

**COMMUNICATIONS
ALLIANCE LTD**



INDUSTRY CODE

C653:2015

COPYRIGHT NOTICE SCHEME

C653:2015 – Copyright Notice Scheme Industry Code

First published as C653:2015

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EXPLANATORY STATEMENT

This Explanatory Statement outlines the purpose of this Industry Code (the Code) and the factors that have been taken into account in its development.

Background

Copyright protection provides an essential mechanism for incentivising and rewarding creative and innovative endeavours. The rapid growth of the internet has brought significant challenges to the protection of copyright, due to the ease of which material can be digitally copied and shared, at little or no cost.

The Government has written to industry to develop a Code designed to facilitate a cooperative industry-led Scheme to deter the practice of online copyright infringement and inform consumers about available and lawful content alternatives.

What the Code will Accomplish

The Code will operate as an important part of a range of measures designed to:

- reduce the incidence of online copyright infringement by Australian internet users;
- improve knowledge of Australian internet users as to which online activities can constitute copyright infringement and when particular practices may be infringing;
- create a Scheme that works in concert with other initiatives that together are designed to dissuade Australian internet users from engaging in online copyright infringement. These initiatives include continuing efforts of rights holders to ensure timely and ready availability to Australian consumers of lawful content alternatives; and
- provide information to Australian consumers as to how to identify and readily access lawful available content alternatives.

How the Code will Achieve its Objectives

The Code provides for the creation of a Scheme under which ISPs will accept Notices (in a prescribed format) from Rights Holders. The Notices will identify Internet Protocol (IP) addresses that a Rights Holder alleges have been used to infringe copyright in copyright work of the Rights Holder (for example, by the unlicensed download of a film or television program). The Notices will request that the relevant ISP notify the Account Holder of the alleged infringements.

ISPs will endeavour to match the IP addresses identified by Rights Holders to the Account Holders to which the IP addresses were assigned at the time of the alleged infringements.

Where an IP address is matched, the ISP will send to that Account Holder a Notice (in a prescribed format) informing them of the alleged infringement.

Notices will also include or link to educational material designed to:

- inform the Account Holder that the activity allegedly detected on their account is indicative of an infringement of copyright under the *Copyright Act 1968*; and
- provide general information about sources of lawful online content.

Any Account Holder who receives three Notices within a 12 month period will have the option to seek an independent review conducted by an independent Adjudication Panel. After a Challenge period has expired, or a Challenge is unsuccessful, the IP address related to an Account will be listed on a Final Notice List. A Rights Holder may write to an ISP to request a Final Notice list.

Where an Account Holder has received three Notices within a 12 month period and a Rights Holder files an application for preliminary discovery in a prescribed court seeking access to the Account Holder's details, ISPs will act reasonably in relation to the preliminary discovery application (as described in Chapter 3 of the Code). It remains a matter for the Court to decide whether preliminary discovery should be granted. An Account Holder's details will not be provided by ISPs to Rights Holders in the absence of a court order.

Anticipated Benefits to Consumers

The Scheme has a strong emphasis on public education and will include a website which will provide information about the Code, the Scheme and matters relating to the legal access to content.

Anticipated Benefits to Copyright Rights Holders

The implementation of an effective code is an important step in protecting creative content in the online environment. The Scheme also includes a 'facilitated preliminary discovery' court process, as discussed above.

Gary Smith
Chair

WC66 : Online Copyright Infringement Working Committee

INTRODUCTORY STATEMENT

The Copyright Notice Scheme Industry Code is designed to facilitate a cooperative industry-led Scheme through which Internet Service Providers (“ISPs”) and the owners of copyright works or their authorised representatives (“Rights Holders”), will work to deter the practice of online copyright infringement and inform consumers about available and lawful content alternatives.

The Code provides for the creation of a Scheme under which ISPs will accept reports (in a prescribed format) from Rights Holders. The reports will identify Internet Protocol (“IP”) addresses that a Rights Holder alleges have been used to infringe copyright in online work of the Rights Holder. The reports will request that the relevant ISP notify the relevant Account Holders of the alleged infringements.

ISPs will endeavour to match the IP addresses identified by Rights Holders to the Account Holders to which the IP addresses were assigned at the time of the alleged infringements. Where an IP address is matched, the ISP will send to that Account Holder a notice (in a prescribed format) informing them of the alleged infringement.

Notices will also include or link to educational material designed to:

- inform the Account Holder that the activity allegedly detected on their account is indicative of an infringement of copyright under the *Copyright Act 1968*; and
- provide general information about sources of lawful online content; and
- provide general information about this Code and the Scheme.

Any Account Holder who receives three Notices within a 12 month period will have the option to seek a review conducted by an independent Adjudication Panel.

Where an Account Holder has received three Notices within a 12 month period, ISPs will, on the request of a Rights Holder, facilitate a Preliminary Discovery process to assist the Rights Holder to enforce its copyright (as described in Chapter 3 of the Code). This process can be initiated by a Rights Holder whose allegation prompted an Education, Warning or Final Notice.

Nothing in this Code affects the rights or remedies of rights holders under the Copyright Act in relation to any alleged infringement of copyright, whether or not the alleged infringement has been the subject of any Infringement Notice.

This Code has been drafted by Communications Alliance Working Committee 66 (WC66), chaired by Mr Gary Smith from Optus (see Committee membership at PARTICIPANTS.) Communications Alliance may issue guidance material from time to time to assist ISPs to understand their obligations under the Code.

April 2015

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1 GENERAL

1.1 Introduction

- 1.1.1 Section 112 of the Telecommunications Act 1997 (the "Act") sets out the intention of the Commonwealth Parliament that bodies and associations, representing sections of the telecommunications industry, develop industry codes relating to the telecommunications activities of participants in those sections of the industry.
- 1.1.2 The development of this Code has been facilitated by Communications Alliance through:
- (a) a Working Committee (WC66) comprised of representatives from the telecommunications industry;
 - (b) a program of bilateral and sub-committee meetings of ISP representatives and rights holder representatives; and
 - (c) a Stakeholder Group, which included representatives of rights holders, consumer representative organisations and the internet industry, assisted by an observer from the Australian Communications and Media Authority (ACMA), which provided input and guidance to successive drafts of the Code.
- 1.1.3 The Code should be read in conjunction with related legislation, including:
- (a) the Act;
 - (b) the *Privacy Act 1988 (Cth)*; and
 - (c) the *Copyright Act 1968 (Cth)*.
- 1.1.4 This Code is intended to be a relevant industry code of practice for the purposes of sections 36(1A)(c) and 101(1A)(c) of the *Copyright Act 1968 (Cth)*.
- 1.1.5 If there is a conflict between the requirements of the Code and any requirements imposed on an ISP by statute, the ISP will not be in breach of the Code by complying with the requirements of the statute.

1.2 Registration

The Code is to be submitted to the Australian Communications and Media Authority for registration under section 117 of the Act.

1.3 Scope

- 1.3.1 The Code applies to the Carriage Service Providers section of the telecommunications industry under section 110 of the Act.

