

11<sup>th</sup> April 2016

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Dear Matt,

### **Review of the legal framework for enforcement of IPRs**

The British Copyright Council is preparing its response to the European Commission's consultation on the legal framework for the enforcement of IPRs. Representatives of the British Copyright Council were at IPO's open roundtable on enforcement issues held on 4<sup>th</sup> February. We were also represented at the meeting chaired by you, with Ms Mosback from the European Commission and held on 23<sup>rd</sup> February and our members expressed their views on enforcement related issues at the Joint Consultative Meeting between the BCC and IPO held on 10<sup>th</sup> March. Following these meetings, we thought it might be helpful to provide a summary of our initial thoughts on this important issue.

1. The questions covered in the Commission's online survey are unsuited to eliciting evidence from anyone other than those rights holders regularly involved in pursuing cases of copyright infringement on a large scale. Some of our members are in a position to provide data relating to large scale infringement, but the BCC is encouraging those members representing smaller right holders to respond (i.e. freelancers, sole traders or small companies; or right holders who deal only occasionally with infringement of their rights; or where the infringement itself is small-scale or has a low commercial value) by sending separate submissions to the Commission to illustrate the challenges their members face when enforcing their rights online and cross-border (Ms. Mosback indicated at the meeting on 23<sup>rd</sup> February that such submissions were acceptable and would be of value to the Commission). **The BCC asks IPO to ensure that the Commission acknowledges the issues for smaller right holders and that it acts to support their enforcement needs (in line with Recital (2) of the Enforcement Directive).**
2. The UK has been and remains at the forefront of work on enforcement and the BCC appreciates IPO's role in relation to that. The possibilities for the 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.

Within the UK, s.97A CDPA, has proved invaluable in enabling right holders in the UK to get websites blocked when it has 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.

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 importance of injunctive relief for all right holders is established under the jurisdictions of different Member States.

Such inconsistencies make the concept of cross border enforcement and recognition of injunctive relief afforded by national courts more difficult to address. **The BCC would welcome IPO support in ensuring that that the Commission fully appreciates how different local protection relies upon, or refers to, provisions supported by the Enforcement Directive, the Copyright Directive and the E-Commerce Directive and its recognition that there is a need to reconcile differences, if cross-border or greater pan-European relief is to be effectively enabled.**

3. The nature of copyright infringement itself has changed since the Enforcement and E-Commerce Directives 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 telecommunication services, etc. **The BCC asks IPO to emphasise to the Commission the need for enforcement measures that are not linked to specific technologies but which support action against all types of infringement resulting from market advances linked to new technologies**
4. In the fifteen years since the introduction of the E-Commerce Directive and its provisions, 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 online intermediaries 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. In particular, the BCC takes the view that the E-Commerce hosting defence is no longer fit for purpose with “Notice and Take Down” procedures, in particular, in need of urgent review. **The BCC asks IPO to support the introduction of a wider “notice and stay down” procedure, to ensure that once content is taken down, it stays down.**

However, while the BCC supports the need for “notice and stay down” and for greater cross-border enforcement of rights, we do not see this as the whole answer, or as a long term answer, to enforcement, 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. **The BCC asks IPO to supports the need for measures under which ISPs take a fair share of the burden for procedures relating to enforcement of rights.**

5. A major factor inhibiting smaller right holders (as mentioned in 1. above) 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 cross border), in investigation and evidence gathering, and in trying to persuade ISPs to act against the infringer. **The BCC asks that IPO raises this with the Commission as an issue specific to smaller right holders. We also support a change in the law that would allow right holders to take representative action (including CMO’s wishing to bring a claim in respect of all the repertoire they own or control) and we hope that IPO agrees that the potential for representative action would be of particular benefit to smaller right holders.**

The BCC notes that UK’s IPEC small claims track has also provided a valuable aid for smaller right holders and **asks IPO to encourage the Commission to look at this example.**

6. The BCC supports the principle of “follow the money” but warns 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 online intermediaries to support them. **The BCC asks IPO to encourage the Commission to act on both fronts.**
7. 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 co-ordinated to apply alongside any change to copyright exceptions. **The BCC would welcome IPO’s support for this.**
8. The BCC recognises that protection of rights online and cross-border does not depend solely on possible changes to the legal framework for enforcement. Other elements of the Digital Single Market Strategy are also crucial, particularly the Commission’s work on online platforms. In this context, the hosting defence under the E-Commerce Directive, introduced initially to protect services such as those providing server “space” but relied on by websites and other services, both in terms of content and functionality, result in creators not being paid for the exploitation of their work and undermine licensed services with a knock-on risk for market development. **The BCC understands that IPO does not have the policy lead in relation to online platforms. However, in the interests of improving enforcement of copyright, the BCC will support IPO in encouraging greater clarity on the types of online intermediaries to which the hosting defence should (or should not) apply.**

I hope that the above is helpful. Please do not hesitate to contact me should you need anything further. I will send you a copy of the BCC’s submission to the Commission once it is ready.

Kind regards.

Yours sincerely,



Janet Ibbotson  
Chief Executive Officer

c.c. Dr. Ros Lynch, IPO