

Section 92A revisited

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Section 92A of the Copyright Act is perhaps the most controversial section ever to appear in a New Zealand intellectual property statute. It relates to the obligations of internet service providers (ISPs) where a copyright owner alleges that an internet user has used that ISP's services to infringe copyright. A Working Group convened by the Ministry of Economic Development recently developed an alternative process to replace section 92A, and released the proposal for public comment.

Why the controversy?

Section 92A was enacted in April of last year as part of the Copyright (New Technologies) Amendment Act 2008, which passed with a majority of 111-10. While most of the Amendment Act came into force on 31 October 2008, section 92A was excluded from the Commencement Order and has not yet come into force.

The section would have required ISPs to adopt and reasonably implement policies which provided "in reasonable circumstances" for termination of the ISP accounts of repeat infringers. It also defined the term "repeat infringer" as being a person who "repeatedly infringes the copyright in a work". (This would seemingly limit the section to users who repeatedly infringed copyright in a single work, rather than the widespread assumption that it would apply to a person who downloaded different works on multiple occasions, but the issue is now academic.)

Much of the controversy over section 92A stemmed from what may have been misapprehensions as to the meaning and intended application of the section. The previous Associate Minister of Commerce, Judith Tizard, expected that stakeholders would agree a general policy covering termination of internet access for users who infringed copyright. There was no express requirement that such a policy be in place before the section came into force, but the new government decided to delay the implementation of the section to allow further negotiations to take place on the basis that a uniform policy would be developed by ISPs. During that time, public debate erupted over the issue and the Commencement Order relating to section 92A was amended, further delaying the implementation of the section and allowing time for a more fundamental review of it.

(A discussion of the desirability, from a constitutional perspective, of using an order-in-Council to delay indefinitely the implementation of a provision enacted by Parliament is beyond the scope of this article.)

The new proposal

The Ministry of Economic Development has now released a policy proposal for public consultation. The proposal is in the form of a description of the proposed process for rights holders to follow if they suspect that internet users have infringed their rights, rather than draft legislation. The proposal refers to the process as the "section 92A procedure".

The policy is much more prescriptive than section 92A in terms of the actions which an ISP must take, but equally it contains more safeguards from a user perspective than the alternative draft policy propounded by rights holders. It represents a reasonably fair middle ground, although some of the detail of the process still requires elucidation before it will be workable.

The process gives the Copyright Tribunal jurisdiction to consider complaints of copyright infringement effected through use of an ISP's internet services, but only on the third (or subsequent) occasion.

Phase 1 – First infringement and cease and desist notice procedure

The section 92A procedure is commenced by a rights holder sending a first infringement notice to an ISP where it considers, on reasonable grounds, that a user of that ISP's services has infringed copyright. Although the notice is sent to an ISP, the procedure requires the ISP to forward the notice to the relevant user.

If there is further infringement after the initial notice, the rights holder can send a cease and desist notice to the user (again via the relevant ISP). The user can reply to the notice but is not obliged to do so.

Phase 2 – Obtain user's details

If there is further copyright infringement after the cease and desist notice has been sent, the rights holder can seek an order from the Copyright Tribunal that the ISP provide the name, contact details and any other relevant information to the rights holder. (This step may be unnecessary if the user sent a response notice and the rights holder has contact details for the user.)

Phase 3 – Copyright Tribunal complaint

Once it has obtained the user's contact details, the rights holder can lodge a complaint with the Copyright Tribunal if any subsequent infringement takes place. The Copyright Tribunal can award damages or an account of profits, and order an injunction, payment of a fine or that a subscriber's internet account be terminated. This contrasts with the original section 92A, which provided termination of internet access as the sole remedy.

Comments on the proposed procedure

Intended targets

One major issue with the proposed procedure is that the particular mischief which the section is intended to cure has never been clearly defined. In very general terms it is a response to the ease by which copyright can be infringed using computers, but this is too broad a problem to address with a single procedure. Groups representing copyright owners suggested that section 92A was aimed at large-scale infringers, but it would have applied equally to someone who copied and pasted song lyrics or downloaded album artwork. The intended effect of the procedure, and the circumstances in which the procedure may be invoked, needs to be clarified.

