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Dear TCF Board members,

RIANZ comments on Telecommunications Carriers' Forum's Internet Service Provider Draft Copyright Code of Practice

RIANZ regrets that despite all efforts of the collective of rightholders, the Draft Code published on 4 February 2009 for public consultation (the "**Draft Code**") has not changed in any material point since our discussions with the TCF started in November 2008. We cannot support it in its present form.

We do support the general framework of the Draft Code however, and believe there is agreement on the following goals:

- establishing a graduated process including warnings and education;
- providing an opportunity for the subscriber to understand the consequences of his actions and choose to stop or prevent infringing or secure their connection before there are any sanctions;
- providing a mechanism for subscribers to challenge any error in the identification of their accounts as infringing;
- setting up a streamlined and efficient process for sending notices; and
- establishing a benchmark for reliable evidence provided by "pre-approved" rightholders.

Unfortunately, the Draft Code does not achieve these goals in a reasonable and effective way. The combination of its detailed provisions render the whole process overly complex, lengthy and overly burdensome for rightholders.

As we have pointed out before, the following are the main points required in a workable code that provides for a reasonable and effective termination process within the requirements of new section 92A of the Copyright Act:

1. A workable mechanism for subscriber challenges: The Draft Code provides for an unwieldy and overbroad counter-notice procedure, allowing users to invalidate education notices and avoid the risk of termination of their accounts, simply by disputing them for any reason.

This is not workable, since this risks dragging out the termination process at the customer's will. The alternative "strawman counter-notice procedure" in the annex is unworkable for the

same reasons and does not accurately capture the suggestions made by rightholders to count all notices towards the termination process, unless the checking of the notice by the ISP confirms that the alleged infringement did not occur via the Internet account set out in the education notice. Users should be required to provide sufficient evidence as to the reasons why they believe the alleged infringement has not occurred via the Internet account in question and/or why there was no copyright infringement of the file in question. Whether this is a dispute relating to a technical or to a copyright issue, all notices should be sent to the ISP in question, who is in the best position to determine technical issues, which constitute the large majority of issues that are raised by users. Notices regarding a copyright issue should be forwarded to the rightholder in question to double-check whether copyright infringement has taken place.

Education notices should only be disregarded in the termination process, if the checking of the education notice by the ISP in question confirms that the alleged infringement did not occur via the Internet account set out in the education notice or, in the case of a copyright issue, the copyright holder confirms that there was no infringement of the file in question .

2. No burdensome shifting of costs and indemnities: The Draft Code requires rightholders to pay for the processing of each notice sent to an ISP and the subsequent notices to subscribers, as well as to give an indemnity for any costs or liabilities. S92A does not provide for these costs of complying with obligations to be passed to rightsholders nor for indemnities. The great bulk of the costs involved in the termination process are already borne by the rightholders who have to detect the infringement in the first place and who gather, process and send the required evidence to the ISPs.

Each party should bear its own costs, with rightholders paying for finding and reporting infringements and ISPs paying for communications with their customers, and with no broad indemnities. This would enable a fair split of costs between rightholders and ISPs.

3. No superfluous evidentiary requirements: The Draft Code requires notices to include evidence of a standard that would be admissible in court, with the ISPs having complete discretion to reject it. But the pre-approval process the Code establishes for eligible rightholders makes these additional requirements unnecessary.

As we have demonstrated to the TCF, the evidence that our industry provides to ISPs is highly reliable, well-tested and accepted worldwide. Our evidence is synched to a trusted atomic time source, based on ICANN (APNIC) information regarding the allocation of Internet protocol address spaces, and matched against a database of music repertoire so that there is always certainty of the copyright protected material and the rightholders in question. Mistakes regarding which ISP is concerned could occur only if the information provided by ISPs to ICANN (APNIC) is incorrect or has not been updated. To date none of the evidence provided by us has been successfully challenged in court anywhere in the world.

Where our evidence collection methods have met TCF pre-approval standards it should be accepted without further hurdles. All that is required for the pre-approval process is that the rightholder can establish that he is an owner of copyright in the work in question, that his agent is his duly authorised agent, and that he is using a reliable detection method for finding infringement.

