

---

**DIGITAL TECHNOLOGY AND THE COPYRIGHT ACT 1994**

**A RESPONSE TO POSITION PAPER DATED DECEMBER 2002**

**TELECOM CORPORATION OF NEW ZEALAND LIMITED**

---

**SUBMISSION****21 February 2003****To:**

Copyright (Digital Technology) Review Submissions  
Attention: Victoria Pearson  
Intellectual Property Policy Group  
Regulatory and Competitive Branch  
Ministry of Economic Development  
PO Box 1473  
Wellington

This submission is made on behalf of:

Telecom Corporation of New Zealand Limited ("Telecom"),  
PO Box 570,  
Wellington.

Any enquiries with respect to the attached submissions should be made in the first instance to Angela Dutton, Corporate Counsel, Telecom New Zealand Limited, Legal Services Group, Private Bag 92028, Auckland. Telephone 09 355 5980. Email [angela.dutton@team.xtra.co.nz](mailto:angela.dutton@team.xtra.co.nz).

Telecom Corporation of New Zealand Limited is the parent company of the Telecom group of companies. Telecom provides a full range of telecommunications products and services including a comprehensive range of internet, e-commerce, data and telecommunications solutions for business and residential customers.

Telecom has reviewed the Ministry's position paper on Digital Technology and the Copyright Act 1994 and has developed its responses with a view towards balancing the rights of copyright owners and copyright users in the community and trusts that its submissions reflect that balance.

Telecom would welcome the opportunity to discuss any of its attached submissions with the Ministry in person, should that be helpful.

## **Submissions on the Ministry's Preferred Policy Responses as set out in the Digital Technology and Copyright Act 1994 Position Paper**

### **1. REPRODUCTION RIGHT - STORAGE AND DIGITISATION**

- 1.1 Telecom supports the Ministry's preferred policy response. While the present definition of "copying" in the Copyright Act is likely capable of encompassing digitisation, as a digital copy is likely not excluded by the words "in any material form", further clarification would be appropriate and helpful.
- 1.2 Telecom notes the Ministry's preliminary view that this clarification could be achieved by amending the current definition of "copying" to state that material form includes digital formats, rather than inserting a separate definition for material form, which is currently not defined. In addition, the clarification should encompass any form of future technology, including those that may not strictly be viewed as digital (eg, optical, photonic, electrical etc). It may be that a separate definition of "material form" would provide a clearer drafting solution, such as that adopted in the Australian Copyright Act 1968:

Material form, in relation to a work or an adaptation of a work, includes any form (whether visible or not) of storage from which the work or adaptation, or a substantial part of the work or adaptation, can be reproduced.

### **2. REPRODUCTION RIGHT - TRANSIENT COPYING**

- 2.1 Telecom supports the Ministry's general approach of creating a specific exception within the definition of copying for transient copying. The exception proposed would cover copying automatically undertaken as part of a technical process involved in making an authorised work, where the transient copies have no independent economic significance. Telecom notes several issues with this proposed exception. The separate exception proposed by the Ministry for ISP caching is discussed below at paragraph 6.10.

#### *Purpose-based*

- 2.2 As a general comment, Telecom considers that applying a purpose-based rather than a technically descriptive approach to the exception will lead in practice to examination of difficult issues of intention and knowledge in relation to what is largely a technical issue. The current proposed exception requires that the copying be involved in making an authorised use of a work. Where secondary infringement is in issue, this would appear to be both problematic in practice and unnecessary in principle.
- 2.3 As a matter of practice, much transient copying is undertaken by intermediaries for users. If that copying is only excepted from potential liability if it is for an authorised use, the intermediary will carry the burden of determining whether the proposed use is authorised. This will lead to the many difficulties of monitoring, intention and knowledge which are the subject of ISP liability for secondary infringement discussed below. However, this is not merely an issue for ISPs, but also for any person involving in the provision of transient copies for third parties, whether for commercial or non-commercial purposes.
- 2.4 As a matter of principle, if the copy or communication for which the transient copy is made infringes copyright, then the person making or using it will have infringed copyright by making it. The transient copy has not derogated from the copyright holder's

economic enjoyment of the work and there should be no reason in principle for the transient copy to be the subject of copyright infringement.

- 2.5 Accordingly, Telecom prefers a technically descriptive exception only, which encompasses temporary reproductions as part of a technical process for making or receiving a communication (see, for example, the s43A(1) Copyright Act 1968 (Cth) Australia - “temporary reproduction of the work or adaptation as part of the technical process of making or receiving a communication”). It is noted as well that exceptions for frequently accessed websites, which address a very similar issue, do not require a similar purpose of authorised use for the copies that are temporarily reproduced (see for example, regulation 18 of the Electronic Commerce (EC Directive) Regulations 2002 (UK) (“**UK Regulations**”)).
- 2.6 Alternatively, if this approach is not adopted, then care must be taken in the drafting of the exception for ISP caching to ensure that the ISP exception takes priority over this exception.

