

## SECTION 92A REVIEW POLICY PROPOSAL DOCUMENT FOR CONSULTATION

### Introduction

This proposal is intended to provide a fair and efficient process for rights-holders (RHs<sup>1</sup>) to deal with repeat copyright infringement in the digital environment. The proposal attempts to address Internet user (subscriber), RH and internet service provider (ISP) concerns that have previously been raised with regard to section 92A of the Copyright Act 1994. During the development of this proposal, of particular focus for the Working Group and Ministry of Economic Development (MED) officials, has been to ensure subscriber access to due process in cases of alleged infringement, and to consider the role of ISPs in curbing copyright infringement that is facilitated through their networks.

We would appreciate your comments on the proposed process. Please forward submissions by **5pm Friday 7 August** to:

[copyrightact@med.govt.nz](mailto:copyrightact@med.govt.nz)

### Background

Section 92A was inserted into the Copyright Act by section 53 of the Copyright (New Technologies) Amendment Act 2008 (the Amendment Act). The majority of the Amendment Act came into force on 31 October 2008. Section 92A did not come into force. Section 92A would have required ISPs to have an account termination policy in appropriate circumstances for repeat copyright infringers.

The entry into force of section 92A was delayed on two occasions prior to its indefinite delay on 23 March 2009. Along with industry and subscriber concerns, a reason for the indefinite delay was that RHs and ISPs were unable to reach an agreement on a voluntary *ISP Copyright Code of Practice* (the Code). The Code would have provided guidance for ISPs and rights-holders on how section 92A would operate.

The Minister of Commerce, Hon Simon Power, the Minister responsible for intellectual property legislation, subsequently instructed MED officials to undertake a review of section 92A. The review was to build on information gathered during ISP and RH negotiations on the Code, and to take account of industry and subscriber concerns. It was within this context that a Working Group of intellectual property and internet law experts was convened to assist MED officials during the early stages of the policy development process. Following the Working Group process, this proposal document has been prepared to provide an opportunity for representatives of interested parties to contribute to the development of a policy to address copyright infringement in the digital environment.

---

<sup>1</sup> For the purposes of this paper, the term *rights-holder* is used in reference to a person or body of persons who is the copyright owner or prospective copyright owner or an agent for the copyright owner.

## **Working Group Approach**

MED officials prepared an initial document for discussion at the first Working Group meeting in June. The Working Group was asked to assess possible options for reform to address copyright infringement in the digital environment with particular consideration around concerns that had been raised by parties prior to the indefinite delay of section 92A.

The Working Group acknowledged there is significant copyright infringement that occurs in the digital environment, particularly through peer-to-peer file-sharing. With this in mind, the Working Group looked at the scope of section 92A and its legislative purpose which was to provide effective relief to RHs affected by digital copyright infringement and to deter future infringement.

At the first Working Group meeting in June, concerns were raised about the intended decision-making role of ISPs. Section 92A would have required ISPs to determine whether alleged copyright infringement had in fact occurred before terminating a subscriber's internet account. The main concern was that this could have led to the disconnection of a subscriber's internet account without due process. Concern was also raised as to whether internet disconnection was a proportional response to copyright infringement.

During the second and final Working Group meeting in July, discussions focussed on a revised proposal paper prepared by MED. Discussions again centred on previously raised concerns by affected parties including due process and definitional issues. The contents of this proposal paper and procedural design have been significantly influenced by input provided by the Working Group.

The proposed policy is intended to provide the basis for a revised section 92A. The proposed procedure will provide RHs with a course of action to pursue repeat online copyright infringers as an alternative to filing proceedings in the High Court. It is intended that the Copyright Tribunal will have exclusive jurisdiction over matters covered by section 92A, unless proceedings commence or have commenced in the courts. Amendment of the Copyright Act 1994 will be required to extend the jurisdiction of the Copyright Tribunal beyond matters relating to copyright licensing disputes. The proposed procedure consists of three phases which are summarised below:

### **The Proposed Approach: Summary**

#### *Phase 1- First Infringement and Cease and Desist Notice Procedure*

Where a RH considers on reasonable grounds that there has been online copyright infringement of one or more of its works, RHs may invoke the section 92A procedure by sending a *first infringement notice* to an ISP. The notice will contain sufficient details to allow the ISP to identify the subscriber

concerned. This notice must then be forwarded by the ISP to the subscriber. If there is further copyright infringement by that subscriber, a RH may send, via the ISP, a *cease and desist notice*. The subscriber will have an opportunity to reply to either notice by way of a *response notice* directly to the RH with their name and contact details attached. Upon receiving a *response notice*, a RH will be required to accept or reject it and inform the subscriber accordingly.

