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Response to the European Commission's public consultation on the evaluation and modernisation of the legal framework for enforcement of IPRs

While the British Copyright Council welcomes the opportunity to contribute to the European Commission's publication consultation on the legal framework for enforcement of IPRs, we are unable to respond directly to the questions presented in the Commission's online survey as they are unsuited to eliciting evidence other than from those rights holders regularly involved in pursuing cases of copyright infringement and infringement on a large scale and who will hold data on such cases.

Some of our members will be in a position to provide data to the Commission, but the BCC itself and those of its members that represent "smaller" right holders (whether that is because they are freelancers, sole traders or small companies; or they are right holders who deal only occasionally with infringement of their rights; or they are right holders who suffer from infringement on a small-scale or which has a low commercial value) are not able to provide such evidence, however much they may wish to contribute to the Commission's consultation. This written submission by the British Copyright Council attempts to summarise the views of all its members.

The BCC asks that, when reviewing the evidence, the Commission takes account of the challenges which smaller right holders in particular face, when enforcing their rights online and cross-border and that it acts in support of their enforcement needs (in line with Recital (2) of the Enforcement Directive), as well as those of other right holders dealing with infringement of copyright and related rights on a larger scale.

A.

Identification

The British Copyright Council is a right holders' association.

The BCC represents those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, performances, films, sound recordings, broadcasts and other material in which there are rights of copyright and related rights.

Our members include professional associations, industry bodies and trade unions which together represent hundreds of thousands of authors, creators, performers, publishers and producers. These right holders include many individual freelancers, sole traders and SMEs as well as larger corporations within the creative and cultural industries. While many of these create works and performances professionally and make decisions relating to both commercial and non-commercial use of those works and performances, they also do so privately. Some of our member organisations also represent amateur creators and performers. Our members also include collective rights management organisations which represent right holders and which enable access to works of creativity. A list of BCC members can be found at <http://www.britishcopyright.org/bcc-members/member-list>.

The BCC is an umbrella/cross-sector organisation representing its members at national level. It is also an NGO observer member of WIPO.

Our members work cross-sector in the creative and cultural industries including information and communications, education and the arts, entertainment and recreation.

The BCC is a British organisation trading in the UK. Right holder members of its member organisations are normally British, but trade globally in their rights.

The BCC represents interests in copyright and rights related to copyright.

B.	Exposure to and impact of infringement
When and how do infringements occur	Infringement of rights occur both offline and online. To some extent the type and extent of infringement varies according to the type of work, as does its impact.
What is the impact of infringement on right holders' businesses	Infringement, particularly online infringement, impacts on right holders at every level.
Has IPR infringement increased in the last 10 years	As well as increasing, the nature of copyright infringement has changed over the last 10 years. See our comments below.

C.	Enforcement Directive
Overall functioning	As the European Commission recognises, the nature of copyright infringement itself has changed since the Enforcement Directive (and the E-Commerce Directive) were introduced. It follows, therefore, that enforcement mechanisms must also change. Existing systems are inadequate when it comes to dealing with the latest developments in stream-ripping, illegal streaming sites, apps., mobile telecommunications services, etc. The Commission are asked to review the need for changes to enforcement measures that are not linked to specific technologies but which support action against all types of infringement resulting from market advances linked to the new technologies.
Evidence	The BCC is aware of difficulties in applying injunctive relief cross border. Please see our comments on Art 9 and 11 below.
Procedures and courts, damages and legal costs (Art 3, 13 and 14)	<p>A major factor inhibiting smaller right holders wishing to take action to prevent online infringement of their rights, is that costs are prohibitive. Such costs arise in relation to action against the infringer (particularly across borders), in investigation and evidence gathering and in trying to persuade ISPs to act against the infringer.</p> <p>With this in mind the BCC strongly supports the introduction of a right for right holders to take representative action (including Collective Management Organisations wishing to bring a claim in respect of all the repertoire they own or control) and we hope that the Commission recognises that that the potential for representative action would be of particular benefit to smaller right holders.</p>
Provisional and precautionary measures and injunctions (Art 9 and 11)	<p>In the UK, the possibilities for provision of injunctive relief, established by Article 11 of the Enforcement Directive, have proved important for the film and music industries and more recently for the publishing sector.</p> <p>Within the UK, s.97A of the Copyright Designs and Patents Act 1988 has proved invaluable in enabling right holders to get websites blocked when it has been shown that they are linking to and promoting infringing materials. However, the BCC is concerned about the consistency in the level of protection afforded elsewhere in Europe.</p> <p>The importance of Article 11 of the Enforcement Directive being applied without prejudice to Article 8 (3) of the Directive 2001/29/EC is underlined by the successful development and use of s.97A CDPA. However in addressing the parallel provisions of the Copyright Directive and the Enforcement Directive (and the relevant provisions of the E-Commerce Directive) there is a real lack of consistency over the way in which the recognised importance of injunctive relief for all right holders is established under the jurisdictions of Member States.</p> <p>Such inconsistencies make the concept of cross border enforcement and recognition of injunctive relief afforded by national courts more difficult to address.</p>