4. A reasonable time-frame: The Draft Code provides for an unprecedented and drawn-out 5-step process, with subscribers given more than 3 months to continue their illegal activity after receiving a first warning. This time period is unreasonably long, and the multiple notices serve no purpose other than as a free pass to share as much music as possible before the final notice. While the overall time-frame of 18 months before an education notice (that does not lead to termination) expires is reasonable, the time-frame provided for consequences where infringement persists, is not.

The overall termination process has to be considerably shortened: after two education notices a final termination notice needs to follow as a third step. This three-step approach is the standard followed in other countries, as it provides users with ample notice and gives them time to change their behaviour. As a first step, users should receive notice that their Internet account has been used for illegal purposes and that there will be consequences if infringement persists. The second notice should be a reminder and stronger warning about these consequences, should the user decide not to stop the infringement. There is then no reason to keep providing additional notices. Regarding the possibility to dispute education notices, the time period should be limited to one calendar month regarding the first education notice, and[five] business days regarding any subsequent notices.

5. No carve-outs of ISP categories: The Draft Code creates two subcategories of ISPs who receive special treatment and are not subject to the standard notice and termination obligations: "downstream ISPs" and "essential service providers". These categories are unnecessary and unprecedented, and will serve only to add complexity and delay, providing excuses for any irresponsible ISPs not to take action.

Regarding "downstream ISPs", the TCF's concern that that some notices could end up not being dealt with is unfounded: if notices are directed to the "wrong" ISP in the first place, they can be subsequently addressed to the "correct" ISP. Rightholders will always address notices to the ISP furthest down in the provision chain, according to the contact details set out in the WhoIs records. Thus, provided that WhoIs records are correct and regularly updated by ISPs, this problem is unlikely to arise.

There is also no need to provide for a separate definition of "essential service providers": any responsible business providing Internet access to staff receiving a warning notice should and would get in touch with its provider and/or take measures to stop infringements on its network. Just as the bill payer of an internet account is responsible under the terms and conditions of its ISP customer contract to pay for subscription fees, he or she should also be required to take action when notified that his/her connection is being used for illegal purposes. We note that neither of these definitions is mentioned in the TCF 2007 Customer Complaints Code. Their inclusion in the Draft Code delays the overall process significantly and renders it unnecessarily more complex, giving both ISPs and users an excuse not to act.

For these reasons both ISP subcategories should be deleted from the Draft Code, as they would seriously undermine the coverage of the termination mechanism.

We would like to point out that none of the above issues have been addressed in this way in the discussions that are going on in many other countries around the world.

We urge the TCF to engage in a constructive consultation to find a solution that is acceptable to rightholders as well as ISPs, providing a workable mechanism to clearly establish ISP compliance with their obligations under section 92A.

Best regards

Campbell Smith
CEO

A. Robert Pisano
President and
Chief Operating Officer

February 6, 2009

MPA Position Points
Regarding the Proposed Graduated Response Program in New Zealand

The Motion Picture Association (the MPA) acknowledges the efforts by the Telecommunications Carrier Forum Board and the Working Party to develop a reasonable policy and process for all parties to comply with Section 92A of the Copyright Act 1994 and, in effect, seek to promote respect for copyright by way of educating internet users and downstream ISPs as well as to establish a fair system that discourages user abuse of ISPs' services in New Zealand.

The MPA also recognizes that the efforts to establish a meaningful and effective Code of Practice is a concerted, ongoing exercise to ensure that proposed measures are reasonable and fair. However, in respect of the proposed Processing Fee in the Draft Copyright Code of Practice 4 February 2009 (Version date 03 February 2009), the MPA and its member companies are not aware of any country where "per notice" fees are being charged. In fact, the MPA and its member companies agree that such a fee is unacceptable, and simply do not support the incorporation of a Processing Fee for notices issued to ISPs.

The MPA is intent on ensuring that ISPs and their subscribers may be confident that Notice requests and associated data are valid and that the process for accepting and forwarding them to subscribers can be automated without imposing a heavy burden on ISPs' operations. In order to realize this, at our cost we have developed, are testing and publishing a set of robust standards for processes such as infringer and infringement verification and for the communication of Notice and evidence data – and we intend to ensure that vendors who contribute scanning and related services to our programs are contracted to adhere to those standards. Also, we are bearing the costs for the scanning, verification, delivery of notices, management of data and reporting exercises. We trust, therefore, that ISPs can recognize the fairness of covering the cost of forwarding the notices to their subscribers.

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