



Analysis of Copyright (Infringing File Sharing) Amendment Bill
(Prepared for InternetNZ by Rick Shera, Lowndes Jordan)

Contents

Introduction	1
International context	2
Summary of International Developments	4
Main Issues	5
Section by Section analysis of the Bill	6
Definitions	6
ISP	6
Internet Account	6
File sharing	6
Infringement	8
Operative provisions of the Bill	8
Multiple copyright owners	8
Notice timing	10
ISP unable to match allegation to IP address	10
Evidence collection period too short	10
ISP costs	11
Form of notices	11
Expiry of Infringement Notices	11
Account holder challenge	12
Concurrent jurisdiction of Copyright Tribunal and District Court	13
Material to be provided by copyright owner	13
Tribunal procedure	14
Account holder liability for actions of others	14
Termination	15
ISP obligations	18

Introduction

1. The massive losses claimed by the corporate side of the music and film industries to have been caused by infringing file sharing, have been doubted by many, including the US Government.¹ However, it is equally clear that copyright infringement is taking place online using the p2p protocol. For large scale commercial infringement, the Courts remain the best avenue for copyright owners to seek redress. However, for smaller scale infringement, copyright owners argue that the Court process is not quick enough and is too costly.
2. It has been recognised by all involved that no system will stop infringement altogether. Steps which increase respect for the creativity of others are key. But, because of the overly aggressive strategies adopted to date by certain copyright owners,² it may now take some time to reverse the scepticism that those strategies have created as to whether copyright protection is useful or necessary at all.
3. Education is generally accepted to be the most effective measure. It is therefore important not to try to implement a system aimed at die hard infringers, since that will fail. The cost and adverse consequences of doing so will therefore outweigh any benefit.
4. Instead any system should focus on education and on encouraging users who perhaps see

¹ The US Federal General Accountability Office has cast significant doubt on the numbers asserted in various reports to be represent infringement losses - see <http://www.gao.gov/new.items/d10423.pdf>

² The Recording Industry Association of America (RIAA) last year decided that suing individual users was creating a backlash out of proportion to the benefit in doing so and so decided not to continue that strategy. However, in recent months a new group has launched proceedings against thousands of unnamed "John Does" – see <http://thresq.hollywoodreporter.com/2010/05/hurt-locker-producer-to-sue-pirates.html>

infringement as socially acceptable but would likely modify their behaviour. In this context it is revealing to find that the New Zealand Federation Against Copyright Theft's (NZFACT) own figures indicate that 70% of New Zealanders would stop infringement if they were sent an educational notice, whereas only 61% would respond in the same way if threatened with disconnection of their internet access.³

5. It is for these reasons that InternetNZ favours a notice and notice system (as do other stakeholders such as the Telecommunications Carriers' Forum). The incremental benefit in adding penalties to a notice and notice system just does not justify the massive increase in complexity and therefore cost. Conversely, only proper recourse to due process and natural justice can really give any confidence that complex copyright infringement issues will be decided correctly. Copyright questions are far more complex than, say, domain name disputes, where a fast track *on the papers* penalty system has worked reasonably well.
6. If, despite these concerns, a process is required to provide copyright owners with a remedy, we must ensure that the remedy is proportionate and that the process carries with it the requisite amount of due process and protection of user privacy. It is in this context that the Copyright (Infringing File Sharing) Amendment Bill⁴ seeks to provide a balance. A mark-up of the changes that the Bill would make to the current Copyright Act 1994 is included with this paper.
7. As so called graduated response systems go, the system proposed by the Bill provides a reasonable balance – that is apart from termination as a remedy, which is disproportionate and would need substantial change even if it were to be included (which it should not).

International context

8. The Bill provides a model for New Zealand and which is also being looked at by other countries facing the same balancing act. This is very much an international discussion. A comparison to other regimes which have been implemented or which are proposed in other countries is therefore relevant.
9. **US** - In the US, copyright owners have attempted to suggest that they have reached or are about to reach agreement on a graduated response regime with ISPs. Whilst there may be isolated instances of ISPs adopting such an approach, there is no known widespread agreement, despite continued copyright owner pressure. A useful outline of the current state of play in the US is in a March 2010 letter from AT&T, one of the World's largest ISPs, to Victoria Espinel, the US Presidential IP Enforcement Co-ordinator.⁵ Apart from termination as a remedy, the New Zealand proposals reflect AT&T's suggestion of best practice.
10. **Canada** – Over the past few years, Canada has attempted to introduce new law to cater for the digital environment. However, vagaries of the Canadian system have meant that the proposed laws have lapsed with changes of Government. Reports are that another attempt will be made soon.⁶
11. **Australia** – As required under clause 29(b)(iv)(a) of its May 2004 Free Trade Agreement with the US,⁷ Australia implemented a full US style Digital Millennium Copyright Act (DMCA) regime.
12. In a direct copy of DMCA section 512(i)(1)(A),⁸ the Australian Copyright Act 1968 was therefore amended to provide that for an ISP to retain its safe harbour from liability for online copyright infringement, it:

³ Press released issued by NZFACT on 20 October 2009.

⁴ <http://legislation.govt.nz/bill/government/2010/0119/8.0/DLM2764312.html>

⁵ see <http://attpublicpolicy.com/wp-content/uploads/ATT-Comments-for-Joint-Strategic-Plan-3-24-10.pdf>

⁶ <http://www.globalnational.com/technology/Copyright+bill+coming+this+spring+heritage+minister/2922215/story.html>

