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NZ Copyright law affecting libraries in the information age...

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NEW ZEALAND COPYRIGHT LAW AFFECTING
LIBRARIES IN THE INFORMATION AGE
- THE RESPONSIBILITY OF LIBRARIES TO KEEP THE
BALANCE: HOW FAR SHOULD IT GO? -

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LIBRARY

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ABSTRACT

This paper considers the responsibility of libraries to maintain the balance between copyright owners' protection and the public's interest in using copyright materials in the digital age. The main argument is that it is unjustifiable to have a far-reaching provision, such as the former section 92A of the Copyright Act or the proposal of its amendment, that provides for the termination of a library's Internet access in case of repeat copyright infringement. This legal consequence applies due to the fact that the current definition of an Internet Service Provider does not distinguish between different kinds of ISP and that therefore, a library as a downstream ISP can be both, ISP and subscriber simultaneously. It is concluded that the termination of a library's Internet access would create an imbalance and thus, overstretch libraries' responsibility in the digital age. The best way forward, as advanced by this paper, is to exclude libraries as downstream ISPs from the legal consequence of termination. However, libraries should be obliged to introduce mechanisms of authentication regarding their users to enable the investigation of repeat copyright infringement within their institutions. This would do justice to both, the copyright owners' and the public's interest and thus, re-establish libraries' responsibility to maintain the balance underlying copyright law in the digital age.

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Copyright law – responsibility of libraries – section 92A of the Copyright Act

I INTRODUCTION

“Libraries are not made; they grow.”¹

This 100-year old statement by politician, lawyer and author Augustine Birrell has gained new importance in the digital age. Because of its power and versatility, digital technology has transformed libraries like no other invention; the explosion of the Internet has reshaped the library world.² With regard to this development, new technologies require the adjustment of existing laws. Among them copyright law is challenged to a considerable extent by the emergence of new technology as it “provides significant opportunities for the creators, for the owners, and for the users of copyright material, as well as offering them potential risks.”³ One of the main risks of technological advance and especially the increasing use of the Internet manifests itself in the illegal downloading of software, copied music and movies.

A study of more than 1000 New Zealand Internet users aged between 18 and 70 found every respondent had downloaded copyrighted material at least once in the past year ... [o]ne said attempts to legislate against illegal downloading were like “trying to stop an avalanche with a stick”.⁴

Moreover, it was found that illegal downloads are rife and that “nearly one in five respondents said nothing could deter them from illegal downloading.”⁵ This statement reflects the temptation to ignore copyright as it is such an intangible thing.⁶

Despite the ignorance and mindlessness regarding piracy and illegal downloading, the New Zealand legislation initiated an Internet service provider (ISP) liability for copyright infringement by its subscribers by the proposal of sections 92A-E of the Copyright Act 1994 within the framework of the Copyright (New Technologies and Performers' Rights)⁷

¹ Augustine Birrell *Obiter Dicta* (Elliot Stock, London, 1906) 263.

² See Jerry D Campbell “The Impact of Digital Technology on Libraries: A Chaotic Revolution” in Deanna B Marcum (ed) *Development of Digital Libraries An American Perspective* (Greenwood Press, Westport, 2001). 49; Brian Fitzgerald “Internet service provider liability” in Anne Fitzgerald and others (eds) *Going digital 2002 – Legal Issues for e-commerce, software and the Internet* (2 ed, Prospect Media Pty Ltd, St Leonards, 1999) 309.

³ Hon Judith Tizard (7 December 2006) 636 NZPD 7045.

⁴ Greer McDonald “Illegal downloads rife, says survey” (7 August 2009) *The Dominion Post* Wellington A7.

⁵ *Ibid.*

⁶ Graham Cornish *Copyright Interpreting the law for libraries and archives* (The Library Association, London, 1990) 1.

⁷ The Copyright (New Technologies and Performers' Rights) Amendment Bill was changed to The Copyright

Amendment Bill in 2006. While sections 92B-E of the Copyright Act deal with ISP liability and the protection of ISPs from liability for copyright infringement in general, section 92A contains a termination policy, which was introduced in an attempt to control breaches of copyright in the digital environment. As with the other amendments it attempted to maintain the overall balance within the Act between the competing rights of copyright holders and the users of copyright works.⁸ However, section 92A was said to “shift the responsibility for balancing competing rights away from the courts and Government and onto the shoulders of ISPs”⁹.

While most of the amended provisions, such as sections 92B-E came into force in October 2008, the implementation of section 92A was first delayed.¹⁰ In March 2009, Prime Minister John Key announced that the Government had decided to throw out section 92A entirely and start again.¹¹ By doing this, the Government reacted to the inability of right holders and ISPs to reach an agreement on a voluntary ISP Copyright Code of Practice as well as to industry, subscribers and public concerns. In July, the Ministry of Economic Development (MED) published a review policy proposal document for consultation.

Birrell’s statement is as potent today as it used to be: Libraries grow and therefore, have to match with the requirements of the digital environment. Among them, libraries have to comply with the requirements of copyright law in the digital age. Besides a variety of positive effects of technology and especially, the increase of the Internet, one has to be aware of the fact, that the Internet can be described as “one gigantic copying machine”¹² and therefore, makes it much easier to breach copyright.

Copyright law has always provided special protection and exclusive rights to copyright owners such as the right to bring proceedings against anyone who infringes their

(New Technologies) Amendment Bill after being reported from the Commerce Committee in 2007. The Committee recommended the title be changed as all amendments - even those provisions concerning performers’ rights - related only to make the provisions technologically neutral see Copyright (New Technologies and Performers’ Rights) Amendment Bill 2006, no 102-2 (Commerce Committee report). In the following it is referred to the Bill and the corresponding Act as Copyright Amendment Bill and Act.

⁸ Emily Mander “Section 92A: Shifting the responsibility of copyright enforcement onto ISPs” (2009) 106 NZLawyer 14.

⁹ Ibid.

¹⁰ “Cabinet delays law” (24 February 2009) *Southland Times* Invercargill 3 see www.stuff.co.nz (accessed 10 September 2009).

¹¹ Hon Simon Power MP “Government to amend Section 92A” (23 March 2009) see www.beehive.govt.nz (accessed 25 August 2009).

¹² Louise Longdin “Copyright and On-line Service Providers” (2000) NZLJ 180.

copyright as they obtain the exclusive right to make copies of their work.¹³ On the other hand, copyright law has always focussed in regulating how others might use the copyright, too.¹⁴ Therefore, the copyright law contains special sections which privilege other individuals or the public to use copyright material without the consent of the copyright holder. These two issues show that copyright tries to strike a balance between competing interests. Even in the digital age copyright law has to maintain the balance between the protection of copyrights to ensure the continued growth of writing and creativity and the public interest in these copyright works and ensure that access to these materials is allowed as well.

Libraries act as a point of intersection. They are on the one hand in a unique position as custodians of copyright material and have the duty to preserve published work for present and future generations, and to make this available to the public.¹⁵ On the other hand, they have to comply with copyright law and therefore, have to ensure the protection of copyrights and copyright holders. Libraries are special institutions which enable users the access to copyright materials, but just within the boundaries of copyright law, such as the permitted act relating to libraries¹⁶ or which can be applied to the users of libraries.¹⁷ Therefore, the role and task of libraries reflect and parallel the balance copyright has to strike. This places special responsibilities on all those working in libraries, protecting the rights of copyright holders by preventing copyright infringement – especially in times of the Internet as a “copying machine” – , whilst, at the same time, ensuring that the rights and privileges of users are also safeguarded.¹⁸

The implementation of a provision like section 92A seems to increase the responsibility libraries have regarding their role to maintain the balance between the competing interests underlying copyright law. This is caused by the fact that to this stage of legislative procedure, libraries come within the definition of an ISP.

Hence, this paper examines the important issue of what level of liability and responsibility libraries should be held to for copyright infringement by their users. It raises the

¹³ These exclusive rights are listed in section 16 of the 1994 Act. Moreover, the Copyright Act 1994 grants special moral rights to the author.

¹⁴ These privileges are contained in ss 40 et seq under permitted acts.

¹⁵ See Graham P Cornish, above n 6, ix; Tony Millett “Librarians and copyright” (2005) 4 NZIPJ 77.

¹⁶ These special provisions are listed in ss 50-57 and apply to prescribed libraries.

¹⁷ As readers use self-service photocopier or scanner, fair dealing provisions relating to research and private study ss 43 et seq might apply.

¹⁸ See Graham P Cornish, above n 6, ix.

question, how and to what degree libraries have to maintain the balance of competing interests underlying copyright law. By doing so, this paper refers in particular to section 92A and shows that the former section 92A and the proposal for a review are an attempt to minimise copyright infringement in the digital age and that they try to maintain the balance. However, this paper concludes that such attempted responsibility of libraries does not reflect libraries' role to keep the balance in an appropriate way as it offers the possibility that libraries will be cut off the Internet. This is caused by the fact that the current legislation does not consider the ambiguous function of libraries as ISPs and subscriber of Internet services. Thus, the paper concludes that libraries should be excluded from termination as subscriber, while at the same time they should introduce authentication mechanisms to investigate repeat infringement within their institutions. Such a regulation provides for the appropriate level of responsibility of libraries, to balance between the protection of copyright holders and users' interests in having access to copyright material.

In the first part of this paper, copyright's rationale and its impact on libraries is discussed. The paper provides some main aspects about the development of copyright law within the international framework and scrutinises the responsibility and an appropriate level of liability of libraries in the digital environment.

The second part of this paper addresses section 92A of the Copyright Act and its challenging legislative process by working out the consequences of the implementation of an ISP liability for libraries. It raises the question of whether section 92A is an appropriate legislative approach to determine libraries' responsibility to keep the balance.

The third part focuses on which approach should be taken by the New Zealand legislature to work out a solution regarding libraries' responsibility in the digital age. Within this discussion, the paper refers to the statements of Tony Millett, member of LIANZA¹⁹ which represents 459 public, educational, commercial, industrial, legal and government libraries in New Zealand.²⁰ Therefore, the answers by Mr Millett supported by other documents published by LIANZA represent the majority of the librarians' points of view.

¹⁹ The Library and Information Association of New Zealand Aotearoa. The statements of Mr Millett are based on an interview conducted within the scope of this research project, see Appendix 1

²⁰ LIANZA "Submission on the Section 92A Review Policy Proposal Consultation Document" (3 August 2009) 2.

II COPYRIGHT AND LIBRARIES

To have a full understanding of the problems that arise while answering the research question one has to examine the diverging interests underlying the copyright law provisions and the development of the role of and its impact on libraries. The function of libraries and their responsibility in the digital environment is analysed below.

A *Libraries as part of the balancing act regarding Copyright Law*

Dictionaries describe the term “library” as a building, room or organisation containing a collection of books and periodicals for use by the public usually without payment.²¹ This definition of “library” was valid in the ancient time and remains valid today – at least to a certain degree. However, one might have a closer look on that definition of “libraries” to redefine it considering the changes and developments libraries had to undergo over the last decades, caused in part by the ramifications of the Internet²² to assess their role and responsibility regarding copyright law.

The above mentioned definition of “library” first of all, refers to the building of a library serving as storage for books and other published material. Books stored in a library fulfil a symbolic value as they represent the aspirations of the human spirit²³ and as they “preserve the documentary heritage of [a] nation; both for cultural and economic reasons”.²⁴ The first English copyright statute, the Statute of Anne for example, required the delivery of a copy of a published book to the main libraries.²⁵ Besides a symbolic meaning of storage, the definition of “library” includes the part “for use by the public” which refers to the meaning and value of libraries for a democratic society. The main role libraries have to play, is the acquiring of information and to facilitate public access to these information resources.²⁶ They preserve the cultural heritage for use by present and future generations of users. This role originally contained the shelving and cataloguing of books and other published material such as periodicals and later on audiovisual materials.

²¹ See Cambridge Advanced Learner’s Dictionary <http://dictionary.cambridge.org> (accessed 22 August 2009); Compact Oxford English Dictionary <http://askoxford.com> (accessed 22 August 2009).

²² See Mark Van Hoorebeck *Law, Libraries and Technology* (Chandos Publishing, Oxford, 2005) xiii.

²³ See Fabrice Papy (ed) *Digital Libraries* (Iste and John Wiley & Sons, London, Hoboken, 2008) 63; see Michael Gorman *The Enduring Library Technology, Tradition, and the Quest for Balance* (American Library Association, Chicago, 2003) 4.

²⁴ Richard Worth “Speech to North Island Public Library Managers’ Meeting” (Wellington, 22 May 2009) www.beehive.co.nz (accessed 1 September 2009).

²⁵ Statute of Anne, 8 Anne, c 19 (1710) s 5.

²⁶ See Carmen Vietri “The free flow of information or the flow of free information” (2005) 4 NZIPJ 48, 51.

