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Business Software Alliance Reply The Online Infringement of Copyright Initial Obligations Code

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The Business Software Alliance (BSA) brings together many of the world's most innovative information technology companies¹. Our members have developed a range of innovations in the UK, spurred by and in reliance on the UK's robust copyright rules, but like many participants in the online economy, are suffering significantly from unchecked digital piracy. BSA therefore welcomes the opportunity to respond to the Ofcom's notice of proposals "to make by order a code for regulating the initial obligations", this code being issued by Ofcom in connection with the implementation of the Digital Economy Act.

BSA has the following comments in relation to the proposed Online Infringement of Copyright Initial Obligations Code ("the Code"). These are by reference to the relevant Article/Part referenced in the Code. (References in this paper to the "Code Consultation" are to Ofcom's consultation paper dated 26 June 2012.)

Article 6

Article 6 requires a qualifying copyright owner to adopt "procedures for gathering and verifying evidence of copyright infringement which have been approved by OFCOM". BSA welcomes Ofcom's recognition that consistency of application by copyright owners is necessary to ensure that confidence and respect for the notification system is both established and maintained, and to that end a degree of standardisation in terms of process is necessary. However, BSA remains concerned that the wording of Article 6 is too open, in that it permits an interpretation that would involve Ofcom having the power to approve or otherwise the use of particular evidence-gathering technologies. BSA does not believe that this is warranted or necessary to give full effect to the Code.

BSA agrees that a standard which reflects industry best practice regarding such matters as internal quality control, process transparency, internal

¹ The Business Software Alliance (www.bsa.org) is the leading global advocate for the software industry. It is an association of nearly 100 world-class companies that invest billions of dollars annually to create software solutions that spark the economy and improve modern life. Through international government relations, intellectual property enforcement and educational activities, BSA expands the horizons of the digital world and builds trust and confidence in the new technologies driving it forward. BSA's members include: Adobe, Apple, Autodesk, AVEVA, AVG, Bentley Systems, CA Technologies, CNC/Mastercam, Intel, Intuit, McAfee, Microsoft, Minitab, Progress Software, PTC, Quest Software, Rosetta Stone, Siemens PLM, Dassault Systèmes SolidWorks, Sybase, Symantec and The MathWorks..

auditing, the provision of evidence regarding the existence and ownership of copyright, and the handling of evidence regarding suspected infringement, can be a useful tool. It will give the overall system a degree of integrity in that participants will understand that a common standard has been applied by copyright owners in terms of their evidence processing and analysis (so that, for example, the likelihood of a “false positive” arising is reduced as far as is practicable). It will also provide a reference point for “entry level” copyright owners which may be unfamiliar with the forensic detail associated with such sophisticated enforcement procedures.

It would, however, be helpful if Ofcom would confirm that Article 6 is not intended to provide a means whereby Ofcom can deny a copyright owner the opportunity to utilise a technological evidence gathering means of its own choosing. BSA does not believe that this is what is intended by the proposed Code but suggests that it would be helpful if this was made clear at the outset. In particular, whilst paragraph 4.17 of the Code consultation says that the quality assurance process “should not promote one detection approach over another”, it would be helpful if Ofcom expressly ruled out any intention to impose any form of technological mandate on copyright owners.

Article 20

BSA notes that Ofcom intends to appoint an appeals body pursuant to the OJEU procurement process, which is intended to ensure that such appointments are made in a transparent manner that offers the best value for money to the taxpayer. In keeping with the comments contained in paragraph 7.47 of the Code Consultation document, BSA and its members would be pleased to engage with Ofcom regarding the appointment of such a body and the specific skills and competencies that would be required of such a body.

Parts 8 and 9

Parts 8 and 9 of the Code deals with subscriber appeals, that is, appeals that may be lodged by recipients of Copyright Information Notices (“CIRs”). BSA has the following comments –

Article 25(c)] provides an appeal right if the recipient of a CIR can show that he did not commit the acts of infringement alleged by way of the CIR, and that he took reasonable steps to prevent others from infringing copyright by means of his internet access. There is an apparent contradiction in the Code consultation document in that whilst, at paragraph 7.41, Ofcom approves the appeal body developing objective standards to be applied in relation to such appeals (one example of which would be, BSA suggests, that a subscriber must secure access to his network), at paragraph 7.44, Ofcom states that it “cannot direct or seek to influence the appeals body as to how it should determine substantive

issues, such as the actions which amount to reasonable steps". BSA would encourage, in the interests of certainty, that the appeals body be encouraged to develop objective standards in this regard. BSA also agrees with the comments attributed to "user groups" in the Code consultation to the effect that some guidance as to what constitutes "reasonable steps" in this regard is needed: requiring the appeals body to, in effect, determine what these are on the basis of matters that are placed before it would appear to be the least efficient solution.

With regards to the suggestion by Ofcom (at paragraph 7.47 of the Code consultation) that Ofcom engage with stakeholders regarding the independence and operational capability of the appeals body, BSA agrees and would be pleased to work with Ofcom on this. However, BSA disagrees that Ofcom needs to consult as to the procedural rules that the appeals body will operate under.

Article 29 provides that the burden of proof in relation to a disputed CIR rests with the copyright owner. BSA notes that proof of compliance with Ofcom-approved procedural standards (referred to in Article 6) is expressed not to be of itself sufficient to satisfy an appeal body. This is a little surprising as it suggests that the appeal body may re-open any issue relating to adequacy of process that will have already been determined by Ofcom in the course of it approving a copyright holder's processes. However the Code consultation also suggests (at paragraph 4.52) that the appeals body may *de facto* find that compliance with Ofcom approved procedures will reverse the burden of proof back onto the subscriber. This area of the Code is confusing and Ofcom might reconsider its approach in this regard.

Article 38 requires a subscriber to pay a fee of £20 in connection with the filing of an appeal following receipt of a CIR. BSA believes that this is somewhat high, and in relation to certain appeals, arguably unfair. For example, if a subscriber can demonstrate that the acts complained of in the CIR were (a) committed by a third party using the subscriber's internet access, (b) the subscriber was unaware of this activity and (c) the subscriber satisfies the appeals panel that he was not aware of the "reasonable steps" that he should have taken to prevent such access, then it would appear that he would be unfairly penalised. The appeals body should therefore have discretion to refund or waive any subscriber appeal fee even if a CIR appeal is not upheld.

BSA would welcome the opportunity to discuss any of the issues raised above.

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