- 1.3.2 The Code deals with the following telecommunications activities as defined in section 109 of the Act:
- (a) carrying on business activities as a Carriage Service Provider; or
 - (b) supplying Goods or Services for use in connection with the supply of a Listed Carriage Service.
- 1.3.3 The Code applies to qualifying ISPs, as specified in section 3.2, that supply residential fixed internet access services and seeks to regulate matters to do with Account Holders of those services and allegations by Rights Holders that an Account Holder's service has been used to infringe online copyright.
- 1.3.4 The Code does not apply to matters covered by codes or standards registered or determined under the *Broadcasting Services Act 1992 (Cth)* (as required by section 116 of that Act).

1.4 Objectives

- 1.4.1 The objectives of the Code are to:
- (a) operate as an important part of a range of measures designed to:
 - (i) reduce the incidence of online copyright infringement by Australian internet users; and
 - (ii) improve the knowledge of Australian internet users as to which online activities can constitute copyright infringement and when particular practices may be infringing;
 - (b) create a Scheme that works in concert with other initiatives that together are designed to dissuade Australian internet users from engaging in online copyright infringement. These initiatives include continuing efforts of rights holders to ensure timely and ready availability to Australian consumers of lawful content alternatives; and
 - (c) provide information to Australian consumers as to how to identify and readily access lawful available content alternatives.

1.5 Commencement Dates for the Code and the Copyright Notice Scheme

- 1.5.1 This Code commences as an industry Code upon registration by the Australian Communications and Media Authority under section 117 of the Act.
- 1.5.2 The Scheme described in this Code commences on a date being the earlier of:

- (a) [1 September 2015] or
- (b) a date to be determined by the Copyright Information Panel, taking account of:
 - (i) the reasonable steps to be taken by ISPs to enable their compliance with the Scheme;
 - (ii) the prescribed steps to be taken by Rights Holders to participate in the Scheme;
 - (iii) the readiness of the Copyright Information Panel, the Adjudication Panel and the Certification Body or Bodies to discharge their responsibilities under the Scheme;
 - (iv) approval by the Copyright Information Panel of the form of Infringement Reports and Notices to be provided under the Scheme; and
 - (v) agreement on an indemnity to be provided by Rights Holders to ISPs in relation to the operation of the Scheme; and
 - (vi) the implementation of agreed Scheme funding arrangements.

1.6 Code Evaluation

The Code will be evaluated:

- (a) 18 months after commencement of the Scheme as described in section 4.3;
- (b) every 5 years subsequently unless an earlier review is recommended by the Evaluation Body in the initial evaluation; and
- (c) (if the CIP resolves to do so) in the event of significant developments that affect the Code.

1.7 Powers of the Telecommunications Industry Ombudsman (TIO) to handle complaints under the Code

The Code does not confer powers or functions on the TIO under section 114 of the Act. Any enquiries from Account Holders or members of the public related to the Scheme are to be handled by the process approved by the Copyright Information Panel. Challenge Notices are managed by the Adjudication Panel.

2 ACRONYMS, DEFINITIONS AND INTERPRETATIONS

2.1 Acronyms

For the purposes of the Code:

ACCAN

means the Australian Communications Consumer Action Network

ACMA

means the Australian Communications and Media Authority.

CSP

means Carriage Service Provider.

ISP

means a Carriage Service Provider that provides a carriage service that enables end users to access the internet.

2.2 Definitions

For the purposes of the Code:

Account

means a residential fixed line internet account with an ISP.

Account Holder

means any natural person who has an Account.

Act

means the *Telecommunications Act 1997 (Cth)*.

Acknowledgment

means an Account Holder's acknowledgement of a Final Notice, as described in section 3.9.2.

Adjudication Panel

means the independent body appointed by the Copyright Information Panel to adjudicate on Challenge Notices by Account Holders.

Carriage Service Provider

has the meaning given by section 87 of the Act.

Certification Body or Bodies

means the third party independent bodies approved by the Copyright Information Panel to carry out the audit and certification of an evidence gathering process under section 3.3.1 (a) of the Code.

Challenge

means a challenge by an Account Holder to a Notice, initiated via a Challenge Notice after receipt of a Final Notice.

Challenge Notice

means a Challenge in a form prescribed by the CIP, sent by an Account Holder to the Adjudication Panel, within the Challenge Period.

Challenge Period

means the period of 30 calendar days from the issue of a Final Notice.

Code Year

means, in relation to an Account Holder who has received an Education Notice, 12 months starting on the day that the ISP sends the Education Notice.

Copyright Act

means the *Copyright Act 1968* (Cth).

Copyright Information Panel (CIP)

means the panel created pursuant to this Code to undertake the responsibilities and provide the services described in Chapter 4.

Copyright Information Website

means a website to be commissioned by the CIP and operated on its behalf, providing information about:

- (a) the operation of this Code and the Scheme, including addressing anticipated questions of Account Holders, ISPs, Rights Holders and members of the public; and
- (b) Access to legitimate content alternatives, how to make internet services more secure from unauthorised access and use; and how to avoid infringing copyright online.

Evaluation Body

means the independent party appointed by the CIP to evaluate the Code and the Scheme.

Education Notice

means a notice in a form prescribed by the CIP and bearing CIP branding, being the first of a series of three Notices that may be issued to an Account Holder, in escalating order (1) Education; (2) Warning; (3) Final. These Notices might not relate to copyright works owned by the same Rights Holder.

Evaluation Process

means the process described in section 4.3

Final Notice

means a notice in a form prescribed by the CIP and bearing CIP branding, being the third of a series of three Notices to Account Holders, in escalating order (1) Education; (2) Warning; (3) Final. These Notices might not relate to copyright works owned by the same Rights Holder.

Final Notice List

means the list referred to in section 3.12.

First Consumer Organisation

means:

- (a) a peak organisation representing communications consumers as agreed by Rights Holders and ISPs, being ACCAN unless otherwise determined in accordance with paragraph (b) below; or
- (b) if another organisation is determined to be a more appropriate peak organisation representing communications consumers by agreement between Rights Holders and ISPs following reasonable consultations with the Australian Department of Communications and after the Rights Holders and ISPs taking due account of the views of the Department as to the appropriateness of that organisation, that other organisation.

Infringement Report

means a report complying with section 3.4.

IP address

means an Internet Protocol address, which is a public numerical label assigned to a device (e.g., modem or router) providing access to a public computer network that uses the Internet Protocol for communication and is consistent with the system known as Internet Protocol Version 4 (IPV4) or Internet Protocol Version 6 (IPV6).

Notice

means an Education Notice, a Warning Notice or a Final Notice.

Personal Information

has the same meaning as in the *Privacy Act 1988* (Cth).

Preliminary Discovery

means an application by a prospective applicant made in the Federal Court of Australia or the Federal Circuit Court for information or documents about a prospective respondent.

Quarantine Period

means a 14 day period following the issue of an Education Notice or Warning Notice to an Account Holder, during which Notices will not be sent to that Account Holder. (If a Rights Holder pursues legal action against an Account Holder, the Rights Holder may rely on alleged infringements detected during any quarantine period.)

Rights Holder

means a copyright owner, an exclusive licensee of copyright work, or a person acting as agent for one or more copyright owners that meets the criteria specified in section 3.3 of this Code.

Scheme

means the copyright notice scheme established by this Code.

Second Consumer Organisation

means:

- (a) a peak organisation addressing consumer concerns as agreed by Rights Holders and ISPs unless and until otherwise determined in accordance with paragraph (b) below; or
- (b) if another peak organisation addressing consumer concerns is determined to be a more appropriate peak organisation addressing consumer concerns by agreement between Rights Holders and ISPs following reasonable consultations with the Australian Department of Communications and after the Rights Holders and ISPs taking due account of the views of the Department as to the appropriateness of that organisation, that other organisation.