### *Phase 2- Obtain Copyright Tribunal Order*

Where a RH considers on reasonable grounds that there has been further (*repeat*) copyright infringement by a particular subscriber after a *cease and desist notice* has been sent, and the subscriber concerned has been provided with an opportunity to respond by way of a *response notice*, a RH may apply to the Copyright Tribunal to obtain an order requiring the ISP to provide the name and contact details of the alleged copyright infringer (the subscriber).

### *Phase 3- Copyright Tribunal*

A RH may then register an infringement complaint with the Copyright Tribunal which will ensure that the infringement complaint complies with requirements in statute/regulation. A RH may then notify the subscriber that an allegation of *repeat* copyright infringement has been lodged against them. The subscriber will have an opportunity to respond to the allegation and to elect to proceed to mediation. The Copyright Tribunal will be convened unless agreed otherwise. The Copyright Tribunal, in addition to available relief by way of damages, injunctions, account of profits or otherwise, may consider ordering a subscriber to pay a fine or an ISP to terminate the subscriber's internet account.

### **Introductory Questions**

1. Do you agree that the proposal in general terms provides for the potential to develop a fair, efficient and workable process for dealing with copyright infringement in the digital environment?
2. If you support the proposal in general, are there elements of the proposal that you believe could be significantly improved?

### **The Proposed Approach: Detailed Questions**

#### **Phase 1** – *First Infringement and Cease and Desist Notice Procedure*

- 1) Where a rights-holder (RH) considers, on reasonable grounds, that a subscriber has infringed copyright, a RH may send a first infringement notice to the subscriber's ISP.

- 2) The first infringement notice shall, as far as practicable, be in a prescribed form containing details as prescribed by regulations, including;
  - a) The RH (or their authorised agent) is entitled to copyright in the work
  - b) Copyright exists in the work based on originality<sup>2</sup>, when it was made/published, and qualification of author<sup>3</sup>
  - c) Basis for the alleged infringement<sup>4</sup>
  - d) Reasonable<sup>5</sup> evidence of infringement based on reasonable inquiries
  - e) The effect of the first infringement notice being served
  - f) A statement to the effect that infringement of copyright is actionable
  - g) Information explaining a subscriber's right to dispute alleged infringement by way of a response notice and what this process involves
  - h) Explanation of possible consequences if infringement continues and the process from here
  - i) Sufficient information for the ISP to identify the subscriber (such as an IP address)
  - j) Any other relevant information
- 3) Upon receipt of a first infringement notice, the ISP must forward the notice to the subscriber at the subscriber's current registered contact address. The mode of communicating this notice to the subscriber's address should be, unless otherwise agreed to, the same mode of communication used for any other purposes of contacting the account holder, such as for billing purposes. The RH must also be sent a notice, within a reasonable timeframe, stating that this has been done.
- 4) A subscriber will have 30 days to respond to the first notice by way of a response notice prescribed by regulations either through their ISP, or directly to the RH with their name and contact details attached. A RH will then be required to accept or reject any response notice and inform the subscriber of their decision. The justification for requiring a RH to inform a subscriber of any action taken in relation to a response notice is to ensure a subscriber understands their position in terms of the allegation of copyright infringement.

---

<sup>2</sup> Copyright Act 1994 section 14 refers

<sup>3</sup> Ibid section 18 refers

<sup>4</sup> Ibid section 16 refers

<sup>5</sup> Reasonable evidence in this instance means evidence that indicates copyright infringement has occurred based on the facts available.

