, infringements with the intent to make a commercial gain or to cause losses have direct negative consequences on the interest. The clear intent of such infringers to violate the interests of the copyright

⁷⁶⁴ Case C-655/21 *G ST T* ECLI:EU:C:2023:791 [65].

⁷⁶⁵ *ibid.*

⁷⁶⁶ Lamond, ‘What is a Crime?’ (n 560) 629.

owners for financial benefit or malicious purposes, and the fact that they will necessarily be competing with or restricting the rights of authors, leaves little room to argue that infringers should not be responsible for the consequences of such infringements on the interests.

When we look at such infringements with a focus on the interest in the reliability of the social institution of copyright, however, the story is not as straightforward because, as we saw earlier,⁷⁶⁷ the positive *prima facie* case for their criminalisation rests on the existence of the harm or the high risk of harm to the reliability or dependability of the social institution. So, one might question whether it is fair to hold a person infringing copyright with the intent to make a commercial gain or to cause losses criminally liable where, despite the intent, the infringer fails to generate profits or cause losses. The response to this challenge is that, despite the failure to achieve the infringer's intent, there is an infringement of copyright with the intent to make a commercial gain using someone else's copyright work or to cause losses. Even where the infringer's intent is not achieved, infringing copyright to make a commercial gain or cause losses could harm the social institution's dependability for some authors and others whose lives are organised around the institution. The risk of the harm materialising does not disappear even if the infringer's intent is not achieved in a specific instance.⁷⁶⁸ That is not all. There appear to be no factors that alter the moral blameworthiness of such infringers' conduct from those who succeed in achieving their

⁷⁶⁷ See the discussion on p 157.

⁷⁶⁸ See the discussion on the cumulative effect in the next paragraph.

intent.⁷⁶⁹ Both categories of infringers engage in the same conduct, with the same intent. The reasons not to engage in the conduct, which the infringers ignore and act against, are the same in both categories.⁷⁷⁰ Given that the moral blameworthiness is the same, it would be odd to say that it is fair to criminalise if one succeeds in achieving the intended goals, but unfair if one fails to do so. Fair labelling principles may require the creation of two separate criminal offences to accommodate the different outcomes⁷⁷¹ – but that does not affect the answer to whether the criminalisation of such conduct is fair.

A sceptic might also argue that if we focus on the interest in protecting the dependability of the social institution of copyright, the scale of the intended infringement may affect the fairness of criminalising infringement that is intended to make a commercial gain or cause losses. There is some strength in this argument. After all, the lower the scale of an individual's intentional infringement for commercial gain or to cause losses, the lower the risk of harm to the dependability of the institution. But we also need to consider the cumulative or aggregate effects of many such 'low scale' infringements on the interest. While a single low-scale infringement intending to make a commercial gain or to cause losses may not have a significant impact on the reliability of the social institution of copyright, the aggregation or accumulation of such low-scale infringements is likely to harm or risk harm to the institution. This takes us to another question of fairness – is it fair to hold one responsible for the cumulative effects of many

⁷⁶⁹ The blameworthiness of both may be affected by the intended scale of the infringement as we shall see in the next paragraph.

⁷⁷⁰ Criminal law theorists are divided on whether criminal laws should be outcome sensitive. See, for a full discussion on three different perspectives, Edwards and Simester (n 423).

⁷⁷¹ Edwards and Simester (n 423) 60-61.

similar conduct by other people? The short answer is yes. Firstly, such infringements contribute to the risk of harm to the reliability regime, even if the individual contribution to the increase in risk is relatively small. Secondly, the type of infringement is a token of the kind of conduct that *would* result in the feared harm or, at the very least, substantially increase the risk of harm to the interest in the dependability of the social institution(s) of copyright when accumulated. Thirdly, the moral content of such conduct is no different to one that results in substantial harm or a substantial increase in the risk of harm to the dependability of the regime. Finally, the *intent* to make a gain or to cause losses sets such infringements apart from other types of infringements and adds to the seriousness of such infringements of copyright. Taken together, these reasons show that it is fair to impute the accumulated impact on the interest in the dependability of the institutions of copyright to the infringers of copyright who intend to make a gain or to cause loss.

The proportionality analysis is the same for both interests. The presence and seriousness of the intents in relation to the interests being protected exclude or at least outweigh other countervailing factors in the analysis of proportionality.

‘Supplying’ infringements with no intent to make commercial gains or cause losses pose a more serious challenge when we consider the fairness and the proportionality of their criminalisation. One of the prime cases of activities falling within this category would be the case of shadow libraries, like Sci-Hub.⁷⁷² The lack of

⁷⁷² The existence of these websites and their stated motivations perhaps point to a ‘market gap’ in the publishing industry. This gap is similar to the one that existed in the music industry before we had Spotify, Apple Music, and the like, which made access to musical works cheaper and easier. The support for such websites in relation to literary works stems from the failures of the publishing industry to meet

an intent to make a commercial gain or to cause a loss⁷⁷³ generally makes such infringements less blameworthy *compared to* those committed with the intent to make a gain or cause a loss. But this may not necessarily be so in all instances of such infringements, as the facts of the *LaMacchia* case demonstrated.⁷⁷⁴

How, then, do we identify which of these non-commercial ‘supplying’ infringements have a sufficient level of blameworthiness to impute the harms to the interests identified to such infringers’ conduct? Identifying the non-commercial ‘supplying’ infringements with a sufficient level of blameworthiness that makes it fair and proportionate to impose criminal sanctions is not an exact science. But regardless of the level that one deems as ‘sufficient,’ it would require analyses of the multiple factors that make such an infringement more serious, primarily – the infringer’s intent, the value(s) of the work(s) infringed, and the scale of the infringement.⁷⁷⁵ Although the infringer may not have the intent to make a commercial gain or to cause a loss, they may still have a blameworthy goal or what I shall call a ‘bad faith intent’ that makes the infringement sufficiently blameworthy. But, a bad faith intent needs to be *almost indistinguishable* from either the intent to make a financial gain or to cause losses and

the expectations of researchers, students, and the public in having affordable and easy access to valuable literary works.

⁷⁷³ The latter is arguable, of course.

⁷⁷⁴ See the discussion on pp 167-169 (above). See, also, *R v Emmanuel Nimley* [2010] EWCA Crim 2752, [2011] 1 Cr App R (S) 120 where the infringer recorded films at cinemas and uploaded them to the internet for ‘kudos’ from friends.

⁷⁷⁵ The scale of the infringement is a factor which is also pointed in Article 61 of the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS): ‘Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity.’

be directly and seriously conflicting with the interests being protected to justify their criminalisation by such an intent alone. In most instances, 'bad faith intent' will be necessary but insufficient by itself. The second factor is the value of the works infringed. The higher the value of the work or works infringed, the greater the seriousness of the infringement. Again, the value alone will not satisfy the threshold of seriousness to warrant criminal sanctions because such infringements will still be relatively less blameworthy if the remaining factors are absent. The third factor is the scale of infringement. Where the scale of infringement increases, the blameworthiness also increases because, with the increase in scale, the disrespect shown by the infringer to the authorial labour and the risk of harm to the social institution of copyright increases. The submission here is that the criminalisation of non-commercial 'supplying' infringements is likely to be both fair and proportionate where there is a 'bad faith intention,' the value of works infringed is not *de minimis*, and the scale of the infringement is high. Where there is no bad faith intention, even if the value of the works infringed is high and the scale of infringement is high, that is still not sufficiently blameworthy. Likewise, where there is a large-scale infringement with a bad faith intent, but the works infringed are of insignificant value (even for the author), the infringement is unlikely to cross the threshold of blameworthiness necessary for fair imputation of criminal liability. Nor would their criminalisation be a proportionate response.

When we consider the fairness and proportionality of criminalising non-commercial 'consumption' infringements or *personal use* copyright infringements, we face some challenges. Perhaps the most serious consumer infringements are those

motivated by greed – intentional infringement of works that the infringer can easily access and afford to obtain legally. Arguably, criminalising such infringements is ‘fair,’ in the sense that it is fair to hold such infringers responsible for the impacts on the interest in the protection of authorial conduct, given the moral vice behind consumer infringements motivated by greed. Likewise, the impact on the social institution may be significant, especially considering the cumulative effects of all similar consumer infringements. Given the social norms of the digital world discussed earlier in Chapter 3,⁷⁷⁶ and the ease of infringement by consumers, there is a high likelihood that such infringements will occur. So, consumer infringements pose a high risk of harm to the dependability of the regime. The copyright regime establishes a balance between the rights of copyright owners and those of the consuming public. And if consumers engage in copyright infringements on a mass scale, the dependability of the regime is likely to be affected, at least from the point of view of copyright owners and those obtaining copyright work legally. And it may, arguably, be fair to impute liability to such consumer infringements.

Yet, unlike the ‘supplying’ infringements, there is a strong element of unease when it comes to punishing consumers of copyright work. Even the strongest advocates for harsh criminal punishments for copyright infringements do not normally advocate for the criminal punishment of mere consumers. This is for several reasons. One primary reason is that it is difficult to argue that criminalisation is a proportionate response against consumer infringements, even where a consumer is infringing out of greed, not least because the level of blameworthiness of consumer infringements,

⁷⁷⁶ See, pp 157-147 (above).

relative to all the other types of infringements, is low. Although the infringing consumer disrespects the authorial labour and does not pay the copyright owner to consume the work, affecting the dependability of the copyright institutions, to which some blame will attach, the infringer is not directly competing with the author. Even in the case of consumer infringements, it is the 'supplier' of the copyright work to the consumer who directly competes with the copyright owner's rights. The infringer is not exercising an exclusive right of the author or the copyright owner. So, less blame is attached to such infringements than to 'supplying' infringements.

Moreover, there appear to be several motivations and factors for consumer infringements that suggest that such infringements are not necessarily malicious. The 12th wave tracker by the UK IPO had identified some of these – the lack of legal sources for content, the lack of choice or variety of legal content, and financial reasons.⁷⁷⁷ Many who participated in the study felt that industries needed to change and provide some solutions, especially with the increasing costs of living. A 2021 EUIPO study also found that, at a macro-level, levels of inequality and income per capita⁷⁷⁸ were significant factors: where all other factors were constant, EU member states with low levels of income inequality and high income per capita had lower levels of illicit consumption of copyright content.⁷⁷⁹

⁷⁷⁷ UK Intellectual Property Office, 'Executive summary Online copyright infringement tracker survey (12th Wave)' (n 527).

⁷⁷⁸ European Union Intellectual Property Office, *Online Copyright Infringement in the European Union: Films, Music, Publications, Software and TV (2017-2022)* 11.

⁷⁷⁹ *ibid.*

These findings suggest that consumer infringements are, at least partly, the consequence of failures of the industries to meet the expectations of the public regarding the accessibility and affordability of copyright works. Humans need entertainment.⁷⁸⁰ Consuming copyright content, such as movies, television series, and games, is an essential part of modern entertainment. When legal options are perceived as unreasonable or unaffordable, consumers may turn to unauthorised sources, not out of intent to harm, but in response to practical limitations.⁷⁸¹ It has also been argued that ‘counterfeiting,’ which often involves copyright and/or trade mark infringements, is a negative corporate externality or a side effect of ‘corporate production and merchandising, including branding activity.’⁷⁸² These concerns or issues cannot simply be dismissed, especially given that copyright law attempts to balance the interests of both the public and those of copyright owners. Consumer infringements do not, generally, have an intent to make a gain or cause losses that can exclude the consideration of such factors. Consequently, resorting to criminal punishments instead of finding solutions to consumers’ legitimate concerns is not the way forward.⁷⁸³

I am not at all suggesting here that consumer infringements are ‘acceptable.’ The gist of my argument here is that consumer infringements are not sufficiently

⁷⁸⁰ Alice Marshall, *Entertainment in the Performing Arts* (Routledge 2022) 46-75; Rodman and Vanderdonckt (n 553).

⁷⁸¹ This is not just limited to entertainment. See, in the context of fashion products, Joanna Large, ‘Get real, don’t buy fakes’: Fashion fakes and flawed policy – the problem with taking a consumer-responsibility approach to reducing the ‘problem’ of counterfeiting’ (2014) 15(2) *Criminology & Criminal Justice* 169, 178-179.

⁷⁸² Simon Mackenzie, ‘Counterfeiting as corporate externality: intellectual property crime and global insecurity’ (2010) 54 *Crime, Law and Social Change* 21. See, also, David S Wall and Joanna Large, ‘Jailhouse Frocks: Locating the Public Interest in Policing Counterfeit Luxury Fashion Goods’ (2010) 50(6) *The British Journal of Criminology* 1094.

⁷⁸³ *ibid.*

blameworthy to make their criminalisation a proportionate response in light of the factors highlighted *and* the lack of direct competition with copyright owners. Even where greed is the motivation, the latter element of competition is not present.

4.3. IS THE CRIMINALISATION PRACTICAL?

A proposed criminal enactment may also be rejected if it is impractical.⁷⁸⁴ One key aspect of practicality is the affordability of the criminalisation.⁷⁸⁵ If the costs to be expended are *prohibitively* high, then a proposed enactment may be rejected, allowing funds to be redirected to strengthen the suite of alternatives. The key costs of criminalisation are enforcement costs. As the Court of Appeal noted in 2017, ‘illegal ... distribution [of copyright works] is very often difficult to investigate and detect’⁷⁸⁶ because of anonymity technologies.⁷⁸⁷ These technologies include Virtual Private Networks (‘VPNs’) that encrypt online communications and hide them even from Internet Service Providers (ISPs); and proxy servers⁷⁸⁸ that bypass ‘blocks’ placed by ISPs.⁷⁸⁹ This increases the costs of detecting copyright infringements. Enforcement costs would also include costs of prosecution, adjudication, and punishment.⁷⁹⁰

However, the scope of justifiable criminalisation of copyright infringements is already relatively narrow in light of the discussions above. The focus here is not on

⁷⁸⁴ *Simester and others* (n 425) 664.

⁷⁸⁵ *ibid.*

⁷⁸⁶ *R v Wayne Evans* [2017] EWCA Crim 139, [2018] 4 WLR 140 [22] (Davis LJ).

⁷⁸⁷ *ibid.*

⁷⁸⁸ *ibid* [3].

⁷⁸⁹ *ibid* [3].

⁷⁹⁰ *Manta* (n 38) 516.

downloaders of unauthorised copyright works.⁷⁹¹ The focus here is on infringements for commercial gain, infringements that intend to cause a loss, and ‘supplying’ infringements of works of some value that are carried out on a large scale with a bad-faith intent. In principle, the enforcement costs of criminalisation of these types of copyright infringement are unlikely to be *prohibitively* high because the number of people involved in such forms of copyright infringement is unlikely to be too high.⁷⁹² And even where the numbers are high, there are many ways that a state can reduce enforcement costs. The detection costs can, for example, be reduced through public awareness campaigns, such as setting up an online portal where the public can report copyright infringements anonymously, and by incentivising people to do so through coupons and vouchers,⁷⁹³ or using other innovative methods. Moreover, owners of domains or services that ‘supply’ infringing copies of copyright work can be identified *relatively* more easily than the consumers of such work, particularly if the source can be identified through payment services, or where online domains are involved, through domain name registrars, the ICANN,⁷⁹⁴ or ISPs. So, in principle, the costs of criminalising copyright infringements with the intent to make a commercial gain or to cause losses, and the criminalisation of the types of ‘supplying’ infringements I have identified are unlikely to be prohibitively high.

⁷⁹¹ Criminalisation of downloaders will be impractical because that would require extensive resources and incur prohibitively high costs.

⁷⁹² Buccasfusco and Masur (n 38) 310.

⁷⁹³ This is done in South Korea: BOP Consulting and DotEcon, *International Comparison of Approaches to Online Copyright Infringement: Final Report* (UK Intellectual Property Office) 4.

⁷⁹⁴ Internet Corporation for Assigned Names and Numbers, ‘Registration Data Request Service’ (ICANN, <www.icann.org/rdrs-en> accessed 25 June 2024).

4.4. UNINTENDED CONSEQUENCES AND OTHER CONSIDERATIONS

Overdeterrence or chilling effects of criminalisation

One concern with criminalisation, and indeed any regulation of conduct, is the possible inhibition or discouragement of legitimate activity. Where rules are vague, uncertain, unclear, or overly broad, people may refrain from permissible conduct because they are not sure if their activity is legal or not. The reduction of legal activity in such circumstances is called a ‘chilling effect.’⁷⁹⁵ In the context of the criminalisation of copyright infringements, it is the idea that legitimate, non-infringing activity (i.e., activities that are permitted either under a statutory exception, a statutory limitation or perhaps even a licence) may be reduced due to the criminalisation.⁷⁹⁶ Where criminal copyright provisions are perceived as ambiguous or overly restrictive, even if they are not so in reality, people may err on the side of caution.

Such effects can, however, be mitigated by ensuring that the criminal copyright provisions are clear, applied consistently, and accompanied by accessible guidance on how to comply with the law. Where individuals or organisations understand the specific conduct that constitutes infringement, criminal infringement, and the distinctions between fair dealing and unlawful copying, they are more likely to feel secure in their creative endeavours. In other words, clear, well-communicated laws that are enforced predictably and consistently can allow individuals and organisations to use copyright

⁷⁹⁵ Suneal Bedi, ‘The Myth of the Chilling Effect’ (2021) 35(1) *Harvard Journal of Law & Technology* 267-272-273.

⁷⁹⁶ Moohr (n 38) 760; Brassell (n 316) 4, 35; Bedi (n 795) 272-273; Foulser-McFarlane, ‘Copyright Damages Need To Have a Sufficient Punitive Element To Successfully Deter Infringement’ 262-271.

works legally without a paralysing fear of legal repercussions, especially that of criminal law, thereby reducing chilling effects.

In the context of having clear, well-communicated criminal copyright provisions, it is worth highlighting that copyright law has a number of vague legal standards – for example, the idea-expression dichotomy, the substantial part doctrine, and what amounts to fair dealing (or in some jurisdictions, fair use).⁷⁹⁷ Criminalisation is likely only appropriate for infringements involving literal copying of copyright works or parts of works where the issue of infringement is relatively straightforward.

Other crimes?

One might suggest that instances of copyright infringements can be dealt with under the common law crime of ‘conspiracy to defraud,’ and therefore, it is not necessary to have criminal copyright provisions. Two points can be noted in response. First, a conspiracy *requires* more than one person.⁷⁹⁸ But, even a single person can carry out commercial-scale copyright to the extent that it sets back the dependability of the copyright system and significantly affects the interest in protecting authorial labour. Secondly, there is a concern about ‘fair labelling.’ When a court sentences someone for a crime, the crime must accurately describe their actions. If the crime is copyright infringement, then we must call it copyright infringement, not something else.⁷⁹⁹ The

⁷⁹⁷ See, for a full discussion, Timothy Endicott and Michael Spence, ‘Vagueness in the Scope of Copyright’ (2005) 121 Law Quarterly Review 657.

⁷⁹⁸ *Scott v Metropolitan Police Commissioner* [1975] AC 819 (House of Lords) 840 (Viscount Dilhorne); *Bently* (n 25) 1268; *Brassell* (n 316) 16.

⁷⁹⁹ Andrew Ashworth, ‘The Elasticity of Mens Rea’ in Collin Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Rupert Cross* (Butterworths 1981) 45, 53-6; James Chalmers and Fiona Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71(2) MLR 217, 218-219.

last reason also applies to any suggestion that the issue of large-scale copyright infringements can be dealt with under the Fraud Act 2006. So, attempting to deal with instances of copyright infringements through ‘conspiracy to defraud’ or the Fraud Act 2006 is not ideal nor appropriate.

Inchoate Offences

What the normative framework deals with are principal offences. But inchoate offences exist and are a general part of criminal law in the UK and elsewhere. In the UK, it is a criminal offence to encourage or assist the commission of an offence,⁸⁰⁰ or to agree with another person or other people to commit a criminal offence,⁸⁰¹ regardless of whether it is an indictable offence or a summary offence or an offence triable either way. It is also a criminal offence to attempt an indictable offence, offences triable either way and some summary offences.⁸⁰² I will not go into whether inchoate offences are generally justifiable, and shall assume that inchoate offences of attempt, encouragement and assistance, and conspiracy are all justified. Assuming so, where conduct falling within the justifiable scope of offences that I have identified above is attempted, encouraged, assisted, or where two or more people conspire to commit such an act, there is no reason, in principle, why the inchoate offences regarding conduct falling within the justifiable scope are not equally justifiable.

⁸⁰⁰ Serious Crime Act 2007, ss 44-46.

⁸⁰¹ Criminal Law Act 1977, s 1.

⁸⁰² Criminal Attempts Act 1981, s 1.

