



Creative Freedom Foundation Newsletter, 16 July 2009

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## Terminator 2: MED release Draft Section 92A Proposal

 Earlier this week the Ministry of Economic Development released their Section 92A [Review Policy Proposal Document](#) for public comment. It's significantly better, including due process and independent experts deciding whether an infringement has taken place however it still includes the internationally unpopular punishment of internet termination which punishes many people for the actions of one. There are better alternatives, and we're looking for your comments.

It's wonderful that Hon. Simon Power, the Working Group, and MED are ensuring due process around copyright infringement allegations. This proposal is certainly a considerable improvement on its predecessor, and it's great to see an independent tribunal and targeted fines as part of the process.

However, there are still some concerns for us. It's unfortunate to see NZ not following international trends by holding on to internet termination as a punishment. As artists, we don't want people's internet taken away to protect our copyright. This is too severe a punishment, and many consider it to be a breach of human rights.

Internet termination would affect entire businesses, government departments, farms & families and anyone else with a shared internet connection due to the actions of one guilty person or even a virus infected computer. Further, internet access is hugely important in today's society, and a lot of basic services including banking, health records, education and social activities are increasingly delivered online.

[The UK have said of internet termination](#) *"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."*

The definition of an Internet Service Provider has also not been addressed, meaning that any shared connection may be considered an ISP. It is also likely that there will be considerable business compliance costs with estimates starting at \$1500 per business to install tracking hardware.

There also doesn't seem to be any penalty for false accusations.

While there are a few creases to iron out, we are optimistic that the government is on the right track to creating a great solution for NZ that supports and protects both creative and public rights.

### Media Coverage of CFF on the Proposal Document:

- One News, 14 July 2009, [Copyright Tribunal may police the net](#) (video)
- Sunrise, 15 July 2009, [Termination of illegal downloaders' accounts too severe - artists](#) (video)
- Radio NZ National, 15 July 2009, [Threat of axing internet access remains](#) (audio)
- The Dominion Post, 15 July 2009, [Copyright proposal targets internet pirates](#) (article)

## S92A: The Proposed Approach (Summary)

MED summarise the process as follows (RH = Copyright Holder). Read the full proposal [here](#).

### Phase 1- First Infringement and Cease and Desist Notice Procedure

*Where a RH considers on reasonable grounds that there has been online copyright infringement of one or more of its works, RHs may invoke the section s92A procedure by sending a first infringement notice to an ISP. The notice will contain sufficient details to allow the ISP to identify the subscriber concerned. This notice must then be forwarded by the ISP to the subscriber. If there is further copyright infringement by that subscriber, a RH may send, via the ISP, a cease and desist notice. The subscriber will have an opportunity to reply to either notice by way of a response notice directly to the RH with their name and contact details attached. Upon receiving a response notice, a RH will be required to accept or reject it and inform the subscriber accordingly.*

This raises two significant questions:

1. **Who's an ISP?** Is it the conventional definition or the existing broad definition that covers practically anyone with a shared internet connection or website?
2. **Who's a subscriber?** Can an organisation's internet be terminated because of misuse by a rogue employee, a child, or a virus infected computer?

### Phase 2 - Obtain Copyright Tribunal Order

*Where a RH considers on reasonable grounds that there has been further (repeat) copyright infringement by a particular subscriber after a cease and desist notice has been sent, and the subscriber concerned has been provided with an opportunity to respond by way of a response notice, a RH may apply to the Copyright Tribunal to obtain an order requiring the ISP to provide the name and contact details of the alleged copyright infringer (the subscriber).*

Currently people can apply to a court order for an ISP to reveal account holder details. This "Phase 2" may be comparable to this or it may be a privacy issue that could be abused, however it's too early to say right now.