- 5) After 9 months have lapsed, the first infringement notice will be deemed invalid. This means that if a RH does not send a cease and desist notice within 9 months of sending a first infringement notice, a RH will be required to begin Phase 1 again by again sending a first infringement notice. Until that time ISPs will be required to maintain records of their subscribers' alleged infringements<sup>6</sup>. An ISP will however, only be required to make this information available to a RH upon receipt of a Copyright Tribunal order or similar. A 9 month validity period for an infringement notice will allow a reasonable time for RHs to send notices on a cumulative basis (to establish repeat copyright infringement) without being overly burdensome for ISPs to maintain records of infringement. 9 months will also provide opportunity for subscribers to change infringing behaviour within a reasonable time period.
  
- 6) After 30 days have lapsed from the date of the first infringement notice being sent, provided there has been further copyright infringement, a RH may send a cease and desist notice to the subscriber via their ISP (unless a subscriber's name and contact details are already known to the RH). The process for issuing the cease and desist notice and response time will be the same as that of sending a first infringement notice. A cease and desist notice will also be valid for a period of 9 months. For the purposes of Phase 1, notices that are sent to subscribers are deemed to be received unless an ISP informs a RH otherwise.

### **Phase 1 Questions**

1. Is *reasonable* evidence of copyright infringement an appropriate threshold level for a RH to send a first infringement notice and subsequently a cease and desist notice?
2. Should there be a limit to the number of first infringement or cease and desist notices that RHs may send, and if so, in what period of time?
3. How long should first infringement and cease and desist notices be valid for?
4. Should RHs be able to allege infringement of multiple works?
5. Should a subscriber be required to supply their contact details to the RHs in a response notice?
6. Should sanctions be imposed against RHs for repeated intentional improper use of the notice procedure?
7. Do you have any further comments with regard to Phase 1 generally?

---

<sup>6</sup> This will require the use of identifiers.

## **Phase 2** – *Copyright Tribunal Order*

- 1) Phase 1 must be completed by RHs in order to proceed to Phase 2 (therefore at least 60 days must have passed after the first infringement notice has been sent).
- 2) Where a RH considers on reasonable grounds that there has been further copyright infringement by the subscriber after a first infringement and cease and desist notice have been sent (which now means there has been repeat copyright infringement), a RH may apply to the Copyright Tribunal to obtain an order requiring an ISP to provide the current name and contact details of the alleged copyright infringer (the subscriber) and any other relevant information. It is intended that the Copyright Tribunal order procedure is completed online. The order will be required unless a subscriber has already provided their name and contact details as required when submitting a response notice.
  - The level of evidence required to obtain an order should be based upon proper inquiry and a RH must have *reasonable grounds to believe* that infringement has occurred.
  - In addition to information already provided by the RH to the ISP in the first infringement notice and cease and desist notice, the following should also be attached:
    - a) Basis that the alleged infringer is a *repeat infringer*
    - b) Reasonable evidence of continued (therefore repeat) infringement based on reasonable inquiries
    - c) Any other relevant information
- 3) Upon being served a Copyright Tribunal order and providing a subscriber's contact details to a RH, the ISP must inform the subscriber within a reasonable timeframe.
- 4) The RH will be required to report back to the subscriber informing them of what action has been taken, if any, subsequent to obtaining the Copyright Tribunal order. Where contact details of a subscriber have been obtained, either through the response notice process, or through the Copyright Tribunal order procedure, a RH must not use or disclose that information for purposes other than taking action against the subscriber, and must destroy the information if the RH decides against proceeding further.

## **Phase 2 Questions**

1. Should the Copyright Tribunal be given authority to order an ISP to provide a subscriber's contact details and any further information requested about the alleged infringer? If not, who should have this authority?
2. The level of evidence required for a RH to obtain a Copyright Tribunal order is based on the equivalent of obtaining a search warrant. Are there any reasons to depart from this threshold level?
3. Should repeat copyright infringement extend to infringement in a work or works owned by different RHs?
4. Do you have further comments or are there any other issues that need to be addressed in this section?