4.5. CONCLUSIONS

The sum of the argument in this chapter is that criminalisation is preferable, fair, proportionate, and practical where the infringements are those committed with the intent to make a commercial gain, to cause losses to copyright owners or the copyright regime, and where the infringements concerned are ‘supplying’ infringements of works of some value that are carried out on a large scale with a bad faith intent. I also argued in this chapter that although it *might* be fair to impute liability on greedy consumers who infringe copyright despite being able to afford or access the work legally, the suite of alternatives is likely to suffice in dealing with such infringements, and that criminalising consumer infringements is not a proportionate response, given the lack of direct competition with copyright owners by consumers, and because consumer infringements are not blameworthy enough to warrant the response of criminal law. Moreover, I have argued here that the criminal copyright provisions must be clear, applied consistently, and accompanied by accessible guidance to ensure that there is no chilling effect on the legitimate uses of copyright works due to the criminalisation of some copyright infringements. The requirement of clarity also means that criminal copyright provisions may only be justifiable where the infringement is straightforward, primarily involving literal copying of works or parts of works. Finally, I noted that inchoate offences are justifiable if the principal offence falls within the justifiable scope and meets the standards of justifiability.

This, then, gives us the justifiable scope of criminal copyright provisions and the standards required under the framework proposed in this thesis. We can catch such

instances of copyright infringements using various combinations of rules and standards.⁸⁰³ There is no one way to do so.

⁸⁰³ Rosati (n 7) also suggests using a combination of rules and standards to criminalise obvious wrongdoers.

5

Chapter 5: The Implications of the Normative Framework on the UK's Criminal Copyright Regime

5.1. Section 107(1), CDPA 1988: offences involving making, possessing, or dealing with infringing copies	234
5.2. Section 107(2), CDPA 1988: offences in relation to articles designed for making copies of copyright works	250
5.3. Section 107(2A), CDPA 1988: communication to the public	252
Actus Reus	253
Mens rea.....	261
5.4. Section 107(3), CDPA 1988: offences in relation to public performance of works....	264
5.5. CONCLUSIONS	270

Having established the justifiability of criminal copyright provisions and the justifiable scope of criminal copyright provisions and the standards they need to meet under the normative framework, this chapter considers the implications of the normative framework on the UK's current criminal copyright provisions. I will analyse the four subsections in section 107, CDPA 1988, which contain the primary criminal copyright provisions in force in the UK today.⁸⁰⁴

⁸⁰⁴ There are other criminal provisions in the CDPA 1988. For example, section 297(1), CDPA 1988 criminalises dishonestly receiving a programme included in a broadcasting service provided from a place in the United Kingdom with intent to avoid payment of any charge applicable to the reception of the programme. As is apparent from the description of the offence, it is strictly speaking, not criminalising infringing copyright *per se*, but the fraudulent receipt of programmes to avoid paying. I limit my analysis in this chapter to the offences in s 107, CDPA 1988 for the reasons explained earlier in the introduction (see, pp 35-39).

5.1. Section 107(1), CDPA 1988: offences involving making, possessing, or dealing with infringing copies

Section 107(1), CDPA 1988 makes it a criminal offence for any person to do certain acts in relation to an article⁸⁰⁵ which is, and which the person knows or has reason to believe is, an infringing copy of a copyright work, without the licence of the copyright owner.⁸⁰⁶ The acts prohibited by section 107(1) are: (a) making for sale or hire; (b) importing into the UK otherwise than for their private or domestic use; (c) possessing in the course of a business with a view to committing any act infringing the copyright; (d) in the course of a business selling or letting for hire, offering or exposing for sale or hire, exhibiting in public or distributing; (e) and distributing otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright.⁸⁰⁷

When we apply the normative framework to this subsection, one thing is apparent. It excludes copyright infringements by those who merely consume infringing copies of copyright works. The conduct prohibited by the subsection goes well beyond mere consumption. Similarly, section 107(1), CDPA 1988 does not criminalise any

⁸⁰⁵ 'Article' has been understood to be a physical or tangible thing. See, for e.g., Gowers (n 335) 98, where a distinction is drawn between physical and online infringement, with the offences in s 107(1), CDPA 1988 being classified in the former, while the offences in s 107(2A) are classified as 'online infringements.' It certainly is the indication from the statute. cf, however, *Wayne Evans* (n 786), where the defendant pleaded guilty to two offences of 'distributing an article infringing copyright, contrary to section 107(1)(e), CDPA 1988, and an offence of possessing an article for use in fraud contrary to s6(1), Fraud Act 2006. But the facts of the case had nothing to do with a physical infringement of copyright. There, the defendant operated several websites which facilitated access to digital, infringing copies of copyright work by linking to 'torrent' websites: [3]. The reason for charging and convicting Wayne Evans under s 107(1)(e), CDPA 1988 as opposed to offences under s 107(2A), CDPA 1988 is unclear. One explanation, perhaps, is that this was not deemed an issue because the defendant pleaded guilty to the offences he was charged with. The same can be noted about *R v Manrico Toschi* [2017] EWCA Crim 141.

⁸⁰⁶ CDPA 1988, s 107(1).

⁸⁰⁷ *ibid.*

infringements where the infringer did not know or had any reason to believe they were infringing copyright (i.e., innocent infringements). The crimes defined in the subsection require the article in question to be an infringing copy of a copyright work, and that the infringer knows or has reason to believe that the article is an infringing copy.

The phrase 'has reason to believe' was subject to debate in the House of Lords before the enactment of the CDPA 1988. Lord Morton of Shuna proposed replacing 'which he knows or has reason to believe' with 'which is obvious to a reasonable person.'⁸⁰⁸ The reason for the proposal, per Lord Morton, was that 'it is almost impossible to prove what the other side subjectively may have reason to believe' ... 'especially as in a criminal case one cannot lead the individual to ask him what he may or may not believe.'⁸⁰⁹ In response, Lord Beaverbrook noted that the reason for the inclusion of the phrase 'knows or has reason to believe' was 'to relax the requirement for guilty knowledge to be proved in respect of secondary copyright and performers' rights infringements and copyright and performers' rights offences.'⁸¹⁰ He also noted that the changes to the mental element in secondary infringements and offences were aimed to discourage piracy,⁸¹¹ and that the Parliament 'must not give the pirates the loophole of being able to turn a blind eye to the facts.'⁸¹² The Copyright Act 1956 had required claimants and prosecutors to prove that the defendants knew the infringing

⁸⁰⁸ HL Deb 23 February 1988, vol 493, cols 1129-1133.

⁸⁰⁹ *ibid.*

⁸¹⁰ *ibid.*

⁸¹¹ *ibid.*

⁸¹² *ibid.*

articles were indeed infringing.⁸¹³ So, the phrase 'knows or has reason to believe' was introduced to relax the *mens rea* requirement and make it easier for claimants and prosecutors to claim against or prosecute those who turn a blind eye to the obvious. The House of Lords, ultimately, rejected Lord Morton's proposal.⁸¹⁴

The precise meaning of 'has reason to believe,' however, still needs interpretation. The courts have done so in the context of civil secondary infringements of copyright under sections 22 and 23 of the CDPA 1988, which use the same phrase. In *LA Gear Inc v Hi-Tec Sports plc*,⁸¹⁵ Morritt J explained that 'reason to believe' must involve 'knowledge of facts from which a reasonable person would arrive at the relevant belief' about the nature of the act, and that 'facts from which a reasonable person might suspect the relevant conclusion are insufficient.'⁸¹⁶ The Court of Appeal accepted Morritt J's interpretation,⁸¹⁷ and the interpretation in *LA Gear* has been applied in several subsequent decisions.⁸¹⁸ Though this is an interpretation given to the phrase in civil proceedings, there is no reason criminal proceedings would require a different interpretation, not least because the phrase was introduced together with the same goals

⁸¹³ Copyright Act 1956, ss 5, 21; *LA Gear Inc v Hi-Tec Sports plc* [1992] FSR 121, 129; We saw earlier that the Whitford Committee had been told by a 'number of interested organisations' that criminal provisions in the 1956 Act were of little use and little used because of the difficulties of proving 'guilty knowledge.' See, pp 90-93 (above).

⁸¹⁴ HL Deb 23 February 1988, vol 493, cols 1129-1133.

⁸¹⁵ *LA Gear* (n 813) 129.

⁸¹⁶ *ibid*; A similar approach is taken in cases involving the offence of handling stolen goods under section 22 of the Theft Act 1968. Mere suspicion is insufficient to establish belief that goods are stolen. See, in this context, *R v Adinga (Larry Ribadu)* [2003] EWCA Crim 3201 [24]; *R v Elizabeth Forsyth* [1997] 2 Cr App R 299 (CA) 318.

⁸¹⁷ *LA Gear* (n 813) 138.

⁸¹⁸ See, for e.g., *ZYX Music GmbH v Chris King and Others* [1995] EMLR 281 (Lightman J) 294; *Springsteen v Flute International Limited and Others* [1999] EMLR 180 (Ferris J) 229; *Pensher Security Door Co Ltd v Sunderland City Council* [2000] RPC 249 (CA) 268, 281-284; *Nouveau Fabrics Limited v Voyage Decoration Limited, Dunelm Soft Furnishings Limited* [2004] EWHC 895 (Ch) (Mann J) [47].

and is precisely the same in sections 107(1), 22, and 23. So, to convict someone of a crime under section 107(1), CDPA 1988, a prosecutor would need to prove either that the defendant knew that the article was an infringing copy of copyright work, or that the defendant knew of certain facts based on which a reasonable person would have formed the belief that the article in question was an infringing copy of a copyright work. This is the *mens rea* element of the offences under section 107(1), CDPA 1988.

One might rightly question whether it is necessary to have a separate strand of interpretation of 'knowledge' or related concepts for crimes under the CDPA 1988, because 'knowledge' and its associated concepts are well-known to criminal law generally. As we saw above, the Parliament's primary concern was the possibility of defendants turning a blind eye to the obvious and escaping liability. They also intended to make it easier to prosecute copyright crimes, which aligns with the Whitford Committee's recommendations.⁸¹⁹

If we look at the judicial understanding of 'knowledge' in criminal law, even back in 1988, the issue of defendants escaping liability by turning a blind eye to the obvious appears to be a non-issue. About two years *before* the CDPA 1988 was enacted, the House of Lords in *Westminster City Council v Croyalgrange Ltd*, stated that⁸²⁰

... it is always open to the tribunal of fact, when knowledge on the part of a defendant is required to be proved, to base a finding of knowledge on *evidence that the defendant had deliberately shut his eyes to the obvious or refrained from inquiry because he suspected the truth but did not want to have his suspicion confirmed*. (emphasis added)

⁸¹⁹ Whitford (n 282) 180-182. I discussed the Whitford Committee's findings and recommendations in Chapter 2. See, pp 89-95 (above).

⁸²⁰ *Westminster City Council v Croyalgrange Ltd* [1986] 1 WLR 674 (HL).

What the House of Lords described there is now commonly referred to as the 'doctrine of wilful blindness',⁸²¹ which has featured in English criminal law since *at least* 1861⁸²² under labels like 'connivance', 'second degree knowledge',⁸²³ and 'blind-eye knowledge'.⁸²⁴ Devlin J notes in *Taylor's Central Garages (Exeter) v Roper*⁸²⁵ that knowledge can be of three types: (i) actual knowledge; (ii) knowledge of a second degree (i.e., shutting one's eyes to an obvious means of knowledge); and (iii) constructive knowledge (i.e., what is encompassed by the words 'ought to have known' in the phrase 'knew or ought to have known'). He then explained the difference between 'knowledge of a second degree' and 'constructive knowledge' in the following terms:⁸²⁶

There is a vast distinction between a state of mind which consists of deliberately refraining from making inquiries, the result of which the person does not care to have, and a state of mind which is merely neglecting to make such inquiries as a reasonable and prudent person would make.

Courts generally assess or infer 'knowledge' from the circumstances and evidence unless there is an admission by the accused.⁸²⁷ 'Wilful blindness' is sometimes

⁸²¹ Simester and others (n 425) 157-158.

⁸²² *R v Sleep* (1861) 169 ER 1296 (Crown Court) (Willes J) 174: '... the jury have not found the prisoner either knew that the goods were government stores or willfully shut his eyes to the fact.' See, also, *Lee v Taylor and Gill* (1912) 77 JP 66 (Divisional Court) (Lord Alverstone CJ) 69: '... the magistrate in dismissing this case has not given effect to his finding that these people who ought to have known were shutting their eyes to what they ought to have known and were thereby conniving at what was going on.'

⁸²³ John Edwards, 'The Criminal Degrees of Knowledge' (1954) 17(4) *The Modern Law Review* 293, 298-300.

⁸²⁴ *R v Peter Hunter, David Thomas Smith* [2021] EWCA Crim 1785, [2023] QB 1 [127].

⁸²⁵ *Taylor's Central Garages (Exeter) v Roper* [1951] 2 TLR 284 (Divisional Court) 288-289.

⁸²⁶ *ibid.*

⁸²⁷ See, *RCA Corporation v Custom Cleared Sales Pty Ltd* [1978] FSR 576 (Supreme Court of New South Wales) 578-579, cited with approval in *Hoover plc v George Hulme (Stockport)* [1982] FSR 565 (Chancery Division) 578-579; Larry C Wilson, 'The Doctrine of Wilful Blindness' (1979) 28 *University of New Brunswick Law Journal* 175, 175.

equated with actual knowledge⁸²⁸ because, as the House of Lords in *Croyalgrange*⁸²⁹ stated, *a finding of knowledge* can be based on evidence that the defendant suspected the truth and closed their eyes to the obvious. It also follows that shutting one's eyes to the obvious may not suffice for such a finding in some circumstances. In the words of James LJ in *R v Griffiths*,⁸³⁰ (a case about the offence of handling stolen goods under the Theft Act 1968):⁸³¹

To direct the jury that the offence is committed if the defendant, suspecting that the goods were stolen, deliberately shut his eyes to the circumstances as an alternative to knowing or believing the goods were stolen is a misdirection. To direct the jury that, in common sense and in law, they may find that the defendant knew or believed the goods to be stolen because he deliberately closed his eyes to the circumstances is a perfectly proper direction.

In the copyright context, in *Hoover v George Hulme (Stockport)*,⁸³² Whitford J relied on the Supreme Court of New South Wales' opinion in *RCA Corporation v Custom Cleared Sales Pty Ltd*⁸³³ that

... the true position is that the court is not concerned with the knowledge of a reasonable man but is concerned with reasonable inferences to be drawn from a concrete situation as disclosed in the evidence as it affects the particular person whose knowledge is in issue.

Wilful blindness is a key and relevant factor in the assessment of a particular person's knowledge in a concrete situation.

⁸²⁸ *R v Mohammed Abdi Godir* [2018] EWCA Crim 2294, [2019] Lloyd's Rep FC 207 [16].

⁸²⁹ *Croyalgrange* (n 820).

⁸³⁰ *R v Griffiths* (1974) 60 Cr App R 14 (CA) 18.

⁸³¹ Theft Act 1968, s 22.

⁸³² *Hoover plc v George Hulme (Stockport)* (n 827).

⁸³³ *RCA Corporation v Custom Cleared Sales Pty Ltd* (n 827).

When we apply the ‘doctrine of wilful blindness’ to the knowledge requirement under the Copyright Act 1956⁸³⁴ and compare it to Morritt J’s interpretation of the phrase ‘has reason to believe’ in the CDPA 1988 as being aware of ‘facts from which a reasonable person would arrive at the relevant belief,’ we see clear differences. One key difference is that the approach under the doctrine of wilful blindness is a subjective one – it examines the individual’s intent or choice to avoid learning the truth. The focus is on the accused’s actual mental state. On the other hand, whether the accused ‘has a reason to believe’ that a work is infringing copyright is an objective assessment. The threshold of culpability is higher under the doctrine of wilful blindness. There is also the difference between ‘knowing’ and ‘believing.’ In some (if not most) situations, the practical result of both approaches might be the same. Morritt J himself appears to recognise that when he asserted the following in *LA Gear*:⁸³⁵

Parliament has seen fit to include these words anew and it seems to me that they must be applied in accordance with their meaning and proper construction and effect. *If, so construed and applied, it reaches the same conclusion as the authorities under the 1956 Act on knowledge, so be it*, but one should not, it seems to me, approach the words “reason to believe” with a preconception that they in fact comprehend the same as and no more than imputed knowledge under the 1956 Act. (emphasis added)

The analysis here suggests that Parliament’s objective of ensuring defendants do not escape liability by shutting their eyes to the obvious was already achieved. But, introducing the phrase ‘has reason to believe’ lowers the threshold to be met to fulfil the

⁸³⁴ Copyright Act 1956, s 21.

⁸³⁵ *LA Gear* (n 813)

mens rea of the offences. So, it does achieve the Parliament's goal of making it easier to prosecute offenders under the CDPA 1988.

Whether an objective test is justifiable here, however, is questionable because it takes the subjective intent of the infringer out of the question. Taking account of the subjective intent is important because there are statutory exceptions and limitations to copyright. The reason for an infringement may be a genuinely mistaken view about an exception. A better option to achieve the goal of making it easier to prosecute offenders would have been to analogise with existing offences, like the offence of handling stolen goods under the Theft Act 1968.⁸³⁶ To be found guilty of handling stolen goods, the accused is required to 'know or believe' the goods were stolen. The test is a subjective one. Similarly, section 4 of the Criminal Law Act 1967 criminalises assisting an offender, where a person acts with intent to impede the apprehension or prosecution of a person who has committed a relevant offence without lawful authority or reasonable excuse, *knowing or believing* that the offender has committed the relevant offence or some other relevant offence.⁸³⁷ Requiring knowledge or belief, as opposed to what the offences in section 107(1), CDPA 1988 currently require, would eliminate the need for a separate strand of interpretation under the CDPA 1988 and the need to justify why those copyright crimes have a lower threshold for culpability compared to offences like handling stolen goods. It would also ensure that the defendant's subjective intent plays a

⁸³⁶ Theft Act 1968, s 22(1): 'A person handles stolen goods if (otherwise than in the course of the stealing) knowing or believing them to be stolen goods he dishonestly receives the goods, or dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so.'

⁸³⁷ Criminal Law Act 1967, s 4: 'Where a person has committed a relevant offence, any other person who, knowing or believing him to be guilty of the offence or of some other relevant offence, does without lawful authority or reasonable excuse any act with intent to impede his apprehension or prosecution shall be guilty of an offence.'

role in finding him guilty, reducing the risk of criminalising those without bad faith intentions. The possible result of having an objective test is a chilling effect on legitimate activities. These are likely to include legitimate activities that fall *just inside* the scope of an exception – caricature,⁸³⁸ parody,⁸³⁹ pastiche,⁸⁴⁰ criticism,⁸⁴¹ review,⁸⁴² incidental inclusion,⁸⁴³ and such.⁸⁴⁴

When we consider the justifiability of the acts prohibited by the subsection, some fall squarely within the justifiable scope of the normative framework. The making for sale or hire; selling or letting for hire in the course of business; the importation into the UK otherwise than for private or domestic use; offering or exposing for sale or hire in the course of business; exhibiting in public in the course of business; or distributing in the course of business; in circumstances where the wrongdoer knew or was aware of specific facts based upon which a reasonable person would have formed the belief that the article in question was an infringing copy of a copyright work fall within the justifiable scope. These are all infringements that display a clear intent to make a commercial gain from the infringement. Not much else needs to be said about them.

A little bit more needs to be said, however, about criminalising possessing an infringing article in the course of business with a view to committing any act infringing

⁸³⁸ CDPA 1988, s 30A.

⁸³⁹ *ibid.*

⁸⁴⁰ *ibid.*

⁸⁴¹ CDPA 1988, s 30.

⁸⁴² *ibid.*

⁸⁴³ CDPA 1988, s 31.

⁸⁴⁴ *ibid.*, ss 28-75.

the copyright, with the knowledge that the article is infringing or awareness of facts upon which a reasonable person would form the belief that the article was infringing copyright. To successfully prosecute someone for this offence, the prosecutor would need to establish that the accused possessed an infringing article, that the possession was in the course of business, that the possession was with a view to committing an act infringing copyright, and that the accused either knew or had reason to believe that the article was infringing copyright. All these would, of course, need to be established beyond a reasonable doubt.

‘Possession in the course of business’ was itself recognised as a secondary infringement of copyright in the CDPA 1988,⁸⁴⁵ following the Whitford Committee’s recommendation that a person who physically ‘possesses infringing articles in the course of trade’ should be covered by the provisions for ‘indirect infringement actions.’⁸⁴⁶ The Committee’s recommendation was based primarily on the concerns of the British Copyright Council, the British Phonographic Industry Copyright Association, and the Musicians’ Union about growing practices of importing and distributing illicit recordings of musical works.⁸⁴⁷ And it is apparent from the Whitford Committee’s Report that the committee was convinced that greater protection needed to be given to copyright owners, especially against secondary copyright infringements by ‘middlemen’ involved in the pirate business. Similar concerns about increasing levels of ‘pirate activity’ related to musical works and films also underlay the Committee’s

⁸⁴⁵ *ibid*, s 23.

⁸⁴⁶ Whitford (n 282) 187-188.