⁷ <http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text>

⁸ <http://www.copyright.gov/title17/92chap5.html#512>

*... must adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers.*⁹

13. Since 2004, ISPs and copyright owner organisations (the latter represented by the Australian Federation Against Copyright Theft (AFACT)), have become increasingly entrenched in their positions respectively against and for a three strikes style repeat infringer regime. Codes have been discussed but have not progressed and positions have been publicly flagged throughout.¹⁰ These arguments culminated in the iiNet case heard in 2009, for which a decision was handed down in February 2010.¹¹ The main finding in that decision was that iiNet had not authorised copyright infringement by its customers who had used BitTorrent to download infringing films and TV shows. However, Cowdroy J, in a detailed judgement on all aspects of iiNet's activities, also cast doubt on whether a three strikes regime without due process would be adequate for the purposes of section 116AH above.
14. AFACT has lodged an appeal in the case (to be heard in August 2010) and is also publicly pressuring the Australian Government to introduce new law to address the situation (using New Zealand as an example).¹²
15. France – The HADOPI regime, a form of “three strikes” adopted last year in France, is a far more regulated solution. It creates a centralised Government body, Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits sur Internet, to investigate and respond to complaints of infringement. That body may impose sanctions including 2-12 months suspension of a user from all internet access – not just with the ISP they were with when they allegedly infringed, but with all ISPs. How a suspension across all ISPs is to be enforced is unknown. Other problems with the French solution include: the lack of any real ability for a user to challenge the evidence presented by a copyright owner or the findings of the HADOPI itself, lack of privacy protection of alleged infringers and the disproportionality of a complete ban of internet access. It is probably too soon to draw any conclusions as to whether HADOPI is working but an academic study seems to suggest that it may not be.¹³
16. Italy - In what appears to be a similar case to iiNet, it has been reported that Telecom Italy has successfully resisted APAV's (Italy's equivalent of NZFACT/AFACT) attempt to make it liable for p2p infringement by its customers and responsible for implementing sanctions against them. In an ironic twist, it is reported that the only order that APAV has obtained is that the ISP must send notices it receives from copyright owners to the local prosecutor, which is what iiNet was doing when it was unsuccessfully sued.¹⁴
17. UK – Although accompanied by similar public outcry to that experienced with New Zealand's s92A, in part because of the impending general election, the UK's Digital Economy Bill was rushed into law in March 2010.¹⁵ It provides for a notice and notice process but with the threat of a possible three strikes complete internet access termination regime to be introduced later by direction from the UK Government to OFCOM, the UK communications industry regulator. It also contains provisions enabling copyright owners to obtain ISPs' customer details and obtain injunctions directly against ISPs to block access.¹⁶ Now that the

⁹ s116AH - http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s116ah.html. This then shows the genesis of the infamous New Zealand section 92A. Interestingly, in its original iteration in the Copyright (New Technologies) Amendment Bill, when that Bill was first introduced in December 2006, section 92A was proposed in the same way, as a pre-condition to an ISP having a safe harbour. However, when section 92A was re-introduced by way of supplementary order paper on April Fools day 2008, a little over a week before the Bill was passed (http://www.parliament.nz/en-NZ/PB/Legislation/SOPs/5/a/7/48DBHOH_SOP1090_1-Copyright-New-Technologies-Amendment-Bill.htm) it had become a more onerous positive obligation on ISPs to comply with that vague requirement.

¹⁰ See for example, IIA's pointed response to AFACT and others in April 2007

http://www.iaa.net.au/images/stories/letter_to_mipi_april07fnl.pdf

¹¹ *Roadshow Films Pty Ltd v iiNet Limited (includes summary)* (No. 3) [2010] FCA 24 (4 February 2010)

<http://www.austlii.edu.au/au/cases/cth/FCA/2010/24.html>

¹² <http://www.theaustralian.com.au/business/media/canberra-urged-to-join-net-fightback/story-e6frg996-1225855218786>

¹³ <http://arstechnica.com/tech-policy/news/2010/03/piracy-up-in-france-after-tough-three-strikes-law-passed.ars>

¹⁴ http://torrentfreak.com/italian-isps-ruled-not-responsible-for-file-sharing-customers-100420/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Torrentfreak+%28Torrentfreak%29&asid=03cabdde

¹⁵ <http://www.publications.parliament.uk/pa/cm200910/cmbills/089/10089.i-iii.html>

¹⁶ A brief summary of the final changes to the law can be found here - <http://paidcontent.co.uk/article/419-digital->

Liberal Democrats, who campaigned against internet termination as a remedy, are in coalition with the Conservatives, there may be some hope that the notice and notice system now in place will not be extended further.

18. **Ireland** – Eircom, Ireland's largest ISP, was sued by EMI and others for copyright infringement in the same way that iiNet was in Australia. During the hearing of the case, the parties settled, reportedly on the basis that Eircom will operate a three strikes repeat infringer termination regime, with no recourse to Courts. Apparently, the settlement will not be implemented unless other Irish ISPs also agree. To that end, BT and UPC, other major Irish ISPs, are being sued also with the case due to start on 10 June.
19. In the meantime, the Court has held that implementing the settlement arrangement will not contravene the privacy requirements of the European Data Directive as reflected in Irish law.¹⁷ It is interesting to note the rose coloured spectacles through which the Irish Judge views copyright owners compared to the more searching analysis of Cowdroy J in the iiNet case.
20. **European Union** - More generally in Europe, after protracted debate, the Telecoms Directive was passed by the European Parliament with the addition of Annex 1. Whilst not specifically requiring judicial consideration of any decision to terminate internet access, it does require adequate due process.¹⁸
21. **Korea** – Korea has had an archetypical three strikes repeat infringer law running for some time. On receipt of 3 allegations of infringement, an ISP is required to suspend internet access for 6 months. Its safe harbour protection from incurring liability itself is also conditional on taking technical measures to prevent infringement and on not knowingly transmitting or hosting infringing material. A user may challenge the copyright owner allegations(s) but only after the ISP has imposed a sanction and the user must then prove that their activity was not infringing - see part VI of a presentation by Chang Beom Yi of the Korean Internet and Security Agency (KISA) to the Korea Australia New Zealand Broadband summit November 2009, New Zealand at www.kanz2009.co.nz.
22. **Japan** – Japan has apparently implemented a three strikes regime similar to that of Korea by private agreement between ISP organisations and copyright owners.¹⁹
23. **ACTA** – Following international pressure (particularly the Wellington Declaration)²⁰ the official text of the latest draft of the Anti-Counterfeiting Trade Agreement (to which New Zealand would be a signatory) was made public after the last round of negotiations in Wellington.²¹ The latest text seems to retreat from termination as a default remedy. However, it is clearly still on the agenda.
24. Almost more concerning is the threat to introduce the US concept of *inducement* as a standard for copyright infringement by ISPs. This is then used a stalking horse to maintain ISP safe harbours but only if ISPs agree to implement strong graduated response systems. More intrusive access to customer details and a stronger injunction regime are also mooted in the latest draft. If proposals suggested in the current draft agreement were to be accepted by New Zealand, the Bill would not go far enough and further changes would be required to the Copyright Act.

Summary of International Developments

25. Following early adoption, or proposed adoption, of a three strikes regime without due process,

[economy-bill-quick-guide-to-all-45-measures/](http://www.economy.govt.nz/economy-bill-quick-guide-to-all-45-measures/).

