



**Creative Freedom
Foundation**

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Re: Section 92A Review Policy Proposal Document for Consultation

Emailed to: copyrightact@med.govt.nz on Friday 7 August

To Whom it May Concern,

The Creative Freedom Foundation thanks the government for listening to our concerns about s92A, and we appreciate having the chance to respond on this issue that is important to our board and members.

We are encouraged to see an independent tribunal and targeted royalty payments or fines as part of the policy proposal document. These days a large portion of interactions with copyrighted material involves what people do in their homes on their internet connections, and controlling what people do on their private internet connections is perhaps comparable to controlling what people do in their bedrooms. In other words, it's essential to win the hearts and minds of New Zealanders with a publicly respectable process that has proportionate sanctions, and we believe the suggested tribunal is a step in the right direction.

It is, however, unfortunate to see NZ not following international trends by suggesting internet termination as a form of punishment. As artists, we don't want people's internet taken away to protect our copyright, this is too severe a punishment. The internet is part of modern free speech, and with essential services moving online termination may hinder people's ability to pay bills, operate their business or do their job, access banking, news, health care records, education, and talk to friends and family.

In future years the internet will continue to become more pervasive and internet termination will be seen as increasingly unfair, and comparable to cutting off someone's electricity, phone or post service. To avoid revisiting a law that will be outdated in the near future it makes sense to look ahead and to exclude termination.

While lowering the barriers to justice is a noble goal it's ultimately the industries themselves that must evolve to the internet – to satisfy people's demand for content. Artists are already using the internet effectively but industries have been slow to adapt. DRM was the result of a scared industry's reaction to digital distribution, and government protection for DRM is now inhibiting the uptake of interoperable legal services by preventing the copying of media between iPods, cellphones, and other digital devices. A business model based around regional release dates (or cinema and DVD release dates) makes little less sense in the modern world and we believe that such unworkable models should not be propped up by government intervention.

The internet isn't going away and a refusal to sell movies, TV, and music online due to not meeting consumer demand. These industries must sell their products online and DRM-free.

Kind regards,

Bronwyn Holloway-Smith
Director, Creative Freedom Foundation

1. Introductory Questions

1. Do you agree that the proposal in general terms provides for the potential to develop a fair, efficient and workable process for dealing with copyright infringement in the digital environment?

In general terms, yes.

One of the key issues with s92A was its potential to punish innocent people either through the lack of due process or for the actions of others. This proposal is significantly better by comparison, affording due process and independent expert decision. We also support the use of royalty payments or fines for copyright infringement.

2. If you support the proposal in general, are there elements of the proposal that you believe could be significantly improved?

There are several elements in which we can see room for improvement. More detail on these is provided later in our submission, however in summary they are:

- 1 **Clarification of Terms:** A clarification of some terms is needed, particularly that of “ISP”.
- 2 **Overlap with section 92C:** We recommend that any s92C disputes are able to be taken to the Copyright Tribunal, and that the s92A and s92C provisions be properly harmonised.
- 3 **Termination an Inappropriate Penalty:** Royalty payments or fines are an appropriate sanction, however the non-targeted punishment of internet termination is disproportionate and will be seen as increasingly unfair as essential services continue to migrate to the internet.
- 4 **Courts for Large Scale Infringement:** the proposal suggests that the Copyright Tribunal will have exclusive jurisdiction over s92A matters however a more thorough process may be essential when dealing in large scale infringement cases and their considerable sanctions.
- 5 **Funding of Copyright Tribunal:** We would like to see more guidance around how the tribunal will be funded.
- 6 **Process for Unreachable Subscriber:** Cases may arise whereby a subscriber is unable to be contacted (eg. internet cafe, or the majority of organisations that can't identify individuals). The process would benefit from guidance around the obligations for when a subscriber is uncontactable
- 7 **Process for shared connections:** The obligations upon organisations with shared internet connections and the associated business compliance costs to identify subscribers should be investigated.

GENERAL OVERALL CONCERNS

Clarification of Terms

Definition of an Internet Service Provider

Note: For the purposes of this response we will either use the term “Conventional ISPs” (Eg. TelstraClear, Xtra) or “ISPs” as given by the existing definition, as follows:

Internet service provider means a person who does either or both of the following things: (a) offers the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing; (b) hosts material on websites or other electronic retrieval systems that can be accessed by a user

This broad definition would describe practically any shared internet connection or website. Opinions on the definition range from it being a simple drafting error to it being intentionally broad so as to encompass any new technologies. We believe that some clarification is necessary here to inform the public about the intended scope.

