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**MED'S POSITION PAPER ON DIGITAL  
TECHNOLOGY AND THE COPYRIGHT ACT:  
LEGISLATION WITHOUT A SOLUTION?**

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*Te Whare Wānanga  
o te Ūpoko o te Ika a Māui*



**LIBRARY**

	<b>TABLE OF CONTENTS</b>	
	<i>EXEMPTION JUSTIFIABLE?</i>	19
	<i>THE POSITION PAPER'S PROPOSALS</i>	29
	<i>Definition of ISPs</i>	29
	<i>Regarding primary liability</i>	30
	<i>Transient copying and the reproduction right</i>	page
<b>I</b>	<b>INTRODUCTION</b>	1
<b>II</b>	<b>TYPES OF LIABILITY ISPS COULD POSSIBLY FACE</b>	6
<b>A</b>	<b>Primary liability</b>	6
	1 Copying	6
	2 Broadcasting and inclusion in a cable programme service	7
	(a) Inclusion in a cable service programme	8
	(b) Broadcasting	9
	(c) Communication to the public	9
	3 Joint tortfeasance	10
<b>B</b>	<b>Secondary liability</b>	10
	1 Vicarious liability	11
	2 Secondary infringement provisions	12
	3 Authorisation	12
<b>C</b>	<b>Risk analysis</b>	15
	1 Content providers	15
	2 Access providers	16
	3 Hosting providers	17



<b>III</b>	<b>IS A SECONDARY LIABILITY EXEMPTION JUSTIFIABLE?</b>	19
<b>IV</b>	<b>THE POSITION PAPER'S PROPOSALS</b>	29
<b>A</b>	<b>Definition of ISPs</b>	29
<b>B</b>	<b>Regarding primary liability</b>	30
1	Transient copying and the reproduction right	30
2	Mere provision of physical facilities	31
3	Analysis	32
<b>C</b>	<b>Regarding secondary liability</b>	33
1	The proposed knowledge standard	35
2	The infringement notice factor	38
<b>V</b>	<b>CONCLUSION</b>	43
	<b>BIBLIOGRAPHY</b>	44
	<b>TABLE OF CASES</b>	48

The text of this paper (including abstract, table of contents, footnotes, bibliography and appendices) comprises approximately 11,570 words.



19	III	IS A SECONDARY LIABILITY EXEMPTION JUSTIFIABLE?
29	IV	THE POSITION PAPER'S PROPOSALS
29	A	Details of ISL
30	B	Regarding primary liability
30	1	Transfer of risk and the reparation right
31	2	More protection of physical facilities
32	3	Analysis
33	C	Regarding secondary liability
37	1	The proposed knowledge standard
38	2	The proposed notice factor
43	V	CONCLUSION
44		BIBLIOGRAPHY
48		TABLE OF CASES

## ABSTRACT

Courts in various jurisdictions had to deal with the question whether Internet Service Providers (ISPs) can be held liable for infringing acts committed by their subscribers. It is perhaps the most controversial legal issue emerging in the digital environment. Although New Zealand courts have yet to deal with the issue of ISP liability for copyright infringement, the Ministry of Economic Development (MED) has suggested a statutory solution for this apparent problem, which was put down in the 2002 "Digital Technology and the Copyright Act 1994" Position Paper. In the Position Paper, the MED proposes to exempt ISPs from liability for primary and secondary infringement under certain requirements. The suggested amendment of the Copyright Act raises several issues and questions, which will be addressed in this paper. The author argues that a total liability exemption fails to take all relevant policy factors into account and favours ISPs unilaterally. The paper suggests that ISPs do not need an exemption clause, because New Zealand's copyright law, although full of uncertainties, appears to be relatively narrow compared to other jurisdictions. The proposed reform causes more problems than it addresses. The constructive knowledge standard, which ISPs have to meet in order to fall under the liability exemption clauses, is difficult to determine and amplifies the existing uncertainties. The author suggests that instead of curing the symptoms, the legislator should get at the root of the problems, which is the cluttered secondary infringement provisions and the nebulous concept of authorisation, which is the true reason for the legal uncertainty copyright owners and ISPs are facing these days.

