

Submission to Communications Alliance

Industry Code: Copyright Notice Scheme

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Executive Summary

In making this submission, we suggest that Australia learn from the experiences of other jurisdictions, and avoid some of the mistakes that have been made. In particular, this involves:

- Ensuring that adequate information is available to evaluate the success of the scheme
- Ensuring that notices sent to consumers provide full and accurate information that helps them understand their rights and options
- Limiting the potential abuse of the system, and particularly attempts to intimidate consumers into paying unfair penalties through ‘speculative invoicing’
- Avoiding the potential for actual or perceived bias in the scheme’s oversight body

Key recommendations

- 1. Clear metrics to measure the success of the scheme should be developed and agreed upon before it commences.**
- 2. A code of ethical conduct for use of the scheme that includes undertakings that:**
 - Notices are issued in a good faith belief of their accuracy; and
 - Any offers to settle potential infringement suits will strictly be limited to a compensatory amount.
- 3. All notices issued to consumers should:**
 - Be drafted in a public, consultative process, with input from rightsholders, ISPs, consumer groups, and legal experts;
 - Contain comprehensive information about limitations and exceptions to copyright infringement; and
 - Provide clear guidance about how consumers can contest allegations cheaply and effectively.
- 4. The scheme should include safeguards to ensure transparency and enable rigorous public oversight. In particular, we recommend that:**
 - All notices should be sent in an anonymised form to a clearinghouse for independent analysis and review of the scheme;
 - Comprehensive statistics should be compiled and made publicly available on a continuous basis about the numbers of each type of notice received and sent by ISPs, the outcomes of any appeals, and other relevant information.
 - Without prejudicing any confidential information, the results of audits of detection methodologies and accompanying reasons should be made publicly available.
- 5. The composition of the Copyright Information Panel Executive Committee should include two additional independent members.**
- 6. In order to improve due process:**
 - Any notice issued to a user should be contestable for the full period in which it is in force;
 - The burden of proof should not lie with a consumer to prove that they did not infringe, especially if the details of detection methodology used is confidential;
 - Appeals process should incorporate protection for natural justice, be determined by independent arbitrators, and require the transparent reporting of all decisions.

Clear evaluation goals

Recommendation: Clear metrics to measure the success of the scheme should be developed and agreed upon before it commences.

Given the significant expense involved in establishing and maintaining this scheme, it is important that there are clear metrics for evaluating the extent to which it is meeting its objectives.

Other jurisdictions have experienced difficulties evaluating the impact of their schemes. It is particularly hard to identify causal links between the introduction of graduated response schemes and a reduction in infringement rates.¹ With the recent launch of streaming services such as *Stan* and *Netflix* and the dynamic nature of the marketplace and products, it is particularly important that enough data is collected to be able to identify causal, not just correlative relationships.

The draft Code provides that an evaluation of the scheme will be started within 18 months, undertaken by an independent contractor with support from the Federal Government.² The scheme's effectiveness is to be evaluated against the objectives of the scheme and operational effectiveness. The current objectives of the scheme, while laudable, are incomplete. Essential consumer issues such as the price and quality of internet access, which may be impacted by the scheme, are not covered. As such, fuller criteria should be developed prior to the commencement of the scheme. These criteria should be developed in a consultative process with input from rightsholders, ISPs and consumer representatives. Evidence required to judge these outputs should be identified and baseline data collected before the commencement of the scheme.

We have outlined below several factors that are of particular significance to consumers and the wider economy.

Availability of legitimate digital content

The success of the scheme should be explicitly evaluated against the availability of lawful content with measures of price, timeliness, and consumer choices in formats and platforms. Australia still lags behind other countries in the ability of consumers to access legitimate digital distribution channels. When accessing digital goods, Australians pay more,³ have less choice in distribution channels,⁴ are exposed to substantial delays in access,⁵ and are

¹ Rebecca Giblin, 'Evaluating Graduated Response' (2013) 37 *Columbia Journal of Law and the Arts* 147., 194.

