

Our Ref: MUL/7916-2009/IR1

6 May 2010

## **CASEWORK INVESTIGATIONS AND OPERATIONS REPORT**

**ANDREW JONATHAN CROSSLEY** (Sole Practitioner)

**(ACS:Law- 437813 and 513065)**

1. I refer to the authorisation of the inspection of the books of account and other documents of the above-named solicitors under the Solicitors' Accounts Rules 1998 and the Solicitors' Code of Conduct 2007. The inspection was started on 11 June 2009, at 18 Hanover Square, London, W1S 1HX. The inspection has been completed and I report as follows.

### Introduction

2. Mr Crossley gave the Investigation Officer, Mr Roberts and Ms Westrop, Senior Adviser, details of his professional history and the firm. He said that he is the manager of the firm which he established on 7 February 2006. Mr Crossley said that on 7 August 2007 ACS:Law became a partnership with Nicola Beale. Ms Beale stepped down from being a partner on 18 May 2009 by mutual agreement. However, Ms Beale continued to work on some matrimonial matters on behalf of the firm in her work as a locum solicitor.
3. Mr Crossley explained that, at the time of the first visit on 11 June 2009, he employed five paralegals and one supervisor, Adam Glenn. The number of paralegals and administration staff working for Mr Crossley has changed throughout the investigation.
4. The SRA had previously conducted an investigation into another firm of solicitors, Davenport Lyons, concerning the conduct of claims on behalf of Davenport Lyons' clients in relation to peer to peer (P2P) file-sharing over the internet and breach of copyright.

That investigation originated from a complaint made to the Chair of the Solicitors Regulation Authority Board in December 2008 by the Consumer organisation, Which?. Which? had raised concerns about letters of claim written to individuals by Davenport Lyons in which it was alleged that the individual had breached the copyright of their client's work by making the work widely available over the internet on a P2P network. The letters of claim typically asked the individual to pay between £350 and £600 costs and damages. A term used by the media and internet forums for this type of action is "speculative invoicing". Where it is necessary to refer to this investigation in this Report it will be referred to as the "Davenport Lyons investigation".

5. On 11 May 2009 the SRA became aware of a number of articles appearing on the internet which indicated that ACS:Law and Mr Crossley was now acting on behalf of Davenport Lyons' clients in relation to the P2P file sharing and breach of copyright claims. Subsequent investigation of this point proved this to be correct. During a telephone conversation between Mr Roberts and Mr Crossley on 12 May 2009, Mr Crossley confirmed that all of the non-contentious work in relation to each of Davenport Lyons' remaining four clients had been transferred to ACS:Law. The clients who transferred their instructions from Davenport Lyons to ACS:Law are:

- Topware Interactive Inc. (Topware)
- Reality Pump Sp.z.o.o. (Reality Pump)
- Techland Sp.z.o.o. (Techland)
- Digiprotect Gesellschaft zum Schütze Digitale Medien Mbh (Digiprotect).

Further details about the transfer of the work to ACS:Law are contained in Section B below.

6. Following a second visit to the firm on 22 September 2009 by Mr Roberts and Mrs Venn, Casework Manager, they became aware that Mr Crossley was also interested in obtaining a new client for his firm to conduct claims for breach of copyright and illegal file sharing, similar to the claims he did for the four other clients. The name of the new client

was Media C.A.T. A copy of the firm's retainer letters with Media C.A.T is included in Section D headed "The basis upon which the firm acted for the clients" below.

7. During the third and final visit to the firm on 16 February 2010, Mr Crossley confirmed that he had also entered into a retainer with a sixth client, Yann Peifer. Unless otherwise specified, the five companies named above and Mr Peifer will be referred to as "the Clients" in the remainder of this Report. It is understood that no letters of claim have been sent out on behalf of Mr Peifer.

8. Mr Crossley also confirmed that several other potential clients had expressed an interest in this type of work, namely:

- Big City Beats (Record Label)
- Allan Kopie (Songwriter)
- Manuel Reuter (Songwriter)
- Autodata Ltd (Software company)
- Alcatech GmbH (Software company)
- Fust (Software company)
- Wever & Ko (Software company)
- KG (Software company)

9. In an email dated 28 April 2010 Mr Crossley stated that he had a retainer with three German songwriters. Mr Crossley also stated:

*"I am close to entering into a retainer – by way of acting as agent for a US Law firm – in relation to a major Oscar-winning film. Media C.A.T will soon be entering into licence agreements with more copyright owners although my retainer shall remain unaltered. I also expect to be introducing work to a US Law firm, but not work carried out by ACSLaw [sic], but work I shall receive a payment for, the details of which have yet to be determined.*

10. The conduct of the firm in the P2P copyright claims has led to media interest, including numerous articles on the internet, on the BBC and in the local and national press. Further details of this are provided in Section J entitled "Media Interest" below.

11. The Solicitors Regulation Authority (SRA) has also received three hundred and twenty-six complaints directly from individuals about the conduct of the firm in these matters.

The information provided by the individuals has been considered as part of the investigation (See Schedule of complaints **Appendix 1**). A number of these complaints have been made by Members of Parliament on behalf of their constituents.

12. It should also be noted that the letters generated by the firm have been the subject of wide discussion on the internet with a number of forums, such as Slyck.com, having sections entirely devoted to discussion on the letters of claim sent out by the firm in which individuals can comment. These forums have helped to drive opposition to the firm's actions forward and have provided a number of template letters that individuals can send to their MP's, the Information Commissioner, the firm and the SRA.
13. By way of further background, the issue of P2P file sharing has also been the subject of a Government consultation process and considered as part of a Report published on 16 June 2009 entitled "Digital Britain." The Report led to the publication of the Digital Economy Bill in November 2009 which proposed the requirement for Internet Service Providers (ISPs) such as Sky, Virgin Media and BT to notify alleged copyright infringers that their conduct is unlawful by writing a series of letters to the alleged infringer. It also set out the possibility of limiting the speed of an individuals' internet connection even disconnecting their internet connection entirely in order to prevent illegal P2P file sharing.
14. The Digital Economy Bill also referred to an intention to require ISPs to collect anonymised information on serious repeat infringers to be made available to copyright rights-holders together with the personal details of the infringer on receipt of a court order. This is a similar process to that adopted by ACS:Law (as described at Section C below). However, it is understood this process is envisaged for use against alleged offenders who ignore the warning letters from their ISPs. The communications regulator, Ofcom, is responsible for ensuring that there are adequate appeal procedures for those accused of illegal file-sharing. The Digital Economy Bill received Royal Assent on 8 April 2010 and is now an Act of Parliament.

15. In brief, the issues arising from the investigation include [not exclusively] Mr Crossley/the firm's compliance with:
- Rule 1.02 Solicitors Code of Conduct 2007 concerning the duty to act with integrity.
  - Rule 1.06 Solicitors Code of Conduct 2007 concerning the duty not to behave in a way that is likely to diminish the trust the public places in you or the profession.
  - Rule 3.01 Solicitors Code of Conduct 2007 concerning a conflict of interest.
  - Rule 5.03 Solicitors Code of Conduct 2007 concerning the duty to have a system in place for supervising clients' matters.
  - Rule 10.01 Solicitors Code of Conduct 2007 concerning the duty not to use the position of solicitor to take unfair advantage of anyone.
16. The remainder of this Report contains an examination of how the firm conducted the claims and their relationship with the Clients (Part I) as well as an analysis of the regulatory and legal issues involved in taking the proceedings and other issues of concern (Part II). The contents of this Report are therefore as follows:

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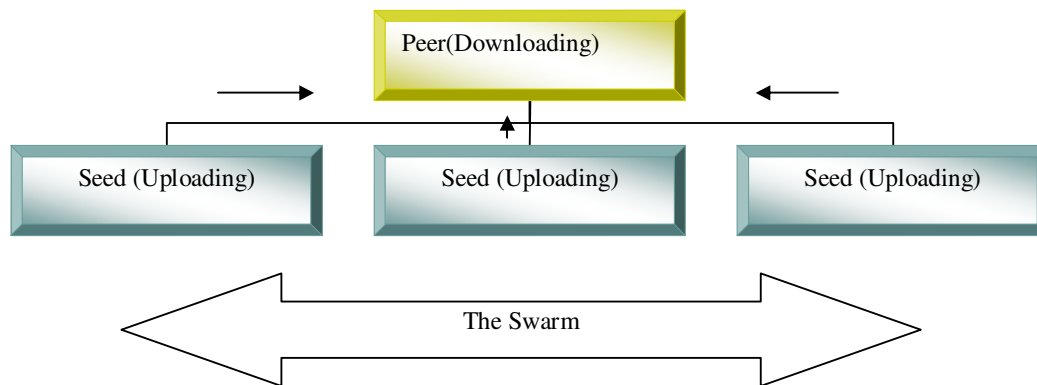
A. What is P2P file-sharing?

- (i) How does illegal file-sharing work?
17. During the Davenport Lyons investigation, the Investigation Officers interviewed the supervisor of the P2P file sharing department, Adam Glenn. Mr Glenn joined ACS:Law as a senior supervisor in May 2009 and it is understood carries out broadly the same

duties at ACS:Law as he had undertaken whilst employed by Davenport Lyons. Further details of the supervision of file sharing matters are provided in the “Supervision” section E below. The following is an explanation of the file sharing process that was given to the Investigation Officers by Mr Glenn during the Davenport Lyons investigation. The explanation of the process has not changed significantly following the transfer of the work to ACS:Law.

18. Mr Glenn explained to the Investigation Officers that when an individual decides that he/she wishes to access, for example, a newly issued computer game he/she can acquire the game by purchasing it from the high street, by a legal download or by accessing the game illegally through a P2P website. The individual would use a search engine (such as Google) to search against the name of the game he/she wanted. The computer’s search engine would then record a number of websites offering the game.
19. Mr Glenn explained that there are two main P2P sharing networks (also called Protocols). These are EMule (or EDonkey) and BitTorrent. According to Wikipedia, BitTorrent is a peer to peer file sharing protocol used for distributing large amounts of data. The protocol works initially when an individual makes his file (or a group of files) available to the network. This is called a “seed” and allows others, named “peers”, to connect and download the file. The seed is therefore responsible for uploading the file onto another individual’s computer. The “peer” is the individual who is downloading the file from the seed’s computer. After the file is successfully downloaded by the peer, many peers continue to make the file available to other users via the P2P network, becoming additional seeds.
20. Mr Glenn also explained that files are downloaded by the peer from more than one computer and this is called the “swarm”. In this way the peer obtains a faster download of the file than if the file was being downloaded from a single computer, as more data is available for transfer. As more seeds get added to the “swarm”, the likelihood of a successful download of the file by a peer increases substantially.

Diagram illustrating how P2P file-sharing works:



21. One of the main BitTorrent index sites is a website called Mininova. Sites like Mininova incorporate mechanisms to optimise their download and upload rates, for example, downloading preference is given to those individuals who make the largest amounts of data available to other users of the network.
22. Wikipedia states that the BitTorrent files themselves do not store copyrighted data, hence the BitTorrent protocol is not itself illegal – it is the use of it to copy copyrighted material that may contravene laws in some jurisdictions.
23. Mr Glenn explained that BitTorrent can be used to access copyrighted material in a number of ways. For example, individuals may have obtained a screen preview disc of a newly released blockbuster movie or may have obtained the disc from the Far East (which he said has illegal copies freely available). Alternatively an individual may simply have illegally filmed the movie in the cinema with a camcorder. The movie is then transferred to an electronic format which is capable of transmission via a P2P network and made available to the network by the seed.



(ii). Tracking illegal file sharing

24. Mr Glenn explained that a number of companies have developed software programmes to monitor the internet addresses of those individuals who they say have uploaded copyrighted data via P2P sites (i.e. the seeds). He said that Davenport Lyons had had arrangements with two such monitoring entities, Logistep A G (Logistep) and Digirights Solution GmbH (Digirights), based respectively in Switzerland and Germany. Mr Glenn explained that these companies access P2P sites and, acting as fictitious users (or peers), pretend they wish to access the copyrighted material. He said that they use their software to make connections with individual seeds who indicate they have the data (or parts of it) available to be downloaded onto the companies' computers. The companies then register the download and compare it with the original material to make sure that it is copyrighted.
25. Mr Glenn advised that the monitoring usually continues for a six week or so period. At the end of the monitoring period the companies will have information about how many individuals accessed the copyrighted material using the P2P websites and the Internet Protocol (IP) address (usually a 12 digit number such as 123.345.567.678) that was used by the seed to connect to the P2P website. It is noted that IP addresses are described as "dynamic" and can change from time to time. For example, if an individual disconnects their modem, the individual will have a new IP address the next time the modem is switched on and connected to the internet.
26. Mr Glenn explained that it is therefore the IP address of the individual who uploads the file (the seed) that is registered by the company and not the IP address of the individual who downloads the file (the peer). This has been a common misconception made by many of the alleged copyright infringers who contact the firm who believe that they have been accused of downloading files rather than making files available to other users of the P2P network. This principle is of importance when assessing likely damages and is discussed further in the "Litigation" section F below. Issues about the potential illegality

of the companies in monitoring the internet in this way are referred to subsequently in the “Legal Issues” Section I below.

27. Mr Glenn showed the Investigation Officers how Davenport Lyons had access to two databases, one for Logistep matters and one for Digirights. Logistep provided Davenport Lyons with the data of alleged infringers in relation to Topware, Reality Pump and Techland. He explained that Digiprotect operated slightly differently in that they used Digirights to identify alleged infringers. Access to both of these databases was transferred to ACS:Law when the firm took over handling of the P2P file sharing claims in May 2009.
28. Since taking over conduct of the matter from Davenport Lyons in May 2009, ACS:Law have obtained two new Clients, as described at paragraphs 6 to 8 above. The monitoring company used to obtain data on behalf of Media C.A.T. is a company called NG3 Systems. This company operates in a manner similar to Logistep and Digirights.

#### B. Transfer of the non-contentious work to ACS:Law

29. As stated at paragraph 5 above, Mr Roberts spoke to Mr Crossley on the telephone on 12 May 2009. Mr Crossley confirmed that he had taken over three clients – Reality Pump, Techland and Topware - from Davenport Lyons and that one thousand seven hundred letters of claim had been sent out by his firm on 5 May 2009. He said he had entered into a retainer with each client and his firm was now instructed.
30. Mr Crossley explained that Davenport Lyons had fully co-operated with the transfer of the work to his firm and had provided him with the accounts spreadsheets, details of infringers and three applications for new Norwich Pharmacal Orders (see paragraph 43 below) in relation to the three clients which had been heard by Chief Master Weingarten on 11 May 2009. These applications had been adjourned. Mr Crossley further explained that he had been liaising with Brian Miller, one of the Partners responsible for the P2P file sharing work at Davenport Lyons, about the transfer of the work for around one month. Mr Crossley confirmed that the Client files had not been transferred from

Davenport Lyons to his firm.

31. Mr Crossley also stated during the conversation that they had details of a further five thousand alleged infringers in relation to Digiprotect. He said that they were in the process of preparing letters for these. Mr Crossley said that he appreciated that the public had been taken somewhat by surprise by his firm's actions as they were used to Davenport Lyons being involved in the claims and now his firm has taken over. He said he had been preparing for the transfer for some time and had taken on six new staff, including two former staff of Davenport Lyons from the file-sharing department.
32. Following the conversation on 12 May 2009, Mr Crossley wrote to Mr Roberts on 13 May 2009 (**Appendix 2**) confirming that his firm had issued one thousand seven hundred letters of claim on behalf of Reality Pump, Topware and Techland. The letter confirmed that he was also retained by Digiprotect and would shortly be sending out a further five thousand two hundred letters of claim. The letter continued that ACS:Law was receiving enquiries on historic data in relation to letters sent out by Davenport Lyons and that Davenport Lyons had notified the "necessary people" of his firm's involvement.
33. Mr Crossley's letter of 13 May 2009 also stated that Davenport Lyons still acted for the Clients in relation to any ongoing legal action. Davenport Lyons had issued a number of claims against individuals as summarised in the "Litigation" Section F below. The letter stated that his firm was not taking those existing claims over. The letter confirmed that ACS:Law had received the computer management systems operated by the Clients to enable the firm to properly and adequately manage the work and the accounting system that was created specifically for the work by Davenport Lyons.
34. Mr Crossley's letter of 13 May 2009 also confirmed that they had inherited staff from Davenport Lyons under the Transfer of Undertaking Protection of Employment Regulations and that "*Accordingly, we have considerable expertise in dealing with these claims.*" The letter stated that they had employed further staff who were either extremely familiar with the work or had been trained up for the purpose. Mr Crossley stated "*There is extensive monitoring and supervision and I am closely involved with every aspect of*

*the process.”*

Visit on 11 June 2009

35. During the visit to the firm on 11 June 2009 Mr Crossley said that he had been invited to take the cases over from Davenport Lyons and was honoured to do so. He described a lead in period of two months where he relied on the expertise and business model prepared by Davenport Lyons but said that they had made stylistic changes to some of the letters prepared by Davenport Lyons. By way of example he explained that Davenport Lyons had an instalment plan whereby they charged an administration fee of £10 per month. He said that he was mindful that people had been critical of the arrangement and could see why. He said they had started off with forty-seven individuals wishing to pay by instalments but had decided to write to everyone, including those transferred from Davenport Lyons, confirming they were cancelling the £10 fee,
36. Consideration and analysis of ACS:Law's correspondence is contained in Section H below.
37. Mr Crossley also explained that letters to alleged infringers were printed off remotely in a small office near to the Surrey/Sussex border where he lives. He said that he had one paralegal and one locum solicitor working in the office to supervise the printing. It was later ascertained by the Investigation Officers that the solicitor was Caroline Miller, the wife of Brian Miller, one of the partners responsible for the P2P breach of copyright work at Davenport Lyons. During the visit to the firm on 16 February 2010, Mr Crossley confirmed that this work was now completed at the firm's Hanover Square office.
38. Mr Crossley also stated during the visit on 11 June 2009 that it may seem odd that Davenport Lyons had approached him to conduct the work. He said he was not a big or prestigious firm but had been around for some time and he believed that Davenport Lyons were attracted to him for a number of reasons. He said that he had been involved in a well publicised case – the Dubai “sex on the beach” case where he represented the male individual who was accused of sexual misconduct by the Dubai authorities – and was well used to dealing with the media and the press. He said that he had been a

litigator all of his working life and had done quite a bit of Intellectual Property litigation. He believed that Davenport Lyons were aware of one piece of litigation in particular. In this matter his client is suing Apple on the basis that they had used his iPod design. He said this is a very substantial piece of litigation which had now been transferred to Origin, a specialist international IT litigation firm, but he is still assisting with the claim.

39. Mr Crossley confirmed that his offices had been very recently leased by him for the purpose of the file sharing litigation (it was later indicated by Mr Crossley that they had moved in the previous day).

40. During the visit to the firm on 11 June 2009 Mr Crossley provided the Investigation Officers with a copy of a letter dated 3 April 2009 from Mr Miller at Davenport Lyons concerning the transfer of the work (**Appendix 3**). This letter stated amongst other things:

- The “Handover Date” for transfer of the work would be 1 May 2009.
- All correspondence and communication regarding the “Cases” would be conducted only in the name of ACS Law or any other law firm previously approved in writing by Davenport Lyons.
- The file sharing team would continue working at Davenport Lyons during a transitional phase until the process was “bedded down” at ACS:Law.
- Davenport Lyons relinquished any claim for payment of fees or work in progress in respect of the Cases following the “Handover Date”.
- All Cases for the Davenport Lyons existing four Clients would be transferred to ACS:Law from the “Handover Date”.
- Where issues arose with a claim after the “Handover Date” a decision would need to be made on a case by case basis as to who dealt with the issue.
- Both Davenport Lyons and ACS:Law needed to agree the precise wording sent out in relation to any media matters; ACS:Law would obtain written consent from Davenport Lyons before issuing any press release.

