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VOLUNTARY MECHANISMS FOR ADDRESSING ONLINE INFRINGEMENT

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A. BACKGROUND

1. The work program of this, the Ninth Session of the Advisory Committee on Enforcement (ACE), includes preventative actions, measures or successful experiences to complement ongoing enforcement measures with a view to reducing the size of the market for pirated or counterfeited goods. This paper considers voluntary mechanisms (also called programs) which have been (or are being) implemented in various markets with the objective of curtailing the supply of infringing materials, reducing demand for them and increasing the potential that consumers will seek legal and licensed goods. For the purposes of this paper, the word 'mechanisms' is interpreted to mean any agreement or procedure that has the effect of protecting an intellectual property right (IPR) and a mechanism is regarded as 'voluntary' if its existence is not compelled by a law (even though its existence may be motivated by a law). This paper considers some sector-specific voluntary mechanisms undertaken by participants in the online eco-system and public-private partnerships to address piracy and to educate consumers. The example case studies will include programs which aim to educate the general public as well as reach people who are involved in online infringement and mechanisms which address the payment processing and advertising industries as well as brand-owners.

2. This paper describes, primarily, the formation and work of two voluntary mechanisms: (i) the Copyright Alert System and its Oversight Body – the Center for Copyright Information (CCI)

* The views expressed in this document are those of the author and not necessarily those of the Secretariat or of the Member States of WIPO.

in the United States and (ii) Operation Creative in the United Kingdom (UK). It considers also, briefly, some comparative programs in those same markets.

a) The Copyright Alert System and the Center for Copyright Information¹ in the United States of America (US):

3. The US Copyright Alert System is the result of an Agreement under a voluntary Memorandum of Understanding between Rights Holders (or their authorized representatives) in the US audio-visual and music segments of the Content Industry – (represented by the Motion Picture Association of America, Inc. (MPAA), the Recording Industry Association of America (RIAA) and - incorporated through them - entities in the independent portion of those sectors as represented by Independent Film & Television (IFTA) and American Association of Independent Music (A2IM)) - and the five largest US Internet Service Providers (ISPs) (Comcast, AT&T, Verizon, Time Warner Cable and Cablevision).

4. The Agreement underpinning the program and CCI supplements US legislation – namely the 1998 Digital Millennium Copyright Act (DMCA)². Title II of the DMCA added a new Section (512) to the then in-force US Copyright Act³ to create limitations on liability for copyright infringement for service providers (such as ISPs) that meet two overall conditions – namely that (i) they must “adopt and reasonably implement a policy of terminating in appropriate circumstances the accounts of subscribers who are repeat Infringers”; and (2) they must “accommodate and not interfere with ‘standard technical measures.’” (Section 512(i))⁴.

5. The Agreement established the Center for Copyright Information (CCI) for educational resources and technical oversight.

6. Under the Agreement:

- Rights holders send Notices to ISPs – who forward them onto subscribers via up to six Copyright Alerts. The program covers Peer-to-Peer activity for ISPs’ residential, wired account holders.
- Initial Alerts are educational – but later ones must be acknowledged and, finally, Mitigation Measures are levied for persistent infringers unless the subscriber is successful in challenging Mitigation Alerts via the Independent Review process⁵.
- Each party bears its own operating costs – and the costs of educational components, Independent Review, CCI and other oversight/monitoring components are shared.

7. CCI’s responsibilities include:

- *Delivering Education*: about copyright law, sources of legal content and Internet safe practices.
- *Providing a mechanism for Independent Review*: contracting a suitable entity to review and rule on subscribers’ challenges to Alerts.
- *Technical Oversight*: contracting independent experts to review methodologies used to identify and verify infringements and to match cases to subscriber accounts.

¹ <http://www.copyrightinformation.org/> .

² For a summary of the DMCA, please see <http://www.copyright.gov/legislation/dmca.pdf> or a complete copy of its provisions at <http://www.copyright.gov/title17/92appb.pdf>.

³ See <http://www.copyright.gov/title17/92appa.pdf>.

⁴ “Standard technical measures” are defined as “measures that copyright owners use to identify or protect copyrighted works, that have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair and voluntary multi-industry process, are available to anyone on reasonable nondiscriminatory terms, and do not impose substantial costs or burdens on service providers”.

⁵ <http://www.copyrightinformation.org/the-copyright-alert-system/what-do-i-do-if-i-think-the-alert-was-wrongly-sent/>.

- *Reviewing Effectiveness:* monitoring, measuring and reporting on progress in terms of Internet activity, consumer behavior and the program's operations.
- *Increasing Participation:* facilitating the involvement of non-participating ISPs and other Rights Holders in the work of CCI and in the program as a whole.

