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Telecommunications Carriers' Forum
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Att: Ralph Chivers, Chief Executive
By email: Ralph.chivers@tcf.org.nz

Dear Ralph

PUBLIC CONSULTATION ON DRAFT COPYRIGHT CODE

Thank you for your letter dated 4 February 2009 and the invitation for the New Zealand Vice-Chancellors' Committee ("NZVCC") Standing Committee on Copyright to make a submission on the Draft Code. This submission is made by the NZVCC Copyright Negotiating Team (the "Negotiating Team") in consultation with representatives from member Universities as the previous Standing Committee has been disestablished.

A. Introduction

1. The Negotiating Team wishes to thank the Telecommunications Carriers' Forum for the Draft Code, for consulting on its provisions and for trying to balance the rights of owners and users. The NZVCC represents all eight New Zealand universities and acts as a consultative and advisory body for its members.
2. This submission opposes the implementation of Section 92A whilst understanding why Parliament felt the need to pass this provision.
3. The Negotiating Team endorses the view that breach of copyright is a serious matter and, where proven, appropriate penalties or civil remedies should apply.
4. Notwithstanding the above, Section 92A is, for the reasons set out below, destined to create more problems than it solves.
5. We note also that the processes set out in the Draft Code, whilst designed to identify repeat infringers, are not necessarily fair and transparent.

B. Particular Concerns

The Negotiating Team is concerned that the definition of ISPs is so broad that it includes not only universities but can extend to individual units such as Libraries and Research Institutes within a university where these units provide e-mail services and internet access to their staff and students. Both staff and students of a university are reliant on information technology, access to the Internet and its intranets to undertake teaching and research. Students in particular are reliant on a university's intranet, which often includes digital learning management systems, to obtain course materials and complete the requirements for assessment in their courses. Termination of staff and students' accounts would have serious downstream consequences for those persons and for a university, which already has in place disciplinary procedures for both staff and students who breach the law and university policies.

The activities of a university also make use of third party copyright materials. These activities could be seriously affected by copyright notices from rights owners demanding the termination of the accounts of a staff member or a student who has legitimately downloaded material under the fair dealing and education provisions of the Act or under the many licences the University holds to copy and use third party copyright materials. Universities largely have processes and penalties in place to deal with any copyright infringement by staff and students, but these may or may not incorporate the termination provisions. The requirement to terminate accounts or comply with a Code which cuts across those policies threatens institutional autonomy. A university may face unreasonable compliance costs and procedures if it adopts the Draft Code.

Particular issues you have asked for comments on:

i. Standard of Evidence

The Negotiating Team is concerned that Section 92A does not provide enough checks and balances to ensure confidence and trust in the fairness of the law. The Draft Code addresses some of these problems, but not all of them. For example, the Draft Copyright Holder Notice set out in Annexure 3 of the Draft Code requires very little information about the nature of the copyright work other than its Title and Type; there is nothing requiring the Copyright Holder to verify its ownership and provide sufficient details about the copyright work leaving the ISP with a "needle in the haystack" type search to try to identify the work. The costs of this are unreasonable.

The information required in the Copyright Holder Notice should be sufficient for an ISP and user to determine whether the claim is valid. The form of notice should be expanded to particularize the details of the copyright work, such as the author, when the work was created and where, and why the copyright holder believes its copyright has been infringed. This information should be provided in a sworn declaration. Without these details the ISP does not have sufficient information to "know or have reason to believe" that there is an infringement of copyright (Section 92C(4)).

The Negotiating Team believes that the lack of particulars required for a notice to be valid poses a threat to the fundamental right to freedom of speech, and to academic freedom under which staff and students of tertiary institutions have, under our law, the right to question and test received wisdom, to put forward new ideas and to state controversial or unpopular opinions.

ii. Repeat Infringement

The Negotiating Team is also concerned about the workability of Section G of the Draft Code, the Final Warning and Termination procedures.

As we understand it, if three so-called Education Notices have been sent, each one of which is in a different calendar month and are undisputed, the ISP must serve on the User a Final Warning which can result in Termination.

However, when an Education Notice is sent out, the Draft allows the User 90 days within which to object and only then for that Education Notice to become disputed. Thus, a User can accumulate within 90 days three Education Notices which are within the 90 day period undisputed, yet the time limit for disputing the first one, let alone the second and third is not, as yet, expired.

