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Submission on the draft ISP Copyright Code of Practice

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This document is a submission to TCF on the draft Code of Practice, dated 4 February 2009.

Thank you for receiving public submissions on this draft. The law prompting this COP has very serious implications for New Zealand, and it is important that the COP avoid making the situation any worse.

This submission supports the following features of the draft COP. These should be retained in the final form of the COP.

- Users and ISPs are innocent until proven guilty. This is a fundamental principle of our law, and the Copyright Act is defective to the extent that it does not follow this.
- Innocent ISPs and users should not bear the cost of enforcing copyright owned by others.
- Natural justice should apply where anyone is accused of copyright infringement. This is partially implemented in the draft, with a high standard of evidence and right of defence, but the draft lacks independent judges.
- Only copyright holders may accuse infringement, and then only in respect of works in which they hold copyright.
- The privacy of innocent users is respected.
- The overall aim of the COP is to encourage compliance with the law, and to provide education.
- Appropriate provisions are made for vulnerable and essential service users.

The draft COP is not adequate in the following areas, and these need to be addressed.

- Any party who makes a false, careless, malicious or vexatious accusation of copyright infringement should be liable for all resulting direct and consequential damages.
- The draft COP has a disputed accusation being decided by the ISP. This is not fair on the user, nor on the ISP. Instead, the ISP should refer cases of disputed copyright infringement to the police. Section 92a requires ISPs to terminate accounts of repeat infringers, but does not require or authorise ISPs to judge on whether copyright infringement has occurred. Judgements on breaking the law should be properly handled in the courts.

The alternative Counter-Notice Procedure attached as a supplement to the draft COP is not supported. This alternative is not acceptable for the following reasons.

- Privacy of innocent users is not respected.
- The accuser is also the judge and jury, thus denying any fair hearing for the accused.

One of the problems with the Copyright Act is that significant changes were made after the public and select committee review processes were closed off. Please don't repeat this mistake with the COP. If significant changes are made, another round of public submissions should be held.

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(contact details on covering email)