



Analysis

UK: “Speculative invoicing” schemes target internet file-sharers and individuals accused of minor retail crime

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Law firms are threatening innocent people with civil court action unless they make large compensatory payments for their alleged wrong-doings. Scared, intimidated and unsure of the law, some are choosing to pay up.

A December 2009 report by the Citizens Advice Bureau (CAB), titled *Unreasonable demands?*, details the growing use of civil recovery procedures against members of the public.[1] Individuals who have been accused of minor shop-lifting and employee theft are increasingly being sent intimidating letters demanding large sums of money to cover the administrative and security costs their actions have supposedly incurred with the threat of civil court action should they refuse to pay.

Similarly, copyright laws designed to allow creative artists to protect their work, are being used far beyond this remit to extort money from internet file-sharers. Dedicated “anti-piracy” companies are leasing the distribution rights of copyrighted material and threatening anyone they believe to have downloaded it with legal action unless they pay a large compensatory fee. The vast scale of the operation and the flawed methods employed to identify illegal downloaders has resulted in large numbers of innocent people being unjustly targeted. In reality, the legal footing on which these lucrative and growing industries operate is so dubious that their practitioners have no intention of taking people to court. Rather they rely on the threat of legal action and the escalating costs it would incur, scaring and shaming vulnerable people into paying. Neither scheme seeks to prevent the behaviour for which it is demanding compensation; in fact both

rely on its continuation for future success: the aim is simply to make money. Perhaps most disturbingly, the vast majority of civil recovery cases and all illegal downloading cases undermine the legal tenet of the presumption of innocence by demanding compensation for an alleged offence in the absence of a criminal conviction.

Civil Recovery

Civil recovery is a civil law remedy through which individuals who believe they have suffered loss or damages as a consequence of another’s wrongful actions can seek monetary compensation. It is based on English “tort” law which concerns civil wrongs and operates separately from criminal law. An individual accused of committing a crime, such as theft, can be charged both by the state for breaching criminal law, and by the individual or company their actions have harmed for a tort under civil law. As with all tort cases, civil recovery claims are heard in a civil court where judgments are made “on the balance of probabilities” rather than the criminal standard of “beyond reasonable doubt.”

Businesses have utilised civil recovery to obtain compensation from individuals that have caused them to suffer financial loss, for example shoplifters and dishonest employees. They can seek to recover not only the value of the items that have been stolen

or damaged, but the administrative, security and surveillance costs that have been incurred. Individuals accused of minor retail offences are increasingly being targeted in this way. The majority of cases reported to CAB involve petty isolated incidents of alleged shoplifting and employee theft where the individual has no previous history of criminal activity and the value of the goods or money allegedly stolen amounts to no more than a few pounds. Sometimes the police were alerted and the individual was arrested or given a fixed penalty notice, but very rarely was there a subsequent criminal prosecution. In many cases the police were not called and it is debatable whether the individual showed any criminal intent.

In virtually all of these cases the individual concerned believed the matter to be concluded, but within a few months had received a threatening letter requesting payment for administrative and security costs. Most of these letters are sent by Retail Loss Prevention (RLP), a firm of “dedicated civil litigators” who act on behalf of large UK retailers such as Boots, Tesco and Waitrose, and are involved in eight out of every ten cases reported to CA. The remaining cases involve the supermarket chain Asda which pursues its civil recovery claims through the law firm Drydens Lawyers.

