
Yeow Thong Kuah -Submission on the draft copyright Code of Practice for S92A

I am an IT professional and I am writing to you to provide my submission for feedback on the Draft Internet Service Provider Copyright Code of Practice as drafted on the 4th of February 2009. Thank you for the opportunity to provide feedback on the draft code.

There are several concerns with the TCF draft code I wish to point out and I wish to state my strong preference for a fair justice system which involves using a third-party adjudicator/expert such as the Copyright Tribunal.

First, I wish to state that I think section 92A of the Copyright Act 1994 is flawed, incomplete and unfair. I am sure that you have noted the public outcry in recent weeks about the amendment, which resulted in the delay to the 27th of March 2009. Opposition and strong concern about Section 92A came from all sides of the political spectrum, the internet community, businesses, lawyers, and even artists. Below are some resources and news (from various sources) that illustrate the many reasons why the law is bad.

- <http://www.scoop.co.nz/stories/PA0902/S00288.htm>
- <http://www.scoop.co.nz/stories/PA0902/S00412.htm>
- <http://www.nzlawyermagazine.co.nz/CurrentIssue/Issue106/F2/tabid/1600/Default.aspx>
- <http://creativecommons.org.nz/story.html?id=183>
- <http://creativecommons.org.nz/story.html?id=198>

Second, no one condones infringement of copyright. Copyright holders have a legitimate grievance about copyright in the internet era. However, the scale of losses and the reasons are still debatable.

Thirdly, I believe the TCF code of Practice as it stands will not be able to help ISPs in ensuring that ISPs stay on the right side of Section 92A, nor provide fair and adequate service to either the rightholders and internet users (who are the customers of ISPs). Following are some of my concerns why the code is inadequate:

1. The TCF code does not seem to address the key phrases "reasonable policy", "repeat infringer" - as found in the law - as the phrases are not even clearly defined in the law. It begs the question of why the TCF does not leave the decision of what is a "repeat infringer" to a court or court order. This relates to my first point that Section 92A is flawed. (Please note I am not a lawyer).
2. Point 11.3 "such other evidence as that Party is prepared, in its sole discretion, to accept would be sufficient to satisfy a Court that an Infringement under the Act has taken place." The code as referenced by this Point does not address the necessary need for (1) data forensic skills and (2) expertise in copyright law. There is no explicit requirement for an expert, who is versed in copyright law and Internet technology to corroborate accusations.
3. "Reworded Strawman Counter-Notice Procedure". The draft revision by several rights holders makes my second concern pale in comparison. It is neither **reasonable** nor **fair** to allow the *accuser* to judge the *accusee* in terms of the acceptance of a "customer dispute to education notice". Given that it just takes three education notices to be disconnected, every dispute to the notice must be treated in the fairest possible way. I strongly oppose this revision.
4. In addition, there is a **privacy** issue in the "Reworded Strawman Counter-Notice Procedure" as the customer has sending details to the copyright holder in order to dispute a notice.
5. Plus, the "Reworded Strawman Counter-Notice Procedure" is a power only enjoyed by Pre-Approved Copyright holders. This is discriminatory to other copyright holders, such as small businesses, artists, and independent content creators.

Fourthly, I submit that any disputes between a copyright holder and alleged infringer be referred to a trusted third-party expert, a copyright Adjudicator. One of the proposals that make sense is to make use of the existing Copyright Tribunal of New Zealand. This provides for a consistent, fair, proportionate form of justice for both sides. Provisions for fair-dealing, etc will still be preserved. Experts will be used to determine whether a complaint represents a genuine infringement or not. It also improves the transparency of the process and reduces the cost of the system as it shifts the process of decision-making away from commercial entities to a recognised central authority.

In summary, ISPs should provide their customers a fair and transparent service and the best way to achieve this would be to defer copyright complaints to a trusted third-party expert, such as the Copyright Tribunal. The process must be fair and accessible (in terms of time and cost) by members of the public, commercial entities and copyright holders.

Thank you for your time,
Yeow Thong Kuah