With regard to libraries' role of dissemination and preservation of knowledge, heritage and information, libraries fulfil one of the intentions of copyright law, which is the "dissemination of copyright works to accomplish the needs of society and copyright users to benefit from the ideas and knowledge incorporated within publications to provide incentives to ensure the creation, development and dissemination of copyright works"²⁷. Therefore, libraries have historically been under the protective wing of copyright legislation, which means that the legislative framework has provided for a long time copyright exceptions or permitted use provisions with special regard to libraries. Section 21 of the New Zealand Copyright Act 1962 for example, contained a special exception for libraries, stating that under certain circumstances the making or supplying of a copy of a copyright work by a library does not infringe copyright.²⁸ The Copyright Act 1994 and the Amendment Act 2008 contain further permitted acts regarding libraries.²⁹ These exceptions might seem to compete with copyright owners' interests regarding their works and the fact that another aim of copyright law is, to protect the rights of copyright holders to encourage creativity and to provide a fair remuneration. However, the exceptions try to find a balance between the competing interests of public accessibility and the protection of copyright holders.

Within the construct, libraries have always been a point of intersection. The exceptions stress the role of libraries to provide access to information and that legislation has always considered this function by enacting special provisions for libraries. However, the exceptions show as well that libraries have to comply with copyright law. Despite their function of information dissemination they have to ensure the protection of copyright as provided under the Copyright Act and copyright holders. It is the responsibility of libraries to provide access to copyright material in the boundaries of the permitted acts and to ensure that their staff, as well as their users, do not infringe copyright. In times without technical devices, which simplify the copying and therefore, under certain circumstances copyright infringement, the responsibility of libraries to keep the balance between the public's interest and copyright owners' interest already existed, however, to a much lesser degree. Libraries had to guide and

²⁷ LIANZA, above n 20, 3.

²⁸ Copyright Act 1962, s 21. The Copyright Act 1913 contained already an exception from copyright infringement for the purpose of private study, research, criticism, review or newspaper summary, see s 5. The Debates concerning the implementation of s 21 of the Copyright Act 1962 do already refer to libraries' role: They are not exempted from recognising copyright, but they have very definite clearly defined rights, see Hon J E Hanan (24 October 1962) 332 NZPD 2325.

²⁹ These exceptions apply to prescribed libraries and are contained in ss 50 – 57 of the amended Act. However, with regard to s 40 of the Copyright Act the use of copyright material might be permitted under other provisions, such as s 43, as well.

assist their users as well as to comply with the law, but only the "print environment" did not offer the possibility of copyright infringement to a high degree.

However, "[b]ookishness has gone - along with the old stereotype of stern shushes from a bluestocking in a tweed skirt and spectacles with her hair in a tightly twisted bun."³⁰ Technological advance and the digital world, particularly the Internet, have created a new imbalance shattering the carefully crafted balance of copyright law which was reflected in librarians' work.³¹ The role of libraries has been reshaped and not without influencing the liability and responsibility of them. Even in the digital world libraries continue to provide to society, repositories at the forefront of information delivery."³² However, the provision is not restricted to published books anymore; libraries are "information brokers" operating as part of an international network of libraries that have the ability to digitise works and provide users with online access to a worldwide repertoire of books.³³ The "globalizing influences of the Internet"³⁴ enable libraries to provide their users online access to journal articles and e-books via electronic databases and electronic document delivery. Moreover, libraries provide access to computers so that users can access information on the Internet.

The increase of access to information and the availability of copyright works from the Internet however, lead to a risk as well. "The technology now available makes it possible to make a copy of a work in digital form both cheaply and quickly, and the copy that is made is just as good as the original."³⁵ As libraries offer free Internet access to their users to ensure modern information dissemination, this might lead to the risk of illegal downloading or copyright infringement "via" the libraries. Therefore, the balance under copyright law between the public interest in access to information and the protection of copyright holders which is reflected in librarians' work is endangered. The responsibility of librarians to ensure that their users do not breach copyright by using technical or digital devices grows with the development of technology. Thus, libraries in their roles of intersection have to adjust the balance between the competing interests. This responsibility encompasses to ensure that the

³⁰ "Shh, this is a digital library: The modern librarian is an online facilitator with an MA" (23 April 2009) *TimesOnline* see <http://business.timesonline.co.uk> (accessed 10 September 2009).

³¹ See Paul Pedley *Digital Copyright* (2 ed, Facet Publishing, London, 2007) XXV.

³² See Mark Van Hoorebeck, above n 22.

³³ Kathy Sheat "Libraries, copyright and the global digital environment" [2004] 22 *The Electronic Library* 487 see <http://www.emeraldinsight.com> (accessed 22 August 2009).

³⁴ Arthur Downing "The Impact of the Internet on the Administration of Libraries" in Lewis-Guodo Liu *The Role and Impact of the Internet on Library and Information Services* (ed) (Greenwood Press, Westport, 2001) 26.

³⁵ Paul Pedley, above n 31.

copyright is not infringed by using self-service photocopiers, printers, scanners or the Internet. Thus, libraries are right in the middle of the balancing act, even in the digital age.

B New Zealand Copyright Law going digital

The analysis of the role of libraries and their development in the digital environment has shown that libraries are a point of intersection within copyright law. It is the libraries' responsibility to provide access to information. At the same time they must comply with the requirements of copyright law which is to act within the privileges and exceptions the law provides and to avoid copyright infringement by their users.

However, the Copyright Act 1994 was drafted before the widespread uptake of digital technology.³⁶ Problems occurring when trying to apply the "non-digital" copyright provisions to Internet inherent questions led to an updating of the Act to ensure that it provides "appropriate mechanisms to protect copyright in the global digital environment"³⁷. Therefore, the MED began a review in the form of a discussion paper³⁸, starting in 2001. It set out the key questions on whether the Copyright Act 1994 was capable of dealing with the use of works in the digital and on-line environment, and whether the Act needed to be reformed to meet the demands of copyright creators, owners and users:³⁹

Copyright creators and owners have concerns about their ability to control digital copying and communication of their works over the Internet. Copyright users have concerns about the effects of digital technology in restricting reasonable access to copyright material.

However, the Discussion Paper as well as the later Explanatory Note to the Bill, promoting the Copyright Amendment Act, confirm the balancing purpose of New Zealand copyright law. The Explanatory Note to the Bill, for example, states, that copyright⁴⁰

³⁶ See Copyright Bill 2006, no 102-1 (Explanatory Note); John Burrows and Ursula Cheer *Media Law in New Zealand* (5 ed, Oxford University Press, Melbourne, 2005) 202.

³⁷ Kathy Sheat, above n 33, 488. The Copyright Bill 2006, no 102-1 (Explanatory Note) refers to the economic losses deriving from these factors: music industry NZ\$ 114 million in New Zealand, computer industry US\$ 11 billion worldwide, picture industry US\$ 4 billion in New Zealand.

³⁸ Ministry of Economic Development "Digital Technology and the Copyright Act 1994: A Discussion Paper" (last updated 19 October 2007). For further information regarding primary and secondary ISP liability see Jens U Nebel "MED's Position Paper On Digital Technology And The Copyright Act: Legislation Without A Solution?" (2005) 36 VUWLR 45.

³⁹ Ministry of Economic Development, *ibid*, A.

⁴⁰ Copyright Bill 2006, no 102-1 (Explanatory Note).

gives copyright owners exclusive rights that allow them to control certain aspects of a work's exploitation, while at the same time providing limited exceptions to these rights for copyright users. In this way, the Act seeks to provide incentives to ensure the creation, production, and distribution of new creative works in a manner that meets society's needs.

Therefore, the exceptions with special regard to libraries, such as the copying by librarians of parts of published works, of articles in periodicals, for users or collections of other libraries⁴¹ were amended and adjusted to the digital age. The provisions include for example the making of digital copies or storage of material of websites. By implementing the amendments, legislation adjusted and extended the use of copyright material for the public. However, the Amendment Act tried to work on the strengthening of the rights of copyright owners as well, to maintain the balance underlying copyright law. A closer examination of these provisions, found in sections 92A-E of the Act, the provisions regarding ISP liability, raises the question of whether they impose a greater responsibility on libraries and whether they create an imbalance in favour of copyright holders. The MED paper raised the issue of ISP liability due to the aspect that "copyright owners may wish to seek redress from ISPs, given that there can be difficulties in taking actions directly against infringers".⁴²

Another impetus for the revision of New Zealand's copyright legislation was to ensure that comparable levels of protection are provided around the world. Therefore, international standards play an important role, they have to be harmonised that copyright owners receive an adequate and comparable protection in foreign countries.⁴³ The review of the Copyright Act was intended to work as a precursor to consideration of New Zealand's possible accession to two "Internet" treaties negotiated by the members of the World Intellectual Property Organization (WIPO 1996).⁴⁴ These are the WIPO Copyright Treaty (WCT) and the WIPO Performers and Phonograms Treaty (WPPT)⁴⁵. Although New Zealand is not party to these treaties until today, the implementation of the Copyright Amendment Act led to the fact being closer to compliance which is also reflected in Free Trade Agreements (FTA) New Zealand has entered in.

⁴¹ Copyright Act 1994, ss 51 – 56c, which apply to prescribed libraries as well as other exceptions which might apply to the users of libraries, e.g. ss 43-44a. These exceptions are not subject of the research paper.

⁴² Ministry of Economic Development, above n 38, D. See III for an analysis of ISP liability with special regard to section 92A.

⁴³ Ibid.

⁴⁴ Cabinet Economic Development Committee "Digital Technology and the Copyright Act 1994: Policy Recommendations" (Wellington, last updated 2005) para 11.

⁴⁵ For further information regarding these treaties see Aaron Schwabach *Internet and the Law: Technology, Society, and Compromises* (ABC-CLIO, Santa Barbara, 2006) 314.

The Trans-Pacific Strategic Economic Partnership Agreement⁴⁶ addresses the importance of intellectual property in promoting social and economic development, particularly in the new digital economy. Within Article 10.2 of the FTA the parties agree to “recognise to achieve the balance between the rights of right holders and the legitimate interests of the users and the community”.⁴⁷ Moreover, the parties agree to provide for reproduction rights and communication to the public rights to copyright owners that are consistent with the WCT. The agreements show the international standard in attempting a balance in copyright law. Although they do not refer to libraries in particular, it can be said that with regard to the function of libraries this balance has to be reflected in their work as well.

In 2008 comprehensive negotiations for the United States to join the Trans-Pacific Agreement were announced. However, these negotiations lead to the fear of libraries, that the United States as a strong party may force changes to New Zealand copyright law in order to strengthen it in favour of copyright owners and to press for the balance to be changed in that direction.⁴⁸

III SECTION 92A – A LEGISLATIVE APPROACH TO DETERMINE LIBRARIES’ RESPONSIBILITY TO KEEP THE BALANCE?

The insufficiencies of the Copyright Act in the digital age as well as the harmonization of international standards have influenced the amendment of the copyright law to maintain the balance between copyright holders’ and users’ interests which is reflected in the role of libraries. However, this paper will scrutinise whether the law with the implementation of section 92A overstretches the responsibility of libraries to strike the balance. To understand the “well-publicised and continued controversy around the inclusion of section 92A”⁴⁹ one

⁴⁶ This agreement was signed by New Zealand, Singapore and Chile in July 2005 and by Brunei in August 2005 and was formerly known as P4. For further information see New Zealand Ministry of Foreign Affairs and Trade www.mfat.govt.nz.

⁴⁷ Trans-Pacific Strategic Economic Partnership Agreement, art 10.2.

⁴⁸ LIANZA “Submission on Free Trade Negotiations with the United States” (2008) 331 *Library Life* 5. Copyright was one of the big costs, for example, to Australia, when signing the FTA with the United States as the United States insisted so much on stringent rules to protect software companies resulting in additional costs for libraries and other educational institutions, see Bill Rosenberg “New Zealand Not for Sale: Who wins if we get a free trade with the US?” <http://nznotforsale.wordpress.com> (accessed 13 September 2009). Section 92A in its former wording was already close to 17 USC, § 512 (i)(1)(A).

⁴⁹ See Emily Mander, see above n 8, 14. Neither the Fair Trade Agreements nor the WCT do not require a regulation such as section 92A. However, this might change if the United States become party to the Trans-Pacific Agreement.

has to show why it affects libraries and analyse the legislative process regarding section 92A as part of the Copyright Amendment Act.

A Internet Service Providers

Sections 92A-E deal with ISP liability. To assess the impact of these regulations and particularly section 92A on libraries, one first has to examine the term "ISP".