8. The Copyright Alert System launched at the end of February 2013 and, as it approaches its first anniversary, CCI is in the process of evaluating its progress with a view to making a public report.

b) Operation Creative in the UK

9. Operation Creative is a partnership between the United Kingdom's City of London Police (specifically the Police Intellectual Property Crime Unit (PIPCU)), the UK advertising industry (represented by the Internet Advertising Bureau UK (IAB UK), the Incorporated Society of British Advertisers (ISBA) and the Institute of Practitioners in Advertising (IPA)), together with rights holders (represented by FACT (Federation Against Copyright Theft), BPI (British Recorded Music Industry), IFPI (International Federation of the Phonographic Industry) and The Publishers Association). PIPCU, which is being funded initially by the UK's Intellectual Property Office (which is part of the Department for Business Innovation and Skills) has been set up to protect UK industries that produce legitimate, high quality, physical goods and online and digital content.

10. The objective of the mechanism (which was announced⁶ and reported on⁷ in December 2013 after completing a three month pilot) is to "target websites that provide unauthorized access to copyrighted content" and which generate (often substantial) revenues from advertising. Rights holders identify the websites and provide comprehensive evidence packages to PIPCU. The press release⁶ notes that "once illegal activity was confirmed by analysts from the City of London Police, a formal "prevention and deterrent" process began to encourage infringing websites to engage with the Police, to correct their behavior and to begin to operate legitimately. Details of those failing to respond to this approach were then passed to a group of 60 brands, agencies and advertising technology businesses with a request to stop advertising on those sites".

11. PIPCU reported that a review of 61 websites over the course of the pilot revealed the following:

- "During the pilot adverts from well-known brands decreased by 12%;
- Adverts that lead the user to sites with explicit adult content or expose them to malware increased by 39% during the pilot, indicating that site owners may struggle to maintain their revenue streams when adverts from established brands are removed;
- Almost half (46%) of total ads served to the sites were for unknown or unidentified brands which invited users to click through, often to fraudulent scams."



Operation Creative
Press Release_Decen

⁶ <http://www.wired.co.uk/news/archive/2013-12/12/pipcu>; <http://musically.com/2013/12/10/city-of-london-polices-operation-creative-targets-ad-sponsored-piracy/>.

12. The next phase of the program targeted the websites that persisted in offending – via formal letters which PIPCU sent out to “domain name registrars explaining that they were hosting websites facilitating criminal copyright infringement under UK law as well as potentially breaching their terms and conditions. Registrars were then requested to suspend these websites until further notice”⁶. At the time of the announcement, these sites remained under an on-going review by PIPCU officers – but the PIPCU release⁶ noted that “40 national and international websites were suspended by domain name registrars”.

13. Operation Creative continues with an updated list of sites – and other rights holders are reviewing its progress with interest.

Section B (which follows below) provides some further analysis of some aspects of these two mechanisms.

c) UK Good Practice Principles

14. In mid-December, shortly after the Operation Creative announcement, the UK advertising industry announced that they had reached agreement on Good Practice Principles and Primary Agreements which crucially involve big players including Google DoubleClick Ad Exchange, Yahoo, Fox Networks and Microsoft⁸.

15. The announcement was made by The Digital Trading Standards Group (DTSG) – a UK group comprising representatives of the entire digital display advertising market, including trade bodies, the Association of Online Publishers (AOP), ISBA – the Voice of British Advertisers, the Institute of Practitioners in Advertising (IPA) and the IAB UK. The objective is to “minimize risk of display advertising placement”⁸.

B. SOME ANALYSIS OF THE TWO MAJOR VOLUNTARY MECHANISMS INCLUDED IN THIS PAPER

16. Each of the voluntary mechanisms referenced in the preceding paragraph is analyzed against the following factors:

- a) **Form:** in what form is the mechanism described?
- b) **Participants:** to which entities does the mechanism apply, and in what manner are they “recruited”?
- c) **Right:** to what legal right does the mechanism apply?
- d) **Requirement for Remedy:** what must a right holder establish to obtain relief under the mechanism?
- e) **Remedy:** what relief or outcome does the mechanism provide?
- f) **Determination Procedures:** by whom and how is a determination made under the mechanism?
- g) **Appeal:** does the mechanism provide a means for challenging a determination?
- h) **Transparency:** are the outcomes of the mechanisms published?
- i) **Motivation:** what is the motivation for adoption of the mechanism?

