



Internet New Zealand (Inc)

Submission to the Ministry of Economic Development

on the

Section 92A Review Policy Proposal
Document for Consultation

7 August 2009

I. Summary and General Position

- I.1 InternetNZ supports protection of copyright and is cognisant of rights holders' issues given the extent and pace of change being driven by the Internet and other digital technologies.
- I.2 InternetNZ is utterly opposed to the inclusion of termination of Internet accounts as a penalty for copyright infringement. This position is held both for principled and practical reasons that are outlined in this submission.
- I.3 The ideal result for InternetNZ is the complete repeal of Section 92A, as outlined in our submissions to Parliament in 2006 and as agreed by the Commerce Select Committee in 2007.
- I.4 However, InternetNZ does not object to a Notice and Notice regime as put forward in the first part of Phase 1 of the MED's proposal. We are aware that this approach is supported by Internet Service Providers and has proven very successful in dealing with copyright infringement in overseas jurisdictions, including in Canada (where it is voluntary) and in Japan (where it is mandatory).
- I.5 This submission sets out:
 - (a) Principles that should guide the Government in deciding what scheme to put in place of the existing section 92a.
 - (b) A narrative analysis of the costs and benefits of intervening in this matter
 - (c) A proposed Notice and Notice regime that would negate the need for the expense of an expanded role for the Copyright Tribunal
 - (d) Other general matters that the review should consider.
- I.6 InternetNZ regards Phase 2 and Phase 3 as set out in the Government's proposal as unnecessary, unlikely to contribute much to reduction in copyright infringement, and likely to incur significant costs for Government, ISPs, rights holders and users.
- I.7 We believe solutions are possible through mutual understanding and facing the reality of technological change. The new business models that need to be developed cannot rely on "breaking" the Internet; instead they should enable New Zealand to continue its path towards digital leadership.
- I.8 InternetNZ notes the submission by the TCF and regards their analysis of the practical issues of implementation of the Government's proposal as robust. We urge detailed consideration of their submission by the Government.

2. Introduction

- 2.1 The mission of InternetNZ (Internet New Zealand Inc) is to protect and promote the Internet for New Zealand. We advocate the ongoing development of an open and uncaptureable Internet, available to all New Zealanders. The Society is non-partisan and is an advocate for Internet, and related telecommunications, public and technical policy issues on behalf of the Internet Community in New Zealand - both users and the Industry as a whole.
- 2.2 InternetNZ appreciates this opportunity to respond to the *Section 92A Review Policy Proposal Document for Consultation*. The Government's proposal is a significant improvement on the regime that it is intended to replace, even if the changes we propose here are not adopted. Congratulations are due to the Minister and the Government for recognising the unworkable nature of the previous legislation and for developing an open and consultative process to replace it.
- 2.3 In responding to the document, InternetNZ's submission is in four parts:
- (a) a description of the principles that should guide the Government in deciding its preferred approach to replacing s92a;
 - (b) a discussion of the costs and benefits of proposed interventions to deal with peer to peer file sharing and associated copyright infringements
 - (c) the presentation of an alternative Notice and Notice regime; and
 - (d) general issues and concerns.
- 2.4 An Appendix (Appendix I) provides answers to the specific questions posed in the document.

3. Principles

- 3.1 In considering the review of section 92A of the Act, InternetNZ considers the following principles should guide policy development.
- (a) **Reflect the purpose of Copyright** – the law should reflect the purpose of copyright, which is to encourage innovation through provision of limited exclusive rights to the creators of content for a set period.
 - (b) **Effective** – the law should be effective in reducing infringement of copyright, by requiring things to be done that will help to reduce it.
 - (c) **Cost-effective** – the law should only impose reasonable burdens, and should do so at the least possible cost to any party involved.
 - (d) **Proportionate** – the law should impose requirements that are proportionate to any damage being caused to any party, taking into account the nature of New Zealand's creative economy and digital content production and consumption.
 - (e) **Reasonable** – the policy should be considered reasonable by the community at large, showing a fair balance between people's right to access the Internet, and the commercial interests of all types of rights holders.

- (f) **Public interest** – the law should be aimed at satisfying the public interest in maintaining an Internet infrastructure that lets people continue to improve their lives, without unreasonable interference.

3.2 InternetNZ believes that the discussion in the following Section shows that the Government's proposal is not consistent with these principles.

3.3 InternetNZ will propose a different regime which is more consistent with these principles in Section Five of this submission.