The existing definition has several interrelated issues,

- **Accurate targeting of individuals:** An appropriate analogy might be that most residential and small/medium businesses have phones that can't track individual users, and similarly most networks run consumer-grade Network Address Translation (NAT) network devices are incapable of logging the routing information necessary to corroborate and identify individuals. In their TCF submission ISPANZ estimate that 90% of NZ businesses use NAT.
- **Business compliance costs:** with the expectations of conventional ISPs imposed upon anyone with a shared internet connection or website there will be considerable costs or business risk. We suggest that these costs be estimated and made public. If adding thousands of dollars in infrastructure to organisations' internet connections is intentional then this should be clarified. Page 2 of the ISPANZ submission to the TCF¹ discusses the quantity of data necessary and the costs associated with this.

We suggest that the scope of an ISP be reduced to Conventional ISPs.

This may put the onus on the government to increase the capability of enforcing the law, e.g. phase in restrictions that all new hardware sold in NZ is capable of logging user traffic, and reassess the scope of "ISP" after that.

While we suggest that the definition of an ISP should be reduced to most conventional ISPs, we also suggest that all networks should benefit from safe harbour provisions. This suggests the need for two terms, such as CSP/ISP² and a generic network provider.

Distinction between alleged infringement and infringement

The document provided sometimes does not distinguish clearly between alleged infringement and a judgment of infringement which, in places, makes the document unclear and difficult to follow. For example,

Where a RH considers on reasonable grounds that there has been further copyright infringement by the subscriber after a first infringement and cease and desist notice have been sent (which now means there has been repeat copyright infringement),

At this point there has not been "repeat copyright infringement" which was judicially proven, only allegations of infringement.

We suggest that "copyright infringement", until proven, should always be referred to as "alleged copyright infringement" (or similar) in future documents from the MED.

Overlap with section 92C

Section 92C of the Copyright Act defines a process for removing webpages based on allegations of copyright infringement and a decision by untrained ISPs. This is described on the MED website as,

The ISP must assess the content of the notice and make a decision as to whether the material on the website is likely to infringe copyright. If the ISP makes a decision to delete or prevent access

1 <http://tinyurl.com/tcf-ispanz>

2 http://www.austlii.edu.au/au/legis/cth/consol_act/ta1997214/s87.html

to the material in question, the ISP must give notice to the user that the material has been deleted or access to it prevented.

Section 92A overlaps with section 92C in that copyrighted material can be delivered both via web (HTTP) and Peer-to-Peer protocols. As there is no significant technology distinction to be made here, in some cases accusations of infringement could fall under either section.. Programmer Dag Wieërs goes into some detail on his site³ about how the Peer-to-Peer protocol Bittorrent can be tunneled over the web HTTP protocol – **effectively removing any distinction between a s92C dispute and a s92A dispute.**

There are several issues with this,

- **Method of resolving disputes is inappropriate:** Within New Zealand there have been complex disputes that ISPs cannot resolve such as Trademe's dispute with Lixtor⁴ or the Electoral Enrollment Centre's dispute with Should-A.com⁵ (this was eventually resolved amicably, but the ISP was not able to judge whether copyright infringement occurred in this political speech).
- **Different approach in s92A and s92C may encourage subscriber behavior:** The process and available sanctions under s92A and s92C are quite different, and therefore knowledge of this may encourage 'tunneling or shaping' of traffic in ways to categorise infringement as either a s92A or s92C dispute. This is, presumably, undesirable.
- **Counter-notice Procedure:** Unlike Section 92A, Section 92C does not include a formal counter-notice procedure unlike similar laws in other countries (eg. United States) which causes an imbalance of rights against subscribers by way of unreasonable legal risk imposed on ISPs.

We recommend that any section 92C disputes are able to be taken to the Copyright Tribunal, and that the section 92A and 92C provisions be properly harmonised.

Phase 1 Questions

1. Is reasonable evidence of copyright infringement an appropriate threshold level for a RH to send a first infringement notice and subsequently a cease and desist notice?

Yes.

The reasonable evidence should include evidence in (1) data forensics and (2) copyright law.

It may also make sense to prove ownership of copyright in NZ. The former head of the Copyright Tribunal, Judge David Harvey, has said,

It is critical that the copyright owner prove at the outset;

(a) that it holds copyright, and

(b) that such copyright is governed by New Zealand law

Some 30% of copyright litigation fails because of failure to prove this essential element.