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<http://www.iabuk.net/about/press/archive/dtsg-launches-uk-good-practice-principles>

a) Form

The two major mechanisms (the US Copyright Alert System and Operation Creative in the UK) are described in operational form – *i.e.*, an overview is presented above in the form of a mechanism that is actually applied by the participants.

b) Participants

For the Copyright Alert System, individual rights holders join the program via their membership of one of the Industry Associations mentioned. In turn, representatives of MPAA and RIAA who were involved in negotiating the program reached out to ISPs to invite their voluntary participation.

Rights holders participate in the Operation Creative program via their membership of one of the Industry Associations mentioned – and members of the Advertising industry receive information inviting their individual participation from their respective Associations.

Other Operation Creative participants include domain name registrars and others associated with qualifying websites on which advertising has been found. Those entities and individuals are the recipients of letters sent by PIPCU once a website has been determined to qualify for inclusion in the program.

c) Rights

As it is concerned primarily with detecting, verifying and notifying ISPs about cases of infringement of copyrighted audio-visual and music content, the rights covered by the voluntary Copyright Alert System are related mainly to copyright - including the use and making available of copyright content.

For Operation Creative, the rights are broader-ranging since the nature of the program addresses the appearance online of advertisers' brand and product identities. Those may be demonstrated by the appearance of advertisements including registered and unregistered trademarks, logos and other identifying attributes, and the use of other IP, including copyright, designs, and patent.

Both mechanisms ensure, via their respective setup, that individuals' rights (such as the right to privacy as well as the right to request a review of their case) are protected within the boundaries of whatever is permitted by the agreements themselves and/or by legislation which may provide a backdrop to the agreements. For example, rights holders cannot gain knowledge of any ISP subscriber's personal identity without an applicable court order.

d) Requirements for Remedy

In the case of the Copyright Alert System, rights holders (or their qualified representatives) list assets (in the case of the audio-visual segment, they are full versions of films and television programs – and, for the music segment, they are full versions of albums or music tracks) for monitoring and for notices to be generated and sent to participating ISPs when cases of infringement of the associated copyright are detected within Peer-to-Peer networks and verified. Ownership of individual assets must be confirmed in advance – and must be supportable by a current copyright certificate or other applicable documentation.

In the case of Operation Creative, rights owners or their representatives conduct extensive reviews of the content being made available on websites – to determine if the

site qualifies for presentation to PIPCU. The standard of evidence which is required is extremely high – and must be at a level sufficient to support a criminal prosecution. PIPCU applies a rigorous quality assurance model to the standard of investigations and ensures that all allegations are supported by evidence that has been obtained lawfully and by a statement from the rights holder or its nominee.

e) Remedies

Within the Copyright Alert System, the remedies available include generation of notice/s to be forwarded to participating ISPs – and, depending on the status of the ISP subscriber's account which is determined to be associated with the IP address that has been confirmed to apply to each case, this may result in an Alert being forwarded to the account holder and/or to the application of a mitigation measure.

For Operation Creative, remedies for advertisers and brand owners – as well as for the rights holders associated with the content being offered on qualifying websites - come from PIPCU's detailed evaluation of each case and, where applicable, their notification of domain registrars and others associated with those websites. It is hoped that this will lead to the subsequent decision of those registrars to suspend them until further notice. Also, there is benefit to all if advertisers, brand owners and their representatives become more aware of the existence of rogue websites and more diligent about not allowing themselves to be represented on (and therefore assisting the flow of money to) such sites.

f) Determination Procedures

Both the Copyright Alert System and Operation Creative require substantial preparatory and investigatory work to be done in order to determine that a case is worthy of action. Both programs ensure that the rationale for a case and its outcome are formally documented

For the Copyright Alert System, individual cases of activity in Peer-to-Peer networks concerning assets listed by rights holders for monitoring are analyzed carefully to ensure that the actual content involved is infringing and also that it was actually shared by the IP address in question for each case. Any verified case resulting in a notice being sent to a participating ISP (and then, potentially an Alert to that ISP's subscriber account) is supported by a multi-component evidence package which contains human-readable and machine-readable digital details of the transaction, the actual exchange of data between the peers and the actual content which was shared. These evidence packages are summarized in the notices to ISPs and Alerts to subscribers – and they are available for inspection by the independent reviewers.

For Operation Creative, the PIPCU officers are reviewing and making decisions based both on large evidence packages related to websites which are provided by rights holders and also by their own intelligence resources. The initial and resulting evidence and intelligence is held by PIPCU as a law enforcement agency – but the inclusion of a website's name on the register made available to entities in the advertising ecosystem confirms PIPCU's high level of confidence that the required standard of evidence has been met in every case.

g) Appeals

Both voluntary mechanisms provide avenues for affected individuals to seek review of their cases.

