Motion Picture Association consultation response: *'Online Infringement of Copyright: Implementation of the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012'*

September 2012

Executive summary

The Motion Picture Association (MPA) welcomes the opportunity to submit comments on Ofcom's consultation on the 'Implementation of the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012'.

The MPA is an international trade association representing six major international producers and distributors of films, home entertainment and television programmes. Its members are Paramount Pictures Corporation, Sony Pictures Entertainment Inc, Twentieth Century Fox Film Corporation, Universal City Studios LLC, Walt Disney Studios and Warner Bros. Entertainment Inc.

A summary of the key points addressed in this response is as follows:

- Overall, MPA believes that, as currently proposed, there is a significant risk that the notice sending system will be unnecessarily expensive for our member companies and that, furthermore, this expense will prohibit the participation of rights holders, in particular smaller independent rights holders.

- Further to these considerable overall costs, rights holders now also face an even higher share of certain cost elements as a result of the Judicial Review. MPA therefore recommends that rights holders' share of relevant costs should be reduced to ensure that the overall cost split for the notice sending process returns to the 75/25% ratio initially set out by the Department for Business, Innovation and Skills.

- MPA is particularly concerned that Ofcom is relying heavily on data from the BWCS study which was gathered and analysed approximately two years ago and that no formal attempt has been made to update this data. We strongly recommend that Ofcom should either:
    - convene a discussion under an appropriate governing model which would permit a frank exchange regarding the state of each stakeholder and how changes over the last two years can be taken into account without going against the language of the legislation; **or**
    - immediately undertake an update to the BWCS study which would provide current (and, ideally projected) ISP data from which better assessments could be made overall about projected costs and timelines for DEA implementation.

- We especially believe that Ofcom should either update, or re-evaluate the BWCS data before any definitive statement is made on a differential notification fee between groups of ISPs. We are also concerned that, if such differentiation is made now, it is not clear how this would affect future ISPs that may be required to join the DEA scheme later.

- MPA believes that Ofcom's estimate of £700,000 for the process of selecting an appropriate provider and setting up the Appeals body is too high – and would welcome considerably more detail about the basis for the number. Also we would welcome clarity about how and when any adjustment in this number will be communicated and integrated if it transpires that the estimated number is too high.

- We also believe that Ofcom's estimated timetable for establishing the appeals body is too ambitious. This observation is evidenced by our experience gained from similar projects abroad such as the US Copyright Alert System. By implication, we also therefore believe that a projected March 1st 2014 start date for the first notification period is much too optimistic. We outline the potential implications of this for both rights holders and ISPs in more detail below.

- Our submission also includes representations on issues including the lack of requirement for ISPs to comply with a 'quality assurance standard', and proposals for the ISP cost items to be counted as part of the Relevant Costs.

Consultation questions

- ***Question 3.1: Do you have any comments on the principles set out above; If you consider there are other economic principles to which we should have regard in setting fees, please identify these?***

MPA continues to believe that implementation of and participation in the DEA will be too expensive and that the allocation of costs between Copyright Holders (75% - 100% for some components) and ISPs (25% - 0% for some components) is unreasonable.

In previous submissions, MPA has expressed our members' concerns at the manner in which fees are set and costs will be allocated between the various stakeholders who choose to participate in the DEA programme. Specifically we believe that it is unreasonable for Copyright Owners to bear the majority share of the ISPs', Ofcom's and the Appeals Body costs – especially when the level of these costs is as significant as it promises to be. The actual numbers are not certain and many are still being estimated using a variety of models which may not in fact reflect the actual costs which will apply. Section 3.7 of the Consultation document notes that *"the extent to which small-scale copyright owners can take advantage of the provisions of the DEA amendments may be constrained if participation is too complex"*. It is our view that it is not primarily complexity which will deter wider participation but, rather, the projected cost – and that, in fact, the potential for others to join MPA and BPI in participating in the programme on an independent basis is extremely low. The level of cost and the requirement for Copyright Owners to make commitments of funds and notice volumes - in advance and likely projecting for many months - will effectively bar many Copyright Holders who may view DEA as a means to help protect their business from copyright theft. Given Government's overriding objective to oversee growth in the UK economy, we are surprised Ofcom is prepared to allow this outcome.

With regard to the economic principles which are described, MPA's major concern is that the data Ofcom is relying on to determine overall costs for the ISP-related components of the programme were gathered and analysed approximately two years ago and that, aside from some adjustments for cost of living etc., no formal attempt has been made to update them in order to assess whether the profile of an "efficient ISP" which was derived at that time is still valid.

Furthermore, the costs associated with conducting and delivering the BWCS study itself are included in the calculation of Ofcom costs for which Copyright Owners will have 75%

responsibility – yet we are not privy to the data which was gathered from the ISPs and/or generated by the study, the methodology used to assess the data or, again, to the details and conclusions of any review of the data and conclusions which may have occurred since the initial data was gathered.

