



COPYRIGHT: REPEAT INFRINGER TERMINATION POLICY

Introduction

1. Section 92A of the Copyright Act 1994 (as introduced by the Copyright (New Technologies) Amendment Act 2008) (the Act) is scheduled to come into force on 28 February 2009.
2. The section states:

An Internet service provider must adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the account with that Internet service provider of a repeat infringer.
3. The Telecommunications Carriers' Forum is currently developing a code of practice, which, if adopted, will provide ISPs with a policy to comply with section 92A (see <http://tinyurl.com/93sfmj>). However, it is possible that that code will not be ready for signature by ISPs until after the 28 February 2009 deadline.
4. Technically therefore, ISPs¹ will need to have a policy in place to comply with section 92A in advance of the TCF code being available.
5. This memo provides a suggestion as to how to approach that situation. Please note that ISPs must make their own decision as to how to comply with section 92A and may not rely on this memo as supporting any such decision. Lowndes Jordan will not be liable for any such reliance and this note is provided solely to enable ISPs to understand the issues, without making any recommendation as to how they should deal with them. Each ISP's circumstances will differ and separate legal advice should be obtained.

Making a decision on section 92A

6. Check what your terms of use/acceptable use policies say. You may already have a policy which effectively complies with the requirement to *adopt [...] a policy* under section 92A. For example many ISPs already have in their standard terms a prohibition on use of their services to infringe copyright or otherwise engage in illegal activity and an overriding right to suspend or terminate services for any breach of that prohibition.
7. If you do have such terms already in place then you need to decide whether they need alteration to comply more specifically with section 92A.
8. If you do not have any such terms in place already, then, in order to comply with section 92A, you will need to introduce them. In doing so, you will need to abide by whatever regime you have for making changes to your contract or relationship with the customer whose internet account might be affected. For example, your existing terms may allow you to make a change by publishing that change on your website with a certain amount of notice.
9. Whilst your policy must be part of the contract or other relationship you have with your customer (so that you have the right to terminate their internet account), the Act does not require that that policy be published. Customer relations would suggest that it is but that is up to you.

¹ Remember that the definition of ISP under the Act (to paraphrase it) includes anyone who provides internet connectivity to anyone else or who hosts material on their own or someone else's website.

10. So, provided you have an overriding right to terminate, your policy on this issue might simply be that you will:

*terminate the internet accounts of repeat copyright infringers in appropriate circumstances.*²

11. Whatever your policy may be, the real question (and the area in which there is likely to be most focus by rightsholders who send notices alleging infringement) is whether you have:

adopted and reasonably implemented a policy [emphasis added]

12. Anyone can have a policy but is it reasonably implemented so that internet accounts are terminated in appropriate circumstances? Unfortunately, the Act gives no guidance as to what appropriate circumstances might be or what a reasonable implementation is.
13. This is where, in the absence of the guidance that the TCF code will give, you as an ISP must make up your own mind as to what approach you will take.
14. In Australia, under a provision which is worded almost exactly the same as our section 92A, the ISP community by and large has decided that it is not appropriate to terminate internet accounts on the basis of allegation only and that a Court order is required before they will act. Notices from rightsholders alleging infringement have been referred to the Police. As a result, 34 film and television companies are suing one significant ISP in Australia for failing to take appropriate action.
15. Other ISPs in some countries have looked at adopting variants of the so-called *three strikes and you're out* policy advocated by rightsholding organisations such as the Recording Industry Association of America and the Motion Picture Association (of which RIANZ and NZFACT respectively are affiliates here in New Zealand).
16. The TCF's draft code is expected to be out for public consultation in mid to late January 2009. Therefore, another option might be for you to run your policy implementation in general compliance with the principles and procedures set out in the draft code, pending that being available for signature.
17. So, for example, if you as an ISP had a policy along the lines of that set out in paragraph 10 above, you might require a certain level of evidence from a person submitting an allegation of infringement, before you are willing to act on that allegation. Whilst notices alleging allegation may well be correct and the repeated infringements complained of may have taken place, the notices themselves are only allegations. There have certainly been reported instances overseas of such processes being abused for ulterior motives or of notices being incorrect. On the other hand, evidence from overseas prosecutions suggests that peer to peer networks, whilst being a very useful technical development of the internet, are being used for repeat infringement. It would be dangerous for you to simply ignore that possibility.
18. One final comment – this note deals solely with section 92A of the Act. Under section 92C of the Act, you as an ISP are required to take down or disable access to material which you *know or have reason to believe* infringes copyright. This must be done as soon as possible after you become aware of infringing material. Since section 92C is already in force, you as an ISP are already required to operate this so-called *notice and takedown* procedure in addition to whatever you decide as a policy under section 92A.

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² This may seem a little unhelpful in terms of a policy but, in fact, in response to similar US legal requirements, US ISPs typically publish policies such as this (for example, YouTube's policy states "YouTube will terminate a User's access to its Website if, under appropriate circumstances, they are determined to be a repeat infringer").