
COMMENTS ON INTERNET SERVICE PROVIDER COPYRIGHT CODE OF PRACTICE

Tony Lozada

Barrister

23A Maxine Place, St. Heliers, Auckland 1071, PO Box 87361 Meadowbank 1742

Tel: 09 578 2577 Mob: 021 175 3545 Fax: 09 578 2574

Comments on Internet Service Provider Copyright Code of Practice.

1. The Internet Service Provider Copyright Code of Practice (“the Code”) is a self-regulatory and voluntary code of practice designed to enable ISPs to comply with s92A of the Act.
2. S92a of the Copyright Act 1994 (“the Act”) requires an internet service provider (“ISP”) to adopt and reasonably implement a policy that provides for the termination, in appropriate circumstances, of the account with that Internet service provider of a repeat infringer.

Comments:

The Code as Voluntary

1. The code is binding on all signatory ISPs (clause D5). Whether or not this fact is reflected in the terms and conditions of use/service it appears that the user has no say on the matter and is required to accept the code in order to avail of the ISP’s service. This “contract of adhesion” may in effect negate the voluntary nature of the code and the definition of “Party” under clause 2.
2. Users such as internet cafes and libraries may take the position that by including the code in the ISPs terms and conditions of service the user is not given the option to withdraw or elect out of the code which is supposed to be voluntary. The inability of the user to elect out of the code may be interpreted that the user has waived his right and has consented to be bound and that the user has voluntarily submitted to the code.
3. If the ISP subsequently indicates or threatens to suspend or terminate the user’s account on the basis that the user refused and failed to respond to any notice or that the user has committed an act of infringement then the user may raise the issue that it did not voluntarily submit to the code.
4. The user may rely on s9 of the Fair Trading Act 1986 which provides that “No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive” and or Clause 17 Freedom of Association of the Bill of Rights to support his position that the right to join an association also includes the right not to be compelled to join an association and thereafter file an application for a declaratory order under s3 of the Declaratory Judgments Act 1908.

5. The Court is likely to interpret the terms of a contract of adhesion like the ISP terms and conditions of service strictly against the ISP and liberally in favor of the user. If the Court grants the application and issue a declaratory order the user may then file an action for damages against the ISP and or the copyright holder or have the decision of the ISP set aside.

The Code appears to allow the ISP to act as a Quasi-judicial Body

6. S92a of the Act requires an internet service provider (“ISP”) to adopt and reasonably implement a policy that provides for the termination, in appropriate circumstances, of the account with that Internet service provider of a repeat infringer. However I submit that the issue as to what constitutes copyright infringement and/or who is a repeat infringer is a question of fact that can only be determined by the Court.
7. S92a of the Act does not grant in favor of the ISPs the power to perform any act to determine the rights and liabilities of the parties including the power to determine whether or not any act of infringement was committed and to provide sanctions or penalties for them including the power to enforce its decision through a third party.
8. I submit that the phrase “to adopt and reasonably implement a policy” does not include the power to decide issues of facts and exercise discretion. S92a may be interpreted to mean that the procedure within the policy should comprise of significantly ministerial functions that do not require the exercise of discretion.
9. S92a of the Act is not a charter that provides for the creation of an independent quasi-judicial body to determine questions of fact and law. I submit that s92a is a simple mandate for ISPs to come up with an implementable ministerial procedure to facilitate the suspension and or termination of a user account of identified infringer without affecting the rights or creating an undue burden on legitimate users.
10. By allowing the ISP members to receive a notice from the copyright holders, pass the notice to downstream ISP and user, and subsequently issuing a notice of suspension or termination of a user account and execute its decision through an enforcement agency it appears that the ISP holds itself out as a quasi-judicial body with the power to determine the rights of the parties and to decide whether or not an alleged act of infringement was committed by the user.
11. In a typical copyright infringement case the alleged infringer can only be stopped by the copyright holder from carrying out the infringing act by filing an action for injunction and or

damages with an application for a preliminary injunction and or a temporary restraining order and the subsequent issuance by the Court of an injunction order after the trial.