The CAB report provides numerous case studies of individuals who have been contacted by RLP demanding compensation for “th

e loss and damage caused by your wrongful actions:

Emma, aged 18, was dismissed from her full-time job with Boots in October 2007, for the alleged offence of fraudulently putting £5.08 worth of points on her Boots loyalty card; she subsequently received a letter from Retail Loss Prevention demanding £578.88, broken down as: £5.08 for the value of “the goods or cash stolen”, £235.00 for “staff and management time”, £138.80 for “administration costs”, and £200.00 for “apportioned security and surveillance costs”.[2]

Kath, aged 17, resigned from her part-time job with the now defunct Woolworths in April 2008, after being accused - falsely, she contends - of the attempted theft of a children’s nursery rhyme CD worth £2.00 by “conceal[ing] the said item in your locker”. Kath contends that she intended to pay for the CD at the end of her shift, and had indicated this to several colleagues. The police were not called, and the CD was recovered intact, but a few weeks later Kath received a letter from Retail Loss Prevention demanding £187.50, including ‘nil’ for the value of “the goods or cash stolen” and £112.50 for “staff and management time”.[3]

Alison, a 23-year-old mother of two young children, was shopping in Boots in July 2009 when

(she contends) her two-year-old child took a drink from a shelf and opened it. Alison was then detained by store security staff, who refused her offer to pay for the drink, but the police were not called and Alison was allowed to leave. Two weeks later, Alison received a letter from Retail Loss Prevention, demanding £87.50, broken down as ‘nil’ for “the value of the goods or cash stolen”, £52.50 for “staff and management time”, £15.75 for “administration costs”, and £19.25 for “apportioned security and surveillance costs”.[4]

RLP typically inundates people with claims letters in an attempt to intimidate and scare them into paying up. They threaten an individual’s prospects for future employment; a particularly effective method of extorting payment when you consider that over half the cases handled by CAB involve those under the age of 25. One in six was under the age of 17 when they received a letter from RLP. Many of the letters seen by CAB warn the recipient that “the personal information we hold [on you]” will “now be held on a national database of incidents of dishonesty” and “may be used in the prevention of crime and detection of offenders including verifying details on financial and employment application forms.” Other claims letters have said that “this information is available to companies with a legitimate interest to screen an individual’s integrity in relation to employment decisions.” [5] Until June 2009, RLP claimed on their website to have “the largest database of dishonest people, outside of the Police Force.” Despite RLP’s claims to the contrary, the Office of the Information Commissioner told CAB that at no time has it approved this scheme.

Individuals are also told that refusal to pay will lead to the commencement of county court proceedings against them. This, RLP warns, will inevitably incur further costs and “where Judgment is obtained against you, it will be for the principle sum together with Court fees, Solicitors costs and interest at the rate of 8% per annum which accrues on a daily basis.” It will also “affect, adversely, your ability to obtain credit in the future. Bankruptcy proceedings may also be instigated.”[6]

However, there is no evidence to suggest that either RLP or Drydens Lawyers is capable of obtaining favourable county court judgments in small-scale, isolated cases where there has been no criminal conviction. CAB states that RLP has “repeatedly declined to give details of (or full citations for) any of the cases it claims to have successfully litigated on behalf of its clients.”[7] On its website RLP promotes three successful litigations but they all followed a criminal trial and conviction for repeated offences - circumstances that are entirely different to those of the majority of people they threaten with legal action. CAB concludes that:

Both Retail Loss Prevention and Drydens Lawyers have failed to provide clear evidence that the civil courts have routinely, consistently and explicitly supported - at contested trials - the recoverability of the sort of sums they demand in cases involving a relatively minor, low-value and one-off offence for which there has been no criminal conviction.[8]

As a result, if a person challenges or simply ignores their threatening letters, RLP tends to eventually withdraw the claim or ceases contact. In one case cited in the CAB report an individual was sent menacing letters for over a year by RLP and two debt collection agencies acting on their behalf without any legal action being taken. CAB argues that the “prospect of having its ‘claim’ robustly challenged in court (should any court proceedings be issued)...leads Retail Loss Prevention to drop some ‘claims’.”[9] Despite vociferous threats to the contrary, RLP appears to be extremely reluctant to make claims in the county court.

