

May 14, 2020

Office of the United States Trade Representative
600 17th Street NW
Washington, DC 20508

Re: Improper Inclusion of Propeller Ads in the 2019 Review of Notorious Markets for Counterfeiting and Piracy

Dear Sir/Madam,

This law firm is international legal counsel to Propeller Ads Ltd. (“Propeller Ads”), a Cyprus company, which is the operator of the Propeller Ads advertising platform. Please direct all correspondence regarding this matter to our attention.

We write to object to the improper inclusion of Propeller Ads in the 2019 Review of Notorious Markets for Counterfeiting and Piracy (the “Review”) issued by the United States Trade Representative (“USTR”) because, as set forth below, Propeller Ads does not violate any laws and in fact complies with many of the best practices which the Review itself suggests. Accordingly, for the reasons set forth below, Propeller Ads requests that the USTR immediately retract Propeller Ads’ inclusion in the Review.

Background on Propeller Ads

Propeller Ads is one of the internet’s largest advertising networks, serving ads for the world’s largest brands to users on countless websites and services of every form. Propeller Ads serves approximately 10,000 new advertising campaigns each week, allowing the entire ecosystem of the internet to operate. Moreover, Propeller Ads is a general-purpose advertising network that works with advertises and publishers of all types around the world. Accordingly, Propeller Ads has not control of and neither endorses, supports, nor encourages any of the content or viewpoints express or distributed on the webpages that publish the advertisements served through its network.

Propeller Ads does not knowingly or intentionally work with any advertiser or publisher that engages in any illegal or unlawful activities and, quite to the contrary, when Propeller Ads has compelling reason that any of its advertisers or publishers are engaging in illegal activities, it takes action in response thereto. More specifically, Propeller Ads actively works to combat abuse by expeditiously taking action on reports of illegal or unlawful activities including, when appropriate, terminating business dealings with the advertiser or publisher engaging in such activities.

No Legal Basis for Inclusion of Propeller Ads in the Review

Given that Propeller Ads does not participate in any illegal activity, there is no legal basis to hold Propeller Ads responsible for the allegedly unlawful or illegal activities that may be taking place on any of its publishers’ websites by those websites or (more likely) by the users of those websites. Indeed, Propeller Ads is in compliance with any and all applicable US laws that regulate the way in which advertising networks like Propeller Ads operate.

In stark contrast to the Review's suggestion that advertising services somehow make Propeller Ads complicit in copyright piracy occurring on certain Internet websites, United States courts have explicitly found that an advertising network like Propeller Ads is *not* responsible for the infringing activities of its publishers. Specifically, in the case of Elsevier v. Chitika, 826 F.Supp.2d 398 (D. Mass. 2011), the book publisher Elsevier brought suit against the advertising network Chitika for serving ads on a website that infringed Elsevier's copyrights, claiming that Chitika was liable for contributory and vicarious infringement. However, the Court dismissed Elsevier's claims, holding in part that it did not believe that Chitika "materially" contributed to the infringement. This is because the websites that allegedly infringed Elsevier's copyrights could and would continue to infringe even if they had no advertisements – accordingly the advertisements could not be considered a material part of the infringement. The court also found that Chitika could not be found liable for vicarious infringement.

A more in-depth analysis of the issue of material contribution is found in the case of Perfect 10 v. Visa, 494 F.3d 788 (9th Cir. 2007). In that case, Perfect 10 filed a lawsuit against Visa and other credit card processing companies because infringing websites were receiving revenue through the credit card companies. Of course, a credit card company directly involved with paying the infringing website for selling the infringing content is even more closely involved with the infringement than an advertising network, but with regard to the issue of material contribution the court held: "The credit card companies cannot be said to materially contribute to the infringement in this case because they have no direct connection to that infringement. Here, the infringement rests on the reproduction, alteration, display and distribution of Perfect 10's images over the Internet. Perfect 10 has not alleged that any infringing material passes over Defendants' payment networks or through their payment processing systems, or that Defendants' systems are used to alter or display the infringing images." *Id.* at 800.

The Ninth Circuit also held that Visa did not induce infringement on the infringing websites because Visa never advertised its credit cards to be used to purchase any particular item (and Visa certainly did not advertise its credit cards for the purchase of infringing materials). The Ninth Circuit stated: "Perfect 10 does not allege that Defendants created or promoted their payment systems as a means to break laws. Perfect 10 simply alleges that Defendants generally promote their cards and payment systems but points to no 'clear expression' or 'affirmative acts' with any specific intent to foster infringement." *Id.* at 801.