² Draft Code at 4.3 'Evaluation Process' specifically 4.3.1 and 4.3.2

³ House Standing Committee on Infrastructure and Communications, 'At What Cost? IT Pricing and the Australia Tax' (29 July 2013)

<http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ic/itpricing/report.htm>.

⁴ Angela Daly, 'Aussies are still paying over the odds and it's time for ACCC action' (16 June 2014) *The Conversation* <<https://theconversation.com/aussies-are-still-paying-over-the-odds-and-its-time-for-accs-action-27920>>.

⁵ Jordi Mckenzie and W Walls, 'File-Sharing and Film Revenues: An Empirical Analysis' [2013] The University of Sydney, Economics Working Paper Series 1, 12-13.

sometimes denied access completely,⁶ as compared with other jurisdictions. The perceived unfairness of this disparity is an important contributor to the willingness of consumers to infringe copyright content.⁷ The recent launch of several new services in the Australian market is a positive sign, but it is important to monitor the degree to which content is legitimately available in Australia, and the terms upon which consumers can obtain access.

Broadband costs and the digital divide

The benefits of the scheme need to be carefully weighed against its costs, especially if those costs are passed onto consumers in increases in internet prices. Any such increase is likely to further broaden the digital divide and unfairly burden the most disadvantaged sectors of society.⁸ Careful monitoring is required on an ongoing process to ensure that the scheme's costs are not being passed on to consumers.⁹

Impact on Australian creators

The impact of the scheme should be explicitly measured against tangible, monetary benefits to Australian creators. Experience from other jurisdictions shows that it can be difficult to determine whether reductions in rates of detected infringement results in increased revenues for Australian creators. These measures should be built into a reliable evaluation methodology from the start of the scheme.

A commitment to ethical conduct

Recommendation: A code of ethical conduct for use of the scheme that includes undertakings that:

- **Notices are issued in a good faith belief of their accuracy; and**
- **Any offers to settle potential infringement suits will strictly be limited to a compensatory amount.**

One of the key challenges facing copyright today is the threat of losing legitimacy. Past efforts to increase the enforcement of copyright through severe penalties or mass infringement suits have been met with hostility, leading to a 'normative backlash' from

⁶ Josh Taylor, *Netflix's Australian block keeps Quickflix going*, ZDNet (1 March 2013)

<<http://www.zdnet.com/au/netflixs-australian-block-keeps-quickflix-going-7000012006/>>.

⁷ See Paula Dootson and Nicolas Suzor, 'The Game of Clones and the Australia Tax : Divergent Views about Copyright Business Models and the Willingness of Australian Consumers to Infringe' (2015) 38 *University of New South Wales Law Journal* 206.

⁸ The Australian Communications Consumer Action Network (ACCAN) notes with concern that in households with income of less than \$40,000 internet access falls to only 57%, and they anticipate any increase in prices to exacerbate the digital divide. See Media Release *Copyright Notice Scheme must respect consumer protections* (20 February 2015) <<https://www.accan.org.au/files/Media%20Releases/150220%20Copyright%20notice%20scheme%20must%20protect%20consumer%20protections.pdf>>

⁹ Note that there is some suggestion that the French ISPs have passed on these costs to consumers by raising the price of their broadband services: see Drew Wilson, *HADOPI Blamed for ISP Rate Hikes in France* (1 January 2011) ZeroPaid <<http://www.zeropaid.com/news/91800/hadopi-blamed-for-isp-rate-hikes-in-france/>>; Cheryl Sun, *Here There Be Pirates ...* (8 October 2014) Birman & Ride <<http://birmanride.com.au/firm/news-articles/here-there-be-pirates/>>; Mike Masnick, *End Result of HADOPI? Higher ISP Fees* (3 January 2011) TechDirt <<https://www.techdirt.com/articles/20110102/14122212488/end-result-hadopi-higher-isp-fees.shtml>>.

consumers.¹⁰ We endorse the scheme's specific design in increasing education about copyright and legal avenues to access copyright content. This must be carefully managed, however, to ensure that the scheme is not used in ways that undermine the legitimacy of copyright law.

