



ACCAN Submission

Copyright Notice Scheme Industry Code DR C653:2015

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About ACCAN

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN represents the views of its broad and diverse membership base to policy makers, government and industry to get better outcomes for all communications consumers.

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Executive Summary

The draft Copyright Notice Scheme Industry Code of Practice (the Code) aims to drive down the rate of online copyright infringement through a cooperative response involving Internet Service Providers (ISPs) and Copyright Holders. In developing this scheme stakeholders were tasked with a number of objectives to meet this ultimate goal, including providing appropriate safeguards for consumers. ACCAN's submission will focus on how well the scheme achieves these safeguards and proposes solutions to address the remaining shortfalls.

We maintain copyright deserves strong protection in order to foster a vibrant market for content. However, ACCAN advises caution in pursuing a Code which may have limited benefit in protecting copyrighted material while adding significant cost for telecommunications consumers. The Code attempts to drive down the incidence of online copyright infringement without paying adequate regard to the core drivers of infringement. Independent research commissioned by industry and consumer groups both point to a lack of affordable and easy to access content as the key driver towards illegal downloads.¹

The draft Code is scheduled to be submitted in final form to the Australian Communications and Media Authority (ACMA) in April this year for registration – in line with the timeline requested by the Federal Government in December 2014. ACCAN proposes that the Code be assessed by the Office of Best Practice Regulation (OBPR) so that the costs and benefits of the scheme can be understood.

Several key issues are still under discussion, including elements of the funding arrangements for the Scheme, the size threshold for ISPs to which it will apply and the volume of notices anticipated to be sent during the Scheme's initial 18 months of operation. We understand the time pressure stakeholders were under meant these key elements were left out of the draft Code. These decisions will have a major impact on the cost for consumers and the relative cost for smaller ISPs. To adequately assess these costs the outcome of ongoing discussions need to be open to public consultation. The lack of consultation on these major elements further highlights the need for OBPR scrutiny on costs and benefits of the Code when it goes for ACMA consideration.

Interaction between the Copyright Act and the Code

ACCAN participated in the pre-public consultation phase of the Code's development because the scheme was likely to impact consumer access to the internet, through sanctions and increased cost. We also wanted to ensure that consumer protections were respected under the scheme.

We don't believe disconnection or throttling is proportionate to tackling the problem of online copyright infringement. We remain concerned that the Code may be used by Rights Holders (RH) to identify repeat offenders and pursue action under the Copyright Act, where disconnection remains a possible response. Consumers rely on internet access for jobs, education and a range of other activities. Measures which limit access, such as speed throttling or disconnection directly impact a consumer's ability to engage fully in employment, education, access support and communicate with relatives and possibly also access emergency services. We encourage stakeholders and government to recognise that disconnection from this essential tool is not proportionate and take steps to have this remedy removed from the Copyright Act.

¹ Communications Alliance, 2014, 'Online copyright infringement research report', JWS Research, November 2014; Choice, 2014, 'Digital Consumers – paying for content behaviour and attitudes', November 2014

ACCAN's analysis

Cost implications

Clause 4.4 outlines that Rights Holders and Internet Service Providers are cooperatively undertaking further work to: - quantify the costs of meeting the specific operational responsibilities and processes required by the Scheme; and - determine how these costs should be fairly apportioned between Internet Service Providers and Right Holders, in line with the objectives outlined in the letter from responsible Federal Ministers of 10 December 2014.

ACCAN's view

The cost to Internet Service Providers of maintaining any scheme will ultimately fall on consumers in the form of higher internet access charges. The rate of households without internet is currently 17%, with access falling to just 57% for households with income less than \$40,000.² Rises in internet cost, even slight, are likely to further exacerbate this digital divide.

To minimise impact on consumers it is our preference that the cost of this scheme be kept to an absolute minimum. We believe the most equitable cost allocation would see Rights Holders pay the majority. This is equitable because it shifts costs onto those who derive the most benefit from a notice scheme. Costs on Internet Service Providers are likely to be passed on to consumers equally, regardless of ability to pay. Further, apportioning more of the cost to Rights Holders is a position which was supported by the Communications Minister in an interview with journalists.³

Cost to challenge a notice

Clause 3.10.3 proposes a fee of \$25 will be payable by the Account Holder upon lodgement of the Challenge Notice and will be refundable if the Challenge is successful. The fee may be waived by the Adjudication Panel if it believes this is warranted in the individual circumstances.