Warning Notice

means a notice in a form prescribed by the CIP and bearing CIP branding, being the second of a series of three Notices to Account Holders, in escalating order (1) Education; (2) Warning; (3) Final. These Notices might not relate to copyright works owned by the same Rights Holder.

2.3 Interpretations

In the Code, unless the contrary appears:

- (a) headings are for convenience only and do not affect interpretation;
- (b) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (c) words in the singular includes the plural and vice versa;
- (d) words importing persons include a body whether corporate, politic or otherwise;
- (e) where a word or phrase is defined, its other grammatical forms have a corresponding meaning;

- (f) mentioning anything after include, includes or including does not limit what else might be included;
- (g) words and expressions which are not defined have the meanings given to them in the Act; and
- (h) a reference to a person includes a reference to the person's executors, administrators, successors, agents, assignees and novatees.

3 COPYRIGHT NOTICE SCHEME

3.1 Overview of Copyright Notice Scheme

- 3.1.1 This Code provides for a Scheme whereby Rights Holders and ISPs work to help deter the practice of online copyright infringement and provide information to consumers about lawful available content alternatives.
- 3.1.2 The Scheme does not identify alleged infringers of copyright. The method of detection entails linking an Account to an IP address allegedly used for infringements. Notices will be sent to the Account Holder to whose service that IP address was allocated at that time.
- 3.1.3 The Scheme provides that, at the instigation of a Rights Holder, an ISP must, where possible, issue Education, Warning or Final Notices to relevant Account Holders.
- 3.1.4 If, within any Code Year, an Account Holder has received an Education Notice and Warning Notice and a Final Notice, a Rights Holder named in any of those Notices will be provided with assistance (as described in section 3.12 of the Code) to take direct copyright infringement action against an Account Holder.
- 3.1.5 Time limits apply to all stages of the Scheme, including the issuing of Notices and the making of Challenges.
- 3.1.6 An ISP must not accept any request by a Rights Holder to, disclose any Personal Information, including the identity or any contact details of an Account Holder, at any stage of the Scheme, unless there is a court order or written permission from the Account Holder expressly authorising such disclosure of Personal Information.
- 3.1.7 The Scheme applies to residential fixed, internet Account Holders only.
- 3.1.8 Attachment 1 provides a graphic representation of the process flows to be followed under the Scheme, the relationships between the different components of the Scheme and a description of those components.
- 3.1.9 Attachment 2 illustrates the steps that ISPs will typically need to follow in order to respond to an Infringement Report received from a Rights Holder.

3.2 Qualifying ISPs

- 3.2.1 This Code applies to an ISP if:
- (a) it provides residential fixed internet access services to 1,000 relevant Account Holders, or more, within Australia; or
 - (b) it is a fixed ISP within a group of associated entities (within the meaning of section 50AAA of the *Corporations Act 2001*) that together provide residential fixed internet access to 1,000 Account Holders, or more, within Australia; and
- 3.2.2 ISPs that meet the criteria outlined in 3.2.1 (a) and 3.2.1 (b) must provide the CIP with a single point of contact to which Infringement Reports will be sent by Rights Holders.

3.3 Qualifying Rights Holders

- 3.3.1 The Scheme is only available to a Rights Holder if it satisfies (a) to (e) below. Namely, if:
- (a) the processes that the Rights Holder uses (or authorises to be used on its behalf) to detect alleged online copyright infringements, identify corresponding IP addresses and generate Infringement Reports have been independently audited and certified by a Certification Body and such an audit verifies that the evidence gathering process will give reasonable grounds to believe that the Rights Holder's copyright has been infringed by a person using a service provided by a particular ISP.
 - (b) the audit opinion, and any conditions to that opinion, including a description of the technology used by the Rights Holder, is a public document made available via the CIP. The independent audit by the Certification Body will be conducted on a confidential basis and the reasoning of the audit opinion will be confidential.
 - (c) Rights Holders must certify, on request made by the CIP, that there has been no material change to the processes described in section 3.3.1 (a). Where a Rights Holder makes any material change to the processes described in section 3.3.1 (a) the Rights Holder must re-submit the process for re-auditing and re-certification.
 - (d) The Rights Holder has provided the CIP with a single point of contact through which Infringement Reports will be provided to ISPs.
 - (e) At or before the first time it sends an Infringement Report to an ISP, a Rights Holder has provided an indemnity to that ISP.

3.4 Infringement Report from Rights Holders to ISPs

- 3.4.1 Any Infringement Report under this Code must:

- (a) be sent by email to the designated ISP email address provided to the CIP, in accordance with section 3.2.2, by the relevant ISP for use under this Scheme;
- (b) be sent within seven calendar days of an alleged infringement being detected and verified (using certified processes as required by section 3.3.1) by or on behalf of the Rights Holder;
- (c) include the information required under section 3.4.2; and
- (d) be sent in a format approved by the CIP.

3.4.2 An Infringement Report must include:

- (a) the name, address and email address of the Rights Holder;
- (b) a statement that the Rights Holder is entitled to send the Infringement Notice;
- (c) identification of the copyright work, including the title of the work and a description of the nature of the work;
- (d) a statement that a certified process has been used and the Rights Holder is satisfied that an infringement of the copyright work has been detected by the use of that certified process;
- (e) the date, time and time zone at which the alleged infringement occurred;
- (f) the IP address associated with the alleged infringement;
- (g) a unique numerical identifier allocated to the Infringement Report by the Rights Holder; and
- (h) the date of the Infringement Report.

3.5 Scheme Funding, Frequency and Volume of Copyright Infringement Reports and Notices

- (a) The Scheme is to be initially funded by commercial agreement negotiated between the ISPs and rights holders to allow for up to (in aggregate) 200,000 Notices to be processed and sent by all ISPs to Account Holders in each 12 months of operation of this Code commencing as and from when the first Notice is sent pursuant to this Code. If rights holders determine that this number is not sufficient to achieve the objectives of the Code, rights holders may propose further or varied funding arrangements to allow for more than (in aggregate) 200,000 Notices to be processed and sent by ISPs to Account Holders in each 12 months of operation of this Code. ISPs will not be obliged to process and send any Notices under this Code unless funding arrangements are agreed between ISPs and rights holders. Any funding arrangements must be designed to ensure that

smaller ISPs are not unduly burdened by the requirements of the Scheme.

- (b) ISPs may use manual, semi-automated or automated processes to fulfil their obligations under the Code.
- (c) ISPs will not be obliged to process more than an agreed maximum number of Infringement Reports during a given calendar month during the initial 18 months of operation of the Scheme.
- (d) An Infringement Report that is above the agreed maximum number will not be actionable if the relevant ISP is not able to process it and send any corresponding Notices to the relevant Account Holder within two months of receipt from the Rights Holder (e.g. due to overwhelming volume and/or the ISP being in the process of upgrading its processing capability).

