



**Submission to the Communications
Alliance on the Copyright Notice
Scheme Industry Code
DR C653:2015**

23 March 2015

57 Carrington Road Marrickville NSW 2204

Phone 02 9577 3333 Fax 02 9577 3377 Email ausconsumer@choice.com.au
www.choice.com.au

The Australian Consumers' Association is a not-for-profit company limited by guarantee.
ABN 72 000 281 925 ACN 000 281 925



About CHOICE

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. By mobilising Australia's largest and loudest consumer movement, CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

To find out more about CHOICE's campaign work visit www.choice.com.au/campaigns and to support our campaigns, sign up at www.choice.com.au/campaignsupporter

Contents

Introduction	4
Facilitated discovery and speculative invoicing	6
<i>Facilitated discovery</i>	
<i>The Code must remove the risk of speculative invoicing</i>	
Consumer access to independent review	8
Other issues	9
<i>Cost allocation</i>	
<i>Educational impact</i>	

Introduction

CHOICE appreciates the opportunity to provide the following comments to the Communications Alliance regarding Industry Code C653:2015 Copyright Notice Scheme (the Code).

The Code contains very limited protections for consumers and does not address the issues underpinning piracy: the accessibility, availability and affordability of content in Australia.

A notice scheme that fails to address the root causes of piracy in Australia is not one that can be supported by CHOICE. However, if any scheme is to be implemented it must include mechanisms to protect consumers from false claims and disproportionate costs.

The final step in the Code allows for consumer details to be passed on to rights holders, ostensibly for the purpose of litigation. This is a punitive scheme, not an educational one. Of particular concern is the likelihood that rights holders will use the facilitated discovery process in the Code to access consumers' personal details and bully them into paying excessive 'fines', rather than using these contact details to initiate civil litigation in court. The Code also lacks key details - in its current form, it is unclear how many consumers could be on the receiving end of bullying tactics like speculative invoicing in the first 12 months of its operation.

The ability for consumers to challenge an allegation of unlawful downloading is extremely limited. The body proposed under the Code to receive and assess complaints is not independent. Consumers are required to pay a \$25 fee in order to lodge a dispute, and their challenge must be made in a form determined by industry. This is a notice scheme run by industry with complaints assessed by industry, removing a consumer's right to a fair review.

Under Australian law there is no limit to the amount of money that could be sought in a court action. In the United States, where damages are capped, a student was recently ordered to pay \$675,000 for downloading and sharing 30 songs.¹ With the stakes this high, it is imperative that consumers accused of breaching the law have access to a fair and independent complaint resolution process.

Recommendation 1: The Code should be primarily for the purpose of education, and should not include a facilitated discovery process. Section 3.12 should be deleted from the Code.

Recommendation 2: If the facilitated discovery process is included in the copyright notice scheme, there should be a positive obligation on ISPs to inform account holders when their details are provided to third parties.

Recommendation 3: The copyright notice scheme enabled by the Code should not be available to any rights holder found to have engaged in the practice of speculative invoicing.

Recommendation 4: The Code should confer powers on the Telecommunications Industry Ombudsman under s114 of the *Telecommunications Act 1997* (Cth) to handle enquiries and complaints related to the copyright notice scheme from account holders and members of the public.

¹ *Sony BMG Music Entertainment et al v Joel Tenenbaum*, No. 12-2146, available at <http://media.ca1.uscourts.gov/pdf.opinions/12-2146P-01A.pdf>

Recommendation 5: If the Copyright Information Panel is retained, then it should be comprised of an independent chair and an equal number of representatives from the rights holder industry, the ISP industry and consumer organisations.

Recommendation 6: Costs of implementing the Code should be borne by rights holders. The notice scheme will aid rights holders in enforcing their civil rights, and should not operate to remove cost burdens that would ordinarily be borne by the plaintiff in a civil court case and instead place these on third parties, being lawful users of internet services.

