



Communications Alliance Ltd
PO Box 444
Milsons Point NSW 1565

Via email

23 March 2015

Dear Working Committee,

Re: C653:2015 – Copyright Notice Scheme Industry Code

Electronic Frontiers Australia (EFA) appreciates the opportunity to provide this submission in relation to this draft code. EFA's submission is contained in the following pages. EFA is happy to appear before the Committee and to provide further information, if required.

About EFA

Established in January 1994, EFA is a national, membership-based non-profit organisation representing Internet users concerned with digital freedoms and rights.

EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting civil liberties in the digital context. EFA members and supporters come from all parts of Australia and from diverse backgrounds.

Our major objectives are to protect and promote the civil liberties of users of digital communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political and civil liberties issues involved in the use of digital communications systems.

Yours sincerely,

A handwritten signature in blue ink that reads "Jon Lawrence".

Jon Lawrence - Executive Officer
On behalf of EFA's Policy and Research Standing Committee



1. Introduction

Electronic Frontiers Australia ('EFA') welcomes the opportunity to comment on the Copyright Notice Scheme Industry Code ('the Code'). EFA submits that the concept of an industry code to regulate the medium that ISPs serve between individuals and rights holders is logical and the Code provides a positive and an important starting point for balancing the rights of right holders with fundamental individual rights.

EFA notes that section 117 of the *Telecommunications Act 1997* provides that the Australian Communications and Media Authority ('ACMA') needs to be satisfied that subsections (a) - (k) have been met before registering the Code. Specifically, EFA makes particular reference to the following subsections:

- Section 117(d)(i): *"in a case where the code deals with matters of substantial relevance to the community--the code provides appropriate community safeguards for the matters covered by the code"*.
- Section 117(e)(ii): *"the body or association gave consideration to any submissions that were received from participants in that section of the industry within that period"*.

It is relevant, before applying the above ACMA tests to the Code, to address the concerns in the Code that need to be highlighted before such a scheme is implemented. Each of these concerns are listed and commented on below.

2. Cost

EFA's primary concern with the Code is cost. The Australian Communications Consumer Action Network has aptly highlighted that:

"we are concerned that the draft Code does not adequately balance industry representation with consumers as there is only a single consumer representative among four industry representatives on The Copyright Information Panel. We are concerned that this risks undermining the independence of the scheme and does not ensure appropriate safeguards for consumers are met.

There is also a proposal that consumers are charged a \$25 fee in order to challenge an allegation of copyright infringement. This is a fine-by-stealth which will limit access to justice and contravenes the Ministerial letter which outlined cost should be fairly apportioned between ISPs and rights holders only".¹

The Code, at 3.1.3 states "this copyright notice scheme provides that, at the instigation of Rights Holders, ISPs must, where possible, issue Education, Warning or Final Notices to relevant Account Holders". This places a substantial burden on ISPs, not only to monitor but also to facilitate the provision of notices to Account Holders. Both the cost of issuing the Notices and the assistance to be

¹ Australian Communications Consumer Action Network, 'Copyright notice scheme must respect consumer protections' (Media Release, 20 February 2015).

provided to Rights Holders after a Final Notice has been issued will need to be explicitly quantified. This cost will need to be applied in a manner which does not overly burden the consumer.

3. Who does this affect and how is their information treated?

3.1. ISPs

The Code does not currently have a fixed criteria for ‘Qualifying ISPs’. This definition is critically important as it requires the balance to be struck to ensure that it is not unduly burdensome on smaller ISPs.