3.6 Processing of Infringement Reports by the ISP

- 3.6.1 An ISP is not obliged to process an Infringement Report received from a Rights Holder or to send any corresponding Notices unless:
 - (a) the Rights Holder has provided an indemnity to the ISP in accordance with section 3.3.1 (e) of the Code;
 - (b) to the extent required to contribute to the funding arrangements of the Code, the Rights Holder has complied with those funding arrangements; and
 - (c) the CIP has prescribed the form of the Infringement Reports and Notices to be issued under the Code and the Infringement Report has been provided to the ISP in the prescribed form; and
 - (d) in the case of a Final Notice, the CIP has appointed the Adjudication Panel.
- 3.6.2 Subject to sections 3.5 and 3.6.1, within seven calendar days of receipt of an Infringement Report from a Rights Holder, the ISP will:
 - (a) send by email an acknowledgement of receipt of the Infringement Report to the Rights Holder;
 - (b) take reasonable steps to match the specified IP address to an Account and subsequently, to an Account Holder of that ISP; and
 - (c) if, after taking reasonable steps, the ISP cannot match the specified IP address to an Account Holder, the ISP will report that failure to the Rights Holder together with, if known, a statement as to why the match was not possible. In these

circumstances the ISP is not required to take any further action in relation to the relevant Infringement Report;

3.6.3 If:

- (a) the IP address can be matched to an Account, and
- (b) the Infringement Report relates to matters which occurred after the end of any relevant Quarantine Period in relation to that Account -

then the ISP must send:

- (c) where the Account Holder has not received any other Notice within the last 12 months – an Education Notice;
- (d) where the Account Holder has received an Education Notice but not a Warning Notice in the current Code Year – a Warning Notice; and
- (e) where the Account Holder has received a Warning Notice but not a Final Notice in the current Code Year, a Final Notice;

in each case in accordance with the relevant Code requirements:

- (f) by email to the contact email address of the Account Holder, as held by the ISP; and
- (g) that includes the information required under either section 3.7, 3.8 or 3.9 as appropriate; and
- (h) in the case of a Final Notice (only), also in accordance with section 3.9.2.

3.6.4 Where the Account Holder has received a Final Notice in the current Code year – the ISP is not required to process any further Infringement Reports relating to that Account Holder.

3.6.5 If an ISP does not receive a total of at least three Infringement Reports in respect of an Account Holder within a Code Year, the tally of Notices pertaining to that Account Holder reverts to zero.

3.7 Education Notice

3.7.1 An Education Notice must include the following information:

- (a) a statement that an Infringement Report has been received from a Rights Holder which alleges that an IP address allocated to the Account Holder's Account may have been used to infringe copyright;
- (b) the identity of the Rights Holder;

- (c) the time, time zone and date of the alleged infringement;
 - (d) a description of the content that is alleged to have been the subject of the infringement;
 - (e) a statement that no Personal Information of the Account Holder has been passed by the ISP to any third party, including the Rights Holder;
 - (f) acknowledgment that the alleged infringement may not necessarily have been undertaken by the Account Holder personally;
 - (g) a statement that further allegations of infringement using the Account Holder's Account may lead to the sending of further Notices;
 - (h) a statement that engaging in copyright infringement may lead to a Rights Holder instituting court proceedings against the Account Holder;
 - (i) a statement that the Account Holder will have the opportunity to challenge the Education Notice at a later date, if they also receive a Warning Notice and a Final Notice within a 12 month period.
 - (j) a statement that any queries about the Notice should be directed to the CIP;
 - (k) a link to the Copyright Information Website that will provide information addressing likely queries by Account Holders and members of the public and provide educational material about how to:
 - (i) access legitimate content alternatives;
 - (ii) make internet services more secure from unauthorised access and use; and
 - (iii) avoid infringing copyright online.
- 3.7.2 In its covering email to an Account Holder, the ISP will:
- (a) identify itself as the sender of the notice but will not be required to place any of its own branding on the Education Notice; and
 - (b) include a reference to and information which would allow an Account Holder to access the ISP's privacy policy, if any.
- 3.7.3 The ISP will make a record that it has sent an Education Notice to the Account Holder.

3.8 Warning Notice

- 3.8.1 A Warning Notice must include the following information:

- (a) a statement that the Account Holder has previously received an Education Notice within the last 12 months;
 - (b) a statement that a further Infringement Report has been received from a Rights Holder which alleges that an IP address allocated to the Account Holder's Account has been used to infringe copyright;
 - (c) the identity of the Rights Holder;
 - (d) the time, time zone and date of the alleged infringement;
 - (e) a description of the content that is alleged to have been the subject of the infringement;
 - (f) a statement that no Personal Information of the Account Holder has been passed to any third party, including the Rights Holder;
 - (g) acknowledgment that the alleged infringement may not necessarily have been undertaken by the Account Holder personally;
 - (h) a statement that receipt of a further Notice may result in a Rights Holder instituting court proceedings against the Account Holder, including a preliminary discovery application to obtain the Account Holder's details;
 - (i) a statement that the Account Holder will have the opportunity to challenge the Warning Notice and/or the earlier Education Notice at a later date, if they also receive a Final Notice within 12 months of the Education Notice;
 - (j) a statement that any queries about the Notice should be directed to the CIP;
 - (k) a statement that the Account Holder may wish to seek independent legal advice; and
 - (l) a link to pages at the Copyright Information Website which will provide information addressing likely queries by Account Holders and members of the public and provide educational material about how to:
 - (i) access legitimate content alternatives;
 - (ii) make internet services more secure from unauthorised access and use; and
 - (iii) avoid infringing copyright online.
- 3.8.2 In its covering email to an Account Holder, the ISP will:
- (a) identify itself as the sender of the Notice but will not be required to place any of its own branding on the Warning Notice; and

- (b) include a reference to and information which would allow an Account Holder to access the ISP's privacy policy, if any.
- 3.8.3 The ISP will make a record that it has sent a Warning Notice to the Account Holder.

3.9 Final Notice

- 3.9.1 A Final Notice pursuant to this Code must include the following information:
- (a) a statement that the Account Holder has received an Education Notice and a Warning Notice within the last 12 months;
 - (b) a statement that a further Infringement Report has been received from a Rights Holder which alleges that an IP address allocated to the Account Holder's Account has been used to infringe copyright;
 - (c) the identity of the Rights Holder;
 - (d) the time, time zone and date of the alleged infringement;
 - (e) a description of the content that is alleged to have been the subject of the infringement;
 - (f) acknowledgment that the alleged infringement may not necessarily have been undertaken by the Account Holder personally;
 - (g) a statement that the ISP will seek an Acknowledgment of the Account Holder's receipt of the Final Notice as determined at the ISP's discretion in accordance with section 3.9.2 of the Code;
 - (h) a statement that receipt of the Final Notice may result in a Rights Holder instituting court proceedings against the Account Holder, including a preliminary discovery application to obtain the Account Holder's details;
 - (i) a statement that any queries about the Final Notice should be directed to the CIP;
 - (j) a statement that the Account Holder may wish to seek independent legal advice;
 - (k) a statement that the Account Holder has the option to challenge the Education Notice and/or Warning Notice and/or Final Notice via the Adjudication Panel; and
 - (l) a link to pages at the Copyright Information Website which will provide information addressing likely queries by Account Holders, state how a Challenge may be made and how it would be assessed, and provide educational material about how to:

- (i) access legitimate content alternatives;
 - (ii) make internet services more secure from unauthorised access and use; and
 - (iii) avoid infringing copyright online;
- 3.9.2 An ISP will select an Acknowledgment measure in its discretion from any one or more of the following:
- (a) registered post: in addition to sending a Final Notice by email, the ISP will send the Final Notice by registered post (recipient signature required) to the billing address of the Account Holder. The signature provided upon receipt will constitute acknowledgement by the relevant Account Holder that a Final Notice has been received by the Account Holder;
 - (b) pop-ups, or other real-time Notices or information pages that do not interrupt the internet services but continue to appear periodically until the Account Holder takes action to acknowledge receipt of the Final Notice; or
 - (c) another acknowledgement measure that the Copyright Information Panel has approved and specified for the purpose of this section 3.9.2 and which is a reasonable alternative.
- 3.9.3 In its covering email to an Account Holder, the ISP will:
- (a) identify itself as the sender of the Notice but will not be required to place any of its own branding on the Final Notice; and
 - (b) include a reference to and information which would allow an Account Holder to access, the ISP's privacy policy, if any.
- 3.9.4 The ISP will make a record that it has sent a Final Notice to the Account Holder and will specify the form of the Acknowledgment in that record.
- 3.9.5 The ISP will make a record of Acknowledgements that it receives.