⁸⁴⁷ *ibid*.

recommendation to make 'possession in the course of trade' a criminal offence.⁸⁴⁸ As the Bill passed through the Parliament, Lord Beaverbrook explained in the House of Lords that the provisions were introduced to 'provide as much protection as we reasonably can against the unauthorised production and possession of infringing copies.'⁸⁴⁹

Though the Committee recommended criminalising possession of infringing articles 'in the course of trade,' the Bill contained the phrase 'in the course of trade or business.'⁸⁵⁰ This was amended by the House of Lords to 'in the course of business,' to clarify that the provision covers anybody who conducts a business, including professions.⁸⁵¹ The House of Lords also amended the bill to define 'business' as including a trade or profession.⁸⁵²

The criminal provision in section 107(1)(c), CDPA 1988 differs from its corresponding civil provision⁸⁵³ in that the criminal provision requires the wrongdoer to possess an infringing article in the course of business '*with a view to committing any act infringing the copyright,*' limiting the scope of the criminal offence. Notably, 'with a view to committing' is not (or at least, does not appear to be) equivalent to 'with the intent.'⁸⁵⁴ Something less than intent is likely to suffice. Although there appear to be no

⁸⁴⁸ *ibid* 180-181.

⁸⁴⁹ HL Deb 03 December 1987, vol 490, col 1208.

⁸⁵⁰ HL Deb 23 February 1988, vol 493, cols 1132-1133; HL Deb 25 February 1988, vol 493, cols 1326-1350.

⁸⁵¹ HL Deb 23 February 1988, vol 493, cols 1132-1133.

⁸⁵² *ibid*; CDPA 1988, s 178.

⁸⁵³ CDPA 1988, ss 23, 107(1)(c).

⁸⁵⁴ See, in this context, the discussion in *Copinger* (n 10) 1781-1782.

UK copyright cases directly on this point, we can draw analogies from other criminal provisions. For example, in *R v Zaman*,⁸⁵⁵ a case where a criminal charge was brought under section 92 of the Trade Marks Act 1994,⁸⁵⁶ the defendant argued in the Court of Appeal that 'with a view to' is equivalent to 'with intent to.' The Court of Appeal, however, disagreed and noted that section 92 already contained the phrase 'with intent to.' So, the Parliament had intentionally drawn a distinction between the two phrases. While that was strictly an interpretation of the specific provision, more general statements were made in this context in *R v Dooley*.⁸⁵⁷ The statutory provision in question was section 1(1)(c) of the Protection of Children Act 1978, which criminalises the 'possession of indecent photographs or pseudo-photographs of a child, with a view to their being distributed or shown by himself or others.'⁸⁵⁸ There, after noting that the phrase 'with a view to' appears in many statutes, such as section 92 of the Trade Marks Act 1994,⁸⁵⁹ sections 1(2), 17, 20, and 21 of the Theft Act 1968,⁸⁶⁰ and even the Obscene Publications Act 1964, Hooper LJ concluded that 'with a view to' is not equivalent to 'with the intention of,'⁸⁶¹ that it is not necessary to show that the objective was the primary one, and that it is only necessary to show that it was one of the objectives of the accused.⁸⁶² It suffices that the accused has an act infringing copyright as an objective

⁸⁵⁵ *R v Zaman (Qamar)* [2002] EWCA Crim 1862, [2003] FSR 13.

⁸⁵⁶ Trade Marks Act 1994, s 92.

⁸⁵⁷ *R v Dooley* [2005] EWCA Crim 3093, [2006] 1 WLR 775.

⁸⁵⁸ Protection of Children Act 1978, s1(1)(c).

⁸⁵⁹ Trade Marks Act 1994, s 92.

⁸⁶⁰ Theft Act 1968, ss 1(2), 17, 20, 21.

⁸⁶¹ *R v Dooley* (n 857) [13].

⁸⁶² *ibid* [14].

in their conduct, even if it is not their primary one. The infringements prohibited by the clause are likely to be either aimed at making a commercial gain or at causing a commercial loss, not least because the possession must be in the course of business. So, the provision does fall within the justifiable scope of criminalisation. The general issue of the vagueness of the *mens rea* requirement, however, is true here as with all conduct criminalised under section 107(1), CDPA 1988.

What is left of my analysis of section 107(1), CDPA 1988 is determining whether criminalising someone who 'distributes otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright, an article which is, and which he knows or has reason to believe is, an infringing copy of a copyright work,'⁸⁶³ is justifiable under the normative framework. This provision on the 'prejudicial distribution offence' makes two things clear. First, the provision is aimed at distributions that are not in the course of business that harm or can harm (or affect prejudicially) the copyright owner. Second, it is the *extent of the distribution* or the scale of the distribution that must 'affect prejudicially' the copyright owner.⁸⁶⁴ But, what is unclear from the provision is what 'affect prejudicially' means.

The phrase 'affect prejudicially' appeared in civil⁸⁶⁵ and criminal provisions⁸⁶⁶ in the Copyright Act 1956 and has been in the CDPA 1988 since its enactment, despite the numerous amendments brought to the Act. The vagueness of the phrase was highlighted

⁸⁶³ CDPA 1988, s 107(1)(e).

⁸⁶⁴ *R (on the application of Wyatt) v Thames Valley Police* [2018] EWHC 2489 (Admin) (Bryan J)[107], [194]-[195].

⁸⁶⁵ Copyright Act 1956, ss 5(4)(b), 16(4)(b).

⁸⁶⁶ *ibid*, s 21(2)(b).

in the context of the criminal offences of communicating a copyright work to the public in section 107(2A) when the government consulted on the changes to the criminal offences and penalties in the CDPA 1988 brought in via the Digital Economy Act 2017.⁸⁶⁷ Some commentators noted that the vagueness of the phrase could result in 'someone facing a criminal charge where only a minimal amount of work has been infringed.'⁸⁶⁸ There is some force in this criticism because, depending on how one interprets the word 'prejudicial,' even a small-scale distribution of a copyright work that affects but does not necessarily harm the copyright owner, could fall within the *actus reus* of the offence. The government, after noting that it is not aware of cases where minor infringement had resulted in a criminal prosecution, accepted that 'the undefined term 'affect prejudicially' could give rise to an element of ambiguity.'⁸⁶⁹ The phrase was ultimately removed from section 107(2A).

We must recognise the difficulties in legislating to catch infringements that cause substantial harm or losses to copyright owners that are not necessarily carried out for a commercial purpose or in the course of business – for example, someone who records films at cinemas and uploads onto the web in a manner that anyone can access for 'kudos' amongst friends⁸⁷⁰ – while excluding low-scale or unintentional infringements – like an inadvertent infringement of a song by a cover artist. Of course, the latter is excluded by the *mens rea* element of the offences in section 107(1), CDPA

⁸⁶⁷ UK Intellectual Property Office, *Summary of responses: Consultation on changes to the penalties for offences under sections 107(2A) and 198(1A) of the Copyright, Designs and Patents Act 1988 (Penalties for Online Copyright Infringement)* (UK Intellectual Property Office, 2015) 3.

⁸⁶⁸ *ibid.*

⁸⁶⁹ UK Intellectual Property Office, *Criminal Sanctions for Online Copyright Infringement: Government Consultation Response* (n 5) 4.

⁸⁷⁰ This is a simplified version of the facts in *Nimley* (n 774).

1988. When it comes to excluding low-scale infringements, it is inappropriate to set a fixed number of distributions that must occur before an act of infringement via distribution would be considered criminal, because copyright pirates would simply stretch themselves to the limit of whatever number of distributions the statute explicates. That would defeat the purpose of such an enactment. Some flexibility is needed. As the European Court of Human Rights asserted in the context of criminal provisions, 'the need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague.'⁸⁷¹ Without such flexibility, the law would be unfair.⁸⁷² Arguments could also be made that the presence of the phrase 'otherwise than in the course of business' means that the provision aims to cover commercial-scale infringements that do not necessarily have a commercial purpose. So, some imprecision or vagueness can be tolerated, but only where the imprecision is necessary to achieve a defensible goal and where the imprecision does not make the scope of the prohibited conduct unclear.

⁸⁷¹ *Müller and others v Switzerland* App no 10737/84 (ECHR, 24 May 1988) para 29.

⁸⁷² Simester (n 302) 29-30. See, further, Jeremy Waldron, 'Vagueness and the Guidance of Action' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (Oxford University Press 2011) 58-82, where Waldron argues that the rule of law should not always be interpreted as demanding determinacy or clarity at all or any cost. He argues that 'standards,' like 'reasonable' which are inherently vague, guide action by guiding practical reasoning – and so are justifiable; and Timothy Endicott, 'The Value of Vagueness' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (Oxford University Press 2011) 14-30, where Endicott argues, among other things, that 'the use of vagueness in normative texts is a technique of central importance' and that the 'rule of law requires vague regulation in every legal system.'

Even if we take these into account, the ambiguity of the phrase ‘affect prejudicially’ remains. ‘Prejudicial’ means ‘harmful or influencing people unfairly.’⁸⁷³ This could be interpreted objectively or subjectively.⁸⁷⁴ Is it sufficient that the copyright owner feels that his interests have been violated? Or does the provision require the court to analyse if a reasonable copyright owner would deem that interests are affected prejudicially in a given situation? Furthermore, there is also the issue of what it means to *affect* prejudicially the copyright owner. It is unclear what interests of a copyright owner need to be affected, and to what extent. Could affecting the owner’s moral rights prejudicially suffice? Or could a minor economic harm suffice? Small-scale distribution of infringing copies of a copyright work could *affect* the copyright owner’s moral rights prejudicially, even if the copyright owner has not or could not have suffered any economic harm or prejudice, for example, because the work has no economic value. Such situations can be resolved using private law or administrative remedies, and there is no need for criminal law’s involvement. Additionally, the fact that the phrase ‘affect prejudicially’ appeared in section 107(2A), CDPA 1988 when it was first introduced in

⁸⁷³ Cambridge University Press, ‘Prejudicial - English meaning - Cambridge Dictionary’ (*Cambridge University Press & Assessment*, 2024) <<https://dictionary.cambridge.org/dictionary/english/prejudicial>> accessed 02 September 2024.

⁸⁷⁴ The word ‘prejudicial’ appears elsewhere in the CDPA 1988, and the approaches of the UK courts are not yet well established. For, example, under section 80, CDPA 1988, the author has the right to object to derogatory treatment of his work. Section 80(2)(b) states that ‘the treatment of a work is derogatory if it amounts to distortion or mutilation of the work or is otherwise *prejudicial* to the honour or reputation of the author or director.’ For an argument that the test of prejudice to the author should not be limited to an objective test of prejudice, but could be either an objective potential prejudice or a subjective test of harm, see, Tanya Aplin and Ahmed Shaffan Mohamed, ‘The concept of ‘reputation’ in the moral right of integrity’ (2019) 14(4) *Journal of Intellectual Property Law & Practice* 268.

2003⁸⁷⁵ and that it was subsequently removed when the Digital Economy Act 2017⁸⁷⁶ came into force, suggests that the Parliament and the government accept that the phrase 'affect prejudicially' is unreasonably vague. And perhaps its continued presence in section 107(1)(e), CDPA 1988 is simply an oversight.

The provision's vagueness makes it possible to interpret it in a manner that goes beyond the justifiable scope of criminalisation I have identified. And it would not be possible for a layperson reading the statute to know precisely what conduct would be considered criminal under the provision. The conclusion here is that the offence could be interpreted narrowly and in line with the normative framework, or broadly in a manner that makes it fall outside the justifiable scope. The provision needs further clarity.

5.2. Section 107(2), CDPA 1988: offences in relation to articles designed for making copies of copyright works

A person who makes an article *specifically* designed or adapted for making copies of a particular copyright work,⁸⁷⁷ or who has such an article in their possession,⁸⁷⁸ knowing or having reason to believe that the article is to be used to make infringing

⁸⁷⁵ See, pp 97-98 (above); Per the Ministry of Justice, between 2004 and 2017, at least 86 cases were proceeded against under CDPA 1988, s 107(2A). Ministry of Justice, 'Criminal Justice System Statistics: Outcomes by Offence data tool - Year ending June 2010 to year ending June 2024'(n 746); Ministry of Justice, 'FOI 200823001 prosecutions and convictions - copyright (table)' (GOV.UK, 22 January 2021) <https://assets.publishing.service.gov.uk/media/600880948fa8f51ee02bd049/FOI_200823001_prosecutions_and_convictions_-_copyright_table ods> accessed 12 December 2024.

⁸⁷⁶ Digital Economy Act 2017, s 32.

⁸⁷⁷ CDPA 1988, s 107(2)(a).

⁸⁷⁸ *ibid*, s 107(2)(b)

copies *for sale or hire* in the course of a business⁸⁷⁹ commits a criminal offence under section 107(2), CDPA 1988. As the provision makes clear, the offence under this section applies to making or possessing articles that are specifically designed or adapted for making copies of a particular copyright work with the requisite state of mind. The provision would apply to a person who is looking after such an article for the real infringer if he knows or has reason to believe that it is to be used to make infringing copies for sale or hire in the course of business. For example, possessing customised printing plates designed to replicate or copy a specific book, or custom moulds to make copies of some specific artwork, would constitute an offence under this section, if the person possessing it knew or had reason to believe that the plates would be used to make infringing copies of the book. The provision also clearly excludes from its scope articles like printers, scanners, and photocopiers used generally because it requires the article to be *specifically* designed or adapted for making copies of a *particular* copyright work.

The clear object of the offences under section 107(2), CDPA 1988⁸⁸⁰ is to prevent infringements that aim to make a financial gain through sales or hires of infringing copies. In principle, this falls within the justifiable scope of the normative framework. This is subject, however, to the same issue regarding the *mens rea* element noted above in my analysis of the offences in section 107(1), CDPA 1988 – the phrase ‘have reason to believe’ needs to be defined in the statute to give clarity.

⁸⁷⁹ *ibid*, s 107(2).

⁸⁸⁰ *ibid*, s 107(2).

Despite its normative justifiability, the provision is rarely used in prosecuting copyright crimes.⁸⁸¹ According to one UK prosecutor, with experience of over 300 prosecutions involving copyright issues, prosecution under this provision can be complex, and it is generally 'easier' to prosecute offenders under 'conspiracy to defraud' because the latter is 'easier for juries to understand.'⁸⁸² I have already highlighted earlier why using 'conspiracy to defraud' to prosecute copyright crimes is far from ideal.⁸⁸³ What the lack of use shows is not necessarily a problem with the offence itself. It points out the need for education about these offences, their scopes, the effects of infringement on copyright owners, the direct and indirect consequences of copyright crimes, and copyright law more generally.⁸⁸⁴

5.3. Section 107(2A), CDPA 1988: communication to the public

I have referred to this offence several times before. We saw earlier that the provision was introduced via the Copyright and Related Rights Regulation, which came into force on 31st October 2003,⁸⁸⁵ and that the purpose of the Regulation was to transpose the InfoSoc Directive into UK law. The InfoSoc Directive⁸⁸⁶ made it

⁸⁸¹ There appear to be no published cases of prosecutions under s 107(2), CDPA 1988 published on LexisNexis, Westlaw, or vLex.

⁸⁸² Out-Law, 'UK cases highlight different routes taken by prosecutors over the supply of modified TV set-top boxes' (*Pinsent Masons*, 2017) <www.pinsentmasons.com/out-law/analysis/uk-cases-highlight-different-routes-taken-by-prosecutors-over-the-supply-of-modified-tv-set-top-boxes> accessed 20 August 2024.

⁸⁸³ See, pp 229-230 (above).

⁸⁸⁴ I discussed this in detail in Chapter 3. See, pp 172-175 (above).

⁸⁸⁵ See, pp 97-98 (above).

⁸⁸⁶ InfoSoc Directive.

mandatory for Member States to provide copyright owners with 'the exclusive rights to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.'⁸⁸⁷ Moreover, it also required Member States to 'provide for adequate legal protection against any person'⁸⁸⁸ who, among other things, communicated copyright works to the public without the authority to do so, and required that the remedies and sanctions provided were 'effective, proportionate and dissuasive.'⁸⁸⁹

The Regulation⁸⁹⁰ amended section 107, CDPA 1988 by inserting subsections (2A) and (4A). Subsection (2A) introduced the offence of infringing upon a copyrighted work by communicating it to the public 'in the course of business or to such an extent as to prejudicially affect the copyright owner,' with the knowledge that, or having reason to believe that the conduct is an infringement of copyright. The offence was then recast by the Digital Economy Act 2017.⁸⁹¹

Actus Reus

Following the amendment, the *actus reus* of this offence is infringing copyright by communicating the work to the public.⁸⁹² Section 20 of the CDPA 1988 defines 'communication to the public' as communications by 'electronic transmission' which

⁸⁸⁷ *ibid*, art 3(1).

⁸⁸⁸ *ibid*, art 8(1).

⁸⁸⁹ *ibid*, Recital 58.

⁸⁹⁰ Copyright and Related Rights Regulation 2003, s 21.

⁸⁹¹ For a discussion of the Digital Economy Act 2017, see, pp 101-105 (above).

⁸⁹² CDPA 1988, s 107(2A).

include broadcasting a work,⁸⁹³ and 'making the work available in such a way that members of the public may access it from a place and at a time individually chosen by them.'⁸⁹⁴ The use of the word 'include' in the provision indicates that 'communication to the public' is not exhaustive.⁸⁹⁵

The exact scope of 'communication to the public' has been the subject of considerable litigation in the UK and Europe, including at the CJEU. The CJEU has decided at least 25 cases about what constitutes a 'communication to the public'.⁸⁹⁶ Notably, 24 of them were retained under the European Union (Withdrawal) Act 2018.⁸⁹⁷ So, they remain part of the UK's domestic law post-Brexit and would apply until or unless the Court of Appeal or the Supreme Court decides to depart from them.⁸⁹⁸

The general principles established by the CJEU's case law retained by the UK can be summarised as follows.⁸⁹⁹ 'Communication to the public' must be interpreted broadly,⁹⁰⁰ and it covers any transmission or retransmission of the work 'to the public not present at the place where the communication originates by wire or wireless means, and including broadcasting.' It does not include any communication of a work carried out directly in a place open to the public through public performance or direct

⁸⁹³ *ibid*, s 20(2)(a).

⁸⁹⁴ CDPA 1988, s 20(2)(b).

⁸⁹⁵ *ITV Broadcasting Ltd v TV Catchup Ltd* [2011] EWHC 1874 (Pat), [2011] FSR 40 [45].

⁸⁹⁶ *TuneIn Inc v Warner Music UK Ltd* [2021] EWCA Civ 441, [2022] 2 All ER 35 [67].

⁸⁹⁷ *ibid* [74].

⁸⁹⁸ *ibid* [74].

⁸⁹⁹ *ibid* [70] also includes a similar summary.

⁹⁰⁰ InfoSoc Directive, Recital 23; Case C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* [2006] ECR I-11519 [36]; *Svensson* (n 4) [17]; *GS Media* (n 576) [30].

presentation of the work.⁹⁰¹ And there is no 'communication to the public' where the viewers do not have access to an essential element which characterises the work.⁹⁰² Furthermore, whether there is a 'profit making nature' to the communication is relevant in determining whether a communication is 'a communication to the public' for the purposes of the InfoSoc Directive, though this is not always necessary.⁹⁰³

The CJEU has also explained that 'communication to the public' involves two cumulative criteria: first, an 'act of communication' of a work, and second, the communication of that work to a 'public'.⁹⁰⁴ It is, however, necessary to carry out an individualised assessment in the light of several factors which are complementary, interdependent, and may be present in widely varying degrees both individually and in their interaction with each other.⁹⁰⁵ In this context, 'communication' refers to any transmission of the work, irrespective of the technical means or process used.⁹⁰⁶ Every transmission or retransmission of the work by a specific technical means must, as a rule, be individually authorised by the right holder.⁹⁰⁷ Moreover, a mere technical means to ensure or improve reception of the original transmission in its catchment area does not

⁹⁰¹ Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd v QC Leisure* [2011] ECR I-9083 [199]-[203].

⁹⁰² Case C-393/09 *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury* [2010] ECR I-13971 [57].

⁹⁰³ Case C-135/10 *Società Consortile Fonografici (SCF) v Marco Del Corso* ECLI:EU:C:2012:140 [88], [90], [99]; *SGAE* (n 900) [44]; Case C-607/11 *ITV Broadcasting Ltd v TVCatchup Ltd* EU:C:2013:147 [42]-[43]; *GS Media* (n 576) [38].

⁹⁰⁴ *Svensson* (n 4) [16]; *GS Media* (n 576) [32]; Case C-263/18 *Nederlands Uitgeversverbond v Tom Kabinet Internet BV* EU:C:2019:1111 [61].

⁹⁰⁵ *GS Media* (n 576) [34]; *Pirate Bay* (n 576) [25].

⁹⁰⁶ *Football Association Premier League Ltd v QC Leisure* (n 901) [193].