## **Phase 3** –*Copyright Tribunal*

- 1) Phase 1 must be completed before proceeding to Phase 3.
- 2) If a RH selects this process it agrees to be bound by the decision of the Tribunal. Either party, however, may appeal to the High Court.
- 3) Online registration of RH complaint to the Copyright Tribunal to be made in a prescribed form containing information in 4) and any other relevant information.
- 4) The RH will need to establish that:
  - The RH or their authorised agent is entitled to copyright in the work(s)
  - Copyright exists in the work based on originality<sup>7</sup>, when it was made/published, and qualification of author<sup>8</sup>
  - Reasonable evidence has been provided of repeat copyright infringement based on the balance of probabilities<sup>9</sup>
  - The alleged infringer is a repeat infringer
  - Phase 1 has been complied with
- 5) The RH is to supply a prescribed filing fee (set at a cost-recovery basis).
- 6) The Tribunal will ensure the complaint complies with procedure, i.e. that the complaint is in the prescribed form where practicable and that Phase 1 has been completed before allowing the RH to serve the complaint notice on the respondent (subscriber).

---

<sup>7</sup> Copyright Act 1994 section 14 refers

<sup>8</sup> Ibid section 18 refers

<sup>9</sup> The balance of probabilities threshold level in this instance means that it is more than likely that repeat copyright infringement has occurred.

- 7) The complainant (RH) may then serve the complaint notice on the respondent (subscriber). The complaint notice must outline the available options, including mediation. The process of checking that the complaint is valid and service of the complaint notice should be done within 14 days of the Copyright Tribunal receiving the complaint notice.
- 8) The respondent will be advised of the available options, including mediation, and will have 14 days to respond. The Copyright Tribunal will be convened unless agreed otherwise. If the respondent does not respond within the designated timeframe, the RH may convene the Copyright Tribunal.

9) **Mediation**

- A Mediator will be appointed from the designated list of mediators
  - A possible outcome may be that parties negotiate a licence agreement, or terms of use agreement
  - Costs for mediation shall be shared between parties unless there are special circumstances
  - Mediation will provide an opportunity for RH to explain that there is infringement occurring. The subscriber (account holder) may be a small business or a domestic household who has multiple subscribers on one IP address which would make identification of the actual infringer difficult and termination perhaps unreasonable. RH may suggest updating software to monitor subscribers (in the case of a small business)
- 10) If mediation is unsuccessful or the subscriber does not respond to the served infringement notice, the **Copyright Tribunal is convened.**
  - 11) The Copyright Tribunal may consider, in addition to available relief by way of damages, injunctions, account of profits or otherwise, ordering a subscriber to pay a fine or an ISP to terminate the subscriber's internet account. Any information obtained by RHs during this process may only be used for the purposes of these proceedings.

### **Phase 3 Questions**

1. Is mediation an appropriate step and is it an effective use of resources?
2. How can the complaint registration process with the Copyright Tribunal be streamlined effectively, i.e. all communication online?
3. Is reasonable evidence of repeat copyright infringement (to be proved on the balance of probabilities during proceedings) an appropriate threshold level for a RH to register an allegation of infringement with the Copyright Tribunal?
5. What remedies should be available to the Copyright Tribunal? In particular, should the Copyright Tribunal be able to order a fine to be paid or an account to be terminated?
6. With regard to account termination, what is an appropriate period of time for disconnection to last?
7. Should parties to a dispute be entitled to appeal and if so, should this be to the High Court or to an appeals section of the Copyright Tribunal?
8. How should costs be assigned in Phase 3?
9. Do you have any further comments with regard to Phase 3 generally?