Aside from the overall level of costs presented by Ofcom, MPA believes that, due to incorrect estimates, "guesstimates" and assumptions that have then been, in many cases, simply collated and "standardised"[1] by BWCS, there is significant potential for ISPs to receive more than 75% of their total costs for both capital and operating expenses.

Specifically:

- With regard to the ISPs' capital costs, Section 1.3 of the BWCS report states that BWCS has "*not taken a detailed audit of the development work and costings provided by the ISPs."* So, if those estimates were not, in fact, reasonable when the initial data was gathered, the conclusions drawn at that point continue to drive the conclusions proposed for the pending setting of the tariff. Even if they were reasonable at that time, things have changed since then. There have been major developments in technology over the last two years (such as the increased use of the internet for business purposes, the availability of much faster server and storage technology at costs which are substantially lower than in the past, the release of new platform and database software which deliver enhanced functionality with improved and simpler administration tools) – and levels of salary and other real term compensation for team members have fallen. Also there is, we believe, greater understanding on the part of the ISPs regarding what would be required from them. Overall it would seem very likely that looking again at the questionnaire will yield different answers with regard to capital expense.
- With regard to operating expenses, MPA believes that this category of expense is more likely to be more problematic than the capital expenses. In explaining that its conclusions about the operational ratios are based on ISPs' own assumptions and then simply BWCS' standardisation of those assumptions, the BWCS report states on page 5 that "*we have not been able to source any independent evidence on the matter".* MPA believes that it would have, in fact, been possible to get and then to analyse independently some comparative data at that time (for example from rights holders and ISPs in other countries who were already operating notice programmes and also by

[1] The general approach that is explained in section 1.2 of the BWCS report.

considering other business models which might have similarities). However BWCS does not indicate that any attempt was made to do that and, again, there has not been a formal attempt since then to improve their assumptions, data, methodology or conclusions.

The Economic Principles at paragraphs 3.7-3.12 include Ofcom's obligation to ensure Qualifying ISPs are incentivised to be efficient and minimise the cost of processing CIRs. It is not clear to us how Ofcom believes it has already and will ensure that obligation and how this is reflected in the data BWCS reviewed on Ofcom's behalf, especially given, as noted above, the many assumptions, including those built into the variable operating costs.

Please note that we develop our comments on a number of these points in other sections later in this response.

- ***Question 4.1: Do you have any comments on the proposed process for establishing CIR estimates and costs; do you have evidence which would suggest that a different process should be adopted?***

After reviewing Ofcom's proposed process for establishing CIR estimates and costs (as it is described in Section 4 of the Consultation document and in Annex 6), it appears to MPA and its members that the model described is unnecessarily complex and time-consuming – and could, in itself, add cost and stress to a process which is already too far too expensive, particularly if many rights holders were to participate. However, we think that it is unlikely that many (if any) small-scale Copyright Owners will be able to participate in the DEA programme at all on an independent basis (and so they would be unlikely to take time to participate in this iterative process). Also, conversely, it is unlikely that any larger-scale Copyright Owner such as MPA or BPI would participate in the iterative process without the certainty that they were going to send some CIRs .

So, considering those factors, we accept Ofcom's proposed methodology on the basis that it seems unlikely that many iterations will be needed in order to reach a conclusion for the small number of Copyright Owners that are likely to participate in it.

In addition to these comments, please note that MPA has a major concern that – whatever process is used for determining CIR volumes and costs – setting volumes and fees for a long period is not reasonable because there are too many "guesstimates" and assumptions in the models that are driving the process. We believe that it will be only when the scheme has been

operating for at least 6 months that all stakeholders maybe able to project with more confidence what a "steady state" situation might be like. For example, some of the higher variable operating costs from a Copyright Owner's point of view are the Appeals cases and the use of ISPs' Call Centres. It is certainly possible that, even if it is the initial launch of the DEA scheme is supported by a robust educational campaign (likely yet another component which is funded primarily by Copyright Holders) and support resources, volumes of both of these incidents may be seen in higher volumes earlier on in the programme than after a few months. However, with the proposed model, Copyright Owners who wish to participate are forced to commit CIR volumes and funds for significantly longer.[2] A further factor is that experience and survey data[3] informs us that the best approach for getting a positive effect from the scheme is to send a large number of notices– to increase the potential that people will receive, or hear about someone else who receives, a notice- and will stop the problematic behaviour. However, here again this would require larger investments in the most expensive notices from the start.

So altogether MPA does not view Ofcom's decision and implementation model as cost effective for our members or for other Copyright Holders.

As the schedule for implementing the scheme becomes clearer, we request that Ofcom considers these points and, ideally in discussions with MPA and other Copyright Holders, investigates whether there is any way to achieve an effective balance without over-riding the requirements of the legislation and the IOC.

- ***Question 4.2: Do you have any comments on the proposed process or timetable for establishing the appeals body?***

MPA believes that Ofcom's estimate of £700,000 for the process of selecting an appropriate provider and setting up the Appeals body is too high – and would welcome considerably more detail about the basis for the number. Representatives of MPA have had discussions with two separate organisations that we believe are qualified to provide services for an Appeals process. It is clear to us that those entities' estimates of their likely costs for technical setup would be significantly less than £700k – and in fact less than 25% of that number. So it has to be our

[2]Although we do understand that, if a shorter period were in place, all of the "up front" costs would be loaded into that initial period and per CIR fees would be even higher.