- ACS:Law was permitted to use the template letters, precedent paragraphs and other related intellectual property that Davenport Lyons had created as part of the business.
- Davenport Lyons would retain conduct of any existing litigation cases. In relation to the thirteen or so litigation cases about to be issued, these may be transferred to ACS:Law with the approval of the Client.
- Davenport Lyons gave no “*warranties, indemnities or any other assurances*” in relation to the “*accuracy, content, fitness for purpose or otherwise*” of the intellectual property developed by Davenport Lyons for the business. The agreement stated “*Should you be in any doubt in relation to this, we recommend that you form your own view (and if necessary, take your own independent legal advice.)*” (**Appendix 3, page 2**).
- Davenport Lyons would send a letter to each existing recipient of one of their letters of claim confirming that they were handing the case over to ACS:Law; there were an estimated four hundred and fifty “live” cases.
- The Transfer of Undertakings Protection of Employment Regulations 2006 applied to the existing members of staff dealing with the file sharing work.

#### C. A general overview of the actions by the firm

41. Information provided by Mr Crossley showed that the claims undertaken by the firm in acting for its Clients followed a similar pattern which is summarised at paragraphs 42 to 53 below.

##### i) Initial investigation and the Norwich Pharmacal Order

42. The Clients had entered into a retainer with the firm and would agree to share in varying percentages with Logistep/Digiprotect/NG3 Systems (the monitoring companies) and the firm, sums recovered from the alleged infringers. Examples of the firm’s engagement

letters can be found in Section D headed “The basis upon which the firm acted for the Clients”.

43. The monitoring company would carry out a monitoring exercise and provide to the firm a list of IP addresses which were then used to obtain a court order (called a Norwich Pharmacal Order) which required the various ISPs to disclose to the firm the name and address of the customer who had been allocated the IP address. A copy of Mr Crossley’s Witness Statement in support of the Norwich Pharmacal Order on behalf of Media C.A.T is attached at **Appendix 4**. The ISP’s seek recovery of their legal costs and these are generally agreed. Once the Norwich Pharmacal order has been made, the ISP’s would generally take a number of weeks in which to provide the firm with the list of the names and addresses.
44. During the visit to the firm on 16 February 2010 Mr Crossley confirmed that his firm only used ISPs who do not object to the Order and disclosure of the information about their customers, in order to keep costs down.

#### ii) Letters of Claim

45. Once in possession of the names and addresses the firm would prepare and send letters of claim to the alleged infringers. An example of a letter of claim can be found at **Appendix 64** in relation to Linda Breach. The documentation and evidence provided to Mrs Breach consisted of:
  - A letter of claim dated 8 June 2009 (**Appendix 64**). This asked Mrs Breach to pay compensation of £500.
  - A statement report detailing, amongst other things, the name of the ISP and the IP address (**Appendix 64, page 6**).
  - A copy of the relevant section of a spreadsheet sent to the ISP in relation to Mrs Breach’s IP address and the spreadsheet received in return (**Appendix 64, page 7**).
  - A document requiring Mrs Breach to give an undertaking (**Appendix 64, page 8**)

- A payment form (**Appendix 64, page 9**)

46. An analysis of the letter of claim is conducted at Section H below.

iii) Actions Post Letter of claim

47. On 28 April 2010 Mr Crossley provided Mr Roberts with details of individuals who, at that time, either had not responded to the letter of claim or had disputed the claim. He provided the following figures:

Client	Letters	Disputed	Non Responders
Digiprotect	6640	1992	2656
Topware	590	177	236
Techland	364	109	146
Reality Pump	236	71	94
Media C.A.T.	3,537	1066	1406
<b>Total</b>	<b>11,367</b>	<b>3415</b>	<b>4538</b>

48. On 16 February 2010 Mr Crossley estimated that around 30% of claims are disputed and 40% of individuals did not respond. This is reflected by the above figures.

49. During the visit on 11 June 2009 Mr Crossley stated that if the alleged infringer provides strong evidence, for example evidence that supported the “wireless defence” (see paragraph 284 below) then they would discontinue the case. Mr Roberts wrote to Mr Crossley on 25 September 2009 and asked him to provide details of any procedures or guidance issued to staff in relation to the reasons for dropping claims. In his response Mr Crossley provided Mr Roberts with two documents:

- Possible reasons for dropping a claim (**Appendix 5**)
- Procedure for dropping claims (**Appendix 6**).

50. The “Possible Reasons for Dropping a Claim” document (**Appendix 5**) includes various reasons why a claim would be dropped including:

- The infringer had moved away
- The infringer had passed away
- The infringer had disabilities



- The infringer is a pensioner
  - The infringer is a child
  - The infringer had given information subsequent to a “third party letter”. This was where the alleged infringer had indicated there might be a third party responsible for the infringement.
51. The “Procedure for Dropping Claims” document set out the procedure in which the paralegal dealing with the correspondence had to complete a “Dropping of Claim Form” (See examples **Appendices 7 and 8**) and seek the approval of Mr Crossley before a claim could be dropped.
52. During the visit on 16 February 2010 Mr Crossley provided the Investigation Officers with a document (**Appendix 9**) which showed the reasons why thirty five cases had been dropped by the firm. These claims were dropped for various reasons in accordance with the “Possible Reasons for Dropping Claim” document. No further details of any claims dropped by the firm were provided by Mr Crossley. A copy of a letter to the alleged infringer, Mr Salem, advising that the claim had been dropped is attached at **Appendix 10**.
53. During the post letter of claim process the firm would typically send to individuals third party letters (**Appendix 59**), final demand letters (**Appendix 67**) and Part 36 Offer letters (**Appendix 70**). Reference to each of these letters is contained in Section H below under the heading “Examples of complaints to the SRA”.

#### D. The basis upon which the firm acted for each of the clients

54. During the visit to the firm on 11 June 2009 Mr Crossley provided the Investigation Officers with copies of the retainer letters that had been sent to each of the four Clients who had transferred their instructions from Davenport Lyons. Subsequently in correspondence with Mr Roberts and on the visit to the firm on 16 February 2010, Mr Crossley provided copies of retainer letters in relation to his firm’s two new clients, Media

C.A.T and Yann Peifer.

55. Typically the Client was provided with:

- A letter entitled “File Sharing – An Overview”.
- A Retainer Letter for Non-Contentious Work
- A Retainer Letter for Contentious Work incorporating a Collective Conditional Fee Agreement (CCFA).

56. Copies of these three letters to the Clients and accompanying documentation are attached at:

<u>Client</u>	<u>“File Sharing – An Overview” letter</u>	<u>Non-Contentious retainer letter</u>	<u>Contentious Retainer Letter</u>	<u>CCFA</u>
Reality Pump	<b>Appendix 11</b>	<b>Appendix 12</b>	<b>Appendix 13</b>	<b>Appendix 14</b>
Topware	<b>Appendix 15</b>	<b>Appendix 16</b>	<b>Appendix 17</b>	<b>Appendix 18</b>
Techland	<b>Appendix 19</b>	<b>Appendix 20</b>	<b>Appendix 21</b>	<b>Appendix 22</b>
Digiprotect	<b>None</b>	<b>Appendix 23</b>	<b>Appendix 24</b>	<b>Appendix 25</b>
Media C.A.T	<b>Appendix 26</b>	<b>Appendix 27</b>	<b>Appendix 28</b>	<b>Appendix 29</b>
Yann Peifer	<b>Appendix 30</b>	<b>Appendix 31</b>	<b>Appendix 32</b>	<b>Appendix 33</b>

57. During the visit to the firm on 11 June 2009 Mr Crossley confirmed that the three letters to the original four clients (Reality Pump, Topware, Techland and Digiprotect) had been prepared by Davenport Lyons. He said that he had conducted a review of the Techland and Reality Pump retainer letters as the revenues for these clients were poor and so the revenues were increased.

58. Mr Crossley also confirmed during the visit in June 2009 that the retainer letters in relation to his new clients, Media C.A.T and Yann Peifer, had been prepared by his paralegal, Terence Tsang.

59. The letters sent to each of the Client are all broadly similar. An analysis of each of these letters is set out below.

#### i) File Sharing – An Overview letter

60. The file sharing overview letter set out the procedure for obtaining data from ISPs and sending letters of claim under the heading “Non-Contentious Work”, as described at paragraphs 63 to 68 below. It stated that a court order was required to compel the ISPs to disclose the names and addresses of alleged infringers. The obtaining of the court order was described as contentious work and covered by the “Contentious Retainer”.
61. The letter also set out that the monies collected from the infringers would be shared out in accordance with “revenue sharing agreements” discussed further at paragraph 67 below. The Client would be invoiced for the firm’s professional fees equivalent to the share of the proceeds due to the firm under the revenue sharing agreement.
62. The letter also went on to explain the various types of contentious work involved in the proceedings, as set out at paragraph 69 below.

#### ii) Non-Contentious Retainer Letter

63. The “Non-Contentious Retainer Letter” typically stated that the Non-Contentious Work included:
- carrying out an analysis of the intellectual property rights in the Work(s) and confirming chain of title and ownership of the rights;
  - obtaining an expert report from the forensic IT experts (monitoring company) to identify the ISP and IP address for each uploader (seed);
  - preparing a letter to each ISP requesting voluntary disclosure of the identity of each uploader in question;
  - preparation of a letter (letter of claim) to each uploader identified together with contractual undertakings.
64. The Non-Contentious work specifically excluded the preparation of the Norwich Pharmacal Order and issuing court proceedings against any uploader.

65. The “Non-Contentious Retainer Letter” also stated that:
- Mr Crossley was the Client Care Partner and Matter Manager.
  - The firm would receive a percentage of the “Net Recoveries” (See table at paragraph 67).
  - A one off payment of set up costs of £2500 would be paid by the Client.
  - The firm would account to the Client once £10,000 had been recovered and would then proceed to account to the Client monthly provided £10,000 more of “Net Recoveries” was available for distribution at the end of each calendar month.
  - The firm might take advance drawings from the “Net Recoveries” in order to pay for the firm’s outgoings.
  - The business model adopted by the firm would only be effective if a minimum number of 2,500 unique IP addresses were obtained.
  - The Client agreed that a minimum of five and up to one hundred test cases per annum could be brought in the form of taking proceedings against alleged infringers. It stated *“This should have the effect of substantially increasing the recovery rate of payment in any Phase and is therefore an important part of the process.”*
  - The Client would provide the firm with chain of title documentation and warrant that it was the rights owner of the Work.
  - The firm reserved the right to charge an hourly rate if ascertaining the chain of title was unduly complex.
  - The Retainer would last for the period of one year (subject to the firm having the right to terminate the retainer by 30 September 2009 in the case of Reality Pump)
  - The firm’s liability was limited by condition 10 of the Terms of Engagement (annexed to the letter, **Appendix 12, page 10**) which stated *“...the Client’s liability to the Legal representative shall be limited to the amount that is so recovered under each of the charges listed above.”*
66. The “Net Recoveries” were defined in the Non-Contentious Retainer letter as:

“...the amount of damages and costs claimed in each Letter of Claim (see below) and recovered from each uploader to whom a letter of claim is sent, **less:**”

1. applicable disbursements (see paragraph 6 of the accompanying Terms of Engagement) including a court fee (currently £70) in respect of the Norwich Pharmacal application obtained against **all** ISPs (in other words only one court order should be necessary in respect of one batch or “phase” of data sent to us by your company on any one occasion);
2. each ISP’s reasonable administrative and legal costs of complying with the Norwich Pharmacal Order..”.

67. The table below sets out the share of the “Net Recoveries” between each of the parties.

<u>Client</u>	<u>Share to Client (%)</u>	<u>Share to Firm (%)</u>	<u>Share to monitoring company (%)</u>
Reality Pump	25	42	33
Topware	25	42	33
Techland	33	42	25
Digiprotect	50	37.5	12.5*
Media C.A.T	35	52.5	12.5
Yann Peifer	40	45	15**

\* The Non-Contentious Retainer letter for Digiprotect expressed the firm’s share of the Net Recoveries as 50% of which 12.5% would be paid by the firm to Digirights (the monitoring company).

\*\* The monitoring company here was Evidenzia.

68. The “Non-Contentious Retainer letter” also agreed the amount of costs and damages that would be claimed in the letter of claim to each alleged infringer depending on the type of work. These are:

<u>Client</u>	<u>Films</u>	<u>Games</u>	<u>Music</u>
Reality Pump	£600	£600	£500
Topware	£600	£600	£500
Techland	£600	£600	£500
Digiprotect	£700	£700	£500
Media C.A.T	£400	N/A	£400
Yann Peifer	£400	N/A	£350

### iii) Contentious Work Retainer letter

69. The Contentious Retainer Letter typically stated that the “Contentious Work” included:

- obtaining a disclosure order from the court to compel the ISPs to release the names and addresses of individuals;
- challenging any order for costs made against ISPs;
- commencing proceedings against file sharers, including the issuing of proceedings;
- preparing applications for and obtaining default judgments in respect of those defendants who did not file an acknowledgement of service or a defence;
- drafting and filing a defence to any counterclaim;
- drafting and filing a consent order to withdraw the claim and dismiss the defendant’s counterclaim (where appropriate);
- attending before the judge on an application for summary judgement;
- preparing for and attending a hearing in relation to an enquiry as to damages;
- preparing papers for enforcement of damages and/or costs, including instructing a bailiff where necessary;
- in “rare” cases preparing for and attending a trial. It states *“We do not presently anticipate (but cannot guarantee) that more than 1-2 cases would go to trial in a sample of about one hundred test cases, so the risk is low.”*
- appealing any decision made by the court against the Claimant arising from a claim made against the infringer.

70. The Contentious Retainer Letter also stated:

*“We will publicise prominent judgments from time to time which should help to increase the recovery rate.”*

71. As with the Non-Contentious Retainer letter, Mr Crossley was expressed as being the Client Care Partner and Matter Manager. The Contentious Retainer letter also stated:

*“Given the element of risk involved in our firm bringing litigation on your behalf on a “no win no fee” basis, we reserve the right to review (and, if necessary, withdraw) our offer to act on this basis following the expiry of one year following the date of this letter.”*

iv) Collective Conditional Fee Agreement (CCFA).

72. The CCFA was included with the firm's Contentious Retainer letter. The CCFA set out the firm's hourly rates at Schedule 1 and at Schedule 2 provided details of how the success fee was to be calculated in relation to each Client. Schedule 2 of the CCFA explained:

*"The pursuit of claims for infringement of copyright against file sharers is a novel innovation in litigation and is not established in the English Courts..."*

73. The success fee was expressed to be:

*"eighty percent (80%) of the Basic Charges, should the matter be successfully concluded without the need for a final trial. If the matter is not concluded more than three months prior to the final trial, then the Success Fee shall thereafter be one hundred percent (100%) of the basic charges."*

The only exception to this was the CCFA entered into with Yann Peifer which expressed the success fee as 75% of the Basic Charges if the matter was concluded without the need for a trial.

v) Terms of Engagement ( File Sharing)

74. The Terms of Engagement (See **Appendix 12, pages 9 to 12**) contained, amongst other things, the scope of the work and the circumstances in which the Client was entitled to terminate the retainer. It is noted that paragraph 17 of the Terms and Conditions states:

***"17 Conflict of Interest***

*Sometimes situations arise where the interests of two or more of our clients are in conflict or where our obligations of confidentiality create a conflict. If this happens, we will inform all clients concerned and then, depending on the circumstances, we may have to stop acting for some or all of them. We will always try to find reasonable and fair solutions to such problems and where appropriate we may seek guidance from the Solicitors Regulation Authority as to the proper course."*

It is noted that the Terms of Engagement make no reference to the situation where a conflict of interest between the interests of the solicitor and client arise (a conflict of self interest as envisage in Rule 3.01 of the Solicitors Code of Conduct 2007.)

Visit on 11 June 2009

75. During the visit on 11 June 2009 Ms Westrop asked Mr Crossley why the retainers with the clients were now for a fixed period of twelve months. Mr Crossley responded that he was keen for it to be fixed as otherwise it could be hard for him to terminate the retainer if it does not work out.
76. Ms Westrop had also noted that the application for the Norwich Pharmacal Order was now included as part of the contentious proceedings and asked Mr Crossley why that was so. Mr Crossley responded that he did not know as the retainer letters were presented to him like that.

vi) Media C.A.T.

77. During the interview on 16 February 2010 Mr Crossley was asked about his firm's relationship with Media C.A.T. including how his firm came to be instructed by Media C.A.T. Mr Crossley explained that Media C.A.T. was owned and operated by a gentleman called Lee Bowden who he had acted for and known for a number of years. Mr Crossley explained that he approached Mr Bowden as he was aware that copyright owners that Mr Bowden knew could avail themselves of ACS:Law's business model for seeking compensation in copyright claims. Mr Crossley stated that he established a "*fairly straightforward licence agreement that he [Mr Bowden] would sign up copyright owners and so I would then only have one point of contact.*"
78. Mr Crossley explained:

*"He operates almost like a collection society would, acting for a very similar model to the way Digiprotect operates insofar as it gathers in copyright owners and its useful for me for a couple of reasons because it means I only have a single point of contact. The copyright owners in his case are his clients and my client is Media C.A.T. and it assists significantly in the application to court because you then only have a single application to court. There is a lot of paperwork behind it but if I acted for individual copyright owners, I would be making lots of separate applications all the time which would be less cost effective and also probably too cumbersome ..."* (Appendix 145, page 2)



vii) Non contentious funding agreements.

Interview on 16 February 2010

79. During interview on 16 February 2010 Mr Crossley was asked various questions about the firm's retainer letters with the Clients and the way in which the agreements to share the costs of the action had been reached.

80. Mr Crossley first of all stated:

*"... in relation to the retainers these were originally prepared by Davenport Lyons and they haven't changed much again because I have been reluctant to change them because I know so much time went into preparing them in the first place by a firm that I have a great deal of respect for and I know that they spent some considerable time preparing these. I have read them of course and I have considered them and I personally am happy with them."* (**Appendix 145, page 20**)

81. Mr Roberts explained that the Non-Contentious Retainer Letters include the preparation of the letters of claim including the sending and processing of the letters of claim. Mr Crossley confirmed that the Non-Contentious Retainer Letters also included responding to the letters of claim.

82. Mr Roberts then referred Mr Crossley to the definition of "litigation services" in Section 119 of the Courts and Legal Services Act 1990 (CLSA) which says that:

*"Litigation services are any services which it would be reasonable to expect a person who is exercising or contemplating exercising a right to conduct litigation in relation to any proceedings or contemplated proceedings to provide."*

Mr Roberts also referred Mr Crossley to Section 58 of the CLSA which refers to a Conditional Fee Agreement as being an:

*"Agreement with a person providing advocacy or litigation services which provides for his fees and expenses or any part of them to be payable only in specified circumstances."*

83. Mr Roberts asked Mr Crossley whether he agreed that, by reason of those two provisions, the Non-Contentious Retainer Letters, which Mr Roberts referred to as "non-contentious funding agreements", are actually Conditional Fee Agreements. Mr Roberts pointed out that the non-contentious agreements cover both the sending and processing of the letters of claim, and they therefore relate to "contemplated proceedings". Mr

Roberts explained that as such, if the non-contentious funding agreements are Conditional Fee Agreements, then they must comply with the other provisions of the Courts and Legal Services Act 1990.