1 General understanding of ISP

ISPs connect the people with the physical network; they work as on-line intermediary and conduit for a large amount of Internet traffic.⁵⁰ In a general sense the term of ISP is used more narrowly, just referring to companies that provide Internet access to individuals, companies, institutions, councils and everyone who seeks to be connected with the World Wide Web. This understanding mainly includes telecommunications and cable television companies. However, the providing of Internet access is not the only service an Internet service provider may offer: e-mail, Web hosting, caching and search services⁵¹ can be provided as well.

2 The Copyright Act view

Section 4 (2) of the Copyright Amendment Act inserted a definition of ISPs in the Copyright Act. This is broader than the above mentioned general understanding of an ISP as a provider for Internet who does this for business purposes by contracts. This definition has been effective since 31 October 2008⁵² and provides that⁵³

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:

⁵⁰ See Judit Bayer "Liability of Internet Service Providers for Third Party Content" (2006) 1VUWLR Working Paper Series 1; Louise Longdin, above n 12, 180; Susy Frankel and Geoff McLay *Intellectual Property in New Zealand* (Lexis-Nexis Butterworths, Wellington, 2002) 748.

⁵¹ See Aaron Schwabach, above n 45, 189. For further information regarding the individual services see Judit Bayer, above n 50, 1.

⁵² See *Copyright and Design NZ* (Lexis-Nexis 2009) Copyright Act 1994, Copyright Act 1994, para [Cop 2.1] (updated June 2009) www.lexisnexis.com.helicon.vuw.ac.nz (accessed 24 August 2009).

⁵³ Copyright Act 1994, s 2.

(b) hosts material on websites or other electronic retrieval systems that can be accessed by a user.

This definition applies to section 92A-E of the Copyright Act.

3 *Is a library an Internet service provider?*

Applying the traditional and narrow understanding of an ISP, a library would not fall into the definition of an ISP as it is not an organisation with the “business objective” to provide telephone, Internet and other telecommunications services⁵⁴ and which is in a contractual relationship with the user of a library-supplied public-access computer rather than it is a non-profit-making, public-sector institution with the ability to search for information and to develop knowledge actively.⁵⁵ One cannot deny that libraries and telecommunication ISPs have the provision of information services in common. However, one has to emphasise their different roles. While libraries provide access to the Internet as part of their societal function of “information dissemination”, telecommunications ISPs follow their business objective.

The definition of ISP provided under the Copyright Act, however, does not distinguish between these different motivations and kinds of information services and includes different categories of ISPs. Besides the category of telecommunications ISP, the definition in section 2 of the Copyright Act can also include downstream ISPs.⁵⁶ These are “organisations that re-supply Internet services received from telecommunications ISPs to other downstream ISPs or directly to their own users”⁵⁷. Thus, they offer, e.g. “the transmission, routing or providing for digital online communications”⁵⁸. As a library might receive Internet services based on a contract with, e.g. a telecommunications company, and re-supplies these services directly to the library’s users, it can act as a downstream ISP. Moreover, the library can act as the “link of a chain of downstream ISPs” as well. For example, a library’s parent institution, such as a city council, is a downstream ISP, receiving Internet services from a telecommunications ISP.

⁵⁴ See Interview with Tony Millett, member of LIANZA (The Library and Information Association of New Zealand Aotearoa) and LIANZA’s Standing Committee on Copyright) (Monika Duppelfeld, LLM Research Paper, Victoria University of Wellington, 2 August 2009), Appendix 1.

⁵⁵ Robert Burrell and Allison Coleman *Copyright Exceptions The Digital Impact* (Cambridge University Press, Cambridge, New York, 2005) 137, 139.

⁵⁶ This term comes from the Telecommunication Carriers’ Forum “Internet Service Provider Copyright Code of Practice Draft 4 February 2009” B.

⁵⁷ See Interview with Tony Millett, above n 54; “Submission on the Section 92A Review Policy Proposal Consultation Document”, above n 20, 5.

⁵⁸ Copyright Act 1994, s 2(a).

The library re-supplies the services such as a website to its users, by receiving it from the parent downstream ISP. Another group of ISP covered by the definition are organisations or individuals who have websites. Therefore, law firms, companies, schools, universities and libraries which have their own website can be regarded as an ISP.

The first problem which occurs when analysing the definition of an ISP with regard to a library, is, that the Copyright Act, as well as other related documents⁵⁹, do not distinguish between the different categories of ISPs. The documents only mention an ISP and the subscriber in general. They do not consider the distinction between telecommunications and downstream ISP and, that based on the broad definition of an ISP “an ISP may be both, ISP and subscriber simultaneously”⁶⁰. As mentioned above, this ambiguity applies to libraries as well. With regard to the different functions of telecommunications ISPs and libraries as downstream ISPs it is questionable whether it is justified that they are treated equally by the law. This might impose⁶¹ the same responsibility on libraries and e.g. telecommunications companies. At the same time libraries can act as a subscriber (downtown ISP subscribing services from a telecommunications ISP) and therefore, be hit in this role by the consequences accruing from the responsibility and liability of telecommunications ISPs. This ambiguity deriving from the broad definition of ISP might be inconsistent with the libraries’ responsibility to maintain the balance and has to be kept in mind for the following analysis of section 92A.

B Facing the Problem

The implementation of section 92A was planned in the context of ISP liability as a provision to combat illegal downloading which facilitates copyright infringement on a large scale⁶² and to provide a strong protection of and effective relief to copyright holders.⁶³ The Minister responsible⁶⁴, Judith Tizard, set forth strong views on how artists were mortgaging

⁵⁹ See for example Commerce Select Committee “Official’s Report on the Copyright (New Technologies and Performers’ Rights) Amendment Bill: Covering Report and Clause by Clause Analysis”(7 May 2007).

⁶⁰ Interview with Tony Millett, see above n 54.

⁶¹ See Earl Gray and Kate Walters “The Copyright (New Technologies) Amendment Act 2009: Updating New Zealand’s Copyright Act for the digital age” (2009) 15 CTLR 88. The further analysis will show the content of ISP liability, with special references to s 92A.

⁶² Hon Simon Power MP, above n 11.

⁶³ Ministry of Economic Development “Section 92A Review Policy Proposal Document for Consultation” (14 July 2009) 1 www.med.govt.nz (accessed 1 September 2009); see further Johann Katz “Section 92A – To be or not to be” (2009) 5 NZIPJ 543.

⁶⁴ Judith Tizard is the former Minister of Commerce (Labour Party) under which the implementation of section 92A was proposed. The current responsible Minister is Simon Power (National Party).

their homes to make films and music and were not making any returns on their investment, and all because of Internet piracy.⁶⁵

In section 53 of the first draft of the Copyright Amendment Bill⁶⁶ section 92A was intended to be a requirement for the application of the limited liability of ISPs provided under sections 92B-E. These provisions limit the liability of ISPs to a certain degree. Thus, ISPs do not infringe copyright because a user infringes copyright by using ISP services or by storing (unless the ISP knows or has reason to believe) or caching infringing material.⁶⁷ However, to qualify for the limitations on liability, ISPs should have adopted and reasonably implemented a policy that provides for termination of the accounts of repeat infringers.⁶⁸ This means, that whilst ISPs undergo a limited liability on the one hand, these regulations only apply if the ISP adapts a termination policy and therefore, provides a procedure to react to copyright infringement by its subscribers or users. This construct seems to balance the responsibility and duties of ISPs, but does not consider the ambiguous role of libraries.

Despite section 92A being removed from the draft Bill by the Commerce Select Committee⁶⁹ entirely, section 92A was included without being a condition to qualify for sections 92B-E by the Government in the final version of the Bill and Amendment Act. It states:⁷⁰

Internet service provider must have policy for terminating accounts of repeat infringers

(1) An Internet service provider must adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the account with that Internet service provider of a repeat infringer.

(2) In subsection (1), repeat infringer means a person who repeatedly infringes the copyright in a work by using 1 or more of the Internet services of the Internet service provider to do a restricted act without the consent of the copyright owner.

⁶⁵ See Colin Jackson "Ministers: why we changed the copyright act" (2008), see <http://it.gen.nz> (accessed 23 August 2009).

⁶⁶ Copyright Bill 2006, no 102-1, s 53.

⁶⁷ These provisions are not subject to the paper.

⁶⁸ See Copyright Bill 2006, no 102 - 1 (Explanatory Note).

⁶⁹ For reasons and recommendations of the Commerce Select Committee see Commerce Committee "Copyright (New Technologies and Performers' Rights) Amendment Bill 102-2 (27 July 2007).

⁷⁰ Copyright Amendment Act 2008, s 92A.

As a consequence of the broad definition and lacking distinction between the different kinds of ISPs, the legal consequence of repeated copyright infringement, the termination or rather disconnection of the Internet access is also applicable to libraries – acting as ISP or subscriber. How this affects libraries' responsibility to strike the balance is analysed below.

C Policy under Section 92A

Section 92A required ISPs to have a policy to terminate the accounts of repeat copyright infringers in appropriate circumstances. However, the law did not state anything about the legal effects of these policies. The Telecommunications Carriers' Forum (TCF) released a Draft Copyright ISP Code of Practice (draft) for public consultation in February 2009⁷¹ which was intended to be a template policy for ISPs, to assist them in meeting their obligations under the Act and had been developed by a TCF working party that included representatives of NZ's leading ISPs.⁷² As can be seen from the name TCF itself, this forum represents ISPs in the above mentioned general understanding, New Zealand's major telecommunications ISPs such as Telecom, TelstraClear and Vodafone.⁷³ However, as it is said in the draft, the Code would have been applicable to all those ISPs that had agreed to be bound by it.⁷⁴ LIANZA, as a representative for various libraries made a submission to the draft. To assess the impact of the draft on libraries, one has to consider the ambiguous role of libraries as a subscriber as well as an ISP itself.

The draft set out some major principles regarding the termination of an Internet account. However, the policy of termination emphasised on education and was intended to be applied in the light of the principle that "[t]ermination of an Internet Account is a 'last resort'".⁷⁵

⁷¹ Telecommunications Carriers' Forum, above n 56.

⁷² Telecommunications Carriers' Forum "Summary: TCF Releases Draft ISP Copyright Code for Public Consultation" (4 February 2009) Press Release www.tcf.org.nz (accessed 22 August 2009).

⁷³ Telecommunications Carriers' Forum "TCF Members" www.tcf.org.nz (accessed 22 August 2009). These major companies were member to the TCF working party as well.

⁷⁴ "Internet Service Provider Copyright Code of Practice Draft 4 February 2009", above n 56, para D 5.

⁷⁵ *Ibid.*, para C 4.8.

1 Downstream ISP

The draft, unlike the Copyright Act, distinguished between different kinds of ISPs by defining downstream ISP in the above mentioned meaning. Moreover, the Code set out in Clause 4.9 that⁷⁶

Downstream ISPs should not have their Internet Accounts terminated, since by doing so, a Party will inevitably terminate the Internet Accounts of Users who are not involved whatsoever in the Infringement, which would be inappropriate and unacceptable.

As libraries fall under the definition of downstream ISPs, this clause⁷⁷

remove[d] one of the major concerns of libraries, that all its Internet connections, and perhaps also the Internet connections of its parent organisation ... could be terminated because of alleged infringement of copyright by someone using a library-supplied public Internet-access computer in the library.

This quotation from LIANZA's submission shows that the association appreciated libraries' exceptional treatment under the planned clause 4.9 in their role as downstream ISP and therefore, subscriber of Internet services. However, the statement does not consider the legal effect of such a regulation. Section 92A required a policy, but did not mention that every policy an ISP might have adapted would be legally effective and would meet the requirements of section 92A in an appropriate way. This question would still be open to a judicial ruling which could find that such an exception is a breach of the requirements under section 92A. Thus, the draft would not remove libraries' responsibility under the Act to implement a termination policy nor does it say that a policy – whether it affects libraries as ISPs or as subscribers – would be declared legally effective by a court.

Moreover, clause 4.9 was not intended to protect downstream ISPs from their liability to have and implement a termination policy complying with section 92A of the Act. Instead, the TCF draft stated, that a downstream ISP's policy is going to be effective, once the telecommunications ISPs has passed a copyright holder's notice of copyright infringement to the downstream ISP.⁷⁸ In other words, the draft just passed on the determination of

⁷⁶ "Internet Service Provider Copyright Code of Practice Draft 4 February 2009", above n 56, para C 4.9.

⁷⁷ LIANZA "Submission on TCF's Draft Internet Service Provider Copyright Code of Practice" (26 February 2009) 5.

⁷⁸ "Internet Service Provider Copyright Code of Practice Draft 4 February 2009", above n 56, para C 4.3; see Appendix 2.

termination of an Internet account to the downstream ISP considering the fact that the involved parties are not just one ISP and an individual subscriber, but a chain of ISPs and a user. Therefore, the draft admittedly exempted libraries from a direct termination of the Internet account.