While it's true that section 128 of the Copyright Act shifts the burden of proving ownership the 30% figure is significant (in United States it's at 37%⁶) and this suggests that a more streamlined process would be one that

3 <http://dag.wieers.com/howto/ssh-http-tunneling/>

4 <http://creativefreedom.org.nz/story.html?id=78>

5 <http://creativefreedom.org.nz/story.html?id=342>

6 In the United States it's estimated that 37% of DMCA copyright allegations are false. Source: University of Southern California report (2007)

filters out these invalid claims early on.

Therefore with the specialised nature of the Tribunal we suggest that the claim (including evidence and proof of ownership) could be granular in its nature.

2. Should there be a limit to the number of first infringement or cease and desist notices that RHs may send, and if so, in what period of time?

While we believe that RHs should be able to send accusations of infringement for each infringement they believe to have occurred, we have some practical concerns over how large quantities of accusations may overload the resources that deal with them.

We note that a deluge of notices (i.e. 1000 notices in 1 day) may bring several consequences:

1. Creating a bottleneck that slows down accusation processing times and places an undue burden on ISPs resources (both financially and timely) to deal with accusations.
2. Slowing down timely action by RHs that may conflict with a goal of educating subscribers about copyright and encouraging them to choose legal alternatives (if available).

As a relatively small number of accusations is needed to progress cases to mediation, to ensure an efficient system the government may wish to consider limiting the number of first infringement or cease and desist notices that may be sent by an individual RH to an individual subscriber.

The TCF code decided on a one-month window for copyright infringement allegations and it may make sense to preserve this decision.

Further notes:

- RHs should have the option of taking situations of large-scale infringement to court (as is currently the case).
- The wording of the alleged infringement notices should be regulated so as to state the rights of the copyright holder and the public defenses for use (eg. Fair Dealing).

3. How long should first infringement and cease and desist notices be valid for?

We agree that 9 months is an appropriate length of time.

4. Should RHs be able to allege infringement of multiple works?

Yes.

5. Should a subscriber be required to supply their contact details to the RHs in a response notice?

No.

We appreciate that the courts already provide a facility to reveal subscriber information based on alleged

infringement but it's likely that any specialised feature of a Tribunal will be more widely and frequently used and therefore may need to be designed to prevent abuse.

Removing privacy would allow direct communication and actions outside of the court and tribunal process which we believe should be discouraged. There are numerous overseas examples of bullying, removing whistle-blower protection, legal threats and general harassment when online privacy is removed. There is potential for allegations of infringement to be used to reveal contact information about subscribers for purposes that are unrelated to copyright enforcement. For the purposes of enforcing copyright there is no apparent need to facilitate processes that circumvent the courts or tribunal.

Instead, privacy-protecting identifiers⁷ could be used for the sole purpose of further tribunal or court proceedings, with only the contact details being revealed upon a guilty verdict of copyright infringement.

Note:

- The proposal states, "An ISP will however, only be required to make this information available to a RH upon receipt of a Copyright Tribunal order or similar" (p.5). We would like to see more definition around what "similar" pertains to.

6. Should sanctions be imposed against RHs for repeated intentional improper use of the notice procedure?

Yes.

We have seen previous scenarios whereby copyright infringement allegations have been used for purposes of censorship (Eg. Scientology⁸) or by businesses against competitors. It's often the case overseas that people make false copyright claims to get content removed in circumstances related to defamation. Due to the considerable volume of examples it's sensible to anticipate misuse of the system and to include deterrents.

Criminal intent is a difficult thing to prove as it's extremely rare for a 'smoking gun' to be found that reveals the improper intentions of a party in any proceedings. Due to this, "intentional improper use" is a prohibitively high barrier to preventing improper use and we suggest that a broad range of justifications be made available to the tribunal, such as:

- number of invalid allegations;
- abusive behaviour and harassment.

In addition to fines, an appropriate sanction may be a stand-down period where the RH cannot use the tribunal or the courts. This may reflect the 9 month expiry on infringement allegations.

Section 112A may be relevant for a RH who declares ownership over content that is not theirs.

7. Do you have any further comments with regard to Phase 1 generally?

Mode of Communication

The proposal suggests that *"The mode of communicating this notice to the subscriber's address should be, unless otherwise agreed to, the same mode of communication used for any other purposes of contacting the account holder, such as for billing purposes"* (p4). While this would seem logical, we have seen situations

⁷ Eg. "subscriber1", "subscriber2", etc.