#### *Automatic*

- 2.7 As regards the requirement that the transient copying, to be excepted, must be “automatic”, Telecom agrees with the comment that not all transient copying is automatic. Indeed, many current instances of transient copying, as well as many which are likely to develop, involve a mixture of automatic and manual or semi-manual processes.
- 2.8 For example, it is very likely that service providers will continue to implement caching towards the edges of their networks as part of the more extensive development of push and pull/on demand technologies. This may involve manual or semi-manual actions of directing particular streams of content to temporary storage, so that it may be more efficiently and cost-effectively accessed by users close to that network edge. The same feature of semi-manual processes is already present in the caching undertaken by Internet browsers, which are to some extent already capable of being tailored by users.
- 2.9 For this reason also, Telecom suggests that an exception requiring temporary reproduction as a part of a technical process, where there is no independent economic significance, is preferable.

#### *Technical process*

- 2.10 Telecom considers that the requirement that transient copying must be part of a technical process should be stated in a way that accurately identifies the use of a technical process in the making or storing of the transient copy but does not limit the way in which the technical process is involved. While the use of a technical process is always involved in transient copying, transient copying may very often go beyond what is strictly “technically required”, while remaining temporary and to enable the making or receiving of communications. This occurs because different decisions are taken both in commercial and non-commercial contexts to cache more or less material, to make more or less use of technical processes and so on.
- 2.11 Accordingly, Telecom does not support adopting the approach taken in Ireland to except only those copies that are “technically required for the viewing of or listening to a work...”. The approach taken in section 43A of the Copyright Act 1968 (Cth) (Australia) is neutral in this regard and preferred.

### **3. TECHNOLOGY-NEUTRAL RIGHT OF COMMUNICATION**

- 3.1 Telecom supports the Ministry's preferred policy response of establishing a technology-neutral right of communication to the public, which has sufficiently broad parameters to encompass all forms of transmission technologies.

### **4. WEBCASTS AS WORKS**

- 4.1 It follows that Telecom supports the Ministry's proposed response to include webcasts within the new category of "communication works".

### **5. CABLE RETRANSMISSION OF FREE-TO-AIR BROADCASTS**

- 5.1 Telecom supports the Ministry's proposal to repeal section 88 of the Act, effectively removing the existing right of cable service providers to retransmit free-to-air broadcasts, at least for the time being until an international position on this issue has been settled through WIPO. It is important that New Zealand not develop an anomalous position which is out of step with other developed countries, which would otherwise impact our ability both to compete internationally and also to be treated equally to other national jurisdictions by content and technology distributors.
- 5.2 Telecom agrees that the rationale for such an exemption no longer applies, given that there is no evidence to suggest that retaining such a provision is required to encourage investment in the cable industry. There is similarly no apparent case for extending the right to other wired and wireless technologies, which are exhibiting competition without the need for this additional incentive.

### **6. INTERNET SERVICE PROVIDER LIABILITY**

- 6.1 Telecom broadly supports the Ministry's preferred policy response to exclude ISPs from some liability, but departs significantly from that response in relation to the scope of the liability exclusion for those merely providing access or transmission services.

#### **Definition of "service provider" for purpose of exclusion**

- 6.2 Telecom agrees with the Ministry's observation that ISPs provide a wide range of services, and that not all of these warrant exclusion from liability. For the purposes of exempting service providers from liability, the touchstone for distinguishing those service providers merely providing access or transmission services (who in providing those functions should be free from liability) from those who provide publishing or content hosting services (who may be subject to liability in some circumstances) is the degree to which control or responsibility for content is exercised.
- 6.3 Telecom therefore supports the Ministry's proposal to define service provider by reference to the nature of the activity rather than the status of the organisation. Assuming that a single definition will ideally be used for the service provider exclusion as well as the exclusion for the mere provision of access or transmission services, the definition must be broadly stated, so that it will encompass the relevant activities of both telecommunications and information service providers. In this regard, it is noted that a number of overseas jurisdictions have adopted different definitions depending upon whether the statute or regulation is dealing with telecommunications carriers, information service or access providers and so on. An example of a broad definition is contained in Directive 98/34/EC of the European Parliament and of the Council of the European Union (20 July 1998) (see definition of "information society service").

