# Big Crook in Little China

## The Ramifications of the Hong Kong BitTorrent Case on the Criminal Test of Prejudicial Effect

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# Big Crook in Little China: The Ramifications of the Hong Kong BitTorrent Case on the Criminal Test of Prejudicial Effect

By Michael Filby[2]

**Abstract**

The ongoing problem of digital file sharing technology evolving at a speed far greater than the law can keep up with is demonstrable with the cases against Napster[3] and Grokster[4] seeing measures upheld against the producers of centralised and decentralised peer-to-peer networks towards the ends of their natural useful lives. As file sharers and, with them, copyright infringers, move onto more efficient networks such as BitTorrent, the story is repeated but with the new problem of the client software being open source.

This has led to avenues alternative to litigating against makers of peer-to-peer network clients being explored. Although it is a long established principle that criminal sanctions can be levied against copyright infringers who operate in the course of a business, ostensibly making money from the labours of others without authorisation, the industries in their fervour to dissuade the sharing of infringing files have inadvertently raised the question of what constitutes an alternative type of infringer, namely one who harms the copyright holder without benefiting from financial gain themselves.

This type of file sharer is described in the Copyright, Designs and Patents Act 1988 as a person who distributes otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright. Unfortunately, the parameters of this test of prejudicial effect is not defined in the Act, has not been addressed by the judiciary and has left commentators submitting conflicting and uncertain views as to where the boundary of this test lies.

This test is examined in the Hong Kong case of HKSAR v. Chan Nai-Ming, which is notable for being the first case in the world where a user of BitTorrent has been criminally prosecuted and given a custodial sentence. This paper examines the case in the context of its alternative approach to curbing a peer-to-peer network that is quite distinct from the likes of Kazaa, and considers the stance taken in light of the test of prejudicial affect which is echoed in the Hong Kong Copyright Ordinance 1997.

With reference to alternative perspectives on the test, including proposals for reform from the Hong Kong government itself, it is argued that the highly strict and surprisingly low level at which the test for prejudicial affect is set is counter-intuitive to the goals of curbing the problems piracy poses. The influence this ruling could have upon a UK interpretation of the test after the final appeal has been heard is considered, and it is concluded that the ongoing battle between file sharers and their opponents has led to the loss of sight of the true goal of regulation: the protection of copyright holders from suffering de facto harm that is at least above a relatively negligible standard.

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[3] Case 00-16404, A&M Records Inc v Napster Inc (ND Cal, 26 July 2000) (9th Cir, 12 February 2001)

[4] MGM Studios Inc v Grokster Ltd, No.04-480, 545 US [2005]

## Main Text

It seems that the innovative and ever-evolving means through which file sharers can operate is transforming into a predictable and circular story. No sooner do the industries manage to utilise the law in a particular jurisdiction to take action against file sharers, than the sharers move onto the next and better means of swapping files.

This is certainly the case when it comes to BitTorrent, the current tool of choice for the discerning sharer of files. Just as predictably though, where there is file sharing, there is copyright infringement.

Litigation has succeeded, albeit belatedly, in curbing file sharing activities in the past by taking action against the makers of the software which is downloaded by users and used to search for and download the files of other users while allowing their own files to be uploaded at the behest of network participants. After the entertainment industries' much vaunted victory over Napster[5], and subsequently other centralised peer-to-peer networks, and in the wake of the more recent US Supreme Court decision against decentralised peer-to-peer network Grokster[6], file sharers have already moved on to alternative means.

Although the Grokster decision has yet to fully impact upon the similar decentralised peer-to-peer file sharing network offered by Kazaa largely due to the movement of their home servers, the technology behind this type of network has now been superseded by the far more efficient BitTorrent.

As users of BitTorrent have proceeded to share copyright infringing files, the entertainment industries have been as equally keen to seek a solution to put an end to such illicit sharing as expediently as the law will allow. As is inherent when it comes to dealing with the legal system, this process is not as expedient as particular parties would like. In the UK, this has been recognised by the industries who are funding a wide-reaching campaign designed to inform the public that "piracy", whatever that may be[7], is a crime, as a substitute or even a stop-gap measure until the law gives them a viable alternative to pursuing file sharers.