### Phase 3 - Copyright Tribunal

*A RH may then register an infringement complaint with the Copyright Tribunal which will ensure that the infringement complaint complies with requirements in statute/regulation. A RH may then notify the subscriber that an allegation of repeat copyright infringement has been lodged against them. The subscriber will have an opportunity to respond to the allegation and to elect to proceed to mediation. The Copyright Tribunal will be convened unless agreed otherwise. The Copyright Tribunal, in addition to available relief by way of damages, injunctions, account of profits or otherwise, may consider ordering a subscriber to pay a fine or an ISP to terminate the subscriber's internet account.*

Many [New Zealanders](#) are against internet termination and it goes against trends in the [European Union](#) and [the UK](#) who said "We currently have no intention of legislating to terminate the accounts of persistent copyright offenders." It's a pity that the draft doesn't appreciate this point. With internet use showing no signs of slowing, in future years disconnection will be seen as a shortsighted and increasingly unfair penalty.

For artists, fines have the potential to include compensation for copyright infringement, whereas broad and indirect punishments that harm innocent people will simply reflect badly on artists.

It's also likely that there will be significant business compliance costs with termination. ISPANZ have estimated that 90% of NZ Businesses use network devices that are currently incapable of tracking and we see no coverage of this in the draft.

**The deadline for public submissions is 5pm, Friday 7 August 2009.**

## Copyright vs. Free Speech and The Smacking Referendum

Dylan Reeve's [Should-A.com](http://should-a.com) launched a fortnight ago as a comment on the upcoming referendum and its particular choice of question. As the site reads,

"The referendum in itself is fine, it is part of the democratic process in New Zealand. However the wording they chose makes a mockery of the process. New Zealanders are asked to vote on the question: Should a smack as part of good parental correction be a criminal offence in New Zealand?"



The obvious bias that that the smack was "good" and not "bad" made it ripe for parody and the site allows people to [remix their own referendum questions into a poster](#) to share with friends. Although this is public commentary we don't have *Parody And Satire* protection within New Zealand and so this unlicensed remix of copyrighted images and trademarks may only be allowed to exist at the discretion of the copyright holder. The United States has parody and satire protection, but New Zealand doesn't.

Unfortunately the Electoral Enrolment Centre sent a copyright infringement / takedown notice to [Should-A.com](http://should-a.com) about misuse of the "orange elector character".

The Electoral Enrolment Centre are likely concerned about the public being confused about whether it's an official site and therefore interested in protecting their brand and public integrity in the democratic process.

The creator of should-a.com, Dylan Reeve, says

I started the site as a way to criticise, even ridicule, a political process that I think has been rendered meaningless by a leading and poorly-formed question. While I personally don't agree with the opinion of the referendum's initiators I don't have a problem with the process, but the way they've carried it out makes a mockery of it.

Commentary about the referendum question has been widespread with most reaching the conclusion that the referendum results can't be clearly interpreted. A voter could be for or against the question but that doesn't necessarily mean they've got the same opinion about the law as it stands. [As reported](#) Citizen Initiated Referendums have a history of bias or imprecise wording. The should-a.com website has been used by people to talk about [tax wastage](#), [french rugby players](#), the [cost of education](#), [international relations](#), [thoughtful orange men](#), and [basic principles of humour](#).



While Should-A.com *is* political speech it also remixes copyrighted material without permission. In some cases copyright or trademark infringement may involve quoting other material (text, images, video) and in the United States they recognise this as a protected Fair Use for commentary such as parody and satire. In New Zealand, however, we have no such protection.

The <http://should-a.com/> site is non-commercial and it always displayed the text "*This site is intended for the purposes of amusement. Any and all trademarks remain the property of their owners.*" however this clarification doesn't seem to comply with the [Election website licensing terms](#) which are described as

"You are free to use, store, copy and reproduce Crown Copyright content from this website for

non-commercial purposes as long as you acknowledge this website as the source and include the document URL and its "last updated" date in your citation.

[...]

No commercial use may be made of the contents of this website without the written permission of the authoring electoral agency.”