### **Liability exception for mere provision of access or transmission services**

- 6.4 Consistent with its previous submission, Telecom considers that where a service provider is merely providing facilities for the transmission, routing, or connection for material through a system or network, the service provider should not be liable for copyright infringement in any circumstances, whether for primary or secondary copyright infringement. If the service provider is doing more, for example, hosting, distributing or storing material on its own behalf, then it may be liable as a primary infringer as presently set out in the Act. Similarly if it is undertaking content services such as hosting for a customer, then it may be liable as a secondary infringer, if the ISP knowledge exception does not apply (see below).
- 6.5 Telecom therefore submits that there should be a positive exclusion from liability where the service provider has merely provided infrastructure, comprising mixed physical and software networks and facilities, for enabling or making a communication. The scope of the exception should encompass both telecommunication carrier and service provider transmissions, including the core activities of connection, call switching, carriage of traffic (ie, voice, data, email and so on).
- 6.6 The position of the service provider in these circumstances is akin to a postal operator carrying post, who it has never been suggested should carry any liability in relation to the post which is carried.
- 6.7 This exemption would furthermore be consistent with what currently occurs in practice and would not in any way inhibit the proper exercise of the copyright holder's rights. The copyright holder or enforcement officials are presently able to obtain required evidence or information (including customer names) using existing legal powers, for example, through warrant and discovery processes. The copyright holder would remain free to pursue the primary infringer.
- 6.8 This exception would also make clear that no steps could be required to interrupt communication signalling or flow to block particular content or website locations, which is technically difficult or in some cases impossible and easily circumvented.
- 6.9 Again, this exception would not prevent the operation of a knowledge exception in relation to service providers who are doing more than merely providing transmission or access systems.

### **Liability exception for transient copying and caching**

- 6.10 Telecom supports the proposed exception for the caching of frequently accessed websites, subject to certain conditions. Telecom notes that other types of online content and traffic are commonly cached, so that the caching exception must be broad enough to include all content that is cached. Subject to comments above on issues concerning requirements for caching to be "automatic" (see para 2.7), an example which may provide guidance is regulation 18 of the UK Regulations:

Where an information society service is provided which consists of the transmission in a communication network of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that transmission where -

- (a) the information is the subject of automatic, intermediate and temporary storage where that storage is for the sole purpose of making more efficient onward transmission of the information to other recipients of the service upon their request, and

- (b) the service provider -
- (i) does not modify the information;
  - (ii) complies with conditions on access to the information;
  - (iii) complies with any rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
  - (iv) does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
  - (v) acts expeditiously to remove or to disable access to the information he has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

- 6.11 As an additional comment on the drafting of this regulation, Telecom notes that the requirement in reg 18(b)(iii) that rules are specified in a manner widely recognised and used by industry should apply also to reg 18(b)(ii) as access conditions must be implemented in a manner accepted by the industry. Telecom notes also that stipulating removal or disablement of access is problematic, as noted in the paper, "Blocking Content on the Internet", prepared for the Australian National Office for the Information Economy by CSIRO, which concluded (at p 39):

Our conclusion is that content blocking implemented purely by technological means will be ineffective.... Work-arounds will quickly be devised for any technologically-based blocking system and distributed over the Internet itself.

### **Secondary infringement**

- 6.12 Telecom broadly supports the Ministry's proposed response which would provide for an exception from liability for secondary copyright infringement unless the ISP had obtained a requisite degree of knowledge. Telecom has strong reservations concerning the application of a "constructive knowledge" test, which it believes would place New Zealand out of step with its international competitors. It also considers that any notice regime must be implemented with care, to avoid the imposition of impracticable and costly burdens on the service provider.

#### *Constructive knowledge requirement*

- 6.13 The Ministry notes in the position paper that other jurisdictions seeking to limit the liability of ISPs for third party activities have adopted a subjective knowledge test. Although noting this approach in other jurisdictions, the Ministry proposes to adopt a wider constructive knowledge requirement, based on the current secondary infringement provisions in the New Zealand Copyright Act.
- 6.14 However, overseas jurisdictions which have a similar constructive knowledge test for secondary infringement have adopted a subjective knowledge test for ISP exclusions from liability. The subjective test is adopted for example in the UK (Electronic Commerce (EC Directive) Regulations 2002, regulations 17 to 22), Australia (Copyright Act 1968 (Cth), section 22(6), 36 and 39B) and Ireland (Copyright and Related Rights Act 2000, section 40(4) and (5)), notwithstanding that in each of those jurisdictions the usual test for secondary copyright infringement is a constructive knowledge requirement (see Copyright, Designs and Patents Act 1988, ss22-26 (UK); Copyright Act 1968, ss37-39 (Australia); and Copyright and Related Rights Act 2000, s45, s46 and s48 (Ireland)).