¹⁷ *EMI Records & Ors -v- Eircom Ltd* [2010] IEHC 108

<http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/7e52f4a2660d8840802577070035082f?OpenDocument>

¹⁸ <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/513&format=HTML&aged=0&language=EN&guiLanguage=fr>

¹⁹ see <http://blogs.zdnet.com/Ou/?p=1063>

²⁰ <http://publicacta.org.nz/wp-content/uploads/2010/04/WgtnDeclPetition.pdf>

²¹ http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf

in a number of countries, it is clear that the adverse consequences of such regimes are now better understood, not just by internet activists but by Governments themselves. As public scrutiny has been applied, as doubt has been raised about inflated loss numbers used by copyright owners and as it has come to be realised how important internet connectivity is, Governments have started to retreat from a three strikes model.

26. In a recent survey conducted in 26 countries, almost 80% of the 28,000 people surveyed agreed that internet access should be a fundamental right,²² echoing the comments of then Minister Judith Tizard in New Zealand.²³ The European Parliament's addition of Annex 1 to its Telecoms package and the push back in the ACTA negotiations are strong evidence of that.
27. Korea's law and Japanese ISPs' and Eircom's respective agreements, represent a high water mark in terms of copyright owner freedom to make allegations leading to termination of internet access without recourse to Courts. France (and, if it is adopted, UK's) termination of all internet access is draconian and seems unworkable (although there is a small degree of due process involved). Overall however, these regimes must now be seen to be out of step. It is in this context that we need to ensure that New Zealand does not adopt what has already become an outdated law model.

Main Issues

28. The main issue with the New Zealand proposals is that termination is still included, since it is a disproportionate remedy for copyright infringement. Even if termination were to remain (which it should not), it would need significant change (see paragraphs 76 to 87 below). In principle, if there is to be a remedial system rather than pure notice and notice, the balance of the Bill is acceptable. However, as was seen with the Telecommunication Carrier's attempt to prepare a repeat infringer code, the issues are complex. There are therefore some areas that require change.
29. The main issues, apart from removal of termination, that need to be addressed, are:
 - 29.1 The definition of ISP, whilst better confined than it was, will still catch entities that should not be classed as ISPs (see paragraphs 30 to 35 below).
 - 29.2 The critical definition of file sharing is too wide (see paragraphs 36 to 43 below).
 - 29.3 The due process in the new regime highlights the unwarranted lack of due process in the existing section 92C regime. The opportunity should now be taken to redress that inconsistency especially given the evidence that alleged infringers are shifting from p2p to file locker type services (see paragraph 38 below).
 - 29.4 The burden put on ISPs in having to run concurrent processes for each copyright owner will add significant cost to ISP services, resulting in a significant increase in the per infringement notice cost payable by copyright owners. It may also cause confusion (see paragraphs 46 to 48 below).
 - 29.5 The process by which account holders are able to challenge allegations of infringement is inadequate (see paragraph 62 below).
 - 29.6 Account holders are still to be held liable for the actions of other users even where they have no control over what those users do when using that account and in circumstances where they do not have a relationship which justifies such liability (see paragraphs 74 and 75 below).
 - 29.7 The standards and procedures by which the Copyright Tribunal and the Court will judge whether or not there has been infringement are ill defined and protection for alleged infringers need to be strengthened (see paragraphs 68 to 73 and paragraphs 86 and 87

²² http://www.globescan.com/news_archives/bbc2010_internet/

²³ <http://computerworld.co.nz/news.nsf/news/6DC929097F31FF8ECC2574B8006D45D8>

below).

29.8 In addition, there are various technical issues that need to be addressed to make the regime workable.

Section by Section analysis of the Bill

Definitions

ISP

30. It will be confusing to have two different definitions, side by side, for *Internet Service Provider*. In any case, the definition used for the purposes of the new repeat infringer regime in sections 122B-122R needs to change and that may influence the name itself.
31. As noted in the explanatory note to the Bill under the heading *ISP Definition* (p4), the intention is to catch only traditional ISPs and exclude universities, libraries, businesses and the like who are not in the ISP business. The definition goes some way towards this but it may still be argued that a university or library that charges for internet access is caught and that should not be the case. Given that the entire focus of the new regime is on infringing file sharing attributable to an IP address, it would be preferable to define an ISP by reference to that activity.
32. If this is not done, it is also possible for a situation to arise where a business is both an ISP and an account holder, which would then lead to the odd situation where it is supposed to give infringement notices to itself. For example, a university that charges for internet access can be said to be an ISP. It is also of course an account holder. There is obviously no need for the university to be giving itself notices. What is needed therefore is a clear and unambiguous distinction between an ISP and an account holder.
33. It is suggested therefore that the name *ISP or Internet service provider* in section 122A be changed to *IP Provider*. In addition, to make it clear that the business referred to is an ISP business, remove the second ambiguous *that* at the start of the definition and change the definition so it reads something like:

means a person that operates a business where that business is not merely incidental to another business or activity and... .

34. Change subparagraph (a) of the definition to read:

offers the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, via an IP address allocated by the IP Provider to the user, of material of the user's choosing

Internet Account

35. This also ties in with a suggested remedy to another issue. In New Zealand, many ISPs are also telecommunication companies and bundle voice and data services together on the one plan. If termination is to remain as a remedy, then it must be made clear that it is only a data account that may be terminated. To address this, the definition of account needs to be added to refer to the IP address. It could therefore read:

account means an IP address based connection allocated to a user by an IP Provider (other than an account of that IP Provider itself).

