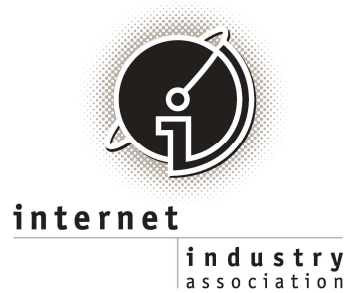


# Telecommunications Carriers' Forum's Internet Service Provider Copyright Code of Practice

Joint Submission

5 March 2009



**Telecommunications Carriers' Forum  
Internet Service Provider Copyright Code of Practice  
Joint Submission**

**EXECUTIVE SUMMARY**

This is a joint submission by the Internet Industry Association of Australia ('IIA') and Australian Internet Service Providers ('ISPs'). We welcome the opportunity to comment on the Telecommunications Carriers' Forum's draft ISP Copyright Code of Practice ('Code').

Over the last 18 months there has been a consistent international campaign by rights holders in the music and film industries, to compel ISPs to apply sanctions against users alleged to be involved in copyright infringement. That campaign is based on the misguided notion that ISPs are the 'gatekeepers' or 'police' of the Internet and, in turn, of user content and user communications.

Rights holders have been promoting a regime whereby ISPs would be compelled to take various steps in response to an *allegation* of copyright infringement, including terminating a user's internet access. ISPs believe that the rights holders' proposal is not effective, enforceable or proportionate, that it raises serious questions of fairness and equity and tips the delicate balance promoted by copyright laws in favour of rights holders.

We believe it is important to state at the outset that we do not approve, condone or authorise any person engaging in copyright infringement by any means. In fact, many ISPs offer their customers legal content downloads and are therefore themselves directly impacted by copyright infringement. While we are committed to working with rights holders to combat copyright infringement, we believe this must be done in a manner which is fair and balanced for all parties, including users.

In our view, the draft Code is neither necessary under New Zealand law, nor is it an appropriate response to the issue of online copyright infringement. As such, we do not believe that the Code should be implemented.

Our grave concerns with the Code are detailed below.

-----

- **Code not necessary to ensure compliance**

We understand that the Code owes its existence to s92A of the *Copyright Act 1994* ("Copyright Act"), which provides that:

*(1) An Internet service provider must adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the account with that Internet service provider of a repeat infringer.*

We submit that the Code is not necessitated by s92A, in that the section does not mandate the creation of a code, nor does it contain an obligation for ISPs to implement a 'notice and disconnect' scheme of the sort reflected in the Code. The draft Code therefore imposes obligations on ISPs, and a very serious penalty for alleged infringers, that extend far beyond what is required for compliance with s92A of the Copyright Act.

Whilst we understand that the aim of adopting an industry code is to create certainty for ISPs as to how they can comply with s92A, we strongly submit that the proposed Code is both unnecessary and not a suitable way to achieve this goal. We are also of the view that implementation of the Code places both ISPs and users in positions of uncertainty, particularly due to the wide ranging discretions open to ISPs and the potential penalties to both users and ISPs of inappropriate application of the Code.

- **Code not appropriate to ensure compliance**

As mentioned above, we are aware that a concerted worldwide effort has been made by rights holders in the music and film industries over the past two years to lobby for the introduction of a ‘notice and disconnect’ scheme along the lines of that proposed in the Code.

In spite of that, no ‘notice and disconnect’ scheme has been implemented anywhere in the world.

In all jurisdictions (except France<sup>1</sup>) where the introduction of ‘notice and disconnect’ schemes have been considered and consulted on by Governments, there is now a general move *away* from any scheme which requires ISPs to terminate internet accounts, on the basis of an allegation of infringement from rights holders. For example, the UK Government recently published its response to its consultation on peer to peer file sharing. The response made it clear that, whilst the UK Government had previously voiced its intention to legislate for a ‘notice and disconnect regime’, its preferred approach is now to introduce legislation along the lines of a ‘notice and notice’ scheme. The reason for this shift is stated to be the opposing positions adopted by the interested stakeholders, and the lack of any reasonable way of reaching consensus of the major issues with the proposal.