- 6.15 Overseas jurisdictions have altered the standard of knowledge for ISPs to avoid the imposition of an unreasonable burden on ISPs to monitor and police copyright infringement by their customers. ISPs deal in vast amounts of data (currently, Xtra is dealing with some 500Mb/second) and it is simply unreasonable to impose a similar knowledge test for ISPs as for other potential secondary infringers. Other jurisdictions have recognised this in adopting a subjective knowledge test to strike an appropriate balance between the interests of copyright holders, consumers of services and service providers.
- 6.16 If a subjective knowledge standard is not adopted, and instead the current constructive knowledge test is used, the proposed exception will not operate as an exception at all but will, with the additional statement of express factors establishing knowledge, in fact increase the burden and risks which ISPs already face under the current provisions. This will in turn lead to lower quality of services and higher costs for consumers and businesses.
- 6.17 If this issue remains unaddressed, and a constructive knowledge test is applied, the outcome will be a decrease in the competitiveness of the New Zealand e-economy (and the companies in New Zealand) compared to its trading partners, and will also make New Zealand a less attractive location for businesses seeking an offshore base for the data and ecommerce operations.

#### **Determining knowledge**

- 6.18 Consistently with this, Telecom considers that any provision which details factors relevant to determining whether the ISP has actual notice should identify the receipt of a notice of infringement which:
- (a) is addressed to a notice officer designated as such by the ISP or preferably a designated “clearing house” (see below);
  - (b) is in a standardised format;
  - (c) is served in accordance with a specified means of communications;
  - (d) is signed physically or electronically by a person authorised to act on behalf of the owner of an exclusive right that is allegedly infringed;
  - (e) identifies the material that is allegedly infringed or the subject of infringing activity and that is to be removed or access to which is to be disabled, and information sufficient to permit the service provider to locate the material;
  - (f) provides contact information;
  - (g) certifies or states that it is believed in good faith that the identified use is not authorised and the notice is accurate;
  - (h) agrees to pay the reasonable costs of the ISP in complying with the notice (which is for the benefit of the copyright holder); and
  - (i) is judged by the “clearing house” to be valid (see below).

In general, the notice requirements detailed in the Digital Millennium Copyright Act (US) are helpful.

- 6.19 As part of this, Telecom also strongly supports the establishment of an intermediary to clear complaints. As presently proposed, a service provider would have to play “judge and jury” when it receives a notice. The service provider is expected to be sufficiently

expert in all relevant areas and to continually make correct determinations. It is unrealistic to expect (especially smaller) service providers to maintain such expertise which is moreover very expensive to outsource. With the interposition of a intermediary or clearing house, the service provider would merely act on instruction, thus absolving itself of making value judgments on content which it merely hosts. Telecom therefore submits that the Ministry in this area should be seeking to provide a framework and procedure for notice and takedown which is workable and fair to all stakeholders, thereby providing legal security for users and ISPs, while providing effective tools for removal of illegal content.

- 6.20 It is finally essential that a service provider be exempt from liability for actions undertaken in response to a notice, by removing or disabling access to allegedly infringing material. The establishment of a clearing house or other notice and takedown procedure would make this process much more balanced and acceptable from the perspective of all stakeholders.

## **7. TECHNOLOGY PROTECTION MEASURES (TPMs)**

- 7.1 Telecom supports the Ministry's proposed retention of protection against circumvention of TPMs that control copying.

### **Access protection**

- 7.2 Telecom also considers that protection should be extended to TPMs that control access. This step is a logical and necessary one, given the extension of copyright protection to works communicated to the public regardless of the technology used. Access protection performs a similar function in relation to communication rights in digital and electronic formats that copy protection provides in relation to reproduction rights.

### **Permitted circumvention**

- 7.3 Telecom comments on the following proposed permitted exceptions:
- (a) The exception for error correction should be sufficiently wide to encompass error detection as well as this activity is often a precursor to error correction.
  - (b) Telecom submits that the proposed exception allowing circumvention of TPMs for interoperability should not be established. Permitting circumvention for interoperability would enable undue commercial benefit without compensation for the content owner by allowing systems to be interconnected regardless of the circumvention prevention technology used. This goes far beyond permitting error correction in relation to the copyright work itself.

