

**The Library and Information Association of New Zealand Aotearoa  
Te Rau Herenga o Aotearoa**

**SUBMISSION ON TCF'S DRAFT  
*INTERNET SERVICE PROVIDER COPYRIGHT CODE OF PRACTICE***

To: Telecommunications Carriers' Forum at [submissions@tcf.org.nz](mailto:submissions@tcf.org.nz)

1. The LIANZA Copyright Task Force, representing LIANZA, The Library and Information Association of New Zealand Aotearoa / Te Rau Herenga o Aotearoa, is pleased to make the following Submission on TCF's draft *Internet Service Provider Copyright Code of Practice*.
2. LIANZA represents 459 public, educational, commercial, industrial, legal and government libraries in New Zealand.
3. LIANZA is very appreciative of the enormous amount of time, effort and hard work that have gone into the preparation of the draft *Code*.
4. In general, LIANZA is supportive of the main thrust of and points made in the *Code*. In particular, LIANZA strongly supports the stated purpose of the *Code*, with its emphasis on the education of users rather than the termination of accounts. LIANZA agrees with the view expressed at the recent TCF Workshop in Auckland, that if disconnections result, all parties to the process have failed.
5. LIANZA also welcomes the distinction made between telecommunications ISPs, downstream ISPs, and users. LIANZA takes considerable comfort in clause 4.9 of the *Code*, which states that "Downstream ISPs should not have their Internet Accounts terminated", for the reasons given in that clause. Clause 4.9 removes one of the major concerns of libraries, that all its Internet connections, and perhaps also the internet connections of its parent organisation (which is in most cases the account holder with the telecommunications ISP), could be terminated because of alleged infringement of copyright by someone using a library-supplied public Internet-access computer in the library.
6. LIANZA accepts the concomitant obligation, expressed in clause 4.3, that  

"All ISPs are required to comply with the Act (whether or not they are Parties to this Code). When a Party passes a Copyright Holder Notice to a Downstream ISP, it therefore does so in reliance on such compliance and in particular in reliance on that Downstream ISP having and implementing a termination policy complying with section 92A of the Act".

However, as “termination policy” is not defined in the *Code*, LIANZA recommends that this sentence be re-worded to copy the wording of the Act:

“... it therefore does so in reliance on that Downstream ISP adopting and reasonably implementing a policy that provides for termination, in appropriate circumstances, of the account with that Internet service provider of a repeat infringer”.

Alternatively, “termination policy” should be defined in section B of the *Code*, using the wording of section 92A of the Act.

7. Section 92A is, of course, silent about what should be included in such a “policy that provides for termination”. In view not only of the legal requirement but also, more significantly, of the importance of such a policy, particularly for downstream ISPs which are unable to identify alleged copyright infringers, LIANZA recommends that a sample policy should be drafted by TCF and included as an appendix to the *Code*. Such a sample policy, which could include suggested wording, or alternatively just a list of the elements that might be included in a policy, could then be adapted by downstream ISPs for use in their organisations. The LIANZA Copyright Task Force is currently preparing for libraries a sample “policy that provides for termination” entitled *Sample Library Internet Service Provider Copyright Policy*, which will be up on the LIANZA copyright website at <http://www.lianza.org.nz/publications/copyright.html> by mid-March.
8. TCF will be well aware that, for some organisations such as libraries, it is not possible to identify the person or persons who may be accused of repeatedly infringing copyright. Public libraries, for example, do not require users of library-supplied Internet-access computers to authenticate. At least 50% of these users are not members of the library; a number do not have driving licences or other means of identification; and some of the users are overseas visitors. Moreover, the Aotearoa People’s Network, being rolled out in public libraries to facilitate access to information and particularly to government information, encourages libraries to provide Internet access as freely as possible, and without requiring authentication.
9. But the problem of what might be termed “anonymous users” (that is, users who are not required to authenticate when accessing the Internet) is paralleled by another issue: for most if not all downstream ISPs (for example companies, offices, businesses, government departments, etc) identification of alleged copyright infringers may not be possible, even if Internet users are required to authenticate, because their systems do not keep records by date and time, for up to a month or more, of every Internet session of every staff member and every user. If downstream ISPs are not able to identify alleged infringers, either because authentication of Internet users is not required, or because records by date and time are not kept, downstream ISPs are simply not able to terminate their Internet access or accounts.
10. Unfortunately, both the Act and the *Code* are silent regarding what should happen if alleged infringers are not able to be identified (so are not able to be judged whether or not they are repeat infringers) and their Internet access or accounts can not, therefore, be terminated.