[3]Graduated Response_Study of S

assumption that the additional costs are coming from the burden of the Ofcom-managed tender process and from whatever Ofcom assumes will need to be done to support this important component. Also we would like to understand how, if at all, any reduction in the estimate (when the tender process is complete and costs are confirmed) will be communicated and allocated to Copyrights Holders (since it seems likely that the actual costs may not be known until Ofcom has set the tariff for CIRs). Moreover, we ask that Ofcom confirms that the £700,000 (or eventual actual) figure includes no potential element of profit to the Appeals Body.

At the same time we believe that Ofcom's estimates of time for establishing the Appeals body (once the provider is selected) are too low – in particular as they are related to the period of time (4 months) estimated for the body to undertake what is referred to in Section 4.20 of the Consultation document as "*necessary preparatory work"*. This statement is made on the basis of experience that our parent entity Motion Picture Association of America, Inc. ("MPAA") has in setting up a similar process in the United States. Also, it follows our review of the language found in Sections 8 and 9 of the draft UK Initial Obligations Code ("IOC") (as published by Ofcom within a related Consultation document on June 26th 2012) ("IOC language") as well as the regulatory language in Sections 122 G - 122 P of New Zealand's Copyrights (Infringing File Sharing) Amendment Act 2011 ("NZ language") which received assent on 18th April 2011.

Here are some points to consider:

a. It is not clear whether Ofcom's estimate of 4 months for setup of the Appeals process is based on detailed discussions with likely candidate providers. However, even if this were to be the case, in addition to being surprised that any candidate would have specified exorbitantly high setup fees, we feel that it is unlikely that the details underlying each required component of the IOC language would have been analysed to the extent necessary to actually establish and operate an efficient and consistent process. This includes having clear definitions of terms, assessment of appropriate levels of compensation which might be levied against a qualifying ISP or Copyright Owner implicated in an Appeal case and comprehensive dissection of the potential "flow" of submitted and required information for various potential Appeals scenarios. For example:

    i. Regarding potentially confusing language, the Grounds of Appeal as laid out in Section 25 of the IOC include statements such as (in Section 25 (c)) *" the subscriber took reasonable steps to prevent other persons infringing copyright by means of the internet access service"* and (in Section 25 (d)) *"there was a*

contravention of this Code or an obligation regulated by this Code". In order to deliver its responsibilities adequately and consistently, those setting up the Appeals process will have to define what is meant by words such as "reasonable steps", "contravention" and "obligation" clearly enough that:

- guidelines may be written for individuals who will determine Appeals cases;
- those people may be trained adequately;
- there can be comprehensive monitoring and assessment of cases on an ongoing basis to ensure that the guidelines are still relevant (as technology changes); and
- there are no anomalies or "outlying patterns" in the decisions that are being made by one or more of those assigned people.

ii. Regarding compensation, the NZ language (Section 122 O) addresses maximum levels for fines (NZ$15,000) and the manner in which costs orders against a participating party are to be determined. However, it was clear from discussions that representatives of the MPAA conducted with representatives of the regulatory body at the time that the legislation took effect, that they expected the Tribunal which would review and decide cases there to have some challenges in setting clear and consistent guidelines. More recent discussions with IFPI (the international Trade Association for music producers) indicates that, as the initial cases are now reaching the Tribunal for determination, there is still concern and confusion about how the numbers will be determined. Without the establishing of guidelines, a new UK model may be similarly confused.

iii. Regarding potential review scenarios, for the US the IOC language specifies that, in general, information related to an appeal (including the initial application as well as materials submitted by ISPs and Copyright Owners) must be in writing, provided within specified periods of time etc. All of this requires that the system put in place must be capable of accepting and managing the applicable business rules, holding and managing the actual data (including, of course, ensuring that Copyright Owners do not have access to personal information), tracking all of the applicable steps sufficiently to ensure compliance as well as to produce acceptable reports etc.

To achieve this will require a detailed analysis exercise which should, ideally, involve representatives of the participating Copyright Owners and ISPs as well as Ofcom and, presumably, representatives of consumer groups and other interested parties. This effort will need to include, for example:

- Mapping the possible scenarios – which are likely to depend on which grounds of appeal are involved, what supporting information is required and from whom etc.

- Agreeing the language and format of the Application form.

- Deciding how data related to notices and CIRs will physically get to the Appeals body (e.g. typed in by the subscriber, sent over from the ISP's system etc.).

- Determining how levels of compensation and costs will be set.

- Etc.