### **Conclusion**

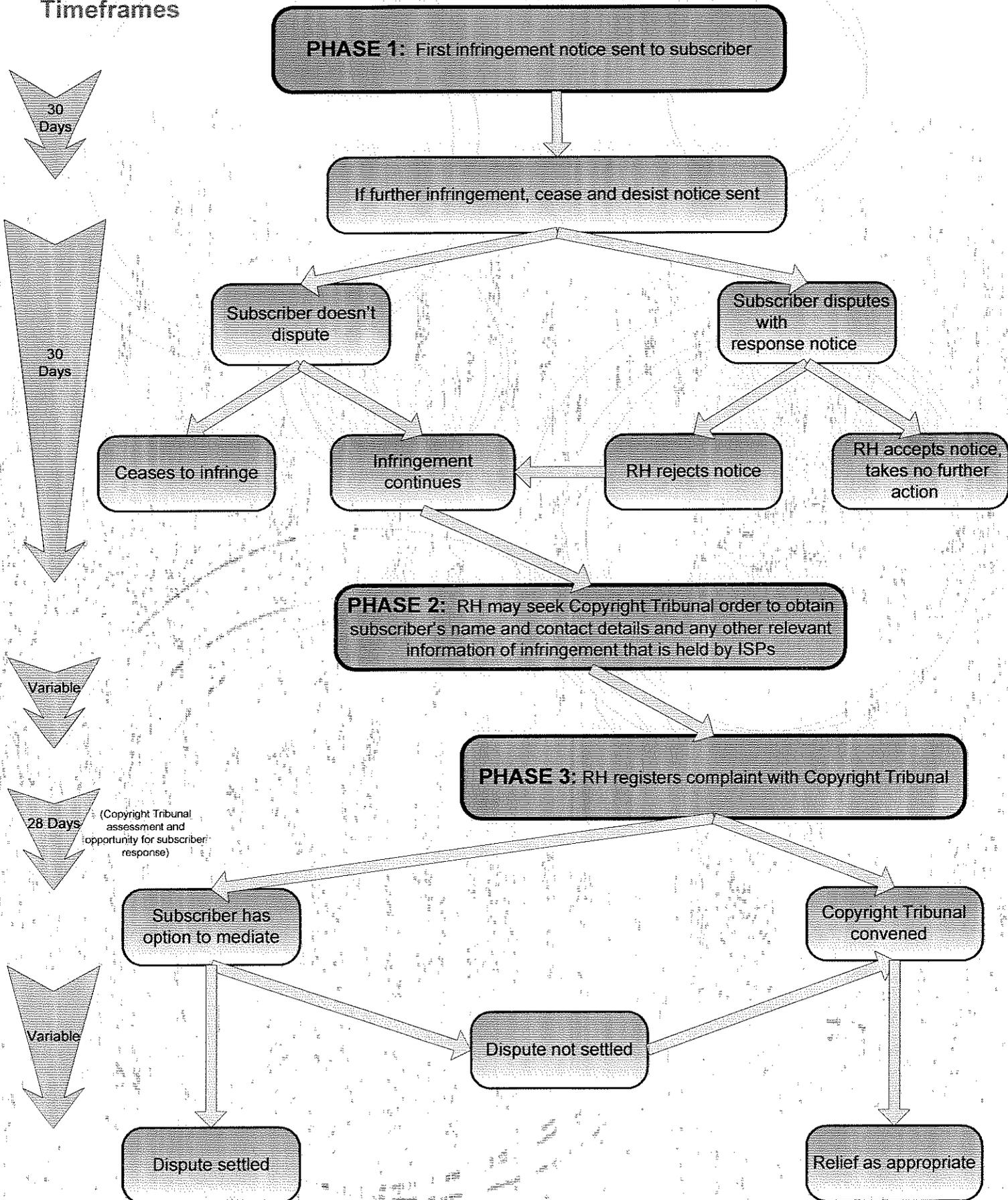
This proposal document has been drafted to direct the scope of the section 92A review. We would appreciate your views on the specific questions that have been posed as well as your opinions on the proposed process generally. The deadline for submissions is **5pm Friday 7 August**.

Please forward submissions to:

[copyrightact@med.govt.nz](mailto:copyrightact@med.govt.nz)

# Section 92A Process Diagram

Indicative  
Timeframes



**PHASE 1:** First infringement notice sent to subscriber

If further infringement, cease and desist notice sent

Subscriber doesn't dispute

Subscriber disputes with response notice

Ceases to infringe

Infringement continues

RH rejects notice

RH accepts notice, takes no further action

**PHASE 2:** RH may seek Copyright Tribunal order to obtain subscriber's name and contact details and any other relevant information of infringement that is held by ISPs

**PHASE 3:** RH registers complaint with Copyright Tribunal

Subscriber has option to mediate

Copyright Tribunal convened

Dispute settled

Dispute not settled

Relief as appropriate