



Internet New Zealand (Inc)

Submission to the Telecommunications Carriers Forum on the
Draft Internet Service Provider Copyright Code of Practice

6 March 2009

Public Version

1. Executive Summary

1.1 The main points InternetNZ makes in this submission are:

- (a) The Government has made continuation or modification of Section 92A dependent on agreement between regular ISPs and rights holders. As a far broader group is now impacted by the Code, further formal consultation should be arranged. [see 4.3 below]
- (b) The process of pre-approval for rights holders should involve robust testing of their information-gathering processes, and provide for termination of this status if they abuse the Act by harassing ISPs customers. [4.12]
- (c) It is reasonable for rights holders to pay the costs of ISPs in dealing with the disputes they raise with ISPs' customers. As such there should be a fee, set by the TCF if possible, which ISPs charge for each notice accepted from a rights holder, to cover processing costs. [4.14]
- (d) Customer authorisation to pass their identity information to rights holders should not be a requirement of raising a dispute. Further investigation is required as to whether this principle can be applied in the case of identifying Downstream ISPs. [4.17]
- (e) Adjudication of disputes about the accuracy of notices must be done by an independent third party: ISPs are not in a position to do this, while rights holders and ISP customers are parties to the dispute. The Copyright Tribunal or another appropriate adjudicator must be available to do this. [4.18]
- (f) InternetNZ utterly rejects the proposed alternative section F which would see disputes leading to customer details going to rights holders. The Society welcomes public comments that the rights holder groups would now accept third party adjudication instead. [4.19]

1.2 Fuller feedback on the clauses of the Code is in section 4 below.

2. Introduction

- 2.1 The mission of InternetNZ, Internet New Zealand Inc, is to protect and promote the Internet for New Zealand. We advocate the ongoing development of an open and uncaptureable Internet, available to all New Zealanders. The Society is non-partisan and is an advocate for Internet, and related telecommunications, public and technical policy issues on behalf of the Internet community in New Zealand - both users and the Industry as a whole.
- 2.2 InternetNZ has participated in the TCF working party that has formulated this Code and welcomes the opportunity to also provide its view through the public consultation process.
- 2.3 InternetNZ is opposed to the introduction of Section 92A of the Copyright Act and recommends that it be repealed. InternetNZ is seeking for the Government to initiate a First Principles Review of the Copyright Act to establish new ways of dealing with intellectual property in the digital age that are not at the expense of fair use and do not compromise the open and accessible nature of the Internet.
- 2.4 As Section 92A has not yet been repealed, and instead a postponement has given further time towards completion of a Code of Practice acceptable to both ISPs and rights holders, InternetNZ continues to participate in the TCF Working Party process in good faith, seeking to establish a policy that enables ISPs to meet the requirements of Section 92A, with the minimum possible impact on basic human freedoms.

3. Policy Considerations

- 3.1 InternetNZ strongly supports copyright, but notes that it is changing due to digital technologies making possible instant, free, perfect replication of media and immediate dissemination thereof via the Internet.
- 3.2 This change requires a new balance to be struck between the rights of content creators and the rights of the public, and this balance should be struck in the public interest.
- 3.3 Copyright is a private economic right and its enforcement is an issue between the rights holder and the alleged infringer.
- 3.4 Penalties for copyright infringements should be proportionate, and the penalty of disconnection is not proportionate.
- 3.5 ISPs should not be liable for copyright infringement and nor should they be coerced into being unfunded police as is required by the Act.
- 3.6 These points mean Section 92A is not good law and should be repealed.
- 3.7 If Section 92A comes into effect, the Code that the TCF has drafted is a reasonable framework that provides a reasonable policy for commercial ISPs and telcos to comply with the Act.

4. Feedback

A. Purpose

- 4.1 InternetNZ agrees with the purposes outlined for the Code.
- 4.2 InternetNZ notes that the Government has made continuation or modification of Section 92A dependent on agreement between ISPs and rights holders, meaning the discussions between the TCF Copyright Working Party and a limited group of rights holders.
- 4.3 Therefore, it behoves the Working Party to take into account the concerns of a broader range of ISPs and rights holders more formally, beyond relying on the public consultation process. For example, BusinessNZ, TUANZ and the Creative Freedom Foundation.

B. Defined Terms

- 4.4 The term Education Notice is only a partial description of the notice, which both educates and provides a warning. "Education and Warning Notice" would be more appropriate and remove Orwellian connotations.

C. Principles

- 4.5 In respect to Code clause 4.1, InternetNZ notes that evidence acceptable to a Court may not be sufficient in a Court to lead to a determination of guilt. The principle appears to be designed to match the planned process rather than provide the baseline point of reference one might expect in a section entitled Principles.
- 4.6 InternetNZ suggests the principle should be "innocent until proven guilty in a court of law", accompanied by an acknowledgement that the law prevents practical application of this and therefore the lesser test is being utilised (as is the format used in the latter part of 4.4)
- 4.7 In 4.4 there appears to be two principles bundled into one and they should be separated. The first is about the definition of parties who are in dispute, while the second is about disclosing customer information.
- 4.8 In the latter part of 4.4, an exception justifies providing customer information. InternetNZ discusses elsewhere in this document that this is unsatisfactory.