It is mostly likely that the outcome of this work would lead to the requirement for one or more participants to initiate and deliver successfully Information Technology ("IT") project/s – if, for example, it is decided that ISPs' systems must deliver data to the Appeals body to avoid a subscriber having to transcribe it manually. Such projects are unlikely to be simple ones – and, even if they were, once the lifecycle associated with even a short project undertaken by a large organisation (such as an ISP) is completed (including a sufficient level of testing), it is unlikely that this work alone (even with a detailed scope and development specification available on "Day One") could be achieved in 4 months.

b. MPAA's experience in the United States lends credence to all of the issues raised above as well as several others. For reasons both of confidentiality and time, we do not propose to detail in this consultation response all of the work associated with delivering the Independent Review Programme ("IRP") for the Copyright Alert System. However we feel that it is worthwhile to note that the timeline for setting up the US programme is significantly longer than 4 months. Also we include in the document attached[4], a few additional things from that experience, which we believe will need to be considered for the UK scheme.

In summary, we hope that Ofcom will consider the points made above with regard to the Appeals process – but will not use them as levers to further increase the estimate of funding that is considered necessary to get the body set up and ready for work. **In fact, MPA's primary**

[4] MPAA_IRP_Experience for Ofcom.pdf

concern is the projected cost of this Appeals component of the DEA scheme. As mentioned at the beginning of the response to this question, we would welcome more information from Ofcom regarding the basis for the current £700,000 estimate for the preliminary activity as we believe it to be an excessive figure.

- ***Question 4.3: Do you agree that Qualifying ISPs should have 9 months from the point at which estimates are finalised to prepare for the operation of the DEA scheme?***

We agree that 9 months is a reasonable period for ISPs to prepare for and to test thoroughly the operation of the DEA scheme as it relates to the processing of CIRs. However we would note again that, without a clearly defined appeals process and associated detailed technical direction for ISPs, it will be difficult for them to anticipate what is required and to make the necessary preparation for that important non-CIR related component. So it seems likely that, even if ISPs are ready within 9 months to receive CIRs and to do the necessary processing work, they may not be ready to assist the Appeals process at that point since Ofcom's estimated timetable will not provide them with the direction that they need until quite late in their implementation timeline. Even if the decision is that the Appeals process should be based primarily on a manual operation, ISPs will need to establish and test significant workflows in order to deliver their responsibilities related to that manual process and to support their subscribers adequately.

- ***Question 4.4: In light of the evidence above, do you agree that the first notification period should start on March 1st 2014 and end on March 31 2015; do you have evidence which would suggest that a different date is feasible and preferable?***

As intimated in previous comments above, MPA believes that a projected March 1st 2014 start date for the first notification period is much too optimistic. Given the uncertainties in the projected schedule for completing the parliamentary formalities associated with implementing the legislation as well as our feeling that the setup of the Appeals process will take longer than Ofcom estimates, it is not easy to offer a specific alternative date. In general, we would suggest that Ofcom should assume that ISPs may require as much as 6 months from the date on which their obligations for the Appeals process are known to them before they can develop, test fully

and deliver all of their CIR processing, Appeals process[5] integration and subscriber support obligations – assuming that all other requirements for implementation have been satisfied.

- ***Question 4.5: Do you agree with the proposed industry payment schedules for fees in respect of Initial and Qualifying Costs?***

MPA believes that a quarterly payment schedule is preferable to the "100% of money up front" model which was proposed initially. However, as expressed in our response to Question 3.1 above, our major concern is that we are forced to commit CIR volumes and funds which are based on uncertain criteria for a potentially long period, and an unfair cost sharing model, even if we do not have to actually pay out those funds in one installment.

- ***Question 5.1: Do you have any comments on the activities which we anticipate carrying out under the DEA amendments which will give rise to Qualifying Costs in the first notification period?***

MPA has concerns about a number of the activities which Ofcom lists related to Qualifying Costs in the proposed first notification period – including:

a. Without the requirement that ISPs must comply with a *"quality assurance standard"* for Qualifying ISPs' CIR processing systems, we question the need to develop such a standard at all, particularly as the process will require the participation of Copyright Owners, presumably ISPs and a variety of other people without any certainty that it will ever be used to assess formally the approach or performance of any ISP. Also it seems unlikely that a delivered standard could even be referenced within an Appeals case since there is no requirement for the ISP involved to have considered it.

   Also related to the development of a standard for ISPs' activities, other discussions with Ofcom have revealed that there may be a proposal to include, within such a standard, some guidelines for ISPs to classify their account base (in order to determine which entities are subscribers versus fitting into other categories specified by the DEA). While MPA agrees that clear guidelines for this issue would be helpful in ensuring that notifications are directed appropriately and that there are not unnecessary appeals cases related to this matter, we do not believe that any additional costs associated with

[5] This would reflect effort for US ISPs once the formalities of contracting with the IRP Provider and detailed technical specifications were completed.

including this issue in the scope of work for an ISP-oriented standard. So we assume that this would result in a higher cost and that the majority of that cost would be passed onto Copyright Holders – again without the requirement for ISPs to use the guidelines and to comply with the standard if and when it is developed.

b. As noted above, we have a major concern about the specified £700k of costs associated with the setting up of the Appeals body (before that body actually handles any cases). Even though we do not have confidence that Ofcom has in fact understood what are all the things that may need to be done (see our response to Question 4.2 above), we still believe that the suggested number is much too high.