However, it did not provide libraries or other downstream ISP with a regulation or sample policy how they should terminate their users' accounts, especially for downstream ISPs "which are unable to identify alleged copyright infringers"⁷⁹. With regard to the above mentioned lack of a legal effect of any draft, the draft itself and in particular clause 4.9 of the draft did not remove libraries' responsibility to adapt a termination policy. The draft passed the responsibility of an appropriate termination policy on the shoulders of libraries, even in their role as a subscriber (or downstream ISP). Hence, the draft – if had been declared legally effective by a court – like section 92A itself lacked an appropriate solution for downstream ISPs, like libraries, which are not able to identify the alleged infringers, either because authentication of Internet users is not required, or because record by date and time are not kept.⁸⁰

Although one cannot assume that the draft would have been declared legally effective and therefore, does not remove the responsibility of libraries to fulfil the requirements of section 92A, the draft reflected the balance libraries have to maintain in a more appropriate way than the law itself. It distinguished between different kinds of ISPs and due to that fact, considered the termination of a downstream ISP, such as a library, as inappropriate and unacceptable. Instead, it passed on the responsibility of the termination of an Internet access of an individual user to the libraries to find a regulation that balances both, copyright owners' and users' interests alike.

2 *Why it failed*

However, one of the largest telecommunications ISP, TelstraClear, withdrew from the TCF's negotiations because it did not "want to make bad legislation work"⁸¹. Without unanimous support from its members, the "Copyright Code of Practice" could not be ratified.

⁷⁹ "Submission on TCF's Draft Internet Service Provider Copyright Code of Practice", above n 77, 7.

⁸⁰ Ibid, 9.

⁸¹ Computerworld "TelstraClear bails from copyright code talks: The code will not solve copyright issues, says TelstraClear" (11 March 2009) <http://computerworld.co.nz> (accessed 25 August 2009).

TelstraClear spokesman, Chris Mirams, stressed the fact that lots of customers and businesses had spoken and protested against section 92A via blogs and petitions. "In TelstraClear's view, any industry code would simply be an attempt to tidy up poorly drafted legislation."⁸² As Prime Minister John Key had already delayed the implementation of section 92A due to the controversy regarding the draft and had announced that the whole section would be suspended if the parties could not reach an agreement, he walked like he had talked.⁸³ He finally stopped section 92A for reviewing and re-examination.

There are several legal problems regarding the draft, reflecting the problems and insufficiencies of section 92A itself which lead it to be an inappropriate solution for libraries' responsibility to maintain the balance. These are briefly outlined in the following paragraphs.

(a) Lack of clarity

Section 92A, as well as the draft which mainly adapts the Act's terms, lacks clarity because of redundant or broad definitions.

Besides the broad definition of an ISP which does not reflect libraries' ambiguous role⁸⁴, the definition of "repeat infringer", which is required under section 92A of the Act is redundant. Subsection 2 of the amended section basically defines a repeat infringer as a "person who repeatedly infringes"⁸⁵ and provides no information as to what repeated infringement actually means. Again, due to the fact that the law does not distinguish between telecommunications and downstream ISPs, the provision remains unspecific regarding the impact on libraries. The definition a "person who repeatedly infringes" shows that the law intends to deter an individual from copyright infringement by terminating their access. While this might be a simple procedure for telecommunications ISP who can easily identify their subscribers as their relationship is based on a contract, the law does not take into consideration that allegations of copyright infringement made against a library may relate to single instances by separate users, rather than to multiple instances by one user. Therefore, the legislative threshold of termination for "repeated infringer" falls short. As a consequence, the termination of a library's Internet account – although there might not be a repeat infringement

⁸² TelstraClear "Submission on Draft Copyright Code of Practice" (6 March 2009) 4.

⁸³ Hon Simon Power MP, above n 11.

⁸⁴ See above III C 1 a).

⁸⁵ Copyright Amendment Act 2008, s 53 (amended s 92A(2) of the Copyright Act 1994).

caused by a single person – would destroy the balance libraries have to maintain and strengthen copyright holders’ protection.

By contrast, sections E-G of the draft set out when a person will be considered to be a “repeat infringer” under the Code, stating a highly administrative notification process under which the account termination is mainly based on three undisputed education notices passed to the infringing user.⁸⁶ However, as the draft passes the responsibility of a termination policy onto downstream ISPs⁸⁷ and therefore libraries, it does not set out conditions of repeated infringement regarding downstream ISPs. This approach – if it would have been declared legally effective by a court – considers the libraries’ responsibility in a more consistent way with copyright law. Under such an approach – although this might lead to further problems⁸⁸ – it would be up to the libraries to identify a repeat infringer and to strike the balance.

Moreover, there is little clarity as to the interpretation of “appropriate circumstances”, a term which is like “repeatedly infringes” essential to the detail for any termination policy. One can argue that this term is open for interpretation and that ISPs who want to fulfil the requirements under section 92A can set their “circumstances” individually. Thus, libraries, which do not require an authentication of their users and therefore, might not be able to identify an alleged infringer, could define “appropriate circumstances” narrowly. However, this could create an imbalance in favour of the users of libraries and copyright material. Moreover, courts could find that such a regulation does not meet the necessary level of compliance.⁸⁹

(b) Guilt by accusation

The proposed wording of section 92A seems to have further shortcomings, based on the breach of legal principals. Section 92A violates the presumption of innocence and does not provide for due process of law.

⁸⁶ This procedure was called a three-strike policy by the Recording Industry, see Recording Industry Association of America “RIAA CEO Encourages ISPs to Work with Music Industry to Address Digital Theft” (6 May 2008) www.riaa.com (accessed 25 August 2009); Recording Industry Association of New Zealand (RIANZ) “Section 92a Questions and Answers with RIANZ CEO Campbell Smith” www.rianz.org.nz/rianz (accessed 25 August 2009). Moreover, it is the term used by other jurisdictions, e.g. in France under Hadopi. However, the New Zealand legislation does not mention the term at all.

⁸⁷ See above III C.

⁸⁸ See III D 3, IV B.

⁸⁹ See Emily Mander, above n 8, 15.

Section 92A demands the reasonable implementation of a policy that provides for termination but does not contain further regulations regarding the process itself. This means that providers would have to disconnect an infringer based on a "guilt by accusation" method of copyright enforcement through an avenue that avoids the stringent evidentiary requirements of the courts.⁹⁰ This method would not match with the principle of the presumption of innocence, set out as a fundamental principle for offences under the New Zealand Bill of Rights Act (BORA).⁹¹ One has to consider, of course, that copyright infringement is not a genuine criminal law. However, the basic rule of evidence is not unbeknown to the civil law either, where it is called the "rebuttable presumption of innocence"⁹². According to this basic rule of evidence, it would be the copyright holder's duty to prove the copyright infringement. As section 92A does not give further advice on the termination procedure but is "based on mere allegations"⁹³ it does not match with the civil law principle of innocence either. Despite the fact, that section 25(2) BORA can be limited in terms of the criteria of section 5 BORA, such a regulation would shift libraries' responsibility to maintain the balance between both, copyright owners' and user's rights, in favour of the copyright holders and thus, would not be an appropriate solution.

The draft however, tries to incorporate the traditional legal concept of "innocent until proven guilty" as well as rules for the admissibility of evidence.⁹⁴ Section E of the draft, for example, states that "the copyright holder must provide a party with evidence"⁹⁵. Moreover, the draft is trying to lessen the effects of section 92A's "guilt by accusation" method by providing that "[u]sers are to be considered innocent until an ISP has reason to believe, based on evidence that would be acceptable to a court, that a user is a repeat infringer"⁹⁶. Therefore, one can argue, that the draft has less legal shortcomings than section 92A itself. However, the draft is just a policy and not legally effective.

⁹⁰ See Emily Mander, above n 8, 15.

⁹¹ New Zealand Bill of Rights Act 1990, s 25(c). One can however, think of limitations to that fundamental right in relation to s 5 of BORA, see Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 676 with special regard to *R v Oaks* [1986] 1 SCR 103. However, Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act a commentary* (Lexis-Nexis, Wellington, 2005) set out examples for such a limitation, e.g. in possession of drugs, which does not seem comparable to the relevant issue.

⁹² *Halsbury's Laws of England* (4 ed Reissue, Butterworths Lexis-Nexis, Bath, 2002) vol 17(1), Evidence, 280, para 579.

⁹³ InternetNZ "InternetNZ welcomes Government Decision to abandon Copyright Act Clause" (23 March 2009), blog.Internetnz.net.nz (accessed 25 August 2009); Jason Rudkin-Binks and Stephanie Melbourne "The new 'three-strikes' regime for copyright enforcement in New Zealand – Requiring ISPs to step up to the fight" (2009) 20 EntLR 146, 147.

⁹⁴ Emily Mander, above n 8, 15.

⁹⁵ "Internet Service Provider Copyright Code of Practice Draft 4 February 2009", above n 56, para E 10.

⁹⁶ *Ibid*, para C 4.1.

(c) ISP's discretion and the shift of responsibility

The draft grants some discretion to an ISP evaluating evidence and determining copyright infringement.⁹⁷ This results from the fact that section 92A “imposes the work of a court on the shoulders of a commercial – or in many cases, private – entity”⁹⁸. Thus, ISPs would be “cop, judge, jury and executioner”⁹⁹ in one person. As copyright law often deals with complicated issues, such as the application of fair dealing provisions and other permitted acts and the balancing of competing rights in general, this task should not be shifted away from the courts and the Government. This brings into the play that section 92A does not offer a due process of law, in which a court might decide about complaints. The regulation might impose sanctions without a first-instance hearing and moreover, deny a judicial review. As the law provides just a framework for a termination policy, but asks ISPs to work out procedures how to meet the law's requirements, it shifts the responsibility on ISPs in several aspects. They have the responsibility to adapt a policy, while at the same time they have the responsibility to “judge” about copyright infringement in an appropriate and fair way as there is no judicial body that can review a decision of termination.

With regard to libraries' responsibility it seems inappropriate that section 92A shifts the responsibility to find a termination policy on the shoulders of libraries. In the interview, Mr Millett explains that to create an own policy “is standard practice for legislation to state the law, and for those affected to work out for themselves policies and procedures as how to meet the law's requirements.”¹⁰⁰ This estimation seems logical with regard to the legal practice, but does not consider that not just a policy itself needs to be reviewed by a court, but also the decision of an ISP to terminate the access of a repeat infringer. Permitted acts under copyright law might be relevant to a case, whereas ISPs might not have the knowledge and power to consider them. This might be different in cases of libraries, which know about their responsibility to maintain the balance between the protection of copyright holders and the access to copyright material for their users. However, it does not justify that the decision of libraries in their role as ISPs are not subject to a judicial review. Moreover, libraries can be

⁹⁷ “Internet Service Provider Copyright Code of Practice Draft 4 February 2009”, above n 56, para C 4.8, E 10-11.

⁹⁸ Emily Mander, above n 8, 15.

⁹⁹ Chris Barton “Copyright not about criminalising kids” (12 March 2009), see www.nzherald.co.nz (accessed 26 August 2009); NZ Centre For Political Research “Three Strikes and You Are Terminated” (16 February 2009), see www.scoop.co.nz (accessed 1 September 2009).

¹⁰⁰ Interview with Tony Millett, above n 54.

affected by this problem in their role as downstream ISP (subscriber) and therefore, be subject to another ISP's¹⁰¹ decision, who is not aware of the special role of libraries.

It has been shown that section 92A was a legislative approach to deal with the online piracy problem and to protect copyright holders. However, due to the lack of distinction between different kinds of ISPs and other legal shortcomings, it does not reflect libraries' responsibility to maintain the balance in an appropriate way.

D *Does the Review Proposal of Section 92A reflect the Responsibility of Libraries in an appropriate Way?*

After section 92A had been scrapped, the MED published on 14 July 2009 a "Section 92A Review Policy Proposal Document for Consultation" (review policy).¹⁰² Submissions on that proposal were invited to address repeat copyright infringement in the digital environment until the beginning of August 2009. As this paper assesses the review policy proposal to find an appropriate solution for libraries regarding their responsibility under copyright law, one first has to point out the main aspects of the consultation document.

1 *The proposed approach: a summary*

The review policy is intended to provide a framework for a new bill to amend section 92A. The proposed procedure of digital copyright infringement and the deterrence of future infringement by a termination of the Internet account of the infringing person consists of three phases. Furthermore, it sets out several questions regarding the procedure which ought to be addressed in submissions.