### Word Length

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## I INTRODUCTION

The Internet, which has been described as “one gigantic copying machine”,<sup>1</sup> poses a major threat to copyright. The development of peer-to-peer file-sharing technology,<sup>2</sup> as represented by the late Napster and its successors eDonkey<sup>3</sup> or Kazaa,<sup>4</sup> has not insignificantly contributed to the media industry’s slump of sales.<sup>5</sup> The battle between the recording industry and those held responsible for the maintenance of file-sharing networks is mainly driven by the difficulties that copyright holders encounter defending their rights against individual infringers. The trouble is partly because it is not the single infringement, but the sum of infringements occurring on these networks, which cause considerable material damage. Although the music industry enjoyed recent success in forcing Internet Service Providers (ISPs) in the United States to reveal the identity of their subscribers,<sup>6</sup> it is still comparatively problematic to identify individual infringers. Besides, suing every single infringer is not a very cost-effective approach, especially if the defendants are not sufficiently solvent to compensate for the damages incurred.

These problems are not limited to peer-to-peer networks. It does not take much effort to set up websites containing infringing material, and ISPs play the most important role in providing the necessary technological facilities. From a copyright owner’s point of view, it appears to be a logical development to look for more effective means to protect their rights by targeting those who enable others to infringe, and who benefit financially both from the non-infringing and infringing use of the Internet. Therefore, courts in various jurisdictions had to deal with the question whether ISPs

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<sup>1</sup> Louise Longdin “Copyright and On-line Service Providers” [2000] NZLJ 180.

<sup>2</sup> Peer-to-peer commonly refers to a method of transferring files within a network that does not have fixed server and clients, but a number of peer nodes that may principally function both as server and client to other nodes on the network.

<sup>3</sup> <<http://www.edonkey2000.com>> (last accessed 9 July 2004).

<sup>4</sup> <<http://www.kazaa.com>> (last accessed 9 July 2004).

<sup>5</sup> It has been estimated that in 2002 sales of recorded music fell by almost 10 per cent due to Internet-based file sharing, see Anonymous “The music industry: In a Spin” (March 2003) *The Economist* London 58.

<sup>6</sup> *RIAA v Verizon Internet Services Inc* 351 F3d 1229 (DC Circ).



can be held liable for infringing acts committed by their subscribers. It is perhaps the “most controversial legal issue emerging in the digital environment.”<sup>7</sup> Obviously, copyright owners and ISPs view this problem “from diametric positions”.<sup>8</sup>

Although New Zealand courts have yet to deal with the issue of ISP liability for copyright infringement, the Ministry of Economic Development (MED) has suggested a statutory solution for this apparent problem. The MED’s view was put down in the 2001 “Digital Technology and the Copyright Act 1994” Discussion Paper (Discussion Paper),<sup>9</sup> on which the MED received several submissions by concerned interest groups.<sup>10</sup> The results of this public consultation process were analysed and reviewed by the MED, and resulted in the release of the 2002 “Digital Technology and the Copyright Act 1994” Position Paper (Position Paper).<sup>11</sup>

In the Position Paper, the MED proposes to exempt ISPs from liability for primary and secondary infringement under certain requirements. The proposed provisions are tailored after the example of the European Union Electronic Commerce directive, which provide exemptions for ISPs providing a “mere conduit” to the Internet, transient caching and hosting.<sup>12</sup> This also reflects the position under the World Intellectual Property Organisation’s (WIPO) Internet Treaties.<sup>13</sup> The United provides similar

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<sup>7</sup> Luca Timberi and Michele Zamboni “Liability of Service Providers” (2003) 9(2) CTLR 49.

<sup>8</sup> Mary Ann Shulman “Internet Copyright Infringement Liability: Is an Online Access Provider more like a Landlord or a Dance Hall Operator?” (1997) 27 GGULR 555, 599.

<sup>9</sup> Ministry of Economic Development “Digital Technology and the Copyright Act 1994 Discussion Paper” (July 2001) <<http://www.med.govt.nz>> (last accessed 9 July 2004).

<sup>10</sup> A summary of the submissions can be viewed on the Ministry’s website. <<http://www.med.govt.nz>> (last accessed 9 July 2004).