4. Costs and Benefits of intervening

Defining the targets of this intervention

4.1 InternetNZ believes that the policy driver behind the replacement to s92a should be to deal with what might be called "**non-commercial infringers**" – private citizens using commercial Internet connectivity, who are alleged to be making occasional infringements of copyright.

4.2 Commercial, large-scale infringement of copyright by any person or organisation is criminal behaviour and should remain subject to strong action by the courts and if necessary by the police. It should not therefore be the objective of the s92a regime to deal with it.

4.3 Similarly, large-scale infringement by technologically competent Internet users should be dealt with by the existing penalties under the law. Notices are unlikely to dissuade such users, and the sorts of technologies available to rights holders to detect small scale infringement are not likely to catch such users, meaning they would not receive notices in any case.

4.4 This focus on non-commercial infringers is the most appropriate one for this legislation, and has consequences for the regime the Government should implement.

Costs of the proposed scheme are high, yet the benefits are not great

4.5 InternetNZ's objections to termination as a proposed remedy have been discussed many times (and are re-stated in Section Six below), but the essential point is that the remedy is disproportionate to the alleged problem of non-commercial copyright infringement. Access to the Internet is too important to New Zealanders to be able to be disrupted by behaviour which has not demonstrably caused significant economic damage to anyone.

4.6 Any regime that makes provision for significant penalties like termination or statutory damages (or fines) by definition needs to include significant due process. In such a system evidence against alleged infringers needs to be of high quality; it needs to be considered by an appropriate body (the courts or a revised copyright tribunal); there needs to be provision for appeal in reasonable circumstances; the costs created for the adjudicating body and those affected by its decisions (especially ISPs) would need to be recovered from those making allegations.

4.7 This is a high-cost scenario. Such costs could be considered reasonable when dealing with commercial infringement or large scale infringements, because there is a clear risk of economic loss involved with such infringement.

- 4.8 However, the focus of s92a should be on occasional, non-commercial infringement. With that focus, the high costs of the regime described in para 4.6 – which is in a sense a summary of the proposal by the Government – do not appear to be met by significant benefits to anyone – to the Government, to the public, or indeed to the rights holders.

What would be a more reasonable response?

- 4.9 InternetNZ proposes that instead of the high-cost model outlined in the Government’s proposal, a much lighter notice-and-notice regime could be developed and implemented. Targeted at occasional non-commercial infringers, and implemented by ISPs which are providing retail services to the public, such a regime would be intended to reduce infringement of this sort, while leaving the more economically significant and troubling sorts of infringement to the existing robust legal processes already available to rights holders.
- 4.10 A notice-notice system along these lines (detailed further below, and similar to the first part of Phase I of the Government’s proposal) should reduce infringement. It could be trialled for a set period, and should it be shown not to deliver reductions in the sorts of infringement it is designed to address, further measures could be considered. The higher costs would presumably be justified at that point by lack of changed behaviour arising from this lower-cost proposal.
- 4.11 InternetNZ further notes that the ongoing development of new business models which provide access to copyright content in lawful and easily accessible ways may over time reduce the significance of the sorts of infringements dealt with by this regime. This is another reason to take a low-cost approach in the first instance, giving the market more time to solve the problem.
- 4.12 Such an approach would in InternetNZ’s view give better expression to the principles we set out in Section Three of this submission – principles which we hope the Government can support.
- 4.13 Such an approach is also consistent with emerging best practice, for instance the approach set out in the UK Government’s recent Digital Britain report.

5. A Notice and Notice regime

- 5.1 The ideal result for InternetNZ is the complete repeal of Section 92A. However, InternetNZ does not object to a Notice and Notice regime, a variant of that which has been put forward in the first part of Phase I of the Government’s proposal.
- 5.2 We are aware that a Notice and Notice approach is supported by Internet Service Providers and has proven very successful in dealing with copyright infringement in overseas jurisdictions. In Canada there is a voluntary system that is the result of industry agreement; in Japan there is a mandatory system required by legislation. In the UK, there is a move towards a notice and notice system currently out for consultation.
- 5.3 InternetNZ’s proposed form of a Notice and Notice regime (which is not the same as that proposed by the Government in the first part of Phase I) would negate the need for the expense of a Copyright Tribunal yet still enable “repeat infringement” to be addressed.
- 5.4 It is based in part on the scheme proposed by the British Government as part of its “Digital Britain” report, released on 16 June 2009, although it should be noted that other aspects of that scheme are not as useful.

