
**Creative Freedom Foundation-
Submission on the draft copyright Code of Practice for S92A**

Hi,

To introduce myself I'm Matthew Holloway of the Creative Freedom Foundation, an organisation founded to represent artistic rights. On our website we have a petition against Section 92A that has 18,243 signatures of which 9,084 are artists. We have read the TCF draft code (*the Code*) and we have several comments.

Primarily, the Code cannot fix a broken law and the CFF recommend that the TCF should immediately contact the Government to tell them the practical changes necessary to implement online disconnection based on copyright infringement,

- 1) Establish An Independent Adjudicator**
- 2) Reduce ISP Scope to those capable of enforcing S92A**
- 3) Change to a Notice-And-Notice model, rather than Notice-And-Takedown**

To elaborate:

1. **Establish An Independent Adjudicator:** This could involve changing the jurisdiction of the existing Copyright Tribunal so that we have qualified people judging cases of copyright infringement, or it could involve a new unrelated Tribunal. The Tribunal could have a range of sanctions, primarily fines but also disconnection for repeat egregious infringers.
2. **Reduce Classification of an "ISP" to those capable of enforcing S92A:** Immediate reduces the scope of ISP to those who can implement the logging necessary to corroborate any evidence of copyright infringement. Most residential and small/medium businesses have phones that can't track individual users, and similarly most network devices are incapable of logging users and the data necessary to corroborate accusations. In practice this means immediately reducing the scope of S92A to conventional commercial ISPs. This then puts the onus on Government to increase capability of enforcing the law (Eg. to phase in restrictions that new hardware sold in NZ that is capable of logging user traffic). CSP is a term used in Australia which seems to be a traditional ISP http://www.austlii.edu.au/au/legis/cth/consol_act/ta1997214/s87.html but of course all internet providers would still need safe harbour.
3. **Change to a Notice-And-Notice model, rather than Notice-And-Takedown:** Internet disconnection is a disproportionate remedy for the complainant that has been rarely (if ever?) chosen by the courts, even in extreme cases of copyright infringement. Fines from the Copyright Holder backed by a Copyright Tribunal (that can issue internet disconnection) to resolve disputes would be more appropriate, and only the Copyright Tribunal should be able to issue disconnections. Music Industry studies suggesting people prefer internet disconnection to fines did not consult businesses (many of whom depend on the internet as much as a phone line). This also works around the problem that the law doesn't distinguish between a copyright infringement of a thirteen year old's self-written Harry Potter story Vs. distributing thousands of movies illegally.

We do have comments on the text of the Code however our primary comments are the 3 points above.

Comments on the text:

A. PURPOSE

We are concerned that the Code does not include a statement about external requirements or ISP scope and that therefore it could encourage an idea that the Code is a self-standing

document suitable for all ISPs without the need for external requirements such as hardware necessary to corroborate accusations or access to people trained in Copyright Law and Data Forensics. It seems that some officials are under the mistaken impression that when The Code is ready the law is ready for everyone, so the scope of the TCF Code should be made clear.

- **DEPENDENCIES:** The Code is practically dependent on a judgment of (a) Data Forensics and (b) Copyright Law. The TCF code must state that without these facilities the Code cannot be implemented.
- **SCOPE:** The type of ISPs the Code is suitable for must be declared upfront and I suggest that this be a conservative estimate. For example, under "Purpose: Internet Account" there is a passing reference to internet cafes and other casual use but the rest of the Code talks about "primary method" of contact which probably doesn't exist for internet cafes. The Code is well written but it is more suited to conventional ISPs and this should be more clearly stated.

B. DEFINED TERMS

"Education Notice" ...rather than infringement notice the idea of an Education Notice is a good one however the CFF suggests that a legal alternative to the alleged infringement be suggested. Eg. "You can buy this movie from mightyape.co.nz" or "you can buy this song online from iTunes, Amplifier.co.nz [...]". If ISPs get to define the words of the Education Notice

D. COMPLIANCE

Repeat Infringement

14.1. After seeing unfair resolutions by overseas ISPs -- perhaps motivated by avoiding cost and risk -- the CFF strongly agree with a Processing Fee paid to ISPs in order to allow ISPs to allocate resources to an investigation. With the reasoning that this is about encouraging thorough investigations a majority of this Processing Fee must be made available to the downstream ISP charged with the investigation.

I. NOTICES

"ensure that the primary method": For a short time the ISP XNet would send bills to a default email address (eg, something@gmail.com) but send infringement notices to the XNet provided address (eg, something@xnet.co.nz). When multiple email addresses are available we strongly suggest emailing ALL email addresses by default.

SUPPLEMENTAL Reworded Strawman Counter-Notice Procedure

If implemented would remove any respect for the judgments made and do great harm to public respect for copyright which artists benefit from.

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<http://creativecommons.org.nz/>