



European Commission (DG Markt): Civil enforcement of intellectual property rights: public consultation on the efficiency of proceedings and accessibility of measures
UK Music response

27 March 2013

About UK Music

UK Music is the umbrella body representing the collective interests of the UK's commercial music industry, from songwriters and composers to artists and musicians, studio producers, music managers, music publishers, major and independent record labels, music licensing companies and the live music sector.

UK Music exists to represent the UK's commercial music sector in order to help drive economic growth and to promote the benefits of music on British society. The members of UK Music are listed as an annex.

I. Background Information

The activities of composers, performers, music publishers, record companies and collecting societies are based on licensing. The income based on business to business licensing was £1,057 billion in 2011 according to the report by our member *PRS for Music* "Adding up the music industry 2012" (out of a total value of the UK music industry of £3,80 billion – the value of the IP portfolio of the UK music industry; this corresponds to €4,4 billion).

Copyright is the basis of the music business permeating the value chain and hence is crucial for the economic activities of all our members.

UK Music puts forward some specific considerations which we hope you find useful.

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II. Efficiency and effectiveness of civil proceedings in cases concerning infringements of intellectual property rights

The questions under this heading concern the costs and duration of civil law court proceedings. We note that the Digital Economy Act (DEA) 2010 established an enforcement mechanism within our jurisdiction which addresses these points. The DEA 2010 was passed into UK law on 8th April 2010 but the implementation has been delayed. Essentially, the DEA compels ISPs to do two things:

- (1) To send notification letters to their subscribers following a “copyright infringement report” by the copyright owner detailing the apparent infringement; and
- (2) To collect anonymised information on serious repeat infringers.

In doing so the DEA would provide for an efficient and effective mechanism for a specific form of infringement whilst taking into account the crucial role that creators and right holders play in the continued evolution of a sustainable digital market. The main principle which the DEA recognised (in addition to a variety of legal cases, e.g. *Twentieth_Century Fox et alia v Newzbin et alia*; *Dramatico et alia v BSKyB et alia*; *BPI v SKY*) relates to the role of ISPs whose responsibility has now been spelled out *de lege lata*.

The ultimate goal of the DEA once implemented is to substantially grow and diversify the digital economy. It will ultimately contribute to the growth of the UK digital economy by supporting the legal market by encouraging Internet users to download music and films through legal channels. Success will be measured by diversity and viability of new services and the volume of illegitimate users which migrate towards them. The UK leads the way with licensed online music services (currently over 73). However, the UK Government has failed to implement these provisions within the Digital Economy Act up until now.

III. Accessibility of measures necessary to ensure civil enforcement of intellectual property rights

The enforcement by civil measures (in addition to the criminal route right holders use with the help of amongst others Trading Standards authorities) is becoming increasingly important in the digital world. We like to specifically point out the orders against internet access providers available in the UK under Section 97A CDPA (implementing Art 8 (3) Information Society Directive).

The principles of Section 97A CDPA have been established in various court cases since 2010 (most notably *Twentieth Century Fox Film Corp and others v British Telecommunications plc and others* [2011] EWHC 1981 (Ch) and *Dramatico Entertainment Ltd and others v British Sky Broadcasting Ltd and others* [2012] EWHC 268 (Ch)). We highlight the application of the principles of Section 97A CDPA 1988 in

the recent case *EMI Records Ltd and others v British Sky Broadcasting Ltd and others* ([2013] EWHC 379 (Ch) – *BPI v Sky*). The civil measure in Section 97A CDPA is straightforward in its application (under Part 8 of the UK Civil Procedure Rules and Practice Direction 8A).

The latter case establishes 4 conditions for Section 97A CDPA to apply (which are being elaborated in detail based on the facts of the respective case)

1. The defendants are service providers
2. The users or the operators of the Websites infringe copyright
3. The users or the operators of the Websites use the defendant ISPs' services
4. The defendants have actual knowledge of this.

The application of Section 97A CDPA has become very important for the music industry given the failure of the UK Government to implement the Digital Economy Act 2010. However, there are various aspects which could be improved on the application of Section 97A CDPA, in particular concerning its application on a European and international level.

- **Costs:** the costs for gathering admissible evidence for one application for a Section 97A CDPA order are considerable (in addition to the costs of the application to the Court). The costs will invariably increase given the number of applications required to have an impact on the activities of the website provider. We ask the Commission to look at further harmonisation of this process under Art 8 (3) Information Society Directive.
- **Timing:** until the order is passed, access to infringing websites remains open leading to considerable damage to right holders; we suggest further consideration of an interim order
- **Scope of the application:** the Order under Section 97A CDPA seems currently limited to the UK; the Commission could support the pan European application of such an Order under Article 11 (1) of the Enforcement Directive (which corresponds with Art 8 (3) Information Society Directive).

We note the legal precedent in the UK which extends to the international application of the rule of law in copyright infringement cases. In *Lucasfilm Limited and others v Ainsworth and another* (Trinity Term [2011] UKSC 39 - On appeal from: [2009] EWCA Civ 1328), the UK Supreme Court held that in the case of a claim for infringement of copyright of a specific kind, the claim is one over which the English Court has jurisdiction, provided that there is a basis for in personam jurisdiction over the defendant in the UK. In that case, Lucasfilm was consequentially held to be entitled to a remedy which could be enforced in the

UK based on US copyright law. We ask the Commission to consider the impact of the application of the principles established in *Lucasfilm v Ainsworth* at a European level.

Annex

UK Music's membership comprises of:-

- AIM – Association of Independent Music - representing over 850 small and medium sized independent music companies
- BASCA - British Academy of Songwriters, Composers and Authors – with over 2,000 members, BASCA is the professional association for music writers and exists to support and protect the artistic, professional, commercial and copyright interests of songwriters, lyricists and composers of all genres of music and to celebrate and encourage excellence in British music writing
- The BPI representing over 440 record company members
- MMF - Music Managers Forum - representing 425 managers throughout the music Industry
- MPG - Music Producers Guild - representing and promoting the interests of all those involved in the production of recorded music – including producers, engineers, mixers, re-mixers, programmers and mastering engineers
- MPA - Music Publishers Association - with 260 major and independent music publishers in membership, representing close to 4,000 catalogues across all genres of music
- Musicians' Union representing 30,000 musicians
- PPL is the music licensing company which, on behalf of 50,000 performers and 6,500 record companies, licences the use of recorded music in the UK
- *PRS for Music* is responsible for the collective licensing of rights in the musical works of 92,000 composers, songwriters and publishers and an international repertoire of 10 million songs
- UK Live Music Group, representing the main trade associations and representative bodies of the live music sector