

**Response Document – Completed by the British Association of Picture
Libraries & Agencies**

Call for evidence: Review of the UK Intellectual Property Enforcement Framework

The call for evidence will be open until 9 November 2020

When responding please state whether you are responding as an individual or representing the views of an organisation:

- I am responding as an individual
- I am responding on behalf of an organisation

What is the name of the organisation?

BAPLA – British Association of Picture Libraries and Agencies (Founded in 1975)

Please check the box that best describes you as a respondent:

About you:

Are you:

- An individual
- Micro business (10 employees or less)
- Small Medium Enterprise (up to 250 employees)
- Large business (over 250 employees)
- Legal profession e.g. attorney or solicitor, barrister, judge
- Representative group
- Other

(Please describe)

BAPLA represents over 115 picture library and agency members, providing the main source of licensed images seen every day in print and digital media, who in turn represent approx. 120,000 professional photographers, videographers and illustrators. We have a broad and diverse membership of image rights holders and purveyors, from sole traders to major news, stock and production agencies, as well as many archives and cultural heritage institutions.

The majority of BAPLA's membership consists of small and medium enterprises (SMEs) accounting for approx. 72% of the membership, with 28% as sole traders - many operating on very tight economic margins. In relation to accessible legal enforcement measures, picture libraries and agencies have made use of the IPEC Small Claims Track to deal with copyright infringement cases. Our response is based on a broad overview of our membership.

Please respond to the questions that are relevant to you.

When responding to the questions please specify which IP right(s) you are referring to.

Please return completed responses to enforcement@ipo.gov.uk.

1. The cost of legal challenges

1.1 Costs of taking action

1. What costs have you or your business incurred when protecting your IP right(s) from infringement? When you respond, please include the type of IP right(s) you were protecting. What was the outcome of the case?

Members costs incorporate business time and resources to bring cases to court, and in instances where cases maybe complex and legal support is engaged – the costs can vary from anywhere between £500.00 (for an individual rightsholder taking a simple single case to the IPEC SCT) to £10,000.00 (for more intricate cases) depending on the level of complexity and number of infringed images. An average of 25% of licensing revenue each year is lost to online infringements of images¹.

2. Have you avoided making a claim or pursuing a case when protecting your or your business' IP? If so, please explain your reasons. For example, was it because of the costs involved?

Yes. There can be several factors that deter members from pursuing cases of copyright infringement, ranging from – identifying infringers; number of infringements relative to business costs (time and administrative resources) - costs can spiral fairly quickly or be prohibitive if seeking legal advice; difficulty in evidencing level of investment and of financial loss; concern over low value judgement of damages associated with individual images; weighing up the likelihood of a successful outcome versus business costs; ability to recover costs; litigation process for individual or small enterprise rightsholder claimants. For many BAPLA members pursuing claims through the legal system is challenging, simply because do not have the financial resources to be able to properly file for copyright infringement².

3. Which costs did you consider when deciding what action to take to protect your IP? For example, the cost of the time spent dealing with the infringement or the possibility of paying an expert?

Our members consider a range of costs – resources used in preparing a case for infringement, such as time spent and loss of licensing revenue; where the infringement takes place (the extent of the infringement itself and further likely infringements, for example if it is online use); gathering evidence to support a claim; if legal advice is required to establish certainty of a clear copyright infringement case.

4. Were you aware of or did you consider the use of protective measures such as IP insurance? For example, BTE (before the event), ATE (after the event), legal expenses insurance, or free legal advice through services like the Citizens Advice Bureau or IP pro bono?

¹ & ² BAPLA Research Into Online Copyright Infringement – Assessing the Value Gap
<https://bapla.org.uk/bapla-releases-its-first-online-copyright-infringement-report/>

Due to the nature of our member's businesses and the potential rate of claims, IP insurance is not applicable. The use of IP pro bono support would only likely be applicable for a court case with significant damages.

5. Is there a reason you did not use protective measures such as IP insurance?

Due to the nature of our member's businesses and the potential rate of claims, IP insurance is not applicable.

Costs from defending action

1. What costs have you or your business incurred when defending an accusation of alleged infringement? When you respond, please include the type of IP right(s) you were accused of infringing. What was the outcome of the case?

2. Could you provide some information on how you funded the case? For example, debt, using free legal services or insurance.

