



Consultation on Evaluating the Enforcement Directive

MPA Group submission

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The MPA Group is a founding member of UK Music and supports UK Music's response to the consultation. This document comprises the MPA Group's own supplemental responses to the consultation as the online questionnaire is not an appropriate format for all responses.

The MPA Group represents the UK music publishing sector; it consists of:

- The **Music Publishers Association** ("MPA") is the trade association representing and safeguarding the interests of the UK's music publishing industry;
- The **Mechanical-Copyright Protection Society Ltd** ("MCPS") licenses mechanical rights to music users, collects fees and distributes royalties to (a) twenty thousand, mostly unpublished, writer members and (b) six thousand five hundred publisher members who in turn represent tens of thousands of writers;
- **Printed Music Licensing Ltd** ("PMLL") licences and collects income, on behalf of over 75 music publishers, for the copying by schools of their repertoire in reproduced in sheet music form; and
- **Independent Music Publishers European Licensing** ("IMPEL") licenses and collects income on behalf of music publishers in respect of the digital mechanical rights in their Anglo American repertoire for pan-European (and wider) online activities.

Executive Summary

This response highlights four key issues concerning the enforcement of intellectual property rights which the MPA Group believes need to be addressed at a European level in order to create a suitable environment to sustain, protect and grow the legitimate market for the distribution and consumption of music across all online and physical distribution channels:

- **E-Commerce Directive to be clarified as regards intermediary liability. Online platforms need to adopt a Notice and Stay Down policy as regards notified infringing content and acknowledge and act upon their duty of care to rights holders (see MPA [submission](#) to consultation on online platforms, January 2016)**
- **Article 11 Enforcement Directive (needs to be implemented in Member States and should be amended to enable cross border application and enforcement of website blocking orders.**
- **Article 4 Enforcement Directive needs to be amended to allow for representative action by trade associations**
- **Establishment of cross border European Specialised Intellectual Property Crime Unit along the lines of the successful UK (PIPCU) model.**

Background

As a trade association the MPA lacks the necessary standing to bring legal proceedings and has not therefore engaged in enforcement activities directly although its individual members are fully engaged. Composers rely on music publishers to enforce their rights and the publishers have a community of interest in doing so. Typically, enforcement efforts stop short of legal proceedings due in part to the prohibitive cost and in part to the fact that the territorial nature of the available remedies are considered ineffective. The ultimate objective of all enforcement strategies is to preserve the value of the rights in question and to support and facilitate the legitimate market for business operating in a licensing framework. The preferred interface between right holders and intermediaries is on negotiated commercial terms between willing licensors and licensees.

Of course that requires not only a willingness to pay but also a viable business model to preserve the value of the rights in question. Effective enforcement procedures play a key role in both incentivising legitimate activity and maintaining value.

Part B. Exposure to and impact of infringements

1. Nature of Infringement

The nature and emphasis of copyright infringement has continued to shift steadily from physical to digital since the Enforcement Directive was adopted in 2004. Whilst physical infringement is still occurring (particularly physical copies of sheet music), the bulk of infringement is occurring online. The MPA Group urge the Commission to take decisive action to combat online infringement as part of its ongoing review of the European copyright framework. Any changes to the underlying copyright framework must as a minimum include improvements to enforcement procedures which enable rights owners to incentivise creativity and protect their assets

According to [research](#) (by Kantar Media) commissioned by IPO) on the extent of this illegal online activity, they estimate that 18% (c. 7.8 million) of UK internet users aged 12+ consumed at least one item of online content illegally over the three-month period March-May 2015 (half of it related to music). They also found that 6% of the 12+ UK internet users have exclusively consumed illegal content i.e. they do not access legal content at all.

Music publishers, like record companies, are directly affected by infringement of recordings of their repertoire and also (unlike record companies) as a consequence of the illegal copying of their sheet music, lyrics and tabulations. The demand for online materials is increasing and this is reflected in a growing legitimate market but which is severely hampered by its inability to compete with illegal sites offering these products for free. This problem is exacerbated by the constant developments in infringement facilitating technology (e.g. stream ripping) and by infringement taking place within applications which together make it difficult to identify infringers.

Currently there exists a very significant mismatch between the value that certain digital platforms extract from music, and the value that is returned to rights holders. A solid and enforceable copyright framework is key for the development of a legitimate market which ensures the value of music whilst protecting the consumer from dangerous illegal online platforms.