Publication of judicial decisions

The BCC takes the view that it would be helpful to have a systematically disseminated and easily accessed means of comparing and monitoring decisions made in individual Member States, across border to ensure that the legal framework for enforcement of IPRs is operating in parity and that implementation is even.

D.

Role of intermediaries in IPR enforcement and the prevention of IPR infringements

Issues outside the scope of the current legal framework

ISPs should take a more pro-active approach to ensure a fair online environment for right holders.

In the fifteen years since the introduction of the E-Commerce Directive and its provisions relating to intermediaries, the online environment has changed beyond recognition. At the time of its inception, the E-Commerce Directive aimed to regulate the provision of services via electronic networks and protected those who provided the networks. This protection is simply not justified for those providers who have built copyright-based businesses exploiting safe harbours for purposes not intended under the Directive. New value chains have emerged, certain ISPs now dominate the marketplace and the extraction of value by aggregators from protected content is a key feature of digital delivery.

As a result, the E-Commerce Directive creates an issue which cannot be resolved by the rights afforded under the IP Enforcement Directive – the two must be addressed together to ensure that right holders can effectively enforce their rights.

i. Hosting Defence

The “hosting defence” under the E-Commerce Directive is no longer fit for purpose. Having been introduced initially to protect services such as those providing server “space”, the defence has been relied on by websites and other services, both in terms of content and functionality, resulting in creators not being paid for the exploitation of their work and undermining licensed services with a knock-on risk for market development. The BCC asks the Commission to provide greater clarity on the types of ISPs to which the hosting defence should (or should not) apply.

ii. “Notice and Take Down” “ Notice and Stay Down”

“Notice and Take Down” procedures are in need of urgent review.

Our member BPI has reported more than 200m infringing links to Google since July 2011. However, BPI finds that illegal search results taken down by Google are frequently replaced by other illegal links with the result that legal services continue to be overshadowed by infringing sites in the top search results.

The BCC hopes that the European Commission recognises and supports the need for a wider “Notice and Stay Down” procedure, to ensure that once content is taken down, it stays down.

However, we do not see “Notice and Stay Down” as the whole answer, nor will it provide a long term answer to enforcement of rights, as it places all the burden on right holders. The requirement and the necessity for right holders to use such procedures against ISPs should be the exception and not the rule.

Specialised courts

There is a real need for ISPs to take a fairer share of the burden for procedures relating to enforcement of rights.

In the UK, the small claims track of the Intellectual Property Enterprise Court has provided a valuable aid for smaller right holders.

E.

Other comments

“Follow the money”

The British Copyright Council supports the principle of “follow the money” but takes the view that voluntary measures or self-regulatory initiatives will not work alone. Such measures should be supported by a clear legal framework to compel advertisers and ISPs to support them.

Exceptions to copyright

With regard to the timing of any measures taken by the Commission to adjust the legal framework for enforcement, the BCC takes the view that any such measures must be coordinated to apply alongside any changes to copyright exceptions.