3.10 Challenge Notice from Account Holder to Adjudication Panel

- 3.10.1 An Account Holder may, after receiving a Final Notice, challenge an Education, Warning or Final Notice, by sending a Challenge Notice to the Adjudication Panel. The Challenge Notice must attach a copy of the Final Notice.
- 3.10.2 The challenge process will be administered by the Adjudication Panel and specified by the CIP. The challenge process must be transparent and accessible by Account Holders while protecting Personal Information such as the identity and contact details of the Account Holder

and the independence and impartiality of the Adjudication Panel.

- 3.10.3 No fee will be payable upon lodgement of the Challenge Notice unless the CIP determines that there is an excessive number of Challenge Notices that appear intended to undermine the integrity and proper functioning of this Scheme. If the CIP, after consultation with the ACMA, determines to introduce a fee, the CIP will give reasonable prior notice of the introduction of the fee and ensure that the fee is small. Any such fee if and if so when introduced would be payable by the Account Holder upon lodgement of the Challenge Notice and will be refunded if the Challenge is successful. Any such fee if and if so when introduced may be waived by the Adjudication Panel if it believes this is warranted in the individual circumstances.
- 3.10.4 The costs of the Adjudication Panel in adjudicating any Challenge Notice are payable by the relevant Rights Holder.
- 3.10.5 The CIP must not itself review the Challenge Notice nor have access to any of the Account Holder's Personal Information at any stage of the Scheme. Challenges may only be determined by the Adjudication Panel following the process prescribed in section 3.10.2 and otherwise in accordance with this Code.
- 3.10.6 A Challenge Notice is not valid if it is received by the Adjudication Panel more than 30 calendar days after the date of the Final Notice to which it relates.
- 3.10.7 The Adjudication Panel must advise the relevant ISP that an Account Holder has filed a Challenge Notice. Until the outcome of that Challenge is determined by the Adjudication Panel and notified to the ISP, the IP address related to an Account must be omitted from any Final Notice List.
- 3.10.8 An ISP must provide the Adjudication Panel with any information that the Adjudication Panel reasonably requests from the ISP, to enable the Adjudication Panel to determine whether the ISP's matching of the IP address specified in the Infringement Report to the Account Holder specified in the Notice was properly conducted.
- 3.10.9 A Rights Holder must provide the Adjudication Panel with any information that the Adjudication Panel reasonably requests from the Rights Holder to enable the Adjudication Panel to determine whether a process certified pursuant to section 3.3.1(a) of this Code was used as the basis for the Infringement Report and that the certification remains current.
- 3.10.10 The function and remit of the Adjudication Panel is to review whether:

- (a) the processes prescribed by this Code in relation to the issue of Infringement Reports and the issue and sending to an Account Holder of an Education, Warning or Final Notice have been properly followed;
 - (b) the act constituting the alleged infringement specified in the Infringement Notice was permitted by the Account Holder; and
 - (c) other matters which, in the reasonable opinion of the Adjudication Panel, warrant consideration.
- 3.10.11 In reviewing a Challenge Notice the Adjudication Panel must take into account any relevant information provided by the Rights Holder, the ISP and the Account Holder. To the extent that it is the subject of the Challenge, the Adjudication Panel may consider:
- (a) whether the Infringement Report in relation to the Notice that is the subject of the Challenge arose out of use by or on behalf of the Rights Holder of a process certified pursuant to section 3.3.1 (a);
 - (b) whether the matching of the IP address specified in the Infringement Report to the Account Holder specified in the Notice appears to have been properly conducted;
 - (c) any other relevant matter raised by the Account Holder that is supported by credible evidence, including without limitation material supporting any claim that the Notice that is the subject of Challenge arose out of use of the Account Holder's Account by a person that was not authorised by the Account Holder to use that Account to infringe copyright; and
 - (d) any other circumstance which the Adjudication Panel considers should reasonably be taken into account.
 - (e) The Adjudication Panel will determine on the basis of material before it in relation to a Challenge whether that Challenge should be successful. The Adjudication Panel must uphold a Challenge if, on the balance of probabilities:
 - (i) the processes prescribed by this Code in relation to the issue of Infringement Reports and the issue and sending to the Account Holder of an Education, Warning or Final Notice have not been properly followed; or
 - (ii) the act constituting the alleged infringement specified in the Infringement Notice was not permitted by the Account Holder; or
 - (iii) there are other matters which, in the reasonable opinion of the Adjudication Panel, warrant the upholding of the Challenge.

3.10.12 If the Adjudication Panel:

- (a) rejects the Challenge, the Adjudication Panel must, within 30 calendar days of making its decision, send a response to the Account Holder:
 - (i) stating the rejection, the reasons for the rejection and the potential consequences; and
 - (ii) stating that matters raised in the Challenge can again be raised by the Account Holder in any court proceedings commenced by the relevant Rights Holder.

The Adjudication Panel must also advise the relevant ISP that the Account Holder's Challenge has been unsuccessful.

3.10.13 If the Adjudication Panel:

- (a) upholds the Challenge, the Adjudication Panel must determine, as the Adjudication Panel reasonably considers fair and just, either: (1) that the Education, Warning or Final Notice that is the subject of the Challenge by the Account Holder is to be treated as never issued and sent, in which event that Notice and each subsequent Notice sent to the Account Holder that is within the Challenge is to be regarded as not issued and sent for the purposes of this Code, or (2) that each Notice including the Final Notice issued to the Account Holder that is the subject of the Challenge is to be treated as never issued and sent, in which event that Notice and each subsequent Notice is to be regarded as not issued and sent for the purposes of this Code, and then, within 28 calendar days of making its decision:
 - (i) send a response to the Account Holder stating the acceptance of the Challenge, the reasons for it and the determination of the Adjudication Panel as to either (1) or (2) above; and
 - (ii) advise the relevant ISP that the Account Holder's Challenge has been successful and the determination of the Adjudication Panel as to either (1) or (2) above and require the Account Holder's ISP to update its records accordingly.

3.10.14 The Adjudication Panel must, at all times, protect the Personal Information of Account Holders in accordance with the *Privacy Act 1988*.

