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Digital Rights and Copyright in NZ: s 92A of the Copyright Act and the Institutional Roles of ISPs and the Copyright Tribunal

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Introduction

On April 15 2008, the New Zealand Parliament passed the third reading of the Copyright (New Technologies) Amendment Bill¹ (“the Bill”) amending the Copyright Act 1994 (“the Act”), with the intention of updating and clarifying:

“how copyright applies to new technologies in today's digital environment, promote a modern legal framework that guides the protection and use of copyright material, ensure the effective operation of the Act in the face of emerging technologies, and ensure that the Copyright Act remains fair and effective in the face of emerging needs of a dynamic and technology-supporting economy”.

A key motivating factor for the new legislation is to address the many ways in which digital technologies can facilitate infringement of a copyright owner’s legal rights to protect and earn an ongoing income from their intellectual property. As part of its provisions, the Bill proposed the insertion of new s 92A in the Act, requiring the new commercial transmission intermediaries that have emerged to facilitate the distribution of digital material, much of which is copyright, (Internet Service Providers or ISPs) to become part of the institutional framework engaged in monitoring and enforcing copyright holders’ rights.

The proposed s 92A proved extremely controversial, as it required ISPs to terminate the internet access of repeat copyright infringers. Whilst the rest of the Act came into force on 31 October 2008, the introduction of s 92A was delayed until 28 February 2009, “to allow sufficient time for rights-holders and ISPs to work together to ensure its effective operation”.² However, agreement could not be reached, and further delays were imposed, culminating in the indefinite suspension of the provision whilst a working group was established to re-evaluate how the spirit and intent of s 92A could be given practical force in such a manner that proved satisfactory to rights-holders, rights-users and ISPs³. The revised proposals, released on July 1 2009, proposed an enhanced role for the Copyright Tribunal as the primary body overseeing enforcement of copyright infringements involving digital material.

This paper seeks to analyse the economic and legal implications of the regime proposed in the review of s 92A, and the role that ISPs should play in this regime. It examines the transaction

¹ http://www.med.govt.nz/templates/MultipageDocumentTOC___35264.aspx

² *ibid*

³ http://www.med.govt.nz/templates/MultipageDocumentTOC___41169.aspx

costs of pursuing copyright infringement and the enforcement of penalties, and questions the ability of the proposed regime to allocate the costs and benefits of monitoring and enforcement in such a manner that cases are not pursued where the costs may exceed the benefits obtained. It also examines the question of ‘incentive’ in the context of future investment in innovative information products when protection of commercial gain for the author or creator remains an uncertain and contentious rationale.⁴

In summary, the paper concludes that the fundamental provisions of copyright law are sufficient to handle the transition from physical to digital transmission media, without the need to include ISPs or any other party other than the courts in monitoring and enforcement. The amended s 92A proposal, whilst addressing many of the concerns raised in respect of the original provisions, fails to demonstrate that the proposed institutional changes are likely to result in an overall efficiency gain that will leave all the affected parties (ISPs, the users of ISP services and copyright owners) better off than under a counterfactual of no change. Rather, we suggest that institutional arrangements are already emerging endogenously to address the monitoring and enforcement of copyright in a digital economy. As these endogenous arrangements are aligned with the incentives of rights-holders to protect their interests and rights-users to engage in legitimate use of the works in question, they will be more effective in encouraging efficient levels of investment in creative endeavour and trade in copyright works than alternative proposals requiring parties unrelated to the exchange of rights to become engaged in the monitoring and enforcement of those exchanges.

1. Property Rights and Copyright Law

Property rights are “the socially acceptable uses to which the holder of such rights can put the scarce resources to which these rights refer”⁵. The concept of property ownership as it is commonly used is associated with a bundle of property rights: the right to use the property, to enjoy the income generated from legally permitted uses of the property, to exclude others from using it, and to transfer control of some or all of the rights to other owners in exchange for mutually agreed compensation. In practice, it is the last of these features that most clearly defines ownership, as ownership can be retained even when all other rights have been

⁴ See Jane Ginsberg, “‘The Exclusive Right to their Writings’: Copyright Versus Control in the Digital Age” (2001) 7 NZBLQ, 136, at p 138.

⁵ Demsetz, H, 1988, ‘Property rights’, in *The New Palgrave Dictionary of Economics and the Law, Vol III*, London: McMillan, pp 144-55.

transferred. Key to the concept of property rights is that the owner has the right to choose who should have access to their property and who can derive benefit from it.

Well-defined, secure and properly enforced property rights ensure that economic agents have security in their ownership of property and in their ability to take decisions with respect to that property⁶. These rights enhance the workings of the economic system by ensuring incentives are compatible with both the sustainable use of scarce resources and the pursuit of economically and socially desirable outcomes⁷. Arguably, these principles apply equally in the traditional economy and the burgeoning, knowledge-based economy focused upon the creation and dissemination of goods whose value derives from their unique information content.

Copyright law is one of the principal means of protecting rights associated with creative works, whose value derives almost exclusively from their information content. In principle, however, copyright does not protect the ideas or information embodied in a work, but only the form of expression of those ideas or information.⁸ Thus copyright law protects the expression of originality in a song, for example, or the expression of creativity in a painting, or an ordered collection of words expressing the author's thoughts in a book as an original literary work.

The Act defines “copyright” as “a property right that exists, in accordance with this Act, in original works of literary, dramatic, musical, or artistic works, sound recordings, films, communication works and typographical arrangements of published editions. A work is not original if it is a copy of another work; or it infringes the copyright in another work...”⁹

Copyright protection appends automatically to a qualifying “work” without any need for formality- but for that reason it is not necessarily satisfactory, as a person who claims their

⁶ Coase, R. H. (1937). The Nature of the Firm. *Economica* 4 (16): 386-405

⁷ Evans, L, Quigley N. & Counsell, K., 2009, ‘Protection of private property rights and just compensation: an economic analysis of the most fundamental human right not provided in New Zealand, ISCR Monograph Series Number 3, February 2009.

⁸ This long-established principle has been undermined by judicial rulings on database copyright, which have effectively protected the information held in those databases. See, for example, *Desktop Marketing Systems Pty Ltd v Telstra Corp Ltd* (2001) 51 IPR 257, [2001] FCA 612; *Waterlow Publishers Ltd v Rose and Anor* [1995] F.S.R. 207, (1989) 17 IPR 493 (CA); *Waterlow Directories Ltd v Reed Information Services Ltd* [1992] F.S.R. 409, (1990) 20 IPR 69; *Macmillan v Cooper* (1923) 40 TLR 186 LR 51 (PC); *Weatherby & Sons v International Horse Agency & Exchange Ltd* [1910] 2 Ch 297; and *Macmillan & Co v Suresh Chunder Deb* (1890) 17 I LR 91.

⁹ Copyright Act 1994, s 14.

work has been infringed is first required to establish the existence of copyright and their ownership of that copyright and, second, that the alleged infringer has not only carried out a restricted action in relation to the whole or a substantial part of the work¹⁰ but also a causal connection by the infringer to the copyright work (since a totally independent creation of an identical work is not an infringement of copyright).