We have also seen positive developments where unlicensed online music services, upon reaching a certain level of commercial maturity are seeking to obtaining licenses from rights holders. This process of legitimisation is often triggered by an initial threat of enforcement although the main motivation for the service provider is commercial (in that only legitimate businesses can hope to attract inward investment).

As a trade association we are not in a position to assess the detailed costs of enforcement but the cumulative costs attributable to loss of turnover, litigation and monitoring costs and reputational damage caused by inferior unauthorised products are significant.

2. Website Blocking

A key shortcoming of the current enforcement regime relates to website blocking orders provided for in Article 11 Enforcement Directive and Article 8 (3) Information Society Directive: This has not been implemented across the European Union and the lack of harmonisation means that rights cannot be uniformly enforced (if at all). Whilst the UK has implemented Article 8 (3) Information Society Directive directly in the form of Section 97A Copyright Designs and Patents Act 1988 as amended, other member states have not done so.

Consequently, despite the successful application of website blocking orders in the last six years in the UK, UK right holders are not able to obtain parallel orders in other member states.

It is crucial that these provisions are implemented across the EU and, in an ideal world, an order obtained in one member state should have pan European effect. However, even if that is not achievable as part of the current review of the copyright framework then at the very least we would hope that the Commission will consider whether a court ruling in one member state can be taken into account in another member state in which the right holder applies for a blocking injunction. This would at least reduce the costs burden on right holders. We understand that under private international law it is already possible for a UK right holder to apply for a website blocking order in another European member state but the costs are prohibitive.

Further, due to the unavailability of damages in tandem with the injunctive relief there is no incentive for an intermediary to agree to block a website without the need for expensive proceedings.

Website blocking orders are not of themselves a universal panacea in the fight against piracy; By way of example such an order would be of no use in trying to prevent the pre-release publication of infringing copies. In such cases more direct and imminent remedies for right holders are of utmost importance and in particular notice and stay down measures.

Part C. Functioning of Key Provisions of Directive

1. Damages

The current measure of damages is referenced against what the infringer would have to pay as a reasonable licence fee. On that basis there is no penalty element and therefore no disincentive to illegal activity. This is not appropriate in many cases, in particular where an unlicensed pre-release might very significantly devalue a musical work. The provisions for an uplift in damages for flagrancy introduced by the Enforcement Directive are narrowly prescribed in the UK and inadequate in practice.

2. Representative Action

MPA Group would welcome the broadening of Article 4 of the Enforcement Directive to allow for representative action by trade associations.

Part D. Issues Outside Scope of Current Framework:

1. Intermediary Duties and Liability

The protections given to intermediaries by Articles 12 -15 e-Commerce Directive (ECD) were intended, in the 1990's, to protect service providers against liability for infringements committed using their service but without their knowledge. However, they are no longer fit for purpose in the present day where most of the online platforms provide content as part of a hybrid offer because the class of entities which claim the protection of ECD is much wider than was envisaged by the draughtsman. The ECD has provided the basis for, and now underpins, a number of business models, which have developed in their sophistication over the years, by which rights can be legitimately exploited and monetised without the consent of or payment to the rights holder.

As elaborated in our response to the consultation on online platforms, if some balance is to be restored then clarification is required as to who is entitled to protection and the circumstances in which that protection may be lost and the duties of intermediaries in particular in circumstances where they have actual knowledge of acts of infringement on their platforms. Once online platforms have actual knowledge of infringing musical works they must ensure that the musical work stays down regardless of the URL used to upload the material (Notice and Stay Down); they also have a duty of care to analyse their platform for further instances of infringing copies of notified works.

2. Police Intellectual Property Crime Unit

The UK Police Intellectual Property Crime Unit ([PIPCU](#)) has been working with right holders for the past three years with considerable success and the MPA Group recommends that approach to other member states. PIPCU focuses on the money generating activities of infringers, e.g. by targeting advertising companies or credit card providers. This practical approach has proved very helpful in curbing infringement.

3. Education

The music industry has undertaken educational activities which together with the practical anti-piracy activities have had an impact on the level of piracy. We ask the Commission to support such activities.

4. The Market

Ultimately the market if left to its own devices will find commercial solutions to address the majority of the challenges it faces and new licensing models are continually developing which evidence that both at a society and individual member level. However an effective and balanced copyright and enforcement framework is a key facilitator of that.

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