File sharing

36. The new regime is intended to apply solely to **file sharing**. Confining it in this way is important since, as many submissions on the previous s92A pointed out, if it is not confined, there will be confusing overlap with the other ISP provisions in ss92B-92E. Unfortunately, the definition of file sharing is so wide that it captures many internet activities far beyond file sharing in the generally accepted sense. For example, it captures simple downloading, email, posting material to a website, blogging, making material available via social networking sites such as Facebook or cloud storage sites like Flickr for photographs, as well as standard sharing of files via the peer to peer protocol.
37. The new regime will therefore overlap with s92C which covers hosting and storage but which has a very different process associated with it. It may also overlap with section 92E which provides the safe harbour condition for caching, since the cache itself will have its own IP address. This is another reason for clarifying the ISP and account definitions as suggested above. Otherwise, whilst the ISP will have a safe harbour under section 92E, it will still be required to comply with this new regime and send itself notices where a copyright owner has identified the IP address of the cache. That would be a waste of time.
38. Ironically, the best way of addressing the overlap with s92C (in addition to changing the definitions) is to dispense with the distinction altogether and apply the new regime to storage and hosting under section 92C as well. This is important for various reasons:
- 38.1 It removes the inconsistency between a provision which has no due process around it (s92C) and the new regime, where there is due process.
- 38.2 It has been recognised that determining copyright infringement in the digital environment is complex and there is no reason for one regime to be safeguarded by due process and the other not to be. Section 92C is a classic Digital Millennium Copyright Act (DMCA) notice and takedown provision (although without even the protection of a DMCA counter-notice procedure). As such it is an invitation to an ISP to take a very risk averse approach and remove material as soon as it gets a complaint from a copyright owner. That is because section 92D makes specific reference to such notices as giving an ISP *reason to believe* that an infringement may have occurred. In those circumstances, unless the ISP removes the material, it risks being liable itself so most ISPs will remove material without attempting a costly and complex investigation of whether in fact there has been infringement. The lack of due process around section 92C is now totally out of step with the new regime and should not be allowed to continue.
- 38.3 This is particularly the case given suggestions that alleged infringers are shifting from p2p use to file locker services such as Rapidshare.²⁴ If that is true, we can expect to see more focus by copyright owners on section 92C processes. Users, account holders and ISPs in those situations deserve equal protection to that which they are to be given under this new regime.
- 38.4 It means that we do not need to try to predict how the internet will develop by making a distinction between various internet activities (transmission via p2p on the one hand and hosting and storage on the other). This is an artificial distinction – it should not matter what service a user is using – the process should be the same.
39. In any case, the definition of file sharing will have to be cut down so that it does not overlap with ss92B-92E.
40. The other problem with the definition of file sharing is that it includes downloading by itself. Filesharing of infringing material is argued by copyright owners to be a problem that needs a specific remedy because of the way infringing material is downloaded **and uploaded** at the same time. This creates what is called a swarm where material is propagated very widely and efficiently. This is a long way away from an individual simply downloading a small number of infringing works.
41. This, combined with the focus on the account holder rather than the user, means that there

²⁴ http://www.channelregister.co.uk/2009/10/13/warez_hosting/

will be account holders who provide internet access anonymously but who will become liable for whatever those users download. That is unfair. If a fast track regime such as this is to be used to attack a particular problem, file sharing, then it should be confined to that – it should not be metastasized into a default regime for all infringement. So, the definition of file sharing should be confined to situations where the same work is downloaded and is at the same time made available for upload. It is not downloading which gives rise to the problem complained of by copyright owners; it is the rapid spread via the swarm created when users both download and upload. Copyright owners are able to see if the downloading user is also making the file available for upload when they conduct IP address based searches so identification of this type of infringer will not be any more difficult.

42. There may also be other unforeseen consequences of such a wide definition.

Infringement

43. The definition of **infringement** includes a very dangerous expansion of copyright protection which is inconsistent with established caselaw. One of the most complex issues in copyright is whether the copying in question has been substantial enough to be considered an infringement. This is measured primarily in qualitative terms but the proportion of a work copied will also be relevant.
44. The definition in the Bill runs roughshod over that complex balancing exercise. By referring to infringement in *part of a work* it suggests that each part of a work might be analysed to see if that part has been infringed, rather than looking at the work as a whole to see whether a substantial copying has taken place. Quite apart from the unwarranted expansion of copyright protection for parts of works, the practical conundrum also arises as to how the Tribunal or District Court is to know which part or parts of a work it must consider. If we take a song for example, does this mean that copying one bar from the chorus, which might not be infringement of the whole song, might nonetheless be infringement of the chorus under this definition? That would be a radical shift in copyright policy and is not something that should be attempted in this Bill (it should not be attempted at all, but certainly not in this Bill). The words, *or a part of a work* should be deleted from the definition.

Operative provisions of the Bill

45. Having looked at the definitions, we now come to operative provisions of the Bill itself. Again, for ease of reference, comments are made on sections in the order those sections appear in the Bill rather than trying to deal with the issues in order of importance.

Multiple copyright owners

46. A confusing aspect of the Bill is whether the infringement notice procedure is intended to match just one copyright owner alleging multiple infringements to an IP address or is intended to aggregate multiple copyright owners to that one IP address. This has major ramifications of course:
- 46.1 If each process from first detection notice through to enforcement notice and, ultimately, any penalty, is to run on a per copyright owner basis, then a person who infringes against multiple copyright owners will be treated more leniently in terms of getting to enforcement stage than a person who infringes multiple times against one copyright owner.
- 46.2 Conversely, when it comes to the penalty phase, it might be difficult to aggregate the claims of all copyright owners that have issued infringement notices and to apportion any reparation under 122N.
- 46.3 If the process is a separate one per copyright owner, then, in theory, it would be

possible for processes involving several copyright owners to run concurrently and, ultimately, for each of those copyright owners to claim reparation up to \$15,000. This could result in a penalty which is far greater than \$15,000.

47. The Bill is a little unclear on this. For example:
- 47.1 The definition of *warning notice* in section 122A states that it is issued *in respect of at least 2 alleged infringements against a copyright owner*. This seems to suggest that each copyright owner is to be the subject of its own process.
- 47.2 Under section 122E(1)(b), a warning notice is only sent if the alleged infringement occurs *at least 3 weeks after the date of a detection notice issued to the account holder in relation to the same copyright owner* This also tends to suggest the possibility of multiple concurrent processes.
- 47.3 Clause 122D, which deals with the first notice to be sent – the detection notice – also seems to envisage a process for each copyright owner. However, it also says that a detection notice may not be sent until after a quarantine period has expired. A quarantine period is a period of 4 weeks following the final enforcement notice during which an application may be made to the tribunal. The idea is that the process starts again after an enforcement notice and quarantine period expires without any enforcement action being taken. But, it is not clear whether the quarantine period is for the one copyright owner or for others.
- 47.4 When it comes to enforcement action before the tribunal, the suggestion appears to be that all infringement notices for an account holder be provided by the ISP to the tribunal (see section 122J(3)). On the face of it, that suggests that all copyright owners are involved in the same process, at least at enforcement level.
48. Overall however, it does seem to be intended that there will be a separate process for each copyright owner. This is despite many submitters in earlier consultations suggesting that one process be used to accumulate all copyright owner allegations. The consequences of running concurrent processes are many. They include:
- 48.1 Multiple detection notices. Although some copyright in popular music and blockbuster film may be aggregated in the hands of a few copyright owners, there are of course an almost unlimited number of copyright owners who could avail themselves of this procedure. A user could therefore receive multiple detection notices for different types of works. Each, of these would presumably suggest to the user that if they “do it again” they will receive a warning notice and then an enforcement notice. But, instead, unless they allegedly infringe again with the same copyright owner, they will not receive those notices but, instead, multiple detection notices. This will be confusing.
- 48.2 If, by chance, the user is alleged to have infringed more than once against the same copyright owner but only once against others, it will be at stage 2 with the first one but at stage 1 with the others. This will also be very confusing.
- 48.3 Further, the various quarantine periods and on-notice periods applicable to each copyright owner may well overlap each other. Again, this will be confusing.
- 48.4 For an ISP, this will dramatically increase the scale of this process and consequent cost. Instead of just logging each allegation, notice and various events in the process against the account holder after matching to the IP address, the ISP will have to have separate logs for each copyright owner and keep track of all the timeframes for each. These include quarantine periods, expiry periods, on-notice periods, different notices and counter-notices etc. It could be faced with the strange situation where it is sending out detection notices, warning notices and enforcement notices to an account holder at the same time or even completely out of sequence. Given the confusion that this will cause account holders, it will also likely receive far more queries – again, at an increased cost to the ISP, which will then need to be recovered in notice filing fees.