⁹⁰⁷ *ITV* (n 903) [24]-[26].

constitute a 'communication'.⁹⁰⁸ But a person makes an act of 'communication' when the person intervenes, in full knowledge of the consequences of the person's action, to give the person's customers access to a protected work, particularly where, in the absence of that intervention, those customers would not be able to enjoy the work, or would be able to do so only with difficulty.⁹⁰⁹ It is sufficient to satisfy the 'communication' requirement if the work is made available to the public in such a way that the persons forming that public may access it, whether or not those persons actually access the work.⁹¹⁰ Mere provision of facilities does not amount to an act of 'communication' itself.⁹¹¹ But, the installation of physical facilities that distribute a signal and so make public access to works technically possible may amount to 'communication'.⁹¹²

As for what 'the public' entails, the CJEU has established that 'the public' refers to an indeterminate number of potential recipients and implies a fairly large number of persons.⁹¹³ Here, 'indeterminate' means that the communication is not restricted to specific individuals belonging to a private group, and 'a fairly large number of people' means the concept of 'public' excludes from the concept groups of persons which are too small or insignificant.⁹¹⁴ For that purpose, the cumulative effect of making the works

⁹⁰⁸ SGAE (n 900) [42]; *Football Association Premier League Ltd v QC Leisure* (n 901) [194]; *ITV* (n 903) [28].

⁹⁰⁹ SGAE (n 900) [42]; *Football Association Premier League Ltd v QC Leisure* (n 901) [194]-[196]; *GS Media* (n 576) [35]; *Pirate Bay* (n 576) [36]-[39].

⁹¹⁰ *Tom Kabinet* (n 904) [63]-[64]; *Svensson* (n 4) [19].

⁹¹¹ InfoSoc Directive, Recital 27; SGAE (n 900) [15],[45]-[47]; Case C-136/09 *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireia* [2010] ECR I-37 [33].

⁹¹² SGAE (n 900) [45]-[47]; Case C-527/15 *Stichting Brein v Wullems* ('*Filmspeler*') EU:C:2017:300 [40]; *Organismos* (n 911) [39]-[42].

⁹¹³ SGAE (n 900) [37]-[38]; *ITV* (n 903) [32]; *Svensson* (n 4) [21].

⁹¹⁴ *SCF* (n 903) [85]-[86]; *Tom Kabinet* (n 904) [68]; *Filmspeler* (n 912) [44].

available to potential recipients needs to be taken into account, and it is particularly relevant to ascertain the number of persons who have access to the same work at the same time and successively.⁹¹⁵ Where there is a communication of works by the same technical means as a previous communication, it is necessary to show that the communication is to a 'new public,' that is to say, a public which was not considered by the right holder when it authorised the original communication.⁹¹⁶ It follows that if the technical means are not the same, it is not necessary to consider whether the communication is to a new public.⁹¹⁷ Additionally, the public that is the subject of the communication needs to be both targeted by the user and receptive, in one way or another, to that communication and not merely 'caught' by chance.⁹¹⁸

While these may seem straightforward when stated at a general level, their application has been anything but. For instance, the CJEU has held that operating television sets in waiting areas of a rehabilitation centre⁹¹⁹ and playing a piece of music on a commercial flight are communications to the public.⁹²⁰ But, the CJEU also held that a dentist who plays radio programmes, including music, in his dental practice

⁹¹⁵ *ITV* (n x) [33]; *SGAE* (n 900) [39]; *Pirate Bay* (n 576) [41].

⁹¹⁶ *SGAE* (n 900) [40]; *Football Association Premier League Ltd v QC Leisure* (n 901) [197]; *GS Media* (n 576) [37].

⁹¹⁷ *Filmspeler* (n 912) [33]; *ITV* (n 903) [39]; *GS Media* (n 576) [37]; *Tom Kabinet* (n 904) [70].

⁹¹⁸ *SCF* (n 903) [91].

⁹¹⁹ Case C-117/15 *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)* EU:C:2016:379.

⁹²⁰ Joined Cases C-775/21 and C-826/21 *Blue Air Aviation SA v UCMR – ADA Asociația pentru Drepturi de Autor a Compozitorilor and Uniunea Producătorilor de Fonograme din România (UPFR) v Societatea Națională de Transport Feroviar de Călători (SNTFC) 'CFR Călători' SA* ECLI:EU:C:2023:307. Although this case was determined after the completion date of Brexit, and so, not strictly binding, it is still persuasive authority.

does not perform an act of communication to the public.⁹²¹ The key distinction that appears to have been drawn between the latter and the former is that a dental practice is likely to have fewer patients and thus not a 'public.' But even this distinction may not necessarily always be true.

The CJEU has also held that 'hyperlinking' to content freely available on another website without the consent of the copyright owner can be a 'communication to the public.'⁹²² The test is 'whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed.'⁹²³ According to this interpretation, where a journalist of a private online news website, for example, posts a link to infringing content (without the knowledge of the nature of the content), they will be presumed to have knowledge that the content is infringing.

What is apparent from this discussion is that the concept of 'communication to the public' is not straightforward. As far as criminal provisions are concerned, this is far from the type of clarity needed. Like the analysis of the vagueness of the phrase 'has reason to believe,' having to resort to judicial interpretations on such a core aspect of the offence is a problem for the same reason – lack of clarity results in the chilling of

⁹²¹ SCF (n 903).

⁹²² Case C-466/12 *Nils Svensson and Others v Retriever Sverige AB* [2014] Bus LR 259 (n 4); Case C-348/13 *BestWater International GmbH v Michael Mebes, Stefan Potsch* ECLI:EU:C:2014:2315 ; Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV and Others* EU:C:2016:221 (n 576).

⁹²³ *GS Media* (n 576) [55].

legitimate activity. Moreover, given how 'communication to the public' has been interpreted by the courts, and especially the CJEU, the precise scope remains unclear even for practitioners and academics.⁹²⁴ A case-by-case analysis of 'communication to the public' is unhelpful in criminal law because those subject to criminal laws need to be able to tell precisely what they can and cannot do beforehand.

The *actus reus* of the offence eliminates the possibility of criminalising end-users who *download* copyright works because we cannot construe downloading as a communication to the public.⁹²⁵ However, some users who download infringing content using peer-to-peer file-sharing technologies (like Torrents) can be caught within the *actus reus* of the offence. That is because some peer-to-peer file-sharing software may upload pieces of the downloaded content to other downloaders while or after downloading.⁹²⁶ Such users communicate 'pieces' of copyright work to the public.⁹²⁷

Because the provision lacks a 'threshold' requirement, the *actus reus* of the offence in the UK catches *all* instances of copyright infringement by communication to

⁹²⁴ In fact, books have been written and published solely on the right of communication to the public under EU law. See, e.g., Makeen Fouad Makeen, *Copyright in a global information society: the scope of copyright protection under international, US, UK and French law* (Kluwer Law International 2000), Justin Koo, *The Right of Communication to the Public in EU Copyright Law* (Bloomsbury Publishing 2020) and Branka Marušić, *The Autonomous Legal Concept of Communication to the Public: Interpretation in EU Copyright Law* (Edward Elgar Publishing 2023).

⁹²⁵ *Tom Kabinet* (n 904) [70]: 'in order to be categorised as a communication to the public, a protected work must be communicated using specific technical means, different from those previously used or, failing that, to a new public, that is to say, to a public that was not already taken into account by the copyright holders when they authorised the initial communication of their work to the public'; *Pirate Bay* (n 576) [28]; *GS Media* (n 576) [37]; *Svensson* (n 4) [24].

⁹²⁶ Michal Kryczka, Rubén Cuevas and Angel Cuevas, 'Measuring the BitTorrent Ecosystem: Techniques, Tips, and Tricks' (2011) 49(9) *IEEE Communications Magazine* 144, 144-145.

⁹²⁷ While subscription or ad-based models have changed the way most digital copyright works are accessed, or downloaded, peer-to-peer file sharing is still relevant today: European Union Intellectual Property Office, *Online Copyright Infringement in the European Union: Films, Music, Publications, Software and TV (2017-2022)* 8, 16, 18-19, 43.

the public, regardless of scale or purpose. The provision does not exempt online content-sharing service providers from its scope either. As noted before, the *actus reus* of the offence was narrower before the Digital Economy Act 2017 came into force. Before October 2017, the *actus reus* of the offence required that unauthorised communication to the public be ‘in the course of business’ or ‘to such an extent as to affect prejudicially the owner of copyright.’⁹²⁸ We saw when discussing the phrase ‘affect prejudicially’ in section 107(1), CDPA 1988 that the phrase was removed from section 107(2A), CDPA 1988 via the Digital Economy Act 2017⁹²⁹ because it was considered unjustifiably vague. But as one anonymous academic also notes, while ‘prejudicial effect’ is imprecise, it does ensure that ‘trivial’ instances of copyright infringements are not caught within the scope of the offence.⁹³⁰ The amendment supposedly aiming to protect innocent or unwitting infringers⁹³¹ from the vagueness of ‘affect prejudicially’ did not replace the phrase, but removed the ‘threshold requirement’ from the *actus reus* of the offence entirely. The effect of this is that all copyright infringements that involve communicating a work to the public satisfy the *actus reus* of the offence in section 107(2A), CDPA 1988.⁹³² This is despite the government acknowledging in its response to the consultation that ‘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

⁹²⁸ *ibid.*

⁹²⁹ Digital Economy Act 2017, s 32(2).

⁹³⁰ Rosati (n 7).

⁹³¹ UK Intellectual Property Office, *Criminal Sanctions for Online Copyright Infringement: Government Consultation Response* (n 5) 3.

⁹³² CDPA 1988, s 107(2A).

impact of their behavio[u]r.⁹³³ This policy intention is in line with the scope elucidated by the normative framework and the wider policies of the state around that time.⁹³⁴ But, the *actus reus* of the offence does not appear to achieve this policy intention. Given the lack of clarity on the scope of the *actus reus* and the absence of any threshold requirement, whether the provision falls outside the justifiable scope or fails to meet the standards of justifiability identified by the normative framework depends primarily on the *mens rea* elements.

Mens rea

Unsurprisingly, the *mens rea* requirements narrow the scope of the criminalisation under section 107(2A).⁹³⁵ Section 107(2A)(a) requires that the infringer 'knows or has reason to believe that he is infringing copyright in the work.'⁹³⁶ This is the same as that of section 107(1). As we saw in the discussion of the criminal offences under section 107(1), the *mens rea* requirements act as a safeguard against criminalising cases of innocent infringements where the wrongdoer subjectively did not know and objectively could not have known or believed that his conduct amounted to an infringement of copyright. We have also already seen in my discussion of the offences under section 107(1) that the phrase 'has reason to believe' is problematic because it takes the subjective intent of the accused out of the question.⁹³⁷

⁹³³ *ibid.*

⁹³⁴ Williams (n 439) 216-217; Law Commission, *Criminal Liability in Regulatory Contexts: A Consultation paper* (CP195, 2010) 8-19; Ministry of Justice, *Advice on introducing or amending criminal offences and estimating and agreeing implications for the criminal justice system* (2015) 2.

⁹³⁵ CDPA 1988, s 107(2A).

⁹³⁶ *ibid.*, s 107(2A)(a).

⁹³⁷ See, pp 241-242 (above).

There is an additional *mens rea* requirement in section 107(2A), however. In addition to knowing or having a reason to believe that he is infringing copyright, an infringer needs to *either* intend to make a gain for himself or another person, *or* know or have reason to believe that communicating the work to the public will cause loss to the owner of the copyright or will expose the owner to a *risk of loss*.⁹³⁸ Gain or loss extends only to financial gain or loss, whether temporary or permanent.⁹³⁹ And loss includes loss by not getting what one might get.⁹⁴⁰ This is similar to the *mens rea* elements of the offences in sections 1-4 of the Fraud Act 2006 – fraud by false representation; fraud by failing to disclose information; and fraud by abuse of position. The difference in the *mens rea* between these statutory fraud offences and the criminal offences under section 107(2A), CDPA 1988 is that the statutory fraud offences all require ‘dishonesty’.⁹⁴¹ No such dishonesty is required for criminal liability under section 107(2A). The rest of it is the same.

Similar to the statutory fraud offences under the Fraud Act 2006, section 107(2A), CDPA 1988 requires the person to have *intended* to make a temporary or permanent gain (in money) for himself or another, or have the knowledge that or have reason to believe that communicating the work to the public will cause loss to the copyright owner or will expose the copyright owner to a risk of loss. He does not have to make any money, nor does the copyright owner have to suffer a loss. Having reason to believe that the infringement will expose the copyright owner to a risk suffices.

⁹³⁸ CDPA 1988, s 107(2A)(b)(ii).

⁹³⁹ *ibid*, s 107(2B).

⁹⁴⁰ *ibid*.

⁹⁴¹ Fraud Act 2006, s 2(1)(a), s 3(a), s 4(1)(b).

While intentional or reckless infringements with the intent to make a financial gain or intending to cause a loss can be justifiably criminalised, and while reckless infringements may be criminalised based on the intent of the infringement, scale, and value of the work, this provision goes beyond that. It is *at least* arguable that *any* sensible person would know that *any* unauthorised communication of a copyright work to the public will expose the copyright owner to the *risk* of not getting money that he *might* otherwise have received. So 'small-time' infringers who are aware or have reason to believe that they are infringing copyright are caught under these provisions simply for *exposing* a copyright owner to a *risk* of loss, regardless of the scale of the infringements and the value of the potential gain or loss. This, combined with the lack of a standard like 'dishonesty'⁹⁴² or a requirement of a 'bad faith purpose,' makes the provision unjustifiably broad. All intentional infringements and almost all reckless infringements by communicating a copyright work to the public will be caught within the provision. The offence goes beyond what is necessary, catching infringements that can easily be resolved via the suite of alternatives discussed earlier.

Furthermore, strict adherence to the provisions may be impractical because trying to catch 'small-time' infringers would result in *prohibitively* high costs. And a loose adherence to criminal laws (or laws generally) is undesirable because that leads to uncertainty and confusion, breaching the rule of law requirements like fair warning, certainty, and predictability. Moreover, the broadness of section 107(2A) gives prosecutors wide discretion on the standards they would apply before choosing to

⁹⁴² The mere requirement of a 'dishonesty' standard, however, might not be successful if society does not believe the behaviour is dishonest. See the discussion on pp 129-130 (above).

prosecute. Therefore, the reworded offence not only fails to meet the scope laid out by the normative framework because the negative constraints are not met, but also fails to meet the government's policy intention of not criminalising low-level copyright infringement.⁹⁴³

5.4. Section 107(3), CDPA 1988: offences in relation to public performance of works

Where copyright is infringed (otherwise than by reception of a communication to the public) by the public performance of a literary, dramatic or musical work or by the playing or showing in public of a sound recording or film, any person who caused the work to be so performed, played or shown is guilty of an offence if they knew or had reason to believe that copyright would be infringed.⁹⁴⁴

'Performance' is defined in section 19(2) CDPA 1988 as including delivery in case of lectures, addresses, speeches and sermons,⁹⁴⁵ and in general, includes any mode of visual or acoustic presentation, including presentation by means of a sound recording, film, or broadcast of a work.⁹⁴⁶ So, public performance would mean doing an act that falls under the definition of performance in 'public.' The meaning of a 'public'

⁹⁴³ One might wonder why the government had amended the scope of the offence at all. The recommendation in the Gowers' Review was to increase the penalties, not the scope of the offence. This is what the government consultation had focused on: UK Intellectual Property Office, *Copyright, Designs and Patents Act 1988 (as amended): A consultation on changes to the penalties for online copyright infringements* (n 364). It was, however, noted in the government's response to the consultation that it planned to alter the offence to 'to ensure the offences are effective at deterring and dealing with criminals while protecting innocent or unwitting infringers.' UK Intellectual Property Office, *Criminal Sanctions for Online Copyright Infringement: Government Consultation Response* (n 5).

⁹⁴⁴ CDPA 1988, s 107(3).

⁹⁴⁵ *ibid*, s 19(2)(a).

⁹⁴⁶ *ibid*, s 19(2)(b).

performance under the Copyright Act 1911 was considered by the Court of Appeal in *Jennings v Stephens*⁹⁴⁷ and later in *Ernest Turner Electrical Instruments, Limited v Performing Right Society, Limited*.⁹⁴⁸ In *Jennings*, Lord Wright MR opined that the test was a question of whether the performance was domestic or quasi-domestic.⁹⁴⁹ If it is, the performance is not a public performance. Determining whether the audience is domestic or quasi-domestic primarily considers the character of the audience.⁹⁵⁰ Neither the presence or absence of visitors, the nature of the performance as paid or gratuitous, whether admission is free or paid, nor the size of the audience is necessarily decisive.⁹⁵¹ The Court of Appeal took the same position in *Ernest Turner*, which concerned relaying programmes of musical broadcasts by the British Broadcasting Corporation and some gramophone records to about 600 employees of a factory to prevent boredom and increase efficiency and output.⁹⁵² Holding that the performances were performances 'in public,' Lord Greene MR cited Lord Wright MR's judgment in *Jennings* and noted the following:

The legitimacy of taking these matters into consideration is clearly recognized by Lord Wright in his judgment *Jennings v Stephens* when he says, in reference to the case before him: "If that were not a performance in public, and might be repeated indefinitely all over the country, the performing right would not be of much value." There Lord Wright was regarding the question from much the same angle as I am. He is taking into account the extent to which the value of the statutory

⁹⁴⁷ *Jennings v Stephens* [1936] Ch 469 (CA).

⁹⁴⁸ *Ernest Turner Electrical Instruments, Limited v Performing Right Society, Limited* [1943] Ch 167 (CA).

⁹⁴⁹ *Jennings v Stephens* (n 947) 479.

⁹⁵⁰ *ibid.*

⁹⁵¹ *ibid.*

⁹⁵² *ibid.*

monopoly would be whittled down as a material factor in dealing with these questions.⁹⁵³

Makeen notes that although courts initially applied several criteria to determine whether a performance was public, such as the nature of the place, profit motive, nature of the gathering and potential financial harm, over time only the latter two remained central to the courts' analyses.⁹⁵⁴ Some courts treated financial harm as the decisive test, and others focused on the nature of the gathering.⁹⁵⁵ But he notes, they were not truly alternative approaches. Rather, each served as the rationale for applying the other: courts relying on financial harm assessed it through the nature of the gathering, and those focusing on the gathering did so with reference to financial harm.⁹⁵⁶ Following his analysis of the courts' approaches to the question of whether a performance was 'in public' and how they changed over time, Makeen proposes that the CDPA 1988 be amended to recognise 'the nature of the gathering as the sole, stand-alone criterion that governs the assessment of the "in public" requirement.'⁹⁵⁷ Though such an amendment does not seem to be forthcoming, what seems apparent is that the courts will take a common-sense approach in determining whether a performance is a public one or not.⁹⁵⁸ But the lack of a clear and precise definition of 'public' is far from ideal in the sphere of criminal enforcement of copyright.

⁹⁵³ *ibid* 174-175.

⁹⁵⁴ Makeen Fouad Makeen, 'Rationalising performance "in public" under UK copyright law' (2016) 2 *Intellectual Property Quarterly* 117.

⁹⁵⁵ *ibid*.

⁹⁵⁶ *ibid*.

⁹⁵⁷ *ibid* 134.

⁹⁵⁸ *Copinger* (n 10) 687.

Where such an act specified in section 107(3), CDPA 1988 occurs, the persons held criminally liable are those who 'caused the work to be' performed, played, or shown. This leads us to the next key question: when can we say a person has 'caused' a work to be played, performed, or shown? The Act does not define this either.

The issues that can stem from not defining the word 'caused' can be seen in the civil cases decided concerning similar phrases in the Dramatic Copyright Act 1833 and the Literary Copyright Act 1842, which gave the copyright owners of musical and dramatic works the exclusive right to represent or '*caus[e]* to be represented'⁹⁵⁹ or 'performed'⁹⁶⁰ their works.⁹⁶¹ In *Lyon v Knowles*,⁹⁶² the Court of Exchequer held that the owner of a theatre did not 'cause' an infringing performance even though he leased the venue to a tenant who staged the infringing production. Despite the owner's involvement in providing equipment, scene shifters, and assisting with advertising – and even being paid by a share in the gross receipts – the conduct was deemed insufficient to establish liability for causing the infringed work to be performed. There, the court's interpretation suggested that merely providing resources or benefiting financially without direct control over the production did not amount to 'causing' the work to be performed, played or shown. The decision implied that causation required more than passive involvement or financial interest, leaning toward a narrow view of what it means to 'cause' an infringing act.⁹⁶³

⁹⁵⁹ Dramatic Literary Property Act 1833, ss 1-2.

⁹⁶⁰ Literary Copyright Act 1842, s 20.

⁹⁶¹ *Copinger* (n 10) 1785.

⁹⁶² *Lyon v Knowles* (1863) B & S 556 (Court of Exchequer).

⁹⁶³ *Copinger* (n 10) 1785.