12. The code appears to allow the ISP to usurp and surpass the Court's power to issue summons and injunction orders in that it gives the member ISP the power to suspend a user account unilaterally on the basis of a notice/claim of infringement from a copyright holder without a need for a hearing and trial. The code further allows the ISP to enforce and execute its decision through an Enforcement Agency. I submit that this is not the likely intent of S92a of the Act.
13. Under the code all that is required for a user account to be suspended or terminated is a notice from a Pre-approved copyright holder and the subsequent failure of the user to respond. It appears that the merit of the copyright holder's claim is not relevant and a notice to suspend or terminate a user account must be issued if the user fails to respond to the notice.
14. A copyright holder simply needs to enroll or sign up as a pre-approved copyright holder and prepare a notice of copyright infringement in order to convince the ISP and support its claim that an infringement has been committed by a user and have the latter's account suspended or terminated if the user failed to file a response.
15. In contrast to an action for copyright infringement the failure of an infringer to answer or respond to any notice or cease and desist letter from the copyright holder is not interpreted as conclusive proof of guilt or admission of liability.
16. The alleged infringer may even go as far as to refuse to file any responsive pleading in Court because he believes that the plaintiff has failed to establish a valid cause of action and there is nothing to answer for and that he is not guilty or liable for any alleged act of infringement.
17. The Court in an action for copyright infringement cannot and is not likely to issue any order in favor of the copyright holder on the basis that the respondent failed or refused to file a responsive pleading.
18. The copyright holder is at all times required to rely solely on the strength and merit of his claim and not rely on the weakness of the defense or lack of response from the alleged infringer if the Court is to grant the relief prayed for. This is not the position of the copyright holder under the code.
19. The code appears to take lightly the established procedure in infringement cases and over simplify the procedure. I submit that this may not be what s92a intended in the phrase "to adopt and reasonably implement a policy."

The Burden of Proof and Due Process

20. Due process requires among others only an opportunity to be heard and a fair hearing. A party therefore cannot be compelled to answer every allegation made against him. As a rule the burden of proof rest on the claimant and this same rule applies in copyright infringement cases.
21. In an action for copyright infringement the alleged infringer may refuse to file any responsive pleading in Court because he believes that the plaintiff has failed to establish a valid cause of action and the Court is not likely to issue any order in favor of the copyright holder because the alleged infringer failed to file any pleading.
22. The code however imposes an onerous obligation on the user to answer every allegation made by the copyright holder because the user's failure to respond is likely to result in the suspension or termination of his account. This appears to shift the burden of proof in that the user is now required to justify his every act and prove his innocence every step of the way instead of requiring the copyright holder to establish the basis and merit of his claim.
23. The copyright holder will then be allowed to fish for evidence and conduct a "trial and error" method to establish his claim. This may create a vicious cycle where a copyright holder can unceasingly cry wolf and claim infringement against any user.
24. Although the code states that it adheres to the presumption of innocence and that it is mandated by s92a of the Act to formulate a policy to suspend or terminate a repeat infringer's account there is no basis to divert from the principle that in copyright infringement matters the burden of proof still rest on the plaintiff.
25. Although it appears that the code creates a convenient procedure for the ISP and the copyright holder to suspend or terminate the account of an alleged repeat infringer I submit that procedural convenience is not a sufficient justification to set aside the principles of due process and shift the burden proof from the copyright holder to the user.

The Quantum of Proof

26. Granting for the sake of argument that the ISP can validly hear and determine whether or not the copyright holder's claim is valid. I submit that the code and the ISP may not set a lower standard or require a lower quantum of proof to justify the suspension or termination of a user's account short of what the Court would require to justify the issuance of an injunction order in a copyright infringement case.

27. The code in clause 10 and 11 provides its own set of rules to establish infringement. However S29 to 39 of the Act defines and enumerates acts of infringement and S92a of the Act did not grant the ISP the power to legislate or provide a different interpretation or to set a lower benchmark to determine what constitutes infringement.
28. Although the code seems to allow for the creation of a copyright registry by a member ISP through a pre-approval process (clause B) I submit that the pre-approval process and becoming a pre-approved copyright holder does not constitute conclusive proof of copyright ownership and as a basis for a finding that an infringement occurred based solely on the allegation of the copyright holder.
29. The question relating to ownership of a copyrighted work and whether or not any act of infringement was committed is still an issue for the Court decide. The pre-approval process and the copyright registry created under the code may however assist the Court in deciding the matter.
30. I anticipate that the pre-approval process will be a ministerial function and is likely to consist mainly of an application form, a declaration and a copy of the work where the author claims copyright.
31. It is not likely that the application will be subjected to or open for opposition similar to that of a trademark application in *inter partes* cases. It is therefore unlikely that the copyright registry will be sufficient to sustain a claim by the copyright holder as conclusive proof of ownership in the work. At best the registry may have some probative value to establish the date of creation of the copyrighted work.

The ISP as Agent of the Copyright Holder

32. Under the code it appears that the ISP can act as an agent of the copyright holder in that the ISP can send all notices and receive from the user any response on behalf of the copyright holder.
33. As a rule a copyright holder may serve a notice of copyright infringement to the user or any infringer on its own and without instructing the ISP. However under the code a copyright holder must first enroll or sign up as a pre-approved copyright holder before it can issue instructions to the ISP to process and send a notice to the user. Conversely the ISP will not process and serve any notice on behalf of the copyright holder unless the latter has been pre-approved by it. A contractual relationship therefore exists between the ISP and the copyright holder.