Similarly to other areas of New Zealand (NZ) law, NZ's copyright law was developed from United Kingdom (UK) law. The first statutory copyright law in the UK, the Statute of Anne 1709, granted the exclusive right to permit the publication of a book for a term of 14 years to the author of that book.¹¹ Since 1709, the categories of works which may be protected by copyright, the rights provided to the authors of those works, and the terms of copyright protection have all expanded significantly in both UK and NZ copyright law and internationally.¹²

Modern NZ copyright law retains strong similarities to UK copyright law, which distinguishes it in several important areas from the US model. For example, two specific areas are the different thresholds for "originality" which a literary work must reach before it is eligible for copyright protection, and the distinction between the UK fair dealing exceptions and the US fair use exception. Nevertheless, despite these national idiosyncrasies, the emergence of international copyright and agreements have ensured that copyright laws throughout the world have certain fundamental principles in common.¹³

Thus, copyright law is a state mechanism, which is intended to provide a balance between the encouragement of innovation and creativity (by providing certain rights of exploitation to the creator or innovator of a work), and the public interest in ongoing access to and further development of a creative or innovative work. Ongoing access is provided by the inclusion of certain limited exceptions to the copyright owner's rights during the term of copyright protection. These include exceptions for fair dealing uses, or 'fair use' as it is called in the US, rights for educational and library use, and several other exceptions that are deemed to be

¹⁰The Copyright Act 1994, s 16 sets out the acts which are restricted to the copyright owner.

¹¹ (1709) 8 Anne, c.19.

¹² For further discussion on the history and development of NZ copyright law, see Susy Frankel and Geoff McLay, 2002, *Intellectual Property in New Zealand*, Wellington: LexisNexisButterworths, ch 5.

¹³The most important of these are the Berne Convention for the Protection of Literary and Artistic Works 1886 and the Trade-Related Intellectual Property Rights Agreement (Annex 1C, World Trade Organisation, Marrakesh Agreement) ("TRIPS) which came into effect on 1 January 1995.

in the public interest.¹⁴ Further development of a copyright work may not occur during the term of copyright protection without the licence of the copyright owner.¹⁵ However, once the term of protection has expired and the former copyright work falls into the public domain it may be freely used and developed by anyone.

Two other characteristics of copyright law are fundamental and particularly relevant to this article. First, it is the copyright-holder who bears the burden of establishing that copyright protection exists in a work, that she owns that copyright and that her copyright has been infringed. Second, it is the copyright-user who bears the burden of establishing that his allegedly infringing use of the copyright work was in fact justifiable under one of the statutory exceptions.¹⁶

The arrival and growing prevalence of digital distribution of, and access to, copyright works has brought with it new demands from copyright owners to provide a different paradigm of control for their rights. They argue that infringement of their copyright in a digital environment has become a problem of such enormity that states should rethink specific aspects of their copyright laws and change the fundamental positions of owner and user in regard to an alleged infringement of copyright. These arguments and others under-scored NZ's Copyright (New Technologies) Act 2008 (the amendment Act) which was intended to update the Copyright Act in a digital environment. This article will discuss one specific provision of the amendment Act, the now notorious s 92A: "Internet service provider must have policy for terminating accounts of repeat infringers".

The preference of digital copyright owners (as encapsulated in the original s 92A provision) is that an intermediary, such as an internet service provider (ISP), should be required to ascertain whether or not copyright in a work has been infringed by that intermediary's customer. Having ascertained copyright infringement, the intermediary should then be required to follow a specific process which would, ultimately, require them to remove that customer's access to the copyright work by disconnecting them from the internet. Under the original s 92A, NZ ISPs were required to agree on the process itself – with the most likely choice being the 'three strikes rule', which had already been considered and discarded in

¹⁴ See the Copyright Act 1994, Part 3, for the acts permitted in relation to copyright works in NZ.

¹⁵ For example, the Copyright Act 1994, s 16(g) provides that making an adaptation of a work is a restricted act (which can only be authorised by the copyright owner of the work).

¹⁶ For discussion of the equivalent position in US copyright law, see Jane Ginsberg, "The Exclusive Right to their Writings": Copyright Versus Control in the Digital Age" (2001) 7 NZBLQ, 136, at p 144.

several overseas jurisdictions.¹⁷ Conveniently for the copyright owner, the costs of this process would have been placed squarely on the intermediary and not, as is the traditional position, on the copyright owner. In any event, NZ ISPs were unable to reach agreement on the process, thus original s 92A was abandoned and a committee appointed to review and suggest an alternative.

The recommendations following the review of s 92A suggest a process that adheres more closely to the traditional position, in that it requires the copyright owner to monitor and evaluate alleged infringement of its copyright works. Although there are certain flaws in the recommended reviewed s 92A process, these flaws are, arguably, less substantive than those in the original provision.

2. Economics of Information Goods and Copyright

Information goods form a special class of intangible property that has always been part of the bundle of goods created and traded in human economies. Providing suitable measures can be taken to define them, information goods can be viewed as commodities that can be traded just as any other good¹⁸. An information good, such as a song, a movie, or a “literary work” expressed in a book or as a database, is costly and valuable, but it has many properties that distinguish it from other commodities¹⁹. It is *non-rival*, in that its use by one agent does not degrade its usefulness to other agents – indeed, without special (costly) legal protections such as patenting, copyrighting or licensing to prevent its use by other agents it is *non-excludable* *i.e. it is impossible or at least very costly to exclude others from using it*. For information goods, almost all of the cost of creating and reproducing the good goes into making the first copy; reproduction is usually very low-cost compared to creating the original (at the extreme, where copying is costless, information goods are said to be *infinitely expandable*). Moreover, once one copy is made, information’s infinitely expandable properties combined with technologies making its copying, communication and transmission widespread result in it immediately becoming *aspatial* – everywhere and nowhere at the same time. Finally, it is

¹⁷ See Susan Corbett “Three Strikes and Out: New Zealand Copyright Law Developments” *The IPIGRAM*, Osgoode Hall Law School, 13 April 2009.

[https://app.e2ma.net/app/view:CampaignPublic/id:27601.1900098136/rid:85479a2883fdbd0cb568a89b7d8b0cb1](https://app.e2ma.net/app/view/CampaignPublic/id:27601.1900098136/rid:85479a2883fdbd0cb568a89b7d8b0cb1)

¹⁸ Arrow, K., 1962, ‘Economic welfare and the allocation of resources for invention’, in *The Rate and Direction of Inventive Activity: Economic and Social Factors*, National Bureau of Economic Research, Princeton University Press, pp 609-26.

¹⁹ Arrow, K., 1996, ‘The economics of information: an exposition’, *Empirica* 23: 119-28.

initially discrete, in that it is valuable only in its entirety - unlike a physical good, “a half-baked idea can be worse than no idea at all”.²⁰

As a consequence of these special economic characteristics, it is difficult to make information goods into easily-definable property and efficiently allocate and trade the property rights associated with them so as the total welfare accrued by society increases. If either the ownership or nature of the rights is unclear, the incentives to create the optimal quantity and type of information goods and trade the property rights associated with them will be lacking. The higher the return required by the creator, the fewer the number of goods made (underinvestment); the lower the return required (or the harder it is to detect copying), the more likely it is that too many goods (and too many copies of those goods) will be made and distributed (overinvestment), with associated costly negative externalities (e.g. spam).

The very act of trading a right to use an information good exposes its owner to the risk of illicit copying that may deprive the owner of future income that could be expected from the good. Yet to preclude the trade denies both the owner access to income from the first trade and also the welfare the user derives from use, including the ability to use the good as an input to a new and different information product that similarly confers benefit on its creator and users. Monitoring and enforcement of rights is costly, but if the costs are less than the gains from trading, then welfare-enhancing trades will occur. The challenge is to design laws and institutions to monitor and enforce the rights to enable efficient levels of creating and trading to occur.