In our view, the 90 day time limit within which to dispute an Education Notice is far too long and we see no reason why it should not be reduced to 30 days. We also consider that a Final Warning and Termination Notice should only be issued where there are, say three, undisputed Education Notices but that an Education Notice should not be deemed to be undisputed unless and until the objection period (which we suggest should be 30 days) has expired and no Notice of Dispute has been served on the ISP.

We believe that even with the allowances for Vulnerable Customers and Essential Service Providers the provisions to terminate the accounts of repeat offenders can be unjustifiably harsh and have serious consequences for those whose accounts are terminated. While the Draft Code is drafted to go some way towards remedying this, there is no proper process in the legislation or in the Draft Code for determining whether the Copyright Holder's claim to copyright in its allegation against the customer is correct, nor for the customer to put forward its objection to the termination of its contract.

iii. Disputes from Users

The Negotiating Team believes that the Counter-Notice should require further information which should include not only a challenge to the allegation of infringement, but also any challenge to the copyright holder's claims to originality and ownership. It should also include any defence it is reliant on such as fair dealing or the educational provisions of the Act. But it must be documented in the same way as the Copyright Holder Notice claims must be. It is not sufficient for example to claim fair dealing without sufficient details to back that claim.

The Negotiating Team is concerned that Universities, staff and/or students, as rights owners wishing to preserve their rights will be required to undertake expensive court action once a user issues a Counter-Notice. Not only is litigation expensive, it can be a time consuming process. We consider that there should be a dispute mechanism built into the Draft Code which can resolve disputes and determine whether termination in particular cases is justified. The dispute mechanism should consist of a person or persons who have sufficient expertise in copyright and information technology to evaluate allegations and responses in a reasonably fast, fair and impartial manner.

The Negotiating Team also does not support, given the lack of detail currently required, providing rights owners with information about Users. There are a number of privacy issues which arise. Such issues would not arise if the information was made available after a tribunal found there were grounds for action.

iv. Appropriate Circumstances

The Negotiating Team remains concerned that there are not enough safeguards around the overriding discretion which permits ISPs to terminate User accounts. Commerce and education are reliant on access to the Internet, staff and students are dependent on the Internet for

access to information to conduct research and undertake the courses and programmes they are enrolled. In our view termination should not normally be undertaken unless a court or some appropriate tribunal has reviewed the evidence and formed a view on the matter.

The Negotiating Team is also concerned that the wording in clause 37 does not make it clear that the accounts of Essential Service Providers cannot be terminated. In our view the case has not been made which would justify the termination of the accounts of Essential Service Providers in any circumstances because of the potential effect on the provision of those essential services should the account be terminated.

v. "Downstream" ISP

In seeking to reconcile the broad definition of an ISP in the Act with the particular requirements of Section 92A, the Draft Code seeks to draw a distinction which the legislation does not recognise, or at least does not provide for. That is to distinguish between the two types of ISP, a primary or upstream ISP and a secondary or downstream ISP. An organisation such as a University may act as an upstream and as a downstream ISP. Whilst understanding why the Draft Code distinguishes between types of ISPs it seems that the Draft Code may also be creating further disputes by drawing this distinction.

vi. Safe-Harbour Provisions

The Negotiating Team is concerned that the Safe-Harbour provision implicit in Sections 92B and 92C will be ineffective when read in conjunction with Section 92A which risks the copyright owners suing the user and the ISP because the ISP "knows or has reason to believe" that the material infringes copyright where the ISP has been provided with an infringement notice from a User. As the Draft Code is currently drafted the ISP does not "know or have reason to believe" until a notice has been undisputed and time for filing a counter notice is expired and the account is terminated or the matter has been determined by a court. However this needs to be clearly stated

Universities are in a special position by being both ISPs and generators of copyright works. The Universities are subject to almost total Government control of fees and income and would face considerable costs in responding to copyright holder notices which can be filed under the Draft Code.

We believe that what is needed is a simple and fair process. Given the complexities of Copyright law this requires an independent tribunal type body to adjudicate over disputes if a section 92A type provision is to remain. Section 92A and the Draft Code as drafted do not provide this. The main problem is in Section 92A of the Copyright Act which we believe should be removed from the Act or, if it is to remain in some form, then substantially redrafted with input from stakeholders as would have happened during a select committee process.

Yours sincerely

Grant Wills

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Office of the Vice Chancellor

On behalf of the Negotiating Team