1.2 Pro bono publico

1. Have you considered or used IP pro bono or similar services to help with the costs of seeking legal advice? If so, please provide details of your case (this can be anonymised) and your overall experience.

Very few of our members have considered using an IP pro bono service, as it is seen in general as only applicable to significant enforcement cases which require initial outlaying of legal expenses, before engaging a barrister, which can be prohibitive.

2. Did anything prevent you using these services? Please provide details.

Very few of our members know what is accessible to them under such a service.

3. If you are aware of the service but have not used it please explain why not?
For example, were you unable to get a referral to the IP Bar pro bono service?

Refer to comments above.

1. Accessibility and effectiveness of judicial processes

1.1 Experience of the judicial system

1. Do you have experience of the judicial process? If you do, please provide details of your specific IP case. Please include whether you found the system easy to understand and use.

A small range of BAPLA members have had experience of the judicial process, in particular the IPEC Small Claims Track, which is regarded by our members as an integral part of the copyright enforcement regime (including as a deterrent), and for the most part is a satisfactory experience.

2. Were you aware of the different routes available to take to pursue the alleged infringement?

Our view is that the importance of highlighting the different routes open to plaintiffs is made much more clearly and widely available. For rightsholders to pursue taking infringement cases to court is not taken lightly given the time, effort and expense of preparing for claims. We would welcome further guidance on what to expect in relation to costs, judgement, and damages, including for example the consequence of choosing one option over another, what to expect and why not all claims may be successful.

3. When your product or creation was being infringed, did you feel there was easy access to the court system? Was there easy access to information on which route would be the most suitable? Please explain what happened in your case.

For some of our members yes, they felt there was easy enough access to the courts, since the introduction of the IPEC SCT in 2012. However, the outcome of closing the IPEC SCT service as a result of the COVID-19 virus has impacted those of our members using the service. It is important the service remains open and functioning, particularly in order to deal with the rise in online copyright infringement and repeat infringers.

As for access to information, members have reported that knowing which route would be the most suitable and how to use the applicable service is one area that could be improved.

1.2 Preliminary and out of court solutions available

1. Have you stopped infringement of your rights without taking the infringer to court?

Yes, to a degree. Our members have to deal with a significant number of copyright infringements, particularly online, and therefore have had to use a variety of methods to

manage the level of infringements. A report³ published by BAPLA in November 2019 indicated members of the trade association use a variety of methods to manage and process online infringements, including takedown notices (69%), independent commercial settlements (45%), copyright enforcement services (41%), and legal action via courts (21%). The latter option tends to be used as a result of following the exhaustion of other remedies, and based on the level of resources used to pursue each case and likely outcome. The success of the Small Claims Track as part of an enforcement countermeasure is important to recognise. BAPLA members that use the IPEC Small Claims Track find it a useful deterrent as a dispute mechanism against commercial entities infringing the use of images, and as such some have structured their internal business mitigation frameworks to include the service.

2. Did you use an alternative dispute resolution (such as mediation or arbitration)? If so, please provide details of which service you used, your experience and the outcome.

If an alternative dispute resolution (ADR), such as mediation or arbitration, has been offered to our members, they have used the service and not made any specific comments or recommendations.

3. How did you find out what route to take to enforcement?

As mentioned previously there are a number of enforcement routes our members will consider. The use of copyright infringement tracking services supports image identification can often be the first step, the decision to enforce rights follows on from this. Our members tend to refer to the IPO web page on defending IP rights, if they are looking to act more decisively in relation to the specific copyright infringement and consider taking legal action. If members decide to undertake a legal case, the service used most often is the IPEC SCT with its upper limit of £10,000 in damages. Within this service rightsholders have the option of two levels – single up to £10,000, or multi-track claims requiring more than £500,000. The gap between the two is significant for BAPLA members that are SMEs as they simply do not have the resources to take a case beyond the £10,000 level, although accumulated costs may reach just over the threshold.

4. What was your experience of using the chosen method?

Refer to general comments under the IPEC SCT section.

³ BAPLA Research Into Online Copyright Infringement – Assessing the Value Gap
<https://bapla.org.uk/bapla-releases-its-first-online-copyright-infringement-report/>

2. Suggested remedies

2.1 Improvements to processes at Small Claims Track (SCT) at the Intellectual Property Enterprise Court (IPEC)

1. Have you used the small claims track? If you have, please describe what happened in your case? Did you find the available guidance easy to understand without the need to seek legal advice?