Recommendation 7: Any notice sent to a consumer alleging that they have infringed copyright by unlawfully downloading specific content should provide information on how the consumer can access that specific content lawfully.

Recommendation 8: The Copyright Information Website should have a search function that spans all countries, referring consumers to purchasable content.

Facilitated discovery and speculative invoicing

Facilitated discovery

Section 3.12 of the Code provides a facilitated discovery process to aid rights holders in pursuing further action against internet users who have received Final Notices under the Code. The facilitated discovery process allows for consumer details to be passed on to rights holders, in order to enable them to commence legal proceedings. This element makes it clear that the Code provides a framework for a punitive scheme, not an educational one.

Rights holders do already have the ability to seek alleged infringers' contact details from ISPs, in accordance with court rules governing preliminary discovery. The Code, however, extends this ordinarily rigorous process by requiring an ISP to "act reasonably" to facilitate and assist a rights holder's application for preliminary discovery. The phrase "act reasonably" is ambiguous. It is not clear whether opposing an application on any grounds would be considered unreasonable by a rights holder. In Australia there are no caps on the damages that can be sought for a copyright infringement claim. Given the potentially drastic, very expensive consequences of providing consumer information to litigious rights holders, a Code that in any way weakens this process is not acceptable.

If this section is not intended to provide rights holders with additional rights that go above and beyond ordinary preliminary discovery processes, then its inclusion in the Code is unnecessary. CHOICE recommends that section 3.12 of the Code be deleted.

The Code must remove the risk of speculative invoicing

The facilitated discovery process included in the Code carries with it a strong risk that it will be used for speculative invoicing rather than court action.

Speculative invoicing is the practice of sending intimidating letters to a large number of alleged unlawful downloaders, demanding that they pay a sum of money in order to avoid litigation. These letters may imply a right to collect a 'fine', be threatening in tone, or misrepresent an alleged infringer's legal rights. They aim to make a profit out of those consumers who agree to pay, even if the rights holder actually has no intention to go through with litigation. This practice has been seen overseas, with the rights holder for the film Dallas Buyers Club sending internet users in the United States letters threatening legal action if 'fines' of \$3500 to \$14,000 were not paid.²

Overseas, there has been an observable reluctance on the part of content owners to commence litigation against individuals, due to financial and reputational costs. For example, since New

² See Reilly C, 17 February 2015, 'iiNet challenges expert in Dallas Buyers Club case', cnet, available at <http://www.cnet.com/au/news/dallas-buyers-club-iinet-full-hearing-day-one-piracy-copyright/>

Zealand introduced an anti-piracy notice scheme, only one rights holder has utilised its new ability to serve notices and litigate, and it has done so on a very limited number of occasions.³

Providing consumer details directly to rights holders is a way that limits or streamlines the ordinary preliminary discovery process enables rights holders to seek compensation outside of court, minimising the risk of damaging their reputation through public actions. It places consumers at risk of being bullied into paying sums of money in situations where rights holders have not been required to prove the validity of their claim in court, and consumers are not given the opportunity to have their day in court and defend themselves.

In order to mitigate the risk of rights holders using the facilitated discovery process for reasons other than to initiate legal action, any rights holder found to have engaged in speculative invoicing or other unconscionable behaviour should no longer have access to the Code's copyright notice scheme.

This could be achieved through an addition to section 3.3 of the Code. CHOICE suggests the following language:

- 3.3.2: The copyright notice scheme enabled by this Code will be unavailable to a Rights Holder if they have been found to have engaged in the practice of Speculative Invoicing. Access can be reinstated if the Rights Holder withdraws any Speculative Invoices issued and demonstrates they have not engaged in the practice for a period of twelve months.

Supporting this, a definition of speculative invoicing should be added to the definitions. CHOICE suggests the following language:

- **Speculative Invoicing:** means a letter sent to an Account Holder from a Rights Holder or on behalf of a Rights Holder demanding, threatening or insinuating that the Account Holder pay a sum of money in order to avoid litigation for alleged copyright infringement, prior to the commencement of any court proceedings between the two parties.

