



Recording Industry Association of New Zealand Inc

Level 1 | 2a Hakanoa Street | Grey Lynn | Auckland 2

Private Bag 78 850 | Grey Lynn | Auckland

Phone + 64 9 360 5085 | Fax + 64 9 360 5086

www.rianz.org.nz

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Ralph Chivers
CEO
Telecommunications Carriers Forum

BY E-MAIL

Dear Mr Chivers

RIANZ, the Recording Industry Association of New Zealand, welcomes the opportunity to comment on the draft ISP Copyright Code that the TCF released for public consultation on 4 February 2009 (the “**Draft Code**”).

Such a code will be an important element of an appropriate implementation of new section 92A of the Copyright Act. It can ensure that a graduated response mechanism is established that is feasible for all stakeholders concerned, with transparent and clear standards. ISPs would have clear guidelines for a policy to manage their obligations under section 92A. Rightholders would have clear rules as to the evidence they need to submit to an ISP. And Internet users would benefit from clear rules on what to expect and how to respond to receipt of a warning notice, including how to challenge any errors.

There is substantial agreement among rightholders and ISPs on the goals of any such code. It should:

- Establish a graduated process including warnings and education.
- Provide an opportunity for the Internet account subscriber to understand the consequences of his/her actions and choose to stop infringing before there are any sanctions.
- Provide a mechanism for subscribers to challenge any error in the identification of their accounts as infringing.
- Set up a streamlined and efficient process for sending notices.
- Establish a benchmark for reliable evidence, including evidence provided by “pre-approved” rightholders.

We support the basic approach of the Draft Code in that it outlines a “graduated response” mechanism with warning and education notices, providing for ample opportunity for Internet users to choose to change their behaviour. This approach is reasonable, more effective and cost-efficient, and less draconian than the alternative of pursuing court proceedings. As a result, the ultimate consequence of termination of an Internet account would only occur in the tiny minority of cases where individuals repeatedly refuse to stop violating the law.

At the same time, however, some of the Draft Code’s provisions place roadblocks in the way of effective use of the process. These provisions contain unnecessarily complex or burdensome rules that could render the process unworkable from a rightholders’ perspective.

In our view, the following points of concerns still need to be addressed:

1. There needs to be a fair and workable mechanism for subscriber challenges:

The overall general counter-notice procedure set out in the Draft Code would be unmanageable in practice. It would allow users to invalidate all infringement notices and avoid the effect of section 92A, simply by disputing them for any or no reason. This would risk making the process entirely ineffective. The alternative “strawman counter-notice procedure” in the annex of the Draft Code would be unworkable for the same reasons.

What is needed for a graduated response mechanism to work is to count all notices towards the termination process, unless a double-checking of a notice confirms that the alleged infringement did not occur via the Internet account set out in the education notice and/or there was no copyright infringement. Such a process would make it possible for effective and timely action to be taken and at the same time ensure that no user is found “guilty upon accusation”. RIANZ continues to support the introduction of an independent third party adjudicator process to assist with this and is willing to continue discussions with the TCF in this regard.

Research shows that the sending of warning notices explaining the possibility of disconnection in itself would be sufficient to stop the vast majority of infringing behaviour, without the need to reach the step of termination. Most users would simply change their behaviour upon receipt of a notice, with no further action needed. In the rare cases where there is grounds to dispute the notice because of a technical issue or where there is a question regarding a copyright issue, users should be required to provide evidence as to the reasons why they believe that the infringement did not take place or their account was not the source – just as they would be required to provide evidence as to why they believe that a bill was issued in error.

2. ISPs and rightholders should each bear their own costs:

The Draft Code requires rightholders to pay for the processing of each notice sent to an ISP and the subsequent notices to subscribers, as well as to give a broad indemnity for any costs or liabilities. These requirements are inappropriate, and risk rendering the whole process unfeasible for rightholders.

The indemnity provisions set out in the Draft Code are too broad and unlimited in scope. RIANZ is prepared to indemnify ISP's, in a defined situation, with regard to the evidence it presents.