Yes, a proportion of BAPLA members have used the IPEC SCT. Some use the service quite frequently to manage the succession of copyright infringements, particularly online.

Recommendations from BAPLA on how to improve the IPEC Small Claims Track process range from: providing clearer guidance on the process required; coherent understanding of the value attributed to images and the level of claimable compensation; injunctive relief available; debt advice, and importantly, swift enforcement settlement outcomes.

2. Have you looked into using the small claims track and decided not to use it? If so please provide details of what happened and your reason for not using the service.

Yes, again a proportion of BAPLA members have considered using the SCT service and have decided not to use it for several reasons, although in the main it is due to the level of expenses and resources required to file a case versus the uncertainty of the level of damages awarded and recouping the costs outlaid in a timely manner.

If it is unclear whether a work is an infringement or falls under an exception, legal advice needs to be sought, which also increases outgoing costs. Online use cases can be very complex, and costs can quickly exceed initial estimates.

The maximum level of damages of £10,000 is relatively low and can be consumed by the high costs of bring cases to court, reducing the incentive to pursue claims through the courts, particularly regarding some of the complexity involved in online copyright infringement which often requires fees for litigation. However, the Multi-track £500,000 isn't necessarily applicable either in most cases. Introducing a staggered system between both tiers – Single £10,000 and Multi-track £500,000, we believe would help to improve the process for SME rightsholders.

3. Would providing examples of cases have helped when considering whether to use the small claims track and your understanding of the process?

Yes, additional information such as case examples, and judgements reached, would be very helpful to claimants. It is important for both plaintiffs and defendants to understand how judgements are reached in order to discourage repeated offenses and those acting in bad faith. Online copyright infringement is exacerbated by repeat infringers, and a lack of education on what constitutes permitted use, therefore the publication of SCT judgements could be extremely helpful in learning and understanding about copyright. BAPLA welcomes

the IPO having recently publishing some data on the record of damages between 2018-2019².

4. If you have used the small claims track would you use it again for a future infringement case? Please explain your reasons for your decision not/to use the small claims track again?

Overall BAPLA members fully support the introduction of the IPEC and in particular the SCT, with some members continuing to use its services by including it as an integral part of managing online copyright infringement. We also recognise that some members no longer use the service, in part because of the limitations the service provides, which has become apparent over time, and consequently they have developed or utilised other methods more effectively in relation to costs and experience. However, it is regarded as an important deterrent, and its services could be utilised further if a tiered approach could be introduced, as well as consideration for relief in the form of non-mandatory statutory damages as part of a range of multiple options available to rightsholders.

5. Have you had experience of using the **CE file application service** to submit an IP claim? If so, please provide details of your experience, including whether it was submitted to one of the regional courts hearing SCT cases.

We would request that as a number of small-scale online copyright infringement cases do not require a full hearing, but still require a judgement, whether the CE file application service could be utilised to provide a fast-track low cost system that allows for captured data to be used in evidence and is less egregious for smaller claims.

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/825494/record-of-damages-awarded-in-IPEC-SCT-cases-19.pdf

2.2 Introduction of a statutory damages regime

1. Have you had a case that resulted in damages being awarded? If You have, please explain on what basis the damages were awarded?

Yes, we have had members who have filed cases that resulted in damages being awarded. In cases where damages maybe awarded, a claimant is given several options, either an award of damages in which the plaintiff has the benefit of seeking further damages, or an account of profits benefited by a defendant resulting from the infringement but without the option of seeking additional awarded damages. However, selection of either option is made prior to the establishment of an infringement, which can be arbitrary for the rightsholder given the burden of providing value to the claim. Additionally, if further damages are possibly relevant, a court may decide not to order an enquiry into applying such damages if they believe it to be ineffectual, leaving the rightsholder with the burden of providing further support for their claim and therefore reluctant to pursue using the service in future.

2. Do you think the introduction of a system such as statutory damages would help reduce barriers (if you believe there are any) for pursuing or defending legal action?

