

6 March 2009

## **SUBMISSION ON THE TELECOMMUNICATIONS CARRIERS' FORUM INTERNET SERVICE PROVIDER COPYRIGHT CODE OF PRACTICE**

### **Introduction**

1. This submission is made by Radio New Zealand Limited, Level 2, Radio New Zealand House, 150 The Terrace, Wellington. Phone: 474 1999.
2. RNZ is a crown entity and New Zealand's public radio broadcaster.
3. RNZ is a significant copyright holder and user of third party copyright works.
4. RNZ believes in the necessity of copyright, both as a holder and user.

### **Submissions as a copyright holder**

5. **"Two tier" approach:** The TCF has adopted a two-tier system for copyright holders in the draft code. This seems unfair and inappropriate in that copyright holders all have the same rights under the Copyright Act.
6. Even though the definition of "Internet Account" as used in the code includes users who engage in website hosting, the wording used throughout the code is focused more on end-users of internet services who may infringe copyright, for example by downloading unauthorised copies of works.
7. RNZ submits that the code wording should be broadened generally to give equal focus on users who operate websites that host allegedly infringing copies of works.
8. **Timing for copyright holder notice:** Clause 14.5 of the code requires that a copyright holders notice must be received by the relevant ISP within one month after "the date of the alleged infringement". This is an impractical requirement for copyright holders who do not have the resources to continually trawl the internet looking for fresh instances of infringement. The deadline to forward the notice should be extended to be a reasonable period.

### **Submissions as a user of copyright**

9. **Copyright notices generally:** Section E, Clause 10 of the code requires that for a copyright holder to establish infringement it must submit evidence to an ISP that the ISP in its sole discretion considers would be sufficient to satisfy a court that infringement has taken place. Elsewhere in the code ISPs and others are required to act or determine issues reasonably. RNZ submits that, at the very minimum, clause 10 should require the ISP receiving a copyright notice to act reasonably and in good faith in deciding whether the evidence submitted by the copyright holder is sufficient.

10. **Liability for misrepresentation:** RNZ submits that the code should include clear warnings to copyright holders that if their copyright holder notice is misleading or deceptive or contains false representations they may be liable for civil and/or criminal penalties under the Fair Trading Act 1986.
11. **Independent determination of disputes:** As written, the ISP (via sections E and F), or the rights holder (via alternative section F) decides if copyright has been infringed. RNZ submits this is unreasonable and inappropriate in general. In the example of RNZ as a copyright user filing a counter notice claiming an exemption from infringement on the basis of fair dealing, the ISP is highly unlikely to have the legal expertise and human and forensic resources to make a proper determination of such complex legal and evidential issues. A copyright holder may be conflicted and biased if it is entitled to make the determination of whether there is infringement or not.
12. RNZ believes strongly that either:
  - (a) all disputed Education Notices should be examined and the issue of infringement determined by an independent body established by the central government for this purpose, such as the Copyright Tribunal with expanded resources and funding; or
  - (b) a court order should be required to be submitted to the ISP before it can terminate a User's Internet Account.
13. **Termination, clause 29:** Termination notices can be sent by post. An ISP sending a termination notice must terminate the relevant User's account within 48 hours of the "sending" of the termination notice, unless prevented by an order of the court.
14. No matter how the termination notice is sent to the user (but especially if sent by post), expecting the user to obtain and provide to the ISP a court order preventing termination of its account within 48 hours is wholly unreasonable. For even a large corporate meeting that time frame would be extremely challenging and costly, in both financial terms and management time. This timeframe should be increased, at the very least, to a minimum of 3 business days.
15. **Reinstatement:** The code does not incorporate any process for a User's Internet Account to be reinstated under any circumstances whatsoever. RNZ considers such a process should be included.
16. **Essential Service Provider:** The current definition of Essential Service Provider refers solely to providers of essential services under the Employment Relations Act. RNZ submits that this definition should be extended to refer to include all "lifeline utilities" as defined under the Civil Defence Emergency Management Act 2002, which includes Radio New Zealand and TVNZ.

**Lack of consultation**

RNZ believes that many of these issues could have been addressed during the drafting process had there been wider consultation with copyright holders.

**Radio New Zealand Limited**

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