84. Mr Roberts referred Mr Crossley to Section 54(b) of the CLSA which states:

*(4) "The following further conditions are applicable to a conditional fee agreement which provides for a success fee –*

*(a) ...*

*(b) it must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased."*

85. During the interview on 16 February 2010 Mr Roberts asked Mr Crossley whether he wished to comment on the view that the "non-contentious" retainer letters/agreements do not comply with Section 58(4)(b) CLSA as they state that fees will be paid as a percentage of the "Net Recoveries". Section 58 CLSA states that any conditional fee agreement which does not satisfy all of the conditions in Section 58 CLSA shall be unenforceable (unless it is an agreement to which section 57 Solicitors Act 1974 applies – A non-contentious business agreement).

86. Mr Roberts said that, on this basis, the perception was that the "non contentious funding agreements" are actually Conditional Fee Agreements (CFA)s and are potentially unenforceable as they do not meet all of the relevant requirements for a CFA.

87. Mr Crossley responded to this point and stated:

*"I see the point you are making and I don't agree with you. The reason I don't agree with you is I come back to the point I made earlier, is this is a compromise agreement and we are inviting people to enter into a compromise agreement. I could include in that compromise agreement if I wanted costs for cleaning my car or paying for my TV licence if someone is prepared to agree it, then we can agree to it. We are not required to agree to it. This is perhaps a bad example but I think the point is well made that you can agree anything you like within a compromise agreement, that's my point and we are indicating where we've arrived at and why the figures are what they are and again, this is perhaps why I have moved away from focussing on the costs and I've been much more generic more recently about the figures because I don't want to have people scrutinise the figure. The figure is a settlement figure that my client is prepared to accept full stop..."*  
**(Appendix 145, page 21)**

88. Mr Roberts then asked whether the recipients of the letter of claim were entitled to

scrutinise the figures if they wanted to as they were the ones being asked to pay costs and damages. Mr Crossley replied:

*“Well, they are but as I say my client’s entitled to say its incurred costs, its incurred costs with us, its suffered damage all of which greatly exceeds the amount that we are asking for in the compromise.... We have an arrangement with our client and as a matter of fact and a matter of record, the client has to pay us for the work that we do and as I say it is entitled to ask for any amount of money it likes in compromise to avoid more litigation if it chooses to.” (Appendix 145, page 22)*

Mr Crossley continued:

*“That’s the offer and beyond that I don’t think anyone needs to go or delve too deeply...” (Appendix 145, page 22)*

89. On returning to the interview after lunch Mr Crossley indicated that he wished to clarify his answer in relation to the point about the Non-Contentious Retainer Letters being potentially unenforceable CFAs. When asked if he wished to add anything he stated:

*“Yes, you challenged me over whether or not non-contentious fee agreement was in fact a contentious matter and therefore couldn’t run under a contingency arrangement and you took me to interpretations under the Courts and Legal Services Act S.58 of the Act. Now that’s fine. I previously had explained that I drew an analogy to debt collection type business where you run something and sure enough I had a look at the code of conduct at 2.04 paragraph 46 which deals with contingency fees and it says at 46 “an otherwise contentious matter remains non-contentious up to the commencement of proceedings. Consequently you may enter into a contingency fee arrangement for example the receipt of commission for the successful collection of debts owed to a client provided legal proceedings are not started.” So I say that effectively allows us to operate in the way that we were operating” (Appendix 145, page 25)*

90. In summary therefore, Mr Crossley did not consider that the Non Contentious Retainer Letters were unenforceable CFAs as the costs/damages figure was a “compromise” that the Client was willing to accept in order to settle the claim. He believed that the Client was entitled to ask for whatever it wanted. The arrangement for recovery of costs with the Clients was not pursuant to a court order or a Conditional Fee Agreement.

91. Mr Crossley also sought to rely upon Rule 2.04 Guidance Note 6 in the Solicitors Code of Conduct 2007. However, it is noted that this Guidance Note relates to whether or not the solicitor has breached Rule 2.04 in relation to Contingency fees. It does not relate to Sections 119 and 58 CLSA. It is also noted that Guidance Note 46 refers specifically to debt actions where the amount of the debt to be recovered is actually known. In the file

sharing proceedings damages have not been determined and the principles behind the claims have not been fully tested in the English courts.

92. During the interview on 16 February 2010 Mr Roberts acknowledged that this question was a technical area of concern and stated he would write to Mr Crossley to further confirm the question about the non-contentious funding agreements. Mr Roberts did this in a letter dated 26 March 2010 (**Appendix 34**).
93. Mr Crossley responded with his letter of 6 April 2010 (**Appendix 35**). This letter states that Mr Crossley had sought the advice of a “*very eminent and senior costs counsel on these issues*” and he considered it was incorrect to assert that he had breached any rules in relation to the funding arrangements.
94. In his arguments Mr Crossley seeks to rely on the definition of “non contentious business” and “contentious business” in Section 87 of Solicitors Act 1974. Mr Crossley states that the definition of “contentious business” states that proceedings must have begun before a court for costs to be contentious. He refers to the case of *Re: A Solicitor Re Taxation of Costs [1955] 2 QB 252* which states that business done in contemplation of proceedings was contentious proceedings but, having regard to the definition contained in section 87(1) Solicitors Act 1974, that work would now be deemed to be non contentious. Mr Crossley states that this approach was further confirmed in *Re Simpkin Marshall Ltd [1959] Ch 229*.
95. Mr Crossley states that, if the work is non-contentious, the solicitor and client may enter into a non contentious business agreement defined by Section 57 of the Solicitors Act 1974. Mr Crossley refers to Section 58(5) CLSA which states that a conditional fee agreement to which Section 57 of the Solicitors Act 1974 applies shall not be unenforceable. However, this argument does, of course, depend upon the work being non-contentious.
96. Mr Crossley then goes on to examine when proceedings can be said to have “begun” as this is relevant to the definition of “contentious business”. He argues that Section 58(4) CLSA means that a CFA *can* exist pre-issue of proceedings as otherwise, pre-issue

costs in contemplation of proceedings could not be recovered if the case settles prior to the issuing of proceedings.

97. Mr Crossley also refers to the definition of a “success fee” under Section 58(2)(b) CLSA which states:

*“a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances.”*

Mr Crossley states:

*“As my retainer provides for a contingency fee, it cannot be a success fee and so the section 58 provisions relied upon by you on behalf of the SRA as to non compliance with the success fee calculation cannot apply.”*

98. A further argument to be considered in relation to the “Non Contentious Retainer Letters” is Rule 2.04(1) SCC 2007 which states:

*“You must not enter into an arrangement to receive a contingency fee for work done in prosecuting or defending any contentious proceedings before a court of England & Wales...”*

99. In his letter of 6 April 2010 Mr Crossley argues that the definition to be applied in relation to Rule 2.04 SCC 2007 is the definition of “contentious business” within the Solicitors Act 1974. He does not consider that the sending of a letter of claim falls within the definition of contentious business as proceedings have not begun. Consequently he believes there can be no breach of Rule 2.04 SCC 2007.

100. Mr Crossley’s letter of 6 April 2010 also states:

*“To my knowledge, it is unheard of that the SRA, or any regulatory body for that matter, has ever taken upon itself to have a retainer declared unenforceable; consequently I query and challenge the power of the SRA to do so.”*

101. Mr Crossley states that a challenge to a “retainer” should only be made by the paying party. He repeats the comments made during the interview on 16 February 2010 that alleged infringers are being offered an “*open compromise as a forbearance to sue.*” He states that the whole purpose of the offer is to avoid the risk of litigation. It is open to the alleged infringer to reject or accept the offer.

viii ) Costs and damages

102. The following invoices showing how each of the Clients were billed by ACS:Law are attached:

- Topware dated 10 June 2009 (**Appendix 36**)
- Techland dated 10 June 2008 (**Appendix 37**)
- Reality Pump dated 10 June 2009 (**Appendix 38**)

103. Mr Crossley provided the following data showing the amounts recovered and paid out on behalf of each of the Clients as at 28 April 2010:

<u>Client</u>	<u>Money Recovered</u>	<u>Paid to Client</u>	<u>Paid to monitoring company</u>	<u>Paid to Firm</u>
Digiprotect	£346,607.90	£151,625.86	£45,060.21	£131,048.38
Media C.A.T	£164,681.00	£35,350.57	£15,066.06	£55,957.20
Topware	£68,127.47	£10,880.48	£10,881.48	£23,551.18
Reality Pump	£34,866.90	£3519.16	£4,645.28	£7,628.20
Techland	£22,474.85	£795.93	£590.00	£2,228.43
<b>Total</b>	<b>£636,758.22</b>	<b>£202,172.00</b>	<b>£76,243.03</b>	<b>£220,413.39</b>

104. During the visit to the firm on 11 June 2009 Mr Crossley was asked whether he was satisfied that the costs and damages included in the letters of claim were appropriate. He stated that he did not have a problem with the figures. He said that he felt that damages for multiple copyright infringements would be substantial. He stated that he had not sought advice about the figures and they were based on his own experience.

105. In a letter dated 14 July 2009 (**Appendix 39**) Mr Crossley was asked to explain how he had calculated the amount of costs/damages to be claimed on behalf of each client including (i) the factors taken into consideration and (ii) the legality and professionalism of asking for a payment of costs yet to be determined by the court.

106. In his response dated 11 August 2009 (**Appendix 40**) Mr Crossley stated that the amount requested for costs and damages is by way of a compromise agreement. He

stated that the figure consists of a combination of factors including damages, out of pocket expenses and legal costs including:

- Damages claimed for lost sales of the client’s copyrighted work. He confirmed the damages related to the uploading of the work and making it available to “*potentially thousands of people*”.
- The charges made by the ISP;
- Costs involved in:
  - Obtaining evidence of infringement;
  - Writing to the ISP to ask for the infringer’s details and applying to the court for an order that they must provide the infringer’s details;
  - Preparing a witness statement and draft order in support of the application;
  - Securing the application and dealing with the queries of the ISPs and their lawyers
  - Attending court to apply for the order;
  - Drawing up the order and lodging it with the court;
  - Serving the order on the ISP;
  - Ensuring that the ISP complies with the Order;
  - Corresponding and communicating with the infringer about the client’s claim.

107. Mr Crossley also stated:

*“Our client’s offer of compromise is not a precise calculation (although the ISP charges have been calculated quite precisely, based on the administrative and legal costs levied upon us by the ISP in question). We are of the firm opinion that damages and costs are likely to be much greater than the sum offered in the compromise if the matter proceeds to court and our client succeeds in its claim. It is nevertheless the sum that our client has instructed us to settle its claim early in order to avoid legal proceedings.”*

108. Mr Crossley further stated:

*“As an invitation to enter into a compromise our client is free to make any offer it deems appropriate. The recipient of the letter is under no obligation to enter into the compromise and they are expressly recommended to obtain independent legal advice...there is an*

*overriding objective in court proceedings to avoid litigation and from our client's perspective this is achieved by an early compromise."*

### Damages

109. During the interview on 16 February 2010 Mrs Venn asked Mr Crossley whether following the transfer of work to ACS from Davenport Lyons, he discussed costs/damages issues and proportionality with each of the clients that he took on and conduct his own review of these.

110. Mr Crossley responded:

*"We have done since but initially I took the cases because they were already pre-determined and they had already been prepared and ready to go with Davenport Lyons and they were already effectively decided upon and so the letters I had were simply printed out on my headed paper as opposed to Davenport Lyons' headed paper in accordance with the client's requirements. Since then, the financial figures have changed here and there and as a general rule, pretty much across the board, they have come down slightly." (Appendix 145, page 14)*

Mr Crossley stated that there was a discussion with each client about the appropriate level of the compromise agreement when each new "phase" of addresses were received.

111. Mrs Venn also asked Mr Crossley how he calculated his firm's share of the "Net Recoveries" as set out in the Non-Contentious Retainer Letters.

112. Mr Crossley responded:

*"Again, that was initially preordained by agreements that had been reached with Davenport Lyons. Those shares I was prepared to accept and I am presently trying to renegotiate those. The Media C.A.T. one was slightly different because that was something I had generated myself and the share is higher because we are also internally managing the, well when I say internally, we are working with a UK based data supplier and we are able to structure it in such a way that the copyright owner at Media C.A.T. as their collector earn significantly more of the percentage than any clients do, for example Digiprotect." (Appendix 145, page 14)*

113. Mrs Venn also asked Mr Crossley whether he had sought Counsel's advice in relation to costs and damages. He replied:

*I don't think I have any written advice. There was some written advice from Amanda Michaels previously provided to the clients through Davenport Lyons (Appendix 130). I have been a litigator many years including copyright litigation and I'm comfortable enough to take my own views and give my own opinion on the likely damages and we always err on the side of caution and will always set the damages modestly. In terms of the compromise certainly very modest. Issue claims presently we are instructed to limit the claim to £3000 damages. It just makes it more manageable and less expensive to issue proceedings. My own view is that the damages for file sharing are higher than that.*



*There is the Barwinska case (See Litigation Section F Below) which is one that occurred £6000 damages and so that was a good benchmark.” (Appendix 145, page 15)*

#### Media C.A.T Costs and damages

114. During the interview on 16 February 2010 Mrs Venn also asked Mr Crossley about how he arrived at the figure claimed for costs/damages in relation to one of his new clients, Media C.A.T (£400). Mr Crossley replied:

*“Again, it is under instructions from the client. There was again a lot of thought gone into that and in fact we have actually sent I think what is 100 or so letters out so far. We have got actually about 2500 letters. We have been instructed to reduce the amount to... it was £540 and we have been instructed to reduce it to £495. I think there are two reasons for that. This is on the client’s instruction.” (Appendix 145, page 15)*

Mr Crossley continued by explaining that the “two reasons” for setting the level of costs and damages at £495 were:

- The ISPs cost were slightly lower than anticipated; and
- The “psychological barrier” of £500.

115. Mr Crossley explained in relation to the “psychological barrier” that:

*“...the client wants to bring the figure below £500 because he believes there is a psychological barrier at £500 that prevents people from paying so he is trying to optimise revenue on settlement on the basis that it can get below £500 and it’s his prerogative to agree to whatever he wants to agree.” (Appendix 145, page 15)*

116. Mrs Venn went on to ask Mr Crossley whether he had any documentation to support his analysis of the costs and damages claimed. Mr Crossley stated:

*“Well again, in relation to the compromise amounts I know there have been ... previously there have been documentation available through Davenport Lyons and we have relied on it as well, to a degree, about how we have arrived at the figure and so on and actually I decided to take a more broad brush approach to this now.... I don’t think we need to quantify how the compromise amount has been arrived at other than to say it’s the amount that our client is prepared to settle at to avoid a claim. ” (Appendix 145, page 16)*

When asked about how costs were quantified Mr Crossley replied:

*“Well we effectively compromise the case on a damages only basis. There is inbuilt as I have indicated, an element of cost for ISPs which is why the figure was arrived at but we are contemplating bringing that downwards. But if we offered £2500 or even £250,000 in settlement if someone is prepared to accept it then a bargain has been struck. It falls outside of any assessment really because it’s a compromise.” (Appendix 145, page 16)*

117. Mr Crossley went on to confirm that damages are not quantified in each individual case and he would have to give more thought to this once it came to an assessment in court.

In relation to claims where proceedings are issued he said:

*"We are setting the bar quite low in terms of the amount of damages we are hoping to recover but it's a lot higher than the compromise amount. We are setting at £3000."* (Appendix 145, page 17)

#### Part 36 Civil Procedural Rules 1998 (CPR) Offer

118. Mrs Venn went on to ask Mr Crossley about the circumstances in which his firm would make a Part 36 Offer under the CPR 1998 and how this was calculated. Mr Crossley replied:

*"It is not made in every case. If people send the template letter we made a decision to effectively withdraw the offer of compromise and replace it with a without prejudice part 36 offer. We felt that it (a) engaged the person that has written back with their template response a little bit more and we also felt that that actually protected and enhanced our client's position from where it started."* (Appendix 145, page 17)

119. Mrs Venn asked in what circumstances a Part 36 Offer might be less than that claimed in the letter of claim. Mr Crossley responded:

*"... anybody who sent a template letter [Slyck.com letter] they generally speaking, weren't reduced because they were as far as we were concerned, not actually responding to the claim and more than that, they were if you like, trying to .... what's the word...they were trying to stick a spanner in the works by sending a template response that we had seen a thousand times before and its time consuming."* (Appendix 145, page 18 )

Mr Crossley continued:

*"...off the top of my head I don't have a firm answer but we, generally speaking as the matter progressed, to try and entice people to settle with us, because that is the object of the exercise to avoid litigation, to try and effect a compromise. If people are engaging with us but deny liability and they aren't appropriate for a third party letter that you have seen before, we get to the stage of offering a Part 36 and they are generally speaking, lower than the original amount offered but it would be on a single instance infringement and not where there was a template response. Occasionally where there was no response at all, we would not send a Part 36 necessarily but we would send, what we would describe as a final demand, it actually is a follow up letter to say we haven't heard from you and so on. And then we may send a Part 36 after that."* (Appendix 145, page 18)

120. Mrs Venn then asked Mr Crossley whether damages were calculated to generate revenue for the client and act as a deterrent to people. Mr Crossley replied:

*"We get revenue for the work that we do and that is paid out of damages that are*

recovered. We don't participate in the business. We act as solicitors and our payment is a share of the revenue that is received but I think you're right, it's to try to maximise revenue and it is to act as a deterrent. Anecdotally it appears to be working and I say that to the extent that in Germany it appears to be the case and as I say this is anecdotal evidence, and there hasn't been any test carried out or analysis, but there is anecdotal evidence that the copyrights that are being monitored and being pursued are less vulnerable to file sharing once that becomes known." (Appendix 145, page 18 )

121. Mr Crossley was also asked about the interim payments referred to in the letters of claim. He was asked how these were calculated and replied:

*"...it's open to the court. I mean we .... I think we suggest £700 would be the request that is made but that again its just, if you like, a partial payment of damages pending the final detailed assessment and we feel that the level and I think we still make that request, that may have gone now actually, but we feel that a request for interim damages is appropriate because it would be the sort of thing that one would obtain if one secured a judgment. Its certainly something that somebody could request if one secured the judgment for damages to be assessed, interim payments are quite common and if we are after £3000 then requesting £700 or so would not be inappropriate. I'm just trying to see if we actually have ..... yes again, the change from 5 May letter is we didn't specify an amount in interim damages although we did initially, but "if it becomes necessary to issue proceedings against you, our client will be seeking within such a claim an interim payment on account of damages if judgment is obtained and we will request the court to determine the level of total damages and costs which may be awarded against you and which will reflect the increased costs of taking proceedings together with damages that fully reflect our client's loss". So, again it is a slightly more developed understanding and description of what we do." (Appendix 145, pages 18-19)*

ix) Conflict of interest

122. During the interview on 16 February 2010 Mr Crossley was also asked about whether there was a conflict of interest between his own interests and that of the Clients. Mr Crossley confirmed that he was familiar with the Rules in relation to conflict of interests.
123. Mr Roberts stated that, by using the non-contentious retainer letters, there seemed to be a clear self interest for Mr Crossley and the firm in the substance of the claim and the recovery of the monies, damages, costs etc and the amount recovered. Mr Crossley stated *"Yes, I would agree with that. Its one of the permitted ways in which you can be interested in."*
124. Mr Roberts then asked Mr Crossley how this "self interest" related to the interest of the Clients and whether Mr Crossley considered there was a conflict between his own interest and those of his client. Mr Crossley stated:

*“Well I’m always mindful for any potentiality for a conflict but I think we have a common goal which in the short term is to try and maximise the revenues on the settlement agreements. But in doing that, there is also the wider issue of ensuring that we carry out our duties appropriately and we are not just, for example, writing letters threatening litigation that is never going to transpire and I make it very clear to the clients they need to pursue that but ultimately that is the client’s choice and I am mindful of conflict and I am not aware at the moment that any has arisen.” (Appendix 145, page 27)*

125. Mr Crossley went on to confirm that he had not pointed out the potential for self-conflict to his Clients but frequently did so in cases where a self conflict arose and advised the client to seek independent legal advice. He stated:

*“But presently, there doesn’t appear to be any disagreement or disharmony with what we are doing and we are all working together to try and get the best outcome for the client.” (Appendix 145, page 27)*

126. Mr Roberts went on to clarify Mr Crossley’s response: The following is an excerpt from the transcript of the interview on 16 February 2010 (Appendix 145, page 27-28):

IR Ok so just to clarify that you agree that you obviously have an interest in the outcome of what happens, receiving the income and maximising that as a result of the letters of claim but you believe you and your clients have a common goal and for that reason you don’t think there is any particular conflict?