Applying these cases to Propeller Ads, contrary to the assertions and implications in the Review, Propeller Ads does not materially contribute to any alleged infringement on any websites. Propeller Ads has no direct connection to the alleged infringement. The allegedly infringing materials do not pass over Propeller Ads' networks or systems. Propeller Ads has not taken any affirmative steps whatsoever with specific (or even general) intent to induce infringement.

In short, there is no basis to claim that Propeller Ads can be or should be alleged to be taking part in piracy. The assertions in the Review that Propeller Ads is willfully funding piracy websites is not only factually wrong, but also is also legally baseless and libelous.

Denial of Due Process and the USTR's Failure to Investigate Propeller Ads Prior to Publication of the Review

The USTR did not undertake any meaningful investigation of Propeller Ads prior to the publication of the Review. At no time did the USTR contact Propeller Ads to inquire about Propeller Ads' business practices.¹ Furthermore, the USTR did not provide Propeller Ads with any notice or opportunity to respond prior to including Propeller Ads in the Review. Hence, the inclusion of Propeller Ads in the Review has denied due process to Propeller Ads.

According to public records, Propeller Ads was nominated to the Review by a special-interest industry group called AVIA (Asia Video Industry Association). AVIA's members have historically had difficulties accepting new technology – they are the very same companies that at one point claimed that the VCR is illegal. My review of communication records for the past two years shows that AVIA itself has not contacted Propeller Ads during this time (and in all likelihood has never contacted Propeller Ads), the AVIA cannot possibly have any knowledge of Propeller Ads' business practices. Its sole gripe with Propeller Ads seems to be that AVIA does like some of the websites that are serviced by the Propeller Ads' advertising network.² That, however, is not a valid reason to conclude that Propeller Ads is participating in illegal activities.

I caution you that by simply repeating AVIA's unfounded allegations, the USTR is participating in the manufacture of evidence. The chain of events is quite simple: (a) having no other facts to support their position, special-interest groups ask the USTR to include the name of its target in the Review; (b) the USTR obliges; and (c) the special-interest groups then cite the Review in lawsuits as conclusive evidence of illegal activities by the target – despite the fact that this “evidence” originated from the special-interest groups themselves. As a US Government representative, the USTR should not engage in the manufacture of evidence.

Propeller Ads Complies with the USTR's Own “Best Practices” specified in the Review

Had USTR provided Propeller Ads an opportunity to respond prior to the publication of the Review, it would have learned that Propeller Ads engages in **all** of the “best practices” applicable to Propeller Ads' business model, which the Review itself suggests third-party intermediaries use. *See* Review, pp. 14-15.

First, Propeller Ads has implemented comprehensive “Terms of Service” agreements with both its advertisers and publishers that explicitly prohibit them from using its services in connection with any unlawful or illegal activities. *See* Publisher Agreement (<https://propellerads.com/terms/#pterm>) and Advertiser Agreement (<https://propellerads.com/terms/#aterm>). Specifically, but without limitation, Section 7 of the Publisher Agreement contains a long list of unacceptable activities, prohibiting publishers from

¹ Propeller Ads is very accessible, and its contact information is prominently displayed on its website.

² My review of the websites listed in the Review that are serviced by the Propeller Ads advertising network shows that none of them have never been found liable for infringing activities by any court in the US.

engaging in any form of unlawful or illegal activities (including copyright infringement, unlawful use of intellectual property, and malware) and which requires that all publishers own and have legal rights to use and distribute all content on their websites.

Second, Propeller Ads also has implemented anti-fraud technologies and measures to limit “high risk products.” See <https://propellerads.com/advertisers/anti-fraud/>.

Third, Propeller Ads has implemented notice and takedown procedures by expeditiously acting on reports of illegal or unlawful activities, including, when appropriate, by terminating business dealings with an advertiser or publisher engaged in such activities.

Fourth, as set forth in the Publisher and Advertiser Agreements, Propeller Ads requires *all* advertisers and publishers (not just foreign ones) to provide indemnification in the event that they are engaged in unlawful activities.

And Fifth, Propeller Ads clearly identifies its country of origin in multiple places on its website. See <https://propellerads.com/terms/>.

Conclusion

Accordingly, by the laws of the United States and the very standards proposed by the USTR in the Review, there is no reasonable basis for including Propeller Ads in the Review as purportedly engaged in piracy or funding piracy.

On the basis of all of the foregoing, Propeller Ads requests that the USTR immediately (a) publish this letter in its publicly accessible records, (b) retract Propeller Ads’ including in the Review and (c) issue a statement confirming the retraction.