5.5 The core of this form of Notice and Notice would be to apply two obligations to ISPs, where ISP is understood to be of narrower scope than the current definition and is as discussed below at para 6.3. The two proposed obligations are:

- (a) A notice obligation
- (b) A data retention obligation

5.6 **Notice obligation** – ISPs on receipt of a notice of alleged infringement from a rights holder (that met an agreed appropriate standard), would pass the notice on to the owner of the account alleged to be infringing copyright. Such notices should deal with either peer-to-peer traffic or hosted material, and would replace the 92A and 92C provisions in the Act. There would be no required counter-notice procedure. This is because in the first instance, the notice/s do not lead to any further action.

5.7 **Data retention obligation** – ISPs would be obliged to retain a record of the numbers of notices sent to a particular customer, and to maintain an anonymised register of frequent infringers. If rights holders became convinced of significant infringement by the customer or customers of a particular ISP, they could apply to the Courts for the release to them of the customer details of the most frequent infringers of their rights. ISPs would not be required to identify repeat alleged infringement themselves otherwise.

5.8 The general idea of how this would work is as set out in the UK proposal¹, copied here by way of example:

"How the notification process and possible court action could work:

- *Rights holders identify cases of infringement and send details including IP addresses to ISPs.*
- *ISPs verify standard of evidence and link infringement to subscriber account.*
- *ISPs send (multiple) letters to subscribers identified as infringing. Those identified as the most frequent added to the serious infringers list.*
- *Rights holders use the serious infringers list as the basis for a large scale "Norwich Pharmacal" order to obtain the names and addresses of those on the list.*
- *Rights Holders send "final warning" letter direct to infringer asking them to stop fleshsharing. Clear warning of likely court action if warning ignored.*
- *Rights Holders take court action against those who ignore final warning."*

5.9 The imposition of these two obligations by appropriate means (possibly through a regulated code under the Act) would ensure the following:

- (a) Rights holders would be able to get notices to alleged infringers.
- (b) Citizens would be assured of a high standard of proof required before interference occurred with their Internet accounts, through the requirement that details could only be released on the order of a court.

¹ "Consultation on legislation to address illicit peer-to-peer (P2P) file-sharing", Department for Business Innovation and Skills, UK Government, June 2009, pp. 20-21.

- (c) Rights holders could obtain contact details of the most egregious alleged infringers, who are presumably those doing the most damage to rights holder interests.
 - (d) No new bureaucracy or agency would need to be established – the Courts already exist as do suitable regulatory agencies to enforce these obligations.
 - (e) Rights holders could be reasonably assured of a reduction in infringement from the notices sent.
 - (f) Disputes would remain between alleged infringers and rights holders, avoiding the ISP having to be judge and jury regarding infringement allegations and avoiding them being involved in coordinating rights holder actions.
 - (g) The unreasonable remedy of “termination” would remain off the table.
- 5.10 In lodging notices under this regime, rights holders should be required to pay a filing fee. The fee should be set at a level which provides revenue for a cost-recovery scheme for the participating ISPs, and which discourages frivolous or vexatious notices being sent by rights holders.
- 5.11 In conjunction with such a regime, safe harbour provisions need to be extended to ISPs who comply with it. ISPs should not be held liable for alleged infringement by rights holders or their customers as long as they are complying with the requirements of this regime.
- 5.12 Section 92C should also be reworked to a notice and notice regime for consistency in application and to avoid unintended consequences, and its safe harbour provisions extended to match.
- 5.13 This proposal leaves issues of occasional non-commercial copyright infringement where they belong, as disputes between rights holders and alleged infringers.
- 5.14 It would be a lower-cost alternative that should work effectively². Importantly, the legislation and regulations required to implement such a scheme would be considerably simpler than would be needed to implement the Government proposal. This would reduce costs and complexity for the Government, for rights holders, for ISPs and for the public.
- 5.15 As already mentioned, if it does not work effectively in reducing alleged or observed infringements, then after a defined period and an independent assessment that infringement had not declined, further measures could be considered.
- 5.16 This scheme meets the principles defined by InternetNZ in Section Three of this submission, and is better targeted to the problem of non-commercial infringement than the Government’s proposal. We commend it to officials for consideration.

² 2008 Digital Music Survey, conducted by Entertainment Media Research and supported by Wiggin LLC (a UK media law firm). Available online at <http://tinyurl.com/luhe8j>.