This campaign was launched in March 2004 by the Industry Trust for IP Awareness (ITIPA), a body of key corporations representing the entertainment industries. The members of ITIPA largely subsist of DVD distributors, retailers and rental businesses who share the common goal of combating "against a common enemy, the DVD pirates."[8] An initial fund of £1.5million was earmarked for the purposes of a four-point plan to be initiated. These were:

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[5] Case 00-16404, A&M Records Inc v Napster Inc (ND Cal, 26 July 2000) (9th Cir, 12 February 2001)
[6] MGM Studios Inc v Grokster Ltd, No.04-480, 545 US [2005]
[7] It certainly is not defined by the campaign
[8] "Revealing The True Face of Piracy", http://www.piracyisacrime.com/press/pdfs/ipac_piracy_guide.pdf

> "- to mount a consumer awareness campaign that starts the process of shifting consumer attitudes so that DVD piracy is no longer seen as acceptable;
>
> - to bolster the resources of the industry's anti-piracy squad, FACT;
>
> - to provide more fire-power to lobby central and local government politicians for more effective enforcement and tougher legislation against pirates;
>
> - to initiate training for retail staff in how to deal with piracy."[9]

The British Video Association (BVA), a member of ITIPA, expands upon the first goal by adding an objective to "dispel the idea that DVD piracy is an acceptable, victimless crime" and broadens the fourth goal by offering support for enforcement agencies in general[10]. These goals essentially translate to funding an advertising campaign with the purpose of influencing several key sectors of society, including consumers and policy makers.

The route which has been trodden since the campaign was initiated has been to place advertisements intended for consumer consumption in cinemas and on DVDs, the funding of various poster and television commercials, and to publish and make available a number of documents on the campaign website[11] which purport to explain the law and justify why DVD piracy is "wrong". On the rare occasions the campaign has chosen to dabble with the task of setting out the law in a more precise manner, the results have been less than helpful.

Much of the campaign appears to be aimed at file sharers who download infringing copies purely for their own private use, arguably the least blameworthy type of pirate, yet the advertising is almost always accompanied by the tagline "Piracy. It's A Crime." Although the Copyright, Designs and Patents Act 1988[12] (CDPA) contains several criminal sanctions, the primary offences which could possibly apply to file sharers, albeit of a very particular breed, can be found in s.107. If a download is made by a file sharer for private use on a peer-to-peer network who has their software set to allow uploading (and, thus, allow others to download the infringing copy from their own computer), s.107(1) specifies that this form of distribution[13] must either be in the course of a business or be to such an extent as to affect prejudicially the owner of the copyright.

As this type of file sharer would necessarily not be acting in the course of a business, particularly as there is currently no means by which payment can be procured through using the most popular networks in this way, the possible application of a criminal sanction would inevitably rely upon whether this type

[9] Ibid.
[10] http://www.bva.org.uk/piracy.asp
[11] http://www.piracyisacrime.com
[12] As so frequently amended
[13] Provided that it does indeed satisfy the definition of "distribution"

of file sharing can ever amount to being to such an extent as to affect prejudicially the owner of the copyright.

The ITIPA advertising campaign has contributed to the conundrum of what this actually entails through the issuing of an informational leaflet interestingly entitled "The Letter of the Law"[14]. The leaflet includes the definition of an infringing copy as per s.27(2) CDPA, and a reproduction of s.107 by way of communicating the criminal sanctions. This is accompanied by some explanatory text which endeavours to reproduce in layman's terms what precisely constitutes an offence. In addition to including the act of "making unauthorised copies e.g. burning films onto DVD-Rs" without pointing out the essential qualification of possessing in the course of a business with a view to committing any act infringing the copyright[15], the section regarding downloading and file sharing is equally as fruitful at explaining the law by summarising downloading as an activity which "may be unlawful".

As it seems the body representing the industry is unsure as to the civil or criminal status of file sharing, important questions are bound to be raised should the day come when litigation is used as a tool to prevent the use of peer-to-peer networks at the user level, which can only be answered through examining the exact terms of the Act.

