

12th October 2012

Marianne Grant
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Dear Marianne

Meeting on Digital Economy Act implementation – evidential standards

I would like to thank you for taking the time to meet with me and my colleagues on 19th September and for explaining how the MPAA collects evidence of apparent copyright infringement through peer-to-peer filesharing. We also discussed the implementation of the Digital Economy Act 2010 here in the UK.

As you know, on 26th July we published an expert report by Dr Richard Clayton of the Computer Laboratory, University of Cambridge, on online traceability – “Online traceability: Who did that? Technical expert report on collecting robust evidence of copyright infringement through peer-to-peer filesharing”. We commissioned this report to advise Ofcom on the implementation of the Digital Economy Act 2010 through a statutory Initial Obligations Code. We shared Dr Clayton’s report with the Department for Culture, Media and Sports (DCMS) and Ofcom on 19th April. Following a recommendation by Minister Ed Vaizey MP, we shared this report with the BPI and the MPAA on the 25th May.

I enclose a letter I have received from Dr Clayton, who attended the meeting on the 19th September, where he comments on your evidence gathering procedures and makes some recommendations for improvement.

Robust collection of evidence through hygiene checks and a doctrine of perfection

Dr Clayton makes recommendations for improving your evidence gathering processes which I hope you will consider and accept. In particular in relation to regular “hygiene” arrangements to ensure that your monitoring system consistently records not only IP addresses, but also the time of an alleged infringement correctly. I also urge you to take on board Dr Clayton’s recommendation to adopt a “doctrine of perfection”, whereby the failure of an ISP to match an IP address to a subscriber account at the time of an alleged infringement should trigger an investigation into the cause of this error. There may be a systematic error, and in such a case all other IP addresses harvested in the same batch should be considered unreliable as well.

As you know, domestic Internet access is commonly enabled through the dynamic allocation of IP addresses by ISPs. Thus, every time a consumer connects to the Internet from their home, their ISP may allocate a different IP address to their Internet connection. If the time of an alleged infringement is recorded incorrectly, even if only by a few minutes, ISPs may match IP addresses harvested from p2p filesharing networks through the processes you described incorrectly to Internet subscribers. Therefore, in the interests of justice, it is critical that such systems consistently records the time of an alleged infringement correctly.

In the 2008 MOU between the BPI and MPAA with six of the biggest UK domestic ISPs, ISPs voluntarily sent notifications of alleged infringement to their customers on the basis of IP addresses provided to them. The ISP Tiscali (now part of TalkTalk) received 13,711 "copyright infringement reports", of which 11,481 related to valid IP addresses that were allocated to Internet subscribers at the time of the alleged infringement. This is a 16 percent error rate, and should according to the doctrine of perfection, have triggered an investigation. IP addresses harvested in the same batch should have been disregarded, even if they could be matched to a subscriber account.

It is anticipated that under the Digital Economy Act 2010 up to 2 million "copyright infringement reports" may be submitted by the MPAA and BPI on behalf of Hollywood studios and record companies every year. Even a small margin of error would be significant, and tens of thousands of Internet subscribers could be wrongly identified by ISPs on the basis of your evidence and accused of copyright infringement.

The hygiene checks and doctrine of perfection is described in greater detail in Dr Clayton's report. I am sure Dr Clayton would be willing to provide further clarification to assist you in ensuring that your evidence gathering processes are as robust as they should be. I would ask you to reassure yourself that the MPAA's evidence gathering processes have been improved since 2008. If the invalid "copyright infringement reports" were submitted by the BPI on behalf of the British recorded music industry, I believe it is in your interest to ensure that the BPI's evidence gathering processes are improved, since both the MPAA and the BPI intend to use the three strikes system under the Digital Economy Act 2010.

Evidential standard in the Initial Obligations Code of the Digital Economy Act 2010

I welcome your commitment to ensuring that your evidence gathering processes are robust and that systems whereby Internet subscribers receive notifications of alleged copyright infringement work efficiently. Consumer Focus will continue to press Ofcom to set a high standard of evidence in its Initial Obligations Code, as well as robust standards for evidence gathering processes which are subject to regular independent audit.

