# Submission on the draft Internet Service Provider (ISP) Copyright Code of Practice (Feb 4th, 2009)

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*Although I am an employee of Telecom New Zealand, I have not been involved with the drafting of the Code of Practice document, and have had only informal discussions internally with other staff members about S92A and the TCF Code. Additionally I am a participant on another TCF working party unrelated to the Copyright Code of Practice. I am making this submission not in my professional capacity, but as an individual interested Internet user in New Zealand.*

## Foreword

*On Monday 23rd February, the government announced that section 92A would be delayed until March 27th to allow parties more time to agree on a voluntary code of practise – in obvious reference to the work conducted by the TCF on this code. It was also indicated that if agreement could not be reached, S92A may be suspended.*

*I do not believe there is any practical chance of agreement being reached before March 27th unless the rights holders withdraw all of their concerns and essentially accept the draft code as is.*

*Nevertheless, I still wish to make this submission since I believe the points are still valid, and the TCF will be working to try and agree a code.*

*I will add that, now the government has blinked, I believe the most likely outcome is that the clock will run down and S92A will be suspended / removed. The work of this group should continue though, because something will be crafted to replace S92A, and if the industry can demonstrate progress in negotiations between rights holders and ISPs, then the government may be more inclusive in drafting the new law.*

*I do have an over-riding concern that no code based on the current S92A wording will be acceptable to all parties. The current draft for example is relatively toothless which doesn't suit the rights holders, but making it more draconian exposes the ISPs to risk in several areas.*

By way of preface, I should say that I broadly agree with the approach taken by the TCF and the participating ISPs and Rights Holder organisations to dealing with a ridiculously imprecise and one sided law. That said, I believe that there are areas in the TCF Draft that are currently ambiguous, ill considered or unwise.

## Definitions

The definitions in the draft code are mostly clear, but the definition of "Infringer" ("means a User who Infringes") is tautological and this is too important a definition to leave unclear. I believe that an "Infringer" must be a user that has been proved to Infringe on copyright. If this level of certainty is not going to be required, then I believe that the users accused of copyright infringement should be referred to as "Alleged infringers" or "Users accused of infringement", and the rest of the code should recognise that action is being taken against users that are accused of infringement, NOT users that have been proved to have engaged in copyright infringement. If the TCF wishes to use the term "Infringer", then a clear statement should be made that guilt is being assumed based on an accusation which will NOT be proved to the standard required by law.

The term "Vulnerable Customer" is introduced and vaguely defined, but avoids making any sort of statement on what would constitute "reliant on their Internet Account". As a specific and salient example, there are households in New Zealand currently that have their only fixed phone line being provisioned over a general purpose Internet Account. These VoIP customers, if on a product like Naked DSL, or a connection that doesn't require a phone line, are reliant on their Internet access for all fixed line calling, including emergency services calling. The TCF should make a statement providing guidance to ISPs about whether or not phone service constitutes being reliant on an Internet Account for "reasons of their health, disability or safety", even if the customers server have no particular health issues.

In addition to the VoIP calling scenario, there are users that use Internet Accounts for activities such as remote security monitoring or for controlling remote systems such as air conditioning units. Some further consideration to "Vulnerable Customers" is given in Section H, but it is not clear who will decide on whether a customer qualifies as a vulnerable customer.

## Principles

Item 4.1 – "*Users are to be considered innocent until an ISP has reason to believe, based on evidence that would be acceptable to a Court, that a User is a Repeat Infringer. To avoid doubt, the fact that a User is considered to be a Repeat Infringer under this Code and is subject to any consequent sanction does not prevent that User applying to a Court for an order otherwise and the Party in question agrees that it will abide by any order of a Court in those circumstances.*"

"***Based on evidence that would be acceptable to a Court***" – this codifies the requirement for an ISP to determine the accuracy of the evidence provided, but as far as I can tell from this code, the guilt is presumed without any input from the accused party. Item 4.1 goes on to say that **a user considered a Repeat Infringer may apply to a Court for an order otherwise**. That is a way of saying that users will be presumed guilty by the ISP, until the users are able to PROVE themselves innocent in court. I understand that this basic tenet of the Code is driven by requirements of the ill worded law, but this is an assumption of guilt and is unacceptable in my view.