48.5 There is potential for duplication at the Tribunal and/or the Court. If one user over a period of time receives enforcement notices with respect to different copyright owners, then each time that happens, a copyright owner might apply to the Tribunal and/or the Court. The Tribunal/Court could therefore end up receiving similar claims with respect to one IP address (one account holder), from different copyright owners.

Notice timing

49. In section 122A(2), it is difficult to understand why there are different standards of notice timing. For users, they are stuck with notice periods which are triggered by the date on the ISP's notices, whereas ISPs (and through them copyright owners) have the benefit of needing to actually receive user notices before they are valid. There is no reason for this. All notices should be valid within X days of being sent subject to the intended recipient being able to dispute receipt in limited circumstances.
50. The trigger for commencement of any notice period is important since some periods are relatively short, such that even a day's difference between the date of a notice and the date of receipt would make a material difference. In any case, since there are numerous dates and expiry dates throughout the process, each needs to be checked against this provision to ensure that reference to either the date of a notice or to the date of receipt is appropriate. Scenarios such as notice, challenge etc need to be worked through to ensure that the time periods for each operate as intended. In some places, they may not.
51. The wording in section 122A(2)(a) also needs to be changed to remove the ambiguity – is the date referred to the date when the alleged infringement occurred, or the date when the copyright owner discovered and recorded it? It should be the former, otherwise the aim of making sure notices are sent to users soon after an alleged infringement has occurred could be thwarted. An example of the confusion this causes can be seen in section 122E(1)(b) which refers to the date on which the infringement occurred rather than the date it was recorded by the copyright owner.

ISP unable to match allegation to IP address

52. An ISP can only take the required actions under this regime where it is actually able to match the IP address to an account holder who is one of its customers. There may be various reasons the ISP is unable to do this and, in those circumstances, the ISP must be excused from taking any further steps. Section 122C(2) therefore needs to be expanded to add the following exceptions:
- 52.1 If the IP address in question is not one that has been allocated by the ISP and is under its direct authority. In those circumstances, the IP address will likely be within an IP number block that has been allocated to another ISP and the first ISP will be unable to match to a customer.
- 52.2 If the ISP no longer retains records that will enable the match (having complied with any information retention requirement as currently set out in section 122Q);
- 52.3 If the account holder has not provided any address or other details necessary for the ISP to comply or has provided incorrect details;
- 52.4 If the number of notices is too high for the ISP to cope with. Note that this is exactly the problem now faced by even large ISPs such as Time Warner in the US.²⁵

Evidence collection period too short

²⁵ <http://arstechnica.com/tech-policy/news/2010/05/time-warner-cable-tries-to-put-brakes-on-massive-piracy-case.ars>

53. The 1 week period in section 122C(2)(a) is too short. Whilst it is important for all concerned that the notice be sent to the user as soon as possible after the alleged infringement, to suggest that a copyright owner must detect that infringement, complete its investigation and send its allegation to the ISP in 1 week is unrealistic. A further week is allowed to the ISP to send out the notice, so if 2-3 weeks were allowed under section 122C(2)(a), that would give a total of 3-4 weeks, which seems a reasonable balance.

ISP costs

54. It is clear that there will be significant cost to ISPs in establishing and operating this system. Cost recovery is therefore important to prevent those costs, which are in effect costs of enforcing third party copyright owner rights, from being loaded onto innocent ISP customers. The requirement in section 122C(2)(e) that ISPs be compensated for their costs in this process is therefore welcome. However, for this to be effective, particularly for overseas copyright owners, rather than the ISP's obligation being triggered by *an agreement to pay*, that should be changed to refer to an agreement to pay *which has been accepted by the ISP*. ISPs should not bear any risk of non-payment unless they have agreed in advance to accept that risk.

Form of notices

55. It would appear that the form of the infringement Notices (detection notices, warning notices and enforcement notices) is to be set out in regulations. This will be useful since any standardisation that can be driven into the system will make it more understandable and will reduce costs.
56. Some details are included in sections 122D(2) (Detection), 122E(2) (Warning) and 122F(2) (Enforcement). Nowhere however is there any indication of any penalty for the issue of a false or misleading notice. Under the US DMCA, a false or misleading notice is classed as perjury and subject to penalty (and lawyers' fees in defending such a notice can also be claimed).²⁶ Similarly, in Australia, the issuer of a notice must undertake that they are doing so in god faith and have taken reasonable steps to ensure accuracy.²⁷
57. To bring New Zealand into line with other jurisdictions, there should be a similar declaration for the purposes of the Oaths and Declarations Act, which would then be actionable if falsely made. Better still, the fines for false or misleading notices which were removed from the Copyright (New Technologies) Amendment Bill by Supplementary Order paper 193 on 1 April 2008 should be reinstated.
58. Notices sent by copyright owners, which trigger infringement notices, should also give contact details of a natural person who is responsible for issuing the notice and capable of making decisions with respect to use of the copyright work referred to. That way, an account holder may make direct contact with the copyright owner if they wish.