AC No, because if the revenue goes up their net revenue goes up and ours would proportionately go up as well so I don’t see a conflict, prima facie I don’t see a conflict there. There is a potential for a conflict but I don’t see one but if I was alerted to one, if the clients needs or specific aspirations changed and moved away for example, from revenue generation to outright eradication of infringement of its copyright, I would switch to a kind of a standard retainer basis but at the moment that isn’t the case.

IR I suppose I see what you are saying on one level, yes you do have a common goal but on another level you obviously want to recover as much money as possible, they want to recover as much money as possible so, on a different level do you agree...?

AC There is always the potential for a conflict but I have not identified one existing in client that I have at present. But I am live to that issue.

127. It is noted from the table provided at paragraph 67 above that in each of the retainers for non-contentious work, ACS:Law and Mr Crossley received the largest portion of the “Net Recoveries”. The only exception to this was in the retainer with Digiprotect who received fifty percent of the “Net Recoveries”.

128. Mr Roberts also asked Mr Crossley whether he considered there was a potential for conflict as the “Net Recoveries” were being shared three ways between his firm, the Client and the Monitoring Company. Mr Crossley responded:

*“Again, I come back to the point that there is a common goal and there are obviously underlying that, obligations that the data is credible, accurate and there is accuracy to what’s being done and we ensure that that takes place by having experts undertake rigorous analysis of the processes invoked by the data supplier concerned. So, to that extent, the only area of potential conflict would be if the data supplier was, if you like, off reservation just running up data to generate revenue but that in itself would be self defeating because it’s the quality of the data and the accuracy that makes this system work properly and there would be no justification or benefit in them producing inaccurate data. It would be self defeating and in terms of conflict there are three people pulling elements of revenue from what’s generated but its pre-determined as to what that percentage is so again, I don’t have any immediate concerns that there is an existing or apparent conflict because of the agreement.” (Appendix 145, page 28)*

Mr Crossley continued:

*“Sometimes the, I mean in the case of DigiProtect its actually a sister company of theirs, DigiRights, that provides the data and so we really are very much behind the line in relation to the data supplier because the data supplier supplies the information to their client. The Media C.A.T. system is slightly different in that we have effectively introduced the data supplier to Media C.A.T. and it supplies the data generated from Media C.A.T.’s clients ostensibly to Media C.A.T. but we deal with all of that, we try to operate if you like a one stop shop and so the way that works is that we collect a global fee so there is actually only a 3 way split between the copyright owner, Media C.A.T. as the kind of collection society and us and then underneath that we pay to the data supplier a percentage he invoices us based on that percentage of recoveries.” (Appendix 145, page 28-29)*

#### x) Experts Reports

129. During the investigation, Mr Crossley provided Mr Roberts with two experts’ reports that had been obtained in relation to the monitoring processes adopted by the monitoring companies.

130. The first report is the report of Clem Vogler, Director of Ad Litem Computer Consultants, dated 9 September 2008 (**Appendix 41**). This report was obtained by Davenport Lyons.

According to the report Mr Vogler’s instructions were to:

- examine the “File Sharing Monitor” software programme (The Monitor) produced by Logistep;
- use the Monitor to download files made available for sharing on the internet using a file sharing application;

- assess to what extent the Monitor is able to identify the source of such files and the time and date at which they were downloaded; and
  - list the types of data that are stored during the monitoring process.
131. The Report of Mr Vogler supports the monitoring methods used by Logistep.
132. The second report is a report by an American expert Dr Doug Jacobson, Ph.D, CFCE. In the letter from Mr Roberts dated 14 July 2009 (**Appendix 39**) Mr Crossley was asked to explain what consideration he had given to the practice of “spoofing” i.e. where an individual may deliberately make their internet address look like someone else’s to hide illegal activity.
133. Mr Crossley explained in his letter of 14 August 2009 (**Appendix 40**) that Dr Jacobson’s report explains how P2P networks function. Mr Crossley said he would like to draw specific attention to paragraphs 14 and 15 of the report (**Appendix 42, pages 2 to 3**). As well as explaining how P2P networks work, these paragraphs explain, amongst other things, the difference between decentralised and semi-decentralised networks, and how the “Kazaa” semi-decentralised P2P network works. Mr Crossley states:

*“Our data suppliers identify infringements by a process of direct connection, thereby making spoofing of an IP address in peer to peer file sharing impossible to achieve with the IP address identified by our data suppliers. If an individual uses a fake address, the exchange of data between the sender and recipient of information simply cannot be completed.”*

#### E. Supervision

134. Once a batch of letters had been sent, the firm inevitably received letters, telephone calls or emails from those affected. These would be dealt with by a team of four or five paralegals under the supervision of Adam Glenn and Mr Crossley. The firm operated a triage system whereby letters from alleged infringers were sorted out according to various categories and the paralegals prepared a draft response which was passed to the supervisor (Mr Glenn) for approval before being sent.
135. During an interview on 11 June 2009 Mr Glenn confirmed that the categories used in the triage system were:

- Payment by instalments;
- Sensitive infringers;
- letter unopened;
- letter expresses an outside interest.

136. Mr Glenn said that both Mr Crossley and he reviewed the correspondence sent out by the firm. Mr Glenn said that if he writes the response, Mr Crossley responds or approves the document and vice versa. Mr Glenn said that there is a final check by the administrator to amend the data for sending and then diarise the follow up.

137. During the visit on 11 June 2009 Mr Crossley provided the Investigation Officers with details of the template paragraphs to be used by the firm in their responses (**Appendix 43**). These template paragraphs were prepared by Davenport Lyons. Mr Crossley also provided the firm's various manuals for dealing with the claims which had initially been prepared by Davenport Lyons. The manuals are:

- File –sharing Quality Procedures and Control dated 1 June 2009 (**Appendix 44**)
- File-sharing: A Guide produced by Brian Miller and Kit delaMare of Davenport Lyons (**Appendix 45**).
- Frequently Asked Questions relating to File Sharing ACS Law Public Website dated 1 June 2009 (**Appendix 46**)
- Questions and Answers for Telephone Callers dated 1 June 2009 (**Appendix 47**)
- Responding to Calls and Processing Correspondence dated 1 June 2009 (**Appendix 48**)

138. Mr Glenn confirmed that he had tweaked the supervision manuals and procedures somewhat. He said that he would like to make some more changes but that if it works, why change it?

139. In relation to his supervision of draft responses prepared by the paralegals, Mr Glenn said he was at the moment only seeing the first round of correspondence and wanted to

see the entire bundle. He confirmed that he had remote access to both the Logistep and Digiprotect databases. He confirmed that he is based at home in Liverpool and approved letters remotely, about forty or so replies a day. Mr Glenn said that he intended to come down (to London) every month. He said that one or two of the remote workers were beginning to make mistakes. Initially he had made corrections but he explained that if they go on for too long then it is an issue of retraining them back in the office for one or two days.

140. Mr Roberts asked Mr Glenn if they were using the same letters as Davenport Lyons and getting the same responses. Mr Glenn said that responses were somewhat different in that there was a website "Slyck.com", the official "ACS Law/DL response" site which had a number of precedent replies and they were getting more of those. Mr Glenn confirmed that they are using the standard template letters and phrases but there had been some changes and three more precedent letters had been drafted to cover situations where, for example, they had received a response using a template provided by the Slyck.com forum (See example **Appendix 60**).

141. Mr Glenn also said that he had also added a sub paragraph to the "third party/security letter" (**Appendix 59**) to ask alleged infringers more specifically about routers used by a third party. He said they receive some letters where it is clear the person does not understand what has happened at all. He said they take the principle that they don't respond with the third party/security letter unless the alleged infringers says that they have an unsecured wireless router. Mr Glenn explained that some responses are hinting that this is their defence but without saying so, so he has added an extra paragraph to help the alleged infringer explain what their defences are.

142. Mr Glenn also explained that other changes they had introduced include where a child has been involved. He said that there has to be a balance. He said that at the moment he is leaving it to the paralegals to decide what to do in these cases but he may suggest a child precedent letter.

143. Mr Roberts asked what would happen if a child was involved and could not pay? Mr



Glenn said if the child does not have the ability to pay they say “*let us know and we will consider*”. Mr Glenn said that in effect they are being judge and jury. He stated that they were trying to understand the reality of who is trying to bluff you and who is not.

144. Mr Glenn added that he and Mr Crossley have been discussing ways of softening the terms in the first round of Digiprotect letters as some of the letters related to pornography. He said that he thought this is necessary when dealing with members of the public and that “politeness does not cost”.

145. Mr Glenn agreed that when the Digiprotect letters were sent out, particularly those in relation to pornography, some training would be required as the calls tended to be a bit more aggressive and needed a different approach. He stated that as they have more paralegals the turnaround was much quicker than Davenport Lyons.

#### F. Litigation

146. During the Davenport Lyons investigation it had been established that Davenport Lyons had concluded legal proceedings in relation to five alleged infringers and had obtained summary judgments against the Defendants on behalf of their Client, Topware, in the following matters:

<u>Defendant</u>	<u>Damages</u>	<u>Costs</u>
Karol Stepien	£4322.15	£3268.49
Kevin Purseglove	£951.91	£2826.15
Adam Towarnicki	£7591.44	£2799.11
Valeria Perrez	£1741.95	£2800.49
Izabela Barwinska	£6086.56	£10,000

147. A review of the five summary judgment matters during the Davenport Lyons investigation showed that three of these matters were completely uncontested and two of these matters (Stepien, Purseglove) were challenged by the Defendant after the summary judgment had been made. Davenport Lyons were also pursuing thirteen other claims as

referred to in the letter dated 3 April 2009 from Davenport Lyons to ACS:Law (**Appendix 3**).

148. During the visit on 11 June 2009 Mr Crossley was asked whether his firm intended to pursue litigation claims against those alleged infringers who did not pay up following the letter of claim in the manner of Davenport Lyons. Mr Crossley responded “absolutely”. He said he hoped that they would be authorised to proceed by the Clients as soon as possible and did not want to be seen by anybody, including the SRA, as making idle threats of litigation. Mr Crossley admitted that he would be stretched in two directions once the time came to issue proceedings but he had not really reached that stage yet.

149. Ms Westrop asked when the firm would be ready to conduct litigation. Mr Crossley responded that they would write to alleged infringers three times after the initial twenty-one day period set out in the letter of claim.

150. In an email to Dr Deborah Prince of Which dated 25 May 2009 (**Appendix 50**) Mr Crossley stated:

*“Proceedings will be issued when we are instructed to do so; such a decision is always left to the client. Fundamentally, everyone we write to is at risk of proceedings being issued. That risk will increase significantly in certain circumstances. People who admit their liability but don’t pay, people who do not respond at all, people who deny the claim by providing untrue, inaccurate or conflicting reasons why, people who offer up pre-drafted template responses available on the internet, people who have a series of multiple uploading or matching user name identification as part of our captured data are all at significantly increased risk of proceedings being issues against them. However, no proceedings are issued without every effort being made by us to first try and avoid such action; proceedings being issued is always the act of last resort for our clients.”*

151. In the letter dated 14 July 2009 (**Appendix 39**) Mr Crossley was asked to explain why the retainer letters with the Clients (See Section D above) referred to a minimum of five and up to one hundred test cases being conducted per annum on behalf of each Client and how his firm would deal with these. Mr Crossley was asked whether there would be any liaison with Davenport Lyons in relation to the litigation claims as it was understood that Davenport Lyons would retain the existing litigation claims on behalf of the Clients.

152. In his response dated 14 August 2009 (**Appendix 40**) Mr Crossley stated:

*“We do not believe that 5 – 100 cases would cause difficulty to our firm. IF we decide to*

*pursue these ourselves, we will recruit additional staff with the skills necessary to deal with the cases effectively. We are currently in discussion with several much larger firms regarding the possibility of outsourcing the upcoming litigation work. Our first batch of cases are to be issued this month by ourselves. I have no relationship with Davenport Lyons in relation to any cases that my firm may be instructed to issue. I am not involved in any way with the cases that Davenport Lyons have already issued.”*

153. During the visit to the firm on 22 September 2009 Mrs Venn reviewed three files relating to claims that had been issued by ACS:Law against alleged illegal file sharers. These were:

- Mr Philip Lewis
- Mr Spenser Trow
- Mr Andrew Bentley

154. A copy of the Particulars of Claim filed in Mr Lewis' claim in the Patents County court is attached at **Appendix 51**. The Particulars of Claim issued in the two other proceedings were broadly similar to those issued in respect of Mr Lewis.

155. During the visit to the firm on 16 February 2010 Mr Crossley provided the Investigation Officers with a further update in relation to the three claims. This stated:

- Mr Bentley had offered to pay their offer of £550 plus costs of £1500 to settle the claim and the file was now closed.
- Mr Trow had called to admit liability and had paid £1000 in damages.
- Mr Lewis had first of all admitted liability and then filed a “weak” defence. They would be making an application for summary judgment in relation to this matter.

156. During the visit to the firm on 16 February 2010 Mr Crossley also provided the Investigation Officers with schedule of future claims (**Appendix 52**). This document identified thirty-eight matters which had been chosen as suitable for issuing proceedings. Reasons given for the suitability of litigation included:

- Admissions had been made by the alleged infringer either on an internet forum or otherwise
- There had been a number of instances of alleged infringement in relation to different works (Demetrius Perdicos, Wu Hong).

- Admissions had been made that the internet accountholders child had uploaded the work.
- The individual could be identified from a specific username required to access one of the peer to peer websites (Ian Pratchett, Fabian Brasco).

157. When asked about the number of potential litigation claims during the interview on 16 February 2010 Mr Crossley stated:

*“At the moment I think you have the figures, about 60 odd. They are in two sections. There are about I believe 60 odd cases that we have identified that we have recommended we issue against. But then there is another batch of cases and it is around about 25 to 30 that are not at all copyright claims but they are what we have recommended to the clients that we issue and they are instalment plans that have been established and set up and then not carried through. They are effectively debt actions because a compromise has been agreed as a forbearance to sue and a fixed amount of money has been agreed to be paid under an instalment plan and we have about 25/30 people who have not honoured those agreements. We would pursue those on the basis of failure to honour those. I think we have one or two bounced cheques as well. They are just straight forward debt action.” (Appendix 145, page 29)*

158. Mr Crossley was asked how the “sixty odd” potential claims had been identified. He responded:

*“...sometimes they are admissions and sometimes they are observations elsewhere or inconsistent remarks and so on. Or we have evidence of a log in to the file sharing network which matches the name of the account holder. Or we find the log in name matches a name that they use on forums and we have been able to identify them that way.” (Appendix 145, page 30)*

159. Mr Crossley went on to confirm that in two of the three cases where proceedings had been issued, the defendant had admitted liability. Mr Crossley stated that the fact that two of the defendants were prolific on the discussion websites such as Slyck.com was not a factor in taking action against them other than that they had made admissions of liability on the web forums.

160. Mr Crossley was also asked how damages would be calculated in any future litigation claims. He replied that they were limiting damages to £3000. He said that generically the spread of seeded copyright is very rapid and they show quite a bit of evidence to a court that file sharing is extremely damaging. He said:

*“...we only need to look at 2 weeks ago when EMI wrote down the value of its catalogue by 35% which caused it to suffer £1m loss, which they blame squarely on file sharing, but added to that there are algorithms and calculations to be made to show how quickly the*

*file shared product can spread and so we actually say that if one wanted to be completely thorough and rigorous about the damages it would be probably very extensive and the damages would be very very high. We actually set the bar very low in terms of a limit of £3000 and I think we can comfortably and easily achieve that level.”*  
**(Appendix 145, page 31)**

161. Mr Crossley went on to state that they are making a generic claim for damages but the actual basis for calculating damages had not yet been finalised as they had not reached that stage yet. He said they would probably take Counsel's opinion on how best to deal with the damages point. Mr Crossley was asked why damages were limited to £3000. The following is an excerpt from the transcript of the interview on 16 February 2010  
**(Appendix 145, page 32):**

AC It was ultimately the client's decision on advice by me because at £3000 the issue fee is £85 and it was a meritable sum. If we are issuing cases in bulk which we are working towards, £85 a time is going to be manageable but if we are then going up to £150 - £200 issue for either £5000/£10,000 claim or even £1700 or so for an unliquidated claim, it becomes unsustainable and so we are trying to balance the potential size of a claim to make it worthwhile pursuing because costs will follow because it's a speciality court with a level of compromise to incentivise people to..

IR So are you hoping that people will pay the £3000 presumably rather than a claim of £10,000?

AC No again, ultimately we'll do what the client tells us to do but if we issue a claim for £3000 we would at any stage, in any proceedings, rather settle the case than take it to court but that is why we try and make the compromise that much lower than the likely claim in court but for the foreseeable future, the cases are going to be run at a £3000 limit on a copyright infringed so that could be multiplied up with a larger claim so that we have as I mentioned, several people with 10/12 copyrights, 20 copyrights even under their belt and we would multiply up the damages sought in cases of that nature.

162. A key factor in the calculation of damages, based upon what Mr Crossley has stated, is likely to be the number of times that a Work has been made available via a P2P network. However, Mr Crossley has provided no direct evidence of the number of times that an uploaded Work has actually been shared with other users of a P2P network. It is

understood that the monitoring process is unable to identify this figure.