2.1 Technological Advances, Monitoring and Enforcement

Historically, reproduction of information goods has tended to be a costly process as the media upon which they are ‘etched’ are themselves either costly or impossible to reproduce (e.g. cave walls, stone tablets, human memories). In these cases, ownership of the bundle of ‘medium plus information’ was usually sufficient to induce the optimal amount of effort to make the bundle rival and excludable, and to facilitate low-cost monitoring and enforcement of trades involving any of the rights associated with the bundle (for example, a temporary lease, a viewing or a live performance). In effect, the rights associated with the (rival and excludable) medium on which the information was stored served as a sufficient proxy for the

²⁰ Quah, D., 2003, ‘Digital goods and the new economy’, Centre for Economic Policy Research Discussion Paper 3864.

rights associated with the bundle that no special provisions were required to induce either their creation or trade.

The use of legal instruments such as copyright and patents has gone some way towards addressing the economic incentives for creating and trading information goods by separating the medium from the information goods and creating a separate set of rights that endeavour to make the information goods legally, if not physically, separate from the medium on which it is embedded. In essence, copyright and patents recognise the inherently infinitely expandable economic properties of information goods, and consequently seek to make them legally excludable for the purposes of supporting economic activity – with respect to both the incentives to create information goods in the first place, and to trade the rights in them so that they end up being held by the individuals whose ownership results in the greatest possible increase in welfare for society. Intellectual property rights instruments vest residual ownership of the property in the creator but recognise that it is optimal for the owner to grant mutually agreed rights of use to other parties (users). Usage rights enable the holder to derive personal value from the good, but not so that the use deprives the original owner of the rights of residual ownership of the good and the future income streams associated with it.

However, new technologies have successively altered the cost of media upon which the information is ‘etched’ (stone to paper to digital signals) and the costs of copying the information itself (chipping stone, clerks copying, the printing press, photocopying, digital copying). The medium upon which the information is bound itself exhibits the same economic characteristics as the information good, rendering possession of the carrier medium unsuitable as a proxy for assumption of copyright obligations. The bundle has also gone from being tangible and costly to reproduce to intangible and cheap to reproduce, increasing the number of potential rights-holders and hence the difficulties faced by the creator and residual rights-holders in detecting abuse and enforcing the rights of ownership. Moreover, with each iteration of technological development of the media upon which information goods are etched, each copy becomes increasingly indistinguishable from the original, further increasing the significant costs associated with monitoring and enforcing the legitimate exercise of property rights.

Whilst monitoring and enforcement of the rights vested under copyright have always been problematic, the extension to digital creation and reproduction has exacerbated the difficulties faced by those seeking to observe abuse of the terms of the ‘right to use’ agreements.

2.2 Copyright Law and Economic Incentives

The question facing law- and policy-makers is how to frame the provisions of the relevant laws – copyright and patents – so that the rights of creators are sufficiently clear to encourage creation of new goods, that welfare-enhancing trades of the rights can occur, but that abuses of the rights can be monitored and enforced cost-effectively, so that the greatest benefit can be yielded from the economy based upon information goods. The question must address not just the creation and the legitimate trading of the rights themselves, but the nature and operations of the institutions designed to and charged with ensuring that monitoring and enforcement of the rights created is consistent with the economy-wide objective.

From an economic standpoint, the inventors of information goods have a natural right to the fruits of their labour – the commercial gain resulting from the creation of the product. There is both tangible and intangible cost involved in creating and maintaining information, hence, it is considered an investment by the owner /originator of the information. Its value lies in the intangible domain of intellectual property – the ability to restrict access to the information, and the recognition of the sole ownership of the licensing right. Copyright law recognises that the creator has rights associated with the original work, but also provides for rights to others of limited copying for certain uses.²¹ These include the rights of fair dealing with the copyright work for criticism, review, news reporting, private study and research;²² and other permitted uses such as those specifically for education, libraries, and other “public good” uses. The creator’s rights are protected to the extent that the other party may not use the original work for purposes that are not included in the “permitted acts” set out in the Copyright Act.²³ Strictly, copyright imposes limitations not so much on the copies of the original work, but on the uses to which the copies are put.

Figure 1 illustrates the current legal position and the ‘right to use’ of copyright material under the copyright law in New Zealand as a mutually beneficial agreement between the rights-holder and the rights-user. The right-holder grants the limited rights specified in the Act to the user enabling use of the copyright good. In exchange, the user undertakes to make use of the good only as specified. Copyright law thus legally protects both the ownership rights of the rights-holder and the legitimate right of users to use the good for their own legitimate

²¹ In NZ the permitted acts are set out in the Copyright Act 1994, Part 3, ss 40-93.

²² Copyright Act 1994, ss 42 and 43.

²³ Copyright Act 1994, Part 3.

purposes (including earning an income from new goods developed using the existing good as an input) so long as that use does not violate the terms under which use was granted. By utilising statutory provisions and the institutional processes of the courts to assist rights holders and users to enforce their respective rights, copyright law goes some way to reducing the transaction costs of, first, striking agreements between rights-holders and users and, second, pursuing enforcement and remedy when the rights are infringed.

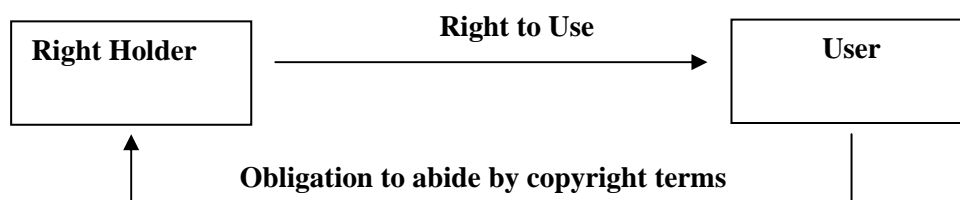


Figure 1. Legal position under copyright law in New Zealand

As with any agreement, copyright will lead to efficient levels of creation and trade in information goods only so far as it is possible to ensure that both parties abide by the terms of the agreement. Ensuring perfect obedience requires that the agreement can be perfectly (costlessly) monitored and enforced. In practice, however, monitoring and enforcement are not costless. Typically, the right-holder must expend resources acquiring information, providing incentives or a combination of the two to ensure that the user does not infringe the agreement. Further resources must also be expended to pursue remedy via the courts in the event of infringement occurring. These are the economic consequence of the legal burden on the right-holder to establish initial ownership and user breach. Likewise, a right-user must incur costs in order to be able to satisfy the right-holder that all use of the good is within the terms of the agreement. Without such evidence, a right-user is exposed to the (personally onerous and socially wasteful) costs of defending allegations of misuse when no such misuse has occurred.

Three distinct welfare losses occur as a consequence of infringement. First, the creator of the illegally copied good forgoes the income that would otherwise be anticipated from that instance of copying being prevented. Second, the greater the risk of infringing occurring and/or the greater the potential losses from each instance of illicit copying, the less likely it is that future right-holders will invest in the creation of new information goods and the greater the opportunity cost to society from the foregone welfare of new goods and their derivatives. Third, a right-user exposed to a high risk of inappropriate allegation of misuse may refrain

from engaging in otherwise legitimate, socially beneficial creative activity based upon the original work.

The more opaque is the action of usage (and infringement) from the right-holder, the more costly it is for the right-holder to establish that infringement has occurred and therefore the more instances of infringing that are likely to occur. The greater is the cost of monitoring and enforcement, the greater must be the potential losses to the right-holder from infringement for resources to be expended on monitoring agreements. The less likely it is that the agreement will be monitored and enforced by the right-holder, the greater is the likelihood that the user will actually engage in behaviour that breaches the agreement, simply because the risk of detection is so small (the first and second causes). However, the more transparent the action of usage is, the lower are the costs of monitoring and enforcing the agreement from the perspective of both the right-holder and the right-user, as transparency also reduces the costs to the right-user of satisfying the right-holder that no infringement has occurred.