Expiry of Infringement Notices

59. The way in which notices expire seems a little harsh on copyright owners. Under section 122F(3) an enforcement notice expires 4 weeks after the date it is issued. Provided that an application is made to the Tribunal within that 4 week period, the expiry will not have any impact. However, if Tribunal proceedings are not initiated within that period, then as we read it, all infringement notices which were the subject of that enforcement notice will expire. It is not specified but it is assumed that this means that expired notices are of no effect and can no longer be actioned (although ISPs must still keep details – see section 122Q(d)).
60. To give an example - over a space of 6 months, a copyright owner issues 5 detection notices,

²⁶ See §512(3)(c)(A)(vi) here <http://www.copyright.gov/title17/92chap5.html#507>

²⁷ http://www.austlii.edu.au/au/legis/cth/consol_reg/cr1969242/sch10.html

then issues a warning notice for 2 further alleged infringements and, finally, issues an enforcement notice in response to another alleged infringement. If it does not apply to the Tribunal within 4 weeks, all of those notices will expire. This seems unnecessary. It is appropriate that enforcement notices should expire if not actioned but detection notices and warning notices need not expire except after the expiry of the 9 month long-stop period.

61. Further, it is unclear how expiry of a notice affects a copyright owner's right to apply to the District Court under section 122O. Conversely, there does not seem to be any cut-off date before which a District Court application must be made. Compare this to section 122J where Tribunal proceedings must be issued within 4 weeks of the enforcement notice otherwise it expires. What happens if Tribunal proceedings are not issued? Does this mean that District Court proceedings cannot be issued because the enforcement notice has expired under clause 122J?

Account holder challenge

62. The process around account holder challenge to infringement notices needs further work. In particular:
- 62.1 This is another area where the difference in treatment of dates may have an adverse impact. 1 week is too short anyway, but since the 1 week deadline for an account holder to submit a challenge commences on the date of the infringement notice being challenged, in almost all circumstances the account holder will have less than a week from the time it actually receives the notice.
- 62.2 In any case, 1 week is too short for a challenge period. For example, assume that an account holder has had a security issue over a period of a couple of months which has resulted in it receiving a warning notice. It calls its ISP but does not issue a challenge to the notices. The discussions with the ISP result in the problem being fixed and no further alleged infringements occur until, 6 months later, another problem occurs and, as a result the account holder is sent an enforcement notice. However, the account holder happens to be away at the time for a 10 day holiday. The account holder's ability to challenge the enforcement notice will have been lost. It can be argued that the account holder is not adversely affected because, if the copyright owner applies to the Tribunal, the account holder will have a right to argue its case there (although, as we will see later, there are suggestions that penalty at that stage is on a strict liability basis). To avoid unnecessary cases going to the Tribunal and to provide a more reasonable time period for account holders to challenge, at least 2 weeks should be given.
- 62.3 It is unclear how an ISP is to decide whether or not to forward the challenge to the copyright owner under section 122G(3). In any case, copyright owners will wish to know of all challenges. From an ISP point of view, this appears to require a manual decision making process which will just add cost and is unnecessary.
- 62.4 Further, it is hard to see why an ISP should be allowed to reject a challenge under clause 122G(4). It is possible that the challenge may be based on a security issue or some other aspect within the purview of the ISP, however, again, ISPs have made it clear that they do not wish to be put in a position of deciding whether or not an account holder's argument that it has not infringed is valid. It should be up to the copyright owner in all circumstances whether it accepts the challenge or wishes to pursue the matter to the Tribunal or Court.
- 62.5 In section 122G(4), assuming that the challenge has been sent to the copyright owner, it is suggested that the copyright owner will then notify the account holder if it rejects the challenge. This is not possible since the copyright owner will not have the account holder's contact details at this stage (see section 122F(4)).
- 62.6 Under section 122H, a challenge is deemed to be accepted if it is not rejected by the copyright owner or ISP within 3 weeks. This again underlines why the ISP should not

be involved in this. If under section 122G(3) the ISP decided that the challenge was not something that need involve the copyright owner and the ISP then simply did nothing, the copyright owner's notice(s) would be cancelled, without it even knowing about it.

- 62.7 There does not seem to be any way that a copyright owner will know if an ISP accepts or rejects a challenge anyway, unless the above issues are dealt with.
- 62.8 Under section 122H(2) it is suggested that if a detection notice is validly challenged or is deemed to be accepted because it is not rejected, all subsequent notices will also be cancelled. It is hard to understand why subsequent notices are affected since they will relate to entirely new alleged infringements. It is also hard to understand why previous warning notices and detection notices are affected.
- 62.9 There is no form of notice specified for challenges. There should be for various reasons. This will assist account holders. It will also assist copyright owners to see exactly why an account holder is challenging. It will make it more difficult for account holders who wish to try to "game the system" to do so, if they are required to specify exactly why they say they have not infringed. It will create a better record for the Tribunal or Court should the matter proceed to penalty. It is also consistent with challenge regimes in the DMCA and Australia, for details required in a challenge or counter-notice to be specified by regulation.
- 62.10 Finally on this point, it is most unclear what is required for a challenge to be successful. It appears from the above that it is envisaged that a security issue (e.g. evidence of a hacked wifi connection) would be sufficient. However, that is not how the penalty regime seems to deal with matters.

Concurrent jurisdiction of Copyright Tribunal and District Court

63. There are arguments for and against copyright owners being able to issue proceedings in the Tribunal or in the District Court or in both at the same time. It is suggested that, if the copyright owner wishes to initiate District Court proceedings, it should not be able to issue proceedings in the Tribunal. The District Court in those circumstances should also be able to award the same fines up to \$15,000 as the Tribunal (as an alternative remedy to termination; not a concurrent remedy). Otherwise, there could be a situation where the Tribunal and the Court are hearing the same evidence. It is even conceivable that they could come to different conclusions, which would bring the system into disrepute.
64. Note in this regard that the domain name dispute resolution procedures in New Zealand and overseas specifically provide that those processes will be stayed pending the outcome of any Court action. This would therefore leave the decision in the hands of the copyright owner – issue in the Tribunal or in the District Court but not both.

Material to be provided by copyright owner

65. In section 122J(e) a copyright owner should also be required to provide:
- 65.1 Evidence to justify its claim for an amount to be paid by the account holder. Any amount payable should be based on normal civil damages principles with proof provided of actual loss by the copyright owner (i.e. not a US style statutory damages regime); and
- 65.2 Confirmation that the copyright owner is not aware, having considered the matter, that any defence under the Copyright Act (e.g. for fair dealing) would be available. It is important to remember that in many situations the copyright owner will have more experience with respect to copyright matters than the account holder.
66. All evidence provided should be sworn in normal fashion. This is particularly important given the preference built into the regime for the Tribunal to decide matters on the papers (see

section 122L).