D. Compliance

- 4.9 No feedback from InternetNZ at this stage.

E. Repeat Infringement

- 4.10 In clause 10 identification of infringement is taken to be when an ISP decides a case would stand up in Court, so the implication of example 11.2 is that the standard of evidence provided in the original notices will be very high. Particularly in the case of non-preapproved rights holders it is not clear that a notice that simply complies with the code would enable ISPs to confidently assert it would stand up in Court and so 10 or 11.2 should be adjusted to reflect this.
- 4.11 The addition of a third party adjudication process would also remove the need for ISPs to make the level of judgements required by clauses 10 and 11.3, so these could be reworded to meet a lesser requirement of evidence that would be acceptable to a court.

- 4.12 Given the ISPs reliance on the standard of evidence, the process of pre-approval for rights holders should involve robust testing of their information-gathering processes, and provide for termination of their pre-approved status if they abuse the Act by harassing ISPs customers.
- 4.13 In 14.5 a full month is given for an Education Notice to be sent after the date of an alleged infringement. This may suit the cycles of ISPs and large entertainment corporates but ignores the reality in home and business of needing to identify who did what and when. Given that it is anticipated that automated detection systems and a pre-approval approach will be used by major rights holders, this should be shortened to two weeks, otherwise the educational benefit is undermined.
- 4.14 It has been suggested by rights holders in the media that pre-approved rights holders should not pay fees. It is absolutely unreasonable for ISPs to fund these copyright dispute processes. The dispute is between a rights holder and a user and the ISP is being forced to be involved as an enforcer and note that they will have no protection under the Act from damages in the case of mistaken or malicious claims.
- 4.15 To ensure consistency of charging, and that costs are reasonable, the TCF should set a fee to be paid by rights holders that covers the cost. This should vary only to the degree that the pre-approval process enables streamlining of the system otherwise pre-approved rights holders are effectively being subsidised by others.

F. Counter-Notice Procedure

- 4.16 Authorisation to provide customer information to rights holders should not be a requirement of raising a dispute. There are privacy issues and an environment where there is a power imbalance. In the Code this is correctly implemented for consumers but needs further consideration in respect to smaller ISPs and businesses.
- 4.17 As well as privacy issues, smaller ISPs and businesses may be commercially vulnerable through identification of major customers or disruption of important customer relations. It should be explored as to whether this can be resolved as part of a third party adjudication process.
- 4.18 Adjudication of disputes about the accuracy of notices must be done by an independent third party: ISPs are not in a position to do this, while rights holders and ISP customers are parties to the dispute. The Copyright Tribunal or another appropriate adjudicator must be available to do this. This should be the priority development for the Working Party and as this is likely to take more time than available further intervention should be requested of Government.
- 4.19 InternetNZ utterly rejects the proposed alternative section F which would see disputes leading to customer details going directly to rights holders. The Society welcomes public comments that the rights holder groups would now accept third party adjudication instead.

G. Final Warning and Termination

- 4.20 The Code enables a user to dispute a notice and for that notice not to count. However, it is noted that there is pressure from rights holders to alter this aspect.
- 4.21 The existing approach is reasonable particularly given that terminating accounts of repeat infringers is highly disproportionate to the charge being levelled. The Code does not take

account of the impact of termination on households and home based businesses in considering appropriateness. Without the due process of the courts, there is no balanced view incorporating the circumstances of the accused.

- 4.22 Therefore, if there is an intention to move away from users being able to dispute notices in the way outlined in the code then a Court or at least an adjudicating body of sufficient qualification should preside over such disputes and terminating accounts should be only one penalty applied, and in the most extreme circumstance only.

H. Vulnerable Customers and Essential Service Providers

- 4.23 The Internet is becoming more and more an essential service per se. As well as commerce, many health services will in future be able to be delivered across fast broadband links including in-home video consultation. Anyone relying on the Internet or a VoIP service to maintain contact with their health professionals should be able to be registered as a vulnerable customer.

I. Notices

- 4.24 No feedback from InternetNZ at this stage.

J. Data Retention

- 4.25 No feedback from InternetNZ at this stage.

K. Complaints

- 4.26 No feedback from InternetNZ at this stage.

L. General

- 4.27 No feedback from InternetNZ at this stage.

M. Reviews

- 4.28 No feedback from InternetNZ at this stage.

Thank you for the opportunity to make this submission. InternetNZ is always available to provide further responses or information,

Keith Davidson
Executive Director

For further information please contact:
Jordan Carter,
Deputy Executive Director
+64 4 495 2118,
jordan@internetnz.net.nz