The initial phase can be described as the "First Infringement and Cease and Desist Notice Procedure"¹⁰³. Copyright holders who ascertain an online infringement of their rights, can begin the section 92A procedure by sending a first infringement notice to an ISP.¹⁰⁴ This

¹⁰¹ The TCF draft mentions the possibility of a complaint. Moreover, a termination would not affect libraries under the draft, see above under III C 1. As it is just a policy and not a statute, one cannot assume its legal effect. However, the draft already shows that ISPs will be "conscious of adequately complying with section 92A, but will also not want to alienate and criminalise their own customers", see Emily Mander, above n 8, 15.

¹⁰² "Section 92A Review Policy Proposal Document for Consultation", above n 63, 2.

¹⁰³ Ibid.

¹⁰⁴ See Appendix 3.

first notice should present the ISPs with some details which enable them to identify the infringer. By doing so the ISP in turn, has to forward the notice to the infringing subscriber. If the subscriber does not stop digital copyright infringement, the first infringement notice is followed by a cease and desist notice. Both notices offer the infringing subscriber the possibility to contend via a response notice.

Further (repeat) copyright infringement leads to the second phase, "Obtain Copyright Tribunal Order"¹⁰⁵. Where a subscriber has not ceased and desisted from further digital copyright infringement, the copyright holder – after passing through phase one – may apply to the Copyright Tribunal to obtain an order requiring the ISP to provide the name and contact details of the alleged copyright infringer.

Once having applied to the Copyright Tribunal regarding this enquiry, the proposed procedure under section 92A enters phase three which deals with the procedure before the Copyright Tribunal. The Tribunal has to ensure that the infringement complaint is in line with the requirements in the statute.¹⁰⁶ After the subscriber has been notified that an allegation of repeat copyright infringement has been lodged against him or her, he or she has the opportunity to choose a mediation process to proceed with the case. Otherwise, or if mediation is unsuccessful, the Copyright Tribunal is convened. "The final stage would allow the Copyright Tribunal to order damages, injunctions, fines and the termination of Internet accounts for persistent breaches of intellectual property."¹⁰⁷

2 *Does the proposal solve the problems of section 92A and the TCF Draft?*

Considering the review policy as a whole it is obvious that it adopts a different approach than section 92A in its withdrawn meaning. While section 92A obliged ISPs to determine whether alleged copyright infringement had occurred and to adapt and reasonably implement a policy that provides for termination, the proposal divests ISPs of doing so. Instead, it seems that a revised section 92A is going to combine a notice-and-notice-regime with a fines and termination policy and to involve a third party, the Copyright Tribunal. As there is not a bill with an explicit wording at this stage of the legislative process, one can only

¹⁰⁵ "Section 92A Review Policy Proposal Document for Consultation", above n 63, 3.

¹⁰⁶ *Ibid.*

¹⁰⁷ The New Zealand Herald "Copyright Tribunal gets 'net cop' power under new proposal" (14 July 2009), see www.nzherald.co.nz (accessed 3 September 2009).

estimate its outcome with respect to the section 92A review policy which had been out for consultation.

(a) Lack of clarity

The section 92A review policy takes up the main terms set out under the original and former provision. However, the proposal contains some questions and ideas on how to define some of the terms.

The proposal mentions the term of ISP as well, which refers the extraordinarily wide definition of an ISP in section 2 of the Copyright Act 1994. There is no mention in the review policy of any proposal to amend it.¹⁰⁸ This means that the proposal does not distinguish between different kinds of ISPs, nor does it recognise that ISPs, as currently defined, may be both ISP and subscriber simultaneously.¹⁰⁹ Therefore, downstream ISPs, such as libraries and schools would be subject to the termination policy in various ways. They could receive an order by the Copyright Tribunal to terminate the subscriber's Internet account as well as being "victim" to the Copyright Tribunal's order addressing a telecommunications ISP to cut off the library itself. In this case the library, school or any other downstream ISP would be in the role of the infringing subscriber, although it might be actually the user of the library who commits the infringement. This problem was again addressed in submissions.¹¹⁰

However, the summary of the submissions barely mentions these concerns, while the corresponding media statement by the Minister of Commerce, Hon Simon Power does not mention this insufficiency at all. Thus, it remains questionable and to be seen whether a revised section 92A seizes on the idea to narrow the ISP definition to telecommunications ISPs.¹¹¹ A definition in the broad understanding, however, could have a great impact on libraries' responsibility to maintain the balance. As libraries could be "cut off" as downstream ISP and therefore, subscriber, the task to provide access to information for users would be curtailed and would create an imbalance.

¹⁰⁸ "Submission on the Section 92A Review Policy Proposal Consultation Document", above n 20, 4.

¹⁰⁹ *Ibid.*, 6.

¹¹⁰ See Ministry of Economic Development "Section 92A Proposal: Summary of Submissions" (August 2009) 1, 5.

¹¹¹ *Ibid.*, 4 (submissions made by New Zealand Information and Communication Technologies Group (NZICT)).

Moreover, section 92A (2) set out a redundant definition of the term “repeat infringer”. The section 92A review policy neither mentions the deleting of that definition in a reviewed section 92A nor does it propose to maintain it. However, the proposal takes up the term of “repeat infringer” and addresses some questions regarding that term at the same time. First of all, the criterion of the status of a repeat infringer is subject to the conditions of the notice procedure: a first infringement notice followed by a cease and desist notice in case of further infringement. If the infringer does not cease and desist from “Internet piracy” after receiving the second notice, he or she equals the status of a repeat infringer. By doing so and by applying to the Copyright Tribunal to start the complaint process, the infringer receives a third notice. This is a complaint notice which has to be sent to the subscriber, outlining the available options of a further proceeding including the mediation process.¹¹²

This means, that the current proposal takes up the idea of a notice which had already been chosen under the TCF Draft.¹¹³ Moreover, the term of “repeat infringer” is subject to another condition. The proposal document also sets out that there has to be reasonable evidence for repeat copyright infringement, which has to be proved on the balance of probabilities during the proceedings.¹¹⁴ The first and second notice require a certain state of evidence as well. Thus, it seems that the formerly redundant definition of “repeat infringement” is underpinned by a seizable definition – the notice procedure. Another specification of “repeat infringement” in the consultation document is raised by the question whether repeat copyright infringement should extend to infringement in a work or works owned by different right holders.¹¹⁵

Those companies and institutions supporting the extension of the term “repeat infringement” emphasise the shortcoming of a regulation which would only apply to a person repeatedly infringing against a single right holder. This would not support the intention of section 92A, which is to implement a workable process to uphold copyright in an online environment.¹¹⁶ The opposite view focuses on the fact that each infringement allegation is a

¹¹² See “Section 92A Proposal: Summary of Submissions”, above n 110, 8.

¹¹³ This procedure is also known in other countries, such as France, where the procedure is called a three-strike-law.

¹¹⁴ See “Section 92A Proposal: Summary of Submissions”, above n 110, 9.
See further analysis under III D 2 (b).

¹¹⁵ *Ibid.*, 7.

¹¹⁶ *Ibid.*, 21-22.

dispute between one right holder and one user with its own particularities, such as that evidence might be only relevant to a single case and should not appear in any other case.¹¹⁷

It is out of the question that this issue either extends or limits the term of copyright infringement. Coming back to the initial understanding and intention of section 92A, it seems that a limitation of the term “repeat infringer” to one right holder and one work would create a loophole. It would miss the point and contradict reality as it is most likely that “digital copyright infringers” do not continue infringing in relation to a particular work, but to many different works owned by different copyright owners. Despite this fact, one cannot deny the objections of the other submitters and that a new section 92A has to ensure that reasonable evidence has to be proven in each case.

LIANZA promotes the extension of “repeat infringement” to works by different right holders.¹¹⁸ As said above, this ensures copyright protection, but might again create an imbalance regarding libraries’ responsibility. In general, the definition of “repeat infringer” is more appropriate, but still lacks clarity and certainty regarding its impact on libraries as a downstream ISP and thus, being a subscriber to a telecommunications ISP. The review policy implies that the subscriber to an Internet service is the alleged and repeated copyright infringer. But at least in the case of downstream ISPs, this will not necessarily be so; it is those users, not the subscribing university, school or library, who may be alleged copyright infringers.¹¹⁹ Furthermore, one has to take into consideration the aspect that an allegation of a repeated copyright infringement made against a library may relate to single instances by separate users, rather than to multiple instances by one user.¹²⁰ Thus, LIANZA remarked in its submission to the consultation document that¹²¹

[r]ight-holders will be able to allege only that there have been possible repeat breaches of copyright at a particular IP address (or address range) – not that the alleged breaches have been undertaken by one or more repeat infringer. Footnote 9 on page 7 states that ‘The balance of probabilities threshold level in this instance means that it is more than likely that repeat copyright infringement has occurred’. However, this is not the same as saying that repeat copyright infringement by the same individual Internet user has occurred.

¹¹⁷ See “Section 92A Proposal: Summary of Submissions”, above n 110, 22.

¹¹⁸ “Submission on the Section 92A Review Policy Proposal Consultation Document”, above n 20, 16, Question 3.

¹¹⁹ Ibid, 8.

¹²⁰ Ibid, 10.

¹²¹ Ibid.

An extension to works of different right holders would also increase the danger of a library “being the infringing user” as different copyright infringements will always be caused by the same IP address of the public-access computer in a library. Thus, a termination of the access is more likely and could favour copyright holders’ interests.

The term of “appropriate circumstances” finds no mention in the consultation document. Instead, the decision of a termination falls under the jurisdiction of the Copyright Tribunal.¹²²

The proposal document shows that the MED and the working party have taken up the concerns and protests about the lacking of clear definitions inflamed under section 92A. However, the analysis has shown that the proposal still overstretches the responsibility of libraries to maintain the balance between the competing interests underlying copyright law as it provides library-inappropriate definitions which lead to an imbalance in favour of copyright holders.

(b) Guilt by accusation

Another concern raised under section 92A was the “guilt by accusation” – principle which would have avoided the stringent evidentiary requirements of the courts.

Instead, the section 92A review policy takes up that concern and introduces different thresholds of evidence, which have to be proven at each stage of the notice-procedure. The first infringement notice has to be based on reasonable evidence, which means evidence that indicates copyright infringement has occurred based on the facts available.¹²³ The level of evidence required for a right holder to obtain a Copyright Tribunal order is based on the equivalent of obtaining a search warrant; the right holder must have reasonable grounds to believe that infringement has occurred.¹²⁴ The last phase of the “termination procedure” proposes the threshold that reasonable evidence has been provided of repeat copyright infringement based on the balance of probabilities.¹²⁵ This means, the plaintiff has the burden

¹²² See III D 2 (c).

¹²³ “Section 92A Review Policy Proposal Document for Consultation”, above n 63, 4.

¹²⁴ Ibid, 6-7.

¹²⁵ Ibid, 7. The balance of probabilities is the standard of proof that must be met to prove a civil case, see Peter Spiller *Law Dictionary* (6 ed, Butterworths, Wellington, 2005) 29; *Halsbury’s Laws of England* (5 ed, Lexis-Nexis, Beccles, 2009) vol 11, Civil Procedure, 20, para 775.

of proving his or her case and "it is proved on the balance of probabilities if its existence is more likely than not, or if it is established by a preponderance of probability".¹²⁶ However, it is said that the more serious the allegation, the higher will be the required degree of proof.¹²⁷

One has to elaborate on the consequences of these different standards of proof as well as the made submissions, to assess whether the proposed regulation matches better with the responsibility of libraries to maintain a balance.

The majority of submitters support the proposal of "reasonable evidence" as an appropriate threshold level to send a first infringement notice, while others postulate a higher level which is consistent with the standard of proof in phase 3, the balance of probabilities.¹²⁸ Others point out that the appropriateness might depend on what is meant by "reasonable".¹²⁹ The last submissions miss some aspects set out in the consultation document: The proposal includes the annotation that reasonable evidence has to indicate that copyright infringement has occurred based on the facts available. One has to admit that the part "based on the facts available" leaves some room for interpretation and that a revised section 92A could include some criteria to specify this definition.

However, one has to stress that reasonable evidence of copyright infringement only leads to a first infringement notice, not to the termination of the Internet access. Therefore, it is justified that the threshold level is lower than in phase 3, where proved repeat infringement might lead to tremendous consequences. The danger of innumerable first infringement notices caused by a low threshold level can be encountered by sanctions against right holders who make improper use of the notice procedure.¹³⁰ Such a regulation considers both – copyright holders and users' interests and therefore, treats libraries fairly. A lower threshold in the beginning of the "infringement process" enables copyright holders to start a procedure, whilst

¹²⁶ see Peter Spiller, above n 125, 29; *Halsbury's Laws of England*, above n 125, para 775.

¹²⁷ *Ibid.*

¹²⁸ See "Section 92A Proposal: Summary of Submissions", above n 110, 10.