<sup>11</sup> Ministry of Economic Development “Digital Technology and the Copyright Act 1994 Position Paper” (December 2002) <<http://www.med.govt.nz>> (last accessed 9 July 2004).

<sup>12</sup> The Directive was transformed into the national law of the United Kingdom by the Electronic Commerce (EC Directive) Regulations 2002 (UK).

<sup>13</sup> The WIPO Copyright Treaty and the WIPO Performers and Phonograms Treaty are collectively referred to as the “Internet Treaties” <<http://www.wipo.org>> (last accessed 9 July 2004).



“safe harbours” limiting ISP liability for copyright infringement in the Digital Millennium Copyright Act.<sup>14</sup>

The suggested amendment of the Copyright Act raises several issues and questions, which will be addressed in this paper.

Most prominently, is there actual need for the proposed liability exemption, or will it be needed in the near future? Do the underlying policies give adequate justification for the suggested amendment?

Even if the general proposition can be found to be appropriate, are the proposed statutory changes sufficient to serve the purposes identified by the MED, which are to foster both private and business use of the Internet, and to ensure protection of copyright in the digital age and provide for a balance between the opposing interests?

The current proposal does not include recommendations for a formalised notice-and-takedown procedure for alleged copyright infringements. This may expose ISPs to another type of liability, namely liability to their subscribers for unwarranted blocking of material. Because ISPs usually owe a duty to host and transmit information to their subscribers under the Internet services contracts, blocking such content after receipt of an infringement notice might render them liable if the blocked content turns out to be non-infringing. Thus, in a copyright conflict ISPs sit in a highly uncomfortable position between the copyright owner and the alleged infringer, which has to be taken into account when addressing the issue. Their attempts to safeguard themselves against copyright infringement liability, for instance by excluding it in the service contracts, will necessarily be at the expense of subscribers.

According to the proposal, liability of ISPs for the conduct of their subscribers will partly rest on the knowledge of such conduct. The

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<sup>14</sup> Digital Millennium Copyright Act 17 USC (1998) (DMCA).



required standard of knowledge will determine to which degree ISPs will be forced to exercise control over their systems. The Position Paper suggests a standard of constructive knowledge, which not only includes actual knowledge, but also knowledge of facts or circumstances from which a reasonable person would infer that infringement has happened. Since the liability requirements in New Zealand are already comparatively narrow, it is questionable if ISPs will actually be able to benefit from the suggested exemptions. For example, liability for secondary infringement requires at least constructive knowledge of the infringing act. Under this regime, ISPs who have constructive knowledge will never qualify for an exemption from liability. ISPs who do not have constructive knowledge are not liable in the first place, and thus do not need the benefit of an exemption from liability.

This paper is going to argue that a liability exemption for ISPs does not strike a proper balance between the policies and interests that should be considered. Its justification is therefore questionable. ISP liability has not been an issue in New Zealand Courts so far. Neither does there appear to be a need for an ISP exemption, because of the comparatively narrow infringement provisions, nor should ISPs be overly afraid of potential liability. Therefore, New Zealand could do well without this law reform. This left aside, the suggested proposal causes more problems than it solves. The most crucial point in the whole discussion is the secondary liability issue, which is mainly governed by the relevant secondary infringement provisions and the concept of authorisation. What is already an uncertainty here, namely the relevant knowledge standard, will be even extended by the proposal. It especially fails to address the question how ISPs should react to infringement notices. A formalised notice-and-takedown procedure could provide for better copyright protection and reliable standards of care on the part of the ISPs. Under the current law as well as under the proposal, ISPs are left compromised, because they are in the unfavourable position to decide whether the hosted material is infringing or not. Apart from possible ways to abuse this system, ISPs risk to be held





## II TYPES OF LIABILITY ISPS COULD POSSIBLY FACE

In order to determine whether a change in the law is necessary, it is essential to establish what the situation under the current law is. Generally, ISPs could possibly face (A) primary or (B) secondary liability for copyright infringement under the present law. Although there are a variety of potential causes of action, a risk analysis (C) will reveal that liability will not be an issue in many cases.