3.11 Record Keeping by ISPs

- 3.11.1 ISPs must retain, for a minimum of 24 months, the following information, in relation to each relevant, active Account Holders:

- (b) any Infringement Reports sent by Rights Holders to the ISP;
 - (c) any Education, Warning and Final Notices sent by the ISP;
and
 - (d) any Acknowledgement received from Account Holders on receipt of Final Notices.
- 3.11.2 To the extent permitted by law and not contrary to any court order, an ISP may de-identify or destroy after 24 months from the date of the relevant document, the following information:
- (a) any Infringement Reports sent by the Rights Holders to the ISP;
 - (b) any Education, Warning or Final Notices sent by the ISP to its Account Holders
 - (c) any records relating to these documents.

3.12 Final Notice Lists and Facilitated Preliminary Discovery – Rights Holders may Pursue Further Action

- 3.12.1 Any Rights Holder that sent an Infringement Report to an ISP in relation to an Account Holder of that ISP who ultimately receives a Final Notice may request a Final Notice List.
- 3.12.2 Rights Holders must send their Final Notice List requests in writing to the designated email address of the relevant ISP.
- 3.12.3 Within seven calendar days (or such time as otherwise agreed between the ISP and the Rights Holder) of receipt of a request under section 3.12.1, an ISP must provide a Final Notice List to the Rights Holder:
- (a) in electronic form; and
 - (b) in a form which does not enable any Account Holder to be identified.
- 3.12.4 A Final Notice List must provide the following information:
- (a) The number of Account Holders who have both:
 - (i) been issued with an Education, Warning or Final Notice in respect of an alleged infringement against the requesting Rights Holder and
 - (ii) received a Final Notice in respect of an alleged infringement against the requesting Rights Holder or any other Rights Holder –

since the most recent of:
 - (iii) the commencement of the Scheme;

- (iv) 24 months before the date of request for the Final Notice List; and
 - (v) the date of the most recent Final Notice List issued by that ISP to the requesting Rights Holder;
 - (b) a record of any Acknowledgement and the form of that Acknowledgment but excluding any Personal Information; and
 - (c) each IP address allocated at the time of the alleged infringement to each Account Holder on the Final Notice List.
- 3.12.5 The information set out in the Final Notice List must not include any Final Notice that is the subject of a Challenge that is pending determination or has been successfully challenged. An ISP does not have to accept a further request for a Final Notice List from a Rights Holder within one month from the making of such a request by that Rights Holder to that ISP.
- 3.12.6 The ISP must not disclose the identity or contact details of any Account Holder to Rights Holders in the Final Notice List.
- 3.12.7 A Rights Holder may elect to lodge an application for Preliminary Discovery seeking to obtain access from an ISP to an Account Holder's identity and contact details.
- 3.12.8 An ISP must act reasonably to facilitate and assist an application by a Rights Holder for Preliminary Discovery to the extent that such orders are sought:
- (a) following the Rights Holder and ISP observing the procedures prescribed by this Code in relation to an Account Holder whose IP address was included on a Final Notice List provided by that Account Holder's ISP to a relevant Rights Holder;
 - (b) in relation to the identity and address (if available to that ISP) contact details of that Account Holder; and
 - (c) for provision of copies of Notices sent to that Account Holder that were the subject of the Final Notice List.
- 3.12.9 An ISP must comply with a final court order to disclose the Account Holder's details to the Rights Holder.
- 3.12.10 Nothing in this Code affects the rights and remedies of Rights Holders under the Copyright Act in relation to any alleged infringement of copyright, whether or not the alleged infringement has been the subject of any Infringement Notice.

4 COPYRIGHT INFORMATION PANEL

4.1 Structure and Operation of the Copyright Information Panel

- 4.1.1 The CIP will be established jointly by Right Holders, ISPs, a First Consumer Organisation and a Second Consumer Organisation and will commence operation no later than operational effect of this Code.
- 4.1.2 The CIP will be a panel of persons appointed, respectively, by the Right Holders, ISPs, the First Consumer Organisation and the Second Consumer Organisation.
- 4.1.3 The operating budget of the CIP will be jointly agreed by Rights Holders and ISPs and its operating expenses will be jointly funded by them in equal portion, (other than as stated in sections 3.10.3 and 3.10.4).
- 4.1.4 The CIP will have a chairperson agreed by Rights Holders and ISPs. The chair will alternate between a Rights Holder representative and an ISP representative annually.
- 4.1.5 The CIP will have an executive committee consisting of six members appointed as follows:
- (a) as to two representatives, by Rights Holders;
 - (b) as to two representatives, by ISPs;
 - (c) as to one representative, by the First Consumer Organisation; and
 - (d) as to one representative, by the Second Consumer Organisation,
- unless the Rights Holders and ISPs agree that the First Consumer Organisation may appoint two representatives, in which case for such time as the Rights Holders and ISPs so agree the First Consumer Organisation may appoint two representatives and there will not be any representative appointed by a Second Consumer Organisation.
- 4.1.6 The tenure of representatives will be two years from the date of their respective appointment, with the right to seek reappointment. The CIP will make decisions by majority vote of representatives present (in person or by electronic communications) and voting. Each representative may appoint an alternate that may attend and vote in the absence of that representative. The CIP may determine other procedural and administrative matters relating to its proper and efficient functioning as the CIP determines by decision.
- 4.1.7 The CIP will offer an avenue for input and guidance as to this Code from other relevant stakeholders.

4.2 Responsibilities of the Copyright Information Panel

4.2.1 The CIP will be responsible for:

- (a) determining the commencement date of the Scheme in accordance with section 1.5.2;
- (b) publishing the commencement date on the Copyright Information Website;
- (c) the appointment of the Certification Body or Bodies;
- (d) determining and prescribing the form of Infringement Reports and Notices;
- (e) the appointment of the Adjudication Panel;
- (f) commissioning and overseeing provision of secretarial and administrative support for the:
 - (i) conduct of the CIP's functions;
 - (ii) conduct of the Adjudication Panel's functions;
 - (iii) content and operation of the Copyright Information Website; and
 - (iv) maintaining a public register of Rights Holders (including details of the single point of contact provided by each Rights Holder);
- (g) oversight of provision (outsourced under such arrangements as the CIP determines) of advice and educational material to the public on the purpose and operation of all aspects of the Code and the Scheme, particularly through commissioning and operation of the Copyright Information Website and including:
 - (i) the reasons for the creation of the copyright notice scheme and how it operates;
 - (ii) activities that constitute an online infringement of copyright and the possible consequences of these activities;
 - (iii) the availability of lawful content alternatives;
 - (iv) how to make internet services secure from unauthorised use;
 - (v) information regarding the privacy rights of Account Holders;
 - (vi) how to avoid infringing activity;
- (h) providing for the handling of any enquiries from Account Holders and members of the public;

- (i) reasonable reporting to interested persons (including Rights Holders, ISPs, consumers, the Federal Government, the Office of the Australian Information Commissioner and the ACMA) on the operation of the Code, including by commissioning preparation and publication of a summary annual report in such form as the CIP may determine following consultations with stakeholders; and
- (j) overseeing the Evaluation Process described in section 4.3.