¹²⁹ LIANZA even stated in its submission that the appropriateness of the term depends on how "reasonable evidence" is interpreted by the Copyright Tribunal and therefore, should issue initial guidelines. However, this proposal does not consider that the review policy involves the Tribunal in phase three to ensure that the complaint complies with the procedure and thus, e.g. that phase one is completed. This affirmation as well as the requirement of proving a repeat infringement on the balance of probabilities might cover and encompass the "reasonable evidence" requirement. However, it is not up to the Copyright Tribunal to set out guidelines as this is not the body which to prove and assess "reasonable evidence" see "Submission on the Section 92A Review Policy Proposal Consultation Document", above n 20, 15 Question 1.

¹³⁰ This proposal of the consultation document was appreciated by all submitters, see "Section 92A Proposal: Summary of Submissions", above n 110, 14.

at the same time, the steplike thresholds of evidence in the further procedure, consider users' rights to have access to the Internet as a source for electronic information.

The level of evidence¹³¹ required for a right holder to obtain a Copyright Tribunal order requiring an ISP to provide the current name and contact details of the alleged copyright infringer was confirmed by the majority of submitters without making any further comments.¹³² The same is true for the question whether reasonable evidence of repeat copyright infringement, to be proved on the balance of probabilities, is an appropriate threshold level. LIANZA, however, remarked in accordance with the insufficiencies of the term "repeat infringer" and its inappropriateness regarding libraries that "the infringement may not be an instance of repeat infringement by one user".¹³³ Thus, it might be quite difficult to prove a repeat copyright infringement on the balance of probabilities.

As the analysis has shown, the whole notice-procedure combined with different kinds of evidence, which to some degree are subject to the Copyright Tribunal's jurisdiction show that a revised section 92A is unlikely to adhere to the "guilt by accusation" principle. The different thresholds of evidence ensure that both copyright holders and users' interests are preserved. The steplike thresholds of evidence find an appropriate balance between the protection of copyright holders rights against copyright infringement and users' interest to have access to copyright material and thus, to the Internet. While it might be easier in the beginning to start a procedure, the copyright infringement has to be "more likely than not" to lead to a termination of the Internet access.

However, one cannot draw the conclusion that this balance is reflected in the effect the regulation has on libraries. Due to the broad definition of an ISP and the problems which occurred relating to the term "repeat infringer", the regulation retains some insufficiencies. As libraries might act as a subscriber and do not require an authentication of their users it might be "more likely than not" that repeat copyright infringement has occurred on a public-access computer of a libraries, although the infringement might be caused by different users. Thus, the Internet access of a library could be terminated pursuant to the standard of proof. By

¹³¹ This is based on the equivalent of obtaining a search warrant, which requires reasonable grounds to believe that infringement has occurred.

¹³² See *ibid.*, 21.

¹³³ "Submission on the Section 92A Review Policy Proposal Consultation Document", above n 20, 17, Question 3.

doing so, libraries' possibilities of information dissemination would be restricted and thus, create an imbalance in favour of the copyright holders.

(c) ISP's discretion and the shift of responsibility

Another aspect which caused protest under the former section 92A was the ISP's discretion and the effect of section 92A to shift the responsibility for balancing competing rights away from the courts and Government. ISPs were required to adapt a termination policy and based on that, to terminate the accounts of their own subscribers in case of repeat copyright infringement.

By involving a third party - the Copyright Tribunal - in the section 92A procedure, the consultation document shifts the responsibility from the ISPs back onto a legal body. The proposal of the Copyright Tribunal playing the role of an independent third party arbiter if necessary found general support in the submissions.¹³⁴ Under the consultation document it is intended that the Copyright Tribunal will have exclusive jurisdiction over matters covered by section 92A, unless proceedings commence or have commenced in the courts.¹³⁵ Section 211 of the Copyright Act states that "The Tribunal shall have such functions as are conferred on it by this Act or any other enactment." The current Act only confers functions on the Tribunal dealing with the hearing of disputes regarding the provisions of licences allowing the copying, performing and broadcasting of copyright works.¹³⁶ The review policy proposes that it will be in the Tribunal's power to obtain an order requiring an ISP to provide name and contact details of the infringer and – as a last option to get through the procedure under section 92A – to impose a remedy, including fines or the termination of the subscriber's Internet account. Thus, these functions are not covered by the current jurisdiction. This means, that an amended section 92A has to extend the jurisdiction of the Tribunals to comply with section 211.

¹³⁴ See Hon Simon Power "Section 92A: summary of submissions released" (August 2009) www.beehive.govt.nz (accessed 1 September 2009). The Copyright Tribunal was originally incorporated in 1983 as a non-profit society to provide copyright and cultural based industries with a range of services, such as disputes about licenses, including an interface with Government, see Copyright Council of New Zealand *Copyright Law in New Zealand: the Copyright Tribunal* see www.copyright.org.nz (accessed 3 September 2009).

¹³⁵ "Section 92A Review Policy Proposal Document for Consultation" (14 July 2009), see above n 63, 2.

¹³⁶ Copyright Act 1993, ss 149 et seq, 54, 63; Ministry of Justice "Copyright Tribunal" www.justice.govt.nz (accessed 17 September 2009).

Beside some submissions addressing the cost assignment of the procedure before the Copyright Tribunal¹³⁷ other institutions and companies have commented on the authority of the Copyright Tribunal in general, questioning whether the Copyright Tribunal is the right body for a jurisdiction dealing with section 92A.¹³⁸ With regard to section 211 of the Copyright Act, the law does not restrict the Tribunal's jurisdiction a priori, but leaves it to legislation to confer functions. Thus, there is no reason to say, that the Tribunal is not the right body to have jurisdiction over these matters. Once the functions of the body grow, the expertise in matters relating to section 92A will grow as well.¹³⁹ One can argue that the solution to shift section 92A matters on the Copyright Tribunal is an appropriate solution and compromise.

The Tribunal might fulfil its responsibility in a better way than Courts, due to the fact, that these legal bodies are not just concerned with copyright law and are over allocated. Thus, from the perspective of a copyright holder it might take too long to proceed against the infringer, while at the same time repeat copyright infringement and its legal consequences can be avoided by an early involvement and fast procedure of the Tribunal. The review policy for example, provides for a mediation process whose outcome may be that parties negotiate a licences agreement, terms of use agreement or that considers that a subscriber may be a business with multiple subscribers on one IP address which makes identification of the actual infringer difficult and termination perhaps unreasonable.¹⁴⁰ This provides a facility to consider libraries' special position as a downstream ISP in an adequate way as they usually do not require an authentication of their Internet users. Thus, it is not compulsory that libraries are cut off the Internet, but are subject to the Copyright Tribunal's or mediator's discretion. This effect balances the interests reflected in the role of libraries in a more appropriate way than leaving it to the discretion of an ISP who might be not aware of the special function and role of libraries.

Moreover, the review policy indicates that either the High Court or an appeal section of the Copyright Tribunal should be concerned with appeals to the Tribunal's decisions.¹⁴¹

¹³⁷ "Section 92A Proposal: Summary of Submissions", above n 110, 32. This question is not to be addressed in this paper.

¹³⁸ See *ibid.*, 9.

¹³⁹ The concern of lacking expertise with issues of an evidentiary nature can be met with the fact that the Tribunal consists of three members, one of whom is appointed and must be barrister or solicitor of the High Court with at least seven year's experience, see Ministry of Justice, above n 136.

¹⁴⁰ See "Section 92A Review Policy Proposal Document for Consultation", above n 63, 8.

¹⁴¹ See *ibid.*, 9.

With regard to section 224 of the Copyright Act which approves an appeal to the High Court on questions of law in a Tribunal decision, it seems to be in line with the Copyright Act to allow an appeal to the High Court. This offers a due legal process in questions of law and ensures once more that libraries in their function as downstream ISP (or affected subscriber) are treated fairly by appealing to another body if they are dissatisfied with a determination of a Tribunal as being erroneous in point of law.

3 *Can libraries fulfil the requirements of a revised section 92A?*

As can be seen from the above analysis the review policy takes up some of the major concerns which were raised under the former wording of section 92A. With special regard to the responsibility of libraries, however, there are remaining insufficiencies, such as the broad definition of ISP and the inappropriateness of the term repeat infringer. Besides these general aspects, the review policy requires ISPs to take part in the "procedure against copyright infringement" to a certain degree. These requirements and hence, their responsibility needs to be assessed with special regard to libraries.

Phase 1 of the review policy requires ISPs to forward the first infringement and where necessary a cease and desist notice to the subscriber at the subscriber's current registered contact address.¹⁴² Moreover, the ISP is required to maintain records of their subscribers' alleged infringements for a period of nine months.¹⁴³ However, the ISP is just required to provide the current name and contact details of the alleged copyright infringer (subscriber) or any other relevant information to a right holder after being served a Copyright Tribunal order. LIANZA pointed out in its submission to the review policy that libraries do not require an authentication of their Internet-access computers.¹⁴⁴

At least 50 % of these users are not members of the library; a number do not have driving licences or other means of identification; and some of the users are overseas visitors. Moreover the Aotearoa People's Network, which is being rolled out in public libraries to facilitate access to information and particularly to official and government information, encourages libraries to provide Internet access as freely as possible, and without requiring authentication.

¹⁴² See "Section 92A Review Policy Proposal Document for Consultation", above n 63, 4.

¹⁴³ Ibid. After 9 months lapsed, the first infringement notice will be deemed invalid and Phase 1 has to begin again.

¹⁴⁴ "Submission on the Section 92A Review Policy Proposal Consultation Document", above n 20, 9.

Furthermore, the submission as well as the interview with Tony Millett emphasises that even if downstream ISPs such as universities require identification of their users by using passwords, these do not currently keep records of the many thousands of users. From LIANZA's point of view, such an obligation "would be prohibitively cumbersome and expensive".¹⁴⁵ Tony Millett even warns that authentication and retention of user records "would act as a deterrent to free Internet access, which is one of the fundamental roles of libraries in New Zealand".¹⁴⁶

It is incontestable, that the previous proposed obligations require investments and a reorganisation of libraries and mean an increased responsibility of ISPs and therefore, libraries. However, it is highly arguable whether the statements by LIANZA and Tony Millett reflect the libraries' responsibility in an appropriate way. As analysed above, the digital age and its technical devices such as the Internet, simplify copying and thus, copyright infringement. Therefore, the digital age requires the legislator to adjust copyright law, to maintain the balance underlying copyright law, which is the protection of the copyright holders on the one hand and easy access to information and copyright material for the public on the other hand. As libraries act as a point of intersection their responsibility has to be reflected by the law.

In the interview, Tony Millett emphasised that "LIANZA does not argue that libraries should receive special treatment because there are a number of other organisations ... which are in the same situation as libraries."¹⁴⁷ However, it seems that by resisting the attempt of authentication and retention, LIANZA indirectly contends to "receive special treatment". Without touching the question of whether "termination" of a libraries' Internet account based on a lacking distinction between different kinds of ISPs reflects libraries' responsibility in an appropriate way, the denying of authentication and retention of user records is not justified. By doing so, libraries could evolve into legal vacuums and a place for a free ticket for repeat copyright infringement. There is certainly no doubt that libraries try to avoid and prevent copyright infringement by education and warning notices¹⁴⁸, but this is not enough to maintain the balance.

¹⁴⁵ "Submission on the Section 92A Review Policy Proposal Consultation Document", above n 20, 11.

¹⁴⁶ Interview with Tony Millett, above n 54.

¹⁴⁷ Ibid.

¹⁴⁸ Copyright Task Force of LIANZA "Sample Library Internet Service Provider Copyright Policy" (March 2009) 14-15 www.lianza.org.nz (accessed 13 July 2009).

LIANZA's Sample Library ISP Copyright Policy, which sets out suggested procedures to minimise copyright infringement and to deal with it, concludes that in most cases it is not possible to identify a person. "In such cases the Library reports back to the ISP or copyright owner that the alleged breach has been investigated but that the alleged infringement cannot be substantiated or infringer identified". This result is not satisfactory relating to libraries' responsibility as it would be a solution to the disadvantage of copyright holders. A new procedure to enable libraries to identify their Internet users is certainly accompanied with considerable cost. However, one has to be aware of the function of libraries to preserve New Zealand's heritage to enable access for the public but to create an incentive to increase creativity as well. As part of "New Zealand's knowledge infrastructure"¹⁴⁹ one has to invest into libraries to ensure that they can fulfil their growing responsibility.

Thus, the above mentioned requirements under the review policy appear to be an adequate approach and are encompassed by the responsibility of libraries in the digital age. On the whole, one can state that the review proposal – despite remaining problems – reflects the responsibilities of libraries in a more appropriate way than the former section 92A.