The threat of legal recourse is therefore little more than a scare-tactic designed to illicit fear and anxiety. Civil recovery, as practiced by RLP and Drydens Lawyers, relies almost entirely on shaming and scaring people into complying. Ignorant of the law, many pay the inflated sums demanded of them because they believe they have no realistic alternative but to do so. Those most susceptible are the young and vulnerable members of society - the CAB report has numerous examples of individuals with physical and mental health problems being targeted. In cases where people offer to pay a reduced amount RLP usually accepts the offer, presumably happy to take what it can.

In this context civil recovery is less about recovering damages than a form of fund raising which provides big businesses with an additional stream of revenue. It resembles little more than a fishing expedition whereby letters are indiscriminately sent to as many people as possible. CAB says that over 600,000 demands have been issued over the past ten years and warns that the UK civil recovery industry is growing. Two new UK firms, Civil Recovery Solutions and Civil Recovery Limited have commenced operations within the last year, and the Florida-based law firm Palmer, Reifler & Associates opened a London office in 2009 and utilised its expertise in US civil recovery law on behalf of the clothes retailer H&M. Certainly RLP sees scope for further growth. In September 2009 the front page of their website read:

Companies are at ever growing risk to losses due to changes within the economic and social environment within the UK. There is a higher volume of crime at all levels. High unemployment and decreased desire to work increases risk. There

is much greater influx of people coming to Britain from a wide variety of backgrounds with different needs and requirements. Growing debt levels, gambling and those aspiring to higher lifestyles beyond their means are increasing dramatically the number of employees stealing from their employers. [The bolded sentence has since been removed from the website]

Some retailers, such as Waitrose and Asda, have justified the use of civil recovery on the basis that it provides an effective deterrent, but CAB argues that “the ends of deterring crime or recovering its cost do not justify any means” and that parliament has not debated, let alone approved, the use of civil recovery laws in this way.[10] Further, CAB believes that RLP and Drydens Lawyers’ continued practice of threatening individuals with financial sanctions in the county courts, despite the fact that they are incapable of obtaining a judgment in their favour, constitutes “‘deceitful’, ‘unfair’ and ‘improper’ business practice, as defined by the Office of Fair Trading’s Debt Collection Guidance: Final Guidance on Unfair Business Practices.” The CAB report urges the Ministry of Justice to undertake an urgent review of civil recovery laws and publish public guidance, but to date the government has proven to be unresponsive to this issue.

Internet file-sharing

A lucrative industry has also grown up around obtaining money from internet file-sharers. “Anti-piracy” companies act as middle-men by leasing the ownership of copyrighted material, often hardcore pornography, with the sole intention of tracking down and soliciting money from those they believe to have unlawfully downloaded it. Their dubious business practices include setting up “honey traps” for file-sharers by themselves making copyrighted material available for download via peer-to-peer file-sharing programmes. They then record the Internet Protocol (IP) address of incoming connections, determine the personal details of its owner and send this person a “pre-settlement” letter informing them of their wrong doing, requesting monetary compensation and threatening legal action if they do not comply. A small percentage of whatever money is elicited from those who choose to pay is returned to the original copyright holder, with the law firm and “anti-piracy” company keeping the bulk share.

The three largest companies, DigiProtect, DigiRights Solutions and Logistep are all based in Germany but operate in the UK using the small law firm ACS:Law which claims to “specialise in assisting intellectual property rights holders exploit and enforce their rights globally.” In practice this means using a Norwich Pharmacal order in the High Court to force

internet service providers (ISPs) to give them the names and addresses tied to any IP address their clients believe to have downloaded copyrighted material (a practice that would not be possible in most EU countries).[11] They then send these people long-winded legalistic letters, predicated on the Copyright, Designs and Patents Act 1998, informing them that they can avoid action being taken against them in the civil courts by paying a compensatory amount of around £500. While dedicated “anti-piracy” companies are ACS:Law’s main clients, the firm also markets its “anti-piracy” scheme directly to all manner of computer game, music and film producers, encouraging them to sign over the distribution rights to their merchandise.