It is our view that even a ‘notice and notice’ scheme would go beyond the bounds of what ISPs should reasonably be expected to do. We would caution stakeholders from adopting this as an alternative pathway to ‘notice and disconnect’. While some may argue this is a reasonable compromise, we hold that the precept of ‘mere conduit’ and all it entails for the ongoing risk management of Internet intermediaries precludes this as an acceptable response to allegations of infringement.

ISPs should not be required to pass on notices based on mere allegation which threaten or imply inappropriate conduct, without an intervening judicial step which tests the allegation against the evidence. To do so would be to cast ISPs in an enforcement role according to the same principles we say would apply to ‘notice and disconnect’. While the sanction may be different - a warning instead of a threat - the same difficulties in principle and in practice would remain.

Moreover, s92A of the Copyright Act is based on a similar provision in the United States *Digital Millennium Copyright Act 1998* (“**DCMA**”). No such code has been implemented in the US despite the fact that the provision has been enacted for more than 20 years. The same provisions have also been replicated in Australia where again no such code exists.

We therefore submit that the creation of a code in New Zealand is not a necessary or desirable corollary to the coming into force of s92A, and that the adoption of a ‘notice and disconnect’ regime of the sort contemplated by the draft Code is at odds with recent international developments.

---

<sup>1</sup> The French approach to notice and disconnect varies from that contemplated by the Code in that it will include an administrative body to make judicial determinations relating to the provenance of notices and administer appeals. The French scheme is also intended to be mandated by legislation. However, it should be noted that the details of the scheme have yet to be worked out and it has yet to be successfully implemented.

- **Code not sufficient to ensure compliance**

We further submit that the compliance with the Code would not, in and of itself, be sufficient to ensure compliance with s92A.

Although an ISP might seek to rely on compliance with the Code as evidencing compliance with s92A, there is no statutory basis for an argument that compliance with the Code would of itself be sufficient to satisfactorily discharge an ISP's obligations under s92A.

We are concerned that it would remain open to a rights holder to take action against an ISP where it was considered that mere compliance with the Code was not sufficient to satisfy the rights holders concerns, or were it was considered that the circumstances in which an ISP might terminate the account of a user under the Code did not accord with that ISP's obligations under s92A.

We therefore submit that, as a means of ensuring compliance with s92A, the Code is imperfect at best, and at worst, may prescribe a second and supplementary set of obligations on ISPs. The assumption of that second set of obligations is needless and unmerited.

- **Code is inconsistent with principles of natural justice**

The draft Code is based on allegations of infringement made by persons holding themselves out to be a rights holder, or representative of a rights holder. The allegations are not considered or tested by anyone independent, let alone judicial. This is very different to the current system, where action against alleged copyright infringers is only taken once infringement has been established by a New Zealand Court following due consideration and legal process.

In effect, the Code reverses the burden of proof and requires users to prove that they have *not* infringed copyright. Such a reversal is out of step with New Zealand jurisprudence, which requires a careful balancing of the interests of and existing remedies available to rights holders and the interests of and detriment to users. This reversal is contrary to the principles of natural justice and places users at a significant and unfair disadvantage, while at the same time giving rights holders an advantage that is not enjoyed by other parties whose rights are infringed.

- **Code imposes a disproportionate penalty**

It is widely recognised that the Internet is an essential platform for a knowledge-based economy and society. Any measures for enforcement of copyright on the Internet should not unreasonably impact on the Internet as an effective communications platform, commercial channel and educational tool.

In our view, disconnection of Internet access is a disproportionate response to an allegation of copyright infringement.

We further submit that the Code provides for a form of collective punishment, by removing access to the internet for all users of an account and not just the party who is alleged to have infringed copyright. It makes the account holder responsible for the conduct of everyone at the premises, whether or not that person has any knowledge of the conduct or any legal, physical or moral responsibility for controlling it. The consequences for small businesses, shared-households, educational institutions cannot be underestimated, nor can the potential impact on the someone who may need emergency assistance.

