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Rt Hon Lord Goodlad KCMG
Chairman
Secondary Legislation Scrutiny Committee
House of Lords
London SW1A 0PW

ANNEX 4

4 July 2012

Dear Lord Goodlad,

Online Infringement of Copyright: Implementation of the Online Infringement of Copyright (initial Obligations) (Sharing of Costs) Order 2012

Thank you for the opportunity to submit evidence about the above statutory instrument. We have not yet time to consider the SI in detail as it was only published on 26 June and remains open to consultation until 18 September. Nevertheless, we wanted to highlight one key issue of concern to us: the SI still includes provision for a £20 refundable charge to appeal the receipt of an infringement report. In our response to the draft SI, we expressed our opposition to such a fee-based system in principle, but we would also question how the Government decided upon this course given the paucity of evidence that it will achieve the stated objectives, primarily to minimise (undefined) vexatious or non bona fide requests without affecting those with legitimate reasons to appeal or seeking further information.

We believe the introduction of a fee for appeal sets a very unwelcome precedent. It is a key principle of any complaints handling and appeals body that it can be accessed free of charge by consumers. We believe that this is especially important in this area due to the examples of inaccurate evidence of infringement that we uncovered whilst helping consumers who were aggressively and unfairly pursued for online copyright infringement by law firms such as Davenport Lyons and ACS Law on behalf of their clients from 2008-10. We are especially opposed to an upfront fee being imposed on any appeal against being placed on the Copyright Infringers List (CIL) as being on the CIL may result in court action against the consumer by the copyright owner.

We believe the introduction of an appeals fee may undermine one of the main stated purposes of the DEA2010; namely to help educate and inform consumers about online copyright. Consumer understanding of online copyright is very low and often confused. This has also been clear to us from our experience dealing with the consequences of the actions of law firms such as Davenport Lyons and ACS Law from 2008-10. We believe that, on receipt of an ISP notification letter, consumers will want further information about it and its implications. The introduction of a fee for appeal could act to scare away consumers who are simply looking for more information. Though both Ofcom and the Government has sought to reassure us that the right to appeal and the right to access free information and advice will not be conflated, we are yet to be convinced this will not happen in practice.



As you will know, in reaching their decision, the Government relied on a report commissioned from Ofcom in 2011 titled 'Options for Reducing Costs'¹. However there is no evidence provided in Ofcom's paper to suggest that the introduction of a refundable £20 fee for appeals will minimise (undefined) vexatious or non bona fide requests without affecting those with legitimate reasons to appeal or seeking further information.

In their report, Ofcom state:

"However, we do not have evidence with which to predict accurately the level of this impact (the introduction of a subscriber fee for appeals)"

"There are currently many unknowns in the appeals process which make it difficult to qualify the cost impact of the options we outline"

"We have found little reliable evidence on the likely impact of introducing an appeals fee at any particular level on lower impact subscribers"

Furthermore, on reading their report, it is clear that Ofcom does not even model the impact of a fee of £20 but fees of £10 and £5, and that the advice given also considers a number of alternative options to imposing a fee at all including:

- 1 Copyright owners to consider a graduated response to generating Copyright Infringement Reports.
- 2 A graduated response to Copyright Infringement Report generation combined with the introduction of an appeals fee through a pilot scheme.
- 3 ISPs to ensure subscribers understand the implications of receiving a notification, their options to appeal at each stage and steps they can take to avoid further notifications.

These options have not even been subject by Ofcom to the (acknowledged) incomplete impact assessment that the appeals fee option has. We therefore question how the Government can make a decision that will likely impact a large section of the electorate given the lack of evidence. In our view, any of the above alternative options would better achieve the Government's objective, in particular option 1 and 3.

Finally, on the issue of sharing costs, it has always been our view that as copyright owners are the main beneficiary of the Digital Economy Act provisions, they should pay the most to run it. We are therefore content that the amended sharing of costs order now published following the litigation and appeals since 2010 is a sensible split between ISPs and copyright owners.

Yours sincerely,

Mark McLaren
Principal Advocate

¹ <http://stakeholders.ofcom.org.uk/binaries/internet/appeals-process.pdf>