The introduction of new internet technologies has imposed substantial new risks of infringement and costs of monitoring and enforcement upon rights-holders. Not only must many more users be monitored, but the nature of the technology has further separated rights-holders from rights-users as the digital medium lacks the transparency of physical media. It is thus both harder and more costly for acts of infringement to be detected and proven to the satisfaction of the courts. Right-users knowing that the medium lacks transparency can engage in even more instances of infringement undetected. Welfare losses are therefore potentially much larger than in the counterfactual of a tangible carrier medium. This leads to the motivation to develop new legal and institutional means to assist in the more efficient monitoring and enforcement of copyright law.

3. The Original Proposal: ISPs as Statutory Enforcers

The motivation behind the original s 92A of the Copyright Amendment (New Technologies) Act was to address the potential welfare losses arising from the higher costs of monitoring and enforcing copyright agreements with respect to digital information goods. The section proposed that, as per Figure 2, ISPs assume a statutory role in the monitoring and enforcement of copyright agreements. ISPs would be required to develop a policy for terminating the

internet accounts of repeat copyright infringers.²⁴ Proposed remedies included the obligation for ISPs to terminate the internet connections of those users found to be persistent user-infringers.

The proposal has some superficial appeal because ISPs, as contracted agents of rights-users in respect of carriage of information to and from the user over the internet, own and manage the infrastructure over which digital material alleged to infringe against rights-holders' rights (i.e. illegally copied) is most likely to be transmitted (analogous to owning the photocopier on which a book is copied or the paper onto which that copy is projected). ISPs can also identify the origin and destination of every digital transmission (analogous to identifying the photocopier user from the access log). Furthermore, ISPs have both the technological capability and the opportunity to 'inspect' material transmitted and received by the user over the internet (no parallel exists for photocopiers).

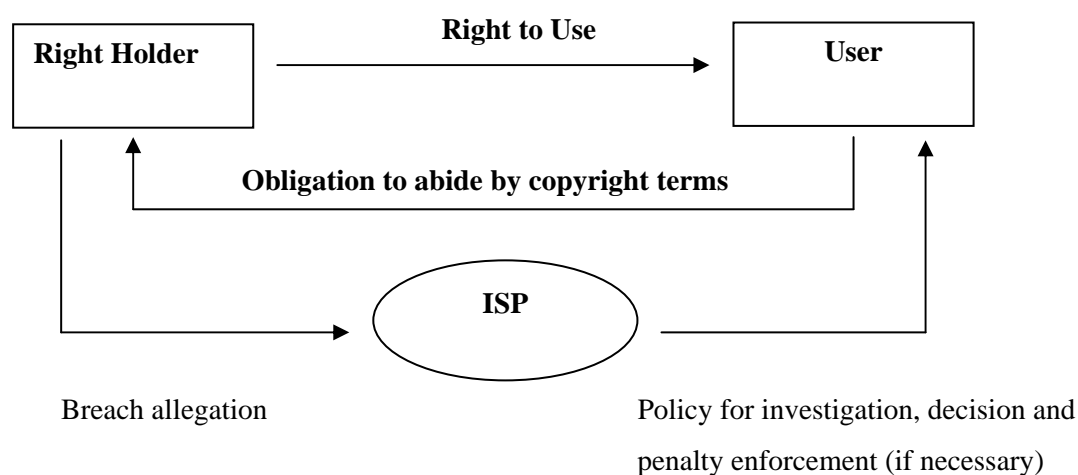


Figure 2. Statutory Obligation on ISPs under Original s 92A Proposal

Assuming there was a simple means of identifying amongst the vast array of digital information being carried by ISP on behalf of the user that material which was subject to copyright agreements, such inspection might assist in the detection of breaches of copyright agreements. That information could then be made available to copyright holders to assist in enforcing their agreements with rights users, or rights users could use such information to fulfil their obligation to prove that all uses have legitimately complied with the usage agreement. Such information

²⁴ As discussed earlier, s 92A as drafted did not come into force.

would be either impossible or extremely costly for the rights-holder or rights-user to acquire otherwise. Thus, ISPs have the potential to reduce the cost of monitoring and enforcement of copyright, thereby reducing the incidence of infringement and increasing welfare to society.

It is noted that if such detection were indeed technically or practically possible, then it might have been expected that the parties concerned would enter into mutually beneficial agreements for the collection and trading of the relevant information – that is, ISPs could be contracted to report to rights-holders the transport of their material over their networks, while rights-users would similarly have an incentive to contract ISPs to report on their individual usage in order to defend misdirected allegations. A price could be found for these contracts based upon the size of losses involved (e.g. rights-holders not expecting to derive an income from their material would not engage in such contracts, but those requiring an income would, with the price determined by the size of losses foregone by the availability of the agreement). That such contracts have not emerged endogenously suggests that either satisfactory technology to undertake such monitoring does not exist, or that more efficient mechanisms exist (including standard copyright protection procedures) to achieve these objectives.

Libraries, it could be argued, play a similar role to that proposed for ISPs in the original s 92A in that they also act as conduits for distributing copyright material to end users, but have no formal (statutory) responsibility to monitor the end use of that material. Thus, while they are required for example to provide only one copy of an article in a periodical to a user,²⁵ they are not required to monitor the subsequent use of that copy. Thus the end user could infringe copyright by making multiple copies of the library copy for distribution and the library itself would not be held accountable.

The Copyright Act permits certain acts in relation to copyright works to be carried out by “prescribed libraries”.²⁶ The list of prescribed libraries includes the National Library, the Parliamentary Library, libraries maintained by educational establishments, government departments and local authorities, and other libraries which are members of the inter-loan scheme but which are not conducted for profit.²⁷ Although these provisions permit the prescribed libraries to supply library users with limited copies of works in the library, the Act strictly prescribes the uses to which the end-user may put any such copies.²⁸ There is however

²⁵ Copyright Act 1994, s 52.

²⁶ Copyright Act 1994, ss 50- 56C.

²⁷ Ibid, s 50.

²⁸ Ibid, ss 51 -54, and s 56.

no statutory requirement for librarians to take any steps to satisfy themselves that the end-user is complying with the prescribed uses.²⁹

However, the key difference between libraries and ISPs is that libraries are, by dint of having acquired rights of use of an item subject to copyright (and indeed even own the physical paper and ink on which a copyright written work is embedded, and therefore have at least some potential means of restricting its physical use), have a direct contractual relationship with the rights-holder in respect of the use of the intellectual property (as per Figure 1) that is not shared by ISPs (Figure 2). Yet, libraries have (via statutory exemptions) even fewer obligations to monitor the use of the item by end-users than other distributors that may acquire the use of a copyright item for the purpose of onward distribution (e.g. content aggregators, broadcasters, or even an end-user lending a CD to another person). In these cases, the distributor retains a responsibility as agent to the right-holder principal to protect the right-holder's interests when making the good available to another party, as per Figure 3.