3.2. Individuals

EFA submits that an element of education is important, however, the Code needs to be reasonably balanced with the rights and interests of individual end users. The Code’s current form creates the possibility of ISPs becoming a direct conduit for Rights Holders to obtain broad court orders and to issue speculative invoices. In this regard, EFA wishes to highlight the following areas of concern:

- The Code *only* applies to fixed residential internet connections (natural persons). This focus is almost entirely on persons’ private domain and leaves a substantial portion of the use of the internet outside of the scope of the Code (corporate accounts, Wireless / Satellite Broadband / Mobile devices).
- The owner of an account will be liable for infringement proceedings. This does not factor the possibility of unauthorised or guest use to infringe copyright.
- Preliminary discovery has the same meaning as under the Federal Circuit Rules. EFA notes that the Dallas Buyers Club LLC preliminary discovery application² is still before the Federal Court. EFA feels that it would be premature to enact such a Code before the Courts have had a chance to weigh in on the legal validity of such discovery.
- Facilitated Preliminary Discovery
 - This is essentially makes third party technology such as ‘Maverick Eye’ redundant by the ISP accepting this burden.
 - This seems to have the outcome of forcing the system to end in the courts.
 - Who will bear the costs if infringements are won?
 - Is there an intended cap on damages against individuals?
 - By requiring an ISP to comply with a final court order to disclose the Account Holder’s details to the Rights Holder does this mean that ISPs have no ability to resist this process once they have been deemed a ‘Qualifying ISP’?
- The Code has not adequately addressed the risk of causing Right Holders to continually apply for court orders or for a carte blanche to access to personal information by way of standardised ISP terms and conditions that include “we will provide your details where requested after the ‘third strike’”.

² *Dallas Buyers Club, LLC v iiNet Limited* (No 2) [2014] FCA 1320.



The Code, and the ease with which Preliminary Discovery is facilitated, is likely to make speculative invoicing an attractive alternative to traditional means of revenue. This, coupled with the introduction of a Mandatory Data Retention Scheme, may make pursuing copyright infringements a profitable endeavour in its own right for Rights Holders. This would be inconsistent with the intent of the Code and would be a most undesirable outcome.

EFA strongly recommends that safeguards are put in place to prevent over-litigation and misuse of the Code by Rights Holders and to maintain the sanctity of the Code's underlying objectives.

4. Review

EFA strongly submits that an initial review after 18 months with further review every five years is not adequate. The Code introduces a number of burdensome requirements which have the potential of negatively affecting the protection of personal privacy and, although a scheme involving Education Notices is an appropriate starting point, there are real risks associated with an imbalance of power as a result of the Code.

Furthermore, the past six (6) months has been an incredibly turbulent time for the global market for pirated material. For instance, it has seen the take-down of the most popular hosting services such as The Pirate Bay, EZTV and Kickass Torrents. On the other hand, it has also seen the introduction of more user-friendly means of accessing P2P file-sharing, such as the open-sourced Popcorn Time. Further, the Australian legal streaming market is also developing rapidly with the introduction of new services from a range of providers. Technology is moving very quickly and it is possible that within 18 months the Code's positive purpose may very well be obsolete.

As such, EFA recommends that should the Code be implemented that it be subject to at least annual reviews for the first three (3) years with the possibility of the Code being removed entirely at any of these review points.

In addition, EFA recommends that any Review of the Code pay particular attention to the other recent factors likely to affect the rate of copyright infringement, including *inter alia*:

1. The introduction of new domestic streaming services such as Netflix, Presto and Stan;
2. The recent take-down of the domains of several popular websites that host pirated content, such as The Pirate Bay, EZTV and Kickass Torrents;
3. The recent widespread use of third-party services like Popcorn Time, which provide a new and more user-friendly P2P file-sharing experience to users;
4. The introduction of a Mandatory Data Retention Scheme, storing Australian users' metadata;
5. The recent popularity of VPN, encryption and anonymity services; and
6. The expected introduction of legislation enabling blocking of websites alleged to be enabling copyright infringement.



Over the next few years, the market for pirated content will inevitably be affected by new externalities and legislative pressures. It would be misleading to attribute any fluctuations in piracy to this Code exclusively, and EFA recommends that the Code include express provisions to include *all* factors affecting piracy on Review, such as those mentioned above.