For the Copyright Alert System, ISPs' subscribers who receive Mitigation Alerts (at the final stage of the program) are entitled to request "Independent Review" of those and other Alerts⁵. The Independent Review process is managed by the American Arbitration Association (AAA)⁹ – one of the world's leading expert resources for this type of assessment and review service – and the entire process is managed entirely separately from CCI's operation or purview.

Website owners/operators will always have the opportunity to challenge PIPCU operational activity. Also both the Agency and rights holders stay vigilant regarding activity of sites so that, where evidence exists that a website no longer qualifies for inclusion in the program, it will be removed with immediate effect.

h) Transparency

CCI (via its website¹ and public statements) and the Rights Holders involved in the Copyright Alert System present clear information about how Peer-to-Peer networks work and how cases leading to notices and Alerts are identified and verified. Also the mechanism includes "Grace Periods" between Alerts – intended to allow consumers time to, for example, review their home network setup to make sure that it is secure from unauthorized or unintended use and/or to counsel children or others who are authorized to use the internet connection but who may be (knowingly or not) interacting with and sharing infringing content.

The level of transparency for Operation Creative is, by nature of the fact that the mechanism is managed via a UK Law Enforcement organization, different than that for the Copyright Alert System. However, as noted above, website owners/operators always have the opportunity to present a case against PIPCU's decision and to discuss the matter further.

i) Motivations

There are a number of motivations behind the voluntary mechanisms reviewed in this paper – including (most importantly) education, protection of rights holder intellectual property assets and the desire to ensure that enforcement and protection programs are designed and operated in a manner which is practical and sustainable for participants and which is reflective of their capabilities and corporate "personalities" (rather than being prescribed for them solely by legislation or a court).

As regards education, currently, the primary "users" involved with the Copyright Alert System are the ISPs' account holders (and perhaps other users of the accounts) who receive Alerts – as well as the general population of consumers. However the intent is not to deliver a punitive message and to focus on the Mitigation Measures¹⁰ included in the program. Rather the objective is , via CCI itself¹¹ and also via sector-specific resources and campaigns offered by participating rights holders¹², to encourage consumers to seek out the many sources of legal content (of all types – and not just limited to downloading options) that are available to them in the United States. Also there is guidance about the risks that consumers may face from malware and other undesirable things which may be

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https://www.adr.org/aaa/faces/s/about?_afrLoop=621069334666245&_afrWindowMode=0&_afrWindowId=1aadgpu9fg_1#%40%3F_afrWindowId%3D1aadgpu9fg_1%26_afrLoop%3D621069334666245%26_afrWindowMode%3D0%26_adf.ctrl-state%3D1aadgpu9fg_51.

¹⁰ Which include such things as a requirement to review educational material on landing pages and reduction of bandwidth speed.

¹¹ <http://www.copyrightinformation.org/a-better-way-to-find-movies-tv-music/>.

¹² See, for example, http://riaa.com/toolsforparents.php?content_selector=legal-music-services; <http://www.wheretowatch.org/>.

encountered on Peer-to-Peer networks. CCI intends to expand its educational mandate over the next year – with one focus being to provide resources to educators.

For Operation Creative and the DTSG “*Good Practice Principles and Primary Agreements*”⁶, the primary “users” in terms of education messages are the members of the advertising industry who are being advised about the activity of rogue websites and encouraged to review their practices for placing advertising to avoid such sites (including those specifically presented by PIPCU).

Rights holders believe that if consumers are provided with clear information about the practice of copyright infringement - and, especially, the manner in which some entities and individuals use commercial markets and provide product offerings which are intent on leveraging the illegal activity of others to realize revenues (and often substantial profits) for themselves – they will generally choose a legal route. This should lead, in turn, to reduction in the levels of infringement and increases in the levels of consumption of legal content.

However, for mechanisms such as the two described in this paper, efficient operation is critical. The systems must work flawlessly, consumers’ and corporations’ privacy and personal/corporate data must be protected, messaging must be “user friendly”, levels of transparency must be optimal and support resources must be available and accessible. So one major premise of both the Copyright Alert System and Operation Creative is that the infrastructure and mode of operation applied to achieve these objectives are best designed and maintained via a collaborative model which ensures that the views and limitations of all participants are considered and that the opinions and desired actions of the “ultimate users” remain as a primary focus. To date these US and UK-based programs are demonstrating that this can be achieved successfully and healthily via robust voluntary agreements and continuing public/private partnerships.

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