163. In an email dated 28 April 2010 Mr Crossley stated:

*“...we are preparing to issue a significant number [of proceedings] on a rolling basis...I am actively seeking to recruit a litigator. Contrary to popular public criticism it has always been and remains my intention to issue claims where all avenues falling short of litigation have failed. However, I consider each case carefully on its merits and will be serving a pre action letter and notification of a conditional fee agreement prior to each case being issued. It was my intention to enlist the help of a larger firm to act as my agents to issue claims on my behalf but such negotiations did not result in any concluded agreement...our aim is to reach at least 500 cases this year.... I have standing instructions from Digiprotect and Media C.A.T to do this. I have no present instructions from Topware, Reality Pump or Techland over the further issue of proceedings but this is also up for further consideration.*

## Part II: Analysis and concerns

### G. Concerns raised by Which?

164. Following Mr Crossley's letter of 13 May 2009 (**Appendix 2**), a decision was made by the SRA to conduct an inspection into the firm. Notification of the inspection was sent to Mr Crossley on 20 May 2009. On 26 May 2009 Mr Crossley called Mr Roberts and, amongst other things, stated that he had had a meeting with Dr Deborah Prince, the Head of Legal at Which?, the week after he had set up the file sharing department and this had resolved the concerns raised by Which? This prompted Mr Roberts to email Dr Prince on 26 May 2009 and ask her to confirm what was discussed at the meeting and whether her concerns were adequately resolved. In her response date 27 May 2009 (**Appendix 53**) Dr Prince stated:

*It is correct that Jaclyn Clarabut, from Computing Which?, and I met with Mr Crossley on 18th May 2009. It is incorrect, however, to say that all of our concerns were addressed at that meeting.*

*In addition to the large number of complaints arising from the first wave of demand letters that were sent out by ACS, we still have concerns about the basis of the complaint being made by ACS on behalf of their clients.*

*For example, we were advised by Mr Crossley that:*

- he was not permitted to disclose details of the technology that his clients use to identify illegal file sharing. As we have said on many occasions, without full details of this technology it is impossible for consumers to understand and challenge the method used to link their internet connection with illegal file sharing. Without this information, it is simply the case that unchallenged and unexplained allegations are being made against consumers.*
- his view is that, once put on notice that an individual's internet connection has been used to illegally file share, that individual owes a duty of care to all copyright owners in the event that their internet connection is used again for illegal file sharing. We believe that this is incorrect in law and is not a tenable basis on which to pursue the payment of damages.*

*It is also important to bear in mind that, to date, we are only aware of ACS sending out demand letters. It remains to be seen how ACS will handle cases where consumers claim that they have no knowledge of the alleged illegal activity. Mr Crossley stated that all cases would be reviewed individually. However, it remains to be seen what criteria will be used, if any, to decide not to proceed in a particular case and how that will be communicated to the individual. Mr Crossley refused to advise us the circumstances in which a case will be dropped.*

*Mr Crossley stated that the correspondence his firm intends to use with these cases are based on precedents which are so comprehensive that he believes they are sufficient to*

*cover any set of circumstances. We do not know if this is true as we have not seen these precedents. But the demand letters that we have seen are pretty much identical to those sent out by Davenport Lyons. Furthermore, we are aware that several thousands of letters have been dispatched recently and more are due to be sent soon, so, we will be keen to monitor how ACS's small team of lawyers and paralegals deal with individual denials using these precedents.*

*We have asked our members to contact us if they receive a demand letter from ACS and they are innocent of the allegations that are made against them. In this way we hope to monitor how ACS deals with similar cases to those we have seen with Davenport Lyons.*

*It is therefore simply wrong to say that we have no concerns about ACS's activities. The fact is we will be monitoring their pursuit of these cases to the best of our ability."*

165. The first visit to the firm took place on 11 June 2009. Following the visit Mr Crossley wrote to Mr Roberts enclosing a copy of a letter that he had sent to Dr Prince on 12 June 2009 (**Appendix 54**). The letter to Dr Prince included the text of an email from Mr Crossley to Dr Prince dated 25 May 2009. This email included the following points:

- Which? should contact Richard Scheider of Logistep for an explanation of how the data capture works;
- He was willing to send Which? a copy of an independent expert's report which was presented to the court in the Norwich Pharmacal applications to show that the data capture was accurate. He said that disclosure was subject to his Client's permission.

166. The email to Dr Prince also outlined the process adopted by his firm in relation to the claims. It stated:

- All telephone calls received are dealt with on an individual basis.
- All letters received are responded to individually by a team of paralegals using a *"multitude of carefully thought out and precisely worded responses to each and every argument raised or observation made."*
- Letters received that are complex requiring additional attention are initially passed to the senior supervisor who considers the most appropriate response and passes his draft replies to Mr Crossley or *"another solicitor"* for final approval. If required, Mr Crossley as the solicitor with overall responsibility will consider the letters and reply



personally to the letter.

- Mr Crossley reads all letters addressed to him personally and all letters received from solicitors (with the exception of those received from Lawdit solicitors).

167. In addition to the email from Dr Prince dated 27 May 2009, Which? have provided the SRA with details of thirty complaints that they had received from individual recipients of a letter of claim. Details of these thirty complaints can be found in the attached spreadsheet at **Appendix 55**. The issues surrounding these complaints are similar to the three hundred and twenty-six complaints received in the SRA at the time of writing this report. These issues are considered at Sections H and I below.

#### H. Examples of individual correspondence

168. During the visit to the firm on 11 June 2009 Mr Roberts was provided with an example letter of claim dated 5 May 2009 in relation to a Mr Cameron Wilkie (**Appendix 56**). Mr Roberts was also provided with various examples of correspondence received by the firm from individuals denying the claim and the various responses sent out by the firm. These included:

- A bare denial and response (**Appendix 58**)
- A “sensitive client letter” response (**Appendix 58**)
- A third party response where the individual alleged a third party was responsible for the breach of copyright (**Appendix 59**). This included a document entitled “*Explanatory Notes on Wireless Security and Related Devices Attachable to a Network Wireless Security.*” (**Appendix 59, pages 4 to 6**)

169. As stated at paragraph 12 above the letters generated by the firm have been the subject of wide discussion on the internet with a number of forums, such as Slyck.com, having sections entirely devoted to discussion on the letters of claim sent out by the firm in which individuals can comment. In particular, Slyck.com had prepared a template

response to the letter of claim that was available for use by alleged infringers. The firm therefore felt it necessary to draft a generic response to be used where an alleged infringer had used this template response. An example of the template letter and the firm's response to the template letter is attached at **Appendix 60**.

i) Examples of complaints to the SRA

170. As stated at paragraph 11 above, the SRA has received three hundred and twenty-six complaints about the firm in relation to file sharing matters at the time of writing this report. Complaints received in writing were allocated a conduct "CDT" file reference and referred to the SRAs Conduct Investigation Unit. A letter was sent to the informant (**Appendix 61**) stating that their details would be passed to the Investigation Officer [Mr Roberts] who would consider their complaint as part of his investigation. The informant was advised that they would be notified of the outcome of the investigation. The file was then closed. The Caseworker in the Conduct Investigation Unit would then complete a proforma, such as the one attached at **Appendix 62** with basic information about the complaint. The proforma was then sent to Mr Roberts who was maintaining a schedule of complaints to the SRA and the details of the complaint were then entered on the schedule.
171. Complaints that were received in the SRAs Contact Centre by telephone were noted down using a proforma attached at **Appendix 62**. These proformas were completed and passed to Mr Roberts so that the details could be entered on the Schedule of complaints. The Schedule of Complaints is attached at **Appendix 1**.
172. Although Mr Roberts did not examine all of these complaints individually, he did examine a sample of these for this report. On 26 March 2010 Mr Crossley was asked to provide "*all documentation, including telephone attendance notes, correspondence and internal documents*" relating to twenty-two individuals who had complained to Which? or the SRA. A summary of six of the files reviewed by Mr Roberts is as follows:

Mrs Linda Breach

173. On 3 November 2009, Des Hudson, Chief Executive of the Law Society received a letter from Geoffrey Hoon MP about his constituent Dr Mark Breach (**Appendix 63**). The letter stated:

*“Dr Breach’s wife appears to have been the victim of a “scam” being operated by a firm of solicitors known as ACS Law... You will see that the letters are threatening in tone and clearly designed to alarm and frighten recipients into compliance.”*

174. On 8 June 2009 (**Appendix 64**) ACS:Law had written to Mrs Breach alleging that she had made the work entitled “Raw Luck” available via a P2P file sharing network. A more detailed analysis of the letters of claim is attached at section (ii), paragraphs 240 to 269 below. The letter of claim asked Mrs Breach to pay “compensation” of £500 plus the ISPs administration costs of £0.02.

175. The letter from Geoffrey Hoon MP enclosed a letter from Mrs Breach to ACS:Law dated 11 June 2009 (**Appendix 65**) which states:

*“I am today in receipt of your letter dated 8 June 2009 in which you allege that I have infringed the copyright of your client by downloading and sharing a file called “Eurocreme – Raw Luck.avi” through the mechanism of Bittorrent. My husband and I have no knowledge of this title or file...my investigations via Google suggest that this is an article of homosexual pornography. We have never downloaded films of any kind, pornographic or otherwise and would not know how to do so.”*

The letter continues:

*“I have to state that we, who are the only occupiers at this address and both in our 60s, are thoroughly shocked and offended, not only by the allegation which we both vehemently deny, but also by the bullying and threatening manner in which it is being pursued.”*

The letter asked for an apology from the firm.

176. On 29 June 2009 the firm wrote to Mrs Breach a letter (**Appendix 66**) which states:

*“I wish to address your suggestion that the letter written to you was “bullying and threatening”. It is unfortunate that you feel that the letter was written in that tone; it was certainly not intended to have that effect. However, we are issuing a Letter of Claim to people holding an internet connection where our client’s data supplier has captured information indicating an alleged infringement of copyright. Consequently it is necessary to write a letter in a certain way outlining not only the detail of the work identified, but also the possible consequences and ultimate actions that could be taken in the event that the*

*matter were to proceed to litigation.”*

The letter continued:

*“In the circumstances, the matter must be regarded as still live, our enquiries are continuing and you will be hearing from our file sharing team separately. On this basis I do not think an apology would be an appropriate response. It is regretted that you have suffered any distress from the receipt of our letter, but I am merely acting on instructions following the receipt of specific data that relates to your IP address.”*

177. The firm then wrote to Mrs Breach on 2 September 2009 (**Appendix 67**). This letter stated:

*“In reference to previous correspondence written by us, or on our client’s behalf, we act for Digiprotect regarding infringement of copyright as referred to above, which included an offer to compromise our client’s claim. To date we have received neither payment nor any response from you.”*

It continued:

*“Accordingly, unless we receive payment from you in the amount referred to below within **seven days** from the date of receipt by you of this letter in compromise of our client’s claim in the sum originally requested, you are at real and immediate risk of proceedings being issued against you without further reference or recourse to you...*

*We look forward to receiving payment from you within the time period stipulated above, failing which we reserve the right to issue proceedings without any further notice or warning.”*

178. The letter from Geoffrey Hoon MP enclosed a letter from Mrs Breach to ACS:Law dated 14 September 2009 (**Appendix 68**) which stated:

*“I am today, in receipt of your letter dated 2 September 2009. In which you state that you have received no response from me to your earlier correspondence. Your statement is not true. I wrote in response to your first letter of 8 June 2009 on 11 June 2009 stating my position. You acknowledged receipt of that letter with your reply of 29 June 2009.”*

179. The remainder of this letter followed the format of a template letter which was available to alleged infringers from the Slyck.com internet forum. This prompted a further letter from the firm dated 28 September 2009 (**Appendix 69**) which stated that:

*“We note that the response you have given matches a template response that is available on the internet. With this in mind we are disinclined to accept at face value what you have said, as it is simply a generic response...The open offer of compromise made in our original letter to you is hereby withdrawn. We have instructions from our client to pursue this matter against your further.”*

The letter included a further letter entitled “Without prejudice saves as to costs – Notice of Offer to Settle – Part 36” (**Appendix 70**). This letter contained an offer of settlement

under Part 36 Civil Procedure Rules 1998. The offer was for £600 to be accepted within 21 days of service of the notice. There was no explanation of why compensation had increased from £500 to £600.

180. No further correspondence has been provided by either the firm or Mrs Breach in relation to this matter and it is understood the claim is still being pursued.

Mr J Whittle

181. On 21 September 2009 the SRA received a letter from Mr J Whittle dated 15 September 2009 (**Appendix 71**). This letter stated:

*“I am writing to complain about ACS:Law and their terrible conduct. They have recently sent me a letter dated 25 June 2009 (copy enclosed), incorrectly accusing me of infringing on the copyright of a client of theirs, Scooter – Jumping All Over the World (Digiprotect Gesellschaft zum Schutze Digitale Median [sic] GmbH (Digiprotect) and initially demanding a sum of £500-00 or else they would take me to court and suggesting that things could turn much worse. I am innocent of these allegations and have issued a standard internet template letter of denial (copy enclosed) for reasons explained in my second letter to ACS:Law.”*

The letter continued:

*“I received a second letter dated 3 August 2009 stating that they are disinclined to accept my letter of denial as it was a template letter taken from the internet, but the second part of their letter offered to settle at £425-00 (Notice of offer to settle – part 36) (copy enclosed). I responded on 21 August 2009 (copy enclosed) pointing out my reasons for a template letter and response times as my wife and I had just completed many months of complete palliative care in our home for my mother-in-law who passed away on the very day the second letter arrived. I again denied the infringement of the said copyright...I explained to ACS:Law that I had spoken with an expert in IT, who assured me that an IP address is not positive proof at all of a computer's use”*

*I received a third letter (copy enclosed) dated 2 September 2009 where ACS:Law stated that “to date, we have received neither payment nor any response from you” and that I should now pay the intermediate interim payment of £1000-00 with further damages to be awarded by the court...*

*I find that all ACS:Laws letters bullying and harassing to put it mildly and the third letter grossly insulting. I have tried to prove my innocence repeatedly but all my information in my correspondence is being ignored. My wife, who is still suffering very badly at the loss of her mother is very distraught at what is going on and I ask you to intervene now on behalf of myself and secondly for all the other innocent people who write to internet forums daily with similar stories. ACS:Law have decided to be my accuser, judge and juror and that is surely very wrong.”*

182. The letters provided by Mr Whittle included the letter of claim dated 25 June 2009 which asked him to pay compensation of £500 (**Appendix 72**) and the firm's letter of 3 August 2009 (**Appendix 74**) indicating that the “offer of compromise” had been withdrawn as the

earlier response of Mr Whittle resembled a template response. It also included Mr Whittle's response to the firm's letter of 3 August 2009 dated 21 August 2009 (**Appendix 75**) which stated:

*"Firstly let me apologise for the lateness of my reply but your letter arrived at a most unfortunate time (6 August 2009) approximately one hour after my mother-in-law passed away in our home after a prolonged period of illness with Cancer. As you can imagine this has caused a great deal of distress in our home, especially for my wife."*

The letter continued:

*"I have subsequently had chance to gather my thoughts and have made a study of an IP address on the internet. My current IP address shows me in three locations, Birmingham, Warwickshire and Anglesey. I find this confusing as it can in my eyes lead to the wrong person being targeted as infringing copyright using the internet.*

*I work for a large firm that is employed by the Ministry of Defence which uses both its own intranet and the internet and I have consulted with their very qualified technicians. They assure me that an IP address is no sure way of identifying who has down/uploaded music/games films etc as it is not sufficiently accurate. I note that the internet is full of other individuals who are in a similar position to myself, who also deny the alleged offence and that they to [sic] are being incorrectly accused...I have offered at your expense, to grant you access to my computers to prove that I have not infringed the alleged copyright nor possess any required software. I should also point out that until I received your letter I had never heard of Scooter (Jumping All Over the World) and have been advised by others that it most definitely would not be music to my very conservative taste. Your correspondence has caused my wife and I a great deal of stress during an already difficult period in our lives. My wife is currently on prescribed medication following the loss of her mother and I have a long and well established history of hypertension for which I am also on medication."*

183. The firm responded to this letter on 2 September 2009 (**Appendix 76**). This was a standard response which said that the firm had received neither payment nor any response from Mr Whittle, despite his earlier letter which was acknowledged by the firm on 3 August 2009. The letter of 2 September 2009 stated:

*"Accordingly, unless we receive payment from you in the amount referred to below within **seven days** from the date of receipt by you of this letter in compromise of our client's claim in the sum originally requested, you are at real and immediate risk of proceedings being issued against you without further reference or recourse to you."*

184. Mr Whittle responded to this letter on 9 September 2009 (**Appendix 77**). Mr Whittle pointed out that the firm had replied to his original letter and all the correspondence sent to the firm had been sent signed for delivery.

185. The firm then wrote to Mr Whittle on 26 November 2009 asking him to pay a settlement

of £350 under Part 36 CPR 1998 (**Appendix 78**).

186. Mr Whittle's complaint was one of the complaints discussed with Mr Crossley during the interview on 16 February 2010. When asked about the complaint Mr Crossley stated:

*"Well I can't predict when someone is going to die and I can hardly be criticised for that but I think lets perhaps ..... what this letter says on the 2 September is not that we haven't received a response from them but we haven't received an adequate or satisfactory response from them but I would need to check this individually because it looks like that may have been dealt with incorrectly because all of these letters .. we have a system whereby all of the letters that are received are then responded to and they are then prepared and reviewed before they are sent out by Adam [Glenn]. Now, it is conceivable that could have slipped through the net and I would like to review that. I want to look at that if I may..."* (**Appendix 145, page 12**)

187. After the lunch break during the interview Mr Crossley returned and stated:

*"I have looked at that now and a couple of things arise from that. First, I'd like to say having read that letter in detail from Mr Whittle, on reflection this claim should have been dropped when his letter of 21 August was sent. That letter of 21 August was received, as you can see by the date stamp on it, on 25 August. We obviously get a lot of letters and it was uploaded onto our system on 1 September. By that time, it had already been designated to send a final letter in the terms that we did on 2 September and so this letter was prepared on 1 September. Coincidentally, the 1 September was the same day that the letter of 25 August was uploaded onto the system and so wires got crossed. There was a subsequent letter on 9 September and that has yet to be effectively responded to other than the fact that the final letter was sent and so at the moment it sits slightly in limbo because its one that would ordinarily be considered for potential litigation. Having said that and having looked at this, this is not a case I wish to proceed with further and I am going to write to Mr Whittle and I am going to apologise for the timing of this letter and make the explanation. Having said that, it was an appropriate letter to send at the time that it was prepared and we hadn't uploaded this letter onto the system. We get a lot of letters that take some time to do that."* (**Appendix 145, page 26**)

Mr Crossley continued:

*"We have actually now changed our procedure. Mr Whittle's letter I might add, this I suppose you could describe it as a final warning or final demand letter, was within the first batch of final letters that we ever sent out and shortly after that, we changed the wording in those letters because what that letter says that I was not happy with, was "to date we have received neither payment nor any response from you". Now it quickly became apparent to me that that could cause me difficulty when somebody had responded but in appropriate circumstances, we would send a letter now and we did from this letter was then drafted in November. This is the standard form letter for this that runs now."* (**Appendix 145, page 26**)

188. Following the interview on 16 February 2010 Mr Crossley wrote to Mr Whittle a letter attached at **Appendix 79**. This letter stated that the matter had been reviewed following Mr Whittle's complaint to the SRA and had been closed. It explained that Mr Whittle's letter of 21 August 2009 had been received on 25 August 2009 but not uploaded onto

their system until 1 September 2009 due to the volume of letters received at that time. It stated that the letter dated 2 September 2009 was prepared on 1<sup>st</sup> September 2009 and was automatically generated. Mr Crossley also explained that the matter had been awaiting review since Mr Whittle's letter of 9 September 2009 because he continued to deny liability. It explained that the case would have been dropped "in any event" from the information Mr Whittle had provided. However, Mr Crossley went on to state that he remained confident in the processes used to capture instances of copyright infringement and explained why he considered the inspection of PCs, as Mr Whittle had suggested, a disproportionate expense.