Yes, we support introducing a system of applying optional non-mandatory statutory damages as a way to reduce the barrier to rightsholders looking to legitimately enforce their IP rights where infringement is established. We believe that this will strengthen the support for copyright education and understanding, whilst being a deterrent for bad actors who currently and/or regularly flout copyright law. It also supports the notion of transparency and consideration for licensing settlements.

3. Do you consider that this could have a negative impact on the system? For example, an increase in false claims?

We cannot see why this would result in an increase in false claims as sufficient evidence needs to be supplied and a judgement of infringement has to be decided and delivered by the court. Copyright cases in relation to exceptions are examined and judged on whether infringement claims apply. Only once clear infringement judgements are made could optional non-mandatory statutory damages apply.

4. Do you think that there is a way that any negative impact of the implementation of statutory damages could be reduced? For example, the inclusion of a clause.

Setting out a clear framework and guidelines on what options are available should help to negate concerns about how the process would work. If relevant rules can establish a minimum and maximum level of damages to be awarded for determined infringement cases it should be possible to vary the amounts according to the type of court, commercial and non-commercial use, etc. As a consequence, it could also support the process of meditation and licensing settlements, without the need for rightsholders to take further action, making it more transparent for everyone involved.

Additional: Inclusion of *registered designs* within the scope of the small claims track (SCT) of the Intellectual Property Enterprise Court (IPEC).

Not Applicable to BAPLA members

1. Have you previously used the small claims track to enforce an unregistered design? If so, please provide details of your experience.
2. Have you been involved in a dispute over a registered design that would have been suitable to be heard in the IPEC small claims track? If so, please provide details of your experience and the approximate damages sought.
3. Have the costs associated with legal action in IPEC's multi-track prevented you from enforcing your registered designs? If so, please provide details and costs.
4. If registered design cases could be heard in the small claims track, would you use this route to enforce your design? Why would you use/not use it?
5. Do you have any concerns about including registered designs in the small claims track? If so, what are they?
6. Do you think there would be any impact on the court system in the UK if registered design cases were heard in the IPEC small claims track? If so, what would that be?

Please include any additional comments or examples, if you have them

Please return completed responses to enforcement@ipo.gov.uk.

Additional Comments:

1. Managing infringements via the IPEC SCT

The impact of copyright infringement on the image sector continues unabated, particularly online. The success of the image industry is fully dependent on the ability to license images for print and online use. A report³ published by BAPLA in November 2019 indicated that of its respondents, 93% experience copyright infringement on the internet, contributing to the 'value gap' in the industry, with less than 46% being successful in pursuing such infringements. Amongst respondents the opinion was expressed that, "identifying an infringement does not constitute a hard task in itself, however being recompensed for the infringement does". The report went on to state that members of the trade association use a variety of methods to manage and process online infringements, including takedown notices (69%), independent commercial settlements (45%), copyright enforcement services (41%), and legal action via courts (21%), the latter used as a result of following the exhaustion of other remedies based on the level of resources used to pursue each case, and likely outcome.

Our online copyright infringement report identified the importance of maintaining both a strong UK copyright framework and a functioning enforcement regime, to ensure members can hold infringers to account. This is particularly crucial as compensation for unauthorised uses is obtained by 79% of BAPLA's membership by various methods, including using the services of the Intellectual Property Enterprise Court Small Claims Track (IPEC SCT).

- Overall, 93% of our members experience copyright infringement online
- An average of 25% of licensing revenue each year is lost to online infringements of images

BAPLA members recognise the importance of the SCT as part of an enforcement countermeasure, and as such we are grateful to the IPO for conducting this review. BAPLA members that use the IPEC SCT find it a useful deterrent as a dispute mechanism against commercial entities infringing the use of images, and as such have structured their internal business mitigation frameworks to include or make reference to the service. Considerations for introducing optional non-mandatory statutory damages, as part of the SCT, and other courts, would be welcomed by BAPLA to support image rightsholders seeking to enforce their copyright.

During the COVID-19 pandemic, the service provided by the IPEC remains crucial to BAPLA members using it. One member already reported on the impact by serial infringers as a result of the closure of the Small Claims Track, generating a 30% drop in successful claim payments.

With no other legal recourse available to deal with copyright infringements, at a value less than £10,000, it is important that this service remains open and accessible. In addition, anecdotally we are seeing an increase in infringed uses of images online, not reflected in the Creative Industries Policy and Evidence Centre (PEC) report on tracking public consumption of digital content during the pandemic.