6. General Issues and concerns

Termination of Internet Accounts

- 6.1 InternetNZ's opposition to termination as a remedy from this regime is based on matters of principle and practicality and include:
- (a) the need to keep the Internet as an open infrastructure unimpeded by vested interests;
 - (b) the increasing reliance on the Internet by businesses and the general public,
 - (c) its lack of impact on determined offenders, given the ease of reconnection following termination,
 - (d) the reasonable expectation that digital infringement of copyright will not attract penalties that are disproportionately greater than those which apply for other mechanisms of infringement under copyright law³,
 - (e) the ease of serious offenders hiding their offending through encryption and other technical means and the risk – particularly to law enforcement and national security interests - that an “arms race” could ensue, and
 - (f) the disproportionate nature of the penalty, given that this has not been contemplated for any other type of infringement and not even for crimes such as accessing child pornography.
- 6.2 If the Government remains determined to include termination as a remedy, it would need to ensure that it is clearly seen as a last resort, with the Act or regulations setting out clear guidance as to the circumstances in which it can be imposed. If included, it should only be possible to impose termination on individuals, not organisations; it should only be for the most egregious and serious offenders; and must only be imposed after a final notice period that would allow people to challenge (in the courts if necessary) the legitimacy of the decision to terminate.

Definition of ISP

- 6.3 InternetNZ strongly recommends that any obligations arising from this replacement scheme apply only to retail Internet Service Providers – companies or organisations that have the equipment and telecommunications line access to provide customers with connectivity to the Internet. It should be a narrower definition than that currently used in the Act. That would seem to meet the intention of the system which is to address alleged occasional copyright infringement.
- 6.4 InternetNZ is happy to offer to officials a group of technical and policy experts to help develop a workable definition of ISP for the purposes of the Act if that is helpful.

Need for further consultation on any regulations

- 6.5 Whatever decisions the government makes, it is likely that there will be extensive regulations required to implement the regime. InternetNZ strongly submits that any such regulations be made subject to public consultation and scrutiny, including a reasonable timeframe for consideration and response.

³ For example, NZ Post does not have the power to deny postal delivery to or from members of the public found liable for copyright infringement; and people who send or receive broadcasts that infringe copyright also cannot have their access to the communications technology involved terminated.

- 6.6 Saying that “the devil is in the detail” is a cliché in regulatory proceedings but it is true nonetheless. The TCF found that months of work and over twenty pages of detail were required to try to give effect to the requirements of the existing s 92a – and an alternative framework will probably require at least that level of detail if not more. The more detail there is, the higher the likelihood of errors or inconsistencies, and the only way they can be detected and avoided is thorough scrutiny and consultation.

Pursuit of Free Trade Agreements

- 6.7 If Phase 2 and 3 are, as has been suggested, driven by the pursuit of a Free Trade Agreement with the United States, then consideration must be given to at least two issues – firstly that New Zealand businesses and general public do not have fair use rights equivalent to the United States and so New Zealand will be at a severe competitive and social disadvantage; and secondly that the compliance and process costs on ISPs and all the businesses categorised as ISPs by this concession would create significant costs for our businesses and lead to a negative impact on the economy. If the Government declines to take a principled stance on this issue then at least this loss and the risks it places on future prosperity should be thoroughly examined before any such trade-offs are made.

The Public Interest

- 6.8 The growing focus by Government on rolling out access to high speed broadband, and the growing use of the Internet for business, education and entertainment purposes has made it a critical part of New Zealand’s infrastructure. Access to the Internet is important. That importance needs to be at the forefront when policy makers are considering how to deal with some of the downsides of widespread Internet use. The balance between producer and user interests in protecting digital content needs to be carefully chosen, and built around a conception of the public interest. What is best for New Zealand as a whole should drive decisions in this area.

Thank you for the opportunity to make this submission. InternetNZ is always available to provide further responses or information, should this be helpful.

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Appendix I: Answers to questions

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?

InternetNZ does not object to the first step of the Phase I process, enabling rights holders to send a copyright infringement allegation notice to an ISP who forwards that to a subscriber, i.e. a Notice and Notice regime. This can be voluntary - as it is in Canada, or mandatory - as it is in Japan.

Attempts to go beyond such a regime may satisfy some specific rights holders but will incur significant compliance costs for ISPs, businesses and the general public that we believe will far outweigh the benefits, as well as put in place an expensive bureaucracy that may not be suitable as business models continue change.

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

If Government is insistent in respect to having Phases 2 and 3 then there are serious issues that need to be addressed in respect to the process. The MED should find some way to benefit further from the many hours of work undertaken by the TCF Working Group.

This submission has detailed an alternative proposal that combines a pure Notice and Notice regime with a basic Data Retention regime. This is a significant improvement allowing for the notice regime to deal with naïve infringers in a better way, while providing basic data retention for rights holders to address the hardcore infringers.

Phase I 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?

