

PUBLIC CONSULTATION ON DRAFT COPYRIGHT CODE
Submission to the Telecommunications Carriers Forum from Judge David
Harvey

Introductory Remarks

This submission is made in my personal capacity. It is not made for or on behalf of Judges of the District Court or any member of the Judiciary in New Zealand.

This submission is of a general nature only. It does not address clause by clause the Draft Code designed to assist organisations to meet their obligations under s 92A of the Copyright Act.

Some comment should be made about s 92A and following of the Copyright (New Technologies) Amendment Act 2008.

Sections 92B through 92E provide for Internet Service Provider Liability in circumstances which might involve copyright infringement arising out of the use of the ISP services. These sections preserve to a certain degree the theory, prevalent in many jurisdictions, that there should be safe harbour provisions for Internet service providers.

Section 92A presents an entirely different set of circumstances. It presumes that there should be termination of a contract between an Internet service provider and a customer where the customer is involved in repeat copyright infringement.

This section is poorly drafted and makes a number of unsupported assumptions, but in essence it suggests that an Internet service provider must develop a policy to cancel an existing contract as a result of copyright infringement.

The reality of the matter is that the cancellation or termination of the contract arises at the behest, not of the Internet service provider, but of copyright owners. Without significant justification in normal circumstances this could amount to an interference with economic relations and raises significant issues about the sanctity of contract.

It is to be noted that most Internet service providers standard terms and conditions already contain provisions relating to the grounds for termination. Copyright infringement is already available as a grounds for termination.

What s 92A seems to do is to provide that some set policy should be put in place to enable termination to be effective at the behest of a third party – a copyright owner.

Given:

- a) that copyright owners have recourse to the Courts to enforce their rights
- b) ISP's terms and conditions provide for contract cancellation in certain circumstances including copyright infringement
- c) The proposals under s. 92A require cancellation of a contract at the behest of a third party
- d) That in being required by a copyright holder to cancel a contract an ISP is being asked to make a complex legal decision and to be an adjudicator in a matter in which it has an interest

section 92A is unnecessary and gives rise to a situation where a person may be deprived of rights under a contract without proper legal process.

If it had been Parliament's intention to provide for a process whereby contract termination should take place, Parliament should have provided such process by legislation after proper consultation with all interested parties.

My view is that s 92A should be repealed, but realistically one must address the situation with which one is faced.

The Draft Code

In general the draft code is satisfactory up to a point. It is essential that a balanced process be provided once a notification is made from a copyright owner to an ISP.

It should be made clear that proof burdens must be allocated. 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.

It is fundamental that the process should not begin merely because a copyright owner says that it should, but that a copyright owner must present sufficient justification by way of proof that an ISP subscriber is engaged in **significant** copyright infringement.

Although copyright owners have said that they are not interested in pursuing the person who downloads the occasional song, it is important to ensure that there is some differentiation between an "occasional one-off" infringer and a significant infringer. It may be helpful to include a definition of a "significant infringer" based upon the volume of downloaded material acquired by that person and ensure that the Code applies to the significant infringer rather than the "one-off" infringer. At present the Code would apply to all alleged infringers.

Clause 4.2 provides a right to challenge copyright holder notices. Perhaps it should be made clear that not only the notice, but the premises behind the notices should also be the subject of challenge including the copyright holder's entitlement to copyright and whether or not, in fact, the allegation of infringement can be sustained.

Clause 4.8 is critical. It recognises the seriousness of contract cancellation at the behest of a third party and gives the ISP a discretion not to terminate notwithstanding the process has been followed. It is anticipated that copyright holders will seek to make termination mandatory once the process has been successfully concluded. This must be resisted. Should termination not follow the process, copyright owners will still have their normal remedies against the infringer pursuant to the provisions of the Copyright Act 1994.

Regrettably in its present form Clause 4.8 is ambiguous. I have given it a broad interpretation that allows an ISP to refuse to terminate even if the evidence would

establish otherwise. This interpretation has been adopted for the purpose of this submission. An alternative interpretation would allow an ISP to opt out of the termination process upon receipt of a counter notice. In such a case the copyright owner could commence proceedings against the infringer in Court

It is of concern that it is the ISP that has to make the determination. Clause 10 places upon the ISP or Party the obligation to make a determination of what is a complex area of law. It is for the ISP or Party to make the determination of whether or not the evidence would be sufficient to satisfy a court that an infringement under the Act had taken place. The question of infringement not only involves the consideration of the existence of copyright, that the copyright owner holds copyright and that there has been a restricted Act, but also the possible applicability of permitted uses which would nullify an infringement.

It seems under the Draft Code that, notwithstanding the various complaint procedures, there remains with an ISP a discretion not to terminate – a broad reading of clause 4.8 - thus bringing into play clause 4.6 making it incumbent upon a copyright holder to take action itself.

Within the Notice Procedure the down-stream ISP or alleged infringer should receive a very clear “plain English” Notice of Rights, so that an informed decision may be made as to the next step to be taken.