Whether file sharing for private purposes, or indeed any purpose which does not involve the course of a business, can ever constitute a criminal offence rests most prominently on the precise definition of s.107(1)(e), which levies criminal liability upon anyone who takes an infringing article and "distributes otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright." The implication of this section is that the magnitude of the act of anyone who is using file sharing software which is distributing unauthorised copies to other users would have to cross a particular threshold to attract liability, that threshold being the point at which the interests of the copyright holder are affected prejudicially.

This section of the Act, or any of the other sections of the CDPA which contain the above phrase for applying liability to alternative types of infringement, such as the playing or showing in public of a film[16], are unfortunately unaccompanied by any definitional guidance in the body of the legislation. Considering the prejudicial affect test appears numerous times throughout the Act[17], the definition has been subject to surprisingly little analysis from academics or the judiciary. It has been described as being "clearly a very subjective test"[18] but, considering it can mean the difference between a criminal conviction with a possible custodial sentence and a civil penalty, any indications as to where the boundary lies is of paramount importance. The test has further been described as applying to "the situation

[14] http://www.piracyisacrime.com/press/pdfs/1132%20LAW%20FLYER%20new%20A4.pdf
[15] S.107(1)(c) CDPA
[16] S.107(3) CDPA
[17] Ss.23(d), 83(1), 107(e) & 107(2A)(b) CDPA
[18] Trevor Cook & Lorna Brazell, "The Copyright Directive: UK Implementation", (Jordans, 2004), para.3.113

where a private individual makes a large number of copies of a copyright work and distributes them freely, perhaps acting out of misguided social, political or moral beliefs"[19], which implies a reasonably high standard, that is, a file sharer would be required to have distributed a relatively significant number of infringing copies in order to attract criminal liability.

The general lack of domestic definitional guidance has led to the argument[20] that as the test derives from the Berne Convention[21] "three step test"[22], which was implemented into the EU InfoSoc Directive[23] stipulating that such measures "shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder"[24], it may be reasonable to inspect the judicial decisions of other jurisdictions to obtain guidance.

Perhaps the most interesting and relevant authority to examine is the Hong Kong case of HKSAR v. Chan Nai-Ming[25]. Not only has this case enjoyed the somewhat dubious pleasure of playing host to the first criminal conviction and imprisonment of a user of BitTorrent, but the consideration and interpretation of the prejudicial affect test contained within is one which has the potential to influence future applications of s.107 CDPA.

The case involves defendant Chan Nai-Ming, who somewhat unfortunately refers to himself online as "Big Crook". The defendant was convicted of charges brought under ss.118(1)(f) and 119(1) of the Hong Kong Copyright Ordinance 1997[26], inter alia, for placing unauthorised copies of three Hollywood films onto BitTorrent (which was construed in the case as "distributing"). The films had been transferred onto the defendant's computer from legitimately purchased video CDs[27], and then uploaded onto the BitTorrent network.

BitTorrent differs in a number of distinct and crucial ways from peer-to-peer networks such as Kazaa and Grokster. Whereas the courts have preferred to target the makers of the client software in the latter instances, much to the chagrin of proponents of the principals relied upon in the UK Amstrad[28] and

[19] David Bainbridge, "Intellectual Property", 6th ed. (Pearson Longman, 2007), p.180
[20] By Cook and Brazell, supra.
[21] Berne Convention for the Protection of Literary and Artistic Works 1886 (1971 revision with 1979 amendments)
[22] Art.9(2)
[23] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society
[24] Art.5(5)
[25] Although both unreported, transcripts of the first instance hearing [2005] and High Court appeal [2006], which are believed to be accurate, can be found here: http://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?DIS=46722; and http://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?DIS=55378 respectively
[26] Cap.528
[27] A format which has never been particularly common or successful in the UK, but bares similarities to the DVD format except the films are stored on CD and are of a quality approximately comparable to a VHS cassette tape when viewed
[28] CBS Songs Ltd v Amstrad Consumer Electronics plc [1988] AC 1013

US Betamax[29] cases, the manner in which BitTorrent functions has made directing similar litigation at the creator of BitTorrent impractical. The client is open source, so there are a great many variations of the client software to choose from which all allow users to access the same network.