This scheme was originally pioneered in the UK in 2007 by the law firm Davenport Lyons. However, in the face of sustained negative media publicity and complaints from consumer association Which?, it abandoned the practice fearful of permanent damage being done to the firm’s reputation. In December 2008, the workings of the scheme were featured in an episode of the BBC television programme Watchdog. It revealed that they sought £600 from a mother-of-two accused of downloading a computer game and demanded similar compensation from a married couple in their 70s for allegedly downloading gay pornography. Both parties strongly denied any wrongdoing.[12]

In early 2009 ACS:Law seamlessly took over the practice, and it quickly became clear that the two firms are closely linked. Some members of ACS:Law staff transferred over from Davenport Lyons, they share the same client list and use the same legal documents and templates. Similarly to Retail Loss Protection, both firms have exaggerated their ability to secure favourable judgments in court. Davenport Lyons frequently used a default judgment (an uncontested case where the defendant failed to appear in court) to claim that they had the law on their side.[13] In March 2010, two of their lawyers were referred to the Solicitors Disciplinary Tribunal by the Solicitors Regulation Authority. In August 2010, ACS:Law’s owner, Andrew Crossley, suffered the same fate for the third time in his career.[14]

ACS:Law conducts speculative fishing expeditions on a vast scale. In one instance, in November 2009, the firm was able to obtain the personal details of around 30,000 ISP account holders.[15] The magnitude of the scheme makes it all the more alarming that the detection methods used to identify copyright infringement have been criticised as inherently unreliable. There are various ways in which IP addresses can be spoofed, and the common use of wireless technology means that access to

internet connections is often not secure. In August 2010, a study found that roughly a third of London households have “wifi networks that can be hacked with ease.”[16]

However, an account holder is not legally responsible for all internet activity connected to their IP address. Crucially, they are only responsible for copyright infringements made using their internet connection if they carried out the infringement themselves or authorised someone else to do so. If they did neither of these things they can simply inform whoever sent them the threatening letter that they have no case to answer.

ACS:Law is clearly aware that it is operating on sketchy legal ground. Accused of merely conducting “speculative invoicing” in a radio interview in September 2009, Andrew Crossley protested that “all we’re doing is putting these people on notice that their IP address is being utilised and we offer a compromise, they’re under no obligation to pay it but if they ignore us we will be taking further action.”[17] The tone of the letters they send is very different. A typical example reads:

Based on the evidence supplied to us, your internet connection has been used to make the work available on P2P network(s) in infringement of our client’s copyright...Our client’s evidence shows you are responsible for committing one or more of these infringements, either directly or by your authorising (inadvertently or otherwise) third parties to do the same. This gives us grounds to bring a civil claim against you and our client holds you responsible for committing these infringements, subject to any submissions you may make.[18]

The letter goes on to warn of the dire financial consequences non-compliance could bring:

Should it be necessary to bring a claim against you for copyright infringement, the legal costs of those proceedings are likely to be substantial. You may know that in civil proceedings in this country, the loser generally not only has to bear its own costs but also the costs of the winning party. This means that should you lose any action our client takes (against you) you will be liable for our client’s costs and vice versa. Costs in an action such as this can amount to several thousand pounds.

And yet in the same interview, Crossley admitted that his company had never taken anyone to court. A year later this is still the case: ACS:Law has never allowed the strength of its evidence to be put to the test. This may partly be because their methods of obtaining IP addresses do not comply with the Data Protection Act 1998. In this context Lord Lucas has argued that threatening individuals with escalating costs is disingenuous and amounts to

“straightforward legal blackmail.”[19] It is worth emphasising that at no point have any of these people been charged with a criminal offence. Like Retail Loss Prevention, ACS:Law’s tactic is to shame them into paying. A number of their clients act on behalf of pornography distributors because their copyright claims are likely to be particularly embarrassing. According to Michael Coyle of Lawdit solicitors, which represents over 100 people who have been written to by ACS:Law, “Because it is porn, the person who’s being accused won’t want to go to court and is more likely to pay up to make the matter go away even if they are completely innocent.”[20] He described the practice as a “licence to print money, all you have to do is hold your nerve, beat the stick and most people do pay.”[21]

Since they have no intention of taking people to court ACS:Law also has little incentive to ensure that their detection methods are accurate. On the contrary, the more letters they send the greater the chance of making money. ACS:Law cannot determine the identity of a file-sharer by IP address alone, but similarly nor can the account holder be sure that a friend or family member was not responsible for the offence. In these murky circumstances it is inevitable that innocent people will pay up in an unwitting attempt to protect the actions of others.