IV HOW TO SOLVE THE PROBLEM

The analysis has shown that the former section 92A contained several insufficiencies relating to libraries and their responsibility. The review policy has taken up some of the major concerns and proposes the inclusion of the Copyright Tribunal and an evidence procedure. These proposals treat libraries more fairly with regard to their special role to maintain the balance between copyright users' and copyright holders' interest. However, there are remaining insufficiencies and regulations which are not appropriate. These aspects are addressed in the following paragraph. Moreover, this paragraph proposes an adequate treatment of libraries that matches with their responsibility in an appropriate way.

A Termination

Both, the former section 92A as well as the review policy focus on termination as a legal consequence of repeat copyright infringement. However, these two proposals had, and have, different impacts on libraries and their termination as a subscriber. While under section

¹⁴⁹ Richard Worth, above n 24.

92A it was up to the ISP to set up the circumstances for a termination of an Internet access¹⁵⁰, the review policy leaves the decision to the Copyright Tribunal's or mediator's discretion. The policy mentions that the subscriber (account holder) may be a small business or domestic household which has multiple subscribers on one IP address which would make identification of the actual infringer difficult and termination perhaps unreasonable. Although libraries are not mentioned in this enumeration, it is possible that a mediator or the Tribunal finds the termination of a library's Internet account unreasonable. This might be the case when the library acts as the downstream ISP and therefore, as subscriber of an Internet account.

Despite this fact, which is more appropriate than the former approach, there is requirement to comment on the possibility of a disconnection of libraries' Internet accounts in general. The termination of a library's account as a consequence of being a downstream ISP is a rigorous and disproportionate sanction. With regard to the above mentioned functions and roles, libraries obtain in the digital age, a termination of a public-access-Internet-computer contradicts the purpose of information dissemination and of free and easy access to online material. The New Zealand Digital Content Strategy Working Paper which stood on the very beginning of the Copyright Amendment Act stated that New Zealand Government's Digital Strategy has a key goal in relation to content: "To unlock New Zealand's stock of content and provide all New Zealanders with seamless, easy access to the information that is important to their lives, businesses, and cultural identity."¹⁵¹ Libraries act as intermediary to reach this goal.

Moreover, one can argue that this goal is somehow connected to section 14 BORA which states that "Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind". The wording of this fundamental right does not just state the right to freedom of expression, but also the right to freedom of information. "The two go hand in hand: without freedom of information, freedom of expression is void of meaning."¹⁵² It prevents the state from restricting a person from receiving information.¹⁵³ From this perspective, one can argue, that termination of libraries' Internet accounts is a breach to the right "to receive information" for all users of libraries as

¹⁵⁰ As seen above, the TCF Draft would have excepted downstream ISPs, such as libraries from a termination. However, the draft would not have been legally effective.

¹⁵¹ Geoff McLay "Strategy and Intellectual Property – Scoping the Legal Issues, Research Report Commissioned to Inform the Development of the New Zealand Digital Content Strategy Working Paper 2" (April 2006) Introduction, 7.

¹⁵² Christina J Angelopoulos "Freedom of Expression and Copyright: The Double Balancing Act (2008) 3 IPQ 328, 330.

¹⁵³ Andrew Butler and Petra Butler, see above n 91, 320.

they would not have access to the Internet and therefore, online sources and databases via the library.

However, one has to be aware of the fact the right to receive information does not entail the right to insist on being given access to information.¹⁵⁴ This limitation of the right to freedom of information was found by the ECHR in *Leander v Sweden*. However, the judgment was concerned with an individual's right of access to information. In the particular situation – due to libraries' ambiguous role of ISP and subscriber – a termination would lead to the denial of online access for all the users and therefore, a restriction of information. As lots of the copyright material and information is available online today, libraries' responsibility to maintain the balance between copyright holders' protection and the providing of information for the public would be endangered. Despite the fact that the libraries' responsibilities to maintain the balance grow in the digital age, this cannot mean that their responsibility is overstretched to an extent that contradicts their genuine function. Thus, a termination seems inappropriate to strike the balance. This result can be stressed by having a look to other countries and jurisdictions which mostly refuse from considering termination as an adequate consequence to repeat infringement. Thus, the European Parliament for example,¹⁵⁵

[c]alls on the Commission and the Member States to recognise that the Internet is a vast platform for cultural expression, access to knowledge, and democratic participation in European creativity, bringing generations together through the information society; calls on the Commission and the Member States, to avoid adopting measures conflicting with civil liberties and human rights and with the principles of proportionality, effectiveness and dissuasiveness, such as the interruption of Internet access.

This statement does not even refer in particular to the special role of libraries, but opposes a disconnection of the Internet in general. Thus, with regard to the aspect that libraries act as intermediary of information and therefore, democratic participation it seems even more justified to exempt libraries as downstream ISPs from the legal consequence of a termination of their Internet accounts. This decision should not be in the discretion of the Copyright Tribunal or mediator, but included into a new section 92A.

¹⁵⁴ Andrew Butler and Petra Butler, see above n 91, 320; *Leander v Sweden* (1987) 9 EHHR 433 (ECtHR) para 74. For influence of ECtHR decisions on New Zealand cases see Paul Rishworth and others, above n 91, 65.

¹⁵⁵ European Parliament Resolution of 10 April 2008 on cultural industries in Europe (INI 2007/2153), no 23.

B Libraries' Responsibility in the Digital Age

Although this paper argues that the legislator should exempt downstream ISPs, in particular libraries, from the legal consequence of termination of the Internet account, this does not mean that libraries do not have to adjust their responsibilities in the digital age. As the Internet simplifies copying, there exists the increased danger of repeat copyright infringement, even via the public-access computers of libraries. Therefore, libraries are asked more than ever before to maintain the balance underlying copyright law and hence, to ensure that the interests and rights of copyright holders are protected whilst at the same time easy access to worldwide information and copyright material for the public remains unchanged.

Thus, it is preferable to require libraries to authenticate users of their library-provided Internet-access PCs, and to retain user records for a certain period. It is unreasonable to exempt libraries not only from termination of their accounts, but from investigating cases of repeat copyright infringements within their buildings. If the law grants a special treatment to libraries by exempting them from termination with special regard to their function, libraries have to accommodate copyright holders by ensuring that their rights are protected as well. Without any doubt, education obtains priority. Users of copyright material have to understand the value of copyrights for a society and that the infringement of a copyright is as worse as infringing a tangible thing.

Thus, libraries should "post warning notices regarding copying and downloading from the Internet adjacent to its public-access computers and on screen-savers."¹⁵⁶ This regulation is part of LIANZA's Sample Library Internet Service Provider Copyright Policy which was produced with respect to the former wording of section 92A, but which is going to be rewritten as soon as the Copyright Act is amended.¹⁵⁷ The regulation provides a good starting point for preventing the users of libraries from copyright infringement. The same is valid for the proposal to block the access to Internet sites on libraries' computers whose sole purpose is known to be to facilitate the illegal downloading of materials from the Internet.¹⁵⁸ However, it seems that these preventive mechanisms do not reflect libraries' responsibility in an appropriate way and therefore, are insufficient. The initially mentioned study about New Zealand's Internet users shows that users are somehow resistant against education regarding

¹⁵⁶ See Copyright Task Force of LIANZA, above n 148, 15.

¹⁵⁷ "Submission on the Section 92A Review Policy Proposal Consultation Document", above n 20, 13.

¹⁵⁸ See Copyright Task Force of LIANZA, above n 148, 16.

copyright infringement. Thus, it is unlikely that library users will care much about warning notices and that librarians can keep an eye on everyone using the Internet.

Thus, it seems more effective to find a regulation besides preventive mechanisms that ensures that libraries can identify their Internet users and potential copyright infringers and to deny infringers Internet access via the libraries by an adequate procedure. This could be formed similarly to the procedure provided under the review policy and therefore, include an evidence procedure and a legal body, such as the Copyright Tribunal. Mr Millett emphasises that this might lead to a limitation of freedom of information as at least 50 % of users are not members of the library; many (particularly young people) do not have driving licences or other means of identification; and some of the users are overseas visitors.¹⁵⁹ This paper, argues that libraries should require user identification. If people do not have any means of identification, this could oblige them to become a member of the library. At worst, this might lead that individual persons, such as overseas visitors, who do not want to become a member of the library, are denied access to the Internet in libraries and therefore, are restricted in their freedom of information. However, as mentioned above, to receive information does not entail the right to insist on being given access to information.¹⁶⁰

It is inappropriate to terminate a whole libraries' Internet access. However, the digital age requires libraries to adjust their responsibility to maintain the balance between the competing interests between copyright holders and copyright users. To require libraries to identify and notify¹⁶¹ their Internet users and potential copyright infringers seems to be an appropriate approach to do justice to both, copyright holders and users. Thus, by doing so, libraries can re-establish the balance underlying copyright law which is reflected in their current function. As Birrell has stated in 1906, libraries have to grow. By applying this statement to the digital age, libraries' responsibilities have to grow and meet the needs of technology and copyright.

¹⁵⁹ See Interview with Tony Millett, above n 54.

¹⁶⁰ See *Leander v Sweden* (1987) 9 EHHR 433 (ECtHR) para 74.

¹⁶¹ Same approach is planned in the United Kingdom, see Department for Culture, Media and Sport and Department for Business, Innovation and Skills "Digital Britain Final Report" (June 2009) 113.

V CONCLUSION

New technologies require the adjustment of existing laws. Copyright law in particular is challenged by the development of the Internet as it makes copying far easier and of better quality. The negative downside of this progress, however, is that copyright infringement, such as by illegal downloading, increases. Therefore, legislation has to adjust copyright law and to crusade against copyright infringement to re-establish the balance underlying copyright law, which is the protection of copyright holders' interest on the one hand and the public's interest to have easy access to information and copyright material on the other hand. As libraries act as a point of intersection, it is their responsibility to reflect this balance.

This paper has presented the approach under the former section 92A as well as the approach under the review policy which address the fight against copyright infringement in the digital age by involving ISPs in the investigation of copyright infringement and the disconnection of their subscribers from the Internet in cases of repeat copyright infringement. This paper has sought to argue that both approaches, however, due to the fact that under the current definition of an ISP, libraries can be both, ISP and subscriber (or downstream ISP) simultaneously, overstretch the libraries' responsibility as the library could be cut off the Internet. Hence, libraries could not fulfil their responsibility to maintain the balance alike and the regulation would create an imbalance in favour of the copyright holders.

Thus, this paper proposes to exclude libraries from the legal consequence of termination. Instead, they should be required to provide authentication mechanisms of their Internet users, to identify repeat copyright infringers and due to a legal process deny them access to the Internet via the libraries. Such a procedure would reflect libraries' responsibility in the digital age in an appropriate way.

VI APPENDICES

A Appendix 1 - Interview with Tony Millett, LIANZA

1. How do you assess the fact that libraries are included in the definition of Internet Service Providers within section 92A of the Copyright Act, and therefore are liable for copyright infringements?

The definition of Internet service provider (ISP) is inserted into section 2(1) of the Copyright Act 1994 by section 4(2) of the Copyright (New Technologies) Amendment Act 2008. The definition, which is currently in force, applies to sections 92A to 92E inclusive. All these sections are in force, with the single exception of section 92A, implementation of which has been delayed.

In my view the definition encompasses four distinct categories of ISP:

- a. **Telecommunications ISPs**, which are commercial organisations set up to provide telephone, Internet and other telecommunications services. Examples include Telecom Xtra, TelstraClear, Vodafone, Woosh, Yahoo, etc.
- b. **Downstream ISPs**¹⁶², which are organisations that re-supply Internet services received from telecommunications ISPs to other downstream ISPs or directly to their own users. Examples include city and district councils, libraries, tertiary education institutions and schools.
- c. **Organisations that have websites**, such as companies, businesses, shops, offices, law firms, Parliament, Government departments, schools, universities, polytechnics, hospitals, cinemas, churches, libraries, etc.
- d. **Individuals who have websites.**

Neither the Copyright Act nor the MED Consultation Document¹⁶³ recognise these distinctions – the Consultation Document, for example, refers to “the ISP” and “the subscriber” without noting that an ISP, as currently defined, may be both ISP and subscriber simultaneously.

If the subscriber relationship was only between a telecommunications ISP and an individual or organisation that purchases Internet access and other services from the telecommunications ISP, there would be no great difficulty. Individuals should be able to be held responsible for their actions; and likewise, organisations should be able to be held responsible for the actions of their employees. In both cases, it should be possible to identify any alleged infringers.

¹⁶² The term comes from the Telecommunication Carriers' Forum draft *Internet service provider copyright code of practice* dated 4 February 2009.

¹⁶³ New Zealand. Ministry of Economic Development. *Section 92A review policy proposal document for consultation*. Wellington, July 2009. <http://www.med.govt.nz/upload/68683/proposal-document.pdf>.

The problem arises with downstream ISPs who on-supply Internet services from a telecommunications ISP to other downstream ISPs or to their own users. It is those users, not the subscribing downstream ISP, who may be copyright infringers.