I appreciate that copyright owners do not want to attract bad publicity as a consequence of unfair allegations of copyright infringement. However, evidence gathering processes are highly complex and, as highlighted in Dr Clayton's expert report, consumers do not have the technical means to disprove incorrect allegations of copyright infringement. Therefore it is vital that the MPAA does everything possible to ensure that mistakes are not made in the first place and I commend the MPAA for opening up its evidence gathering process to independent scrutiny by Consumer Focus. I hope you will join Consumer Focus in demanding a robust Initial Obligations Code.

Evidential transparency vis-a-vis consumers accused of copyright infringement

As discussed at our meeting, Consumer Focus will continue to press for full transparency in relation to how evidence is gathered, so that Internet subscribers can challenge allegations of copyright infringement. Dr Clayton has emphasised that Ofcom should not accept secret designs as providing reliable evidence of copyright infringement. We received legal advice that it would be contrary to principles of natural justice if Internet subscribers would have to second guess the evidence on the basis of which they are accused of copyright infringement. Natural justice demands that Internet subscribers should have access to the same evidence that copyright owners used to determine that there appears to have been a copyright infringement, and this includes the evidence gathering process used. As a matter of principle Consumer Focus cannot accept that UK consumers should be accused of

copyright infringement on the basis of secret evidence, or that consumers should be subject to enforcement actions, such as the disconnection of Internet access, on the basis of secret evidence.

We accept that some material must remain confidential but, as Dr Clayton has explained, only a handful of details, such as the monitoring systems' IP address, must remain confidential. I hope that the MPAA will join Consumer Focus in supporting Ofcom's efforts to ensure full evidential transparency and that the MPAA accepts that full evidential transparency needs to be enshrined in the Initial Obligations Code to ensure consumers' right to due process is respected.

It would be helpful if you could provide Consumer Focus with the names of the Court cases you have successfully brought against consumers for copyright infringement through peer-to-peer filesharing. You mentioned in the meeting that your evidence has been examined by courts in the US and Australia. In the UK the small sample of cases that have been brought thus far (for example those by members of the BPI in 2005) have not been fully fought in court, as they have either settled or been determined at the summary judgment stage. As noted in the meeting, the High Court did not examine the BPI's evidence in 2005; BPI members only obtained two summary judgements in a case commonly reported as *Polydor Limited & Ors v Woodhouse & Ors*, or alternatively *Polydor Limited & Ors v Brown & Ors*. In 2010 the High Court kindly granted us access to the court files for these cases. It would be of great assistance if we could establish cases where a Court has found that MPAA evidence, on the balance of probability, proves that a copyright infringement was committed by use of an Internet connection as identified by an IP address.

Proportionate enforcement and competitive markets

I would like to stress that we are not "anti-copyright". The creative industries are an important component of our prospects for economic growth. Neither do we oppose proportionate enforcement of copyright law. We believe that enforcement actions against consumers for non-commercial infringement should be pursued as a civil matter, that due process should be followed and that consumers should have effective and affordable access to justice. Enforcement action always has a place, and we believe that the general public will accept the MPAA and BPI taking enforcement action against consumers for copyright infringement if this enforcement action is proportionate. The new specialist small claims track in the Patents County Court for England and Wales, which we have campaigned for and which we welcome, provides cost effective access to justice for copyright owners and consumers alike. We hope the MPAA members will use this court procedure before the MPAA makes renewed demands for new enforcement measures in UK law, such as in the forthcoming Communications Bill.

The answer to high volume, low value online copyright infringement by consumers is not large scale enforcement action through administrative three, or even six, strikes schemes. Neither are technical measures, such as the slowing of internet connections or disconnection, the answer because such measures could deprive entire households of essential Internet access. Even in instances where one member of a household has been found guilty of copyright infringement, it would be disproportionate to deprive the entire household of Internet access.