#### Mr Roger Holgate

189. Mr Holgate complained to the SRA on 21 September 2009 (**Appendix 80**). Amongst other things Mr Holgate stated:

*"You will note that, in Mr Crossley's letter of 2<sup>nd</sup> September he states that he had received no response from me, which was not true. I had emailed his office to advise him that I was going to contact my ISP in order to try to assess the likelihood of the information they had given being faulty. I also informed him that I would contact him upon conclusion of my enquiries."*

Mr Holgate continued:

*"I telephone [sic] the ISP provider and was advised that there were indeed technical factors which might call into question the reliability of the information given. I also emailed the same organisation in order to acquire a written statement to this effect, but they were reluctant to put such a thing in writing.*

*It is this dubiety regarding the reliability of evidence that has caused me to consider paying the £500.07 demanded, as I cannot risk the possibility that a Court might find that the evidence provided is sufficient to find against me. As Mr Crossley states, I would be liable for an interim payment of £1000 together with damages and costs. This is extremely worrying for someone in my financial position.*

*As previously stated, I cannot afford to take legal advice on my situation and, what would be judged "robust" language by another solicitor, comes across as very threatening to a lay person. I have contacted my local Citizen's Advice Bureau, but they were unable to provide me with the necessary level of expertise in this area.*

*I have been extremely distressed and worried by the affair; so much so, that I wrote to Mr Crossley, without prejudice, asking if he would accept a smaller compensation fee. In order to be finished with the whole matter. Again, I received no response. Now, as I say I feel that I must pay up the initial amount demanded, rather than risk the possible consequences of court action. As you can see Mr Crossley's deadline has already passed."*



190. Mr Crossley provided the Investigation Officer with copies of correspondence between his firm and Mr Holgate. This included the letter of claim dated 19 June 2009 (**Appendix 81**) which stated that Mr Holgate had made the Work “Jumping All Over the World” by Scooter available to a P2P network in May 2008. The letter of claim asked Mr Holgate to pay £500 compensation and £0.07 towards the ISPs administration costs.
191. Mr Holgate responded to the letter of claim on 10 July 2009 (**Appendix 82**). He stated that he had now contacted his ISP in writing and would contact the firm again once he had received a response.
192. On 2 September 2009 (**Appendix 83**) the firm wrote a standard letter to Mr Holgate stating that they had received neither payment nor response from Mr Holgate. The letter stated:
- “Accordingly, unless we receive payment from you in the amount referred to below within **seven days** from the date of receipt by you of this letter of compromise of our client’s claim in the sum originally requested, you are at real and immediate risk of proceedings being issued against you”*
- “...if it becomes necessary to issue proceedings against you, we shall be applying for judgment and shall seek an award of damages in an amount to be determined by the Court, together with an order for an interim payment of £1,000.”*
193. On 4 September 2009 Mr Holgate emailed the firm (**Appendix 84**) to explain that he had responded to the letter of claim. He explained that he had now contacted The Law Society and was awaiting their response before considering his next course of action. Mr Holgate asked if the seven day deadline could therefore be extended. This generated a standard response from the firm (**Appendix 84**).
194. On 7 September 2009 (**Appendix 84**) Mr Holgate emailed the firm again explaining he had now contacted his ISP and The Law Society about the matter. The email stated that the ISP could not categorically state that the evidence would not be upheld in a court of law. The Law Society had also advised him that court action could not be ruled out. He advised he was not in a position to seek legal advice as £500 was a great deal of money to him. He asked whether the firm would consider a lower amount. He received no reply to this email so sent a chasing email on 14 September 2009 (**Appendix 84**).

195. Mr Holgate then forwarded a cheque to the firm for £500.07 on 21 September 2009. This was acknowledged by the firm on 30 September 2009 (**Appendix 85**) in a letter which confirmed that no further action would be taken against Mr Holgate.

196. On 6 October 2009 (**Appendix 84**) Mr Holgate contacted the firm and the SRA via email. He stated:

*“As stated in my last correspondence, I was aware that your deadline was close and, as intimated in my contact with the Law Society, I could not afford to run the risk of being taken to court and found liable for a large sum in damages, should the jury find that the available evidence was sufficient to find me guilty...consequently as you are no doubt aware, I forwarded a cheque in the sum of £500.07 on 21<sup>st</sup> September, which was acknowledged on 30 September.”*

197. The email advised that the SRA was now looking into the matter.

#### Carol Spindler

198. Mrs Spindler complained to the SRA in February 2010 (**Appendix 86**). She was one of the cases transferred from Davenport Lyons to ACS:Law in May 2009. Mr Crossley was asked to provide copies of all documents held by him in relation to this matter which were provided by him on 6 April 2010.

199. Davenport Lyons had written a letter of claim dated 17 November 2008 to Mrs Spindler (**Appendix 87**) alleging that she had made the Work “Jumping All Over the World” by Scooter available over a P2P network in May 2008. The letter of claim asked for £500 compensation and the ISPs administration costs of £8.86.

200. Mrs Spindler responded to the letter of claim on 30 November 2008 (**Appendix 88**). She stated *“Unfortunately I am unable to help you with this as I have never downloaded or uploaded the file in question.”*

201. On 26 February 2009 Davenport Lyons wrote a further letter to Mrs Spindler (**Appendix 89**) explaining that the evidence showed the work had been made available using her internet connection. It stated that unless they received payment of £508.86 within fourteen days they would have no alternative but to consult their client with a view to commencing legal proceedings against her.

202. Mrs Spindler responded to this letter on 2 March 2009 (**Appendix 90**). She stated:

*"I confirm that I have not downloaded or uploaded the file in question and I have never granted permission for anyone to use the network to do so. I have always made every effort to secure the network. I wrote to my ISP (Plusnet) and they have written back to confirm that they are happy that I have done everything I can to secure my network. This complies fully with their terms and conditions of service."*

203. The next document provided by Mr Crossley was an annotated copy of a letter from Davenport Lyons dated 27 March 2009 (**Appendix 91**). This asked various questions about Mrs Spindler's wireless network. It also contained explanatory notes about wireless security.
204. Mrs Spindler responded to this letter on 4 April 2009 (**Appendix 92**). This letter denied she had made a statement that she had a secured wireless network and other statements contained in the letter of 27 March 2009.
205. Davenport Lyons then wrote again to Mrs Spindler on 24 April 2009 (**Appendix 93**). This letter asked Mrs Spindler to provide Davenport Lyons with further information about her internet security.
206. Mrs Spindler responded to this letter on 29 April 2009 (**Appendix 94**). She stated that she was wary of releasing any information about her security as this could compromise the security. She confirmed that she had now increased her security and purchased a new router which had been password protected. She continued:
- "I am not a computer expert and I have no way to determine who could have used my connection, **or to verify if indeed it was used at all** for this infringement. I have already informed you that I have asked my ISP if the infringer could be traced and beyond that I have no means or experience to investigate further. I feel exasperated that I am still accused of this infringement after all the efforts I have made and I sincerely hope that this information and declaration above is now enough to satisfy."*
207. ACS:Law then wrote to Mrs Spindler in an undated letter attached at **Appendix 95**. This letter is headed "draft" but must have been sent as Mrs Spindler responded to the letter from ACS:Law on 6 June 2009 (**Appendix 96**).
208. The undated "draft" letter from ACS:Law stated that they had not received a satisfactory explanation as to how the infringement may have occurred. There was no explanation that ACS:Law had taken over the matter and were acting on behalf of Digiprotect. The letter stated:

*“Our client’s claim against you has been clearly set out in previous correspondence and since you have failed to accept our client’s settlement offer, or provide a satisfactory explanation as to why you are not liable for our client’s claim, we are currently taking our client’s instructions with a view to issuing proceedings against you.*

*Should our client proceed, the claim will include a claim for damages and we will be asking the court to award a sum in excess of the settlement figure that our client was prepared to accept. We will also be asking the court to make an award of costs against you in the extent [sic] the claim is successful....the terms and conditions of your contract with your ISP will normally put a positive obligation on you to ensure the security of your system. ”*

209. It is noted that Mrs Spindler had confirmed in correspondence that she had checked with her ISP who confirmed that her security complied with their terms and conditions.

210. Mrs Spindler responded to this letter on 6 June 2009 (**Appendix 96**). She confirmed that she had received no notification that the claim had been transferred from Davenport Lyons. The letter repeated her previous assertions made in the correspondence with Davenport Lyons. It also asked ACS:Law to provide her with full documentary evidence of:

- The complete “Forensic Computer Analysts Report”
- The information regarding the “monitoring program”, including all documentation of the regulatory body that independently verifies it.
- The Client’s copyright paperwork relating to the “Works”.
- A full breakdown of the “Settlement” figure.

211. The next correspondence provided by ACS:Law was a standard letter dated 2 September 2009 (**Appendix 97**) stating *“To date, we have received neither payment nor any response from you.”* This was despite the letters of denial sent to Davenport Lyons and ACS:Law, copies of which were in the firm’s possession. The letter also stated:

*““Accordingly, unless we receive payment from you in the amount referred to below within **seven days** from the date of receipt by you of this letter of compromise of our client’s claim in the sum originally requested, you are at real and immediate risk of proceedings being issued against you”*

*“...if it becomes necessary to issue proceedings against you, we shall be applying for judgment and shall seek an award of damages in an amount to be determined by the Court, together with an order for an interim payment of £1,000.”*

212. Mrs Spindler responded to this letter by email on 11 September 2009 (**Appendix 98**).

She stated:

*"I am writing this email to verify to you that I have responded to your last letter in which you state I have not responded to you at all. I have posted a letter by recorded delivery, but it may well be delayed by the current postal strikes..."*

She continues:

*"Firstly I must say that I find your approach with me has been arrogant and uninformed. You have not introduced your company nor explained how you have come to be in the procession [sic] of this case. Furthermore you appear to have not read my previous correspondence in which I have tried to explain my position."*

Mrs Spindler again repeated the information she had provided to both Davenport Lyons and ACS:Law. She finished by stating:

*"If your client does wish to proceed to the courts with this claim then please let them know that I will defend my innocence to the full and make a counterclaim to recover any costs incurred."*

213. ACS:Law then wrote to Mrs Spindler on 5 January 2010 (**Appendix 99**) explaining that they acted for Digiprotect and the claim had been transferred to them from Davenport

Lyons. The letter stated:

*"The original correspondence sent to you included an offer to compromise our client's claim. To date, we have received neither a satisfactory response, payment, nor an adequate explanation as to why you are not liable for the acts of copyright infringement alleged against you. Additionally you have failed to respond adequately to our questions addressed to you in our letter dated 24 April 2009...the open offer of compromise made in our original letter to you is hereby withdrawn. We have instructions from our client to pursue this matter against you further."*

214. The letter of 5 January contained a settlement offer of £350 under Part 36 CPR 1998 (**Appendix 100**). This offer was open for twenty-one days.

215. ACS:Law then sent a further letter to Mrs Spindler on 13 January 2010 (**Appendix 101**).

This letter contained some of the information provided in the letter of 5 January 2010.

However, it also repeated questions about Mrs Spindler's wireless network that had been asked in earlier correspondence.

216. Mrs Spindler responded to this letter on 18 January 2010 (**Appendix 102**). She stated that the questions had already been answered in previous correspondence but she would try and answer them in a more direct format. She stated:

*“While you may reject my claims regarding your approach I would like to make you aware that I feel I am being harassed with this claim. This is the ninth time I have responded to your clients claims and I am exasperated that I have to repeat myself many times. I have clearly stated that I have not committed the infringement or authorised anyone to use my internet connection to do so. I have followed the Pre Action Conduct [sic] that is advised and I have been helpful and answered your letters to the best of my ability and knowledge. My responses have been sent timely and have taken much of my time and effort. While I understand the need to communicate I feel it unnecessary that you request the same information over and over again.*

*I note that you have failed to respond to my requests to exchange further information. I have asked you to provide further evidence to support your clients claim back in June 2009 and reminded you in September 2009, which you have so far failed to provide or even respond to. Without this information I am unable to investigate your clients claim further or to verify that your clients claim is justified. This lack of co-operation and your persistence in this claim has prompted me to report your conduct to the SRA and I have enclosed all letters of correspondence to them for their perusal.”*

217. ACS:Law responded to this letter on 1 February 2010 (**Appendix 103**). This letter stated:

*“You are under no obligation to answer any of these questions. However, if you do not answer any of these questions in full, we will have no option but to consider that you may be liable for the infringement of copyright in the Work and the matter will proceed further, including the possibility of court proceedings.”*

218. ACS:Law then received a response to this letter dated 16 February 2010 from Lawdit solicitors who Mrs Spindler had instructed to act on her behalf (**Appendix 104**). This letter stated:

*“We have enclosed copies of all the eight letters our client has sent you and Davenport Lyons denying your client’s claim. You will see that our client has answered each one of your letters and has provided as much information as she is able. She considers your relentless accusations and your barrage of letters both intimidating and bullish.*

*We consider that sending so many demands for payment to our client when the reality is you have no real intention to issue a claim is fundamentally oppressive and potentially a breach of the Solicitors Code of Conduct.*

*One of the main effects of your tactics is to reverse the burden of proof and require our client to prove her innocence. The burden of proof is in you to prove that our client has infringed your client’s copyright not the other way around. It is an abuse of process and must cease.”*

219. Included with the documentation provided by Mr Crossley is an “Action Points” document which was completed by one of the paralegals at ACS:Law on 15 March 2010 (**Appendix 105**). This contained a note from “AG” – Adam Glenn which stated:

*“16/3/09. AG The correspondence with Spindler has been going on for some time now and there have been multiple attempts to get her to respond with the Third Party information...Having read the correspondence, especially the letter of 18 January 2010, I would, in this instance, recommend that we should give consideration to dropping the*

*claim against the infringer.*

*It should be noted that the infringer was in the Panorama program broadcast on 15 March 2010 (approx 20 minutes into the program). It should be noted that the interview has not influenced my assessment. This has, in my opinion, always been a case where if the infringer supplied sufficient information there would be positive consideration to dropping the case."*

220. A letter was sent to Lawdit Solicitors on 18 March 2010 (**Appendix 106**) advising that the clients were dropping the claim. The letter gave no apparent explanation for dropping the claim other than following a "*detailed study of the case against your client.*" The letter concluded by stating that ACS:Law still held the view that Mrs Spindler's internet connection was used for the infringement. It stated that they were putting Mrs Spindler on "*strict notice that we consider that your client owes our client a duty of care to secure access to her internet connection so as to ensure that no more infringements of our client's copyright could occur using her internet connection.*"

Andrew Medcalf

221. On 20 January 2010 the Legal Complaints Service received a complaint from Stephen Dixon, solicitor, acting for Mr Medcalf (**Appendix 107**). The email said that Mr Medcalf had received a letter of claim from ACS:Law and had contacted Mr Dixon's firm to ascertain whether the letter of claim was genuine or not. The email set out Mr Dixon's view that the letter of claim raised serious issues of professional conduct. It states:

*"Our concerns about the letter are that many people may feel blackmailed into paying, either by the threat of legal action and the claimed costs liability they could face of "several thousand pounds", or because (as in this and probably the majority of cases) the filed [sic] allegedly downloaded is pornographic material and would cause great embarrassment if the allegation became public (whether innocent or not).*

*You will note that the letter offers no explanation whatsoever of the estimate value of the damages claim (other than asserting they would be "significant") or the basis on which the damages are claimed. It merely states the work was "made available" in breach of copyright, without stating on how many occasions the rights were allegedly infringed, or the damages estimated to have been sustained on each occasion. It states that each copy downloaded as a consequence of the breach represents "a potential lost sale", without even asserting how many times this is said to have happened or the amount of profit thereby lost. These matters would of course have to be properly pleaded and proven in any court proceedings brought by the Claimant. The letter is entirely inadequate in this respect to comply with the requirements of the Protocol or the Practice Direction on the Pre-Action Protocol.*

The letter continues:

*“You will note from the extraordinary array of payment methods available and the mass produced/mail merged format of the letter that they clearly expect large numbers of payments of this kind, without so much as a proper explanation of why any of them should pay a single penny...our view is that such conduct breaches Practice Rule 10.01 by taking unfair advantage of members of the public, and Rule 10.2 by failing to provide sufficient time and information about costs being claimed.”*

222. Mr Crossley provided the Investigation Officer with copies of documentation in relation to this claim. This included the letter of claim dated 12 January 2010 (**Appendix 108**) where the letter stated that the firm was acting for Media C.A.T Limited and that Mr Medcalf had made available the Work “UK Student House 3” available by via a P2P network in breach of the client’s copyright. The letter of claim asked Mr Medcalf to pay compensation of £540 in *“full and final settlement and in compromise of any claim our client may otherwise have against you in respect of the identified infringement.”*
223. Mr Medcalf responded to the letter of claim on 24 January 2010 (**Appendix 109**). This reply was in the template format obtained from the Slyck.com web forum.
224. On 26 March 2010 (**Appendix 110**) ACS:Law wrote to Mr Medcalf stating:
- “We note that the response you have given matches a template response that is available on the internet. With this in mind we are disinclined to accept at face value what you have said, as it is simply a generic response. The open offer of compromise made in our original letter to you is hereby withdrawn. We have instructions from our client to pursue this matter against you further.”*
225. The letter of 26 March 2010 enclosed a Part 36 CPR offer of settlement for the sum of £1080. This offer had to be accepted within twenty-one days. There was no explanation as to why the sum had increased from £540 to £1080.
226. No further correspondence has been provided in relation to this matter.

Mr A T Froggatt

227. Mr Froggatt complained to the SRA on 29 June 2009 (**Appendix 111**). Mr Froggatt states:

*“I enclose a copy of a letter from ACS Law dated 8 June 2009 and which was received by myself on 10 June 2009. As you will see the letter is most frightening, threatening and intimidating and on first perusing this I thought it was a scam. Therefore I consulted the Citizen’s Advice Bureau and also the Trading Standards Department, Burton Upon Trent, who, as I am totally innocent of the charge, advised that I should...send a simple letter denying the claim.*



228. Mr Crossley provided the Investigation Officer with documentation in relation to the claim. This included the letter of claim dated 8 June 2009 (**Appendix 112**) which stated that Mr Froggatt had made the Work entitled “Young Harlots the Governess” available via a P2P network over the internet in breach of their client, Digiprotect’s, copyright. The letter of claim asked Mr Froggatt to pay compensation of £500.
229. Mr Froggatt responded to this letter on 25 June 2009 (**Appendix 113**) and stated:
- “As a pensioner I was shocked to receive your letter of the 8 June 2009. This is a multi user household and neither I nor anyone else in the household as any knowledge of what you claim.*
230. In his complaint of 29 June 2009 Mr Froggatt had confirmed that this response was much simpler than the one he intended to send as Burton Upon Trent Trading Standards had advised him to keep the letter simple.
231. On 20 July 2009 ACS:Law sent a second letter to Mr Froggatt asking information about his internet connection (**Appendix 114**). This letter also enclosed the “Explanatory Notes on Wireless Security and Related Devices Attachable to a Network Wireless Security.”
232. On 2 September 2009 ACS:Law wrote a third letter to Mr Froggatt in the form of a standard letter saying that they had not received payment or any response from him (**Appendix 115**). The letter asked for payment of £500 within seven days.
233. On 7 September 2009 (**Appendix 116**) Mr Froggatt provided the SRA with a copy of the letter from ACS:Law dated 2 September 2009 and his response dated 7 September 2009 (**Appendix 117**). The letter dated 7 September 2009 pointed out that he had already replied to the letter of claim and states that he denied all knowledge of the accusations. The letter concluded:
- “I have already taken legal advice, and if you continue to harass me on this matter. I will proceed under the Protection from Harassment Act 1997.”*
234. ACS:Law responded on 9 October 2009 (**Appendix 118**). This letter stated:
- “To date, we have received neither a satisfactory response, payment, nor an adequate explanation as to why you are not liable for the acts of copyright infringement alleged against you. The open offer of compromise made in our original letter to you is hereby withdrawn. We have instructions from our client to pursue this matter against you further.”*”

235. The letter of 9 October 2009 also enclosed an offer to settle the claim under Part 36 CPR 1998 for £600 (**Appendix 119**) which was to be accepted within 21 days. There was no explanation as to why the amount had increased to £600.
236. Mr Froggatt responded to this letter on 21 October 2009 (**Appendix 120**). He again denied all knowledge of the allegations.
237. No further documentation has been provided in relation to this matter.