11. For downstream ISPs which are unable to identify an alleged copyright infringer (who of course may not be one person, but may be a number of different people over several months), a comprehensive and well-drafted policy, showing exactly what steps the organisation is taking (for example user education, warning notices, blocking of offending websites, etc), becomes all the more important, and a sample policy or guidance from TCF on what a policy should include will be very useful.
12. In reading the *Code*, it is not always entirely clear which type of ISP is being referred to. It is therefore recommended that in section B (Defined Terms) a new definition of "Telecommunications ISP" be added, and that under the definition of "ISP" on page 6 a cross-reference be added: "see also Downstream ISP, Telecommunications ISP". Throughout the *Code*, the phrase "Telecommunications ISP" should be used when this is what is meant, whenever "ISP" is referred to.
13. LIANZA is concerned at the very broad definition in the *Code* of "Internet Account", which is very much wider than that used in normal discourse – particularly when being used in a business sense. Section 92A of the Act uses the term "account", but does not define it. LIANZA considers that the term should be limited (a) to those who have a financial or contractual arrangement with the ISP, and/or (b) to those who authenticate themselves on a computer system, for example by entering a username or user number and password or PIN. The term should not cover those who make occasional use of a computer system without authenticating or otherwise identifying themselves. While the TCF *Code* does not, of course, have the force of law, its wide definition may be held by others to be acceptable to those involved, and so may render it more difficult for downstream ISPs such as libraries to claim that unauthenticated users of public Internet-access computers do not have accounts with the internet provider (the library) and so are not within the purview of section 92A. LIANZA recommends that the definition of "Internet Account" in the *Code* should be re-written.
14. Whatever, In clause (b) of the current definition of "Internet Account", we suggest that the words "tertiary institution" should be deleted, leaving just "library" as one of the examples of organisations that provide Internet access on a casual basis, since all types of libraries (and particularly public libraries) are affected, not just university libraries.
15. Like others, LIANZA is not sure how the disputes procedure will work in practice. Obviously, if there is a dispute someone has to make a judgment. It seems likely that education will be required, both of copyright holders in submitting comprehensive copyright holder notices, and of users and downstream ISPs in submitting counter-notices. Unfortunately for telecommunications ISPs, section 92A would appear to give judgmental responsibility to them, and this is reflected in the *Code*. LIANZA suggests that this should be tried for perhaps a year, until experience has been gained as to how the process works in practice and what problems or conflicts arise; at the end of that period consideration could be given either to continuing with this process, or referring disputes to an independent party such as the Telecommunications Dispute Resolution Service. LIANZA would not recommend use of the Copyright Tribunal, given the slowness of its operation and the ponderousness of its processes.

16. With regard to the Counter-Notice procedure given in section F of the *Code*, and the alternative wording given in the Supplemental, LIANZA has no strong view either way, since for downstream ISPs such as libraries the process is the same in both versions.
17. LIANZA does have some difficulty with the wording of section F clause 24, the first sentence of which reads (in both versions):

“If a Person that a Party considers to be a Downstream ISP wishes to dispute an Education Notice, it may do so solely on the basis that it is not a Downstream ISP with respect to that Copyright Holder Notice (unless it wishes to claim that it is a User).”

The clause in parentheses seems to imply that there is some category other than User or Downstream ISP into which a person or organisation may fall. Surely, if a person or organisation is not a Downstream ISP with respect to an Education Notice, it must be a User? Or does this sentence mean that the person or organisation wishing to dispute an Education Notice may respond by saying either that it is not a Downstream ISP for the person responsible for the alleged infringement, or that it is a User and disputes the Education Notice? It is suggested that this sentence is not very clear, and should be re-written.

18. Clause 24 goes on to read (in both versions):

“To avoid doubt, the Party will not be obliged to accept any dispute on the basis that the Downstream ISP is not in a position to directly control the Internet Account of the User that is the subject of the Copyright Holder Notice.”

Presumably this means that a Counter-Notice or Disputed Education Notice which states that the library or other downstream ISP is unable to terminate the Internet account of an alleged repeat infringer is not sufficient for the Counter-Notice or Disputed Education Notice to be accepted and the Copyright Holder Notice to be flagged as such (as described in clause 25), thereby removing that Copyright Holder Notice from the Final Warning and Termination process. But as noted in paragraphs 8-9 above, it will very frequently be the case that libraries and other downstream ISPs are not able to identify a repeat infringer or infringers, and therefore are unable to educate them with regard to copyright law or (after due warnings) terminate their Internet access. In such circumstances, how are libraries and other downstream ISPs able to get their Counter-Notices or Disputed Education Notices accepted? It is suggested that this sentence also be clarified or re-written.

19. In a letter written by the Minister for Communications and Information Technology dated 5 February 2009 in response to my letter of 13 January written to him on behalf of LIANZA, Mr Joyce states:

“The government intends that Section 92A of the Copyright Act will come into effect as scheduled on 28 February 2009 [now 27 March 2009]. However, the government

will listen to any residual concerns expressed by the [TCF] working party about the wording of section 92A and will closely monitor the impact of the new legislation”.

LIANZA requests that the TCF take up the Minister’s offer, and raise our (and others’) concerns about section 92A with him – and in particular, how section 92A, together with the extraordinarily wide definition of Internet service provider used in the Act, will affect libraries and other downstream ISPs.

20. LIANZA very much appreciates the opportunity to comment on the TCF draft *Code of Practice*.

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