c. Related to Ofcom's comments in Section 5.10 of the Consultation document that *"it is feasible that the Secretary of State will request Ofcom to provide a report under 124G CA 2003 before the end of the first notification period",* it seems possible that such a report may precede the sending of even one single CIR (if our expectations about the overall timeline are proved reasonable). It is of great concern that this report may, in fact, be premature and is likely to be of little or no value in determining the impact of the notice sending up to that point and the question of whether Technical Measures are required. Therefore we would urge Ofcom to petition that the report should not be requested and produced until the DEA scheme has been running for at least 9 months and a reasonable amount of data is available.

d. Finally, we are surprised at the estimate of £1.3m offered in Section 5.12 of the Consultation document related to *"research for Ofcom's reporting duties, and for input to the setting of a notification fee for 2015/16"*. MPA, MPAA and other entities associated with rights holders have considerable experience in conducting research, acquiring data from third parties, evaluating data and producing UK-related reports regarding the online landscape and other related subjects. Assuming that the larger share of the £1.3m estimate by Ofcom would be for this category of activity, in our opinion this is extremely high and we would value some more details about what supports it.

- ***Question 5.2: Do you agree with our proposed approach to the costs incurred by the appeals body during a notification period?***

As indicated during the Judicial Review process, MPA feels strongly that ISPs should share in the costs of setting up and operating the Appeals body (especially since it is likely that it is ISPs' activities which will be the subject of many cases – and since ISPs are not required to comply with any Ofcom-provided standard).

However MPA accepts Ofcom's approach as described in the Consultation document on the basis that it is driven by the outcome of the Judicial Review proceedings.

- ***Question 6.1: Do you agree that all initially Qualifying ISPs will face the same model of efficient costs in carrying out the Initial Obligations and hence should be treated as having the same Relevant Costs for the purpose of setting a Notification Fee? If not, please provide your reasons for that view.***

MPA agrees that all Qualifying ISPs will be required to deliver similar functions in order to meet the requirements of the DEA scheme. Our concern is that, while Ofcom has (for example in Section 6.5 of the Consultation document) attempted to adjust for inflation some components of the data gathered as much as 2 -2.5 years' ago, there has been no attempt to understand what ISPs have in place currently with regard to the manner in which they communicate with and provide systems to support their subscribers. For example there has been no attempt to review how ISPs have improved their use of digital and online approaches for billing, for marketing and promotional purposes, for handling complaints or other service-related issues etc., the manner in which ISPs are using social networking (Twitter, Facebook etc.) or, in general, improvements that ISPs have made with regard to Information Technology infrastructure such as automated Customer Service software and Call Centres management systems. Given the fact that there have been some significant changes in ISPs' corporate structures and organisations of several Qualifying ISPs over the last two years, it seems particularly important that some independent assessment should have been made of their current state before model parameters and actual costs are applied to final models used for Copyright Owners' commitment to participation in the DEA scheme.

- ***Question 6.2: Do you agree that we should apply the full automated cost model to all Qualifying ISPs for the full range of monthly activity from 2,500 to 200,000 CIRs per month? Do you have evidence that an alternative approach to costs should be adopted for any levels of CIR activity; and any evidence about what costs should be for those levels?***

We agree that ISPs should be using automated systems to accept and process CIRs and to deliver all other functions related to forwarding notices to subscribers, reporting to Copyright Owners and Ofcom and integrating with the Appeals process. We do not have (yet) any substantial evidence that increases in numbers of CIRs (or their equivalent) will lead inevitably to significant increases in, for example, customer service calls. However it does seem to be true that, with an automated system, an ISP could automatically (without additional load to systems or human resource) map an unlimited number of IP addresses to subscriber accounts to determine with which account each CIR is associated – and that, therefore, a larger CIR volume should not lead to a significant increase in processing costs. So we are concerned that any upper volume of CIRs has been presented.

- ***Question 6.3: Do you agree that the Relevant Costs for the first notification period should include 100% of ISP relevant capital expenditure?***

MPA believes that it is usual practice to capitalise some expenses associated with a project (but then to amortise and depreciate those expenses according to the company's individual policies) and to assign others to operational expense. For example, while software and some infrastructure may be assigned to capital expense (Capex) and other components such as professional services and maintenance fees to be assigned to operational expense (Opex), it is not clear that Ofcom is assuming this typical model or that each of the Qualifying ISPs used the same approach in its submissions in 2010. Also, as indicated above, MPA is not convinced that the first notification period would be, in fact, 13 months – but believes that, with an end date of March 31st 2015, it would actually have a shorter duration as the start date would likely be delayed beyond March 1st 2014. So, with that in mind, MPA feels that a formula should be developed which balances the various aspects (including ISPs' desire to be compensated as soon as possible, Copyright Owners' concern about per CIR fees and any requirement to make an early commitment to volumes and costs of CIRs). In short, given the uncertainty about dates of implementation, set up of the Appeals body and its process, current state of ISPs' infrastructure (and projected state given that we are about 1.5 years away from the earliest, optimistic DEA implementation) etc., MPA requests that Ofcom would either:

a. Convene a discussion under an appropriate governing model which would permit a frank discussion about what is the state of each stakeholder and what would work without going against the language of the legislation –or

b. Undertake (immediately in order that the resulting data can be useful to this process) an update to the BWCS study which would provide current (and, ideally also projected) ISP data from which better assessments could be made overall about projected costs and timelines for DEA implementation – before the tariff is set by Ofcom without such a discussion.