67. In section 122J(3), not only should the Tribunal be satisfied that an enforcement notice has been sent but also that the procedural requirements in sections 122J(1) and (2) have been complied with. If the regime proceeds on the basis that each process is particular to each separate copyright owner, then section 122J(3) also needs to make it clear that the detection notices and warning notices that the ISP must deliver up to the Tribunal are only those of the copyright owner who is seeking to enforce the enforcement notice, not all such notices.

Tribunal procedure

68. In section 122K, it would be useful to have more clarity as to who must receive notice of proceedings and could be joined or appear. Currently this is entirely at the discretion of the Tribunal but it is unclear whether a copyright owner or account holder could apply for a third party to be joined.
69. It has already been noted that there needs to be clarity around whether the regime envisages one process per copyright owner or the aggregation of all copyright owners in a single process. If a single process was used, then all copyright owners could appear.
70. The admonition in section 122L(4) that the Tribunal use reasonable efforts not to reveal identity and address details of account holders to copyright owners is welcome. However, as an added safeguard against later copyright owner abuse of such information, there should also be a prohibition the copyright owner using any such information which does come into its possession other than for the purposes of that particular proceeding.
71. In section 122M it is suggested that a party may not be represented by a representative (other than an employee etc). This is potentially unfair on both copyright owners and account holders. Many copyright owners in the film, TV and music industries for example licence copyright via collecting societies or organisations. Those organisations or their representative bodies commonly represent the copyright owner in this sort of enforcement activity. RIANZ and NZFACT here in New Zealand are examples of this. There is no reason why they should not be able to represent the copyright owner. Conversely, because copyright owners, particularly in these industries, have people who are experts in enforcement (often lawyers or ex law enforcement personnel), lay account holders who do not have that expertise will be at a significant disadvantage in arguing issues such as fair dealing or other permitted use, or substantiality, for example. Account holders should be entitled to legal representation to address that imbalance in expertise.
72. In section 122N no indication is given as to the standard of proof the Tribunal must adhere to. The reference to it being *satisfied* in subsections (1) and (2) is insufficient. It must be made clear that it must be satisfied of infringement under the Act on the balance of probabilities (i.e. the normal civil standard).
73. Further, in terms of the Tribunal's general procedures, it should observe principles of natural justice. So, for example, the same right must be given to an account holder to raise its defence as is given to the copyright owner to make its case on the balance of probabilities. If the Tribunal procedure is not to be made explicit in the Act, then there should at least be a statement of this principle of equality to guide the Tribunal and to rebut any suggestion that an aspect of the regime is intended to favour one party over the other (which it should not).

Account holder liability for actions of others

74. The Bill makes an account holder liable for any activities conducted using the account, whether or not they are directly responsible. So, in section 122N, fines may be levied and in section 122O the account may be suspended, even where the account holder has no involvement in the infringement. There are many situations in law where such vicarious liability applies and fines may be payable by one person in respect of another's illegal action (employer responsibility for employees is a typical one) but the common thread among them is that the person who is to be held vicariously liable has:

74.1 A legal relationship with the person for whom it may be held responsible;

74.2 The ability via that relationship to control the activities of the person for whom it may be held responsible.²⁸

75. These principles should also dictate when an account holder can be made liable for user actions. So, for example, a library that has no legal relationship with and no ability to control the actions of users at public access terminals, should not be held liable for fines or termination, if those users should infringe. Standard vicarious liability principles should apply.

Termination

76. Termination is a disproportionate remedy. Internet access has become and will increasingly become a utility service, as necessary for us to go about our daily lives as electricity or water. The suggestion is sometimes made that if an internet account were to be terminated it would not matter because the account holder could simply use publicly available access points at internet cafes or libraries for example. But, we already know that internet access is essential in many interactions required by law. Examples include:

76.1 Filing company annual returns each year under the Companies Act. These may only be filed online. Filing requires the filer to have the company key, a password that allows any of that company's statutory, publicly available, records to be altered. Therefore, filing via a public access computer at a library or internet café, would be most inadvisable from a security perspective;

76.2 Many employers are required by law to file monthly PAYE records online. Again, it is inconceivable that an employer would do so via an unsecured publicly accessible computer;

76.3 The Personal Property Securities Act 1999, requires holders of security interests (e.g. hire purchase lenders, car financiers etc) to file financing statements online in the personal property securities register, or lose priority. Timing is critical since the order of registration on that register dictates who will have priority should the creditor default. Again, it would be inappropriate for a financier to have to file via a public terminal;

76.4 All land transactions in New Zealand must be effected online via the Landonline portal maintained by the Government agency, Land Information New Zealand. Access is enabled on a per computer per user basis with several layers of both technical security and authorisation by lawyers required. It would therefore not be possible for sales and purchase of land, mortgages or other transactions to be effected by lawyers for their clients if the per computer per lawyer access was lost. For a conveyancing lawyer in sole practice, internet termination therefore effectively means he or she cannot practice. Again, termination is disproportionate; monetary penalty would suffice;

76.5 Many other businesses are run entirely online now. Loss of internet access would have a catastrophic impact both at the user end and for the business itself. There are many examples, but a few include:

76.5.1 Domain name registrations and filing of domain name dispute proceedings;

76.5.2 Online auction businesses and general online listing and bidding;

76.5.3 Purchase of tickets (e.g. music concert ticket and Rugby World Cup tickets which often sell out quickly);

76.5.4 Cloud computing, software as a service generally. For example, many

²⁸ See, for example, *A v Roman Catholic Archdiocese of Wellington & Ors* [2009] 1 LRC 211 (CA), where it was held that the Archdiocese was not vicariously liable for the actions or omissions of the manager of one of its orphanages.

businesses run their accounts on xero, a New Zealand company challenging the world in SaaS accounting. Again, having to handle sensitive financial information via a public computer, if the business's private internet access was terminated, would be unworkable and inappropriate.