An additional concern with evidence that would be "***acceptable to a court***" relates to the fact that in NZ courts, there are different evidentiary standards for civil and criminal proceedings. While I believe it's likely that a civil standard is intended here, it is not stated. The definition of "***acceptable to a court***" (If the TCF considers that the ISPs should act as the court) should be a properly drafted document with legal oversight and signoff. Without this definition, the situation may arise where unqualified individuals are making determinations of what would be acceptable to a court with no guidance, and there may be extreme disparities across providers about what would be "acceptable to a court". Ultimately, only a **COURT** could properly determine what evidence would be acceptable to a court, but without clear and well drafted guidance, private companies and individuals may not even get close.

I note with interest that the term "Guilt" does not appear anywhere in this document, and the term "Innocent" only occurs once – but the assumption of guilt based on accusation is clear in the text. I believe that the Code should make it clearer that action is being taken on accusations from interested parties only, since this is what will be happening.

The definition of "sufficient evidence" in item 11 which includes "*a Copyright Holder Notice which complies with this Code*" is unreasonable, because it assigns establishment of infringement completely to the accusing party (the rights holder), presuming they can fill out a form correctly. This is very clearly the "Guilt by accusation" that has been bandied about in various public discussion forums.

As a note, I find the entire treatment and concept of "Downstream ISPs" well thought out and seemingly very workable – it seems a very elegant way to appropriately move the responsibility to another party where the risk of disconnection of innocent users is high. I would specifically however ask the TCF who receives the processing fee in the case where a Downstream ISP has a notice forwarded to them by the original ISP. In this case (admittedly probably only the first instance), both the primary and downstream ISP will incur costs related to the processing of the Copyright Holder Notification but it seems that only the primary ISP would receive a processing fee. Further, there may be cases where "Downstream ISPs" may be companies on dynamic IP addresses, which would mean that they would not be able to be identified without assistance from the primary ISP each time there is a copyright infringement notice lodged – what would happen to the processing fee in this case?

## Final Warning and Termination

The Final Warning and Termination section is interesting in that it precisely defines the timeframes for user disconnection, but is completely silent on whether the user will face any sanctions from their current (or future) ISP after their disconnection. Put succinctly – Are users allowed to immediately reconnect to the Internet, either with the provider that just disconnected them, or with another provider? If not, what does the TCF see as a suitable standdown time?

Related to account termination – does this extend to all services provided, or just the Internet Access? In the example of a customer with Telecom, is Telecom required to have Yahoo! delete the email account associated with the Internet account, unread email and all? Is a provider like WorldXchange that may have a VoIP account with the customer required to delete their VoIP account? Does Telecom delete the users Flickr Pro account and all the photos uploaded to it? (The Flickr Account is related to the Internet Account)

My reading of the code highlights what I believe is an unintended side effect. It would appear that since records are kept for 2 years, if a user rejoins the same ISP the day after they are disconnected and continues to have accusations of copyright infringement made against them, they will satisfy the criteria for disconnection on the SECOND notice after rejoining, since according to item 27 they will receive a final warning for their first alleged infringement, and will satisfy conditions for disconnection on their second. Is this intended, or an artefact?

I note that the Code is silent on the subject of information sharing between ISPs. Although I believe this is probably clear in existing law, I believe the Code should state, for the avoidance of doubt, that ISPs will never share their alleged infringement databases with other providers.

Presuming that disconnected users are free to immediately rejoin their original or another provider, and presuming that there will be no inter-provider sharing of data – is it fair to say that persistent

copyright infringers (or more correctly, users that regularly get accused of copyright infringement) can still cycle between ISPs with relative impunity?

## Copyright Holder Notice (Pre-Approved Copyright Holder)

In annexure 2, the method of detection section for pre-approved Copyright Holders just requires the copyright holder to assert that the method of detection used is the same as which they have previously demonstrated or explained to the TCF. It is this method of detection that I am concerned about. I would encourage the TCF to make the methods of detection utilised by pre-approved copyright holders available for public scrutiny, or at least make them available under NDA to interested parties for the purposes of external validation. For example, I would class myself as an interested and informed party that has sufficient experience and knowledge to evaluate the methods used for detection – and I would be disappointed if the method by which Copyright holders get to determine infringement (note lack of word alleged) was kept secret. Remember that the Copyright holder is essentially assigning guilt based on this method, and the ISPs are not required to investigate the accuracy of the copyright holder notices with respect to method of detection.