As to costs, the great bulk of the costs involved in the termination process are borne by the rightholders who have to detect the infringement in the first place as well as gather, process and send the required evidence to the ISPs. ISPs have a role to play in controlling illegal activity using their services, and it is reasonable to expect them to take responsibility for communicating with their own subscribers. The graduated response process established by the Draft Code is a means to reasonably implement an obligation imposed on them by law, not simply by the request of rightholders. Each party should therefore bear its own share of compliance costs, with rightholders paying for finding and reporting infringements, and ISPs paying for the communications with their customers.

3. Evidentiary requirements should be robust but reasonable:

The Draft Code requires notices to include evidence of a standard that would be admissible in court, with the ISPs having complete discretion to reject it. We agree that the evidence should be robust and reliable. But the pre-approval process the Code establishes for eligible rightholders makes these additional requirements unnecessary.

The evidence that the recording industry provides to ISPs is highly reliable, well-tested and has been accepted in countries around the world as the basis of criminal and civil legal actions. Since our evidence collection methods meet the TCF pre-approval standards set out in the Draft Code, they should be accepted without additional onerous requirements. The pre-approval process already appropriately requires that the rightholder can establish that he is an owner of copyright in the work in question, that his agent is his duly authorised agent, and that he is using a reliable detection method for finding infringement.

4. The overall timeframe should be less drawn-out:

The Draft Code provides for a lengthy five-step process, with subscribers given more than 3 months to continue illegal activity after receiving a first warning. This time period is unreasonably long, and the multiple notices

set out in the Draft Code could simply signal infringers to share as much infringing music as possible before receiving a final notice.

While the time-frame of 18 months before an education notice expires is reasonable, the overall time-frame for consequences for persistent acts of infringement should be shortened. Two education or warning notices and a final termination notice would be ample, allowing for reasonably prompt action and also giving plenty of opportunity for a user to understand the situation and respond appropriately. A three-step approach is the standard in other countries where a similar graduated response is in effect or under discussion. As a first step, users should receive notice that their Internet account has been used for illegal purposes and that there will be consequences if infringement persists. The second notice should be a reminder and stronger warning about these consequences, should the user decide not to stop the infringement. There is then no reason to keep providing additional notices.

5. There should be coverage of all ISPs without unnecessary carve-outs:

The Draft Code creates two subcategories of ISPs who receive special treatment and are not subject to the standard notice and termination obligations: “downstream ISPs” and “essential service providers”. These categories are unnecessary and unprecedented, and would serve only to add complexity and delay, providing excuses for irresponsible entities not to take action. To date neither of these definitions is mentioned in the TCF 2007 Customer Complaints Code, which also provides for the disconnection of customers who are not paying their bills.

There is no need to provide for a separate definition of “downstream ISPs”. Rightholders will only contact the ISP furthest down in the internet access provision chain, according to the contact details set out in the Whois records that are publicly available. Whatever the nature of the entity set out in the Whois records, be it a small business with ten employees, or a big university with hundreds of students, there will be no risk of losing an Internet account, as long as this entity takes reasonable action when notified that its connection is being used for illegal purposes.

There is also no need to provide for a separate definition of “essential service providers”. Any responsible business providing Internet access to staff, that receives a warning notice should and would get in touch with its provider and/or take reasonable measures to stop infringements on its network. The Draft Code should not provide an incentive for any business to turn a blind eye to how their Internet services are used by their employees or other end-users.

It is in everybody’s interest to make the Draft Code workable and to provide a meaningful and reasonable mechanism for ISPs to comply with their statutory obligation under section 92A.

We are pleased with the progress that has been achieved in discussions since the publication of the Draft Code. However, more work needs to be done to make this Code workable for everyone, including rightholders.

We look forward to further discussions with the TCF in order to find a feasible solution to accommodate the remaining outstanding points.

Best regards,

A handwritten signature in black ink, appearing to read 'Campbell Smith', with a stylized, cursive script.

CAMPBELL SMITH
CEO