The biggest potential for abuse of this system is so-called 'speculative invoicing', where rightsholders contact consumers with offers to settle alleged infringements for grossly disproportionate amounts.¹¹ This is dangerous for two reasons. First, the settlement figures have little relationship to the harm suffered;¹² they are unfair penalties that abuse the legal system. Second, consumers who are wrongly accused face the difficult choice between paying up or incurring significant expense in contesting an action in court. Internationally, courts have begun to exercise greater control over the ways that rightsholders communicate with users in order to limit these practices.¹³

In order to ensure that the Australian notice scheme is not abused, we recommend limiting participation to rightsholders who affirmatively commit to using the scheme for legitimate purposes. We suggest that the ability to utilise the system should be conditioned on adherence to a code of ethical principles. We also suggest that a requirement be introduced for rightsholders to provide some form of undertaking that notices are made in a good faith belief in their accuracy. Rightsholders who have been found to repeatedly abuse the system or fail to take due care in the allegations they issue should lose the ability to utilise the scheme.

Particularly, the code should provide that before taking steps to identify consumers, rightsholders must make an undertaking that any offer to settle a prospective suit will be limited to a purely compensatory amount based on the average market price of the allegedly infringed good. It is a fundamental principle of our rule of law that penalties for breach of the law can only be imposed through judicial proceedings.¹⁴ If it is necessary to seek additional damages for infringement, this should be done within the context of a full judicial procedure under section 115(4) of the *Copyright Act 1968* (Cth). If, after the evaluation period of this scheme, it becomes clear that a deterrence scheme is required, we strongly argue that it must only be created legislatively with full public oversight and adequate protections for due process.

¹⁰ See Timothy L. Yim, 'Normative Avoision: Revising the Copyright Alert System to Avoid Normative Backlash' (2014) 6 *Hastings Science and Technology Law Journal* 1; Ben Depoorter, Alain Van Hiel and Sven Vanneste, 'Copyright Backlash' (2010) 84 *Southern California Law Review* 1251.

¹¹ *Patrick Collins, Inc. v John Doe 1*, 2012 US Dist LEXIS 71122 (ED NY, 2013), 5.

¹² *Golden Eye (International) Ltd v Telefonica UK Ltd* [2010] EWHC 723 (Ch), [137].

¹³ *Golden Eye (International) Ltd v Telefonica UK Ltd* [2010] EWHC 723 (Ch), [36]; *Voltage Pictures LLC v John Doe* (2014) 240 A.C.W.S (3d) 964. [133].

¹⁴ Nicolas Suzor and Brian Fitzgerald, 'The Legitimacy of Graduated Response Schemes in Copyright Law' (2011) 34 *University of New South Wales Law Journal* 1.

Ensuring transparency

Recommendation: The scheme should include safeguards to ensure transparency and enable rigorous public oversight. In particular, we recommend that:

- **All notices should be sent in an anonymised form to a clearinghouse for independent analysis and review of the scheme;**
- **Comprehensive statistics should be compiled and made publicly available on a continuous basis about the numbers of each type of notice received and sent by ISPs, the outcomes of any appeals, and other relevant information.**
- **Without prejudicing any confidential information, the results of audits of detection methodologies and accompanying reasons should be made publicly available.**

In order to ensure that this code is accepted as legitimate, its operation must be transparent and accountable to the public. The experience of the New Zealand Government highlights the potentially disastrous effects of failing to build transparency into a copyright notice scheme. When asked for an update on the progress of its evaluation of the NZ Scheme, the NZ Ministry of Business, Innovation & Employment recently noted that it has not been able to assess the volume of notices sent through the scheme:

“Since 2012 we have monitored the effectiveness of the regime by maintaining regular contact with stakeholders, including the rights owners, the [ISPs] and InternetNZ. We do not have access to the volume of notices that have been issued under the regime because that information is commercially sensitive to the stakeholders.”¹⁵

This is an unacceptable situation that must be avoided. Without clear data, no evaluation of the scheme can be comprehensive. It is not appropriate that the important task of evaluation be left to those with a direct interest in some aspect of the scheme.

We recommend that all notices sent to ISPs are anonymised and provided to a public and independent repository or clearinghouse. This transparency is important to enable independent review and academic analysis of the operation of the scheme and to inform the future development of regulatory policy. It will also facilitate public confidence in the operation of the scheme.