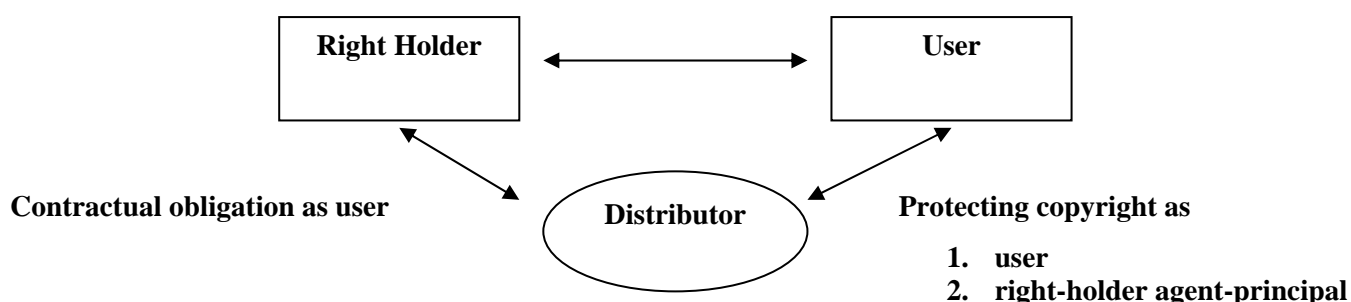


Figure 3: Agent -Principal relationship between Distributor and Right-holders

It begs the question, therefore, why ISPs in the digital world (who never enter into an agreement with either rights-holders or rights-users in respect of use of the copyright material) should be placed under more onerous obligations to monitor and enforce both legitimate and illegitimate use of copyright material than those bound by copyright agreements in the physical world. The original s 92A proposal both discriminates against ISPs (libraries, video libraries and even physical book, CD and DVD owners can also be complicit in the infringement of

²⁹ Note that in this respect New Zealand law differs from UK copyright law. In the UK librarians are required to satisfy themselves of their users' intent in copying the material: S Frankel and G McLay 2002, *Intellectual Property in New Zealand*, Wellington: LexisNexis Butterworths, pg 296..

copyright) and leads to inconsistent treatment of copyright enforcement in respect of the same digital work depending upon the medium upon which the rights-holder makes it available in the first place or the infringer distributes copies of it subsequently (e.g. on CD or DVD rather than over the internet).

Furthermore, by including ISPs in policing copyright infringement, the original s 92A placed ISPs in a potentially untenable dual agency. ISPs are first and foremost agents of internet users, providing the means by which they can send and receive material over the internet. ISPs have a contractual obligation to carry that traffic, regardless of its content. Internet users have no reason to suppose that ISPs would have any legitimate interest in that material (save for the purposes of ensuring that their traffic gets delivered under the terms of their transportation agreement – i.e. ISPs may scan content type or sites between which information is sent to in order to improve service delivery for all of its users collectively – known as ‘traffic shaping’). In Figure 2, however, ISPs must also assume a set of obligations to rights-holders. The ISP is now an agent to two principals, invoking the classic case of agency conflict. In these circumstances, when conflicts arise, the ISP must choose which principal’s interests should take priority. Usually, this is the principal who rewards the agent highest³⁰. As the original s 92A made no provisions for payment of the services undertaken in respect of rights-holders, it follows logically that ISPs would place the interests of their internet access customers over that of rights-holders. With no clear requirements for rights-holders to remunerate ISPs for the activities they were required to perform, the incentives associated with the original proposals were therefore incompatible with the contractual realities in respect of both copyright enforcement and internet service delivery.

Moreover, the original s 92A required an ISP to act as judge and executioner of an internet user’s infringement of copyright obligations. It does not follow that simply by knowing a subscriber’s internet usage habits that the ISP is in a good position to make that judgement. It is far from clear that internet users (including those using the internet to breach copyright agreements) use only one ISP (for example, a user may have a fixed broadband account, a mobile broadband account and a WiFi account, all provided by different ISPs). Obliging one ISP to enforce a penalty will not necessarily lead to the other ISPs also enforcing it. Moreover, it also does not follow that simply because an ISP is informed by another party that an infringement has occurred, even when it has access to information that might support that

³⁰ Milgrom, P., & Roberts, J., (1992), ‘Economics, Organisation and Management’, Englewood Cliffs, New Jersey. Prentice-Hall.

allegation, it possesses sufficient legal or technical knowledge to assess whether a claim that rights have been violated is justified or whether a defence of legitimate use offered by a rights-user is justified. Indeed, the ongoing commercial agreement that exists between the user and the ISP places the ISP in a conflicted position that in any other context would make any quasi-judicial ruling made by it highly questionable as a consequence of potential economic bias (disconnecting a user imposes a financial penalty on the ISP as it loses a customer and hence a revenue stream).

In light of this explanation, it is therefore clear why ISPs in particular found the original s 92A proposals untenable. The underlying problem in reaching a resolution was not one of ‘parties failing to mutually agree on a process via which rights-holders’ rights could be enforced and infringing users suitably sanctioned’. Rather, the originally-proposed enforcement structure was fundamentally flawed as it imposed upon an institution (ISP) an obligation which it was inherently ill-suited to carry out. It is the agreements between rights-holders and users, not the institutions mediating them, that drive the economic activity that underpins the exchange of information goods and the monitoring and enforcement of the concomitant copyright obligations that attend many of these exchanges. The search for a resolution of the dilemma of how to reframe copyright law must therefore follow the agreements and not the institutions.

4. The Current Proposal

In the absence of agreement between ISPs and copyright holders on a process by which original s 92A might be implemented, the provision was removed in its entirety and the Ministry of Economic Development (MED) was instructed to undertake a review of s 92A that would take into account the concerns of the ISPs, the copyright holders’, and the copyright users’.³¹ To this end, the revised proposal substantially addresses the weaknesses identified above.

The revised proposal specifies a three-phase process to allow copyright holders to pursue those who infringe:

- A copyright holder (RH) upon discovering infringement could complain to the ISP which would notify the internet user. The user would have the opportunity to reply to the RH by way of a response notice, sent via the ISP. Further

³¹ 1709-copyright-blog@googlegroups.com

infringement would cause a cease-and-desist order to be sent. There is a second opportunity at this stage for a user's response notice to be sent.³²

- The RH could then, if it considers on reasonable grounds that there has been further (repeat) infringement, obtain an Order from the Copyright Tribunal requiring the ISP to reveal the copyright user's name and contact details.³³
- The RH may then register an infringement complaint with the Copyright Tribunal and may notify the user that an allegation of repeat copyright infringement has been lodged against them. The user again has an opportunity to respond and may elect to go to mediation. Unless agreed otherwise, the Copyright Tribunal would convene and could impose penalties which could include fines and/or termination of the copyright user's internet service.³⁴

The arrangements are illustrated in Figure 4.

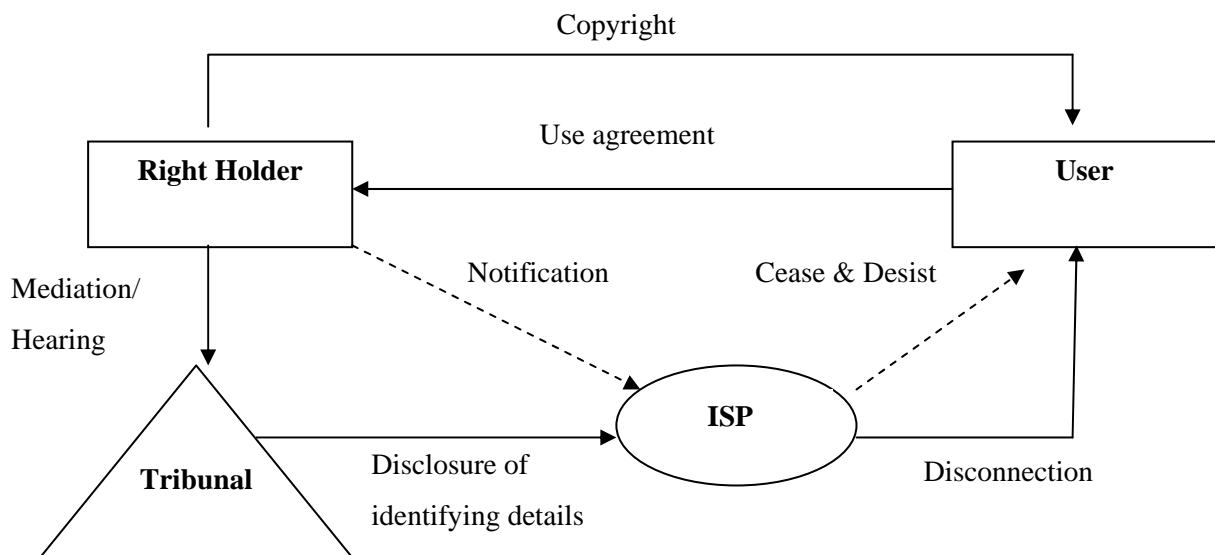


Figure 4: Revised Proposal July 2009

³² See Ministry of Economic Development, *Section 92A Review Policy Proposal Document for Consultation*, Phase 1.