Consumers spend billions of pounds every year on films and music, and the experience of the music industry in the UK shows that meeting consumer demand through a variety of innovative legal services increases revenues for the industry. You may be aware that I have written to the Competition Commission about Consumer Focus' concerns over the lack of competition in the first subscription pay-TV window for Hollywood movies. Our concerns

about the lack of competition and innovation, and failure to meet consumer demand for Hollywood movies shortly after cinematic release remain. I think it would be good for both copyright owners and consumers if MPAA members act decisively to take advantage of UK consumers' demand for digital movie services.

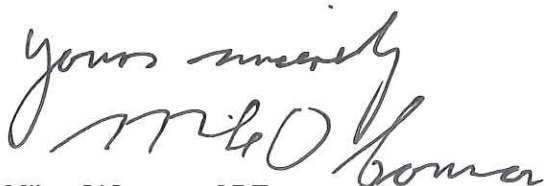
The focus must be on migrating the minority of consumers who engage in online copyright infringement to the legal market. I wholeheartedly agree with your CEO Chris Dodd when he said that going after "the kids" who use peer-to-peer filesharing networks criminally is "misguided and off-track".¹ I would hope that in its engagement with the, often young, consumers who infringe copyright, the MPAA could take inspiration from The Industry Trust's *Moments Worth Paying For* campaign. I also strongly urge your members to focus on making their movies available through a variety of legal services at different price points, and that the MPAA focuses on raising awareness among young fans about where and how they can enjoy Hollywood movies legally. I also believe that synchronising global release windows, and where appropriate closing national release windows, is key to reducing the appeal of unlicensed services to impatient "digital natives".

Implementation of the Digital Economy Act – going forward

As you may know, following the Government's decisions on the UK "Consumer Landscape", it is intended that from April 2013, Citizens Advice and Citizens Advice Scotland will become the publicly funded voice of consumers in Great Britain. From that date Consumer Focus will be restricting its work to representing consumers in markets subject to economic regulation. In 2014, subject to decisions by the UK Parliament, the remaining functions of Consumer Focus will become part of the Citizens Advice service, and in part the General Consumer Council for Northern Ireland. As I expect you know, Citizens Advice has engaged with Ofcom on the implementation of the Digital Economy Act 2010 and we are working closely with the Open Rights Group on copyright enforcement. Both the Citizens Advice service and the Open Rights Group are grass-roots based, not-for-profits who work to help consumers, defend their rights and advocate in their interests. I hope that you treat them with the same courtesy you have afforded Consumer Focus should you have an opportunity to deal with them.

You may also know that Consumer Focus is part of the IP working group of the Transatlantic Consumer Dialogue (TACD). In the light of Dr Clayton's recommendations to improve your evidence gathering process I have serious concerns about the voluntary six strikes system that is to be implemented in the US at the end of this year. Therefore I am copying this letter to the European and US co-chairs of the IP working group and US TACD members, and I hope that you will continue this important conversation with them.

I would like to thank you again for taking the time to meet me and my colleagues. Good copyright law and proportionate and fair enforcement is good for both economic growth and for consumers and I hope we can reach a consensus on the way forward.



Mike O'Connor CBE
Chief Executive

¹ Interview with Chris Dodd at The Commonwealth Club, 2nd October

CC:

The Rt Hon Ed Vaizey MP – Department for Culture, Media and Sports

Claudio Pollock – Ofcom

Geoff Taylor – British Recorded Music Industry (BPI)

Gillian Guy – Citizens Advice

Margaret Lynch – Citizens Advice Scotland

Madeleine Durie – Department for Business, Innovation and Skills

Matthew Cope – Intellectual Property Office

Jim Killock – Open Rights Group

Kostas Rossoglou – European Consumer Organisation (BEUC)

James Love – Knowledge Ecology International

Mark Cooper – Consumer Federation of America

Carline Rossini – Electronic Frontier Foundation

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