- ***Question 6.4: Do you agree with our assessment of the fixed costs which will be reasonably and efficiently incurred by a Qualifying ISP in carrying out the Initial Obligations? Do you have evidence to suggest amounts attributed to these costs may be incorrect?***

Once again, MPA has a concern that the only adjustment that Ofcom seems to have made to data considered in the BWCS study is to take account of inflation. While recent studies[6] about ISPs' services do not applaud the major ISPs that qualify for DEA participation, it is MPA's opinion (backed up by anecdotal information) that most if not all of these ISPs have made significant changes in their subscriber support and general Information Technology models which would make previous estimates for their initial DEA compliance too aggressive.

So, again, MPA requests that Ofcom considers updating the data set provided for the BWCS study and/or agrees to a more interactive and consultative model which provides for the various stakeholders to discuss more practical and cost-effective models.

- ***Question 6.5: Do you agree the proposal that we set two notification fees, one for O2 and Everything Everywhere and the other for the larger Qualifying ISPs?***

Again, MPA is concerned that the most current and near-term projected data for all ISPs is not being considered by Ofcom and others in determining applicable costs for DEA implementation. Also there have been changes in corporate structures over the last two years[7], we feel that it is critical that some further assessment is conducted before any final and definitive statement is made regarding dates and funding for initial DEA implementation and any differential between individual or groups of ISPs.

[6] For example http://www.ispreview.co.uk/index.php/2012/05/uk-internet-service-providers-association-reveals-2012-award-finalists.html

[7] For example the merging of Orange and T-Mobile into the Everything Everywhere setup and the increasing focus on the mobile customer http://www.metro.co.uk/tech/909171-t-mobile-and-orange-owner-everything-everywhere-given-4g-ok

Also MPA is concerned that, if such differentiation is made now, it is not clear how this would affect future ISPs that may be required to join the DEA scheme later.

- ***Question 7.1: Do you agree with the proposals for the ISP cost items to be counted as part of the Relevant Costs; do you have evidence to support alternative approaches?***

MPA understands the various cost items that Ofcom considered in deciding which should be part of Relevant costs. However we do not agree with all of the conclusions.

Even without refreshed data from the ISPs, there are a few items that MPA believes should be required from ISPs and enforced as the initial phase of the DEA is implemented - and also we have a few comments to be made with regard to implementation.

As noted earlier, of particular concern are many of the estimated Operational costs (both Fixed and Variable) which are detailed in the BWCS report and Ofcom's summary in the Consultation document – and which are, from there, used to drive conclusions about how resulting obligations for monies from Content Owners will be calculated and levied. We are very concerned by the lack of transparency in this regard.

For clarity, we are including below Ofcom's summary of relevant issues and providing our comments and responses to applicable items. Please note that some of the points made in the response to this question may address the issues behind the questions which follow later in this response:

> *"Qualifying ISP activities which generate variable costs*
>
> *7.9 The main activities identified by Qualifying ISPs that generate variable costs are as follows:-*
>
> *i) Sending a letter to a subscriber (following a certain level of infringement).*
>
> Even though this Consultation document does not invite comments on earlier decisions, we feel it important to make clear that we remain concerned that the only method of notice delivery that is provided by the DEA is via hard copy letter. While we are relieved that the requirement for Registered letters has been removed, we are still concerned that other dependable mechanisms (such as sending to a reliable email

address and using a "pop-up" requiring a qualified acknowledgement") are not being considered.

ii) Call handling. i.e. responding to calls from subscribers, following the receipt of one of the above letters. The cost of this depends on:

a) Duration of call

b) Labour costs.

MPA believes that an additional factor affecting ISPs' Call Centre costs is the actual volume of calls.

MPA's experience with current notice programmes is that between 0.5 and 1.0% of notice recipients contact our offices directly (using information provided in the notifications themselves) – and that this is an even larger volume than the calls received by the respective ISPs or their representatives. In New Zealand, neither ISPs or participating Rights Holders have received large numbers of calls (our information is that the rate reflects less than .5% compared to numbers of the CIR-equivalent items and 3% when compared to numbers of notices to subscribers). However use of the educational website (www.respectcopyrights.co.nz) - which, like its US equivalent (www.respectcopyrights.com), offers comprehensive information about the programme there and guidance for notice recipients and general consumers including direction to sources of licensed and legal content- continues to be robust. Also data from the Music Industry's "Hubcap" initiative revealed a similarly low percentage of customer contacts. So we have a concern that an unduly high ratio may be allocated to this component of the ISPs' programmes.