³³ See Ministry of Economic Development, *Section 92A Review Policy Proposal Document for Consultation*, Phase 2.

³⁴ See Ministry of Economic Development, *Section 92A Review Policy Proposal Document for Consultation*, Phase 3

The revised proposal has several merits. First, consistent with the long-standing principles of copyright law, the new proposal place the burden of pursuing copyright infringement squarely upon the copyright owner, and the obligation to furnish evidence of legitimate use on the user. ISPs have no obligation to take any pro-active steps to monitor customers' internet activity simply because a threat of infringing exists. Second, the revised scheme removes the quasi-judicial responsibility of determining if infringement has occurred and enacting penalties via ISPs. Instead, the adjudication responsibility is placed upon an appropriately-equipped (i.e. a panel with specialist legal and commercial expertise) and commercially-independent quasi-judicial body, the Copyright Tribunal. The Tribunal is a statutory body with well-defined procedures governing its operation, including access to appeal of its decisions to the High Court on any question of law.³⁵ Third, an ISP cannot be required to enact a disconnection punishment without the matter of the user's guilt having been established to the satisfaction of the Tribunal, thereby reducing the commercial risks to ISPs arising from disconnections of individuals whose offending is questionable or so minor that the economic harm imposed exceeds the loss to the rights-holder. This latter requirement is reminiscent of the scenario envisaged in Article 47 of the Agreement on Trade Related Aspects of Intellectual Property Rights 1994 (TRIPS), which provides as follows:

Members may provide that the judicial authorities shall have the authority, unless this would be out of proportion to the seriousness of the infringement, to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods and services and of their channels of distribution.

Because TRIPS was drafted prior to the arrival of the digital era, it would not be expected to contain appropriate provision for either internet copyright infringement or the role of third party intermediaries in that infringement. Arguably, however, the proviso in Article 47: "...unless this would be out of proportion to the seriousness of the infringement..." should be persuasive in guiding the Copyright Tribunal as to when it is appropriate to order an ISP to inform a copyright owner of the identity of an alleged infringer.

However, despite addressing the worst problems of the original provision, a number of weaknesses remain in the revised proposal.

³⁵ Copyright Act 1994, s 224.

First, despite partially addressing the relativity of the economic harm imposed by the offence and the extent of the punishment, the ultimate disconnection penalty potentially imposes economic losses upon non-offending third parties who share the internet connection with the proven offender. Internet NZ has strongly criticised the new draft arguing that “termination of a household or business internet account is simply out of proportion to the alleged offence”.³⁶ The current provisions require that the evidence gathered by the copyright owner need go only as far as identifying the account (computer terminal) but will not necessarily target the actual infringer. To avoid collateral losses to innocent parties, the law and the associated process must take account of these distinctions.

Second, the overly-broad definition of an ISP in the Copyright Act remains unchanged following the review of s 92A, exacerbating both the potential inequity of punishment relative to the offence and the potential to unfairly harm third parties. The definition states:

Internet service provider means a person who does either or both of the following things: (a) offers the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing; (b) hosts material on websites or other electronic retrieval systems that can be accessed by a user.³⁷

The breadth of this definition results in it including not only conventional commercial ISPs providing internet connectivity to business and residential customers but also intranet providers, such as schools, universities, businesses, and libraries making internet access available to associates (staff, students, customers etc). It became apparent during the earlier debates that many intranet-operating organisations neither understood the new law, nor realised the implications for their own business. Should an individual associate of one of these organisations be deemed to be a “repeat infringer”, potentially the ISP providing the internet connection between the intranet and the internet may be required to cancel the whole organisation’s internet access account.³⁸ The economic harm to the organisation from

³⁶ So far, plain sailing for new-look S92. *The National Business Review*. Retrieved 17 July 2009 from <http://www.nbr.co.nz/print/105761>

³⁷ Copyright Act 1994, s 2(1), as inserted by the Copyright (New Technologies) Amendment Act 2008 s 4(2).

³⁸ Corbett S “Three Strikes and Out: New Zealand Copyright Law Developments” The IPIGRAM, Osgoode Hall Law School, 13 April 2009. [https://app.e2ma.net/app/view:CampaignPublic/id:27601.1900098136/rid:85479a2883fdbd0cb568a89b7d8b0cb1](https://app.e2ma.net/app/view/CampaignPublic/id:27601.1900098136/rid:85479a2883fdbd0cb568a89b7d8b0cb1)

disconnection alone may be substantial. Furthermore, even if an infringement can be tracked back to a specific computer, it may be difficult to isolate precisely who the infringer was. The practical difficulties and costs of tracking down and cutting off the internet access of the offending employee impose an additional economic burden on the organisation that may exceed the loss to the rights-holder. The larger the size of the organisation, the greater the costs will be so the greater the likelihood of such termination being economically costly even though legally justified under the current provisions. Furthermore, potentially there will be legal implications and human rights issues if an alleged infringing employee suffers loss of employment due to being cut off from the business' network for an alleged infringement without having a chance first to prove their innocence.

Third, whilst the revised proposal addresses the process required for rights-holders and commercial ISPs (who are easy to identify and have common interests that have facilitated their ability to participate in the process of framing the new provisions), it does not address the residual issues relating to the relationship between the very much broader category of intranet operators who, just like ISPs are independent entities carrying traffic but may (as per distributors in Figure 3) or may not (as per ISPs in Figure 2) themselves actually take ownership of any of the property rights or obligations associated with the copyright material. Where clear exchange of the intellectual property occurs with the knowledge of the organisation concerned (e.g. the copyright material is used for the commercial activity of the firm concerned even though it is actually accessed by a specific individual such as an employee, student, contractor, etc.) then the organisation is clearly a party to any infringement and has an obligation to develop policies to collect the necessary information to either detect and sanction individual infringers or satisfy the Tribunal in the event of an inquiry that the use is justified. However, where the organisation takes no such ownership, the current proposals make no specific allowance for the organisation responsible for the internet account (and hence the relationship with the ISP) to defend its interests separately from those of the actual transgressor. Whilst it may be prudent for such firms to have policies or utilise specific contractual agreements to protect themselves from such occurrences, lack of knowledge or understanding of the issues concerned may preclude the creation of such provisions. In these instances, the use of a statutory provision placing liability clearly upon the infringer but not the third party carrier may improve the effectiveness of the provisions.

A final concern attends the overall economic efficiency of the process. Optimally, the institutional arrangements supporting the monitoring and enforcement of copyright law should induce the efficient level of infringement (alternatively stated as the efficient level of intervention to detect and punish infringements). The legitimate expectation is not that the arrangements will prevent all infringements from occurring, but rather they will induce intervention only in those cases where the economic losses prevented or redressed by intervention exceed the costs of that intervention.