More detail required

The framework set out in the consultation paper appears broadly acceptable, but much will depend on details of the process which have not yet been considered. There should be further opportunity for public comment on:

- (a) the circumstances in which termination may be ordered;
- (b) the levels of damages which might be awarded; and
- (c) the level of costs which can be awarded.

The draft policy does not suggest how the Copyright Tribunal should deal with the situation where multiple users access the internet through a single service, and the occasions complained about may be attributed to different users.

In addition, termination of a user's internet access may have a disproportionate effect on some users. If a business uses an email address provided by its ISP, for example, terminating its account may mean that its email address is no longer operative and it could lose business as a result. By contrast, an individual may be able to change ISP with relative ease, and the sanction may not have much of a deterrent effect. The proposal does not comment on what would happen if the user had signed up to a contract with a minimum term.

Appropriateness of Copyright Tribunal assuming jurisdiction

Other tribunals may be better suited to having jurisdiction over these matters rather than the Copyright Tribunal, depending on the types of cases which the procedure is intended to cover. The principal limitations of the Copyright Tribunal are:

- (a) Its members are appointed on the basis of interest in and expertise in copyright licensing matters. Tribunal members may or may not be interested in or suited to determining what will probably be mainly low-level infringement cases.
- (b) The Tribunal does not currently have the resources or processes for managing a large number of small cases.
- (c) The Tribunal is based in Wellington, whereas it may be desirable, from an access to justice perspective, to have hearings on these matters close to the location of the defendants (if in-person hearings are to be allowed).

While the Tribunal's expertise in copyright would be helpful, it may be that appropriate training could be given to District Court judges or Disputes Tribunal referees (for example) given the relatively confined nature of the types of disputes which will fall within the section 92A procedure.

User perspective

As a general comment, the Working Group does not appear to have considered how the process would operate from the point of view of users who are accused of copyright infringement or provided appropriate safeguards for users. For example:

- (a) The timeframes are relatively short.

- (b) The first infringement notice should refer to the right of a user to take legal advice (as with a notice of proceeding) and the fact that any response notice may be used by the rights holder in the Copyright Tribunal or any subsequent court proceedings.
- (c) A notice is deemed to have been received by a user unless an ISP informs a rights holder otherwise. (The better position would be for the rights holder to check that there was no reason to suspect that the initial notice had not been received by the user if it is at the point of sending a cease and desist notice, and to ensure that ISPs keep records of any material which might suggest that a recipient did not receive a notice.)
- (d) There does not appear to be any imperative for a copyright owner to act reasonably, nor any incentive for a copyright owner to accept a response notice.
- (e) While the proposal suggests that a copyright owner should use information only for the purposes of potential Copyright Tribunal proceedings no sanctions have been suggested for unauthorised use of information or timeframes for destruction of information.
- (f) As a matter of natural justice, users should be notified of an application that their details be provided to a rights holder before a decision is made on the point.
- (g) It is not clear whether the Copyright Tribunal is obliged to consider the propriety of the initial infringement and cease and desist notices, or whether an action in the Copyright Tribunal will fail if the Tribunal finds that one or other of the earlier notices was invalid. (One way of dealing with this could be for the Tribunal to proceed on the basis that the earlier notices were valid, but to consider these issues if the defendant queried the earlier notices.)
- (h) The proposal does not discuss a right of appeal from a decision of the Copyright Tribunal.

These matters need to be addressed in any draft legislation, and there needs to be a further opportunity for public submissions on the details of the procedure once they are available.

Conclusion

The proposed policy would provide a lower-cost alternative to court proceedings for rights holders to take action in cases of copyright infringement. The danger is that such expediency could come at the expense of the rights of those accused of copyright infringement. Much work still needs to be done on developing the details of the policy before the fairness of the procedure can be assessed properly.

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