When a user wishes to upload a file to the BitTorrent network, he is required to create a .torrent file. The .torrent file contains information which will instruct any BitTorrent client where the tracker for the file the original uploader (termed as the original seeder) has made available. Once the first query to the tracker is made, the downloader will be connected to the original seeder, and the file will begin to transfer in small broken up packets. As other downloaders activate the .torrent file, they too will query the tracker which will maintain the web of computers downloading and uploading the file, known collectively as the swarm. Every computer in the swarm will continue downloading the small packets of information from both the original seeder and from each other. Once a computer contains enough packets to form the complete file, it will become an additional seeder for as long as it is connected to the tracker and so will continue to upload packets to other computers in the swarm.

Once the defendant had created the .torrent files for each of the three films, he published their existence on a newsgroup. It was here that a Customs and Excise officer found the .torrent file of the film Daredevil, and proceeded to activate it and downloaded a complete copy of the film. The defendant's connection then ceased, although it is unclear whether this was severed by the defendant through his own choice, or by some other intervention. The officer later downloaded complete copies of Red Planet and Miss Congeniality from .torrent files created by the defendant. The defendant was then traced back to his home domicile through his Internet Protocol (IP) address, where officers searched his dwelling and arrested him.

On interpreting prejudicial affect, residing Magistrate Colin Mackintosh found that;

> "It was a distribution in a public open forum where anyone with the appropriate equipment could obtain an infringing copy from the defendant. The technology has developed to such a point that the prejudice to the copyright owners when their films are distributed in this fashion is, in my judgment, manifest. And these were attempts to commit offences even if the completed offences had not been committed."[30]

On appeal, the defence concentrated primarily on the definition of "distribution" and "copies", the main thrust of the former argument being that distribution should not be applied due to the passiveness of the defendant once he has made the copies available, and that these terms should be construed as requiring a tangible element which is being physically copied and distributed. The court, taking a contextual and purposive approach to

[29] Sony Corporation of America v Universal City Studios Inc [1984] 464 US 417
[30] B131

statutory interpretation, agreed with the respondent's assertion that these representations were erroneous, and dismissed the appeal.

Considering the nature of BitTorrent's method of distribution by swapping small packets of information between computers within the swarm, it is surprising that the defence did not pursue the uncertainties which have been raised by commentators[31] regarding the question considered inconclusively in Electronic Techniques (Anglia) Ltd v Critchley Components Ltd[32]. Namely, whether obtaining portions of a copyright material which by themselves are non-infringing due to their not meeting the requirement of substantial taking (such as the packets BitTorrent deals with) can be construed over a period of time once put together as an infringing copy.

However, it is more surprising still that the question of where the court set the level of prejudicial effect was not challenged either. In considering the test at first instance, a wide view as to what could constitute a prejudicial effect was adopted. This judgment was affirmed by the Hon Beeson J during the High Court appeal, who also affirmed the broad nature of the test where it was held that "It is inevitable that distribution to 30 or 40 or more downloaders would involve prejudice to the copyright owners through unauthorised distribution of their intellectual property and lost sales. And though lost sales, in the context of the evidence in this case, might be small, nevertheless, such losses would amount to a prejudicial effect."[33] Thus, the threshold of prejudicial affect was set at an extremely low level[34].

This judgment is questionable on several levels. Firstly, it should be noted that at the time the connection between the defendant's computer and the BitTorrent network was terminated, two of the three files had been completely downloaded by three people including the Customs and Excise officer (the third had just been downloaded by the officer). However, the nature of BitTorrent means that as computers join the swarm, they are almost immediately obtaining file packets from each other as well as the original seeder. This means that, technically, neither the officer nor the other two seeders would be likely to have downloaded the complete file exclusively from the original seeder. It therefore seems incongruent to impose complete liability upon the original seeder as he had not only almost certainly not been exclusively responsible for the distribution of the file packets to the three eventual seeders and 30-40 other members of the swarm, but the distribution of the packets became a joint enterprise by every member of the swarm as they joined. Nevertheless, the court at first instance held "The fact that the recipients of the packets of data, originating from the defendant's computer,