In respect to a pure Notice and Notice regime this may be a sufficient threshold: the evidence should be sufficient on the balance of probabilities to convince a reasonable person that infringement has occurred. In a Tribunal or Court process the level should be determined that is sufficient for such processes.

Consideration should also be given to notices only being accepted from New Zealand domiciled organisations. This might enable ISPs, or any businesses caught up in the definition of an ISP, to set-aside high volumes of auto-generated notices that do not take proper account of New Zealand legislation, and allow space for growth in goodwill between ISPs and locally domiciled right holders.

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?

There should be a limit to the number of notices that are required to be passed on by ISPs in a set time period. This is for two reasons. Firstly, the passing on of notices is a cost that is likely to be absorbed by ISPs and this should not be able to be abused. Secondly, there is the risk that a particular ISP might be targeted or another favoured by rights holders. A reasonable limit might be one notice in any twenty-four hour period.

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

Nine months is a long time but the period appears arbitrary and only experience would enable a conclusion to be drawn.

Notices must be dated from the date of the alleged infringement. There may be cost factors in how a rights holder collects information that affects the time between an alleged infringement and when they hear about it. However, if a notice is to be an effective educational message it should be received as soon as possible and ISPs need to have a clear idea of how long they will need to keep the data that enables matching an IP address to a customer name.

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

Yes, so long as these are not regarded as repeat infringement, which should be defined according to infringements of the same work in separate time periods and notified separately and in a timely fashion.

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

No. This has privacy implications.

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

Yes, and perhaps even for any intentional improper use or any repeated improper use. Rights holders should be expected to act in good faith and so should have no problem with this.

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

The process for when an end-user cannot be identified is undefined. For example where an ISP operates an anonymous service such as an Internet café or library, or where it does not have the technology to match the IP address. It should be clear that exceptions such as this are anticipated.

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?

Not in our view. A notice and notice regime without the Tribunal should be sufficient to address the majority of the alleged infringement and would be an acceptable starting point that is likely to be the end point of what is required, as set out in the body of our submission.

If the Copyright Tribunal approach is to be used then it is acting in lieu of a Court. If the offender is a serious repeat offender and the cost estimates of losses claimed by certain rights holders are to be given any credibility then it should be affordable for rights holders to proceed through a regular Court process.

InternetNZ suggests the proposal creates a huge cost just to address the narrow “edge” between these two groups and is therefore not cost-effective. This “edge” may better addressed following some experience with Notice and Notice.

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?*

No.

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

No. We understand there is a view that there is little difference in the systems and cost required to do this if an ISP is already required to log alleged infringements. However, on principle each infringement allegation is a dispute between one rights holder and one user. It is not appropriate for an ISP as an independent carriage provider to coordinate rights holders interests in a dispute with a user.

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

Yes. It is not clear how a rights holder will know that an infringer is a repeat infringer given it is mainly dealing in IP addresses that may or may not change for a particular individual. A rights holder may know the identity of the infringer already through other evidence besides the IP address, otherwise it may be relying on the ISP to advise it.

Our submission sets out how we believe this should be addressed in a notice and notice context.

Phase 3 Questions

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

It is unclear. It appears on the one hand that it will add costs and time to the process and on the other may provide for less confrontation more understanding between the parties.

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

InternetNZ favours online processes so long as it doesn't lead to an unmanageable quantity of notices.

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.

4. *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?*

InternetNZ is absolutely opposed to the inclusion of termination of Internet accounts as a penalty for copyright infringement. This position is held both for principled and practical reasons which have been reiterated in the body of our submission. We do not support the Tribunal model as set out in this proposal.

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

If termination is a remedy it should be stand-alone, with no time period. The notion that the Government or the ISPs should maintain a black-list of users who cannot create Internet accounts with ISPs is completely unacceptable.

6. *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?*

As per any equivalent Court process.

7. *How should costs be assigned in Phase 3?*

Costs should be assigned to the complainant in the first instance, perhaps with the Tribunal able to redirect those costs in a guilty finding. The ISP, being an independent third party in a dispute between a rights holder and a user, should bear as little cost as possible.

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

We understand from talking to officials that it is intended that Phase 3 be able to follow Phase 1 directly. This leads to an abhorrent 'two strikes' system, whereby Phase 3 can be initiated immediately following a Cease and Desist notice with no further alleged infringement having occurred and the user is regarded as a repeat infringer. This appears to be a late change that has not been well thought through, evidenced by its lack of inclusion in the diagram. If the Government persists with a three strike model it should do so with no ambiguity about the numbers of notices required.