Recommendations 1, 2 and 3:

- The Code should be primarily for the purpose of education, and should not include a facilitated discovery process. Section 3.12 should be deleted from the Code.
- If the facilitated discovery process is included in the copyright notice scheme, there should be a positive obligation on ISPs to inform account holders when their details are provided to third parties.
- The copyright notice scheme enabled by the Code should not be available to any rights holder found to have engaged in the practice of speculative invoicing.

³ J Taylor, 1 August 2014, 'Rights owners must sue mum and dad copyright infringers: Turnbull', available at <http://www.zdnet.com/au/rights-owners-must-sue-mum-and-dad-copyright-infringers-turnbull-7000032225/>

Consumer access to independent review

Section 1.7 of the Code states that “any enquiries from Account Holders or members of the public related to the copyright notice scheme are to be handled by the process approved by the Copyright Information Panel”. The Code also states that disputes or challenges to notices are to be managed by the Adjudication Panel.

Given the concerns outlined in this submission, it is clear that consumers need to be able to access a genuinely independent, accountable complaints resolution process. Section 4.1 of the Code provides that the members of Copyright Information Panel will be appointed by rights holders, ISPs and one consumer organisation.⁴ CHOICE approves of the inclusion of a consumer representative body, but notes that the panel is still predominately an industry body. Four members of the Executive Committee are to be appointed from the rights holder and ISP industries, with just one member being appointed by the consumer organisation. The Copyright Information Panel is responsible for appointing the Adjudication Panel, which will consequently also be comprised largely of industry representatives. CHOICE considers that a more balanced Copyright Information Panel would be headed by an independent chair and comprise one representative from the rights holder industry, one from the ISP industry and one from the consumer organisation.

The Code expressly states in section 1.7 that it does not confer powers or functions on the Telecommunications Industry Ombudsman (TIO). The TIO is a genuinely independent body that provides accessible, fair, efficient dispute resolution services in relation to internet services in Australia; it is far better placed to deal effectively with consumer complaints about the Code than the industry-dominated Copyright Information Panel would be. CHOICE recommends that the Code confer functions and powers on the TIO to investigate and handle complaints about the Code, including the Dispute Notice process, under s114 of the *Telecommunications Act 1997* (Cth).

Any costs of complaints dealt with by the TIO should be borne by Rights Holders as the ultimate beneficiaries of the Code and the initiators of any notice.

Recommendations 4 and 5:

- The Code should confer powers on the Telecommunications Industry Ombudsman under s114 of the *Telecommunications Act 1997* (Cth) to handle enquiries and complaints related to the copyright notice scheme from account holders and members of the public.
- If the Copyright Information Panel is retained, then it should be comprised of an independent chair and an equal number of representatives from the rights holder industry, the ISP industry and consumer organisations.

⁴ The consumer organisation is to be the Australian Communication Consumer Action Network (ACCAN), unless otherwise determined by agreement between rights holders and ISPs. See section 2.2 of the Code.

Other issues

Cost allocation

The Code lacks specificity in a number of areas, including how costs will be allocated. If substantial costs are placed on ISPs, these are likely to then be passed on to all internet users in the form of higher bills. The Code is intended to educate consumers for the benefit of copyright holders. Copyright holders, separate from artists, are the group who stand to gain from the implementation of the scheme. The costs associated with the scheme should be primarily borne by the copyright holders.

CHOICE is also concerned that, in the absence of a requirement for copyright owners to bear the full costs of this policy, these are likely to be passed on to consumers who do not engage in conduct that breaches copyright law. Overseas examples demonstrate that comparable policies have been costly. The French government spent tens of millions of euros implementing and administering its copyright infringement “three strikes” procedure.⁵

In New Zealand, the costs of issuing copyright infringement notices are partially borne by the content owners, who are required to pay \$25 per notice issued.⁶ Despite this, it has been estimated that each notice costs ISPs up to \$79 out of pocket.⁷

Under the Code, costs will need to be borne by content owners, ISPs or both. If ISPs are required to cover the costs, it will likely lead to higher prices for consumers of internet services as businesses seek to recover costs spent in implementing and maintaining the scheme. CHOICE opposes a Code that requires internet users generally to shoulder the financial burden.

