

## **Submission on the TCF Draft Code of Practice**

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The draft Code of Practice generally does the best of a bad situation. However, there is one major issue and a few minor issues I think arise out of a close reading of the code.

The biggest flaw I see in the code is the lack of a requirement to either accept consequences for misleading or incorrect assertions, or ideally, *prove* copyright ownership over a given file. As it stands, the code requires proof about the event of infringement occurring. While evidence collection in that area has been shown to be unreliable<sup>1</sup> I think the counter-notice procedure adequately compensates for the possibility of mistake in this area, subject to some considerations below.

The problem that is just as important, if not more, derives from the fact that copyright is a slippery concept. There are numerous conditions that must be made out in a normal copyright claim as well as exceptions and defences. While it is implicit in the code that the copyright holder notice must be (for example) the “author” or his agent as defined in the Copyright Act, it is not explicit and there is no proof necessary. Admittedly, proof is an unreasonable requirement to include in a copyright holder notice, so perhaps the next best thing should be included: a punishment or sanction for an incorrect claim of authorship. Other issues along the same line include not having to prove (or assert under threat of sanction) that the infringement was incidental,<sup>2</sup> fairly done as criticism or review,<sup>3</sup> that the infringement was not a backup of a legitimately owned computer program,<sup>4</sup> and so on.

Because of the lack of a requirement to give details of *why* copyright has been infringed as opposed to *how and when* it was infringed, copyright holder notices could be misused negligently or even maliciously (say, by a pre-approved copyright holder wishing to sabotage a rival’s work). On top of this, there is no

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<sup>1</sup> <http://dmca.cs.washington.edu/>

<sup>2</sup> Copyright Act 1994 s41

<sup>3</sup> Copyright Act 1994 s42

<sup>4</sup> Copyright Act 1994 s80

sanction against false copyright holder notices except for the notice not having effect if it is disputed. This can only encourage careless use and issue of notices. Therefore there needs to be either:

- A requirement to give some non-trivial degree of proof that legal copyright ownership rests with the person or company issuing an ISP with a copyright holder notice; or
- A non-trivial punishment or sanction against a copyright holder (pre-approved or not) that asserts copyright infringement against a user that has not infringed their copyright, or with respect to a work that they do not own copyright over in the first instance.

Both of the above suggestions require somebody to make a call about whether an actionable infringement has taken place, and it would be rightly pointed out that it is not the ISP's job to do this, nor are they strictly capable of doing so. On the other hand, it cannot be expected that every user will have both the motivation and means to get a court ruling in their favour, especially for minor issues. So since ISPs are already being forced into a position slightly lower on the continuum between having no discretion and having full discretion, it is my opinion that they ought to take a step further up. This will even out to some degree the imbalance of power created by the Act between copyright holders and users and ensure false or frivolous claims by over-eager copyright holders are kept to a minimum. It is true that it pushes ISPs further towards the position of a judge, but they are *already there*, with respect to the event of infringement occurring. In the interests of fairness they should take up the responsibility of deciding at least the prima facie merits of a case, and if there is doubt, should not be taking any action in the first place.

Other minor points about the Code of Practice I'd like to raise are:

- Pre-approval is probably a bad idea, as it encourages those that have pre-approval to issue as many notices as they can, and there is no real consequence for misuse. Why not put all copyright holders on the same footing and instead permit copyright holders wishing to issue a large number of infractions, to be allowed to issue bulk infractions (for example, a couple of times per month), but make them subject to authorisation each time? Alternatively implement a real penalty for those found to be misusing pre-approval – not just removal of pre-approved

status, it would have to be at least semi-permanent, and perhaps even incur a fine.

- Copyright holders that are not pre-approved do not get any access to downstream ISP details whereas pre-approved ones do. I cannot see how this can be justified, since whether a copyright holder is pre-approved or not should have no bearing on their access to justice.
- Clause 24 raises some ambiguity. It implies that a discretion exists for parties to accept or reject any dispute in relation to downstream ISP status. But this discretion is not implied anywhere else. Do ISPs have a general discretion to reject a counter-notice? If yes, then they are in the position of making a judgement on the accused' possible copyright claim on both heads (event occurring, and it being an illegal infringement of copyright), which so far the code appears to have shied away from.
- There is a second ambiguity in the drafting of clause 24, in that it is unclear whether it refers to situations where there is a second or third DISP, or situations where the DISP disputes that infringement has occurred. It should be redrafted to address this and make the meaning more clear, since we cannot expect schools or hotels to make sense of it, and the section directly affects them.