4.3 Evaluation Process

- 4.3.1 An evaluation of the Code and the Scheme will be conducted by the Evaluation Body.
- 4.3.2 The Evaluation Process will have such terms of reference as the CIP may determine, but must at least consider the matters noted in section 4.3.5.
- 4.3.3 ISPs and Rights Holders must provide the Evaluation Body with any information that is reasonably requested to enable it to conduct the Evaluation Process, except that the Evaluation Body will not have access to Personal Information of Account Holders.
- 4.3.4 The Evaluation Process will include consideration of:
 - (a) the effectiveness of the Code against the Objectives in section 1.4;
 - (b) the operational effectiveness of the Code processes, including the number of Notices sent to Account Holders and the number of Preliminary Discovery applications filed by Rights Holders;
 - (c) any potential refinement of the Code and the processes prescribed by the Code that might improve its effectiveness, including the scope of coverage of the Code, or address any unintended adverse effects;
 - (d) the effectiveness and fairness of operation of provisions of this Code in relation to applications for Preliminary Discovery made in respect of alleged online copyright infringement, including any allegations of inappropriate practices; and
 - (e) any other matters which the CIP considers should reasonably be taken into account.
- 4.3.5 The Evaluation Body will provide a written report to the CIP within 3 months of commencing the Evaluation Process. The report may include commercial in confidence material and is to be drafted so that commercial in confidence material is redacted or otherwise separated to enable release of a public summary version or other fair version of the report.

5 REFERENCES

Legislation

Copyright Act 1968

<http://www.comlaw.gov.au/Series/C1968A00063>

Privacy Act 1988

<http://www.comlaw.gov.au/Series/C2004A03712>

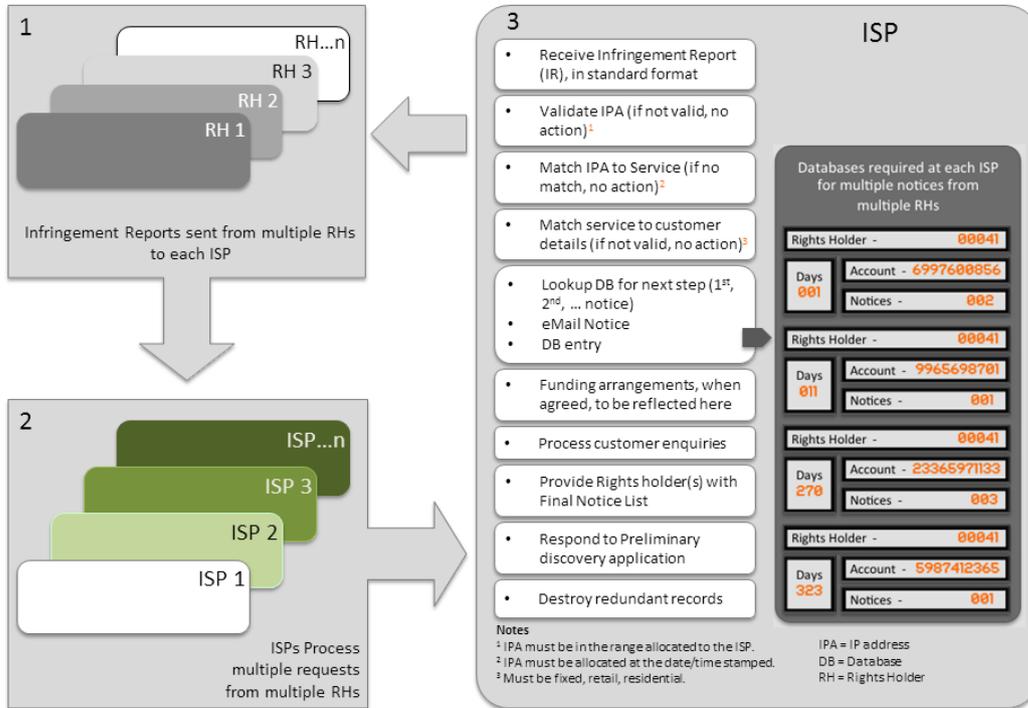
Telecommunications Act 1997

<http://www.comlaw.gov.au/Series/C2004A05145>

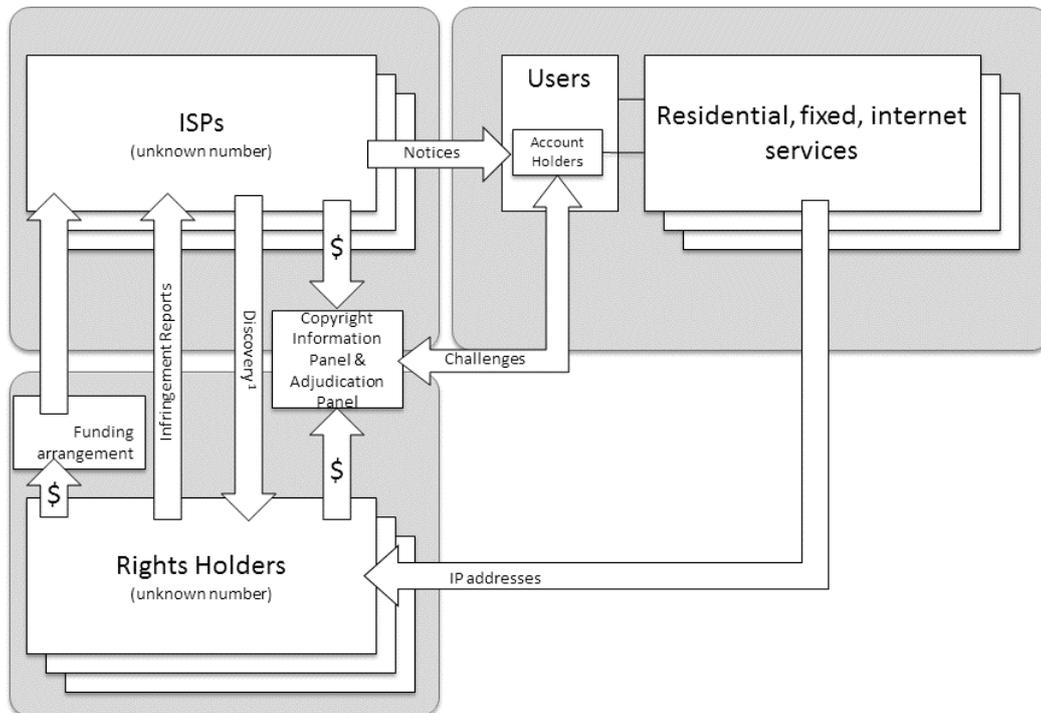
ATTACHMENT 1 – PROCESS FLOW

The following diagrams are included to illustrate processes to be undertaken by ISPs. In the event of a discrepancy, the rules described in the Code text take precedence.

Possible process overview – Copyright Notice Scheme



Relationships and information flows – Copyright Notice Scheme

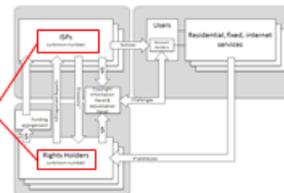


¹ Subject to court order

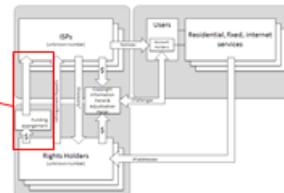
ATTACHMENT 2

Major components of the Copyright Notice Scheme

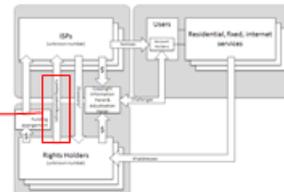
An unknown number of participants will join the scheme. Both ISPs and RHs will qualify according to requirements. The scheme will bind ISPs with > [Minimum Specified Number] residential, fixed internet account holders and is available to qualified RHs.