We also recommend that reviews of detection methodologies be made publicly available and that sufficient data is made available to enable ongoing oversight of efficacy in practice. The overseas experience suggests that infringement detection systems are vulnerable to technical

¹⁵ Ministry of Business, Innovation and Employment spokesperson, email dated 19 March 2015.

errors¹⁶ and abuse.¹⁷ In the absence of an independent legal examination of the evidence, rightsholders have little incentive to take care when collecting data and issuing warnings.¹⁸

Content of notices to consumers

Recommendation: All notices issued to consumers should:

- **Be drafted in a public, consultative process, with input from rightsholders, ISPs, consumer groups, and legal experts;**
- **Contain comprehensive information about limitations and exceptions to copyright infringement; and**
- **Provide clear guidance about how consumers can contest allegations cheaply and effectively.**

In order to ensure that this scheme is best able to fulfil its educational goals, the content of notices sent to consumers should be carefully designed and regulated. This scheme should include safeguards to ensure that the notices sent to consumers are clear, contain accurate information, and provide comprehensive information about consumers' rights, including potential grounds for appeal. The notices sent to consumers should be developed through a consensus based process in conjunction with rightsholders, ISPs, and consumer groups, and agreed upon by the ACMA.

Because copyright law is complex, there is a strong risk that without adequate information consumers may not take appropriate steps to protect their interests. It is fundamentally important that education notices sent to consumers provide information not just about the subsistence and ownership of copyright in the contested material, but also about relevant exceptions and defences to infringement that may apply to the consumer's use. As far as possible, consumers should be able to understand this information without the need to seek legal advice.

Care must be taken to ensure that notices are drafted with these considerations in mind. The standard forms should undergo a drafting process where early drafts are made available to the public for comment and consultation. This process will ensure accountability and competitive neutrality in the drafting of the forms and will promote public confidence in the process. The international experience suggests that this is a vital safeguard — the notices issued under the US Copyright Alert Scheme, for example, are deficient in failing to fully articulate the

¹⁶ See e.g. Cowdroy J's finding of the unreliability of 350 daily "robot" notices sent to iiNet from the United States over several years: *Roadshow Films Pty Ltd v iiNet Ltd* (2010) 263 ALR 215, 257. In the USA, a prime example is the Recording Industry Association of America in the Napster litigation suing certain individuals for illegal downloading, despite one of whom being deceased, and another whose computer was incapable of operating the software to illegally download music as alleged.

¹⁷ This behaviour is, unfortunately, all too common in non-judicial copyright processes; a 2006 study shows that over 40 per cent of copyright takedown notices issued to Google under the DMCA are issued against business competitors, and over 20 per cent of those contained substantively questionable claims: Jennifer M Urban and Laura Quilter, 'Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act' (2006) 22 *Santa Clara Computer & High Technology Law Journal* 621, 655, 684.

¹⁸ Peter Yu, 'The Graduated Response' (2010) 62 *Florida Law Review* 1373, 1391–2.

defences and limitations to copyright law that consumers are able to rely on.¹⁹ This gives a misleading impression to consumers and has the effect of arbitrarily limiting the reasons for which a consumer can challenge a notice.

Increased public interest representation on Copyright Information Panel

Recommendation: The composition of the Copyright Information Panel Executive Committee should include two additional independent members.

The draft Code provides that the Copyright Information Panel Executive Committee will consist of five members, with two representatives appointed by rightsholders, two by ISPs and one by the Consumer Organisation (ACCAN). This composition does not adequately reflect the significance of this scheme to the public. Industry codes can be an effective mechanism to regulate industries, but in order to ensure that they reflect the public interest, it is important to empower public interest groups to monitor their performance.²⁰

Given the vital role of the Copyright Information Panel Executive Committee in overseeing this scheme, we recommend that its composition be reviewed to better include public interest groups. Because this scheme is specifically aimed at regulating consumer behaviour, we suggest that a clear plurality of representatives on this panel are selected from consumer groups and independent members with no actual or perceived conflict of interest. We suggest that the composition and appointment of Committee members could be carried out in a similar process to that of the Classification Board, in order to ensure that it is broadly representative of the Australian community and that members are transparently appointed on merit.²¹