[31] See Simon Stokes, "Digital Copyright: Law and Practice", 2nd ed. (Hart Publishing, Oregon, 2005), p.36 and Martina Gillen, "File-Sharing and Individual Civil Liability in the United Kingdom: A question of Substantial Abuse", Entertainment Law Review 17(1), pp.12-13
[32] [1977] FSR 401
[33] B130-131
[34] Although the court of first instance acknowledged that "affect prejudicially" is not defined, they view was submitted that "it is clearly wide in scope." Supra, para.35

might have received it by indirect routes does not alter the nature of the defendant's act of distribution."[35]

Secondly, the court seemed to sidestep the issue of how little financial effect the distribution of old films which have already sold significant quantities of legitimate copies would have with regards to potential lost sales by emphasising potential damage to the rental market, and remarking that the "widespread existence of counterfeits tends to degrade the genuine article and undermines the business owners."[36] Although this harm was neither quantified nor elaborated upon, the sentencing consideration upon appeal affirmed that an emphasis on the harm to the copyright holder over any financial gain of the distributor was the correct approach to take.

This setting of the boundary of prejudicial effect at such a low level, practically construing the uploading of the number of packets which form a single complete file to a collective and indeterminate number of users within a swarm as exceeding this boundary, could quite easily lead to the knock-on effect of any user within the swarm who has also uploaded packets amounting to an equivalent of one whole file becoming open to criminal liability. In practice if this was to occur, it would be difficult if not impossible to prove that any seeder other than the original seeder had uploaded packets which together amounted to a complete file (unless the original seeders and all other seeders had disconnected leaving only one seeder for some notable amount of time), as opposed to several duplications of packets which together amount to the same file size, but would not form a viewable file as portions of the file would be incomplete. Nevertheless, if criminal liability can be construed from uploading the packets which amount to a single complete file but to several recipients due to the purposive approach taken by the courts, it would not be difficult to envisage the same construction of the law being applied conversely in this way.

As a point of further interest, it is worth noting that the charge brought in relation to this case was one of attempt. The prosecution when the case was heard at first instance pointed out that the rationale for the charge of attempt to commit the offence being used was related to the issue of prejudicial effect[37]. As it was found that copies of the unauthorised material had only been distributed at most to three people, one of whom was a Customs officer, before the connection was ceased, this suggests that an implication of intent to prejudicially affect the copyright holder was applied. It is not made clear in the case reports who was responsible for terminating the original seeder's connection, but it is an important question. If it was the appellant who broke the connection voluntarily, then surely it cannot be argued that it was his intention to distribute to "30 or 40 or more" downloaders, to which it would follow that he should therefore not be judged on an attempt to distribute to such a number unless it could be proven that he had attempted to do so but had to break the connection prematurely.

[35] Supra, at para.34
[36] Supra, paras.37-38
[37] Supra, para.29

If the connection was broken by a third party, such as the appellant's ISP on request of the authorities, the appellant's intention to distribute unauthorised copies to the "30 or 40 or more" downloaders would still need to be proven for the charge of attempt to succeed if the court is suggesting that that is where the threshold for prejudicial affect lies.

The apparent hard line taken so far in Chan Nai-Ming is not one which is shared by other policy makers. A recent case which, although not sharing the precise wording of the prejudical effect test, had been considering the point at which such damage occurs to invoke a criminal response was the Russian Vereshagino District Court hearing involving Alexander Posonov[38]. Posonov had obtained 20 computers in his capacity as the headmaster of a school. When the computers were inspected, it was found that 12 of the 20 contained infringing copies of Microsoft operating systems and Office software which was calculated as being worth 267,000 rubles (approximately £5,000) in terms of damages to Microsoft. After deliberation regarding the charge contained in Art.146(3) of the Russian Criminal Code, which imposes a maximum sentence of five years' imprisonment for infringing use of copyright software, Judge Elvira Mosheva dismissed the case citing the damages to be insignificant and trivial. It is interesting to note that the approach taken in that jurisdiction is to consider the significance of damage to the particular copyright holder in each instance, which in this case was Microsoft.