We therefore submit that the Code is not an appropriate response to the problem which it purports to address.

- **Code requires ISPs to act as judge, jury and executioner**

The Code is based on the principle that ISPs (not a Court or legislatively appointed body) must decide whether a notice received from a rights holder is sufficiently reliable in its allegations of copyright infringement, and adequately identifies the alleged infringer, such that it should be forwarded to the alleged infringer.

In essence, the draft Code requires ISPs to act as judge, jury and executioner in defence of the private property interests of a rights holder.

Of more concern, the draft Code makes the ISP responsible for deciding to terminate a user's Internet account and the ISP must make that decision on the basis of an *allegation* made by a rights holder. This is clearly not the role of ISPs. It is not in the public interest for a private enterprise to be usurping a judicial function that should be reserved to the Courts, or bodies appointed by the New Zealand Parliament.

The Code requires significant exercises of subjective judgment by ISPs, for example to decide whether a customer is 'vulnerable', or is an 'essential service provider' and the circumstances in which such a person should have their Internet service terminated. ISPs are not in a position to make these types of decisions, nor is it desirable to compel them to do so.

Further, the obligations imposed on ISPs under the draft Code are directly contrary to the fundamental premise of such a code, wherein ISPs would take action on the basis of sworn allegations by rights holders, with some indemnification from rights holders where those allegations prove to be unsubstantiated. A code which requires significant exercises of discretion by ISPs, ultimately in the service of a third party's interests, does little to facilitate an ISP's compliance with s92A. At the same time, a code which provides such broad discretion to ISPs to refrain from terminating accounts is unlikely to satisfy the concerns of rights holders where ISPs exercise that discretion in favour of customers.

Therefore we strongly submit that it is not appropriate that a Code be introduced which requires ISPs to make any such fundamental judgments or to exercise a discretion so far removed from their role as a mere conduit of third party content.

- **Code places an unduly onerous burden on ISPs**

We submit that the processes proposed in the draft Code place an unduly onerous burden on ISPs to take steps to police, prosecute and protect a private property right.

The administrative processes contained in the Code for ISPs are complex and require manual compliance, whilst it is open to the rights holders to use automated processes to initiate the sending of large numbers of Copyright Notices. It is our members' experience that rights holders do in fact use automated processes to generate notices and as a result, rights holders often send hundreds of notices to an ISP in a single day. The draft Code contemplates that ISPs will have to review and process every notice individually, keep records of notices received and actions taken as well as any decisions the ISP may make in relation to termination of a customer's account. The ISP will also need to defend its actions against concerns by rights holders that it may not have acted strongly enough and users who will undoubtedly be concerned that it is acted too strongly.

We submit that the burden on ISPs is manifestly unfair and unreasonable and tips the careful balance of copyright law disproportionately in favour of rights holders.

- **Code raises serious privacy and data retention concerns**

The draft Code raises serious practical and privacy concerns as regards the information which it requires ISPs to retain, and the information which it may be required to make available to rights holders and other third parties.

The Code does not take into account the fact that many ISPs only retain IP address information for a very short period of time, and otherwise might be unable to identify the relevant User specified in a notice where a notice is received at the extremes of the timeframes permitted for the submission of notices under the Code.

Further, in some cases ISPs may not be able to take any action in response to a rights holder notice if, for example, they are unable to identify the alleged infringer.

- **ISPs should not bear the cost of protecting the private rights of rights holders.**

We note that provision has been made in the Code to ensure that payments are made by rights holders to ISPs of a 'Processing Fee' for reviewing and sending out notices on behalf of the rights holders. However, very careful and detailed consideration would need to be given to the quantum of this fee, to ensure that it adequately covers all of the costs incurred by ISPs in complying with the Code and enforcing the rights holders interests.

As discussed, the administrative burden on ISPs to implement and comply with the Code is significant. As such, it is essential that ISPs are given the opportunity to calculate the estimated capex and ongoing opex costs of compliance, and that this is reflected in the Processing Fee.