This is an important step to avoid the difficulties faced by the US Copyright Alert Scheme. Under that scheme, the Center for Copyright Information (CCI) is responsible for the selection of an independent firm to engage in an auditing role.²² This panel appointed an auditing firm that was found to be compromised in their independence due to their links to the RIAA.²³

¹⁹ Annemarie Bridy, 'Graduated Response American Style: "Six Strikes" Measured Against Five Norms' (2012) 23 *Fordham Intellectual Property, Media & Entertainment Law Journal* 1, 33.

²⁰ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

²¹ See Australian Classification Board, *Guidelines for the Selection of Members of the Classification Board* (2008) Commonwealth of Australia

<http://www.classification.gov.au/About/Documents/O_Guidelines%20for%20the%20Selection%20of%20Members%20of%20the%20Classification%20Board%20-%20June%202008.pdf>, incorporating the Merit and Transparency procedures issued by the Australian Public Service Commission.

²² Annemarie Bridy, "Graduated Response American Style: "Six Strikes" measured against five norms"

²³ Jill Lesser, *CCI Recommits to Independent Evaluation of Content Methodology*, Ctr. for Copyright Info., Oct. 30, 2012, <http://www.copyrightinformation.org/node/712>

Challenges to notices, due process, and adjudication

Recommendation: In order to improve due process:

- **Any notice issued to a user should be contestable for the full period in which it is in force;**
- **The burden of proof should not lie with a consumer to prove that they did not infringe, especially if the details of detection methodology used is confidential;**
- **Appeals process should incorporate protection for natural justice, be determined by independent arbitrators, and require the transparent reporting of all decisions.**

First, we submit that there is no good reason to limit the appeal period to 28 days after the issue of a Final Notice. By this time, much of the evidence that would exculpate an Account Holder may be lost.

Second, it is dangerous to reverse the onus of proof on Account Holders, and it is unacceptable to put in place a system that requires users to bear the onus of proof without the requisite information to actually contest that allegation. It is not always clear how, exactly, an Account Holder can prove a negative in these circumstances. This leaves consumers with a high responsibility to provide evidence to contest spurious requests.²⁴ Because details of the audits are confidential, the Account Holder does not have access to all the material facts necessary to properly challenge allegations. This is dangerous; in Ireland, for example, in 2011, it was found that 390 subscribers were misidentified as infringers due to what was described as a “minor technical issue” on Eircom’s part.²⁵ We also note that the onus of proof effectively undermines the principle of personal responsibility in copyright law. There is no obligation under Australian law for an account holder to monitor the actions of other people using their networks, and no general law principles hold account holders automatically responsible for unlawful uses of their networks.

Third, appeals process should incorporate strong protections for natural justice. While this is an industry code, the ultimate goal is a public one: to regulate the behaviour of individuals. As a public system, users have a legitimate expectation that decisions will be made in a legitimate, accountable, transparent, and procedurally fair manner.²⁶ As a first step to achieve this, we recommended that independent and accredited arbitrators be engaged to determine the outcome of any challenges. This is crucial in order to protect consumers’ rights relating to due process, minimise any perceptions of bias in the process, and promote consumer trust in the system. Importantly, in order to ensure that consumers are well informed in these processes, the outcomes and reasons of all decisions should be published and accessible. This is particularly important in order to limit the structural bias of a ‘repeat player effect’ in these proceedings.

²⁴ As, for example, the defendant in *Malibu Media, LLC v. Roberto Roldan*, 8:13-cv-03007-JSM-TBM, who was required to adduce a great deal of evidence to demonstrate that he was misidentified by the plaintiff, despite not residing at the address of the internet connection for over two years.

²⁵ *EMI Records v Data Protection Commissioner* [2012] IEHC 264.

²⁶ Nicolas Suzor and Brian Fitzgerald, ‘The Legitimacy of Graduated Response Schemes in Copyright Law’ (2011) 34 *University of New South Wales Law Journal* 1.