ACCAN's view

We believe it should be free to challenge a notice. This \$25 fee is a fine-by-stealth and contravenes the Ministerial letter which outlined cost should be fairly apportioned between Internet Service Providers and Rights Holders only. External dispute resolution schemes in Australia have a tradition of being fee free, so that cost isn't a barrier to justice (e.g. TIO, FOS and EWON). We do not accept that the provision of fee waivers, especially in the case of financial hardship, will be sufficient to ameliorate all affordability issues. Many consumers are likely to simply pay the fee to avoid going through the often lengthy and sometimes stigmatised process of applying for financial hardship. There are always difficulties ensuring the existence of fee waivers are sufficiently visible to those consumers that need to apply for this option.

² ABS, 2014, 'Household Use of Information Technology, Australia, 2012-13', available at: <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/8146.0Chapter12012-13>

³ <https://www.scribd.com/doc/249750103/Malcolm-Turnbull-talks-online-copyright-infringement-policy>

Directing consumers to lawful content

One of the objectives of the Code is to “provide information to Australian consumers as to how to identify and readily access lawful available content alternatives.”⁴

ACCAN’s view

We believe there should be more specification about how consumers will be directed to lawful available content alternatives. To be effective, notices should target the reasons people pirate. While Rights Holders may feel morally and legally justified educating consumers about the legality and damage caused by infringement, the objective of the scheme is far more likely to be met if education addresses the triggers for piracy. Choice research found the major triggers for piracy were based on perceptions that:

1. TV shows and movies are more expensive in Australia than overseas – 63%
2. Legitimate overseas content websites shouldn’t be blocked – 59%
3. I use legal sources first *if I can* – 55%
4. Would pay if cost same as overseas – 53%
5. Would pay if I could “try before I buy” – 48%
6. Would pay if available as soon as overseas – 46%⁵

If behavioural change is to be effective, the scheme must where possible address these perceptions. Primarily consumers want to be able to access content at comparable prices and quality to overseas. One possible solution is either to greatly improve the information available on the industry website (digitalcontentguide.com.au) or direct consumers to content comparison websites such as <http://streamin.it>.

Promoting the use of comparison websites may address many of the market based problems identified in the online copyright infringement debate. For example the streamin.it website provides a price comparison of a number of Australian and US services. After some improvements in price over the last year the price differential between Australia and the US appears to be reducing for some content. Comparisons on this website for the week beginning 15 December 2014 show US services offer the same content for about 10% cheaper.⁶ However many Australian consumers may find the convenience of purchasing from an Australian source worth the additional cost.

More importantly these websites allow consumers to compare multiple sources, cutting down the time required to find available and affordable content. Ultimately this kind of aid to consumer decision making will lead to better market and competition outcomes. Knowledge about price quality and availability are all preconditions for a properly functioning market.

The streamin.it website highlights that there are still problems with availability of content in Australia. In the week beginning 16 March 2015, none of the 10 most torrented movies were available through Australian video on demand services, compared with 5 in the US. We encourage Rights Holders to take a policy decision to not pursue action against consumers who have no legal

⁴ Clause 1.4.1(c) *Copyright Notice Scheme*

⁵ Choice, 2014, ‘Digital Consumers – paying for content behaviour and attitudes’, November 2014

⁶ <http://streamin.it/discover> Prices for top 10 pirated movies for the week 15 December.

means of accessing the content in question. Instead this effort should be directed to making content available in Australia at a comparable time to overseas markets. It would also begin to address the perception issues identified in the triggers for piracy research and repair trust between Rights Holders and their customers.

Quarantine Period

The Code has a 14 day period after the issue of an Education or Warning Notice in which subsequent Infringement Reports will not result in the issue of further Notices.

ACCAN's view

We believe the 14 day quarantine period should be amended to 21 days. If the Code is to fulfil its objective of educating consumers there needs to be sufficient time to take remedial action after receiving a notice.