Other quotes from informants

238. In addition to the matters listed above, Mr Roberts also reviewed sixteen other complaint files and the thirty complaints made to the SRA by Which? (**Appendix 55**). A sample of quotations from various informants about their experiences with ACS:Law are set out below:

*"The letters sent were threatening and harassing and are very upsetting. I wonder whether it would be easier just to pay the money and have piece [sic] of mind that I will not be contacted again...when will something be done about "solicitors" such as Andrew Crossley...ACS Law should be exposed for its bullying ways and brought to an end.."*

Jennifer Pettit, Email to Which? 4 September 2009

*"My nephew's girlfriend has just had a second letter from ACS Law last Friday and is totally traumatised by it. She has recently qualified as a doctor and is being accused of downloaded [sic] hardcore pawn [sic] and so she is terrified that people will hear about it...the whole thing is absolutely appalling..."*

Liz Kwantes, MBE, Email to Which? 8 September 2009

*"This is causing me a great deal of stress and anxiety which is particularly harmful as I am 8 months pregnant and suffering from a condition called SPD."*

Katie Little. Email to Which? 6 September 2009

*"...have a very close friend worried sick about letters she has received about an illegal down load of a scooter song or video as were [sic] both not sure? she is not a person who does that sort of thing and has so far received two letters asking for £500 now £1000 but doesn't believe its right and I feel they are putting undue pressure on her to settle? We've talked about how to find a solution and continplating [sic] going to the police or solicitor or our local MP?"*

James Moffat, email to Which? 8 September 2009

*"I have recently received the enclosed threatening letter demanding £500.07 for allegedly [sic] downloading a CD, I have no knowledge of this I would not know what to do.*

B Jackson, letter to the SRA 26 June 2009

*"My wife who is 59 cannot understand or knows how to use a computer let alone downloading or copied [sic] any of the material. Secondly I am 61 and use the internet for my wifes shopping, paying bills etc. and I have also not downloaded or copied any of the material. My wife has poor health problems asthma, muscular sclerosis, and a damaged spine etc, which makes her wheelchair bound and has enough problems to cope with let alone this letter.*

B Bennett letter to the SRA dated 16 May 2009

*"I am at my wits end with this. I am on tablets for blood pressure and have an ongoing heart issue. My age is 55 and my condition can be confirmed if needed by my doctor."*

Mr A Dempsey letter to SRA received 13 July 2009

*"You continue to threaten me with court action and as such I find your letters harassing. If you send me any more communications on this matter I will consider it nothing less than harassment."*

Mr A Dempsey letter to ACS:Law 24 July 2009

*"I also feel that the letters you have sent are aggressive and I find them threatening and as a result I will be writing to the Solicitors Regulation Authority outlining proceedings so far."*

Mr S Brooks letter to ACS:Law 22 June 2009.

*"It is also interesting to note that my reply is nothing more than a generic response sourced from a template on the internet. I may say the same about your batch sending of letters as generic, indeed in the first letter you address me as sir or madam?...My name is clearly a male. Also I find your length of time for a response unacceptable. You give me a deadline, yet take months to reply yourself."*

Mr Kevin Dite – letter to ACS:Law 25 August 2009.

*"This is absolutely shocking that a Law Firm is able to send threatening letters demanding money like this. I don't know the process, is this something you can investigate."*

Simon England letter to the SRA dated 4 September 2009

*"I must also express my deep concerns over the regrettable tone adopted by you in your response as you have explained that as this response matches a template response available on the internet you are "disinclined to accept at face value what he has said, as it is simply a generic response." However, I have had several constituents contact me regarding this issue and it appears that the letters which are being sent out from ACS Law appear to be the same generic response. I am concerned that my constituents' letter have been completely dismissed as they have used a template. I am afraid that not everyone has the capacity, for a variety of reasons, to respond to a solicitor's letter in their own words and I find it appalling for you to label my constituent's letter as being "absent of anything meaningful to consider." "*

William Rennie MP letter to ACS:Law on behalf of Mr J Lyons – 23 October 2009

*" I find your letters both very harassing threatening [sic] so to that end I have written to both the SRA and the ICO to review your correspondence and the way that you operate.*

Mr R J Lucking letter to ACS:Law 28 October 2009.

#### Common themes to the complaints

239. The review of the complaint files has therefore revealed a number of common themes to the complaints. These are:

- The letters of claim and correspondence are perceived to be variously "bullying" "threatening" and "harassing";
- Recipients of the letters of claim believed them to be a "scam";
- The firm had failed to read responses and consider the information provided by the alleged infringers.
- The firm had used template letters/paragraphs which did not fully reflect the true position.
- The letters of claim and correspondence have caused stress and anxiety to the recipients of the letters, some of whom suffer from medical conditions such as asthma, high blood pressure, heart disease etc.
- The firm had provided insufficient evidence to support the claim and the amount of "compensation" claimed.
- Alleged infringers have felt pressurised into paying the compensation in order to avoid proceedings being taken against them.

ii) Analysis of the letters of claim

240. During the investigation Mr Roberts examined letters of claim and other correspondence sent on behalf of each of the Clients. An analysis of this correspondence is set out at paragraphs 241 to 279 below.

241. An example of the first batch of letters of claim sent on behalf of Digiprotect can be found at **Appendix 64** in relation to Mrs Breach. Under the heading “Unlawful Act and Consequences” the letter of claim stated:

*“Based upon the evidence supplied to us, your internet connection has been used to make the Work available on P2P networks in infringement of our client’s copyright, in breach of sections 16 and 20 of the Act [Copyright Designs and Patents Act 1988]...Our client’s evidence shows you are responsible for committing one or more of these infringements, either directly or by your authorising (inadvertently or otherwise) third parties to do the same. This gives us grounds to bring a civil claim against you and our client holds you responsible for committing these infringements, subject to any submissions you may make.”*

242. The letter of claim therefore holds Mrs Breach responsible (as the internet account holder) for the alleged infringement under the Copyright Designs and Patents Act 1998.

243. Under the heading “Consequences of bringing a claim” the letter of claim states:

*“...our client has been instructed by Dream Logistics BV to enforce its member’s rights in an attempt to stem the wholesale misappropriation of Dream Logistics BV’s property. Should it be necessary to bring a claim against you for copyright infringement, the legal costs of those proceedings are likely to be substantial. You may know that in civil proceedings in this country, the loser not only has to bear its own costs but also the costs of the winning party. This means that should you lose any action our client takes (against you) you will be liable for our client’s costs and vice versa. Costs in an action such as this can mount to several thousand pounds.”*

244. The letter of claim then invites Mrs Breach to provide submissions in writing if she considers she is not responsible for the infringement.

245. Under the heading “Offer to Settle” the letter of claim asks Mrs Breach to delete any copies of the Work from her PC and provide a written undertaking “*not to download, make available or otherwise share the Work or to permit others to do the same using your or any other internet connection.*” The letter of claim also asks Mrs Breach to pay compensation of £500 plus the ISP’s costs of £0.02. The ISP’s costs are broken down into costs to disclose the information and the ISPs solicitor’s costs. It explains these costs are actually a pro rata share of the costs charged by the ISPs solicitors for all of

the ISPs subscribers against whom they had obtained evidence of copyright infringement.

246. Under the heading “How the Settlement Figure is Calculated” the letter of claim states:

*“The sum of money claimed is not the amount that would be claimed in the event that our client commences proceedings against you. Damages and costs are likely to be much greater than this sum. It is the sum that our client is prepared to accept (on this occasion and at this stage only) by way of settlement to help defray its costs if you are prepared to give the undertakings sought and enclosed with this letter and settle the matter early by paying the compensation claimed in this letter.” The amount represents:*

*1) a token sum by way of damages for lost sales of our client’s copyright work which has been made available for others to download; and*

*2) a proportion of costs involved in:*

*i) obtaining evidence of infringement;*

*ii) writing to your ISP to notify it that our client is preparing an application to the court for an order that your ISP must provide the name and address connected with the IP address in question;*

*iii) preparing a witness statement and draft order in support of that application;*

*iv) serving the application for a disclosure order on your ISP and dealing with its queries or those of its solicitors;*

*v) attending court to apply for the order;*

*vi) drawing up the order and lodging it with the court;*

*vii) sending the order to your ISP or its solicitors;*

*viii) ensuring that your ISP complies with the order; and*

*ix) corresponding with you about our client’s claim.*

*3) the amount charged by your ISP (together with legal costs, if any) for disclosing your name and address pursuant to the disclosure order.”*

247. There is no explanation of the amount of the “token sum” of damages or how this has been calculated.

248. Under the heading “Next Steps – Payment and Undertakings” the letter of claim states:

*“Please note that the amount claimed represents only a small proportion of the damages which our client believes it is entitled to claim from you, and of the costs our client has incurred in instructing us to proceed against you.”*

249. It is noted that the nature of the firm’s retainer with the clients means that the client does not have to make any payment of costs as the firm’s costs and disbursements are deducted from the “Net Recoveries” – See section D above.

250. Under the heading “Next Steps – Commencing Proceedings” the letter of claim states:

*“If either the payment or undertakings are not received within the time period specified above, we are instructed to commence proceedings against you, subject to receiving any submission you may wish to make to us. If it becomes necessary to issue proceedings*

*against you, our client will be seeking as a minimum from you an interim payment on account of damages and will request the Court to determine the level of total damages and costs which may be awarded against you and which will reflect the increased costs of taking proceedings, together with damages that fully reflect our client's loss".*

251. At the time of writing this Report the firm had only issued proceedings in three claims, details of which can be found at paragraph 153 above.
252. The letter of claim then went on to state that if Mrs Breach was in any doubt about the contents of the letter and its "seriousness", she should seek legal advice "*as a matter of urgency*". The letter of claim also referred Mrs Breach to the Frequently Asked Questions available on the firm's website (**Appendix 46**).
253. The letter of claim continued:
- "You may also contact us by email at info@acs-law.org.uk. Because of the volume of cases with which we are dealing and because we cannot act on the basis of oral submission alone from you, we would ask that any response from you be in writing."*
254. The letter of claim concluded by stating that it complies with the Code of Practice for Pre-Action Conduct in Intellectual Property Disputes (**Appendix 121**) a copy of which was available on the firm's website.
255. Examples of letters of claim in relation to the other Clients can be found at:
- Reality Pump (**Appendix 122**)
  - Techland (**Appendix 123**)
  - Topware (**Appendix 124**)
  - Media C.A.T. (**Appendix 108**).
256. There are no substantive differences between the letters of claim sent on behalf of each of the Clients.

#### Interview on 16 February 2010

257. During the interview on 16 February 2010 Mr Crossley was referred to a letter of claim sent to Cameron Wilkie on 5 May 2009 (**Appendix 58**) and asked various questions about the firm's letters of claim.
258. Mr Crossley was asked whether the letters of claim had changed substantially since the

first batch sent out by his firm in May 2009. He replied:

*"I don't think they have. They do develop and what has changed more significantly I think is the way we deal with the responses that we get in and how we reply. We introduce new approaches, new strategies that would be marketed differently from the way Davenport Lyons dealt with the matter and so I think while the letter of claim is, in principle, pretty much the same, the responses that we sent out after that are different."* (Appendix 145, page 3-4)

259. Mr Roberts referred Mr Crossley to the text in the letter of claim to Mr Wilkie which states that submissions must be in writing. He asked whether Mr Crossley agreed that this could be taken as meaning that no observations of any substance could be made over the telephone, despite the fact that the twenty one day time limit for a response was ticking away? Mr Crossley replied:

*No I don't accept that because we invite people to call and we have actually developed the letter slightly and I am giving you a more recent letter and we try to invite people to call if they are in any doubt at all and we give the phone number in the letter and so I don't accept that and we receive many many calls from people. Our phone number is at the top of the letter and they are welcome to call us."* (Appendix 145, page 5)

He continued:

*Well put it this way, there is a phone number at the top of the letter and anyone who calls we speak to them, we don't say we are not able to talk to you. We take careful notes and you will see on the computer records, telephone attendance notes. When people do call, we do invite them to put in writing what information they do have to say to us because it is difficult for us to simply take a full analysis of what they are saying verbally and I think it would be inappropriate for us to rely on that on behalf of the client so to that extent we always try to get information right. I mean we are talking about a potential copyright infringement action. They are complicated and we are trying to invite them to provide reasons as to why they are not liable if they are not prepared to enter into a compromise or they don't believe they are liable and for us to be able to act in our clients' best interests we need to have something tangible to look at and consider."* (Appendix 145, page 5)

260. A copy of the "recent letter" referred to by Mr Crossley during the interview addressed to Lynette Morris is attached at **Appendix 125**.
261. On 19 February 2010 Mr Crossley emailed Mr Roberts (**Appendix 126**) and provided him with a copy of a further amended letter of claim (**Appendix 127**) which invited individuals to call the firm if they had a query. This version of the letter of claim was to be used from Monday 22 February 2010. The letter of claim also included an amendment to the letter of claim requested by Chief Master Winegarten during an application for a Norwich Pharmacal Order on 17 February 2010. Chief Master Winegarten had asked for



the removal of the word “detailed” from “detailed submissions” as it appears on page three of the letter of claim under the heading “Submissions from you.”

262. On 20 April 2010 Mr Roberts received a letter from an alleged infringer, Peter Latham, (**Appendix 128**). In this letter Mr Latham explained that he was a retired Circuit Judge. He states that he had tried to call ACS:Law on the number provided on ACS:Law’s letter of claim. Mr Latham said he only received a recorded message requesting him to send a letter and that the firm did not deal with submissions over the telephone. When Mr Roberts tried to call the number provided to alleged infringers at around 11 am on 20 April 2010, the number was engaged. Mr Roberts did call the number at 10.50 am on 21 April 2010 and the phone was answered by a male individual.

#### Strict liability

263. During the interview on 16 February 2010 Mr Roberts also asked Mr Crossley whether he considered that the letter of claim leads individuals to believe that they are strictly liable for illegal infringements of copyright committed by others, regardless of how much downloading or uploading has occurred or whether or not there has been a third party involved, and whether this was overbearing and/or oppressive. The following is an extract from the transcript of the interview (**Appendix 145, page 6**):

AC I don’t believe that is what it says. I believe it says what it says on the tin. The internet connection has been identified as being utilised in connection with illegal file sharing and we stand by that as evidence because the evidence that we have is accurate. I don’t think it is in any way and it certainly doesn’t say ...

IR You don’t think you are making strong assertions there about the evidence?

AC We are making an assertion about the evidence that we have because we are confident about it but only in relation to an IP address that is connected to the person that we are writing to and we are making it clear that it is the internet connection. We don’t state that it was that person or anyone connected with them that did it. We invite them to respond.

264. Mr Roberts went on to ask Mr Crossley about this further. He referred to Mr Crossley’s comments in the letter dated 11 August 2009 (**Appendix 40**) that his firm does not

pursue owners of an identified connection merely because they are the account holder. In the letter of 11 August 2009 Mr Crossley states "*Guilt is not assumed at any time.*" However Mr Roberts stated that the letter of claim refers to "you" and "yours" and asked if Mr Crossley accepted that the impression given by the letters is that the internet account holder is being held personally responsible for the infringement. Mr Roberts also asked why, if, as Mr Crossley maintained, the firm are not pursuing someone directly because they are the named account holder, the letter of claim did not make this clearer? The following is an excerpt from the transcript of the interview showing Mr Crossley's response (**Appendix 145, page 6**):

AC Well I believe it is clear. I don't believe it is an overbearing letter. It is a letter of claim its got to be forceful to that extent but it is relevant to these people insofar as they are responsible for the file sharing. If you look at the bottom of page 2, "submissions", "*if despite the information set out above you say you are not responsible, set out your reasons in writing for us to evaluate. Please provide as much detail as you are able to...*" and because we received many many letters, template letters from the internet, about 30% of our letters were the same reply, they weren't really giving anything of any value related to the individual. They just trotted out a letter that they had been told to write to us on the internet and we had literally hundreds and hundreds of them, we slightly amended the wording to say it will be necessary for you to set out your reasons, and we emphasise the word "your" and underlined it, in writing in order for us to properly evaluate what you have to say. So, we do make it clear that they have an opportunity to respond to us and deny the claim if they feel that is appropriate.

IR My perception, having admittedly only seeing people that denied the claims, is that they believe they are being personally held to account but I understand what you are saying about the letter.

AC We do have quite a well worn letter in response when people do challenge that point to say I did not download this product. We actually have a fairly standard response to say we are not saying that it is you, we are saying that it is your internet connection and so we do make it clear.

265. Mr Roberts also asked Mr Crossley about the statement in the "Next Steps" Section of the letter of claim that "*If either the payment or undertakings are not received...we will*

take proceedings against you...” Mr Roberts commented that this doesn’t actually happen in the majority of cases. Mr Crossley replied:

*“So far that hasn’t happened in the majority of cases. I’ve been running this for 8 months and its still early days. A few cases have been dropped altogether. What my clients propose to do with the other cases remains to be seen but I have on file a number of cases that we are proceeding to issue.” (Appendix 145, page 7)*

Mr Crossley continued:

*“Can I pause there and say that this letter that you are referring to was dated 5 May [2009] which was the first day I was doing this and so I was running quite heavily on the guidance and prior workings of Davenport Lyons. That actually changed... the wording of that has changed and if I can read you the wording now and I will give you this letter as well “if neither payment nor written undertaking are received within the time specified above we are instructed to take matters further which may ultimately include the commencement of proceedings against you subject to receiving any submissions we may wish to make against you”. So I accept that this initial letter may be overly demonstrative and indeed as a reflection of that I fairly quickly changed that wording. Having said that, they were the instructions that we were given and that was my clear understanding from the client from the outset that it was their instructions to do that. The fact that their instructions and their desires overall had changed or they altered their position, it is a matter for them but the point I make is that I actually softened that letter quite deliberately because I didn’t want it to sound as if it was a pre-determined thing that proceedings would be issued and that isn’t the intention of that letter. Those were the instructions at that time.” (Appendix 145, pages 7-8)*

266. Mr Crossley was asked when he changed the letter. He said he thought it was June/July 2009. Mr Crossley provided the Investigation Officers with a letter dated 12 January 2010 in relation to Lynette Morris (**Appendix 125**) with the revised wording.

267. Mr Roberts also asked Mr Crossley whether he had any comment about the wording of the letters of claim including the statement *“should it be necessary to issue proceedings against you in a court of law for copyright infringement subject to any submissions you make, the legal costs of those proceedings are likely to be substantial”* and the reference about costs being *“several thousands of pounds.”* Mr Crossley replied:

*“I can’t see actually anything wrong with that statement unless you tell me from a regulatory point of view there is something wrong with it, on the basis that we are putting somebody on notice of a potential claim that could be against them. On the face of it, we have an identified act of infringement and that happened on that account holder’s internet connection. That is our case.” (Appendix 145, page 8)*

Mr Crossley continued:

*“... our starting point is the account holder’s connection and primarily one would assume that the account holder is somebody who uses that account.” (Appendix 145, page 8)*

268. Mr Roberts then commented that he could understand what Mr Crossley was saying if someone is guilty but an individual would be “pretty worried” if he/she read that statement and believed themselves to be innocent. Mr Crossley replied:

*“Well that’s only if we have a case against them and if we are successful. I mean I’ve been a litigator for 20 years and I would think that if we are threatening a legal action against somebody that would be an appropriate comment to make. There were a couple of very minor amendments here but “should you lose our action our client takes against you in addition to any damages that may be awarded you may also be liable to for our client’s legal costs...” and again, here it says you will be liable for our client’s legal costs. So I softened it because it is not for me to be determinative about the costs but here it said that in the original letter it says “should you be unsuccessful in any proceedings our client may bring against you, you will be liable for our client’s costs and vice versa” meaning that if they were successful in defeating the claim, they would receive the costs. I changed that slightly to “you may also be liable for our client’s legal costs”.* (Appendix 145, page 9)

269. Mrs Venn asked whether the fact that Mr Crossley had made changes to the letter of claim was indicative of the fact that he felt that the original letter might have been seen to be overbearing or oppressive. Mr Crossley replied:

*No, I don’t accept that. I just think that this is better and more elegantly worded. I still think that letter is compliant and I stand by it. But I have made changes because I want to make this as clear to people as possible and I realise I am writing to individuals who are not legally minded, legally qualified and unfortunately, this is a complicated area of law and we do try to make it as clear as we possibly can. We do have, as you know, our website is effectively given over entirely to the work on file sharing ...”* (Appendix 145, page 9).