Another view contrary to the decision of Chan Nai-Ming but more specifically in line with the prejudicial effect test as it is worded in UK and Hong Kong law lies in a consultation paper issued by the Hong Kong Commerce, Industry and Technology Bureau[39]. This paper discusses this particular aspect of UK law, in addition to the provisions provided by other jurisdictions, in the context of considering reform of the law by the Hong Kong Copyright (Amendment) Bill 2006. Although the Hong Kong Copyright Ordinance[40] takes the same position as UK law, the consultation paper is as uncertain as UK commentators when it comes to the question of whether the threshold of prejudicial affect applies to users of peer-to-peer networks[41]. The proposals for reform recognise the danger such ambiguity represents, with the suggestion closest to the current UK position[42] specifically pointing out that criminalising unauthorised downloading and file sharing activities would only take place if they were to result in direct commercial advantage or are otherwise "significant in scale", and that such provisions if passed would have to enjoy particular attention being given to "the clarity of the circumstances" in which unauthorised use would fall under the criminal test. This is referring to the observation made earlier in the paper that where criminal convictions have

[38] [2007] unreported, although numerous accounts can be found summarising the salient points of the case. See, for example: http://news.zdnet.co.uk/itmanagement/0,1000000308,39285944,00.htm?r=20
[39] "Copyright Protection in the Digital Environment", available at http://www.citb.gov.hk/cib/ehtml/pdf/consultation/Consultation_document.pdf
[40] Cap.528
[41] Ibid. p.1
[42] Ibid. para.1.11(c)

taken place against file sharers in France and Germany, the sharing activity "involved rather large quantities of infringing copies."[43]

It is odd then that upon appeal, the Magistrates Court decision of Chan Nai-Ming was not challenged directly as it was opined that there is no ambiguity in s.118(1)(f) of the Copyright Ordinance which contains the test. This was further elaborated upon with the opinion that the test "uses ordinary language in a clear manner."

At the time of writing[44], the appeal hearing at the Court of Final Appeal which has been set for 9th May 2007 is still pending, but it will be particularly interesting to note the final outcome of this case considering its current uniqueness in the context of prejudicial affect. As to the question of whether or not the case becomes truly persuasive in terms of the domestic application of the test under the CDPA, it would appear doubtful. Upon appeal, the court in affirming the initial judgment and agreeing with the submissions of the respondents emphasised the differences between the Copyright Ordinance and UK law[45], and dismissed specific comparisons of the bodies of law of the two jurisdictions:

> "Solutions and any offences devised to combat specific problems would be peculiar to Hong Kong; although comparable problems might arise in parallel in other jurisdictions, methods for solving them may vary…new problems may or not be of universal effect and might arise at different times in other jurisdictions."[46]

As the situation currently lies, it is still difficult to ascertain where, if at all, a UK court would consider a file sharer to have breached the threshold of prejudicial affect. Realistically, the nature of networks such as BitTorrent encouraging an upload to download ratio of 1:1, which means many users would only be responsible for uploading the equivalent of a single copy to other users, lends credibility to the notion that non-commercial file sharing would rarely, if ever, be subject to criminal liability under the CDPA as it currently stands. The fact that the Hong Kong courts drew such an emphasis on the deterrent nature it was envisaged imposing a criminal sanction would bring makes it unlikelier that UK courts would be tempted to take such a restrictive view of a test which arguably resides on the slippery-slope of being contrary to public policy solely in order to send a message to society. Setting the standard by which prejudicial effect can be construed at such a wide level invites questions as to why the legislature would bother to include the test if it is merely to be treated as a conceptualised means of transposing what a court would deem to be, realistically, negligible harm to the copyright owner in order to leapfrog civil action in favour of criminal sanctions.

[43] Ibid. para.1.6
[44] February 2007
[45] Supra, paras.73-74, inter alia
[46] Supra, para.80

While there is little doubt that certain forms of piracy do warrant actions stronger than those which can be supplied via the civil arena, it seems the fight between policy makers and file sharers is in danger of becoming so messy that lower-level pirates are at risk of becoming unjustly entangled in the conflict and sight is being lost of what must be the true ultimate goals of anti-piracy regulation: the prevention of pirates making money from copyrighted works without authorisation, and the prevention of de facto harm to the copyright holders that is at least above a relatively negligible standard. If this latter goal is to be achieved through application of the criminal law, it is of paramount importance that it is made perfectly clear by the policy makers precisely what harm has been committed, and to quantifiably establish that it is to an extent that the copyright holder has genuinely been affected to the point that civil action is unviable.