On receipt of a notice a consumer, acting in good faith, will look to take action to avoid the receipt of a further notice. This may include steps such as discovering which household member, if any, was responsible for the download. It may also involve taking steps to secure home Wi-Fi. This action takes time and may require an account holder to possess a moderate to high level of technical ability. While online guides exist, some consumers will not be capable of undertaking this action themselves and will require assistance.

In all likelihood a friend or family member may be able to help, alternatively professional services are available. These services can cost upwards of \$200 and take a number of days to get a technician to arrive.⁷ We believe it is only reasonable to allow 21 days, factoring in:

- the time from issue to receipt of a notice,
- time to identify the cause of the notice, and
- searching for and receiving technical assistance to address the cause.

It would be highly undesirable if the only consumers targeted under this scheme were those without the technical skills or resources to properly secure their home Wi-Fi.

Privacy concerns

The Code requires Internet Service Providers to retain evidence gathered under the scheme for a minimum of 24 months.⁸ Barring a legal obligation, an Internet Service Provider *may* de-identify or destroy this evidence after 24 months of its creation.

ACCAN's view

We believe there should be an obligation that an ISP *must* de-identify or destroy information gathered under the scheme, at most, 24 months after it is created. As currently worded it is up to an ISP to decide when to de-identify or destroy after 24 months. Holding this information for an

⁷ Telstra, 2015, 'Telstra Platinum' available at: <https://www.telstra.com.au/connectedhome/enhancements/platinum#why>

⁸ Clause 3.11.1 *Copyright Notice Scheme*

indefinite length of time not only adds an additional cost, but it increases the potential for the privacy of a consumer to be compromised by a leak. The impact of this information being leaked is likely to be very serious as it contains allegations of illegal activity against individual account holders and records of content they may have accessed.

Under the Australian Privacy Principles (APP) an entity *must* take reasonable steps to destroy or de-identify personal information if it no longer requires it for any authorised purpose. For some information the Code scheme only requires that it be kept for a period of 12 months. In this context keeping the information for an indeterminate amount of time is excessive and likely breaches the APPs. We believe all records should be destroyed or de-identified after 24 months, and some after 12 months, as there is no reason under the Code to keep records beyond this time.

Acknowledgement (clause 3.9.2)

The scheme requires an Account Holder to acknowledge receipt of a final notice and sets out a number of methods for how this must be achieved.

ACCAN's view

ACCAN supports in part the acknowledgement process suggested in clause 3.9.2. It is important from a natural justice perspective that a consumer is aware of an allegation of copyright infringement.

Registered post is a preferable form of acknowledgement from a consumer rights perspective, as it has an inbuilt mechanism (it is addressed to the Account holder) to ensure only the Account Holder acknowledges receipt and not another user accessing the same account. It also removes potential privacy fears a consumer might have in acknowledging receipt online. Some consumers may also fear that an online acknowledgement may be interpreted as an admission of guilt. In ACCAN's opinion registered post is the best method for meeting natural justice concerns while minimising any unintended consequences which may flow from an acknowledgement.

We remain concerned about the possibilities created by other forms of acknowledgement being agreed between Internet Service Providers and Rights Holders after the scheme is implemented. As already mentioned different forms of acknowledgement do not necessarily have the inbuilt protections of registered post. Without confining language, clause 3.9.2 may be used for purposes beyond those originally contemplated by the drafters. If an alternative acknowledgement process is proposed it should be clearly outlined in the Code. We recommend that clause 3.9.2 be amended to close this possibility of future acknowledgement options.

Challenge Notice from Account Holder to Adjudication Panel (clause 3.10.6)

Account holders are given 28 days after the date of the Final Notice to challenge the claims made by rights holders.

ACCAN's view

We recommend clause 3.10.6 be amended so that the 28 day challenge period begins running on acknowledged receipt of the Final Notice. We understand an Account Holder will also be sent an

email of the Final Notice, but without an acknowledgement of receipt consumers may miss this email altogether.

Linking the challenge period to an acknowledgement of receipt is important from a natural justice perspective as it will ensure that an Account Holder does not lose the opportunity to challenge a notice because they are unaware of the allegation. Otherwise people in more remote parts of Australia may get this acknowledgement notice after or very close to the challenge period expiring. ACCAN is aware of examples of this occurring in relation to billing practices where people living in remote Indigenous communities received bills after the due date and were subsequently fined for late payment. This is also a broader consumer issue as the receipt of registered post sometimes requires a consumer to pick up the mail from a Post Office. Depending on work schedules this receipt may be further delayed.