³ BAPLA Research Into Online Copyright Infringement – Assessing the Value Gap
<https://bapla.org.uk/bapla-releases-its-first-online-copyright-infringement-report/>

2. Section 97a: Copyright infringement and remedies

Injunctions against service providers which act as mere conduits (Safe Harbour provision, e-Commerce Directive) are useful in tackling websites and online platforms providing vast access to infringing content. Whilst the legislation has been used to decide upon communication to the public cases involving live streaming sites, such as *The Football Association Premier League Ltd v British Telecommunications Plc & Others* [2017]⁴, they have not been applied for in respect of social media platforms that display vast volumes of user uploaded content and operate as online content sharing service providers. Such platforms are able to avoid liability for licensing third party user uploaded content by relying on take-down safe harbour provisions. We would therefore ask - how may rightsholders effectively enforce against the unauthorised upload of their content to social media platforms in the UK where these platforms display large amounts of unlicensed user uploaded images? Should policymakers look to redress the disproportionate effect on rightsholders, including those from the image sector? How will the IPO reconcile the platform liability issue bearing in mind the reports we have recently seen from the US Copyright Office on Section 512, the recent EU Copyright Directive which includes Article 17 and the updates on the EU Digital Services Act & the E-Commerce Directive, none of which the UK will automatically benefit from?

3. Review of the Copyright Tribunal

The Copyright Tribunal system is principally used by Collective Management Organisations and licensees, in disputes about licensing terms. It is not open to rightsholders to challenge licensing terms provided by CMOs, even though it is the rightsholders' interests that the CMOs are acting to protect.

4. Link to online harms

UK Government White Paper on Online Harms is a proposal for major reform of the obligations of various online services, looking at the statutory duty of care in respect of illegal content and ensuring the safety of service users. There is consideration for a code of practice, and an independent regulatory body in order to ensure platform compliance and measures at its disposal such as fines, senior management liability, as well as blocking of non-compliant services.

The proposal is currently reviewing social harms rather than economic harms, despite the fact that certain online content sharing service providers profit from content uploaded and shared by users on their platforms. For all intents and purposes, economic harms to image rightsholders, caused by copyright infringement online, evidently has an acute negative impact on the amount of income generated for the people who rely on it, contributing to a growing threat to future investment, stability and growth of the industry. Given the challenges of dealing with a continual tsunami of image infringement on such platforms, and that there is no 'one-size-fits-all' solution, it would be an endorsed solution if we had confidence that the inclusion of economic harm would be accepted.

5. Alignment with competition regulations

Anti-trust laws have a useful purpose in ensuring a level playing field in the marketplace, online it becomes even more evident. The mechanisms used by major digital platforms, including online content sharing service providers, give rise to significant unfair practices – attraction and retention

⁴ *The Football Association Premier League Ltd v British Telecommunications Plc & Ors* [2017]
<https://www.bailii.org/ew/cases/EWHC/Ch/2017/480.html>

of traffic (digital gatekeepers), unwaiverable usage terms, and opaque data (text and images) collection, all used as leverage to gain a competitive edge over others, to a point at which they dominate and stifle the online marketplace.

We would fully sanction any initiative to build on the existing UK competition framework in order to provide complimentary authoritative powers, identify large scale practices (using several markers), a toolkit to prohibit bad behaviours & practices, and increase enforceable obligations, all done with the aim of encouraging more contestable marketplaces.

As a member of CEPIC, who undertook an EU anti-trust case against Google (November, 2013)⁵ over their anti-competitive behaviour and use of scraped third party imagery through Google Images, diminishing a fair marketplace for image rightsholders, we support the notion of proposing remedies and responsibilities that these monopoly and oligopoly platforms should adhere to given their market power, as another supporting mechanism working between the IPO and CMA.

If you have any questions or want to follow up on any points we have made, please feel free to contact us.

Yours faithfully

Isabelle Doran
Head of Policy & Public Affairs (Interim Chair)
<http://www.bapla.org.uk>

⁵ CEPIC submits EU antitrust complaint against Google Images <https://ceplic.org/issues/ceplic-submits-eu-antitrust-complaint-against-google-images>