⁸ <http://tinyurl.com/p4hlsd>

whereby the ISPs have sent take-down notices to subscribers via a special web-based email account that the subscriber does not check regularly, and therefore they may not receive the notice within the given time-frame for response. We suggest that the subscriber be contacted via addresses that they have provided, and preferably by two means of communication where possible.

Burdensome for ISPs

Page 5 of the proposal states, *“A 9 month validity period for an infringement notice will allow a reasonable time for RHs to send notices on a cumulative basis (to establish repeat copyright infringement) without being overly burdensome for ISPs to maintain records of infringement.”*

We question whether the statement that this will not be “overly burdensome for ISPs” is well founded. Following our comments on the possibility of there being large quantities of accusations to process (p.5, question 2), we suggest that this may be presumptuous.

Phase 2 Questions

1. Should the Copyright Tribunal be given authority to order an ISP to provide a subscriber's contact details and any further information requested about the alleged infringer? If not, who should have this authority?

Provide the information to who? The RH? Assuming this is the case, yes, but only as a guilty verdict in the phase 3 process.

2. The level of evidence required for a RH to obtain a Copyright Tribunal order is based on the equivalent of obtaining a search warrant. Are there any reasons to depart from this threshold level?

Our view is that the burden of proof should be the civil standard (the balance of probabilities) which is somewhat higher than the standard required for a warrant.

The narrow scope of online copyright infringement may allow a more prescriptive and streamlined method of submitting evidence. Any test of online infringement will involve (1) data forensics and (2) copyright law. It may make sense to explicitly exclude certain discredited techniques for data forensics such as the ones defined in *Challenges and Directions for Monitoring P2P File Sharing Networks –or– Why My Printer Received a DMCA Takedown Notice by Piatek, Kohno, Krishnamurthy (2008)*⁹.

3. Should repeat copyright infringement extend to infringement in a work or works owned by different RHs?

Yes, however this is a complicated scenario and will need very careful consideration. This may imply that the ISP keeps a tally of alleged infringements and perhaps provides the number to rights holders. See also our comments on p.4, question 3.

⁹ <http://dmca.cs.washington.edu/>

4. Do you have further comments or are there any other issues that need to be addressed in this section?

Reasonable Timeframe

Page 6 of the proposal states *“Upon being served a Copyright Tribunal order and providing a subscriber’s contact details to a RH, the ISP must inform the subscriber within a reasonable timeframe.”* Many other timeframes are defined in this process, so it would make sense to give guidance about what a “reasonable timeframe” is in this part of the process also.

Privacy

For the purposes of enforcing copyright there is no apparent need to facilitate processes that circumvent the courts or tribunal, and therefore the justification for Phase 2 is unclear to us.

We suggest that the facilities of removing privacy from subscribers or rights-holders be part of an early court or tribunal proceeding. The process could be managed while preserving privacy, with only the contact details being revealed upon a verdict of copyright infringement.

There is significant potential for abuse of this system to reveal information about subscribers for purposes unrelated to copyright enforcement, which is why we suggest that this be integrated with any proceedings.

Phase 3 Questions

1. Is mediation an appropriate step and is it an effective use of resources?

Yes. Bringing copyright holders and subscribers face to face with a mediator will provide the opportunity for resolution before cases go to the tribunal, saving time and expense.

2. How can the complaint registration process with the Copyright Tribunal be streamlined effectively, i.e. all communication online?

Yes, communication online would streamline the process.

In any dispute there is often a great deal of superfluous information (personal grievances and other extraneous information) and filtering this online could help streamline the process. An online dispute resolution would likely be a way of streamlining the process.

We have worked with Rochelle Hume, who is an expert at online dispute resolution who may be able to advise on this.

3. Is reasonable evidence of repeat copyright infringement (to be proved on the balance of probabilities during proceedings) an appropriate threshold level for a RH to register an allegation of infringement with the Copyright Tribunal?

Yes (see earlier comments on “reasonable evidence” however)

5. What remedies should be available to the Copyright Tribunal? In particular, should the Copyright Tribunal be able to order a fine to be paid or an account to be terminated?

There's a public relations aspect to good copyright law. These days a large portion of interactions with copyrighted material involves what people do in their homes on their private internet connections, so to control this would be comparable to controlling what people do in their bedrooms. Remedies need to be publicly respectable, with proportionate punishments, or there is a risk that public respect for artistic rights will be harmed, ultimately harming New Zealand artists.

Royalty payments or fines are appropriate, however it's likely that a three million dollar fine for distributing 24 songs¹⁰ would rightly be seen as disproportionate by the public and artists alike. Poorly designed copyright laws can cause public disrespect for copyright and other artistic rights.

