

23 March 2015

Mr John Stanton
Chief Executive Officer
Communications Alliance
PO Box 444
MILSONS POINT NSW 1565

Dear Mr Stanton,

Copyright Notice Scheme Code

Thank you for the opportunity to comment on the draft Copyright Notice Scheme Industry Code, (“Code”).

Free TV Australia (Free TV) represents all of Australia’s commercial free-to-air television broadcasters. At no cost to the public, our members provide fifteen channels of content across a broad range of genres, as well as rich online and mobile offerings.

Online piracy is a serious issue in Australia. It undermines content investment, content industry business models, employment and innovation. The existing legal framework does not adequately address online piracy. This was made clear by the decision in *Roadshow Films Pty Ltd v iiNet Ltd [2012] HCA 16* which found that the *Copyright Act 1968* does not capture the activities of ISPs in providing services to infringing customers.

Therefore as a representative of legitimate businesses creating and distributing content for Australian viewers, Free TV strongly supports this Code as an important first step towards countering online copyright infringement.

In particular Free TV is supportive of the three notice system which is set out at clauses 3.7 – 3.9. Addressing online copyright infringement requires a multi-faceted approach including education, availability of legal content and enforcement. The three notice process recognises this and this approach has been found to be successful in other jurisdictions.¹

Some specific feedback on Code clauses is set out below.

Comments on the Code

Qualifying ISPs

Clause 3.2 of the Code provides that it will apply to ISPs that supply residential fixed internet access services to a threshold number of account holders within Australia.

Free TV notes that subject to smaller ISPs not being unfairly or disproportionately affected, the scheme should capture the vast majority of ISPs.

While the scheme will not apply to mobile and Wi-Fi in its initial 18 months of operation, the appropriateness of excluding mobile and Wi-Fi should be reviewed as part of the 18 month evaluation process.

¹ For example, the first progress report regarding the operation of the US Copyright Alert System found that the vast majority of the Copyright Alerts delivered (more than 70%) occurred at the initial education stages and less than 3% were sent at the final mitigation stage. Similarly, evidence from European jurisdictions also supports the effectiveness of graduated response systems.

Rights Holders

Clause 3.3 broadly sets out the requirements that must be met in order for the Code to be made available to rights holders, including that the processes used to detect alleged online copyright infringements must be audited and certified. While the detail of these processes is not included in the Code, Free TV notes that it is important to ensure that they are not unnecessarily onerous and do not act to deter rights holders from using the scheme.

Indemnity

Clause 3.3.1(c) requires rights holders to provide ISPs with an indemnity on terms still to be agreed. Free TV is not in favor of including an indemnity in the Code. Similar Codes in other jurisdictions do not include indemnities.² In the context of the scope and objectives of the Code, and in light of the fact that it does not include explicit sanctions against internet users, it is unclear why an indemnity is necessary. Requiring rights holders to provide an indemnity is likely to deter some rights holders from accessing the scheme, to a greater or lesser degree depending on the wording and scope of the indemnity.

If an indemnity is included in the Code, it should be narrowly drafted and should not cover processes and actions that are not within the control of rights holders.

Costs

Free TV notes that quantification of costs of the scheme and apportionment of those costs between ISPs and rights holders at clause 4.4 has not yet been finalised. The Government has asked that the Code fairly apportion costs between ISPs and rights holders.³ Achieving a fair apportionment of the costs which recognises that ISPs also benefit from the distribution of copyright content on their networks is critical to the Code becoming operational and for it to be sustainable.

Contact

Thank you for the opportunity to provide feedback on Copyright Notice Scheme Industry Code. Free TV looks forward to continuing to work constructively with Communications Alliance to resolve these outstanding issues. Please don't hesitate to contact me if you wish to discuss this letter or any other matter regarding Free TV.

Yours sincerely



Julie Flynn
CEO

² For example, schemes in the US, UK, Canada and NZ do not include indemnities.

³ Letter from the Hon George Brandis QC and the Hon Malcolm Turnbull MP to Julie Flynn, Free TV Australia, dated 10 December 2014.