
Matt Vickers -Submission on the draft copyright Code of Practice for S92A

My name is Matt Vickers. I am a Business Analyst and Developer. I currently work for Shift, a web agency specialising in online marketing strategy and web design and development. I am interested in the New Technologies Amendment to the Copyright Act, because I am someone who has an interest in seeing the web survive and thrive.

Section 92A requires a Code of Practice for all ISPs, resulting in the termination of internet connections in appropriate circumstances for repeat infringers. I believe that 'in appropriate circumstances' should mean 'never' in the case of a utility, which is becoming essential to the lives of all New Zealanders (it's a mark of Government hypocrisy that this law is being bungled through at the same time as an initiative to see optic fibre to all New Zealand homes). At my place of work we conduct work for clients that have users logging in on a daily basis: newspapers, banks, government sites. To deny them access to this information is wrong, as it is, especially for the younger generation, the primary mode of access. We are also finding that the government is putting more content online and wanting to conduct less support through call centres. Again, a law like 92A is counter-productive to this. Nicholas Negroponte is giving OLPCs to children in deprived communities as he believes these children are being denied the opportunity to participate in the new connected culture. A large number of New Zealanders would rather see their phones disconnected than their internet connection; our Government would never legislate to cut off our phone lines except in the case of non-payment; that they've legislated this shows a remarkable lack of foresight.

Because the Government has not fully defined what this means in law, it falls to you to provide the definition. You have been working with Copyright holders to come up with a solution that is agreeable for copyright holders and ISPs. I have read the draft code, and you have expanded the definition of repeat infringer to meet the widest possible interpretation of the statute. That is fine. You have a process by which a copyright holder can report an infringement. That is fine too. Beyond that, the Code of Practice breaks down.

What your Code of Practice is missing is a process by which an accused copyright infringer can appeal to the courts in order to save their internet connection. When a copyright holder accuses an internet user of infringing their copyright, they are accusing them of a breach of contract and a breach of terms of use. We have a system for dealing with contract breaches under civil law: the court system. As Anthony Healey of APRA has pointed out, Entertainment Media Research found that "Seven out of ten (72%) UK music consumers would stop illegally downloading if told to do so by their ISP." I do not see how providing an appeal process that went through the courts would change that figure: it is easier for a user to stop downloading illegal music than it is to have to defend themselves in court. This law gives them a way to potentially reduce piracy by 70%: providing a method for accused copyright holders to defend themselves in court, if they choose to, will not change that figure. It merely gives them voice, which your current code denies them.

ISPs are not judges, and Copyright holders (the plaintiffs) are certainly not judges. A private adjudicator is not a judge either: the entertainment industry has powerful lobbyists and such a thing could be corrupted. Drafting a code that provides a process for issuing notices but neglecting to give a defendant the right to request an impartial crown-appointed judge, if they wish to have one, is wrong.

I request that you throw out that straw-man addendum: giving copyright holders the right to solely judge the validity of a counter-notice is a violation of natural justice, specifically "nemo iudex in causa sua", or "no man is permitted to be judge in his own cause." In addition, I would prefer that under 11, you removed 11.2 and 11.3, and all related clauses. Ideally no-one should judge the validity of an infringement except a court. Failing this, keep your process in place, but allow a defendant to escalate to a court. An ISP may be the middle-man, but that does not make them impartial. They have entangled interests with

the entertainment industry (not only business relationships, but also the threat of being sued themselves) and cannot be trusted to make impartial judgements.

The Government has placed a huge responsibility on you: and they have done so unfairly. However, they have not legislated against you directing some responsibility back to them through the courts system. If you agree that an ISP cannot be impartial, then it is only reasonable to direct proceedings back through the courts. Then you will be free to terminate user connections 'in appropriate circumstances'.

Thank you,
Matt Vickers