Structure and Operation of the Copyright Information Panel (clause 4.1)

The Copyright Information Panel consists of an Executive Committee made up of two Rights Holders, two Internet Service Providers and a single Representative of a Consumer Organisation. The Committee is to have a chair alternating between Rights Holders and ISPs annually.

ACCAN's view

We believe there must be improved consumer representation on the Executive Committee, so that there are 2 consumers, 2 Internet Service Providers and 2 Rights holder representatives. The Chair should rotate between these three stakeholder groups. A more balanced membership of the Executive Committee will improve consumer perception of the scheme in three main ways.

1. It should partially allay fears that the focus of the scheme is about punishment rather than education.
2. It will ensure the scheme is keenly focused on the major cause for piracy, which is consumer concern about available and affordable content.
3. Increasing consumer representation will help ensure the educational messages are targeted, clear and easy to understand.

Consumer perception of this scheme will be vital to its effectiveness and without positive engagement with consumers it is unlikely to create behavioural change.

This change will require further amendment to the definition of Consumer Organisation in the Code. We recommend that the second member of the Executive Committee is an appointee of a general consumer representative body.

'Consumer Organisation' definition

Currently it is defined as:

Consumer Organisation

means:

(a) unless otherwise determined by agreement between Qualifying Rights Holders and ISPs, ACCAN;

(b) if another organisation is determined by agreement between Qualifying Rights Holders and ISPs, that other organisation.

The independence of the Consumer Organisation may be called into question if the appointee is determined by agreement between Qualifying Rights Holders and Internet Service Providers. ACCAN acknowledges that this definition should be future proofed and so a general definition should be included. There is precedence for this approach in other industry bodies such as the governance arrangements for Communications Compliance. A preferable definition would be:

Consumer Organisation

Means:

- (a) ACCAN, or
- (b) a subsequent peak body representing communications consumers, and
- (c) a peak body representing consumers.

Responsibilities of the Copyright Information Panel (CIP) (clause 4.2)

Clause 4.2.1(f) states that the CIP will be responsible for providing advice and educational material to the public as required under the Code

ACCAN's view

There should be an amendment in clause 4.2.1(f) to ensure that this information is accessible. This better recognises that people have a range of needs in understanding and accessing information. While we acknowledge that provision of information on an accessible website will be sufficient for many consumers, there does need to be alternative means to make enquires, such as a phone line, when further clarification is required.

Grounds for Challenges (Clause 4.2.1)

ACCAN also recommends that the CIP be given direction in clause 4.2.1(f) to produce and make available on their website (and more widely as appropriate) plain language information outlining the grounds for Challenge under the scheme. A consumer's ability to seek redress for a false allegation will be severely limited if they are unaware of the grounds on which a challenge may be accepted. As previously stated, this will improve consumer understanding of their rights in relation to the scheme and copyright generally. It may also help streamline the Adjudication Panel's decision, as Account Holders wishing to Challenge will more likely address *relevant* considerations.

Adjudication Panel (Clause 1.7)

Clause 1.7 clarifies that the Code does not confer powers or functions on the Telecommunications Industry Ombudsman (TIO) under section 114 of the Telecommunications Act. We understand that the main reason for not conferring power on the TIO was a concern that the TIO is currently funded

by the telecommunications industry and that Rights Holders should be responsible for the costs of making a challenge.

The Code provides little direction on how the Adjudication Panel will operate. The most detailed explanation of the Panel's operation is in clause 3.10.2 which states:

The challenge process will be administered by the Adjudication Panel and approved and specified by the CIP. The challenge process must be accessible by Account Holders and transparent while protecting personal information such as the identity and contact details of the Account Holder and the independence and impartiality of the Adjudication Panel.

ACCAN's view

The Adjudication Panel will be one of the most important elements in ensuring appropriate consumer safeguards are met under the scheme. The result of an adjudication decision could result in evidence of alleged infringement being passed by ISPs to Rights Holders without any judicial oversight.

