



To: CopyrightActReview@mbie.govt.nz

By email

5 April 2019

Dear Sir/Madam,

Copyright Act review - Issues Paper – TCF submission

1. The NZ Telecommunications Forum Inc (TCF) welcomes the opportunity to make a submission on the Issues Paper on the Review of the Copyright Act 1994 (the Issues Paper).
2. The TCF is a pan-industry organisation which aims to encourage cooperation and develop standards for telecommunications equipment and services. Its members include 2degrees, Chorus, Spark New Zealand, Vodafone New Zealand as well as a significant number of smaller players in the New Zealand telecommunications industry. The TCF's members provide services to 95 per cent of telecommunications customers in New Zealand.
3. It is to be noted that while some of the TCF's members provide content and other services to consumers, this submission considers issues from the position that TCF members provide internet access services to end users, both to consumers and businesses. This is important in the context of the Issues Paper as it frames the roles that TCF members play, the challenges they face and their ability to control or prohibit content.
4. Government policy on telecommunications has as a key aim the delivery of fast, consistent and reliable broadband services to end users (both consumers and businesses) throughout New Zealand. The telecommunications industry, including the TCF's members, therefore have critical roles in ensuring this policy objective is achieved.
5. TCF members acknowledge it is important to ensure that copyright regulation has appropriate checks and balances to protect creators from unfair exploitation of their content but also that it

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maintains appropriate exceptions and safe-harbours to enable the continued delivery of fast, consistent and reliable broadband services to end users. The TCF notes there could be unintended consequences for end users and the performance of broadband services in New Zealand if compliance costs are raised or inadequate exceptions are enabled for critical functions of the internet such as, but not limited to, caching.

Part 4 Rights

6. The predominant role of the TCF members is the operation and maintenance of communications networks and to provide services to end users (both consumers and businesses) which provide for the transmission of content from and to those users.
7. In the context of retransmission, the TCF would like to clarify that Wi-Fi or wireless networks should not be considered differently to the fixed network where it is simply used as a means to provide access to the internet. The law should be technically neutral on the access technology as wireless and Wi-Fi networks can often be used interchangeably for physical wires both in the access and core network.
8. The TCF supports appropriate copyright protections but considers such a regime cannot, and should not, extend to general monitoring controls or general tracking of content by the telecommunications industry. Content that the TCF's members' customers receive or transmit, is not and cannot, generally be tracked for content that infringes or potentially infringes copyright. Even if monitoring at this level were practical, it would undermine confidence in New Zealand's internet services and service providers.
9. The TCF considers the definition of an ISP is currently too wide to be helpful in the copyright context. The issues and controls affecting providers who provide internet access to their customers are very different to those who run consumer-based websites and content services as they have a more direct involvement in their customer's activities. For example, and as noted earlier, internet access providers do not monitor the detailed activities of their customers, whereas social media companies actively use data gathered from their customers to provide targeted services to them. This puts the social media companies in a much better position to identify and take action against copyrighted material on their services, compared to internet access providers.
10. If a narrow definition of ISP is adopted, this may allow appropriate exceptions and safe harbours to be afforded to those who are not connected to, and have no control of, the delivery of infringing content to end users. It would thus separate the policy issues associated with these two categories of providers.

Part 5 & Part 6 – Exceptions

11. As noted above, the TCF considers that it is reasonable, proportionate and operationally essential for the existing safe harbour provisions to continue to apply to ISPs in their capacity as providers of connectivity services which enable their customers to transmit and receive content over the internet.
12. Internet access providers need certainty around the investments they make to improve their network performance, such as the use of caching technologies. Caching is an important part of internet access networks. Legislation should be clear that technology and devices like caching, which make transient copies of content for the purpose of improving customer experience, do not infringe copyright. Caching provides a better service for end users who can see the content appear on their screens quicker, as well as providing benefits to the website owner thanks to the improved customer experience. Neither the end user nor the website owner will usually be aware of this technology in the network. Legislation should be clear that technology and devices like caching, which make automatic, transient (temporary) copies of content for the sole purpose of making transmission more efficient and improving the customer experience, does not infringe copyright.
13. Caching is an important part of internet access networks and should not be excluded simply because it is not 'integral' or 'essential'. Were it to be excluded, end customers would see slower load times for many popular websites.
14. The TCF notes there are other elements of providing internet services, such as content distribution networks (CDN) which may require consideration as part of defining exceptions to copyright regulation. The TCF recommends that exceptions or safe harbours for CDNs are made available for ISPs whose role it is to provide internet services to enable content to be distributed, but whom are not involved in the delivery of content services to an end user.
15. The TCF notes there are situations where its members might act to block content from being distributed where there are social, moral or other standards that must be upheld for the public good under extraordinary circumstances. These circumstances and actions need to be differentiated however from the protection of commercial interests, including copyright. The TCF wishes to note there are considerable practical difficulties for an ISP to proactively detect, and prevent access to, infringing copies of a work given their limited role as providers of access to the internet (but not the content itself). ISPs neither have the capability or resources to consistently and proactively identify

copyright breaches and take action on infringing content, nor should they be accountable for making a decision on whether a particular piece of content is infringing as a matter of law.

16. The TCF would be happy to meet with officials to explain how technologies like caching work in practice and the benefits they provide to end users and copyright holders.

Part 7 - Enforcement of Copyright

17. The TCF considers it is important to note that at the time when the current Copyright Act was developed, peer-to-peer sharing of content was at its zenith; much of that sharing was illegal and resulted in the abuse of many copyrighted works. There has, however, since been a significant growth of legitimate streaming services and a reduction in illegal peer-to-peer traffic as a proportion of total internet traffic. The TCF notes, from an end user perspective, it is important to prevent legitimate sharing services from being adversely affected.
18. The TCF notes the telecommunications industry, including its members, made a substantial investment in people, processes and systems when this legislation was introduced to enable this infringement regime to operate. The TCF acknowledge there may have been a few cases of “teething troubles” with the implementation of the regime but wish to assure MBIE that those issues were quickly rectified. The experience of the TCF’s members is, however, that the regime has not been widely used by those seeking to protect their rights.
19. If the Government is minded to allow copyright owners to obtain a court order to require internet access providers to block certain content then the TCF considers that the following principles should apply in relation to the involvement of ISPs:
 - a. A court should judge whether the specific content should be blocked and make the appropriate orders against ISPs. ISPs should not be required to make judgements themselves on what content should be blocked;
 - b. The regime should apply to all ISPs;
 - c. The choice of technology for blocking should be for the ISP to decide;
 - d. ISP’s costs should be covered by the party seeking the blocking (who may be the copyright owner or another party);
 - e. There should be a process to manage changes to the list of the websites blocked e.g. timeframes and notice period, when a site should be unblocked, how to manage mirrors of a site which subsequently appear;

- f. ISPs should be indemnified by a copyright holder against third party liability for any action they take pursuant to a website blocking order for such copyright holder under the Copyright Act.

Please contact Geoff Thorn if you have any queries.

Yours faithfully

A handwritten signature in black ink, appearing to read 'G. Thorn', followed by a horizontal line.

Geoff Thorn

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