On the other hand, in *Marsh v Conquest*,⁹⁶⁴ the court distinguished *Lyon v Knowles*⁹⁶⁵ and held a theatre owner liable. There, the theatre owner employed his son as a stage manager, who then hired the theatre and company for a benefit night for his father. The son then presented an infringing performance. The owner's liability rested on the familial and managerial relationship that implied ongoing control over the production. Because the owner retained control and the infringing act occurred with his implicit permission, he was seen as having 'caused' the work to be performed. This interpretation represents a broader view of causation, as liability extended beyond direct control to include situations where implicit permission and professional connections indicated control over the production. Similarly, in *Monaghan v Taylor*,⁹⁶⁶ a broad interpretation of causation arose from the concept of agency. The court found the owner of a music hall liable because he had hired a singer who, acting as his agent, performed songs without obtaining the necessary licence. By granting the singer unrestricted choice over the repertoire, the owner essentially authorised the performance without specifically controlling the infringing act. There, the owner's liability was tied to the owner's broad delegation of authority, indicating that causation could extend to vicarious liability when an agent acts on behalf of the principal, even in the absence of direct involvement.

In *French v Day, Gregory*,⁹⁶⁷ however, a narrower interpretation of causation prevailed. In this case, the court held that a general manager, who lacked authority over

⁹⁶⁴ *Marsh v Conquest* (1864) 144 ER 169 (Court of Common Pleas).

⁹⁶⁵ *Knowles* (n 962).

⁹⁶⁶ *Monaghan v Taylor* (1886) 2 TLR 685 (Divisional Court).

⁹⁶⁷ *French v Day, Gregory* (1893) 9 TLR 548 (QB).

artist selection and followed the proprietor's instructions, did not cause an infringing work to be performed. Although the manager had the power to halt the performance, he acted strictly within the confines of the proprietor's guidance, functioning merely as a 'mouthpiece' without independent authority. The court's conclusion underscored that without substantial control or decision-making authority, indirect involvement does not equate to causation. Whether this is correct is questionable.⁹⁶⁸

Although the cases relate to different copyright statutes and were determined in the civil context, they highlight the interpretive challenges that stem from the failure to define the term 'caused.' Such challenges may be acceptable in civil contexts, where a case-by-case analysis may suffice. The consequences, after all, are not the same if a civil claim succeeds when compared to the consequences of a criminal conviction – a criminal record, possible time in prison and a criminal fine. The lack of a statutory definition leaves room for at least two possible ways for a criminal case under the provision to proceed: (1) following the principles or rules established in cases interpreting the word 'caused' in analogous civil provisions; or (2) following the general principles of causation in criminal law – including that deliberate conduct of free, and informed adults of sound mind breaks the chain of causation.⁹⁶⁹ When it comes to criminal liability, the law needs to be clear in advance to allow those who wish to be on the right side of the law to act knowing that they are not risking criminal behaviour.

The observations I have made throughout this chapter about 'has reason to believe' apply here as well. Similarly, the offences in section 107(3), CDPA 1988, like

⁹⁶⁸ *Copinger* (n 10) 1785-1786.

⁹⁶⁹ *R v Kennedy (No 2)* [2007] UKHL 38, [2005] 1 WLR 3594.

those in section 107(2A), do not have a threshold requirement. In addition to infringements of copyright by showing, playing, or performing a copyright work with the intent to make a gain or to cause a loss (which is justifiable), it also criminalises reckless infringements without considering the scale of the infringement, the value of the copyright works, or the intent of the infringer. Simply put, the provision is too broad to be justifiable under the normative framework because it applies to infringements that can easily be resolved using the suite of alternatives available to rights holders.

5.5. CONCLUSIONS

Several key points can be highlighted about the current criminal copyright provisions of the UK. Firstly, all four main provisions use the phrase ‘has reason to believe’ which requires judicial interpretation. While that alone may not have taken the provisions out of the scope of normative justifiability, when combined with the other issues identified, it makes some of the provisions unjustifiable under the normative framework. So, when we consider the offences in section 107(1), CDPA 1988, much of it is justifiable in principle. The exception is what I referred to above as the ‘prejudicial distribution offence’ in section 107(1)(e), which criminalises distributions ‘otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright, an article which is, and which he knows or has reason to believe is, an infringing copy of a copyright work,’⁹⁷⁰ primarily because the phrase ‘distribution to such an extent as to affect prejudicially’ the copyright owner is too vague a standard. It fails to specify which interests of the copyright owner must be affected, nor what it

⁹⁷⁰ CDPA 1988, s 107(1)(e).

means to affect the copyright owner. This is in addition to the vagueness inherent in the phrase ‘prejudicially.’ As for the offences in section 107(2), CDPA, we observed that the provision is justifiable in principle but is rarely utilised due to difficulties in explaining the law to the jury. I noted that this points towards a need for education, not necessarily a problem with the provision itself.

As for the offences under section 107(2A), we saw that the provision is unjustifiable for two key reasons. First, ‘communication to the public’ is defined inclusively in the statute and has been interpreted extremely broadly. This requires courts to take account of a multitude of factors, which is not a straightforward task for the layperson (or even for seasoned lawyers, for that matter). Its scope is unclear. Secondly, the provision is unduly broad because it does not have a threshold requirement, catching within it all infringements that are not innocent infringements. We saw earlier that the normative framework views the criminalisation of infringements for financial gain or to cause losses as justifiable.⁹⁷¹ We also saw that for other infringements that may be justifiably criminalised, account needs to be taken of the value of the work, the scale of the infringement, and whether there is a bad faith goal or intent in the infringement.⁹⁷² Section 107(2A), CDPA 1988 does not (in terms of liability) differentiate infringements with a bad faith goal from infringements that do not. It does not recognise the role played by the suite of alternatives and goes beyond what is necessary and proportionate. Finally, we saw that section 107(3), CDPA 1988 also suffers from similar issues. What it means to ‘cause’ a copyright work to be shown,

⁹⁷¹ See, pp 231-233 (above).

⁹⁷² *ibid.*

played or performed publicly is not entirely clear. Moreover, like sections 107(2A), CDPA 1988, section 107(3), CDPA 1988 does not have a threshold requirement.

Perhaps the issue is more fundamental. It seems that we have viewed criminal penalties as just another alternative to enforcing copyrights. But criminal penalties are, by their nature, different. Their consequences are severe. So, the submission here is that criminal copyright provisions need to have their own clear definitions and scopes, which generally should be more limited in scope than their civil counterparts in a way that complicated questions of copyright law would not arise. Not every word or phrase can indeed be defined in the statute. But, where the word or the phrase is key to the offence, and thus criminal liability, it needs to be defined to the extent that a reasonable person can understand what is prohibited by reading the statutory provisions.

That criminal provisions are inappropriate where liability depends on answers to difficult questions of copyright law is not a new proposition. In *R v Gilham*, Stanley Burnton LJ noted 'with emphasis' that 'the trial of cases involving recondite issues of copyright law' or '[c]ases that ... involve determination of difficult questions whether a copy is of a substantial part of a copyright work, can and should be tried in the Chancery Division before specialist judges.'⁹⁷³ He further noted that '[i]n appropriate cases, the Court will grant injunctive relief, and a breach of an injunction will lead to punishment for contempt of court' and that '[i]f the facts proven against a defendant show that he has substantially profited from criminal conduct, proceedings for the civil recovery of the proceeds of his crimes may be brought under Part 5 of the Proceeds of Crime Act

⁹⁷³ *R v Gilham* [2009] EWCA Crim 2293, [2010] ECDR 5 [30].

2002.’ A similar ‘unease’ was expressed in *Murphy v Media Protection Services Ltd*,⁹⁷⁴ which raised complex questions of EU copyright law. Therefore, a justifiable criminal copyright provision needs to be sufficiently clear – it must allow a reasonable person to understand precisely what is prohibited and what is not from the provision itself without complex interpretive exercises.

On the same note, it is worth recalling what I pointed out earlier⁹⁷⁵ about criminalisation being appropriate only for infringements involving literal copying of copyright works or parts of works where the issue of infringement is relatively straightforward. The criminal provisions that I analysed above are not limited to literal copying. It may have been the assumption that they only apply to instances of literal infringement. But it appears to have been left to the common sense of the judges and prosecutors.

⁹⁷⁴ *Murphy v Media Protection Services Ltd* [2008] EWHC 1666 (Admin), [2008] FSR 33 [60]; Speck and others, *Laddie, Prescott & Vitoria: The Modern Law of Copyright* (n 70) 1759.

⁹⁷⁵ See, p 229 (above).

6

Chapter 6: The Prosecution Practice

6.1. Factors present in copyright prosecutions.....	275
Public Prosecutions.....	275
Private Prosecutions.....	280
Other cases	288
6.2. The case for reform	289
6.3. Should private prosecutions for copyright crimes be abolished or reformed?	290

This chapter examines whether the prosecutorial practices in enforcing the criminal copyright provisions in the CDPA 1988 – ‘the law in action’ – are justifiable, despite my conclusions on the justifiability of the criminal copyright provisions in the CDPA 1988. The UK has both public and private prosecutions, and copyright crimes are prosecuted publicly and privately.⁹⁷⁶

I first consider the factors present in public and private prosecutions under the CDPA 1988. This will show that the factors present in criminal copyright cases are generally comparable across public and private prosecutions. It will also show that despite the criminal copyright provisions going beyond the justifiable scope identified in the normative framework developed in this work, the prosecution practice is very

⁹⁷⁶ Gwilym Harbottle, 'Criminal remedies for copyright and performers' rights infringement under the Copyright, Designs and Patents Act 1988' (1994) 5(1) Entertainment Law Review 12, 12; *R v Wayne Evans* (n 786); *Federation Against Copyright Theft (FACT) v Broomhall and Others* [2007] 4 Costs LR 640 (Supreme Court Costs Office).

much within it. I will then use this discrepancy to make a case for reforming the statutory provisions, and also look at whether private prosecutions should exist for copyright crimes.

6.1. Factors present in copyright prosecutions

As mentioned above, prosecutions under the CDPA 1988 can be public or private. But the type of prosecution is often unclear from the cases. Moreover, many are unreported. Those that are reported often are appeals of sentences, as we shall see below. That said, Trading Standards surveys and other publications by authorities and various organisations help with the distinction and in my analysis of the factors, to an extent. We shall also see below that cases sometimes touted in various publications as criminal copyright cases are sometimes actually prosecuted under other offences like conspiracy to defraud. This makes their analysis more difficult. So, my analysis here is designed to give a general overview of the key factors in public and private prosecutions of criminal copyright offences under the CDPA 1988. I will first look at public prosecutions and private prosecutions separately. Then, I look at a few known cases where the type of prosecution is unclear. Finally, I will look at the general trends or factors present in all or most cases.

Public Prosecutions

No prosecution guidance has been published for copyright crimes.⁹⁷⁷ And my attempts to obtain the specific factors looked at by public prosecutors before deciding to prosecute someone for a copyright crime were unsuccessful. Consequently, the

⁹⁷⁷ Crown Prosecution Service, 'Cybercrime - prosecution guidance' (*Crown Prosecution Service*, 2018) <www.cps.gov.uk/legal-guidance/cybercrime-prosecution-guidance> accessed 01 October 2024.

standard that a case needs to meet before a public prosecutor would prosecute someone for a copyright crime under the CDPA 1988 has to be derived from the Code for Crown Prosecutions – which sets out the general tests that need to be satisfied before the CPS would prosecute someone for any criminal offence – and from the factors consistently present in cases prosecuted by the CPS or other public bodies for copyright crimes.

Before a public prosecutor decides to prosecute anyone for any offence, the case needs to meet the ‘Full Code Test.’ The test has two main limbs or stages – (1) evidential stage: ‘there needs to be sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge;’⁹⁷⁸ and, if limb (1) is satisfied, the (2) public interest stage: a prosecution will usually take place unless the public prosecutor is satisfied that there are public interest factors ‘tending against prosecution which outweigh those tending in favour.’⁹⁷⁹ The assessment would involve weighing various factors such as the seriousness of the offence, the level of culpability of the suspect, the suspect’s age and maturity at the time of the alleged offence, the impact of the offence on the community, whether prosecution is a proportionate response, and the possibility of out-of-court disposal as an alternative to prosecution.⁹⁸⁰ In the context of copyright crimes, this would necessarily require an analysis of the scale of the infringement, the harms caused by it, and the gain made from it (if any), among other things. Consequently, public prosecutions of copyright crimes are likely to involve infringements where the scale of infringement is high, the gain made is significant, or the losses are considerable. A

⁹⁷⁸ Crown Prosecution Service, ‘The Code for Crown Prosecutors’ (*Crown Prosecution Service*, 2018) <www.cps.gov.uk/publication/code-crown-prosecutors> accessed 01 November 2024.

⁹⁷⁹ *ibid.*

⁹⁸⁰ *ibid.*

comprehensive analysis of the public prosecution cases under the CDPA 1988 could confirm this hypothesis. But here, again, there is a notable limitation – most of the cases are unreported. So, the analysis below should be considered with this limitation in mind.

I will start by looking at the most recent cases. Public prosecutions of intellectual property crimes are usually undertaken by the Trading Standards Authorities.⁹⁸¹ The Trading Standards IP Crime Survey and Successes 2023 to 2024, published on the 5th of November 2024, reports three prosecutions⁹⁸² by Trading Standards Authorities of various Councils that are relevant. This relevant period is between April 2023 and March 2024. Interestingly, per the Ministry of Justice's data, between July 2023 and June 2024, only four prosecutions were brought under the CDPA 1988 for copyright crimes, and there were three convictions. Looking at the dates of the convictions highlighted in the Ministry of Justice's data, it is likely that the three convictions are the three highlighted in the survey.⁹⁸³ The first of the three I will look at is *R v Adam Jeffreys*, prosecuted by the Trading Standards Authority of the Lancashire County Council.⁹⁸⁴ Between 2014 and 2021, Jeffreys ran a counterfeit poster operation, selling tens of thousands of fake posters featuring copyright works and trademarks. He used fabricated

⁹⁸¹ UK Intellectual Property Office, 'IP crime and enforcement for businesses' (*UK Intellectual Property Office*, 2024) <www.gov.uk/government/publications/ip-crime-and-enforcement-for-businesses/ip-crime-and-enforcement-for-businesses> accessed 10 December 2024.

⁹⁸² Recall that, per the Ministry of Justice's statistics, between July 2023 and June 2024, only four copyright crimes were prosecuted under the CDPA 1988: see, p 213 (above).

⁹⁸³ UK Intellectual Property Office, 'Trading Standards IP Crime survey and Successes 2023 to 2024' (*UK Intellectual Property Office*, 2024) <www.gov.uk/government/publications/trading-standards-ip-crime-survey-and-successes-2023-to-2024/trading-standards-ip-crime-survey-and-successes-2023-to-2024> accessed 16 November 2024; Trading Standards Authorities are authorised to enforce the offences in s 107 CDPA 1988, by s 107A CDPA, 1988.

⁹⁸⁴ *R v Adam Jeffreys* (Preston Crown Court, 19 December 2023).

invoices and emails to try to show that his posters were legitimate, and he had registered businesses in other people's names to hide his illegal activities. When charged, he also tried to convince the court that his business was legitimate. His Honour Judge Jeffries KC described him as 'a liar, who had operated with a brazen disregard for licensing and trade mark laws'⁹⁸⁵ when sentencing him to 43 months in prison. In the proceeds of crime hearings that followed, it was found that he made sales totalling £1,819,783.18 and a profit of £ 1 million through his sales.⁹⁸⁶ He had £514,052.77 available, which he was ordered to pay in full or face an extra five years added to his sentence.⁹⁸⁷

The second case is *R v John Williams*.⁹⁸⁸ Williams, 72, who was prosecuted by the Suffolk Trading Standards, was found guilty of two offences – one of which was the offence of making for sale or hire an article infringing copyright under section 107(1), CDPA 1988. The other was a trade mark offence. He was making and supplying counterfeit DVDs of classic movies and TV series.⁹⁸⁹ He pled guilty to the charges and was sentenced to 16 months in prison (suspended for two years) and fined £7,500.⁹⁹⁰ He was also ordered to pay proceeds of £77,182 as the criminal benefit he made from the sales of counterfeit discs, plus pay prosecution costs of £42,870.⁹⁹¹ It is notable that the

⁹⁸⁵ *ibid*; Journal of Trading Standards' in-house team, 'Lengthy sentence for fake poster fraudster' (*Journal of Trading Standards*, 2024) <www.journaloftradingstandards.co.uk/counterfeit-goods/lengthy-sentence-for-fake-poster-fraudster/> accessed 28 November 2024.

⁹⁸⁶ Lancashire County Council, 'Poster fraudster ordered to pay back £500,000' (*Lancashire County Council*, 2024) <<https://news.lancashire.gov.uk/news/poster-fraudster-to-pay-back-gbp-500-000>> accessed 10 December 2024.

⁹⁸⁷ *ibid*.

⁹⁸⁸ *R v John Williams* (Ipswich Crown Court, 09 January 2024);

⁹⁸⁹ UK IPO (n 983); Shannon Eustace, 'Suffolk counterfeiter sentenced over pirate DVDs' *BBC News*, (Suffolk, 10 January 2024) <www.bbc.co.uk/news/uk-england-suffolk-67924555> accessed 04 December 2024.

⁹⁹⁰ *ibid*.

⁹⁹¹ *ibid*.

original complainant, Network Distributing Ltd, whose business involved buying licences to restore and remaster classic TV and films for DVD, ceased trading in June 2023,⁹⁹² and that reportedly nearly 30 jobs were lost.⁹⁹³

The third case of relevance is *R v Suraj Singh (t/a Justt Vape Ltd)*.⁹⁹⁴ Singh pled guilty to 22 offences, two of which were offences for infringement of copyright under the CDPA 1988.⁹⁹⁵ He was selling counterfeit e-liquids and hand sanitisers, breaching trademark, copyright, and safety laws. Investigations by Salford Trading Standards between 2019 and 2020 led to multiple seizures, including over 56,000 infringing products and hazardous hand sanitisers.⁹⁹⁶ Despite the investigation and an asset restraint order in July 2020, Singh continued his illegal conduct. Ultimately, the Manchester Crown Court sentenced him to 12 months in prison (suspended). His criminal benefit was assessed by the court to be £592,407.10, of which he was ordered to pay £125,259.09.⁹⁹⁷

The Trading Standards Survey 2022-2023⁹⁹⁸ has one noteworthy case – *R v Richard Hutter*.⁹⁹⁹ Richard Hutter sold counterfeit vinyl records, earning over £1.3 million in profits. The investigation began after a consumer complaint led Dorset

⁹⁹² Companies House, 'Network Distributing Limited' (GOV.uk) <<https://find-and-update.company-information.service.gov.uk/company/01476436>> accessed 04 December 2024; UK IPO (n 983).

⁹⁹³ UK IPO (n 983); Eustace (n 989).

⁹⁹⁴ *R v Suraj Singh (t/a Justt Vape Ltd)* (Manchester Crown Court, 28 November 2023).

⁹⁹⁵ UK IPO (n 983).

⁹⁹⁶ *ibid.*

⁹⁹⁷ *ibid.*

⁹⁹⁸ UK Intellectual Property Office, 'Trading Standards Survey 2022-2023' (UK Intellectual Property Office, 2023) <www.gov.uk/government/publications/trading-standards-ip-crime-survey-and-successes-2022-to-2023/trading-standards-survey-2022-2023> accessed 07 December 2024.

⁹⁹⁹ *R v Richard Hutter* (Bournemouth Crown Court, 04 April 2023).

Trading Standards to uncover counterfeit records. Evidence showed that he made the counterfeit records himself, despite Hutter claiming he bought them at record fairs across Europe. He involved his family in his fraudulent conduct by using their bank accounts to take payments. In April 2023, Hutter pleaded guilty to trade marks, copyright, and money laundering offences. He was given a suspended sentence, ordered to complete unpaid work, and placed under a curfew. He was also ordered to pay £373,000 under the Proceeds of Crime Act.

If we look at all the cases above, they have consistent features. The infringements were large-scale infringements. They all involved considerable amounts of financial gain or considerable financial losses for rights holders (or licensees). Additionally, the infringements are wilful and flagrant, with some continuing their conduct despite warnings and ongoing investigations. This is a limited sample of cases, of course. And drawing conclusions from them alone could mislead us. But the factors seen in the most recent cases do align with the UK government's purported policy of not applying criminal provisions 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'.¹⁰⁰⁰

Private Prosecutions

A private prosecution is a 'prosecution conducted by a private individual or entity, rather than a prosecuting authority with a statutory power to prosecute'.¹⁰⁰¹ The Code for Crown Prosecutors does not apply to private prosecutions. Consequently, the

¹⁰⁰⁰ UK Intellectual Property Office (n 5) 3.

¹⁰⁰¹ Crown Prosecution Service, 'Private Prosecutions' (2019) <www.cps.gov.uk/legal-guidance/private-prosecutions> accessed 02 November 2024.

Full Code Test does not apply. So, a private prosecutor does not need to assess the public interest factors relevant before prosecuting someone. And there are no general factors we can derive from any statutory provisions.