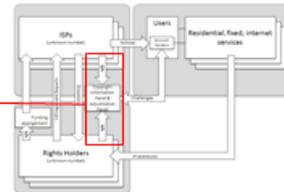
Funding arrangements between ISPs and RHs, when agreed, to be reflected here]



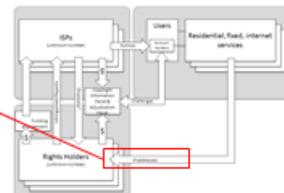
Infringement Reports will be forwarded to ISPs, in a prescribed format..



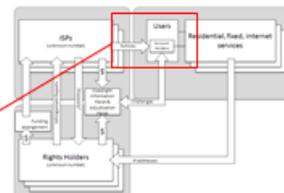
In order to facilitate the operation and governance of the scheme, a Copyright Information Panel (CIP) will maintain a register of qualified RHs, make arrangements to deal with enquiries about the operation of the scheme, develop educational material and provide links to lawful content, An Adjudication Panel will manage challenges from Account Holders to Final Notices or other Notices. The CIP will be co-funded by RHs and ISPs.



RHs will develop the detection and recording of IP addresses believed to be used for infringements and forward in an agreed standard format to ISPs, together with any other information required by the scheme.

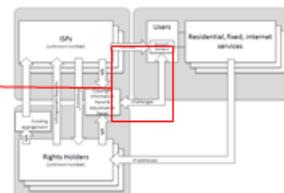


ISPs will receive Infringement Reports from RHs, verify IP addresses, match IP addresses to services and account holders, forward notices in an agreed standard format to primary email address of account holder. ISPs will develop and maintain databases to record notices sent and the status of those notices according to the scheme requirements.



Account Holders will be offered a challenge process for any Final Notice. Details of the process and means of access to the Adjudication Panel will be included in the notices.

RHs will fund the cost of the Adjudication Panel determining Challenges



ISP Actions

Each ISP will establish a secure mailbox in which to receive Infringement Reports from RHs, create task lists, create permission for access, develop and document processes and recruit and train staff in the new processes in order to action notifications.
ISPs will create a distribution list of a 'task' which allow management of alerts and escalations within parameters set to ensure actions completed in agreed timeframes.

IP addresses (IPA) have specific formats, are 'time-stamped' and are issued to ISPs in blocks. The ISP will allocate any given IPA to different devices at different times. The ISP will need to validate that the IPAs provided are correctly formatted; in the range allocated to the ISP; and in use at the time indicated by the RH. A record of each validation will be made.

IPAs are allocated to devices connected to services. The device and, therefore, the service must first be determined, for the time stamp provided. This is an action performed with access to network records. A record of each search result will be made.

Once a service has been identified, staff must access billing systems to search for customer identification associated with that service. **This will provide Account Holder details, and also determine if it is a service within the scope of the scheme (Residential, fixed, internet).**
A record of each search result will be made.

ISPs will refer to an appropriate data base (not yet in existence) to determine the appropriate notice (Education/Warning/Final) for issue to the Account Holder. **This DB must record time frame of previous notices. ISP will refer to business rules and create and issue correct notice.**
A record of each notice issued will be made.

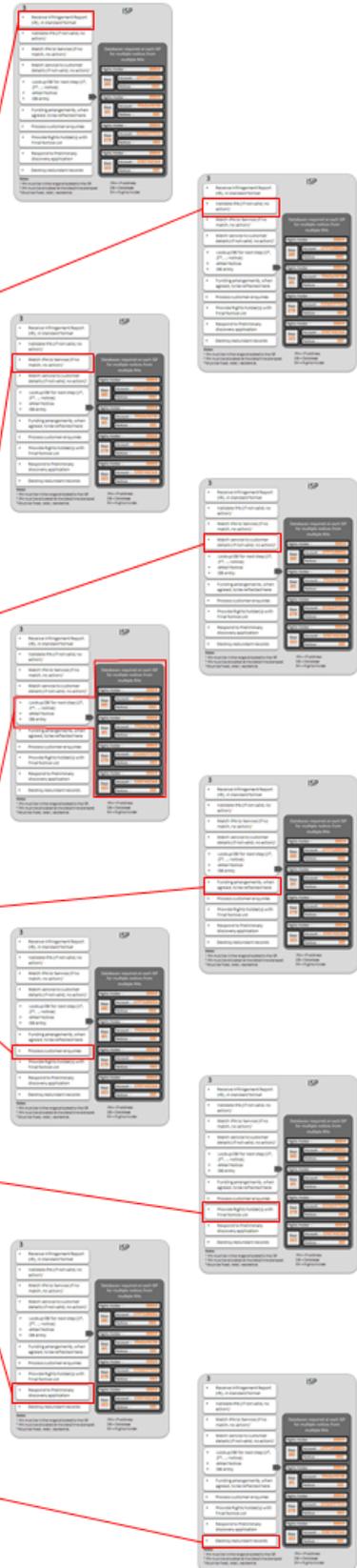
[Funding arrangements between ISPs and RHs, when agreed, to be reflected here]

ISP will recruit and train staff to handle customer enquiries, that are not made to the CIP.
Handle customer enquiries **in relation to notices.**
A record of each enquiry will be made.

On receipt of request for a 'Final Notice List' from RHs, ISPs will generate list in prescribed format, from records kept.
Forward to RH.
A record of each 'Final Notice List' issued will be made.

If preliminary discovery proceedings commence, respond as appropriate.
Comply with any resulting Court Orders.

Identify aged records and delete according to Code provision or business rules.



PARTICIPANTS

The Working Committee that developed the Code consisted of the following organisations and their representatives:

Representative	Membership	Organisation
Patrick Fair	Voting	Baker and McKenzie
Ben Jenkins	Voting	iiNet
Adam Leeflang	Voting	IPSTAR
Simon Lewin	Voting	M2
Gary Smith	Voting	Optus
Jane Perrier	Voting	Telstra
James Shaw	Non-voting	Telstra
Mary-Jane Salier	Voting	Verizon
Matthew Lobb	Voting	Vodafone Hutchison Australia

This Working Committee was chaired by Mr Gary Smith of Optus. Shona Fury of Communications Alliance provided project management support. Leanne O'Donnell provided legal drafting services.

Communications Alliance was formed in 1997 to provide a unified voice for the Australian communications industry and to lead it into the next generation of converging networks, technologies and services.

In pursuing its goals, Communications Alliance offers a forum for the industry to make coherent and constructive contributions to policy development and debate.

Communications Alliance seeks to facilitate open, effective and ethical competition between service providers while ensuring efficient, safe operation of networks, the provision of innovative services and the enhancement of consumer outcomes.

It is committed to the achievement of the policy objective of the *Telecommunications Act 1997* - the greatest practicable use of industry self-regulation without imposing undue financial and administrative burdens on industry.



**Published by:
COMMUNICATIONS
ALLIANCE LTD**

**Level 12
75 Miller Street
North Sydney
NSW 2060 Australia**

**Correspondence
PO Box 444
Milsons Point
NSW 1565**

**T 61 2 9959 9111
F 61 2 9954 6136
E info@commsalliance.com.au
www.commsalliance.com.au
ABN 56 078 026 507**

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