#### Notes on Evidence.

270. The letter of claim referred the recipient to the Notes on Evidence available on the firm’s website (Appendix 64a). This document states:

*“This note accompanies the letter you will have received (“Letter of Claim”) regarding unauthorised infringement(s) of our client’s copyright in a named work (“Work”) on peer-to-peer (i.e. file sharing) networks.”*

271. Section 1 of the Notes on Evidence refers to the Forensic Computer Analysts Report. It states:

*“Full evidence of the nature of our claim against you is provided to the Court, which is then invited to order your ISP to disclose your contact details. This enables us to write to you. On the date set out in the Letter of Claim, such an order was made against your ISP, pursuant to which your ISP provided your name and address some weeks later and we were then able to write to you.”*

272. The evidence provided to the court is as set out in Mr Crossley’s Witness Statement

(**Appendix 4**). In essence the court is provided with evidence that there had been an infringement of copyright and that the ISP will know the identity of the person whose IP address had been identified by the Monitoring Company in relation to the infringement.

273. Section 3 of the Notes on Evidence document refers to “Evidence of Copyright Infringement”. It states:

*“It is irrelevant for the purposes of our client’s evidence how the Work came to be resident on the computer connected to the IP address in question at the time of upload and/or making it available on a P2P network. Prior to making the Work available on P2P networks, it may have been copied from a CD or DVD ROM (or other medium) or indeed downloaded from either a bona fide website or obtained through file sharing on a P2P website, either by you or a third party using your internet connection. What our client’s evidence shows is that the Work was made available from an internet connection registered to your name on a certain date and time.”*

274. Section 3 of the Notes on Evidence therefore repeats the assertion that the IP address of the recipient of the letter of claim has been used for the uploading of copyrighted material belonging to the Client.

275. Section 4 of the Notes on Evidence document relates to IP addresses and explains:

*“You may have noticed that the IP addresses listed on page one of this letter (if more than one) are all different. This is because your ISP has allocated dynamic, rather than static, IP addresses and therefore your IP address may change over time. This may also explain why you may not now have the same IP address as any of those listed on page one of this letter.”*

276. Section 7 of the Notes on Evidence document refers to “How the Settlement Figure is calculated”. It states:

*“The sum of money claimed in our original letter to you is not the amount that would be claimed in the event that our client commences proceedings against you. Damages and costs are likely to be much greater than that sum. It is the sum that our client is prepared to accept (on this occasion only) by way of settlement to help defray its costs if you are prepared to give the undertakings sought and sent to you in our original letter. If you are not prepared to accept that offer, then we suggest that you seek legal advice as a matter of urgency.”*

277. This repeats the information about costs and damages and the need to seek legal advice “as a matter of urgency” contained in the letter of claim.

278. The Notes on Evidence document concluded with a copyright notice under the heading

"Use of our documentation". This stated:

*"Finally please note that the information and documents contained in this letter are the copyright of ACS Law. Any unauthorised use, e.g. posting on websites and fora, will render the persons responsible liable to ACS Law for copyright infringement, in addition to any liability which may be owed to our client for the same. Further action, in addition to that contemplated in this letter, may result."*

279. During the interview on 16 February 2010 Mr Roberts asked Mr Crossley about the copyright notice on the "Notes of Evidence" and whether this could be seen as discouraging reasonably minded people from discussing the contents of the "Notes of Evidence" as they were entitled to do? Mr Crossley replied:

*"It's a copyright notice. I don't think it is appropriate for people to be placing documentation that we have written and copyrighted wherever they want. It clearly doesn't prevent them from taking advice. It clearly doesn't prevent them from discussing it with whoever they want. I don't accept that at all."* (**Appendix 145, page 10**)

Mr Crossley continued:

*"...this is part of our business model along with the hundred and so precedent paragraphs and sentences that we have and along with, you know, the structures that we have in place. I wouldn't want to just hand this stuff, that has been developed over a long period of time, over to somebody else to pick up and run with. No doubt, the firm that we saw has just jumped into this file sharing business appeared recently and will have their own processes and procedures but I wouldn't want to just hand those processes and procedures to somebody else, so I think I am entitled to protect my own writing."* (**Appendix 145, page 11**)

#### l) Legal issues arising from the firm's conduct

280. An examination of the firm's client files and the firm's correspondence with individuals raised a number of legal issues that arise from the firm's conduct of the P2P file-sharing matters. One of these issues relates to the Copyright Designs and Patents Act 1988.

281. Section 16 of the Copyright Designs and Patents Act 1988 states:

#### ***The acts restricted by copyright in a work***

*(1) The owner of the copyright in a work has, in accordance with the following provisions of this Chapter, the exclusive right to do the following acts in the United Kingdom—*

*(a) to copy the work (see section 17);*

*(b) to issue copies of the work to the public (see section 18);*

*(c) to perform, show or play the work in public (see section 19);*

(d) to broadcast the work or include it in a cable programme service (see section 20);

(e) to make an adaptation of the work or do any of the above in relation to an adaptation (see section 21);

and those acts are referred to in this Part as the “acts restricted by the copyright”.

(2) Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright.

(3) References in this Part to the doing of an act restricted by the copyright in a work are to the doing of it—

(a) in relation to the work as a whole or any substantial part of it, and

(b) either directly or indirectly;

and it is immaterial whether any intervening acts themselves infringe copyright.

(4) This Chapter has effect subject to—

(a) the provisions of Chapter III (acts permitted in relation to copyright works), and

(b) the provisions of Chapter VII (provisions with respect to copyright licensing).

282. Section 20 of the Copyright Designs and Patents Act 1988 states:

***Infringement by broadcasting or inclusion in a cable programme service***

*The broadcasting of the work or its inclusion in a cable programme service is an act restricted by the copyright in—*

(a) a literary, dramatic, musical or artistic work,

(b) a sound recording or film, or

(c) a broadcast or cable programme.

283. Section 16(2) Copyright Designs and Patents Act 1988 which states:

*“Copyright in a work is infringed by a person who without the licence of the copyright owner does, **or authorises another to do [emphasis added]**, any of the acts restricted by the copyright”.*

284. The arguments put forward by Which? and certain alleged infringers is that there can only be a breach of copyright under the Act if the internet account holder specifically authorises another person to breach copyright by illegally sharing files over the internet.

If the illegal activity arises as a result of the account holder's computer being hacked or the unauthorised use of their wireless network, it has been argued there can be no strict liability under the Act. This is the so-called "wireless defence" to claims.

285. In his letter of 11 August 2009 (**Appendix 40**) Mr Crossley states:

*If further investigations do not provide any additional evidence of infringement by or with the permission of the person we have written to and there is no additional evidence of any other person within the household having infringed copyright, we will then write to the individual letting them know the case will not be pursued."*

286. The schedule of dropped claims (**Appendix 9**) shows that the security of a wireless connection or a potential infringement being committed by a third party was a factor in thirteen of the thirty five dropped cases shown in the table.

#### ISPs Terms and Conditions

287. During the interview on 16 February 2010 Mr Crossley was also referred to the reference in the firm's correspondence to the ISPs Terms and Conditions. A letter dated 9 August 2009 to Mr Robin Harries (**Appendix 129**) stated:

*"However, please note that the terms and conditions of your contract with your ISP will normally put a positive obligation on you to ensure the security of your system and that your internet connection should not be used for any illegal purpose.*

*Furthermore, without prejudice to the remedies open to our client, you should treat this letter as notice that your failure to properly secure or control access to your internet connection has enabled the use of your network to infringe copyright belonging to our client. As a result of this notice, we take the view that you now owe a duty of care to our client to ensure that your network is properly secured and/or controlled against such unauthorised use. Failure properly to secure or control access to your network going forward could also therefore lead to proceedings being issued against you arising in negligence."*

288. It is noted that this text was included in the letter to Mr Harries despite the merits of a claim in negligence on the basis that a defendant had failed to secure his/her wireless network being described as "extremely poor to hopeless" by Counsel, Ms Michaels, in her Opinion of 30 June 2008 (**Appendix 130, page 19**) as referred to at paragraph 299 below.

289. Mr Roberts asked Mr Crossley to explain the basis for the assertions made about the ISPs terms and conditions in the letter to Mr Harries. Mr Roberts said it appeared that the firm is saying that the Terms and Conditions support the Clients' claim. Mr Crossley



responded.

*"I don't think that is what we are saying. I think we are saying that there is normally a positive obligation to ensure security on your system. Your internet connection should not be used for any illegal purpose and that is a fairly trite point. I don't think it suggests or supports our case one way or another. It just identifies to the individual that that is what their ISP would most likely have said and I think for a matter of record that is true."*  
(**Appendix 145, page 11**)

#### Data Protection issues/recovery of information by the Monitoring Company

290. Concerns were also raised by Which? and alleged infringers about whether the method used by Logistep to obtain the information necessary to identify the IP address holders is illegal under UK law. This issue was considered by Counsel and is discussed at paragraphs 294 to 296 below.

#### Amanda Michaels Opinion dated 30 June 2008

291. Davenport Lyons had obtained an Opinion dated 30 June 2008 from Amanda Michaels of Hogarth Chambers, London (**Appendix 130**). A copy of this Opinion was provided to Mr Roberts by Mr Crossley with his letter of 11 August 2009 (**Appendix 40**).

292. The opening paragraph of this Opinion states:

*"I am asked to provide some rather general advice to Davenport Lyons on behalf of a number of their clients who are the owners of copyright works the subject of file-sharing on P2P networks in the UK".*

293. The key points of advice considered by Counsel in this opinion are examined at paragraphs 294 to 301 below.

#### The legality of the information obtained by Logistep.

294. Ms Michaels considered whether the method used by Logistep to obtain the information necessary to identify the IP address holders is illegal under UK law. Ms Michaels advised that Logistep may have committed an offence under S.9 Computer Misuse Act 1990 if it made unauthorised access to P2P computer records of UK IP address holders whose computer was in the UK. She states *"For obvious reasons, this is a point which merits further careful consideration."* (**Appendix 130, Page 4**).

295. It is understood that Davenport Lyons gave consideration to this issue and therefore no

further consideration of this issue was made by Mr Crossley.

The status of IP addresses in accordance with the DPA 1998

296. Ms Michaels further considered whether the IP addresses found by Logistep are “personal data” within the meaning of the Data Protection Act 1998. Ms Michaels considered that there were arguments for and against IP addresses being “personal data” under the Act. However, she felt that if they were personal data, the processing of the data would fall within the exception provided by S.35(2) of the Act where it is “*necessary for the purposes of establishing, exercising or defending legal rights.*” (**Appendix 130** page 7).

“Variations on the theme of innocence”

297. Ms Michaels also gave advice about whether or not a defence could be argued due to “*variations upon the theme of innocence.*” (**Appendix 130**, Page 16). Under this heading Ms Michaels considered whether an unsecured wireless router fixed the holder of the IP address with liability for copyright infringement, as having “impliedly authorised” the infringement for the purposes of Section 16(2) of the Act. She states “*I think this is extremely unlikely*” (**Appendix 130**, page 16) and goes on to explain the arguments why she thinks this to be the case with reference to case-law on page 17. She states:

*“I think that the same arguments would apply with even more force to any argument that the holder of the IP address was liable for authorising infringements where his wireless network was secure, or where he had reason to think it was secure.”* (**Appendix 130**, page 17).

298. Ms Michaels also considered whether liability arose in the situation where the holder of the IP address suggests that any infringement was carried out by a third party, with or without his knowledge, using his computer at home. She states “*It would be difficult to say that there was authorisation of any infringement.*” She considered that where the holder of the IP address suggests that the infringement was carried out by his/her child, the child is likely to be responsible for his own infringement and should be sued in the child’s name. She concluded that the same arguments as to authorisation by the parent

apply to the authorisation by a third party.

299. Ms Michaels was further asked to consider whether there was any merit in bringing an action in negligence as an alternative to breach of copyright on the basis that the defendant who had failed to secure his wireless network, negligently made it possible for a third party to infringe using the connection. Ms Michaels states:

*"I conclude that the merits of such a claim in negligence are extremely poor to hopeless, save in cases where, exceptionally, a defendant admits letting someone else use his computer/internet access in circumstances where it is obvious or very likely that he will use it to infringe."*

300. Other points that Ms Michaels advised upon were :

- Whether or not a potential challenge to a Norwich Pharmacal Order was likely to succeed.
- Whether or not file-sharing only part of an overall copyright work would be copying or "making available" a "substantial part" of the work, sufficient (and necessary) for copyright infringement.

301. It appears from the above that the legal advice obtained from Ms Michaels was unfavourable to the position that where an alleged infringer claimed that someone else had accessed their computer and connected to the P2P network via a wireless router (secured or otherwise) they had "impliedly" authorised a third party to breach copyright as required by Section 16(2) of the Copyright, Designs and Patents Act 1988. Similarly, Ms Michaels considered the same arguments would apply if the individual alleged that the file-sharing was conducted by a third party (for example a child) without that individual's knowledge. Mr Crossley's comments on this point are summarised at paragraphs 285 to 286 above. He states that such cases will not be pursued.

## J) Media Interest

302. The firm's conduct and the issues surrounding P2P file sharing has been the subject of media interest, both in local and national newspapers, on television and throughout the internet. In particular there have been a number of internet forums and websites which have dedicated a substantial amount of time to this issue. An example of such a forum is slyck.com. This is a forum where individuals who have received letters from the firm can write comments and give each other advice.
303. Examples of articles that have appeared on the internet and in the media include:
- Legal row over download claim – Hartlepool Mail, 12 May 2009 (**Appendix 131**)
  - Innocents accused of net piracy – BBC News Website, 2 July 2009 (**Appendix 132**)
  - File-sharing sweep hits 20 “innocent” people – PCPro, 2 July 2009 (**Appendix 133**)
  - More innocent consumers accused of file sharing – Which?, 2 July 2009 (**Appendix 134**)
  - Lawyers target thousands of “illegal” file-sharers – BBC News Website 27 November 2009 (**Appendix 135**)
  - Piracy letter campaign “nets innocents” - BBC News website, 26 January 2010 (**Appendix 136**)
  - ACS:Law threatens more than 150 Innocent People – filesharingz.com 29 January 2010 (**Appendix 137**)
  - Government will watch file-sharing firms – Which? 9 March 2010 (**Appendix 138**)
  - O2 condemns lawyers targeting alleged file-sharers – BBC News website, 17 March 2010 (**Appendix 139**).
  - Anti-piracy firm defends net hunt – BBC Website, 15 April 2010 (**Appendix 140**).
304. The BBC television programme Panorama also produced a programme which examined the issue of P2P file sharing and copyright in light of the Digital Economy Bill. This programme was broadcast on Monday 15 March 2010. Carol Spindler, whose complaint

appears above, appeared on this programme although ACS:Law was not named as the firm responsible for sending her a letter of claim.

305. The above articles are a sample of the media coverage given to this issue. Unsurprisingly the greatest coverage has been given in IT Journals and magazines such as “The Recorder” which have also produced a number of articles on the subject. The subject of P2P file sharing and breach of copyright continues to provoke much debate about the technical issues involved in identifying copyright infringers and the right and wrong way to address the issue of illegal file sharing over the internet.
306. Furthermore, the actions of firms like ACS:Law has also featured in the debate over the Digital Economy Bill in the House of Lords. An excerpt from Hansard of a debate on 1 March 2010 showing the comments of Lord Lucas is attached at **Appendix 141**. Letters from Mr Crossley to Lord Lucas dated 15 December 2009 and 25 January 2010 are attached at **Appendix 142** and **Appendix 143**.
307. In addition to this, Mr Crossley wrote a letter to the Law Society Gazette which was published on 9 April 2010 (**Appendix 144**).
308. During the interview on 16 February 2010 Mr Crossley was asked about the media interest generated by his firm and the file sharing work. He was asked whether he would consider stopping the file sharing work in light of the adverse interest in the media and in Parliament as well as the effect his letters have on consumers. Mr Crossley replied:

*No, certainly not. That wasn't why I would consider stopping doing it. Only the workload really. It has caused me to be up in London permanently effectively 5 days a week whereas I live 40 odd miles from here and my family moan that don't see me enough and they moan that I get home late and they moan that I go into work too early and that I am not around and zonked out at weekends. So it's for those reasons not anything to do with bad press, bad publicity or people not liking us. In a way I think if we are feeling a lot of resistance I think we can be seen that we are doing our job effectively for our client and that is my constituency and I am happy with what we are doing and I'm not going to stop it for that purpose at all and I have no intention of stopping doing what I'm doing until you tell me I can't do it anymore but I think we're doing the right thing and we are doing it for a good reason.”* (**Appendix 145, page 36**)

## K Other issues raised with Mr Crossley

### i) Elizabeth Martin

309. During the interview on 16 February 2010 Mr Crossley was asked whether he was aware of the case of a French Lawyer, Elizabeth Martin, who was the subject of a 2008 investigation by the Conseil de l'Ordre du barreau de Paris. Ms Martin had been sending out letters to individuals similar to those sent out by Davenport Lyons and had been suspended for six months by her regulatory body. Mr Crossley replied:

*"I know about it, I know of it. All I know is that Brian Miller at Davenport Lyons said she was actually suspended for doing things other than just doing letters about infringement. I think actually she was, I don't know, taking clients money or something. I'm not sure but I know she was suspended and I don't know the detail other than the fact that it's a different jurisdiction. According to Brian Miller she was a complete fool. He met her and he wasn't very impressed with her. His words to me were "she was an utter muppet" but I haven't really been overly interested or concerned about her or looked into it in any detail."* (Appendix 145, page 34)

### ii) Final comments made during the interview on 16 February 2010.

310. Mr Roberts concluded the interview on 16 February 2010 by asking Mr Crossley whether, if he could start all over again, would he do anything differently in relation to the file sharing work. Mr Crossley replied:

*"Other than not do it at all, the person I live with is being driven to distraction by it and it annoys her a lot but generally speaking no, I mean I would probably re-write the letter of claim..... I would prefer to have re-written the letter of claim sooner and on that point I said that I thought I changed the letter last year. The letter was actually changed at the end of last year in preparation for the latest batch of letters that we sent out so we've only .... the letter that we are sending out now is in fact the second tranche of letters because the first tranche were back in last year and we had the ones already from May and then there was an order, initially it was heard on 11 May, and then granted I think a month later and all of that was the DigiProtect application..."* (Appendix 145, pages 35-36)

Mr Crossley continued:

*“... and so with the benefit of hindsight I probably would have worded the letter more elegantly that it was worded by Davenport Lyons. Having said that I’m comfortable with the letter is compliant and certainly reflected the instructions that we had from the client. I have just modified the letter here and there and made it a little bit clearer about what we are trying to do, what we are trying to achieve and being slightly softer in the wording I think. I think the letter reads better now. But that’s the only thing I would change and I think we have run this as honestly and diligently as we can and I’ve had great support from Terence and Adam and others here and they are all really hard working people. They are good, intelligent paralegals. Mostly people who have done the LPC and trying to get a training contract and they are good hard working people. So I’d say, the short answer to your question is I’m happy with what I’ve done to date and there isn’t much I’d change.” (Appendix 145, page 36)*

G SEAGER

Head of Casework Investigations and Operations

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