## **8. ELECTRONIC RIGHTS MANAGEMENT**

- 8.1 Telecom supports the Ministry's proposed policy response on Electronic Rights Management. Telecom is concerned however that the legal protection of ERM not place undue burdens on content distributors and resellers. For example, if ERM is implemented for a WAP mobile phone service, the display requirements of the ERM might seriously degrade the usability of the service. Exceptions should therefore be considered to allow alteration of the ERM provided it is in substance adhered to and brought to the notice of the end-user of the content.

## **9. NON-ORIGINAL DATABASES**

- 9.1 Telecom supports the Ministry's preferred policy response on the protection of non-original databases.

## **10. PERMITTED ACTS AND EXCEPTIONS**

- 10.1 Telecom supports the Ministry's preferred policy response in relation to permitted acts and exceptions, except where noted below.

### **Research or private study**

- 10.2 Telecom considers that where s43(4) authorises the making of one copy of a work for fair dealing purposes, that any transient copying be regarded as a distinct and separate exception. In addition, copies made under s43(4) should be required to be made from the original work and not from a copy. Each of these preserves the commercial benefit to the copyright holder to the extent possible while still not inhibiting research or private study.

### **Educational institutions, libraries and archives**

- 10.3 Telecom does not support the permission of educational institutions, libraries and archives to archive entire collections. Section 55 of the Act is aimed at protecting specific works that are either at risk of damage through degradation or need to be preserved. Section 55 applies only where it is not reasonably practicable to purchase a copy of the item in question to fulfil the purpose. Archiving entire collections is not in keeping with the purpose of section 55 and should be rejected.
- 10.4 Telecom is in agreement with the Ministry that libraries and archives should not be permitted to digitise material only available in hard-copy for the purpose of providing such material online. Telecom's concern in this regard is that the right of copyright owners to digitise their works and make them available in digital form for commercial exploitation is effectively reduced by increasing the number of viable copies in circulation through digital distribution.
- 10.5 Telecom also does not consider that libraries and archives should be entitled, by a statutory exception, to make electronic materials available through restricted remote access. This right could be available through commercial licence negotiations and if otherwise not restricted could see these institutions operating on a near-to-commercial profitable basis with the benefit of statutory protection through a permitted use exception.
- 10.6 In respect of the Ministry's approach regarding caching of websites, Telecom submits that an educational institute which is caching for instructional purposes should be required to continue to use the original source (i.e. the live website) until the original content is no longer displayed there. Only then should the cached copy of the website be used by the educational institution. This ensures that the visited website maintains its traffic and records of traffic which may be crucial to its business model. If a caching exception is introduced, Telecom submits that intermediaries from which that content is cached are provided with a statutory release from any licensing restrictions, since they will not be in a position to prevent caching by third parties who do not enjoy the statutory exception. Telecom's concerns here also apply to archiving, in that when material is archived from an intermediary, then that intermediary should also enjoy a statutory release from any breach of any licensing provisions.
- 10.7 Telecom is in agreement with the Ministry as regards distance learning.

### **Time shifting**

- 10.8 Telecom submits that the time shifting exception should not apply to all Internet content. Major issues exist here for commercial Internet content providers, as advertising revenue can be a significant revenue stream for Internet website operators. The Ministry approach would allow websites to be copied under the time shifting exception provided in s 84 of the Act, as a result of which many New Zealand Internet website businesses would be commercially undermined. Telecom submits that content that is available at any time on request should not be subject to the time shifting exception as it has been provided as an on-demand service.
- 10.9 Telecom submits that overall s 84 needs to be controlled tightly as it represents a significant inroad into copyright protection and as more copyright works are delivered across the Internet, time shifting exceptions will encroach to a large extent on copyright owners' ability to sell works. Time shifting digital copyright works also creates another opportunity for users to create viable copies of works in easily transferable formats, whereby infringement of copyright can be easily achieved.

### **Format shifting**

- 10.10 Telecom is concerned to see that the new exception for format shifting must be drafted in a manner which requires the original version to have been purchased as an original version for personal or domestic use, and not acquired as a copy of another copy or a copy of a time shifted communication. There is a significant risk that what appears to be a narrow exception may end up to be inappropriately wide as new forms of distribution emerge. For instance, where a customer pays a subscription for a certain number of sound recordings to be downloaded on a monthly basis, each sound recording could be legally format shifted, with a serious impact on legitimate sales/transactions.

### **New Permitted Use Exceptions**

- 10.11 Telecom notes the Ministry's intention to introduce new exceptions for error correction in software and decompilation of software. Any such exceptions should take into account the comments set out in relation to TPM exceptions above.

## **11. WIPO INTERNET TREATIES**

- 11.1 Telecom supports the Ministry's approach to the ratification of the WIPO Internet Treaties.