To make matters more complex that is just one interpretation of Crown Copyright and there are others. [Crown Copyright in New Zealand](#) is based on archaic legalese that lawyers regularly argue over. Because of this uncertainty around Crown Copyright there have been recent moves within government to consider migrating content to the public domain or a [Creative Commons Public Domain license](#).

Could should-a.com have done it without remixing the imagery of the referendum? Sure, but that's not as effective a method of communication as turning the media message against itself.

Dylan Reeve says it's a difficult decision,

At this stage it's an awkward situation for me - because I actually really want to support the referendum process... I want as many people as possible to take part, and to really move beyond the emotive question and look at the facts of the issue. Early on when I'd thought about this I'd actually considered approaching Elections NZ and offering to display a banner for enrolment, but wrote it off.

So, where does this leave Should-A.com and the people using it to express themselves through remix of copyrighted Electoral Enrolment Centre material? In a legal quagmire of outdated Crown Copyright, Bill of Rights issues competing with copying rights, and the natural desire for the Electoral Enrolment Centre to ensure that the public aren't confused around what's official and what's not.

Thankfully it was all resolved amicably a few days later.

We're very pleased to see that Dylan Reeve from [Should-A.com](#) and the [Electoral Enrolment Centre](#) have reached agreement on the use of Crown Copyright images. Good on the EEC for not taking a heavy handed approach towards this kind of free speech. As [Kiwiblog comments](#), it highlights the need for an update to New Zealand copyright that *"protects fair use and free speech by allowing satire and parody."*

See also: [PublicAddress.net have a thoughtful story](#) on this issue.

## A Record Label Where Musicians Retain Their Copyright

[Techdirt has a story](#) on Radiohead's manager, Brian Message, who is about to launch an record label called Polyphonic where musicians retain their copyright and earn 50% of profits. Techdirt says, *"We've pointed out how incredibly ridiculous the old structure of the recording industry was, where artists would hand over pretty much all of their rights to the label. It's amazing that this sort of indentured servitude model has survived as long as it has. After all, if you look at other parallels -- such as venture capitalists and startups, the VCs don't end up totally owning startups to the same extent as labels. Of course, this was really a function of the limitations inherent in the industry: the very limited ability to promote and distribute music in the past without a major record label behind you. With those barriers falling away, we're seeing much more reasonable models pop up. I still believe there's a big place for record labels, but it no longer needs to be a massive record label where you hand over all your rights."*

## The Big Idea on Copyright

Showing the importance of speaking up about copyright The Big Idea, "home of NZ's creative community", have today launched [a Copyright Forum](#) to discuss the correct balance between public and private rights. Started by Cathy Aronson they're initially they're discussing the Section 92A review.

## Labour Further Develop Copyright Policy

Clare Curran, Communications and IT Spokesperson for Labour, recently held a meeting in Auckland to

discuss broader issues with Copyright in NZ. One purpose of the meeting was to encourage discussion that would feed into a policy on copyright that Labour are developing.

Many key stakeholders involved in the current Copyright debate in NZ attended, and CFF were among them. We found it to be a very positive experience with some surprising common ground. Participants were respectful and a general consensus was reached that technology is radically shifting the way people engage with media. Business models need to be updated to keep up with the change, but education and awareness around respecting the rights of copyright owners is also important.

Some time was spent discussing the questionable and unproven "statistics" that have been given by rights holders as an attempt to paint illegal downloading as a major revenue threat. It was even admitted by one party that recent claims of internet traffic being significantly reduced around the time of the Internet Blackout, and subsequent increases following the suspension of s92A, were entirely fabricated.

All in all, we found Curran's comprehensive grasping of the key issues to be encouraging and greatly look forward to seeing her further progress. Due processes worthy of respect from the public, and Fair Use are essential to New Zealand's future creative sector and it was great to hear these issues given the time they deserve.

Curran's response to the meeting is [here](#) and her longer post about Copyright issues is [here](#).

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**Thanks, from the Creative Freedom Foundation team**

<http://creativecommons.org.nz>

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