When we look at recent private prosecutions in the context of copyright infringements, a lot of them are prosecutions under the common law offence of conspiracy to defraud, as opposed to prosecutions under the copyright offences in the CDPA 1988. Consequently, the prosecutions do not show up in the Ministry of Justice's statistics as offences under the CDPA 1988. The 2012 conviction for conspiracy to defraud in *R v Anton Vickerman*¹⁰⁰² seems to have been a turning point in the use of conspiracy to defraud to address issues of large-scale infringements of copyright. Vickerman was the owner of the website Surfthechannel.com – a website that provided links to infringing content, and encouraged users to provide links, but did not themselves host any of the infringing content on their servers.¹⁰⁰³ He was not charged with copyright offences under the CDPA 1988. Instead, he was charged with conspiracy to defraud, for which he was found guilty and sentenced to four years in prison.

Following the decision in *R v Anton Vickerman*,¹⁰⁰⁴ the use of conspiracy to defraud to prosecute offences that could be proceeded under the CDPA 1988 became more common, primarily because, as I mentioned earlier in Chapter 5,¹⁰⁰⁵ charges under conspiracy to defraud are easier for juries to understand. The Premier League (and FACT), for instance, appear to use conspiracy to defraud to prosecute offences that

¹⁰⁰² *Anton Vickerman* (n 567).

¹⁰⁰³ *ibid.*

¹⁰⁰⁴ *ibid.*

¹⁰⁰⁵ See, p 252 (above).

could be classified as copyright offences. In *R v Terrence O'Reilly and another*¹⁰⁰⁶ the Premier League and FACT charged O'Reilly and O'Leary with conspiracy to defraud the Premier League and subscription television providers. The two defendants were selling modified IPTV boxes to pubs and consumers. The boxes were preloaded with applications and add-ons that allowed unlawful access to copyright works, including allowing 'free' streaming of subscription-only content.¹⁰⁰⁷ O'Leary, who pleaded guilty, was handed a suspended two-year prison sentence, while O'Reilly, who was found guilty by a jury, was sentenced to four years in prison. The CDPA 1988 does provide means to prosecute such offences under section 296ZB(1)(c)(iii).¹⁰⁰⁸ This is demonstrated by the public prosecution brought by the Middlesbrough Council in *R v Brian Thompson*¹⁰⁰⁹ though the defendant pleaded guilty in that instance.

*R v John Trevor Dodds and Jason Richards (aka Jason Richard Graham)*¹⁰¹⁰ was a similar case prosecuted under conspiracy to defraud by the Premier League in the Newcastle Crown Court. Both defendants were sentenced to 4 years and 6 months imprisonment each after pleading guilty to the charges. The facts were similar to those of *R v O'Reilly and Another*.¹⁰¹¹ The defendants supplied streaming devices to commercial premises, along with access to illegal streaming services. The court assessed Dodds' benefit at £995,000, and he was ordered to pay the £521,692.78 available,

¹⁰⁰⁶ *R v Terrence O'Reilly and another* (Nottingham Crown Court, 09 December 2016).

¹⁰⁰⁷ Out-Law, 'UK cases highlight different routes taken by prosecutors over the supply of modified TV set-top boxes' (n 882).

¹⁰⁰⁸ CDPA 1988, s 296ZB(1)(c)(iii).

¹⁰⁰⁹ *R v Brian Thompson* (Teesside Crown Court, 20 October 2017).

¹⁰¹⁰ *R v John Trevor Dodds and Jason Richards (aka Jason Richard Graham)* (n 752); IP Crime Group, *IP Crime and Enforcement Report 2017/18* (IP Crime Group 2018) 68.

¹⁰¹¹ *O'Reilly and Another* (n 1006).

including a Villa in Northern Cyprus, vehicles, and cash.¹⁰¹² Richards was assessed to have made some £462,463, of which only £2,500 was available.¹⁰¹³

In *R v King & Ors*¹⁰¹⁴ was another case that the Premier League prosecuted privately. Following a four-week trial at Warwick Crown Court in March 2019, the jury convicted the three defendants of conspiracy to defraud for unlawfully providing unauthorised access to Premier League football to over 1,000 businesses and homes across England and Wales, generating earnings exceeding £5 million.¹⁰¹⁵ The mastermind of the operation, Steven King, was later ordered to forfeit £963,000 as proceeds of his crimes.¹⁰¹⁶

The final case I will examine involving private prosecutions for conspiracy to defraud in the context of copyright infringements is *R v Gould (Mark)*, another prosecution by the Premier League, supported by FACT.¹⁰¹⁷ The reported Court of

¹⁰¹² National Trading Standards, *Annual Report 2019-20* (National Trading Standards 2020) 52.

¹⁰¹³ *ibid*; Rob Kennedy, 'Sports broadcasting conman who made £462,000 from lucrative fraud must pay back just £2,500' (*ChronicleLive*, 2019) <www.chroniclelive.co.uk/news/north-east-news/jason-richards-sports-broadcasting-conman-16562423> accessed 07 December 2024.

¹⁰¹⁴ *R v King & others* (n 752).

¹⁰¹⁵ Premier League, 'Illegal stream organisation jailed for total of 17 years' (2019) <www.premierleague.com/news/1110569> accessed 20 November 2024; Federation Against Copyright Theft, 'Three sellers of illegal streaming devices jailed for a total of 17 years for defrauding Premier League' (2019) <www.fact-uk.org.uk/three-sellers-of-illegal-streaming-devices-jailed-for-a-total-of-17-years-for-defrauding-premier-league/> accessed 09 November 2024.

¹⁰¹⁶ *ibid*; Federation Against Copyright Theft, 'Court orders £1m Court Order for supplier of illegal streaming devices providing illegal access to Premier League content' (*Federation Against Copyright Theft*, 2022) <www.fact-uk.org.uk/court-orders-payment-by-criminal-who-supplied-illegal-streaming-devices-providing-unauthorised-access-to-premier-league-content/> accessed 12 December 2024; Premier League, 'ISD supplier ordered to pay back £1m for defrauding Premier League' (*Premier League*, 2022) <www.premierleague.com/news/2640659> accessed 07 November 2024.

¹⁰¹⁷ *R v Gould (Mark)* [2024] EWCA Crim 669.

Appeal decision was a refusal of an application for leave to appeal. The decision, however, helpfully summarises the key facts in the following terms:¹⁰¹⁸

4. In August 2016, the appellant set up a streaming service accessible via the internet. It was called Flawless Hosting. That service, and successor services which operated from July 2018, were engines of fraud. The appellant had two partners, named Gordon and Jolley, when the service was first set up. Shortly thereafter, a man named Felvus joined them. In January 2018, a man called Brown became involved. All of these men were prosecuted along with the appellant.

...

6. Flawless Hosting copied, or otherwise unlawfully obtained the content of, pay-tv broadcasts made for subscribers to legitimate providers, both in the United Kingdom and in other English speaking countries around the world. The unlawfully obtained content was then provided by an internet streaming service to customers of Flawless Hosting. The customers were mainly based in the UK, though the service also had customers in the United States, Australia and Ireland.

7. Customers of the streaming service would pay £6 or £10 a month, depending on whether they purchased material directly from the streaming service or via a re-seller. At any one time the service would have been received by up to 60,000 subscribers. In the period August 2016 to May 2018, Flawless received approximately £4.6 million from its direct customers. The overall cost to Flawless for providing the streaming service was of the order of £800,000, leaving £3.7 million to be shared between the conspirators. The appellant's share was £1.7 million.

8. ... Had the Flawless customers obtained the material legitimately from the legitimate providers, the subscription income to Sky and BT would have been in excess of £37 million.

...

12. ... The business changed its name, first to Shared Servers and then to Shared VPS. A new PayPal account was set up in

¹⁰¹⁸ *ibid* [4], [6]-[8], [12]-[13].

the name of a Hungarian national. Customers would pay into that account, which was under the control of the appellant.

13. Between June 2018 and July 2021, the turnover of the streaming service which succeeded Flawless (whether it was named Shared Servers or Shared VPS) was around £2.6 million. Those receipts represented some 430,000 subscribed months. The receipts per customer were less than when Flawless had been operating, because the successor service took a significant part of its income in Bitcoin. Customers who paid in Bitcoin were given a discount. In addition, the cost of legitimate subscriptions to Sky and BT fell over this period. Had the services obtained unlawfully during this period been obtained legitimately, the cost to subscribers would have been in excess of £29 million.

Gould was convicted on 30th May 2023 for two counts of conspiracy to defraud, and sentenced to 10 years and 2 months imprisonment on those two counts.¹⁰¹⁹ We are yet to have a decision or a confiscation order under the Proceeds of Crime Act 2002 – but given the amounts involved, it is likely to be significant (provided they are available).

Of course, although many private prosecutions in the context of copyright infringements are prosecuted under ‘conspiracy to defraud,’ there are some reported private prosecutions under the criminal copyright offences in the CDPA 1988. One is *R v Ross (William Keith)*,¹⁰²⁰ where the defendant pleaded guilty to one count of distributing/infringing copies of copyright works, contrary to section 107(1)(d)(iv), CDPA 1988.¹⁰²¹ He was sentenced to 36 weeks’ imprisonment, suspended for 12 months.¹⁰²² Moreover, in the confiscation proceedings under the Proceeds of Crime Act 2002, the criminal benefit was assessed at £102,143, and the court found that the

¹⁰¹⁹ *ibid.*

¹⁰²⁰ *R v Ross (William Keith)* [2012] EWCA Crim 750.

¹⁰²¹ CDPA 1988, s 107(1)(d)(iv).

¹⁰²² *Ross* (n 1020) [1].

amount was available. Consequently, a confiscation order was made for £102,143.¹⁰²³ Another is *R v Toska (Albert)*.¹⁰²⁴ The reported decision is an appeal of his sentence after he had pleaded guilty to several offences, including one count of making articles for sale in breach of copyright, contrary to section 107(1)(a), CDPA 1988.¹⁰²⁵ The defendant had downloaded and scanned the artwork to put on blank disks related to satellite navigation material, which he intended to copy and then resell without a licence.¹⁰²⁶ The appeal was partially successful, but only affected a sentence on a different count (i.e. possessing apparatus designed for making false identity documents with intent), which is not relevant here.

In *R v Mark Schofield*,¹⁰²⁷ a private prosecution by Sky TV, Schofield was sentenced in the Bolton Crown Court to imprisonment of 24 months (suspended for 2 years) and required to complete 240 hours of unpaid work. The defendant had entered guilty pleas to various offences under the Fraud Act 2006 and the CDPA 1988, which concerned his adaptation and sale of devices enabling the viewing of pay TV without a subscription. The prosecution and the defendant reportedly agreed that the turnover amounted to £100,000.¹⁰²⁸

¹⁰²³ *ibid.*

¹⁰²⁴ *R v Toska (Albert)* [2010] EWCA Crim 2187, [2011] 1 Cr App R (S) 102.

¹⁰²⁵ CDPA 1988, s 107(1)(a).

¹⁰²⁶ *Toska* (n 1024) [5].

¹⁰²⁷ *R v Mark Schofield* (Bolton Crown Court, 09 June 2020).

¹⁰²⁸ Jamie Bowman, 'Facebook trader from Radcliffe 'causes Sky losses of £1m' with illegal streaming devices' (*BuryTimes*, 2020) <www.burytimes.co.uk/news/18506716.facebook-trader-radcliffe-causes-sky-losses-1m-illegal-streaming-devices/> accessed 10 November 2024.

The final case I will look at in this part is *R v Stephen Millington*,¹⁰²⁹ a private prosecution by FACT.¹⁰³⁰ Millington created a software package called 'stephen-builds' that facilitated access to subscription television and film content without payment to the rights holders. He also supplied details of the 'Supremacy' and 'Supremacy Sports' add-ons, which enabled users to access that content via a group he set up and managed on Facebook, in which thousands of members were given instructions and support with the use of the add-ons. Millington also created multiple YouTube videos, which helped users install the software and add-ons and demonstrated the ability of his 'build' to enable the viewing of subscription television and film content. He was found guilty of making and supplying software to enable illegal access to subscription content, distributing infringing film content via a dedicated server he controlled, sharing login credentials for subscription streaming services and illegally accessing content for personal use. The value of the content unlawfully made available was estimated to be in the region of £3.8 million per year, amounting to over £10 million over the course of the fraud.

Based on the limited data and information about private prosecutions that are available, it appears that private prosecutions in the context of copyright infringements (whether proceeded under the CDPA 1988 or the common law offence of conspiracy to defraud) also target mass-scale infringements that are primarily aimed at generating

¹⁰²⁹ *R v Stephen Millington* (Chester Crown Court, 30 November 2021).

¹⁰³⁰ Federation Against Copyright Theft, 'Thirty months' imprisonment for pirate software developer' (*Federation Against Copyright Theft*, 2021) <www.fact-uk.org.uk/thirty-months-imprisonment-for-pirate-software-developer/> accessed 10 December 2024.

profits or ones that cause considerable losses to rights holders, similar to public prosecutions.

Other cases

I mentioned at the start of this section that some cases lack information about the nature of the prosecution. Here, I will analyse a couple of cases that fall into this category. I will start with *R v Price*.¹⁰³¹ The case involved the counterfeiting of vinyl disc recordings of various 1960s artists. Price was a director of Soulttime Records Ltd, which arranged for the counterfeit records to be made or pressed before selling them. On 12th November 2018, he changed his plea to guilty and admitted two counts of unauthorised making of a copyright work, contrary to section 107(1)(a), CDPA 1988, among other offences.¹⁰³² The judge found Price had benefited from his criminal conduct to the extent of £115,496.69 and that this amount should be increased to £146,213.34 to reflect the increase in the value of money over time. The judge also found that the current available or recoverable amount was £94,200.21, which included an amount of £15,386.41 found to be hidden assets.¹⁰³³

Another relevant case is *R v Manrico Toschi*.¹⁰³⁴ The case was an unsuccessful appeal of a custodial sentence after the defendant changed his plea to guilty on three counts, one of which was the offence of distributing infringing articles contrary to section 107(1)(d), CDPA 1988.¹⁰³⁵ The defendant ran a home-based business copying or

¹⁰³¹ *R v Price* [2023] EWCA Crim 1705 [5]-[7],[10]-[11].

¹⁰³² CDPA 1988, s 107(1)(a).

¹⁰³³ *Prince* (n 1031).

¹⁰³⁴ *R v Manrico Toschi* (n 805).

¹⁰³⁵ CDPA 1988, s 107(1)(a).

producing audiobooks of copyright works without the necessary licences, and sold them primarily on eBay and i.offer.com for profit. He carried out the activity even after warning notices. On that count, he was sentenced to 2 years' imprisonment. A confiscation order of £56,000 was also issued.

6.2. The case for reform

From the analysis above, it seems apparent that recent reported or known cases applying the criminal copyright provisions in section 107, CDPA 1988 are all instances of large-scale, intentional copyright infringements only. So, the law in practice is focused on bad faith, large-scale intentional infringements that aim to make a commercial benefit or cause considerable loss. The general prosecution practice in the UK is quite clearly within the scope of justifiability laid out by the normative framework. There is, therefore, a discrepancy between the justifiability of the law in practice and the law on paper. And that provides a basis for reforming the criminal copyright provisions in the CDPA 1988, to narrow its scope.

The immediate question, perhaps, is: Why should we amend the criminal copyright provisions if there is nothing wrong with how prosecutors use them? The simple answer is that the mere fact that the practice is one way today does not guarantee that it will remain that way. The discrepancy leaves room for arbitrary decision-making and reduces the consistency and fairness of the process. Moreover, the existence of private prosecutions and the lack of a consent requirement for prosecutions for copyright crimes in the UK means that there is always a risk of prosecutions that do not align with the government's or the CPS's policies.

The analysis of the prosecution practice also highlights another key aspect to reform – the use of the common law offence of conspiracy to defraud as opposed to the specific offences in the CDPA 1988. I have already discussed why the use of the common law offence is inappropriate.¹⁰³⁶

6.3. Should private prosecutions for copyright crimes be abolished or reformed?

Our analysis here would, perhaps, be incomplete without considering whether private prosecutions for copyright crimes should be abolished or reformed, especially given the current discussions about the use and misuse of private prosecutions stemming from the British Post Office Horizon Scandal.¹⁰³⁷ The Explanatory Notes of the Post Office (Horizon System) Offences Act 2024 summarises the key facts of the scandal in the following terms:¹⁰³⁸

From 1996, the Post Office piloted new Horizon software in some of its branches. This software was introduced across the network of branches in 2000. The software had faults which meant that some postmasters' accounts showed false shortfalls. The Post Office obliged postmasters to "repay" these false shortfalls. Some postmasters and others were suspended (generally without pay) and/or dismissed. Others were prosecuted for dishonesty offences (by the Post Office itself or by the Crown Prosecution Service (CPS)); some were convicted and imprisoned. Some were made bankrupt (in some cases on the petition of the Post Office: there are allegations that this was done maliciously). Some lost their homes. Some suffered mental or physical health

¹⁰³⁶ See, p 229 (above).

¹⁰³⁷ See, for e.g., Kate McMahon, 'In defence of private prosecutions' (2024) 174(8061) *New Law Journal* 7; Stephen Colman, 'Evaluating private prosecutions: reform or abolition?' (2023) 11 *Criminal Law Review* 692; JR Spencer, 'The unhappy state of private prosecutions' (2022) 1 *Archbold Review* 8; Jonathan Rogers, 'Private prosecutions and safeguards' (2020) 9 *Criminal Law Review* 769; Philip Stott, 'Public pain about private prosecutions' (*The Bar Council*, 2024) <www.barcouncil.org.uk/resource/public-pain-about-private-prosecutions-post-office-scandal-blog.html> accessed 01 December 2024.

¹⁰³⁸ Explanatory Notes of the Post Office (Horizon System) Offences Act 2024, para 3.

problems as a result of their treatment or of the financial consequences. Some were harried as thieves by their local communities. Some suffered breakdowns in relationships with their partners, children or other families and friends. Several died by suicide.

The Act quashed the wrongful convictions for theft, fraud, and related offences during the period of the Horizon Scandal in England and Wales, on a blanket basis.¹⁰³⁹ With over 900 individuals convicted between 1990 and 2015,¹⁰⁴⁰ the scandal has been described as one of the largest miscarriages of justice in modern English history.¹⁰⁴¹ An overwhelming majority of those convictions – estimated to be around 700 – were in cases prosecuted by the Post Office privately,¹⁰⁴² which sparked discussions on whether private prosecutions should be abolished, or at the very least reformed.¹⁰⁴³ Although the Crown Prosecution Service also undertook some of the prosecutions caught in the scandal, the scale of the private prosecutions by the Post Office that resulted in wrongful convictions, and the fact that the prosecutors had failed to investigate the relevant and necessary matters and failed to make the necessary disclosures regarding the issues with the software, underscored the potential for abuse when individuals or entities

¹⁰³⁹ *ibid* para 1; Post Office (Horizon System) Offences Act 2024, s 1(1): ‘Every conviction to which this Act applies is quashed on the coming into force of this Act.’

¹⁰⁴⁰ HC Deb 10 January 2024, vol 743, col 302.

¹⁰⁴¹ Explanatory Notes of the Post Office (Horizon System) Offences Act 2024, para 8; UK Research and Innovation, ‘Exposing the driving force of the Post Office scandal’ (UKRI, 2024) <www.ukri.org/who-we-are/how-we-are-doing/research-outcomes-and-impact/esrc/exposing-the-driving-force-of-the-post-office-scandal/> accessed 01 December 2024.

¹⁰⁴² Sally Lipscombe and others, *Post Office (Horizon System) Offences Bill* (Research Briefing CBP No 9986, House of Common Library 2024) 5, 11. Note, however, that the Private Prosecutors’ Association does question if the Post Office was a private prosecutor during the period of the Scandal: Private Prosecutors’ Association, ‘Written Evidence from Private Prosecutors’ Association (PPS0021)’ (*UK Parliament*, 2020) <<https://committees.parliament.uk/writtenevidence/8284/html/>> accessed 13 October 2024.

¹⁰⁴³ See fn 1037.

motivated by self-interest,¹⁰⁴⁴ as opposed to the public interest, are allowed to prosecute privately.

The right to bring a private criminal prosecution is not a statutory right. It is a general historical right stemming from the earliest days of the British legal system.¹⁰⁴⁵ Following the formation of regular police services and the establishment of the office of the Director of Public Prosecution ('DPP') in 1879,¹⁰⁴⁶ the *need* to bring private prosecutions has declined because public authorities generally deal with the investigation and the prosecution of the majority of the crimes. But, the right to bring a private prosecution remained, and is preserved by the Prosecution of Offences Act 1985.¹⁰⁴⁷ Lord Diplock explained the rationale for having private prosecutions in *Gouriet v Union of Post Office Workers*.¹⁰⁴⁸ He describes private prosecutions as 'a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of [public] authorities to prosecute offenders against the criminal law.'¹⁰⁴⁹

The right to bring private prosecutions is not an unfettered one. Section 6(2) of the Prosecution of Offences Act 1985 empowers the DPP to take over the conduct of any private prosecutions, which the DPP may continue or discontinue in line with the

¹⁰⁴⁴ *Hamilton v Post Office Ltd* [2021] EWCA Crim 577, [2021] Crim LR 684 [129]: 'We are driven to the conclusion that throughout the period covered by these prosecutions POL's approach to investigation and disclosure was influenced by what was in the interests of POL, rather than by what the law required.'; Juan Cardenas, 'Crime Victim in the Prosecutorial Process' (1986) 9(2) Harvard Journal of Law & Public Policy 357, 359-366.

