

Blanch, Belinda

From: Chadwick, Richard
Sent: Monday, 15 September 2014 9:06 AM
To: Hatfield, David; Ransom, Hannah
Subject: FW: ACCC info request re Authorisation Application - Follow the Money [DLM=For-Official-Use-Only]

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From: John Stanton
Sent: Friday, 12 September 2014 4:24 PM
To: Chadwick, Richard
Cc: Margaret Fleming; Austin Carwardine; Visu Thangavelu
Subject: FW: ACCC info request re Authorisation Application - Follow the Money

Hello Richard

Please find embedded below that best answers I can give you today in response to your request for additional information. Happy to discuss. Thank you for your consideration of this.

1. Please confirm whether CA wishes authorisation to extend to future as well as current CA members.

A: Yes, CA does wish the authorisation to extend to future as well as current CA members.

2. Please clarify whether CA wishes authorisation to potentially extend to other future parties also – for example, in response to question 2(a) on the application form, CA notes that other organisations from different sectors are considering joining the arrangement in the future. If this is the case, CA may need to consider amending its application to include parties that are not CA members.

A: Yes, CA does wish the authorisation to extend to other future parties also.

3. The identity of the independent party who is to create and maintain the Infringement Website list may be important to the ACCC's consideration of this matter. Please indicate when the independent party is to be determined and what this party's qualifications and expertise will be.

A: I have contacted the Secretary of the Federal Department of Communications (DoC), Mr Drew Clarke and sought his assistance in the task of agreeing on an independent party to create and maintain the Infringement Website list and to oversee the appeals/review mechanism. Mr Clarke is considering the issue and has agreed to work with me to craft an optimal solution. Rights holders will also be consulted on this issue. The independent body chosen will need to have significant expertise in the area of online copyright infringement, preferably including both policy and operational experience. My target is to have the issue settled by mid-October, but obviously I can't commit Mr Clarke to a specific timeframe at this stage. Examples of potential independent bodies include:

- the Department of Communications;
- the Australian Communications and Media Authority (ACMA) or
- an expert individual whose appointment would attract the support of rights holders and ISPs alike.

4. Please indicate the basis for determining which sites will be placed on the Infringement Website list? Specifically:

a. What criteria will be applied?

A: The list will be comprised of web-sites that promote or facilitate online copyright infringement. Examples of this include sites offering torrents that enable internet users to illegally download or upload digital files containing content that is subject to copyright, e.g. movies, music, books, software etc. Other sites that will be targeted may include:

- those that promote and provide links to sites that offer torrents; and
- those that offer advice to internet users on how to go about illegal downloading of content

b. What is meant by sites which promote “online copyright infringement”? CA’s response to question 4 on the application form indicates this is “primarily via improper file-sharing”. What kind of files do the arrangements relate to, and will anything else (besides file-sharing) be targeted as part of the arrangements?

A: See answer to question a. above. Regarding the second part of question b. it should be recognised that the technology used to facilitate illegal file-sharing is constantly evolving. It may be that if technologies other than bit-torrent gain wider usage as a means of illegally accessing content via the internet, the sites promoting or facilitating those technologies might also be considered for inclusion on the list.

c. How will the arrangements deal with websites who are not primarily, or intentionally, engaging in online copyright infringement? For example, facilities or software provided by a website may be improperly used for sharing of copyrighted material without the knowledge or intention of the website operator.

A: The independent body maintaining the list will inevitably need to make some judgment calls in cases such as that cited. Any web-site placed on the list will have an opportunity to state its case for non-inclusion.

d. What is the lead time between the identification of an infringing website to its placement on the Infringement Website list, and what notice and opportunity to respond will be given to the operator of the website before being added to the list?

A: The first part of the question is an operational detail that is yet to be decided. The intention would be to give the operator of an identified web-site a reasonable period (e.g. 48 hours) to argue against its inclusion on the list.

5. Where and how will the Infringement Website list be published, and who will have access to the list?

A: Whether the list will be published is an issue to be decided in discussion with the independent body. In the UK the infringing website list is not published. It is intended that internet service providers (ISPs) and their representatives, and rights holders and their representatives, will have access to the list on terms to be decided by the independent body.

6. How many sites does CA envisage the proposed boycott may cover? What proportion of these sites are likely to be Australian?

A: I don’t have these data at this time.

7. Can you provide an estimate of the current advertising spend of CA’s members on sites proposed to be included in the Infringement Website list, and the basis on which this estimate is made? Also, if possible, please indicate what proportion of advertising spend on these sites is constituted by CA members’ spend.

A: I don’t have these data at this time.

8. Please provide further detail on the review and appeal mechanism available to website owners who claim their website should not be included on the Infringement Website list.

A: Web-sites proposed for inclusion on the list would be notified and given 48 hours to put forward arguments as to why their site should not be included. The adjudication could be undertaken by the independent body or outsourced to a suitably accredited independent commercial arbitrator.

9. To assist in its assessment of the authorisation the ACCC compares the likely future with the conduct that is the subject of the arrangements to the likely future without the arrangements. The ACCC will compare the public benefits and detriments likely to arise in the future where the conduct occurs against the future in which the conduct does not occur. To this end, please indicate CA's view of the likely future without the arrangements.

A: Any prediction will be highly speculative. Bit-torrent traffic (not all of which contains illegally shared content) has fallen in recent years in the US from a figure of 31 percent of total downloaded traffic to its current level of 5.69 percent. In Asia (including Australia) the figure is still approximately 25 percent and relatively stable. The rights holders assert that the value of lost content sales per annum in Australia, attributable to online copyright infringement, is up to \$1.37 billion.

CA's belief is that a combination of factors, including greater availability of lawful, affordable content, combined with the follow-the-money strategy, will see the percentage of torrent traffic in Australia drop significantly during the next three years. Absent measures such as the follow-the-money strategy we believe that the level of decline will be significantly slower.

10. CA's response to question 2(a) on the application form refers to the arrangements as being part of a "multi-faceted approach". What other activities will be undertaken by CA as part of this approach?

A: The response to question 9 highlights one of the other facets – action by rights holders to address availability and pricing issues. The Federal Government is engaged in a consultation process with stakeholders at present as to other potential actions. This process is not yet complete, but might generate additional responsibilities for CA e.g. as part of a broader public education effort.

Regards

John Stanton

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