In November 2009, leaked documents of correspondence between Davenport Lyons and DigiProtect showed how the two companies ranked people out of ten on the basis of how likely they were to pay up and then targeted them accordingly.[22] An individual’s financial resources, legal knowledge, and the potential for negative publicity were all carefully considered before a decision was made over whether to pursue the claim. DigiProtect has even had debt collection agencies write threatening letters on their behalf despite the fact that there is no debt involved if the person has not agreed to pay compensation.[23]

Incredibly, ACS:Law responds to those who refute allegations of file-sharing by sending them a questionnaire which essentially asks them to help build a case against themselves or incriminate others. The recipient is asked to confirm that they are the owner of the internet connection; state whether their wireless connection is secure; state whether they use file-sharing software and why; state who else has access to the internet connection and whether they would be willing to submit their computer(s) for forensic analysis. *Which?’s* head of legal affairs, Deborah Prince, branded the practice “outrageous” and argued that it undermines the legal tenet of the presumption of innocence:

ACS Law should have all the evidence it needs before making these allegations. If it doesn't, then it shouldn't be asking unrepresented consumers to provide that evidence...This is just another variation of what we believe is bullying behaviour by ACS Law, who say that by not completing the questionnaire it has no option but to consider people guilty of illegal file sharing and pursue the case in court. Declining to fill in a form does not provide evidence of guilt.[24]

The key point is that far from seeking to stamp out illicit file-sharing, some copyright holders are now embracing the practice as a highly lucrative revenue stream. Indeed, it could be argued that by allowing companies such as DigiProtect to deliberately make their products available for illegal download they are actively encouraging copyright infringement. File-sharing is the very lifeblood of the scheme: the more people who do it, the bigger the profits.

DigiRights Solutions claims that in Germany roughly 25% of people to whom they send a letter pay an average fee of around €450. They keep 80% of the money and return 20% to the copyright holder meaning that every letter they send stands to make them €90. The copyright holder stands to receive roughly €22.50 for every letter sent which is often substantially more than they make through legal sales of their product. A record label can make almost 40 times as much through an illegal download of a song than when someone buys it online legitimately.[25]

On 24 September 2010, ACS:Law accidentally published its entire email archive online, revealing that the company has made just over £636,000 in under two years.[26] The leak also made available the personal details of over 10,000 people including the credit card records of those who paid up. The UK’s Information Commissioner has said it will investigate the leak and Privacy International is planning to take legal action. Its director, Simon Davies, said this is a rare example of a case in which “almost every aspect of the Data Protection Act has been breached.” The head of the organisation’s ethical networks project, Alexander Hanff, warned that “this data breach is likely to result in significant harm to tens of thousands of people in the form of fraud, identity theft and severe emotional distress.”[27] The company faces a fine of up to £500,000.[28]

A leaked email also revealed that ACS:Law specifically asks people to pay £495 to avoid breaking the psychological barrier of £500. DigiProtect, whose motto is “turn piracy into profit”, extracts money in a similarly calculated way. In December 2008, the company’s account manager,

Thomas Hein, explained how the company operates in Germany.