¹⁰⁴⁵ Lipscombe and others, *Post Office (Horizon System) Offences Bill* (n 1042) 17; *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL) (Lord Diplock) 477-478.

¹⁰⁴⁶ Prosecution of Offences Act 1879.

¹⁰⁴⁷ Prosecution of Offences Act 1985, s 6(1).

¹⁰⁴⁸ *Gouriet* (n 1045).

¹⁰⁴⁹ *ibid*.

Code for Crown Prosecutors.¹⁰⁵⁰ Moreover, some crimes require the consent of the DPP. The decision to give consent to, and the decision to discontinue a private prosecution (and, in fact, a decision to prosecute or continue a public prosecution) ultimately depends on the ‘Full Code Test’ under the Code for Crown Prosecutors.¹⁰⁵¹

This discussion is hardly new in the context of copyright crimes. Back in 1997, the Law Commission proposed a framework requiring the consent of a Law Officer or the Director of Public Prosecutions to be a condition precedent to the institution of private prosecutions of various crimes,¹⁰⁵² primarily due to anomalies in the consent requirement for crimes.¹⁰⁵³ One of the categories of cases identified by the Law Commission in its proposal was those ‘in respect of which it is particularly likely, given the availability of civil proceedings in respect of the same conduct, that the public interest will not require a prosecution.’¹⁰⁵⁴ Copyright infringement cases were explicitly noted as the paradigm example of this category of cases.¹⁰⁵⁵ The proposal was ultimately abandoned following a public consultation, noting criticisms by the Criminal Bar Association, who argued that ‘it would be difficult to decide what motives lay behind concurrent civil and criminal proceedings,’¹⁰⁵⁶ and the Bar Council and Professor

¹⁰⁵⁰ Prosecution of Offences Act 1985, s 10; *R (on the application of Gujra) (FC) (Appellant) v Crown Prosecution Service (Respondent)* [2012] UKSC 52, [2013] 1 AC 484 [15].

¹⁰⁵¹ See, pp 275-280 (above) for what the ‘Full Code Test’ entails.

¹⁰⁵² Law Commission, *Consents to Prosecution Report* (Law Com No LC255 1998).

¹⁰⁵³ One example that the Law Commission noted in their proposal was the example of bribery – the offer or receipt of a bribe could be, in specific circumstances, charged under the common law offence of bribery or under the statutes (for e.g., Prevention of Corruption Act 1916). Under a common law charge, no consent is needed. Under a statutory charge, consent is needed. See, for further examples, *ibid* 49-53.

¹⁰⁵⁴ *ibid* 69.

¹⁰⁵⁵ *ibid*.

¹⁰⁵⁶ Law Commission, *Consents to Prosecution Report* 48-49.

Andrew Ashworth, both of whom pointed out that the cases falling within the category would be 'subjective and difficult to define'.¹⁰⁵⁷

But, in light of the developments since then, it is worth considering again whether private prosecutions should either be abolished in copyright crimes or reformed, for instance, to require the consent of the DPP. I will first consider the arguments in favour of having private prosecutions for copyright crimes.¹⁰⁵⁸ I start with Lord Diplock's rationale – that private prosecutions act as a 'safeguard' 'against capricious, corrupt or biased failure or refusal of [public] authorities to prosecute offenders against the criminal law'.¹⁰⁵⁹ There is strength in this. Copyright holders often have a vested interest in ensuring their rights are protected. So, where public prosecutors do not act due to capriciousness, corruption, or bias, or for some other reason, private prosecutions *can* be an effective mechanism to enforce copyright law and deter infringers. For instance, we saw above that *R v Anton Vickerman*¹⁰⁶⁰ was a private prosecution brought by FACT. The case was brought privately after the CPS had refused to prosecute, with the CPS reportedly noting the following in a letter dated 12 December 2008:¹⁰⁶¹

I understand from [Northumbria Detective Constable] Watkin that there have been no other successful prosecutions that he is aware of where we could point to this type of website being classified as amounting to "making available... by electronic transmission," the legal standard needed to find Vickerman guilty of copyright infringement. At present it

¹⁰⁵⁷ *ibid.*

¹⁰⁵⁸ Although we consider them in the context of copyright crimes, some of the arguments considered here are more general arguments for having private prosecutions.

¹⁰⁵⁹ *Gouriet* (n 1045).

¹⁰⁶⁰ *Vickerman* (n 567).

¹⁰⁶¹ Timothy Lee, 'Private justice: How Hollywood money put a Brit behind bars' (*Ars Technica*, 2012) <<https://arstechnica.com/tech-policy/2012/08/private-justice-how-hollywood-money-put-a-brit-behind-bars/>> accessed 25 November 2024.

appears uncertain if in fact what the suspect has done does infringe *this particular legislation*. Certainly on the evidence thus far provided it is impossible for me to determine if this is the case and therefore I cannot advise any prosecution on the evidence presented.

...

His 'crime' is to make it easier for others to find what is already there. This begs the rather obvious question of why he is being pursued rather than those who actually breach the copyright by displaying the material.

The letter was released by Vickerman following the trial along with other restricted court documents, for which he was held in contempt.¹⁰⁶² It is worth recalling that Vickerman was charged with conspiracy to defraud, which is a common law offence, and not an offence under the CDPA 1988.¹⁰⁶³ So, the CPS's reported position is understandable. It was also a time before the scope of the 'communication to the public' right under the InfoSoc Directive received sufficient clarity from the CJEU.¹⁰⁶⁴

Of course, a private prosecution need not be, and in fact, is not the only recourse available where the public prosecutors refuse to prosecute. One alternative is the Victims' Right to Review ('VRR') Scheme introduced on 05 June 2013, which allows victims¹⁰⁶⁵ of crimes to request a review of decisions, *inter alia*, not to bring criminal

¹⁰⁶² Ernesto Van der Sar, 'SurfTheChannel Owner Sentenced for Contempt of Court' (*TorrentFreak*, 2012) <<https://torrentfreak.com/surfthechannel-owner-sentenced-for-contempt-of-court-121122/>> accessed 10 December 2024; 'Surfthechannel owner jailed for contempt of court' *BBC News* (21 November 2012) <www.bbc.co.uk/news/uk-england-tyne-20435505> accessed 01 October 2024.

¹⁰⁶³ *Vickerman* (n 567); See, pp 281 (above).

¹⁰⁶⁴ Of the cases I had referred to in Chapter 5 (pp 253-261) only *SGAE* (n 900) had been decided at that point.

¹⁰⁶⁵ A victim is defined as 'a person who has made an allegation that they have suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by criminal conduct.' Those falling within the definition of a victim can also include close relatives of a person whose death was directly caused by criminal conduct; parents or guardians where the main victim is a child or youth under 18; police officers who are victims of crime; family spokespersons of victims with a disability or

proceedings, decisions to discontinue or withdraw charges involving the victim, thereby entirely ending all proceedings relating to them. Another option is judicial review, where any bias, capriciousness, or corruption can be challenged in a court of law. This is the general way, and perhaps, the proper way of challenging such decisions by state authorities. A decision by the CPS under the VRR scheme can also be the subject of a judicial review.¹⁰⁶⁶ Given the availability of suitable and arguably more appropriate alternatives that have been introduced and developed since Lord Diplock's rationale is no longer as strong as it was then.

The second key argument in favour of retaining private prosecutions is that private individuals or entities, especially those in the creative industries, have greater specialised knowledge about copyright infringement compared to public authorities. This can allow them to identify and pursue infringements that might otherwise go unprosecuted. This is an argument that Ari Alibhai, Counsel retained by the Premier League, Sky, and FACT, submitted to the Justice Select Committee in response to the Committee's request for evidence concerning safeguards against prosecutorial abuse in victim-led private prosecutions.¹⁰⁶⁷ He noted that courts themselves have recognised the difficulties that public prosecutors face concerning the prosecution of complex cases of copyright infringements. He points to Leveson LJ's comments in this context in

who are so badly injured they cannot communicate; and businesses: Crown Prosecution Service, *Victims' Right to Review - Policy and Guidance 2020* (Crown Prosecution Service 2020) para 16.

¹⁰⁶⁶ *ibid*, para 47; *R (on the application of Wyatt) v Thames Valley Police* (n 864) [107]-[116]: Although the application was unsuccessful in the particular instance, the case makes it clear that judicial review is an option for those aggrieved by a public authority's decision not to prosecute.

¹⁰⁶⁷ Ari Alibhai, 'Written evidence from FACT, Sky UK Limited, The Football Association Premier League Limited (PPS0016): Response to Request for Evidence from the Justice Select Committee Concerning Safeguards Against Prosecutorial Abuse in Victim-Led Private Prosecutions' (*UK Parliament*, 2020) <<https://committees.parliament.uk/writtenevidence/8269/html/>> accessed 13 October 2024.

Scopelight v Chief Constable of Northumbria,¹⁰⁶⁸ as an example. There, the Court of Appeal had noted that cases involving copyright infringements are ‘complex’ and that ‘specialist knowledge will inevitably be required to pursue them, and each case is likely to be difficult, time-consuming and expensive.’¹⁰⁶⁹ Levenson LJ went on to state:

In a time when allegations of terrorism and other extremely serious crime take up more and more time and involve ever increasing resources, it is inevitable (and appropriate) that the CPS will have to be selective.¹⁰⁷⁰

All this is true. But they are generally true for most economic or financial crimes. Specialist knowledge would be required when prosecuting them. Terrorism and other extremely serious crimes may be prioritised over them.

Notably, about four years after the Court of Appeal’s decision in *Scopelight*, the Police Intellectual Property Crime Unit (PIPCU) was established to investigate, disrupt, and prevent intellectual property crime. The PIPCU (as we saw earlier in Chapter 4) is a specialist police unit established in 2013, ‘dedicated to protecting physical goods from intellectual property crime and combating online piracy.’¹⁰⁷¹ So, there is an expert team of police officers who know how to investigate IP crimes and are dedicated to it. That eliminates (or at least reduces) the issue of the public authorities lacking specialist knowledge for investigating copyright crimes.

¹⁰⁶⁸ *Scopelight v Chief Constable of Northumbria* [2009] EWCA Civ 1156, [2010] QB 438.

¹⁰⁶⁹ *ibid* [51].

¹⁰⁷⁰ *ibid*.

¹⁰⁷¹ City of London Police, ‘Police Intellectual Property Crime Unit (PIPCU)’ (*City of London Police*, <www.cityoflondon.police.uk/police-forces/city-of-london-police/areas/city-of-london/about-us/about-us/pipcu/> accessed 20 November 2024).

As for prosecutorial expertise, a couple of things must be noted. First, the CPS has had an 'Advocate Panels Scheme' operating since February 2012.¹⁰⁷² It is essentially a program whereby the CPS instructs external advocates (primarily self-employed barristers) to represent the CPS in criminal prosecution advocacy in the Crown Courts and Higher Courts.¹⁰⁷³ The relevant point here is that several Specialist Panels, such as the Fraud Panel, the Proceeds of Crime Panel, and the Serious Crime Group Panel, have been in existence since April 2013. So, if the CPS lacks specialist knowledge to prosecute copyright crimes, an IP Crime Panel *could* be created. Second, specialist knowledge, like all forms of knowledge, is obtained through education and experience. Though creative industries may have specialist knowledge about some aspects of creative work, it does not necessarily mean that public prosecutors or CPS cannot obtain the expertise required to prosecute copyright crimes. After all, even in private prosecutions, the cases are (generally) handled, presented, and advocated by barristers – and not by creators, artists, or copyright owners themselves. What is needed, therefore, is the incentive to invest in specialist public prosecutors for IP crimes, including copyright crimes. It may very well be that the knowledge that private prosecutions will likely be brought in instances of complex copyright crimes 'allows' or somewhat 'encourages' the public authorities or the State to 'forgo' training specialist public prosecutors to deal with such crimes. Thirdly, the proposition that the CPS does not have or may not have the expertise to deal with complex cases of copyright infringement does not appear to be true anymore (assuming it ever was). As we saw above, a lot of private prosecutions

¹⁰⁷² Crown Prosecution Service, 'Selection of Advocates' (Crown Prosecution Service, 2022) <www.cps.gov.uk/publication/selection-advocates> accessed 13 November 2024.

¹⁰⁷³ *ibid.*

undertaken to enforce copyrights or private parties tend to use the offence of ‘conspiracy to defraud’ as opposed to statutory offences under the CDPA 1988. In just 2019/20, the CPS prosecuted approximately 10,000 fraud cases, with an 86.4% success rate.¹⁰⁷⁴ The CPS also has a Specialist Fraud Division (SFD), which works closely with the PIPCU and other investigators and handles most complex fraud cases.¹⁰⁷⁵ The SFD was involved, for example, in *R v Wayne Evans*,¹⁰⁷⁶ a landmark case that provides sentencing guidelines for conviction under the CDPA 1988.¹⁰⁷⁷ Finally, I have already argued that a justifiable criminal copyright provision needs to be clear enough to allow a reasonable person to interpret from the provision what precisely is being prohibited and what is not.¹⁰⁷⁸ If statutory provisions meet that standard of clarity, the investment needed to train or hire specialist public prosecutors who can prosecute copyright crimes is unlikely to be too significant, if indeed that is necessary.

What remains is an issue of public resources, primarily time and money. While the CPS would have to allocate its resources appropriately, considering all crimes committed, based on their seriousness, private individuals or entities interested in protecting their copyrights through private prosecutions may be better equipped in terms of funding and financial resources needed for the prosecution. That said, where the prosecution is successful, private prosecutors can, and do¹⁰⁷⁹ recover costs from

¹⁰⁷⁴ IP Crime Group, *IP Crime and Enforcement Report 2020-2021* (n 655) 32.

¹⁰⁷⁵ *ibid.*

¹⁰⁷⁶ *Wayne Evans* (n 786).

¹⁰⁷⁷ IP Crime Group, *IP Crime and Enforcement Report 2016/17* (n 755) 26-28.

¹⁰⁷⁸ See, p 273 (above).

¹⁰⁷⁹ *R v Peter Ernest Wylie* [2010] EWCA Crim 3110, [2011] LLR 586; *R v Ross (William Keith)* (n 1020); *Federation Against Copyright Theft Limited v Stanley Richard Ashton* [2013] EWHC 1923 (Admin), [2014] 1 WLR 1322; *Federation Against Copyright Theft (FACT) v Broomhall and Others* (n 976).

central funds in sums the court considers reasonable to compensate the prosecutor under the Prosecution of Offences Act 1985.¹⁰⁸⁰ Successful private prosecutions, therefore, consume public resources in addition to the normal expenses of the court in conducting the proceedings.

The summary then is that private prosecutions provide a safeguard against public authorities' failure or refusal to prosecute, whether it is due to capriciousness, corruption, bias, or lack of specialism or resources. Undoubtedly, these are reasons that support retaining private prosecutions for copyright crimes. But, the reasons are not necessarily conclusive because there are alternative means of redress, especially in the cases of capriciousness, corruption, or bias.

When we move on to the reasons to abolish or reform private prosecutions for copyright crimes (and indeed more generally), a fundamental issue comes up – the nature of a crime and the conceptual bases of today's criminal justice system. Recall that when I defined criminalisation in Chapter 3, I stated that it is the 'state's moral condemnation of specific conduct'¹⁰⁸¹ and that it is the 'state's assertion that people engaging in criminalised conduct are culpable wrongdoers deserving of moral stigma, blame, and punishment.'¹⁰⁸² The reader is likely to have accepted that as fact without much thought.

¹⁰⁸⁰ Prosecution of Offences Act 1985, s 17(1).

¹⁰⁸¹ See, pp 125-130 (above).

¹⁰⁸² *ibid.*

A crime has long been understood as a ‘public wrong.’¹⁰⁸³ What this means is not without disagreement.¹⁰⁸⁴ But, one widely accepted view (and one that I implicitly endorsed in Chapter 3) is that a crime is not just a wrong committed against a victim,¹⁰⁸⁵ but a wrong against ‘the good order of the state.’¹⁰⁸⁶ Consequently, it is for the state, through its agents, to investigate and prosecute crimes. The public nature of a crime distinguishes it from a tort. Some wrongful conduct, like assault or battery, can be criminal and also amount to a tort, giving the victim of the conduct the right to claim damages or other private law remedies. While there was a *need* for private prosecutions in the past because of the lack of public prosecution services, that is no longer true. The response may be that every resident should have a remedy available to protect the public interest criminal laws seek to protect, not least because the state itself (in a modern democracy, at least) derives its power and moral authority from the people’s delegation. The role of a private prosecutor, therefore, is a public office that is voluntarily assumed.¹⁰⁸⁷ Where the public authorities are not acting in the public interest due to a lack of resources, which can exhaust any remedies from a judicial review, there needs to be some way to hold criminals accountable. There is, after all, a public interest in

¹⁰⁸³ Lamond (n 560) 614; Blackstone, *Commentaries on the Law of England - Book III: Of Private Wrongs* (n 97) 1: ‘Wrongs are divisible into two sorts or species; private wrongs, and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed civil injuries; the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdeemesnors*.’

¹⁰⁸⁴ *ibid.*

¹⁰⁸⁵ Some crimes, like drug use offences, are often referred to as ‘victimless’ crimes. But, such crimes are only ‘victimless’ in a narrow sense. They protect the wider societal interests that are set back by such offences. So, for instance, illegal drug use can have severe impacts on drug users, their families, and the wider society.

¹⁰⁸⁶ *Jones v Whalley* [2006] UKHL 41, [2007] 1 AC 63 (Lord Bingham) [16]; Lamond (n 560).

¹⁰⁸⁷ *R (Bin Khalifa) v Ghadeer Alsaqabi* [2024] 5 WLUK 570 (Crown Court) [25].

prosecuting crime. But one key question remains: How can a private prosecutor act in the public interest when they also have their private interest in mind?

The answer to this question takes us to a second key concern about private prosecutions – their potential for abuse. As highlighted earlier, a private prosecution does not need to pass the Full Code Test, meaning that a private prosecution can proceed even if it is not in the public interest (unless the DPP takes over and discontinues the proceedings, or unless the court finds an abuse of process). Nor does a private prosecutor need to show a public interest in bringing a private prosecution.¹⁰⁸⁸ But, they are still bound by the overriding object of the Criminal Procedure Rules in the same way as a public prosecutor,¹⁰⁸⁹ and have to ‘observe the highest standards of integrity, of regard for the public interest and duty to act as a Minister for Justice in preference to the interests of the client who has instructed them to bring the prosecution – owing a duty to the court to ensure that the proceeding is fair.’¹⁰⁹⁰

A private prosecution could be pursued for mixed motives, which by itself is not a bar to prosecution.¹⁰⁹¹ Courts do not require the presence of a dominant public interest factor either.¹⁰⁹² That is understandable because, except in rare instances of mixed motives, it would be difficult to assess what motive is the primary one. But, courts

¹⁰⁸⁸ *R (on the application of Ewing) v Davis* [2007] EWHC 1730 (Admin), [2007] 1 WLR 3223.

¹⁰⁸⁹ Criminal Procedure Rules 2020, r 1.2.

¹⁰⁹⁰ *R (Kay) v Leeds Magistrates' Court* [2018] 4 WLR 91 [2018] EWHC 1233, [2018] 4 WLR 91 (Admin) [23].

¹⁰⁹¹ ‘... [A] private prosecution can have another motive as well as being motivated by a public interest factor.’ *Muhammad Asif v Adil Iqbal Ditta and Noreen Riaz* [2021] EWCA Crim 1091, [2022] 1 WLR 285 [74]; *Re Serif Systems Ltd* [1997] 4 WLUK 151 (QBD) [24]–[27]; *R v Bow Street Metropolitan Stipendiary Magistrate Ex p South Coast Shipping* [1993] QB 645 (Divisional Court); *D Ltd v A* [2017] EWCA Crim 1172 [59]–[60].