There are several issues here:

- a. It is not acceptable that the entire Internet access of a library, university or school could be terminated because of alleged infringement of copyright by one of its users.
- b. And in many if not most instances, it will not be possible for the downstream ISP to identify alleged infringers, either because (like libraries) they do not require users of their public Internet services to authenticate; or because (like universities and schools) they do not retain records by date and time of those using their public Internet services, and to require them to do so would be both unreasonable and expensive.
- c. Further, telecommunications ISPs and rights-holders will not be able to distinguish between single instances of possible copyright infringement by separate users, and multiple (repeat) instances of possible copyright infringement by one user. All they will be able to do is to allege that there have been possible repeat breaches of copyright at a particular IP address or address range – not that the alleged breaches have been undertaken by one or more repeat infringer.

LIANZA does not argue that libraries should receive special treatment, because there are a number of other organisations (for example universities, polytechnics, schools, Internet cafés, etc) which are in the same situation as libraries. Rather, LIANZA is arguing that the law needs to be framed in such a way as to recognise the different types of ISPs, and to take cognisance of the fact that most downstream ISPs are unable to identify alleged infringers.

2. With respect to your own experiences, do you think there has been a high number of copyright infringements that occurred on library-supplied Internet-access PCs?

There is no way of knowing. It is known that library clients use library-supplied PCs illegally to download music from library-owned CDs and other sound-recordings onto their own iPods or other devices, and there is no reason to suppose that they don't also illegally download music from the Internet. It is unlikely, however, that such illegal downloading would be significant, given that most library-supplied Internet access PCs are in view both of library staff and other library users, and that there are usually user time restrictions on Internet access.

The LIANZA *Copyright Guidelines*¹⁶⁴ recommends that libraries put up warning notices about illegal copying and downloading of music and gives suggested wording in Appendix 2 of that document.

¹⁶⁴ LIANZA. Copyright Task Force. *The Copyright Act 1994 and amendments: guidelines for librarians*. 6th edition. Edited by Tony Millett. Wellington, March 2009.
http://www.lianza.org.nz/library/files/store_022/LIANZA_Copyright_Guidelines_March_2009.pdf.

3. How do you assess the fact that section 92A creates only a framework for ISP liability, but leaves it to the ISP to create its own policies?

It is standard practice for legislation to state the law, and for those affected to work out for themselves policies and procedures as to how to meet the law's requirements.

4. Where do you see the weaknesses of the draft of the Telecommunications Carriers' Forum (TCF) code of practice relating to libraries?

This is covered in LIANZA's *Submission on TCF's draft Internet service provider code of practice* of 26 February 2009.¹⁶⁵ The Submission includes many of the same points as are given above.

5. Do you think libraries should have a special role regarding the embodiment of ISP liability, such as exceptions which just apply to libraries?

No, for the reasons given in the last paragraph of the response to Question 1 (above).

6. What is your forecast for the future? Do you think there might be any problems and changes following the review of section 92A affecting libraries? What are your recommendations and suggestions?

The MED has recently released a Consultation Document¹⁶⁶, to which LIANZA has responded¹⁶⁷. As is made clear in this Submission, the same problems remain. While I may be pleasantly surprised, it seems unlikely that Section 92A or other sections of the Copyright Act will be changed to take into account all the points made by LIANZA in its Submission. LIANZA will, of course, be able to make a submission on the Bill implementing section 92A and any other amendments at the Select Committee stage – unless implementation is by Regulation.

LIANZA will strongly resist any attempt to require libraries to authenticate users of library-provided Internet-access PCs, and to retain user records for a lengthy period, just so that possible alleged copyright infringers can be identified. Authentication and retention of user records would be very difficult and expensive, and would act as a deterrent to free Internet access, which is one of the fundamental roles of libraries in New Zealand, particularly those libraries which are part of the Aotearoa People's Network. At least 50% of users are not members of the library; many (particularly young people) do not have driving licences or other means of identification; and some of the users are overseas visitors.

Once the revisions come into effect, libraries will just have to find ways of working with whatever the legal requirements turn out to be. To assist in this, LIANZA's Standing Committee on Copyright (the Copyright Taskforce's new name) will revise the *Copyright*

¹⁶⁵ See <http://www.tcf.org.nz/content/748ca4ef-1cd7-4c25-b54e-eb4b7e933714.cmr>.

¹⁶⁶ New Zealand. Ministry of Economic Development. *Section 92A review policy proposal document for consultation*. Wellington, July 2009. <http://www.med.govt.nz/upload/68683/proposal-document.pdf>.

¹⁶⁷ LIANZA submission on the section 92A review policy proposal consultation document. Wellington, August 2009.

Guidelines, and also LIANZA's document *Sample library Internet service provider copyright policy*.¹⁶⁸ In this environment it is very important that libraries have policies and procedures in place which define what steps they take to prevent copyright infringement in their institutions by either their own staff or by library users, insofar as this is possible.

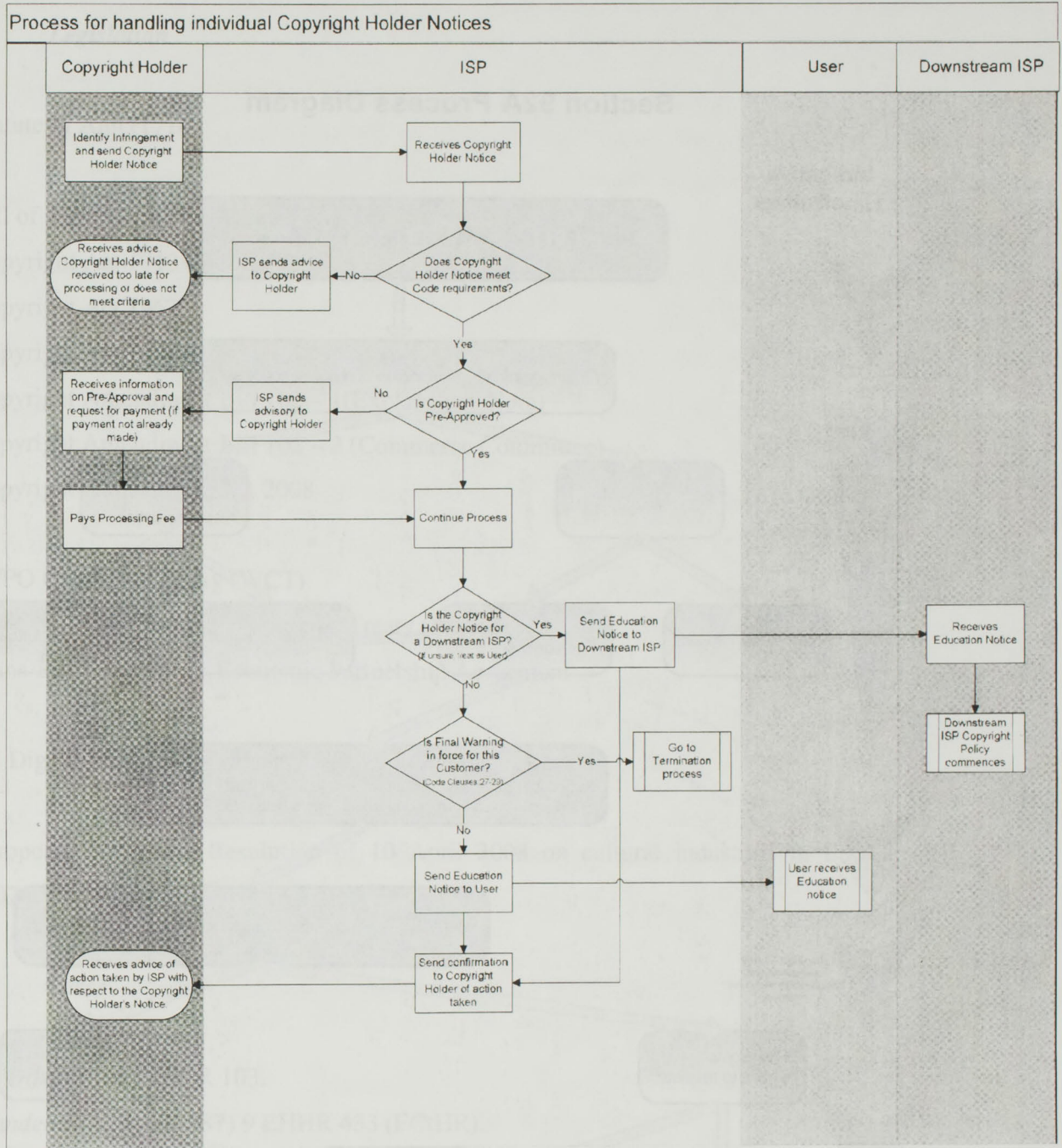
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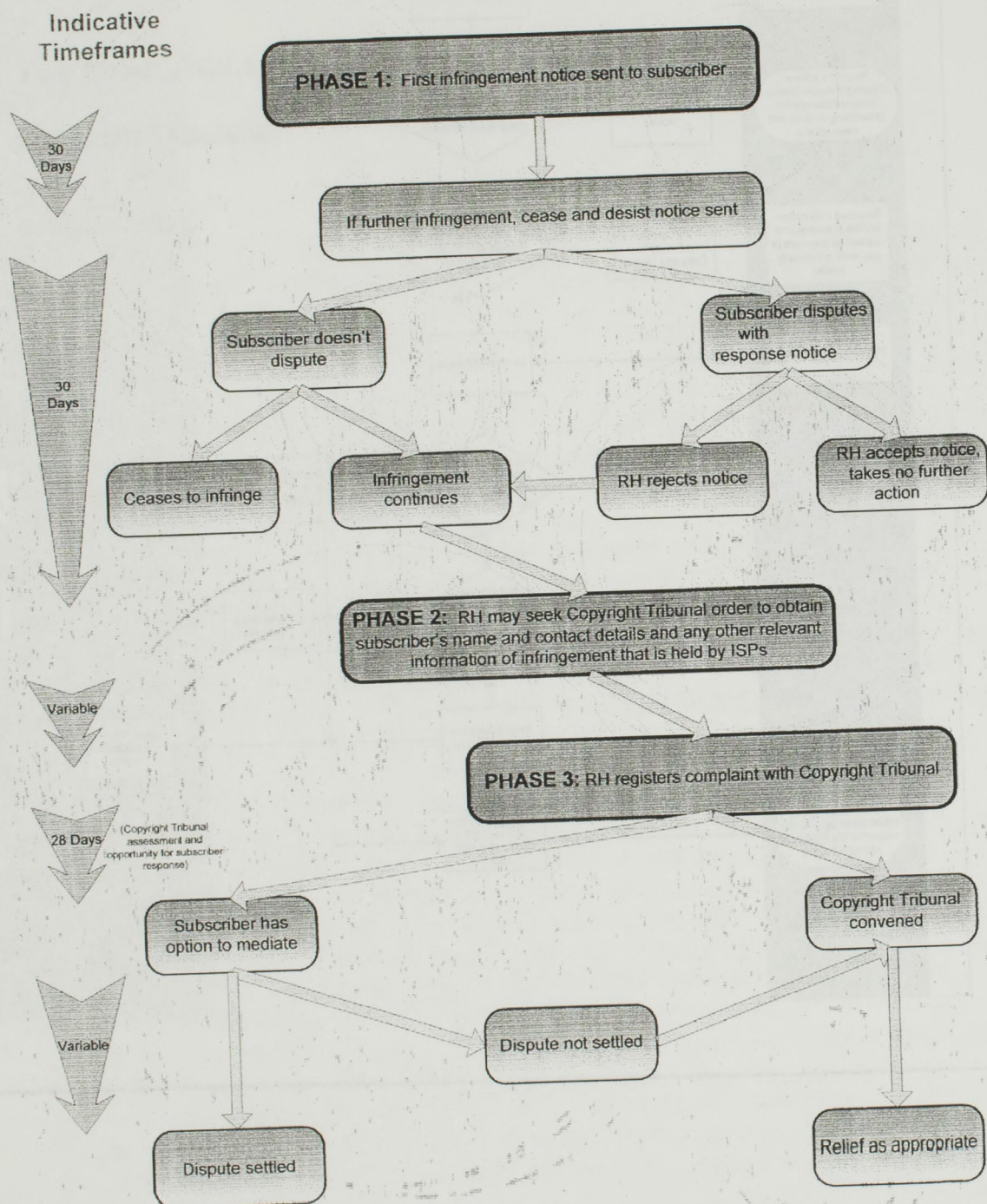
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¹⁶⁸ See http://www.lianza.org.nz/library/files/store_022/LIANZA_ISP_Copyright_Policy.pdf.

B Appendix 2 – TCF Draft Code of Practice (4 February 2009)



Section 92A Process Diagram



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