Accordingly MPA would advise that, even though the Grounds for Appeal are fairly narrow, that calculations should reflect no more than a 5% call rate to ISPs from notice recipients – and that provision should be made to adjust this expectation after a short period – for example as an outcome of the 6-month review. Furthermore, MPA feels strongly that, in order to maximize consumer focus and efficiency – while also reducing cost - ISPs should be encouraged to direct notice recipients to an efficient and shared/centralised Resource Centre[8] and should certainly not be

[8] Such a Resource Centre could provide online resources such as answers to frequently asked questions, explanations about the scheme and how to access the Appeals body. All of these issues would be common to all participating ISPs' subscribers and the general public and it would seem more efficient and consistent to provide comprehensive information, online, to all requestors in the same way – and, if needed, to supplement the online content with a common and secure email and telephone support facility.

permitted to direct recipients to a specific ISP-operated telephone number.

iii) "Save" calls and the cost of a lost customer. A customer may be considering leaving the Qualifying ISP following receipt of a letter. Calls from such customers may be passed to a "save" team to attempt to persuade the customer to stay with the Qualifying ISP. Similarly, if a customer does decide to leave the Qualifying ISP, it could be argued that there would be a cost to the Qualifying ISP in terms of lost future revenue/ margin from the customer.

It is MPA's belief that the potential[9] for a subscriber to leave their ISP and join another one (for reasons only that they receive one or more notifications from an ISP) is remote – particularly if that subscriber has a subscription plan which includes telephone service, internet access and access to television (plus other video content and services). We intend to research further to see if there is **any** conflicting data but, so far, do not believe that there is.

In short MPA agrees that this component should not be considered in the calculation of a per CIR fee.

iv) Handling complaints. This covers the cost of handling a complaint from a subscriber who has received a notification.

MPA believes that, with careful attention to the functionality of, and then widely advertised availability of consumer-facing educational services[10] which provide information about the scheme and the manner in which cases are identified and verified as well as advice for people to inspect and secure their home networks etc., the number of actual complaints from a subscriber will be minimal – and that any that do arrive, can be assisted by comprehensible and timely information on an educational website supported by a general Resource Centre and, as a last resort, the opportunity for a subscriber to request an Appeal.

Therefore we do not believe that an ISP's cost of handling a DEA-related or notification-related "complaint" should be included in the calculation of costs.

[9] http://musicbusinessresearch.wordpress.com/2012/06/18/the-impact-of-hadopi-on-music-file-sharing/

[10] Including a robust educational website and a Contact Centre that can field calls and emails from affected consumers)

v) Manual identification of the subscriber who is the subject of a CIR where the automated system has failed.

MPA believes that, given the elapse time between the DEA legislation being passed and the likely implementation date – as well as MPAA's experience in dealing with ISPs in the US and several other geographical markets, there is no reason that qualifying ISPs should not be able to, if needed, extend current matching systems or to employ new ones that deliver comprehensive results in this area. Assuming a reasonable data retention policy, there is no reason that an ISP would be able to provide reliable (and current or at least near current) data to support an IP address to Subscriber Account match

Therefore we agree that the costs of manual identification should not be included in the calculations here.

vi) Continuous monitoring of CIR processing quality.

MPA is confused by the proposal to include this component in the costs calculation and we do not agree that it should be included.

Our confusion starts with the belief that this Quality Assurance activity is not really intended to address the quality of the CIRs themselves – but rather it concerns the respective ISP's own methodology and operation for processing CIRs that it receives.[11] However Ofcom's current position is that ISPs should not be required to comply with an Ofcom-published (or any other) standard for the manner in which they process CIRs and deliver their various other technical responsibilities (this looks, therefore, like de facto quality assurance at the expense of the Copyright Owners). So this raises several questions about what each ISP is actually supposed to do, what will be the outcome of that activity visible to Ofcom and what Ofcom intends to do as a result. For example:

- We do not understand on what basis any individual ISP's processes are to be assessed by the ISP itself – and from the various comments from ISPs and/or the group's inconsistent and/or absent estimates for the activity as reported by the BWCS

[11] If we are mistaken – then surely it is ***Content Owners'*** responsibility to maintain the quality of their CIRs – which we believe would be covered more than adequately by the adoption of the ACNS standard (or something which we assume will be similar as described in the Publicly Accessible Standard ("PAS") which Ofcom proposes to publish and with which Content Owners are required to comply).

report, the ISPs are confused about this also. As Ofcom is not requiring ISPs' compliance with the Publicly Accessible Standard ("PAS") that it proposes to publish concerning ISPs' technical methodologies, presumably there is not an expectation that an ISP would be using ***that*** document as a guide. So, without any guidelines for ISPs to follow and, as MPA and other rights holders have now (and expect to have in future) very limited visibility to the exact approach that any ISP may be taking to deliver its responsibilities, we do not feel that it is reasonable for any monies paid by us to be given to ISPs to compensate this ill-defined and potentially unsatisfactory effort.