¹⁰⁹² *Muhammad Asif v Adil Iqbal Ditta and Noreen Riaz* (n 1091) [78].

draw a distinction between having mixed motives, and there being ‘an [improper] oblique motive which is so dominant and so unrelated to the proceedings that it renders them an abuse of process.’¹⁰⁹³ Such dominant improper motives include motives to harm a competitor, intimidate individuals who may have violated copyright inadvertently or innocently, in the sphere of copyright, or obtain a settlement in a parallel civil lawsuit.¹⁰⁹⁴ The power to stay a proceeding on the grounds of abuse is exercised in exceptional cases. The key test is whether ‘in all the circumstances a trial will offend the court’s sense of justice and propriety.’¹⁰⁹⁵ Moreover, while justices have the power to prevent an abuse of process, ‘[justices] have no power to refuse to embark on an inquiry because they think that a prosecution should not have been brought because it is, for example, meanminded, petty or animated by personal hostility.’¹⁰⁹⁶

In private prosecution cases since the Post Office Scandal came to light, courts have emphasised the duties of a private prosecutor and the importance of prosecutions being in the public interest. For example, in *Morjaria v Westminster Magistrates’ Court*,¹⁰⁹⁷ summonses issued in a private prosecution by a businessman against his business partner were set aside by the Westminster District Court, and the criminal proceedings were stayed as an abuse of the court’s process.¹⁰⁹⁸ The District Court had found that the private prosecutors’ ‘overwhelming, primary and dominant motive (in

¹⁰⁹³ *R(G) v S* [2017] EWCA Crim 2119 [27].

¹⁰⁹⁴ Gwilym Harbottle, ‘Private prosecutions in copyright cases: should they be stopped’ (1998) 20(8) *European Intellectual Property Review* 317.

¹⁰⁹⁵ *R v Elie Taktouk* [2022] EWCA Crim 1254, [2022] 7 WLUK 642 [22].

¹⁰⁹⁶ *R v Telford Justices, Ex p Badhan* [1991] 1 QB 78 (QBD) (Mann LJ).

¹⁰⁹⁷ *Morjaria v Westminster Magistrates’ Court* [2023] EWHC 2936 (Admin), [2024] Crim LR 184

¹⁰⁹⁸ *ibid.*

bringing the criminal proceedings) was to seek to force settlement;¹⁰⁹⁹ and not to seek justice in an objective sense.¹⁰⁹⁹ The private prosecution was issued ‘to threaten the defendants in order to extract a settlement from them.’¹¹⁰⁰ The private prosecutors’ motive was also concealed from the court prior to the issuance of the summonses because the prosecutors failed to make proper disclosure and breached their duty of candour, which was deemed ‘serious and substantial.’ In upholding the District Court’s decision, the High Court noted, among other things, that ‘[w]here a prosecution lacks any true public interest rationale, the use of the criminal process *prima facie* will be oppressive.’¹¹⁰¹

Similarly, in *Muhammad Asif v Adil Iqbal Ditta and Noreen Riaz*,¹¹⁰² a private prosecution was stayed as an abuse of process because it was brought on behalf of a third party (a notorious fraudster) in a manner that masked his true involvement, and because it was being used as ‘leverage’ to achieve recovery of money, and not to obtain punishment for criminality.¹¹⁰³ It was found that the private prosecution was being used *entirely* as a means to achieve financial recovery from the defendants, without bringing civil proceedings at all – to avoid ‘the inconvenient consequences (to him) of use of civil proceedings: such as uncertainty of success in civil proceedings, quantum of costs, giving security for costs ..., perhaps not having to pay costs at all if unsuccessful, avoiding (by applying for a restraint order rather than a civil freezing order) having to

¹⁰⁹⁹ *ibid* [22].

¹¹⁰⁰ *ibid* [21].

¹¹⁰¹ *ibid* [49].

¹¹⁰² *Asif* (n 1091).

¹¹⁰³ *ibid* [64].

offer a cross-undertaking in damages; and so on.¹¹⁰⁴ The Court of Appeal, in refusing the prosecutor's application for leave to appeal, also noted that the 'prosecution is being used for private tactical and oppressive reasons and the judge made no arguable error in staying the proceedings as an abuse.'¹¹⁰⁵

So, private prosecutions initiated with improper motives that bring justice into disrepute,¹¹⁰⁶ have little or no public interest, are oppressive, or are not primarily aimed at achieving retributive justice, are stayed as abuses of the court's process. Such improper motives likely stem from the private interests of the prosecutor or the lack of independence on the part of the prosecutor. Of course, a public prosecution could also have improper motives. But there is a higher likelihood of that happening in private prosecutions, not least because of the *prima facie* conflict between the private interests of the prosecutor and their duties to the court. Importantly, there is little evidence suggesting this is a feature of private prosecutions for copyright crimes.¹¹⁰⁷ The possibility of that happening remains.

What is fairly apparent from this discussion is that the debate over private prosecutions (generally and in the context of copyright crimes) is multifaceted. It involves questions of fairness, efficiency, resource allocation, and accountability. While private prosecutions can serve as a useful tool for protecting copyright holders' interests, the risk of misuse and the potential for harm, as demonstrated by the Post Office Scandal, suggests that at least some reform is necessary.

¹¹⁰⁴ *ibid* [64].

¹¹⁰⁵ *ibid* [94].

¹¹⁰⁶ *R v Latif* [1996] 1 WLR 104 (HL), 112 (Lord Steyn).

¹¹⁰⁷ Harbottle (n 1094) 319.

A call for abolishing private prosecutions would be a call for a radical change,¹¹⁰⁸ one that is unlikely to be forthcoming.¹¹⁰⁹ Precisely how private prosecutions should be reformed and to what extent requires a dedicated, comprehensive, and evidence-based analysis – one that I cannot undertake in this thesis. As for the precise form that the reform (short of abolishing private prosecutions) could take, the Justice Committee suggests ‘enacting a binding code of standards, enforced by a regulator, that applies to all private prosecutors and investigators’ if private prosecutions increase.¹¹¹⁰ Something like the Full Code Test could be mandated through the code of standards. De Than and Elvin recommend having a statutory code to regulate private prosecutions to filter cases through the CPS and/or the courts.¹¹¹¹ Whatever form reform of private prosecutions takes, it would need to keep the public interest at the forefront, far more than it does now.

¹¹⁰⁸ Stephen Colman, ‘Written evidence from Stephen Colman, Senior Lecturer in Law, University of Suffolk (PPS0014)’ (UK Parliament, 2020) <<https://committees.parliament.uk/writtenevidence/8245/html/>> accessed 13 October 2024; Colman (n 1037) feels that the ‘combined weight of’ ‘individual strands of conflict with the adversarial system’ and ‘the paucity of protections for defendants against capricious decision-making from private prosecutors, and the lack of a desire on the part of policy makers to increase safeguards for defendants leads to the conclusion that private prosecutions should no longer be accommodated within the contemporary criminal justice system and should be abolished.’

¹¹⁰⁹ Justice Committee, *Private prosecutions: safeguards* (HC 2019-21, 497) para 28: ‘It is a strength of the current system that it enables corporate victims of crime to pursue justice when public authorities decline to intervene.’

¹¹¹⁰ *ibid* para 60.

¹¹¹¹ Claire de Than and Jesse Elvin, ‘Private prosecution: a useful constitutional safeguard or potentially dangerous historical anomaly?’ (2019) 2019(8) *Criminal Law Review* 656, 679-680.

7

Chapter 7: So what?

7.1. THE AIMS OF THIS THESIS.....	307
The Historical Context of Criminal Copyright Provisions	308
The Normative Framework: The Harm Principle and Its Application	308
Evaluation of the UK's Criminal Copyright Law	310
Prosecution Practices and Legislative Reform	310
7.2. BROADER IMPLICATIONS	310
7.3. RECOMMENDATIONS FOR REFORM	313
7.4. CONCLUDING THOUGHTS.....	315

7.1. THE AIMS OF THIS THESIS

This thesis set out to achieve two primary objectives: first, to contribute to the broader project of evaluating normative justifications for criminal copyright provisions; and second, to critically evaluate the current laws and prosecutorial practices concerning criminal copyright infringement in the United Kingdom through the lens of the Harm Principle. In pursuing these objectives, the preceding chapters have delved into the historical, philosophical, doctrinal, and practical aspects of criminal copyright law in the United Kingdom and have provided a critique of both the theoretical foundations and practical applications of criminal copyright provisions in section 107, CDPA 1988. This concluding chapter consolidates the key analyses of the thesis, reflects on their broader implications, and offers recommendations for reform. It also considers the broader significance of this research for the discourse on the appropriate limits of criminalisation.

The Historical Context of Criminal Copyright Provisions

In Chapter 2, I demonstrated that the introduction of criminal copyright provisions was a relatively recent development in UK law, with their genesis occurring in the 20th century. Earlier legislative provisions linked to copyright were not ‘true’ criminal copyright provisions because they did not criminalise infringements of copyright *per se*. Instead, they aimed to criminalise fraud and protect consumers from fraudulent conduct. We also saw that the justifications for the introduction of ‘true’ criminal copyright provisions in the 20th century, and their subsequent expansion, reflected concerns about the efficacy of civil remedies and enforcement, rather than a robust normative foundation.

The Normative Framework: The Harm Principle and Its Application

Chapter 3 explicated the Harm Principle as the central normative framework for this thesis. It identified that for conduct to be justifiably criminalised under the Harm Principle, it must cause a ‘wrongful harm’ that is sufficiently serious to warrant criminal sanctions. Additionally, I argued that supplementary factors or faulty traits – such as fraud, treachery, or force – are necessary to distinguish conduct that can be candidates for criminalisation from conduct better dealt with using other forms of regulation available to the state. Moreover, we saw that criminal provisions generally need to align with societal moral views about the conduct being criminalised, though criminal law can (sparingly) be used to set moral standards.

Applying this framework to copyright infringements, I argued that the primary welfare interests justifying their criminalisation are the protection of authors' labour and the reliability of social institutions. Unlike specific entitlements conferred by

copyright law, these interests are inherently valuable and exist independently of legal recognition. Moreover, the recent empirical evidence available on British society's moral views on copyright infringements, which (admittedly) is not robust, suggests that a majority of the public believes that copyright infringements are wrongful. Ultimately, the arguments in the chapter excluded two types of infringements from the scope of justifiable criminalisation – innocent infringements of copyright, and non-commercial infringements that fall on the borderline of infringement.

In Chapter 4, I examined constraints that help refine the scope of criminalisation – primarily, principles of necessity, proportionality, fairness, and practicality. Overbroad criminalisation risks punishing minor or unintentional infringements, 'chilling' legitimate uses, and undermining the credibility of copyright law and the criminal justice system more generally. Applying these principles, I concluded that criminalisation is preferable, fair, proportionate, and practical where the infringements concerned are those committed with the intent to make a commercial gain, to cause losses to copyright owners or the copyright regime, and where the infringements concerned are 'supplying' infringements of works of some value that are carried out on a large scale with a bad faith intent.

I further contended that criminal copyright provisions must be clear, applied consistently, and accompanied by accessible guidance to prevent chilling effects on legitimate uses of copyright works. The requirement of clarity also means that criminal copyright provisions are only justifiable where the infringement is unambiguous, typically involving direct and literal copying of works or parts of works. Finally, I noted

that inchoate offences are justifiable if the principal offence falls within the justifiable scope of the normative framework and meets the standards of justifiability.

Evaluation of the UK's Criminal Copyright Law

Chapter 5 evaluated the UK's current criminal copyright provisions in section 107, CDPA 1988 against the normative framework, finding notable misalignments. Some provisions, such as those that apply to large-scale commercial infringement, align with the framework to some extent. Others, which catch minor, non-commercial infringements, exceed the justifiable scope of criminalisation. I also highlighted that most provisions do not meet the standards required by the normative framework.

Prosecution Practices and Legislative Reform

Chapter 6 highlighted discrepancies between the law on paper and its enforcement in practice. Despite the broad scope of criminal copyright provisions, prosecutors apply them within the justifiable scope. There, I noted that the discrepancy supports the reform of the criminal copyright provisions of the UK. I also noted that this discrepancy between the law on paper and the law in practice is problematic because it leaves room for arbitrary decision-making and reduces the predictability of the enforcement of the criminal copyright provisions. I also analysed whether private prosecutions of copyright crimes should be abolished or reformed, in light of the Post Office Scandal. I concluded that although private prosecutions serve as a useful tool for protecting copyright holders' interests, the risk of misuse and the potential for harm suggest that at least some reform is necessary.

7.2. BROADER IMPLICATIONS

The findings of this thesis carry wide-reaching implications, not only for the understanding of criminal copyright law but also for broader discussions about the role and limits of criminalisation in modern society. At its core, this thesis underscores the importance of a principled approach to criminalising copyright infringements, one that prioritises fairness, necessity, and proportionality while safeguarding public trust in the legal system. It presents a legal argument based on one normative theory of criminalisation (i.e., the Harm Principle) and highlights the unique position held by criminal law within the legal framework. Criminalisation is associated with severe penalties, moral condemnation, and stigmatisation of the conduct it prohibits. Therefore, its application must be reserved for wrongful and harmful conduct that deserves the moral stigma associated with crime. When the boundaries of criminal law are stretched too far, its legitimacy is undermined, leading to scepticism, resistance, and in some cases, outright defiance of the law.

Digital technologies have democratised access to cultural and informational resources, but they have also blurred the lines between legitimate use and infringement. In such a context, laws that rely on overly punitive measures to control behaviour risk becoming both impractical and unpopular. Policymakers must accept this reality and consider whether the benefits of criminalisation outweigh the costs in terms of public discontent, enforcement challenges, and unintended consequences. Criminal provisions that lack a clear normative and empirical basis risk being ineffective or counterproductive. Policymakers must, therefore, ground their decisions in robust evidence, including studies on public perceptions, the economic impact of infringement, and the effectiveness of different enforcement strategies. As highlighted

at various points in this thesis, criminal law can lead and set moral standards. But this requires extreme care to ensure that criminal law does not lose its credibility.

Another key implication of this thesis is the need to rethink the relationship between copyright law and the broader goals of society. Copyright is fundamentally a balancing regime, designed to protect the interests of creators or authors while ensuring public access to knowledge, arts, and culture. However, the expansion of criminal provisions has tilted this balance in favour of copyright holders, prioritising their economic interests over the public good. This shift risks restricting access to information and perpetuating inequities, particularly for individuals and communities with limited resources. A more equitable approach would recognise that while authors and creators deserve protection, this protection should not come at the expense of the broader societal benefits that arise from open access to knowledge and culture, which could be lost if criminal provisions are overly broad due to ‘chilling effects.’ With the availability of stronger civil and administrative remedies and tools, the role of criminal law can be reserved for the more serious infringements.

The practical implications of these findings are equally significant. One of the central issues identified in this thesis is the inconsistency between the law on paper and its application in practice. In the UK, while the scope of criminal copyright provisions is broad, enforcement tends to focus on serious cases, such as large-scale commercial piracy. However, as highlighted, this discrepancy creates its own set of problems. It opens the door to arbitrary or uneven enforcement, leaving individuals and businesses uncertain about the boundaries of permissible behaviour. It can also erode trust in the fairness of the criminal justice system.

Finally, this thesis contributes to a broader conversation about the role of criminal law in regulating behaviour. The issues explored in the context of copyright law are emblematic of larger trends, including the increasing use of criminal sanctions to address complex social and economic challenges. These trends raise important questions about the proper limits of criminalisation, the role of alternative regulatory mechanisms, and the need to protect individual freedoms in a rapidly changing world. The insights gained from this thesis, along with those from other areas of law,¹¹¹² can inform debates in areas like data protection and environmental regulation, where similar tensions between public interest and individual rights arise.

7.3. RECOMMENDATIONS FOR REFORM

The findings of this thesis suggest that the UK's criminal copyright provisions require reform to align them more closely with normative principles, including the principles of necessity, proportionality, and practicality. The first recommendation is to narrow the scope of criminalisation. Currently, the law casts a wide net, encompassing a broad range of conduct that varies significantly in terms of harm and moral culpability. Criminal copyright provisions of the UK fail to distinguish literal copying infringements and other forms of infringement that can give rise to difficult questions of copyright law. A more targeted and justifiable approach would focus on the most serious and harmful forms of infringement, such as large-scale piracy that undermines the economic viability of creative industries and causes tangible harm to authors and

¹¹¹² Jones and Williams (n 438); Angus MacCulloch, 'The Quiet Decline of the UK Cartel Offence: A Principled Victory in the Face of Practical Failure' in Barry Rodger, Peter Whelan and Angus MacCulloch (eds), *The UK Competition Regime: A Twenty-Year Retrospective* (OUP 2021).

creators. By limiting criminal sanctions to these cases, policymakers can ensure that the moral weight of criminal law is reserved for conduct that truly warrants it.

Another key recommendation is to reform the framework for private prosecutions. As the analysis in this thesis demonstrates, private prosecutions play a significant role in enforcing copyright law. But they raise serious concerns. Private entities, driven by their interests, may pursue cases that do not align with the public interest. To address this issue, public interest needs to be brought to the forefront of private prosecutions. This can be achieved via a statutory requirement that applies to private prosecutions akin to the Full Code Test, or via a 'filter' mechanism where private prosecutions need to fulfil some gateway requirements which are confirmed by the CPS, the DPP, or the courts to ensure that only cases with a public interest in their prosecution proceed.

Education and raising awareness about the law of copyright are equally critical. Many of the problems associated with copyright infringement stem from a lack of understanding among the public about the rules and their implications. The use of 'conspiracy to defraud' instead of specific criminal provisions in the CDPA 1988 is just one example. Educational campaigns should aim to demystify copyright law, helping individuals and businesses navigate its complexities while promoting respect for creators' rights.

Such campaigns should also focus on further illuminating the limitations and fair dealing exceptions to copyright, ensuring that legitimate uses are not unduly chilled by fear of legal repercussions. When individuals or institutions are uncertain about what constitutes permissible behaviour, they may avoid engaging in lawful activities, such as

fair dealing for research, education, or criticism, leading to the loss of valuable expressive works. Reform efforts could further clarify the boundaries of permissible use and provide greater legal certainty for users.

The suggested reforms would not only enhance the legitimacy of criminal copyright provisions but also contribute to a broader vision of copyright law that supports creative expression and access in an increasingly digital world.

7.4. CONCLUDING THOUGHTS

Copyright law, at its core, represents an effort to balance the interests of creators of expressive work with the broader public good, incentivising the creation of literary, musical, dramatic, and artistic work (among others) by protecting the authors' labour while also ensuring fair access to knowledge and creative works. As discussed in Chapter 2, criminal copyright provisions were not an intrinsic part of early copyright law but emerged in the 20th century in response to the rise of large-scale music piracy operations enabled by technological advancements. However, that 'reactive development' appears to lack a coherent normative foundation. It was then extended to other types of copyright work to consolidate the various copyright statutes existing at the time. Since then, criminal copyright provisions have grown in scope and severity, fuelled primarily by the perception that technological developments were making private law remedies inefficient. As this thesis has shown, that is true, but only to an extent. Private law remedies may not be effective against some categories of infringements, like large-scale infringements for commercial gain. But, with the developments in the law and the new technologies available today, private law remedies,

along with administrative measures, appear to suffice for many other types or categories of copyright infringements.

The analysis presented in this thesis highlights that criminal law should be a tool of last resort, employed only when other regulatory mechanisms prove inadequate, and only where necessary. Criminal punishment should be reserved for conduct that meets stringent criteria, including demonstrable harm, moral culpability, and (usually) societal consensus on the wrongfulness of the behaviour. These criteria, outlined in Chapters 3 and 4, are critical to ensuring that the criminal justice system remains both fair and effective, upholding the principles of justice while maintaining its legitimacy in the eyes of the public.

In the digital age, the challenges facing copyright law have become even more complex. The internet has transformed how creative works are produced, distributed, and consumed, enabling unprecedented levels of access and collaboration. However, it has also facilitated new forms of infringement that are difficult to regulate using traditional legal tools. The proliferation of peer-to-peer sharing, streaming platforms, and user-generated content has blurred the lines between legitimate use and piracy, creating grey areas that are difficult to categorise. Criminal copyright law, with its binary approach to legality or illegality, is ill-suited to address these nuances. Instead, a more flexible and adaptive framework that utilises a suite of alternative remedies is needed – one that can respond to the complexities of digital culture while preserving the core principles of copyright law.

I have demonstrated that while some criminal copyright provisions in the UK are justifiable under the Harm Principle, others are not. The overcriminalisation of

copyright infringements risks undermining both the moral credibility of the copyright regime and the criminal justice system. Laws that are perceived as overly punitive or disconnected from everyday experiences risk becoming unenforceable and irrelevant. This is particularly true in the context of copyright, where the norms of the digital era have shaped public attitudes toward sharing and access. Efforts to enforce criminal provisions that lack public support can backfire, leading to widespread noncompliance and eroding respect for the law. Policymakers must, therefore, engage with the public to understand their perspectives, concerns, and expectations to ensure that criminal copyright law reflects not only the authors' interests but also the values of the community.

This thesis calls for a principled, evidence-based approach to criminal copyright law. Such an approach needs to balance the interests of copyright owners and the public without compromising individual liberty or the principles of necessity, fairness, proportionality, and practicality. By aligning criminal copyright with normative principles of criminalisation, such as the Harm Principle, we can ensure that it targets only serious and wrongful harms and reinforces public trust in the justice system while fostering a fair and balanced creative economy. While the Harm Principle serves as a robust starting point for this endeavour, future research should explore complementary frameworks to further refine the justifiable boundaries of criminalisation in copyright law.

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