



THE NEW ZEALAND
SOCIETY OF AUTHORS
(PEN NEW ZEALAND INC) TE PUNI KAITIHI O AOTEAROA

75 years of working for writers

SUBMISSION

To

**The Telecommunications Carriers' Forum
PO Box 302469
North Harbour
Auckland**

on the

**Internet Service Provider
Copyright Code of Practice**

**Draft
4th February 2009**

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Introduction

The New Zealand Society of Authors (PEN NZ Inc.) welcomes the opportunity to make this submission on the Draft of the Internet Service Provider Copyright Code of Practice (4th February 2009).

The New Zealand Society of Authors

The New Zealand Society of Authors (NZSA (PEN NZ INC)) was established in 1934 as the New Zealand PEN Centre and has a long history as an advocate for the professional interests of New Zealand's writers. We act on behalf of writers by promoting and protecting their rights in New Zealand and overseas.

The NZSA (PEN NZ INC) is a member of the Copyright Council of New Zealand where it represents the interests of authors. The NZSA (PEN NZ INC) is also owner, along with the Book Publishers Association of New Zealand (BPANZ) of Copyright Licensing Limited, a non-profit company, which provides licensing services for the reproduction of extracts from books, journals and periodicals in New Zealand. NZSA (PEN NZ INC), of course, obtains no direct benefit from this organisation.

The Society also has representatives on the Montana New Zealand Book Awards and New Zealand Post Book Awards management committees and is represented on the boards of the Burns Fellowship and the Christchurch Arts Festival. It is also represented on the New Zealand Book Council International Writers Programme selection panel. The Society administers the Ashton Wylie Charitable Trust Awards, the Foxton Fellowship, the Lake Ohau Fellowship, the Lillian Ida Smith Award, the Copyright Licensing Ltd Research Awards and the Janet Frame Memorial Award for Literature. A member of International PEN, the NZSA (PEN NZ INC) works closely with allied organisations overseas for freedom of expression.

The NZSA (PEN NZ INC) currently has 1,280 members throughout New Zealand and due to our active involvement in the Public Lending Right Bill our membership has increased of late.

Submissions

The New Zealand Society of Authors (PEN NZ Inc.) is concerned about the introduction of the proposed Section 92A of the Copyright Act 1994. Whilst we strongly support the need for measures to control repeat copyright infringement we feel that this clause is not ideal – it has been hastily written and we recommend the need for further discussion.

We feel that should Section 92A be implemented, it is imperative that the Code of Practice be effective and respectful of the rights to freedom of expression.

TCF Draft for Consultation

A – Purpose

1.4 We question whether S92A as it currently stands is a 'fair system to discourage ISP services being used for copyright infringement'. The proposed section states implementation of termination 'in appropriate circumstances' which is open to interpretation, and we feel that the Code of Practice must clarify the terms existent in 'appropriate circumstances' to remove any doubt of interpretation. In addition it is of concern that clause 1.4 in the draft gives ISPs control to take action on matters that it is not their primary responsibility to do so 'whilst recognising that the primary responsibility for resolving issues of use and protection of copyright material rests with the Copyright Holder and the user directly as between themselves'. We would encourage discussion and negotiation with Copyright Holders and creators to establish an appropriate resolution.

1.5 We question the effectiveness of the proposed Section 92A when repeat infringers will be able to sign up with other ISPs when their internet account has been terminated. This clause states The Code will assist other ISP organisations to achieve the same purposes ‘by passing on Copyright Holder Notices of Infringement to those ISPs where they appear to be responsible for or have a closer relationship to the Internet Account of the User in question’. NZSA (PEN NZ INC) urges that individuals’ privacy be borne in mind in relation to this undertaking. In addition, there is no guarantee that ISPs not party to the Code will act similarly as they are not required to under the proposed act.

C – Principles

4.7 We feel that ISPs should also be expected to treat Copyright Holders equitably and not unduly discriminate between Copyright Holders.

4.8 We are concerned that this clause gives ISPs the discretion to terminate an internet account if they **considered** there to be serious or repeated infringement, and where following the processes envisaged by section E of the Code ‘would be inappropriate’. NZSA (PEN NZ INC) feels that clause 4.1 ‘Users are to be consider innocent until an ISP has reason to believe based on evidence that would be acceptable to a court, that a user is a repeat infringer’ must be adopted in all circumstances.

E – Repeat Infringement

14.1 – NZSA (PEN NZ INC) would appreciate information about the Pre-Approved Copyright Holder Process and costs involved in the Processing Fee currently not detailed in the draft code. It is important that these do not put the facility out of the reach of independent copyright holders and we would appreciate the opportunity to comment on this when the necessary information is available for us to respond fully.

F – Counter-Notice Procedure

As it has been clearly stated the ultimate responsibility for copyright infringement lies with the Copyright Holder it seems appropriate that Copyright Holders be involved in the counter-notice procedure rather than leaving it to the users discretion.

H – Vulnerable Customers

NZSA (PEN NZ INC) feels there should be a clear definition of what would constitute a vulnerable user to avoid unnecessary confusion.

I – Notices

The NZSA (PEN NZ INC) strongly recommends that all notices be confirmed in writing. Clause 38.3 should have added ‘and confirmed in writing to the Downstream ISP or user’. Without the confirmation the advice is open for dispute.

Libraries

NZSA (PEN NZ INC) would like clarification of where libraries would be classed – ISPs or Downstream ISPs. With the growing use of library computers by overseas visitors, it is of concern that the responsibility to police all their users would put unnecessary strain on the libraries’ already stretched resources.

Summary

The NZSA (PEN NZ INC) has concerns that under this code a copyright holder has to pay to have its Copyright Notice considered by an ISP. Whilst we can appreciate that ISPs have a desire to recover costs, it seems unreasonable for the aggrieved party to be required to do this. “...*I’m not sure that any policy that allowed an ISP to overlook incontrovertible proof just because someone hasn’t paid it some money could be regarded as reasonable.*” Steven Price.

The NZSA (PEN NZ INC) would like clarification of what detection methods are approved and/or pre-approved for copyright holders.

It should also be noted that the NZSA (PEN NZ INC) has issued a submission to the Law Commission on the Tribunal Reform recommending that the Copyright Tribunal Mandate be extended beyond handling issues concerning licensing systems to offer individual copyright holders a way to resolve copyright disputes –including digital and ISP copyright issues.

NZSA (PEN NZ INC) has canvassed its members on this issue and their feedback has been incorporated in the above.

Conclusion

The NZSA (PEN NZ INC) feels that both S92A and The Draft ISP Copyright Code of Practice need further development and clarification and this must involve the creators and copyright holders.

We look forward to hearing further from you on this subject.

Maggie Tarver
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