Recommendation 6:

- Costs of implementing the Code should be borne by rights holders. The notice scheme will aid rights holders in enforcing their civil rights, and should not operate to remove cost burdens that would ordinarily be borne by the plaintiff in a civil court case and instead place these on third parties, being lawful users of internet services.

Educational impact

The Code’s introductory statement notes that it is designed to “inform consumers about available and lawful content alternatives”. Section 1.4.1 (c) reinforces this message, stating that one of the objectives of the Code is to “provide information to Australian consumers as to how

⁵ R Giblin, 2014, ‘Evaluating Graduated Response’, 37 Columbia Journal of Law & the Arts 147-209; Monash University Faculty of Law Legal Studies Research Paper No. 2013/56, available at <http://ssrn.com/abstract=2322516>. Note that there is no data available estimating the additional costs paid by ISPs.

⁶ Earlier modelling of a scheme in the UK estimated a per notice cost of approximately \$30. More recent estimates suggest a set-up fee of AUD\$1.8m, with annual ISP costs of AUD\$178,000 (based on currency conversion of GBP1 to AUD1.78. See S Letts, 3 July 2014, ‘Why do online pirates continue to sail the web?’

⁷ R Giblin, 2014, ‘Evaluating Graduated Response’, 37 Columbia Journal of Law & the Arts 147-209; Monash University Faculty of Law Legal Studies Research Paper No. 2013/56, available at <http://ssrn.com/abstract=2322516>.

to identify and readily access lawful available content alternatives". Despite these positive intentions, the Code appears likely to have a limited practical impact on consumers, as it requires copyright holders to provide only general information in relation to finding and accessing lawful content.

The Code could have a greater impact on consumer behaviour if the information provided to consumers was tailored to their needs. If a consumer is accused of having unlawfully downloaded specific material, providing them with information on how to access that content (rather than content generally) is likely to have a greater impact on reducing piracy. For instance, the website streamin.it provides a useful tool for consumers seeking to legally access content. A search for the television show Game of Thrones returns results from two content providers based in Australia, and one in the US.⁸ A similar tool could be developed for use by rights holders who genuinely want to educate consumers about where they can pay for content.

Providing specific information will not only have an impact on the demand side of the market, but may encourage copyright holders to ensure that their works are available for Australian consumers to purchase legally, before sending a notice under the Code. This would assist both in preventing specific individuals from downloading unlawfully, and in addressing the overall drivers of piracy in Australia.

This could be achieved through an amendment to the sections of the Code dealing with notice requirements.. CHOICE suggests the following language be inserted as 3.7.1(i), 3.8.1(j) and 3.9.1(k):

- a link to a legitimate source or sources for the content that is the subject of the notice.

In addition to these amendments, the Copyright Information Website should have a search function that spans all countries, referring consumers to content that they can purchase. Provided the Copyright Information Website has this functionality, it could be used to comply with the suggested sections 3.7.1(i), 3.8.1(j) and 3.9.1(k).

Rights holders have a part to play in reducing piracy by making their content available universally and at a competitive price. The framework outlined in the Code must be coupled with increasing the availability and affordability of content in order to be an effective means of reducing online copyright infringement.

Recommendations 7 and 8:

- Any notice sent to a consumer alleging that they have infringed copyright by unlawfully downloading specific content should provide information on how the consumer can access that specific content lawfully.
- The Copyright Information Website should have a search function that spans all countries, referring consumers to purchasable content.

⁸ Search conducted at 11:44am 16 March 2015, results for Seasons 1 to 4, available on Quickflix, iTunes Australia and iTunes US.