Given the broad interpretation of clause 4.8 I have adopted, the provisions of clause 29 seem to be contradictory. It could be read in such a way as to assume that the ISP had decided not to exercise its discretion under rule 4.8, thus placing the onus upon the copyright holder under clause 4.6. General termination is not mandatory, yet the effect of clause 29 seems to make it so.

This highlights the ambiguity in Clause 4.8. If either interpretation is adopted it is clear that there is a necessity for some form of arbitration which would give effect to the spirit of s. 92A - to provide a process whereby serious repeat infringers are disabled from carrying on their infringing activities without recourse to the expense of delays in High Court or District Court proceedings

Arbitration

Of concern to ISPs is the determinative role that they appear to be required to undertake. The cartoon in the Herald 20 February 2009 graphically makes this point. Little guidance is provided. Although the copyright holders may find such a suggestion objectionable, an ISP acting in the capacity required will have to act fairly and judicially and without being placed under undue pressure from either party - a rather difficult position to be in when an ISP has an interest in the proceedings directly and indirectly

Thus, within the Code there should be a provision for arbitration which would have two functions – first, as a forum to resolve a dispute arising from the process and secondly as the final tribunal to decide on whether or not termination is justified.

As to the first function it is proposed that arbitration be available where concerned parties (both ISP, alleged infringers and copyright holders) can resort

- a) in the case of a dispute or
- b) where the determination is a complex one requiring independent assessment or
- c) where, notwithstanding the process that has been put in place, a party who is dissatisfied with the process may resort for determination.

Such arbitration panel could operate within the structure, determine grievances or objections between the parties and make a binding determination. Although it is tempting to suggest the incorporation of some form of appeal process, I am of the view that this may unduly complicate the matter, and if the provisions of the Arbitration Act were to apply to such body then normal recourse to the courts would be available in the circumstances provided by that legislation.

As to the second function, where an ISP decides to exercise its discretion to cancel a contract, the matter should be submitted to the arbitration panel which would be entrusted with the final decision as to whether or not termination was justified. Such a consideration would be effectively a form of *de novo* hearing where all of the evidence would be reviewed to determine whether or not termination was justified. In this way the final decision about termination would be removed from the hands of the ISP and placed in the hands of an objective body

The arbitration body that provides a good example in the structure and procedure of which could be applied mutatis mutandis is the Domain Name Dispute Resolution Process currently operated by the domain name Commissioner. Proceedings could be done “on the papers” before an arbitrator drawn from a specialist panel. In certain cases there would be a right to be heard in person and to test the evidence by cross-examination. The costs of the tribunal could be funded by way of a set contribution from copyright owners and Parties as well as by way of filing fees not unlike those applicable in the domain name Dispute Resolution Process. An alternative would be to place the determination in the hands of the Copyright Tribunal, although this would require statutory amendment to widen the powers of that body.

The availability of independent arbitration would, in my view, mitigate many of the concerns of ISPs and provide an independent transparent adjudicative process and one which, in my view, having regard to the seriousness of an interference with contractual relations, is justified.

Copyright holders may well find an arbitration process adds another layer of complexity to the process. The recent comments reported in Computerworld for 23 February would seem to suggest so. What copyright holders must recognise is that a balancing of interests must take place. The cancellation of a contract is a serious matter and should not be embarked upon lightly or upon a mere allegation. Whilst it may seem clear to a copyright holder that infringement has taken place, such an allegation must be considered and established objectively and by proper evidence. Suggestions that evidence sufficient to satisfy a court is onerous and reallocating proof burdens upon an alleged infringer run counter to legal theory and the principle that it is for an accuser to prove his allegation. Suggestions that this process should be otherwise should be strongly resisted. The process under s. 92A should not be seen as

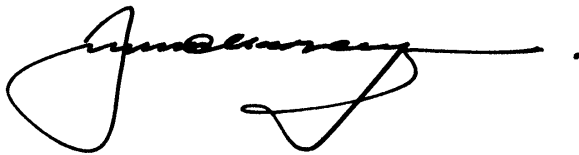
a “soft option” in terms of proof or the establishment of grounds to terminate. However, the process should be such that it is an attractive alternative to formal court proceedings

Conclusion

In summary:

- a) There should be a clear allocation of proof burdens upon copyright owners and a presumption of innocence. The standard of proof should be that applying in copyright proceedings before a Court of Law
- b) The Code should apply to significant infringers rather than all who may be involved in downloading. Significant infringers should be defined
- c) The foundation of a notice should be the subject of challenge as well as the notice itself
- d) The complexities of copyright law including the applicability of concepts such as “permitted use” make it inappropriate for ISPs to determine whether termination should take place
- e) There should be a plain English notification of rights to any person to whom a notice is sent
- f) There should be an arbitration process
 1. in the case of a dispute or
 2. where the determination is a complex one requiring independent assessment or
 3. where, notwithstanding the process that has been put in place, a party who is dissatisfied with the process may resort for determination.
 4. To determine whether or not there should be termination of a subscriber’s account with an ISP after completion of the notification process

I trust these submissions are helpful in the final settlement and resolution of the Copyright Code.

A handwritten signature in black ink, appearing to read "David J Harvey", with a long horizontal flourish extending to the right.

Judge David J Harvey
District Court Judge
27 February 2009