We have to be careful about the amount of damages we ask for...we try to find a figure that covers our costs and pays money to our licensors, which is usually around 500 Euro (\$700). Other firms are going for huge amounts of money, and the judges don't like it. If the judges feel you're being greedy, they won't rule in your favour.[29]

The question of what constitutes a fair or proportionate amount to ask for is irrelevant. What the file-sharing has actually cost the copyright holder also appears to be a non-factor. Their only consideration is determining the optimal amount to ask for that will make everyone concerned the most money. As Hein says:

No one working for DigiProtect has a fixed salary. If we make money, everybody makes money. If we don't, nobody does. This means the lawyers, sales people and customers. It's all about how much money can be recouped and then sharing it.

Unsurprisingly the industry is growing. Tilly, Bailey and Irvine solicitors began working on behalf of pornography copyright holders in early 2010 but by April had stopped sending claims letters because they were “concerned that the adverse publicity could affect other areas of our practice.”[30] In July 2010, it emerged that the Gallant Macmillan solicitors has sent threatening letters on behalf of the “Ministry of Sound” demanding compensation of around £350 per copyright breach.[31]

As more law firms become involved in the practice, criticism increasingly mounts. In January 2010, in a House of Lords debate, Lord Clement-Jones warned that the targeting of file-sharers is becoming a “big business” that “does nothing to protect the proper and legitimate rights of copyright owners in the UK.”[32] Further, “this kind of bullying that never results in an actual court action which can be tested

is the worst kind of harassment, and this is only too common.”[33] In March 2010, he branded the activities of ACS:Law and Logistep “an embarrassment to the rest of the creative rights industry.”[34] Lord Lucas was similarly damning of a practice which “produces a great deal of distress and indignation among many thousands of our citizens and which ought not to be allowed to continue.”[35] He added that “the reason this particular scam works is because of the impossibility of producing proof against this allegation.”

The Ministry of Justice expressed similar concern in a letter sent by the then Parliamentary Under Secretary of State, Bridget Prentice, to Lord Young. The Ministry of Justice recognises the distress that has resulted from the conduct of ACS Law and shares the concern expressed by the Lords in this matter. It may be helpful to say to recipients of a letter from ACS Law who are satisfied that they have no liability whatsoever in respect of the issues raised, that it is open to them to inform ACS Law that they are not liable and do not intend to reply to any further correspondence, save to defend a claim should one be brought.[36]

The BPI, which represents the UK music industry, stated: “Our view is that legal action is best reserved for the most persistent or serious offenders - rather than widely used as a first response.”[37] The Mobile phone company O2 has condemned “attempts by rights holders and their lawyers to bully or threaten our customers about file sharing.”[38] Talk Talk has gone further and refused to hand over the personal details of its customers. Not for the first time ACS:Law elected to avoid a legal confrontation by dropping the ISP Tiscali - which Talk Talk owns - from its recent High Court orders. This perhaps speaks volumes for the quality of the evidence ACS:Law holds against Tiscali’s subscribers.[39]

Footnotes

1. Citizens Advice Bureau briefing: Unreasonable Demands? Threatened civil recovery against those accused of shoplifting and employee theft, December 2009:

http://www.citizensadvice.org.uk/unreasonable_demands_final.pdf

2. Ibid., p. 3-4

3. Ibid., p. 4

4. Ibid., p. 4-5

5. Ibid., p. 6

6. <http://www.lossprevention.co.uk/advice/advicepage.aspx?page=3>

7. Unreasonable Demands? p. 11

8. Ibid., p. 14

9. Ibid., p. 16

10. Ibid., p. 18

11. A quick guide to Norwich Pharmacal orders can be found on the Practical Law Company website: <http://ld.practicallaw.com/0-211-3137>

12. BBC Watchdog website, 8.12.08:
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23. TorrentFreak website, 6.12.09:
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<http://www.guardian.co.uk/money/2010/jul/17/file-sharers-legal-action-music-downloads>
32. House of Lords debate, January 2010: <http://www.youtube.com/watch?v=ORBfs3QCvTY>
33. House of Lords debate, January 2010: <http://www.youtube.com/watch?v=S5GaZV8O1WM>
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