As identified above, one of the primary motivations of engaging ISPs in the activity of monitoring and enforcing copyright law was their access to and relatively low cost of procuring information that might facilitate the detection of copyright infringement. As it stands, the current proposal does not offer any special advantages over the original s 92A arrangements in respect of how a rights-holder might acquire the information necessary to support an allegation that a specific rights-user is infringing the copyright agreement. A rights-holder must already have some knowledge of the infringement occurring, the internet identify of the infringer, and the ISP(s) carrying the relevant traffic to invoke either a notification or a 'cease and desist' action.

Whilst a rights-holder may have internet address information relating to copies made available under legitimate copyright agreements, these are not necessarily the ones associated with infringements (e.g. multiple ISPs). Clearly, substantial resources must be spent identifying the internet addresses associated with infringement (e.g. separate contractual agreements with ISPs to provide information, or private surveillance of other forms). Detection is thus costly. It will also be extremely costly for a right-holder to engage in a Tribunal-mediated process. Thus, the arrangements will potentially facilitate remedy for only the most extreme examples of copyright infringement (i.e. only those where the expected loss to the rights-holder exceeds the substantial cost of engaging in the process). On this presumption, the very large majority of low-value infringements would not be deterred by this process.

As the potential for large numbers of infringements remains substantial, it becomes important to consider the ways in which the current proposal allocates its costs across the relevant parties. As it stands, a rights-holder can mandatorily require an ISP to engage in the notification, response and cease-and-desist process merely upon the presumption "on

reasonable grounds”³⁹ provided solely by the rights-holder that an infringement has occurred, and without any clear provision for compensation for the costs of the action. Presumably rights-holders do not have sufficient proof of infringement at this point to invoke a Tribunal action (because if they did, a Tribunal process rather than a notification would be the reasonable course of action). If the only information lacking for undertaking a Tribunal process was the infringer’s identifying information, then this should be the first step undertaken in the monitoring and enforcement of the agreement rather than the action following delivery of notification and ‘cease and desist’ orders.

There is a very real risk that under the current proposals, in the absence of any charging arrangement for rights-holders to compensate ISPs and the high costs of alternative discovery processes, rights-holders may simply use the notification process to go on ‘fishing expeditions’ or as an ‘intimidation tactic’ whenever they have information about the ISP-mediated internet identify of a rights-user. ISPs have no capability of assessing the merits of the allegation, and there is no intervention by the Copyright Tribunal to assess the merits of a claim before ISPs are required to intervene. Without such assurances, the cost to rights-users of pursuing such actions is low or non-existent, with the attendant risk that the notification and ‘cease and desist’ element of the process may be over-used, inconveniencing rights-users who have not infringed and imposing costs upon ISPs for which they are not compensated. Inevitably, this will increase the costs of internet access for all internet users, regardless of their internet activity or use of copyright material, and also reduce the incentives for rights-users to legitimately use the copyright material as a basis for further welfare-enhancing creative endeavour. Thus, the potential exist for the current proposals to alter the locus of net welfare losses from rights-holders to rights-users.

Furthermore, it is unclear who will bear the costs of Tribunal actions. This is important for determining the incentives for bringing Tribunal actions. The efficient level of actions will occur when the costs are imposed upon the parties whose actions result in the hearing. Whilst the provisions indicate that there may be some retrospective charge made when an allegation of case of infringement by a rights-user is proven⁴⁰, it is not clear how rights-holders will contribute to the costs of the actions they invoke. If there is no charge made to rights-holders bringing actions subsequently found to be not proven, then as with the direct ISP process,

³⁹ See Ministry of Economic Development, *Section 92A Review Policy Proposal Document for Consultation*, Phase 1.

⁴⁰ See Ministry of Economic Development, *Section 92A Review Policy Proposal Document for Consultation*, Phase 3.

there is a risk that the Tribunal process may be over-used, increasing total Tribunal workload and costs, and delaying the time taken to deal with legitimately proven infringements. Requiring the rights-holder seeking a hearing to lodge a bond before a Tribunal action is commenced provides an incentive-compatible means of ensuring only the clear-cut and truly questionable cases requiring Tribunal adjudication are actioned.

5. Further Considerations

Copyright law has always clearly distinguished between the property rights to the medium upon which a copyright work is embedded, the ownership of which can be traded, and the copyright information product, where rights to use are granted rather than ownership being transferred. Regardless of the media upon which their copyright works are embedded, the primary challenge for rights holders has always been:

1. identifying that a copyright infringement has occurred; and
2. identifying who has infringed;

whilst the primary challenge for rights-users has been being able to prove that their use of the copyright material is legitimate. It is not clear that simply changing the carrier medium from one which is physical, rival and excludable, and therefore well-suited to traditional property ownership rights to one that also shares the same economic characteristics as the copyright information good should alter the principles of copyright law. The development of digital media has simply clarified that the two sets of rights are distinct and must be considered separately. Whilst the owner of the paper and ink upon which a work of written fiction is embedded is usually also the rights-user, this need not be the case. With internet-mediated digital goods, it is almost always the case that the owners of the transport medium will be neither rights users nor rights holders.

To find a tractable way towards more efficient monitoring and enforcement of copyright in a digital economy, it is imperative that the design of laws and institutions return to the origins and principles of copyright law. The focus in the New Zealand legislative review upon institutions as a means of achieving a more efficient outcome has resulted in a flawed set of proposed arrangements that will likely create more distortions than resolutions. ISPs have become embroiled in the debate because, rightly or wrongly, they have been viewed as institutions whose emergence has facilitated cost reductions and media transformations that have enabled more copyright infringements to occur. As they are seen as part of the

‘problem’, it appears that it has been assumed that they must also become part of the ‘solution’. But whilst ISPs may be able to track the movement of digital material generally and assist with enforcing penalties when an infringement has already been detected and proven, they have no special advantages in determining either whether any of the myriad of information content they carry is subject to copyright, and even if it is, whether the computer they deliver it to or collect it from is associated with an individual who has infringed against copyright. They are very imperfect proxies for the information required to enforce the three rights identified above.

Focusing upon the institutions has thus resulted in legislative reform losing sight of the original principles of copyright. However, returning to them may assist in the revelation of a set of institutional and legislative provisions that better meets the needs of all of rights-users, rights-holders and ISPs.

Intuitively, as technological change has created new challenges to copyright law, technological change can also facilitate efficient resolutions, but only if the true underlying problems are identified. Figure 2 above identifies that ISPs are never party to the copyright agreement, so are ill-positioned to assist either rights holders monitoring and enforcing their copyright or rights users justifying their usage. However, Figure 3 indicates that it is possible for a distributor to act as an intermediary between a rights-holder and a rights-user, and that the incentives for that distributor to monitor and enforce copyright obligations are aligned only when that intermediary is contractually obligated to act as both a rights-holder and a rights-user.

The distributor model exists in both the physical and the digital world as a ‘two-sided market’ bringing together rights-holders and rights-users⁴¹. Rights holders contract the distributor to distribute their material because of the lower costs and wider ability they have to publicise the availability of the copyright work. Rights-users go to distributors to lower their search costs when looking for new material. Historically, it has been either impossible or very costly for distributors to track each end-user (e.g. because of the depth of subcontracting arrangements in physical distribution – such as exists in book wholesaling and retailing). However, when distributors move from dealing in physical to digital media, it becomes now technologically

⁴¹ Evans, D. & Schmalensee, R., (2005), ‘The industrial organisation of markets with two-sided platforms’, NBER Working Paper 11603, <http://www.nber.org/papers/w11603>. Also, Wright, J., (2004), ‘One-sided logic in two-sided markets’, *Review of Network Economics* 3(1): 44-64

feasible and very much more cost-efficient for them to deal directly with the ultimate end-user, and hence collect the information necessary to:

1. inform a rights-holder exactly who has entered into a legitimate usage agreement (every transaction can be electronically tagged and linked to an identifiable individual); and
2. assure a rights-user that use within the defined conditions is legitimate (the record of the transaction is low cost to create and store indefinitely) .

