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Ministry of Economic Development
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New Zealand

Send Via Email: copyrightact@med.govt.nz

SPADA'S SUBMISSION on Section 92a Review Policy Proposal Document for Consultation

Preliminary

1. The Screen Production and Development Association ([SPADA](#)) welcomes the opportunity to respond to the Ministry of Economic Development's Section 92a Review Policy Proposal document. This is a key policy issue for the screen production industry. SPADA is keenly following the development of this policy, and supports the intention of Section 92a, which is to implement a *workable* process to uphold copyright in an online environment.
2. Formed in 1982, SPADA is a non-profit, membership-based organisation with three full-time staff.
3. SPADA represents the interests of producers and production companies on all issues affecting the commercial and creative aspects of independent screen production in New Zealand.

4. SPADA's contact person for this submission is:

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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?**

Fairness

While the proposal should produce a fair *outcome*, the process is not likely to be fair to the right holders or the users. The proposed method is overcomplicated and, with the inclusion of a mediator as well as the Copyright Tribunal, protracted. This will result in higher costs for the right holder.

Also, given previous concerns regarding privacy, we believe it is fairer to the user for communication to continue through the ISP until the involvement of the Copyright Tribunal.

Efficiency

Phase 1 (*First Infringement and Cease and Desist Notice Procedure*) of the proposal is efficient; however, Phase 2 (*Obtain Copyright Tribunal Order*) and 3 (*Copyright Tribunal*) are not.

We do not think the inclusion of both a mediator and the Tribunal is necessary or efficient. In addition, there is potential for swamping of the system through large numbers of requests through the Copyright Tribunal for user details as well many instances of the tribunal being convened, and perhaps unnecessarily, given there is no suggested process for non-response from a user.

Workability

The first and second phases are workable, however, the third phase appears overly complicated and less user-friendly than the current practice of taking court action. In addition, the change from previous proposals that now limits the involvement of the ISP makes the proposal largely unworkable, as it appears to rely on the user repeating the infringement to a single right holder – rather than allowing an infringer to be identified as a 'repeat' infringer from infringing on different right holders works.

2. If you support the proposal in general, are there elements of the proposal that you believe could be significantly improved?

To retain privacy and to identify repeat infringers, we recommend the communication should remain between the ISP and the user, up to the point of involvement by the Tribunal.

We recommend the introduction of a standard penalty for infringers who do not respond to any of the notices to avoid an overload on the system, which would result in significant costs and delays to the Copyright Tribunal and the right holders.

Phase 1 Questions

1. Is reasonable evidence of copyright infringement and appropriate level for a right holder to send a first infringement notice and subsequently a cease and desist notice?

Yes. There is little alternative to this. Conclusive evidence can only be proven through court action and while the process allows for dispute of the infringement by the user, this should not be an issue. If the process were to include a 'preapproved right holder' status as was proposed in the previous code, there could be standards agreed for such evidence.

2. Should there be a limit to the number of first infringement or cease and desist notices that right holders may send and if so in what period of time?

It is unclear whether the question pertains to overall number of infringement notices or notices to a single user. SPADA believes however that either case restriction would be impractical and unfair due to the following:

- 2.1 The right holder does not know the identity of the infringer. With dynamic IP addresses used in some cases it would not be possible for the right holder to know that the different alleged infringements were from a single user.
- 2.2 A right holder may have more than one piece of copyright material that is allegedly being infringed. Provision of a notice for one piece should not restrict issue of notice for a second.
- 2.3 While there is unlimited infringement there should not be limits on educating users about infringement, nor should there be limitations on numbers of attempts to remedy infringing behaviour.

3. How long should first infringement and cease and desist notices be valid for?

The proposed period of nine months seems fair.

4. Should right holders be able to allege infringement of multiple works?

This question is unclear. Does it refer to the right to allege infringement of multiple works *in one notice*; or the right for a single right holder to allege infringement of more than one of his/her works?

If the intent of the question is to establish if it is desirable to have multiple infringements on one notice, then we agree that this as a means of ensuring the process is efficient.

If it refers to a single right holder alleging infringement of more than one work, then we believe that it is critical that this be their right. To restrict this would undermine the whole basis of copyright. Damage occurs to a right holder with infringement of each work; therefore it is only fair that remedy is able to be sought for infringement of each work. In addition, there is very little likelihood of a repeat offender infringing by downloading the same material more than once (i.e once downloaded the infringer has the material on their hard drive).

5. Should a subscriber be required to provide their contact details to the right holders in a response notice?

The proposed process would fall over without this step; however our preference is that the communication between the right holder and the user be undertaken through the ISP up to the point of involvement by the Tribunal, unless the subscriber is claiming authorised use, in which case the identity of the subscriber is required to verify this.

6. Should sanctions be imposed against a right holder for repeated improper use of the notice provision?

There may be some basis for consideration of a process similar to that used by the Broadcasting Standards Authority for identifying and dealing with 'trivial and vexatious' complaints.

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 would have the authority?

We believe the Copyright Tribunal should have the authority to order an ISP to provide as subscriber's contact details and any other necessary information. However, the communication should involve the ISP until such time as Tribunal involvement to alleviate any privacy concerns about this and to ensure that repeat infringers are identified.

2. The level of evidence required for a right holder 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?

No.

3. Should repeat copyright infringement extend to infringement in a work or works owned by different right holders?

Yes.

This is a key point, and one which is particularly pertinent in cases of infringement on domestic film and television material. To allow the definition of “repeat infringer” to only apply to a person repeatedly infringing against a single right holder does not support the intention of Section 92a; which is to implement a workable process to uphold copyright in an online environment. For example, if a right holder has only a single piece of copyright material, this restriction would not allow them any protection from copyright infringement.

Phase 3 – Copyright Tribunal Order

1. Is mediation an appropriate step and is it an effective use of resources?

Whilst SPADA understands why the mediation step has been inserted, it believes it is preferable to remove this step; and instead resource the Copyright Tribunal effectively to deal with mediation.

We believe the inclusion of both mediation and the Copyright Tribunal process is problematic and will prolong the process.

2. Is reasonable evidence of repeat copyright infringement (to be proved on the balance of probabilities during proceedings) an appropriate threshold level for a right holder to register an allegation of infringement with the Copyright Tribunal?

Yes.

3. What remedies should be available to the Copyright Tribunal? In particular, should the Tribunal be able to order a fine to be paid or an account to be terminated?

We believe the Copyright Tribunal should be empowered with the right to order the termination of the Internet account. Empowering the Copyright Tribunal in this way will ensure the process is taken seriously; and sends a clear message to infringers that there will be severe consequences if earlier stages of the process are ignored.

4. With regard to account termination, what is an appropriate period of time for disconnection to last?

This should be assessed on a case by case basis by the Copyright Tribunal; with the period of time for disconnection reflecting the magnitude of the infringements.

5. 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?

To ensure costs and efficiencies are preserved, we support an appeals section of the Copyright Tribunal. With appeals restricted to a perceived error of fact in a Tribunal judgement.

6. How should costs be assigned in Phase 3?

Each party should bear their own costs.

Conclusion

SPADA would once again like to thank MED for the opportunity to comment on Section 92a. This is a key policy issue for the screen production industry. SPADA is keenly following the development of this policy, and supports the intention of Section 92a, which is to implement a workable process to uphold copyright in an online environment. Therefore, please do not hesitate to contact me if you would like to discuss any aspects of this submission on +64 4 939 6934.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Penelope Borland'. The signature is fluid and cursive, with the first name 'Penelope' and last name 'Borland' clearly distinguishable.

Penelope Borland
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SPADA