The total amount in royalty payments or fines should not be corrosive to the public trust in copyright education that artists benefit from, or it risks undoing the social contract that underlies copyright, instead encouraging illegal downloads and taking money away from the creative sector.

We suggest \$100 per CD or DVD (approximately triple the cost in store), with a cap of \$1000 on total amount of royalty payments fines per month. Assuming that the sanction is targeted upon individuals (and not users of a shared internet connection) this would encourage people to change.

Internet Termination

Shared Internet Connections, One Guilty Person Harming Innocents

One of the key issues with s92A was it's potential to punish innocent people for the actions of others.

Internet termination will inevitably punish many people for the actions of one person on any shared internet connection. This means that organisations such as businesses, farms, schools, libraries, and family homes will have their internet access harmed by the actions of a single person or even a virus infected computer (25% of computers are infected according to OECD reports¹¹).

Disproportionate punishment

Due to New Zealand's geographical isolation the internet is a vital tool for connecting to the rest of the world, and is also becoming more pervasive with vital services moving online such as parts of government, health care (records, scheduling) and social interaction tools (newspapers, phone, email, social networks). Disconnection may hinder people's ability to pay bills, operate their business or do their job, access banking, education, insurance, etc. Due to this the internet is already a necessary service like other utilities such as the phone and postal systems. With internet use showing no signs of slowing, in future years disconnection will be seen as a shortsighted and increasingly unfair penalty.

It may be the case that a computer is rendered useless without internet connectivity. To quote John Gage, a famous technologist, "the network is the computer". The rise of Cloud Computing means that software is delivered online through shared computing resources, and removing the internet may effectively mean removing the ability for a person to use a computing device.

¹⁰ <http://creativefreedom.org.nz/story.html?id=337>

¹¹ OECD Report "Malicious Software (malware): a Security Threat to the Internet Economy" (2008)

6. With regard to account termination, what is an appropriate period of time for disconnection to last?

Internet termination is never an appropriate penalty.

The UK have said it well¹²,

"We currently have no intention of legislating to terminate the accounts of persistent copyright offenders [...] We don't consider this to be a proportionate response, especially given the importance of internet access in today's society, where many services including banking, health and education are increasingly delivered online. Disconnection is even less fair in situations where a number of people in a household may share one broadband account."

7. Should parties to a dispute be entitled to appeal and if so, should this be to the High Court or to an appeals section of the Copyright Tribunal?

Yes, as new evidence can come to light and change the factors of any case.

It would seem that an appeals section of the Copyright Tribunal or the Court would be the appropriate venue.

8. How should costs be assigned in Phase 3?

We are unsure whether this refers to royalty payments and fines, or funding the process.

As it is with the Disputes Tribunal and the Tenancy Tribunal costs are usually paid by the party initiating the proceeding. Keeping in mind that the Copyright Tribunal is intended to be cheaper than the courts, it seems appropriate for the copyright holder to be expected to pay to initiate the proceedings however they may be later compensated if the subscriber is found to have infringed their copyright. People falsely accused should not have to pay for proceedings.

9. Do you have any further comments with regard to Phase 3 generally?

See our comments on p.6, question 6 (penalties for false accusations).

Jurisdiction of the Copyright Tribunal

Referral to the courts

The proposal document says:

It is intended that the Copyright Tribunal will have exclusive jurisdiction over matters covered by section 92A, unless proceedings commence or have commenced in the courts.

One unavoidable problem with resolving disputes is the fact that the quality of the process often equates to the time, effort and expense of that process. It's important to find a balance between a fair process and an efficient and cost effective process.

¹² <http://creativecommons.org.nz/story.html?id=328>

Where that balance can be struck will differ depending on the circumstances of the dispute. For minor matters a quick and cheap dispute resolution process may be appropriate even though this may also be less fair/effective. For more serious matters a more cumbersome and time consuming process may be appropriate even though this will cost significantly more.

Therefore the Copyright Tribunal should be able to refer serious matters to the courts at their discretion; and allow subscribers and rights-holders to apply through a defined process for a referral. This may mean that the Copyright Tribunal do not have exclusive jurisdiction over all of section 92A.

While one might rarely expect a rights-holder to refer their own dispute to the courts it may be appropriate if a case became more complex due to new details.

A “serious matter” may be defined in regulations by a certain scales of infringement such as commercial infringement or amount of fines. We have previously suggested a \$1,000 limit on the Copyright Tribunal for this reason.

It is expected that cases cannot be tried in both the tribunal and the courts.