It is imperative that the Government and industry bodies undertake and share quantitative data on the above. This ensures that the effectiveness of the Code is determined accurately, and the effectiveness of the Code is not given too much, or too little, emphasis upon Review.

5. International Comparisons

Graduated Response Schemes have been implemented in a number of national jurisdictions. In France and New Zealand, this implementation process benefited from extended public consultation and numerous revisions to their respective counterpart Codes.

In France, initial attempts to implement the *Haute Autorité pour la Diffusion des œuvres et la Protection des droits d'auteur sur Internet* ('HADOPI') law in 2009 failed due to parliamentary constraints and invalidation by the Constitutional Council on the grounds of violation of the presumption of innocence, separation of powers and freedom of speech. HADOPI was revoked in 2013 due to disproportionate punitive penalties being imposed on copyright infringers.

Furthermore, implementations of graduated response schemes have been criticised for being ineffective. In 2013 an analysis of the graduated response schemes in France, New Zealand, Taiwan, South Korea, the U.K., Ireland and the U.S. found that "analysis casts into doubt the case for their [graduated responses] future international roll-out and suggests that existing schemes should be reconsidered"³.

As such, EFA recommends that the Code be given the benefit of extended public consultation. It would be unfortunate for the Code to suffer the same hurdles as its counterparts in France and New Zealand. Extended public consultation and scrutiny, multiple drafts and consideration of recent market developments should ensure a more effective Code.

6. Accessibility and Cost of Content

The inability of Australians to legally access content at the same time, at equivalent cost and via multiple distribution platforms as consumers in other OECD countries is a key factor driving rates of copyright infringement. EFA appreciates that this trend is changing with more content being made available on a timely basis to Australian consumers, however, this is still not on par with other countries, such as the United States, where larger Rights Holders provide streaming and music services to US consumers at a more competitive price and with a greater range of content.

³ Rebecca Giblin, 'Evaluating Graduated Response' (2013) 56 *Monash University Faculty of Law Legal Studies Research Paper*.

EFA recommends that the implementation of the Code be delayed to allow for more empirical research to be undertaken on the effect of new music and entertainment services for Australians on the overall rate of copyright infringement.

7. Code Implementation Trials

EFA recommends that trials be performed before the Code is implemented in full. Ideally, these would be done with a small sample of individual instances chosen at random. This would allow the Communications Alliance to identify the logistical feasibility of the Code and to gain an insight into the immediate effectiveness of the graduated response approach on a small sample of individuals.

8. Recommendations

EFA makes the following recommendations regarding the Code:

1. Any and all costs associated with the Code, whether directly or indirectly, incurred by the end user be detailed for further and more accurate consultation;
2. Allow the Dallas Buyers Club LLC preliminary discovery application to be finalised prior to the implementation of the Code to prevent any conflicts of law;
3. Due to the substantial nature of the Code, it should be subject to at least annual reviews for the first three (3) years with the possibility of the Code being removed at any of these review points;
4. The Communications Alliance seek extended public consultation, particularly after the effect of recent developments in the content market have been fully realised. EFA recommends that the Code be given adequate scrutiny and revision, so as to best achieve its objectives in light of a rapidly-evolving online content distribution market;
5. Include express provisions or acknowledgements that any Review of the Code take into account accurate, reliable and extensive data on the many other factors that will inevitably influence the rate of copyright infringement in Australia over the next few years; and
6. A trial be undertaken before the Code is implemented, for the benefit of all parties and the identification of its immediate effectiveness on a small sample space.

9. A way forward

In summary, EFA submits that the core concept of a scheme designed to mitigate instances of copyright infringement by improving the informed understanding of Australians by way of education and warning notices is not an unreasonable approach. EFA, however, submits that the Code still requires further balancing and safeguards. EFA recommends that the Communications Alliance give the submissions contained herein serious consideration.