34. After the pre-approval process the ISP only has a ministerial duty to serve the notice on behalf of the copyright holder and it may only refuse to serve the notice if the copyright holder notice fails to satisfy the formal requirements of clause 14.
35. In other intellectual property disputes such as trademarks and patent it is the plaintiff who serves the notice of infringement and or cease and desist letters to the respondent. At this stage there is no basis for the Court or any quasi-judicial body such as IPONZ to be involved because there is nothing to determine. It is only after the parties have failed to settle or resolve their differences that the matter may be brought before the body such as IPONZ in *inter partes* cases or the Court for determination.
36. The requirement that must be provided by a copyright holder under clause 14 and annexure 2 may not be sufficient to establish a valid cause of action for infringement. However if the user fails or refused to respond to the notice the ISP may subsequently issue a notice to suspend or terminate the user account.
37. A user account may therefore be suspended or terminated by the ISP not because the copyright holder was able to establish that infringement was committed by the user but instead the ISP is acting as an agent of the copyright holder and is carrying out its contractual obligation.
38. It may be that from the time that a copyright holder signs up to be a pre-approved copyright holder up to the time that an ISP sends a notice to the user it is likely that the issue of copyright ownership and infringement may have already been pre-determined by the ISP in favor of the copyright holder.
39. I therefore submit that it may be inappropriate for an ISP to suspend or terminate a user account due to the failure of the user to respond and solely on the notice from a copyright holder.

Circumventing the Judicial Process

40. It may be argued that the code has been formulated to circumvent the judicial process in that;
 - a. The code grants the ISP to act as a quasi-judicial body. I submit that S92a of the Act only intended for the ISP to carry out ministerial functions that do not require the exercise of discretion.
 - b. The code shifts the burden of proof from the copyright holder to the user in that it imposes an onerous obligation to the user to respond to every allegation by the copyright holder.

- c. Procedural convenience is being used as a basis to set aside the principles of due process and shift the burden proof from the copyright holder to the user.
- d. The code appears to allow the ISP to act as an agent of the copyright holder and allows the ISP to make a pre-determination of the matter.
- e. The code allows the ISP to set a lower benchmark as to what constitutes infringement (clause 10-11). S29 to 39 of the Act defines and sets the benchmark for infringement. S92a did not grant the ISP the power to interpret, amend or repeal the provisions of the Act.
- f. The code makes the pre-approval process and being a pre-approved copyright holder as conclusive proof of copyright ownership in the claimed work.

41. I submit that the code does not enable ISPs to comply with s92A of the Act.

Recommendations

ISP and Copyright Holder Working Together

- 42. Creating a copyright registry and maintaining a database of copyright holder appears to be a move in the right direction. The registry may have some probative value to establish the date of creation of the copyrighted work and assist the Court in determining ownership in the copyrighted work and whether or not the work was infringed.
- 43. The contractual relation between the ISP and copyright holder under the pre-approval process may facilitate the identification of infringers and provide a more effective way of serving an infringement notice.
- 44. Although the copyright holder notice does not establish infringement it may be sufficient to deter or stop an infringer from carrying out any infringement under threat of legal action.
- 45. The user should not be threatened with suspension or termination of his account and be required to respond to the copyright holder notice. It is sufficient that the user has been notified and was given the opportunity to respond.
- 46. The ISP will retain all relevant data that is related to the copyright holder's claim from the time a copyright holder's notice is sent to the user.
- 47. It may also be a good idea for the ISP to issue a certification that the copyright holder is a pre-approved copyright holder in a specific work.

48. The certification and relevant data retained by the ISP will significantly help the copyright holder in obtaining an injunction order in that all documentary evidence to support a claim of copyright infringement is now compiled in a logical sequence.

Suspension or Termination of User Account

49. The pre-approval process and maintaining a registry of pre-approved copyright holder will facilitate in bringing the matter to Court. It would be appropriate for the ISP to suspend or terminate a user account only after the issue of infringement has been brought by the copyright holder to the Court and only after an order of preliminary injunction or an order of injunction after the trial has been issued.

50. I submit that an ISP will be able to comply with s92a of the Act as follows:

- a. Work with the user under the pre-approval process.
- b. Keep a registry of pre-approved copyright holder.
- c. Send copyright holder notice.
- d. Assist the copyright holder in establishing a claim for copyright infringement in Court.
- e. Suspend or terminate a user account based on a Court order.

51. These are administrative and ministerial functions that do not require the exercise of discretion and is likely to be what s92a of the Act intended.