## Specific note relating to the Reworded Strawman Counter-Notice Procedure

This proposal "to address concerns from certain Copyright Holders" is simply unacceptable for a number of reasons:

- The rest of the code already gives Copyright Holders the absolute power to determine guilt by defining the threshold that must be accepted by ISPs as having a properly filled in form FROM THE RIGHTS HOLDER.
- Making the group that determines guilt also responsible for processing appeals is illogical and unreasonable.
- This would require accused infringers to identify themselves to the rights holder, after an accusation, and without a court order, possibly in relation to an erroneous accusation.
- There is no consideration of a privacy agreement between the accused user and the Copyright Holder and no assurance that the users' personal information would not be kept. I believe in fact that the Copyright Holders would keep this information and use it to target users that disputed infringement notices more heavily in the future.

## General comments and questions

The existence of a processing fee is a significant mitigation to my early concerns about the potential for abuse of this law by Rights Holders in NZ. Without a processing fee, the cost on rights holders to accuse indiscriminately was negligible and would have resulted in significant work and cost for ISPs. The inclusion of a processing fee (per notice) is an excellent economic control against abuse of this extremely biased law and I applaud its inclusion. I would be interested to know what level this fee would be set at in the sense of whether it would be nominal ($0.20 per notification), significant ($50-$100 per notification) or prohibitive ($500+ per notification).

Recent news has indicated that the rights holders are concerned about having to pay a processing fee and believe that the ISPs should fund this system. If the processing fee is nominal, or is dropped, then a whole new slew of concerns arises – including the strong likelihood that the rights holders will use automated systems to generate very high numbers of infringement notices since their cost per notice would be so low. It is not reasonable to assume that the rights holders would NOT do this – in

fact the rights holders, if provided with an almost free method to accuse Internet users of copyright infringement, WILL do so – given there is minimal cost and apparently no legal comeback for erroneous accusations. The existence of a fee that reflects cost recovery for the ISPs will force the rights holders to appropriately consider which infringement notices are the most likely to be accurate.

Although the nature of the problem means that fast, fixed lines are more likely to be involved at least initially, it is perfectly possible that an infringement notice could be sent that relates to mobile internet usage. Does the TCF intend that the code extend to disconnecting mobile services? Or would the intention be that a company may have to take steps to remove JUST the Internet Access from a user's phone? If this is the case, significant design work and cost would be involved.

I understand that the TCF has tried to create a code that deals with a bad law and has tried to balance the rights of the end users with those of the Copyright Holders, but I feel that a more honest code where it's clear that ISPs are acting based on unproven declarations from parties with a strong vested interest would serve the NZ Public better. It appears that the code as currently drafted attempts to reconcile S92A with other parts of the Law and with the users' rights, where this is plainly impossible.

The TCF should make it clear that the ISPs do not agree with this law, and are (in my personal opinion) grudgingly implementing a bad solution that specifically codifies Copyright Holders being able to assign guilt, and requires the ISPs to disconnect users that have never had a Court of Law make any determination.

Further, I am concerned that while this may have some deterrent effect, it is trivial for determined users to sidestep the detection completely by utilising overseas servers and encrypted tunnels to New Zealand to mask their NZ IP address from any possible detection methods. It is also possible depending on individual ISP implementations that some users may simply choose to resign up to their ISP every 3 months, or rotate between a couple of ISPs.

I have read the code very carefully I believe, and where I have not commented on an aspect in this paper, I believe that due consideration has been given to the areas discussed.

## Summary

- "Infringers" should be referred to as "Alleged infringers".
- Vulnerable customer definitions should be clearer.
- Customers using VoIP should automatically be considered Vulnerable Users due to the emergency services calling requirements.
- ISPs are assuming guilt based on Rights Holders filling out a form correctly. This is wrong and should be massaged so that it is clear that ISPs are taking action as the result of an unproven allegation.
- Is there anything stopping disconnected users immediately reconnecting with the same, or a different ISP?
- Must ISPs delete related material when disconnecting a customer? (For example Email accounts, unread email, Flickr Pro accounts, VoIP accounts etc?)
- Could the TCF please state that ISPs will never share infringement notice data with other ISPs except as specifically required on a case by case basis with "Downstream ISPs".
- Would the TCF please consider making the methods for copyright infringement detection open to at least limited industry review?

- The proposal that Rights Holders are given the task of assessing disputed allegations is highly objectionable given the Rights Holders are the ones that made the allegation!
- Processing fee is an excellent economic control. Recent objections by Copyright Holders to paying a processing fee concern me greatly and the lack of this fee would critically flaw this code.
- Will Mobile Internet be covered by this code?
- The TCF should make clear that this code has been created to deal with a law that is vague and is pushing ISPs to take action on the basis of accusations only. (Granted, these are probably good faith accusations, but they are NOT proven)

Regards
Neil Gardner
An interested NZ Internet user only.