77. Many of these examples involve time sensitive transactions. It is simply not feasible to suggest that an account holder or user that has had internet access terminated must somehow find timely access some other way. Libraries and internet cafés are generally not open 24/7 in any case – another problem in an increasingly global marketplace.
78. It is also not always the case that someone who has their internet access terminated with one ISP will be able to sign up with another one (although, ironically, in situations where this is possible, it underlines how ineffective termination will be). In some parts of New Zealand, there is only one ISP available. Terminating internet access in those circumstances is tantamount to kicking that person off the internet.
79. Further, it is clear that the New Zealand Government, at both Central and Local Body level, is rapidly moving to an online model. Interactions with Government will increasingly only be able to take place via online portals secured by personal password access (not something one would ever want to entrust to a non-secure public access computer). Even voting itself is moving online. To suggest that a New Zealand citizen who infringes copyright might therefore, as a result, lose his or her ability to interact with Government on an equal footing with other New Zealand citizens is anathema. It is interesting to note also the pressure being brought to bear on Government both here and overseas to use cloud computing solutions, which will only increase the need for internet access.²⁹
80. Even if we thought of the internet as just another utility, it is very difficult to see how termination is appropriate. If criminal activity is undertaken using electricity and water supply (for example, growing cannabis), we do not cut off the criminal's power and water. Copyright infringement is not a criminal offence so it is even less appropriate to terminate in these circumstances.
81. Internet access is not just a utility however. Its ability to provide social and family connection across distances and time zones, educational and work opportunities, personal development and general societal benefits is a driver for the Government committing \$1.5 billion of taxpayer funds to its ultrafast broadband initiative. This capacity for improvement in the human condition, provided by the internet, takes it from a mere utility to a human right. 28,000 people in 26 countries see access as fundamental.³⁰
82. In addition, with the growth in VoIP, termination of internet access effectively becomes termination of telephone access, ultimately endangering property and personal safety through lack of access to the 111 system.
83. It is said that termination is a necessary ingredient to discourage infringement and yet NZFACT's own figures indicate that the greater benefit will come from the notice regime. In any case, monetary penalties are adequate in a myriad of other situations across New Zealand statute books – there is no reason whatsoever that they will not be adequate as a remedy to discourage infringement in these circumstances. In other words, not only is termination disproportionate; it is also unnecessary.
84. The termination remedy should therefore be removed by deletion of section 12220.
85. If, despite the above, termination is to remain as a remedy, it must clearly not be extended as per the HADOPI regime in France or the proposed regime in the UK, whereby an infringer is

²⁹ See for example, the reported comments of Department of Internal Affairs, pressing for Government CIOs to be less timid in take-up of cloud solutions http://computerworld.co.nz/news_nsf/news/dia-official-says-privacy-security-different-for-cloud?opendocument&utm_source=topnews&utm_medium=email&utm_campaign=topnews. In this, New Zealand is part of a worldwide trend – see *The Cloudy Future of Government IT: Cloud Computing and the Government Sector Around the World* David C. Wyld, International Journal of Web & Semantic Technology (IJWesT), Vol 1, Num 1, January 2010 - <http://airccse.org/journal/ijwest/papers/0101w1.pdf>

³⁰ See footnote 22 and associated text above.

effectively cut off from all internet access altogether. It seems doubtful that this could be effectively imposed but that does not excuse the attempt.

86. There are also problems in any case with the suggested regime, if it is to remain:
- 86.1 It is unfair and a breach of natural justice principles for a user who accesses the internet via an account holder's IP address to be penalised by having his or her internet access terminated without any right to be heard. Any user who will be adversely affected by a decision to terminate should be able to submit evidence to the Court and be heard.
- 86.2 It is implied but it should be made clear in section 122O(1) the only account which may be suspended is the account of the account holder with the ISP that provides the IP address that is the subject of the enforcement notice. There should be no question whatsoever of termination of an account with any other ISP.
- 86.3 Section 122)(1) lacks the all important criterion as to when the Court is able to suspend. It almost seems to proceed on the basis of strict liability – if the notices have been sent then that is the end of it. That cannot be right. It needs to include a new section 122O(1)(c) to read along the lines of:
- (c) beyond reasonable doubt, the actions referred to in the enforcement notice(s) that are the subject of the application each represent an infringement of a work referred to in those Notices*
- 86.4 Suspension of an internet account is more akin to a criminal penalty and therefore the higher criminal burden of proof should be applied (hence *beyond reasonable doubt* above).
- 86.5 In section 122O(2), it is grossly unfair that the copyright owner is able to provide evidence but the account holder is not. In considering the seriousness of the infringing, the Court should take into account any evidence adduced by the account holder and users as well as that adduced by the copyright owner.
- 86.6 The factors which could influence the Court in its decision as to whether to suspend should be made mandatory. In other words, the Court should be required to take those factors into account rather than having a discretion as to whether or not it does, as seems to be implied at present.
- 86.7 Additional relevant factors should be included, such as:
- 86.7.1 The degree of anyone else's reliance on access to the internet (i.e. other users);
- 86.7.2 Whether the account holder has authorised the infringement under section under section 16(1)(i) of the Copyright Act;
- 86.7.3 Any adverse impact of the suspension on the ISP who provides the account. For example, if suspension means that the cost of a phone or other device provided by the ISP is not recovered as it would have been had the account holder remained on a particular account plan for its term, then that should be taken into account;
- 86.7.4 Conversely, if an account holder will be subject to a monetary penalty under its contract with the ISP, for early termination, then that should weigh against such termination.

87. In addition, there should be circumstances where, despite the seriousness, suspension should not be awarded – an absolute defence along the lines of:

provided that suspension shall not be awarded where the account holder can show, on the balance of probabilities:

(a) the infringements complained of are the actions of a user that, apart from provision of internet access via the account itself, the account holder has no legal control over or responsibility for; and

(b) the account holder has not authorised the infringements under section 16(1)(i) of the Act; and

(c) the account holder has taken all steps reasonably available to it in the circumstances to prevent infringement using the account,

or that account holder or any user accessing the internet via the account needs access for health, safety or other reasons of vulnerability.

ISP obligations

88. In section 122Q(3), the prohibition on the ISP disclosing information to a copyright owner should be extended to a prohibition on disclosure to anyone except in the circumstances set out in sub-sections (a) and (b) of that section.
89. It is unclear what the objective of having ISPs publish the annual compliance report referred to in section 122Q(4) is. If that is to be a requirement, then more guidance needs to be given as to what is intended here and the information retention should be limited to that which is required for an ISP to comply with the regime.
90. In addition, if it is seen as a useful tool to assess the size of the infringement problem, for ISPs to keep information and report as envisaged in section 122Q(4), it would also be appropriate for any copyright owner that has used the system to publish statistics of how many of each type of infringement notices it has lodged, with which ISPs, and how many applications it has made to the Tribunal and the Court, plus total fines or suspensions it has obtained.

Rick Shera
Lowndes Jordan
24 May 2010