Under normal circumstances, a Rights Holder would be required to go to court and have a judge review the evidence before this type of information could be handed over. ACCAN understands that in the Federal Court, which has jurisdiction in copyright cases, it is common practice for a judge to review a discovery application even where it is not opposed. This level of scrutiny is important because it allows the probity of the evidence to be tested before further cost is incurred in pursuing an action. The Adjudication Panel needs to have adequate processes articulated in the Code to protect consumers wrongly accused of infringement from having to defend a subsequent court case based on faulty evidence.

There are references made to the Adjudication Panel having accessible, transparent, independent and impartial processes. However, it is left to the Copyright Information Panel to determine the practicalities of these measures. The Copyright Information Panel is made up of four industry members and a single consumer representative. Given the Adjudication Panel will be funded by Rights Holders and beholden to an industry dominated panel, there is a real threat that at the very least it will not be perceived as independent.

ACCAN's preferred method for dealing with this problem is to appoint the TIO to perform the functions of the Adjudication Panel. We acknowledge that the TIO is not presently set up to undertake some of the aspects which may be relevant to a Challenge. This does not mean the TIO is not equipped to perform the task. Recently, the TIO was the first external dispute resolution (EDR) scheme recognised by the Information Commissioner to handle privacy related telecommunications consumer complaints.⁹ This demonstrates the aptitude of the TIO to quickly develop a new proficiency and expertise to cater to the EDR needs of both industry and consumers.

Other concerns, such as the greater cost of the TIO scheme, have also been raised but require further evidence to adequately assess. We would envisage that there would be minimal cost difference between the TIO scheme and that of a properly resourced review mechanism. The TIO's funding structure does not presently allow for Rights Holders to contribute to the cost of review.

⁹ OAIC, 2014, 'Recognised EDR schemes', available at: <http://www.oaic.gov.au/privacy/applying-privacy-law/privacy-registers/recognised-edr-schemes>

We suggest that stakeholders meet with the TIO to discuss possible funding mechanisms to address this issue.

Establishing a review mechanism is not as straightforward as the draft Code seems to anticipate. The TIO currently deals with over 100,000 complaints a year. Given some of the Rights Holder figures on the extent of the copyright infringement, it is not unreasonable to suggest there will be a large number of consumer challenges to notices issued under this scheme.

In the last financial year the TIO received a 90% consumer satisfaction rating on its complaint handling processes.¹⁰ Along with the TIO's relatively high public profile the scheme is much better placed from a consumer confidence perspective to provide independent reviews.¹¹ To ensure appropriate consumer safeguards are met we believe the TIO should be appointed to the role of the Adjudication Panel under the Code.

Speculative invoicing

Speculative invoicing is the practice of a Rights Holder contacting an Account Holder who is alleged to have infringed copyright, in order to gain payment in return for not pursuing further court action. When received by a consumer with limited knowledge of their legal rights this practice can intimidate and lead consumers to believe they must pay a fee where no case has been proven.

ACCAN's view

Ultimately this scheme should aim to educate and create lasting behavioural change rather than bully and intimidate consumers into paying speculative fines. A measure to discourage this behaviour would be to add a clause in 3.3.1 which disqualifies Rights Holders attempting to speculatively invoice from making use of the scheme. This would ensure that the process set out in the Code and broader court based process are respected.

¹⁰ TIO, 2014, 'TIO 2013-14 annual report', available at: <http://annualreport.tio.com.au/>

¹¹ TIO, 2013, 'Consumer awareness of TIO at all time high', more than 33 per cent [of people] said they would contact the TIO if they could not resolve a complaint with their service provider (unaided awareness), available at: <http://www.tio.com.au/publications/blog/consumer-awareness-of-tio-at-all-time-high>

Conclusion

ACCAN thanks Communications Alliance and Rights Holder representatives for their engagement in the Code development process. We look forward to ongoing engagement on the key issues yet to be determined under the Code. With costs still under discussion and the impact the scheme will have on piracy largely unknown, we propose that this Code is a good candidate for Office of Best Practice Regulation review.

We have laid out the remaining gaps in consumer protection measures under the Code and provided workable solutions that are in keeping with existing EDR and legal standards. ACCAN has also flagged the need for stakeholders to focus future efforts on reforming the Copyright Act to ensure disconnection from the internet is no longer an available remedy.