- Given that this would be a "self-assessment" endeavor, we are wondering how Ofcom proposes to compare one ISP's conclusions with another's. Again, the fact that ISPs are not required to achieve and maintain the standard described in a PAS seems to lay open major potential for different ISPs to consider that different things are or are not important and/or to include or not include different issues. Also we do not believe that there is any required format for the communication of the outcomes to Ofcom. All of this suggests that Ofcom's own effort to review the (presumably reported) outcomes – and, from there, to have some satisfaction that things are in order for all ISPs - will be larger than it need be and could, in fact, be quite significant. Also it would seem that there could be no guarantee that the initial set of criteria that Ofcom decides to use for the first period can be used for future years (assuming continuation of the scheme).

- Finally, we think it likely that at least some ISPs will request confidentiality for whatever they do provide as an outcome of this Quality Assurance review (particularly if their "self-assessment" effort reveals that there are some problems). So that will make it challenging for MPA, other Content Owners and other interested parties to comment on it and to suggest improvements in the model for future periods.

So, for all of these reasons, once again we state that the ISPs' costs associated with this Quality Assurance activity should be disallowed from the calculation here.

7.10 There is no separate provision made for the cost of generating CILs, which we presume can be generated automatically at a negligible cost. Similarly, there is no provision for CIRs which are not processed by the ISP which receives them, on one of the grounds set out in the Code, and which do not therefore generate costs."

MPA agrees with this approach.

- ***Question 7.2: Do you agree our proposals in relation to the activities which give rise to variable Relevant Costs and the proposed values of those relevant cost items? Please provide reasons and evidence to support any different assessment of the variable cost element of Relevant Costs and/or alternative values?***
- ***Question 7.3: Do you with agree the proposed values for the operational ratios? Can you provide evidence to support alternative values?***

Please see our response to Question 7.1 above for our initial comments on the variable cost elements of Relevant Costs. With regard to the specific values of the relevant cost items and the ratios themselves:

a. *Cost of Sending a Letter:* MPA retains the belief that hard copy letters are not the best or most cost-effective method for communicating with subscribers and that the delivery method should be whatever means enables the ISP to contact its subscriber effectively (as they do for communications about billing and terms of service). If the decision remains that all notifications will be sent by First Class letter, MPA accepts the estimate of 64p as the cost of preparing and sending each item. However we request and expect that this value should be reconsidered during the 6-month review.

b. *Cost of Call Handling:* We disagree with Ofcom's estimates. As discussed above, based on data from other notice sending programmes we believe that, in the absence of any artificially-generated campaign, call volumes will be low (since most typical enquiries could be dealt with via alternative, online means). So we feel that the ISPs' per call cost should be lower – and no more than £5.19 (the lowest ISP estimate £5 plus the applicable Consumer Price Index Adjustment). Also we request that the volumes and

costs of this component of the scheme will be evaluated as part of the 6-month review – both to determine if the costs can be reduced and also to take account of any unusual call volume patterns which may have been experienced.

c. *Cost of Complaints Handling:* As noted above, MPA does not agree that this component should be included in the calculation. We believe that the availability of educational and online resources and a formal Appeals process are sufficient components to address consumers' issues regarding the scheme. If individuals still have other complaints, they may be more likely to be related to the manner in which they were treated by ISPs' personnel or other issues not so directly related to the scheme – and so should definitely not be charged to Content Owners.

d. *Cost of Monitoring Quality:* For the reasons noted in our response to Question 7.1 above, MPA does not agree that this component should be included in the calculation.

e. *Proportion of CIRs producing a letter:* MPA data from the US continues to suggest a 50-55% ratio between notices to ISPs and notices to subscribers. However, as Ofcom suggests, the Grace Period for US programs tends to be shorter (e.g. 21 days) and this would have an impact on the ratio.

   Therefore MPA accepts Ofcom's proposal of a 45% ratio for letters to UK subscribers – and suggests that the data are reviewed on a regular basis, including at the 6 month point.

f. *Proportion of CIRs to be checked:* As indicated in our responses to previous questions, MPA does not agree that ISPs' costs for checking CIRs as part of normal operation (after the initial substantial test period) should be included in the calculation.

g. *Proportion of letters resulting in a call:* As noted above in our response to Question 7.1, MPA does not agree that the proposed 15% calls to letter ratio proposed by Ofcom is reasonable. This is based both on data from notice programs in the US and New Zealand, other related data from BPI in the UK as well as the fact that Content Owners intend to deploy considerable educational resources for the UK scheme which are intended, among other things, to reduce the need for people to call their ISP.

Accordingly we would propose maximum 5% calls to notification letter operational ratio and suggest that Ofcom may find helpful some additional data on notice patterns over time which is available from a US program.[12]

h. *Proportion of letters resulting in a complaint:* As noted above, MPA does not agree that there will be a significant number of complaints to ISPs which result directly from the DEA scheme itself. Also we disagree that any costs incurred by ISPs for handling such complaints should be charged to Content Owners – since those costs are more likely to be the consequence of previous actions by the ISPs' own teams and not attributable to the DEA scheme itself.

ISP Notification Patterns.pdf

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