Thus the logical electronic intermediaries to facilitate the low-cost monitoring and enforcement of digital works subject to copyright are not ISPs but distributors. Moreover, the economic rationality of their use is manifest in the growth of such electronic intermediaries distributing works subject to copyright. One example is iTunes, but many other similar intermediaries exist, and indeed compete with iTunes for both the right to distribute works on behalf of rights-holders and for the attention and custom of rights-users. Users cannot obtain material from iTunes (either paid for or free) without first providing identifying information. All downloads are tracked, and each can be transparently associated with an affirmation that the user acknowledges the good downloaded is subject to copyright terms. Legitimate rights-users have nothing to fear from this tracking process. Indeed, they are assisted, as evidence now exists that the user obtained at least one copy legitimately, providing a form of defence should a false allegation of infringement be made.

Under these conditions, rights-holders will have good reasons to prefer to make their copyright material available only on such sites (it may be only one or more, depending upon the specific circumstances). If an individual can be found with a copy of the good, but cannot demonstrate that it was obtained from a legitimate distributor, then it is most likely that the copy is an illicit one and an infringement has occurred. If an allegation is then laid, it is the responsibility of that individual now to prove how the copy was obtained, thereby leading back to the original infringer. The appropriate body to determine the merits is an independent court, or some other quasi-judicial body appointed for the purposes of adjudicating claims of copyright infringement.

The advantage of the distributor model is that it aligns the incentives of both rights-users and rights-holders by utilising the very technology that enables infringement to work instead to mutually reinforce the income-earning potential of both. The rights-holders and rights-users in effect move into a 'walled garden'. Whilst the actual transmission of digital material from

distributor to user may pass outside the garden via an ISP, this is only in a transport capacity. The ISP never becomes part of the copyright agreement. Whilst the ISP may be used to transport an infringing copy to a party outside the walled garden, it is the responsibility of the outside individual, and not the ISP, to furnish the necessary information (Figure 5). Indeed, the model is robust even to the distribution of infringing digital material via media other than the internet (e.g. via CD or DVD).

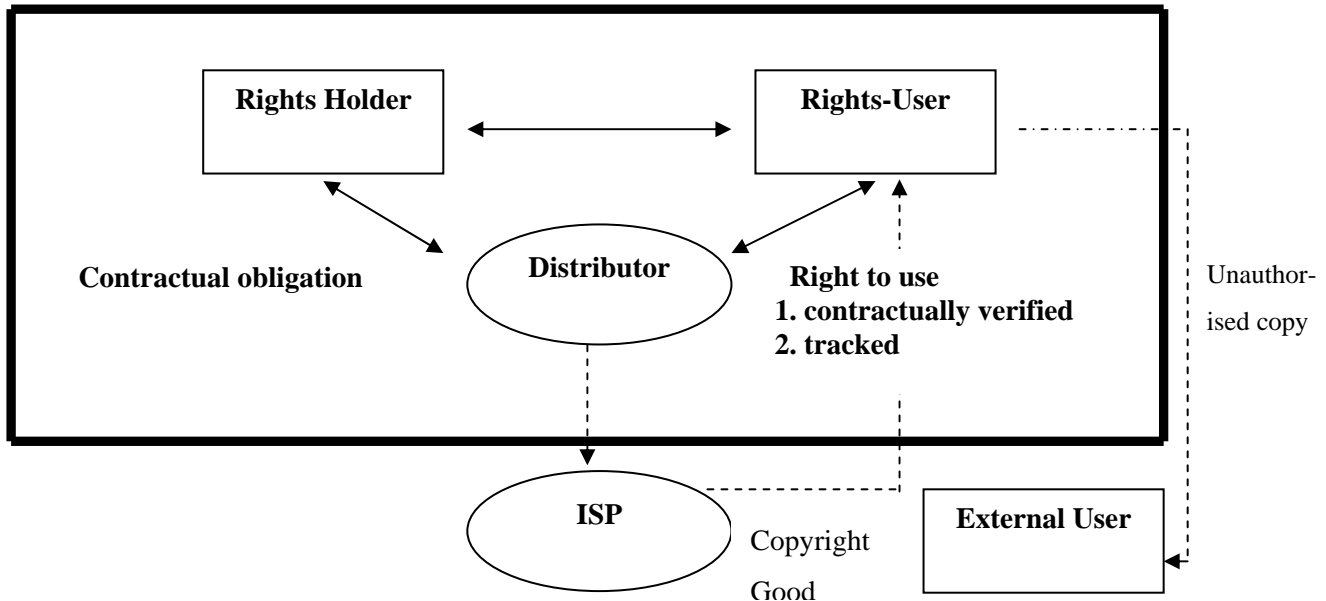


Figure 5: 'Walled Garden' Model

The robustness of the 'walled garden' model is attested to by the fact that such arrangements are emerging endogenously as a solution to the problems thrown up by the creation of digital technology and the internet. It is a simple and logical solution that sheets home the responsibilities to monitor and enforce solely to those parties to the copyright agreement.

Moreover, the simplicity of Figure 5 and its close similarity to the principles of Figures 1 and 3 confirm that in principle, the current copyright law is perfectly adequate to cope with changes in technology. New institutions will emerge on the basis of commercial imperatives to address the problems arising. It may take a little time for them to emerge, but when they do, it is more likely that they will support the mutual benefit of all participants than artificially imposed institutions. The risk is that legislators will move too quickly to implement imperfect solutions that exacerbate, rather than resolve the difficulties.

If there are any concerns about the ability to enforce copyright upon the basis of the ‘walled garden’ model, it is that the gardens are global in nature. This suggests that the institutions developed to support the monitoring and enforcement of copyright in this context must be able to act on a global level. This may pose some challenges, but is by no means insurmountable given that agencies already exist to address cross-border consistency and enforcement. If there is to be effort exerted in developing new institutions, our analysis suggests that this would be best directed at the international rather than national level.

6. Conclusion

By taking a law and economics approach to analysing the proposed changes to copyright law in New Zealand, we conclude that there is no special challenge posed to the nature and structure of copyright law generally by the emergence of digital technologies and the internet. Endogenous solutions are emerging to the problems posed by the apparently greater opacity and reduced costs of copying inherent in internet technologies. Consequently, the proposals to involve ISPs in the monitoring and enforcement of copyright in New Zealand, both in the original and refined s 92A clauses, are inherently flawed, and may invoke unexpected and costly consequences, without having any substantial effect upon the amount of infringement occurring. Thus we conclude that the most efficient outcome for New Zealand copyright law is that the s 92A proposal be removed entirely.

We suggest instead that the emergence of ‘walled gardens’ within which material subject to copyright is traded, monitored and enforced enable both rights-users and rights-holders to engage in welfare-enhancing creativity. Their presence enables the focus of effort to reduce illicit use to be placed on activities outside the garden. As technology enables better tracing of rights-users, the emphasis may shift in practice to users having to expend more resources proving their right to possess. Whilst there may be some issues of market power associated with the walled gardens, this is rightly a matter for competition rather than copyright law.