### A Primary liability

Copyright infringement occurs if a person engages in an act restricted under the Copyright Act without having a license.<sup>15</sup> The acts restricted by the Copyright Act are listed in Section 16, namely copying, issuing copies to the public, performing, playing or showing the work, broadcasting or including the work in a cable programme, or adapting the work.<sup>16</sup> Among possible types of primary infringement in relation to ISPs, (1) copying, (2) broadcasting and inclusion in a cable programme service, and (3) joint tortfeasance are the most prominent and likely ones.

#### 1 Copying

Primary liability for copying may arise when ISPs store copyrighted material by any means.<sup>17</sup> Thus, caching and other forms of temporary storage may infringe upon copyright.<sup>18</sup>

There have been cases, in particular in the United States of America, in which ISPs were held liable based on the fact that copyrighted material was

<sup>15</sup> Copyright Act 1994 (NZ), s 29(1).

<sup>16</sup> Copyright Act, s 16.

<sup>17</sup> Copyright Act, s 2.

<sup>18</sup> Louise Longdin "Copyright and On-line Service Providers" [2000] NZLJ 180, 181.



stored on their systems. In *Playboy Enterprises Inc v Frena*,<sup>19</sup> the defendant operated a bulletin board service. Frena allowed his subscribers to upload the plaintiff's pictures without their authorisation as well as the download of the files. Frena argued that he had not uploaded the pictures himself. However, his defence was rejected and he was held directly liable for copyright infringement. In *Playboy Enterprises Inc v Hardenburgh Inc*,<sup>20</sup> the scenario was similar. In this case, the defendant even encouraged its subscribers by allowing free download in exchange for uploads. The defendant's employees checked uploaded content for pornography and potential copyright infringement. The Court held for Playboy and ruled that Hardenburgh was liable for direct infringement.

In both cases, liability arose not only by the fact that the bulletin board operators provided the necessary technical means for infringement, but also by their encouragement of the subscribers' infringing conduct.<sup>21</sup> Consequently, in *Religious Technology Center v Netcom On-Line Communication Services Inc*,<sup>22</sup> the Court ruled in favour of the ISP in the absence of such endorsement or a volitional element on the part of the provider.

## 2 *Broadcasting and inclusion in a cable programme service*

The New Zealand Copyright Act offers a somewhat arbitrary distinction between the broadcast of a copyrighted work and its inclusion in a cable programme service. Both are restricted acts under New Zealand copyright law. Although similar in nature, the risk of primary liability for infringement differs significantly. However, it can be expected that the reform will abolish these differences.

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<sup>19</sup> *Playboy Enterprises Inc v Frena* 839 F Supp 1552 (MD Fla 1993).

<sup>20</sup> *Playboy Enterprises Inc v Hardenburgh Inc* 982 F Supp 503 (ND Ohio 1997).

<sup>21</sup> In a similar case the Court came to the same conclusion, see *Sega Enterprises Ltd v MAPHIA* [1994] 857 F Supp 679 (ND Cal).

<sup>22</sup> *Religious Technology Center v Netcom On-Line Communication Services Inc* 907 F Supp 1361 (ND Cal 1995).



(a) Inclusion in a cable service programme

Under section 16(f) copyright owners have the right to include the work in a cable programme. Section 4(1) defines that a cable service programme is a “transmission service where the transmission is (a) for the reception at two or more places, either simultaneously or at different times, in response to requests by different users; or (b) for presentation for the members of the public.” However, pursuant to section 4(2), interactive telecommunication systems are excluded from cable programmes. Interactivity means reciprocal communication by transmitting and information through the means of the same system. Therefore, ISPs could face liability where they provide separable services without elements of interactivity. In the United Kingdom case *The Shetland Times v Willis*,<sup>23</sup> the Court distinguished the part where users could send in comments by e-mail from the rest of the website and held the operator liable for providing an infringing “cable programme service” under the relevant United Kingdom provision. Although commentators have suggested that this is technically unjustified,<sup>24</sup> especially for ISPs offering the hosting of websites,<sup>25</sup> they may still be held liable, because the statute does not distinguish between the provider of the technical facilities and the provider of the content.

However, the statute may already offer a solution to the problem. Section 4(2)(e) excludes from the definition as a cable programme service “a transmission service that is ... run for persons providing broadcasting or cable programme services or providing programmes for such services.” As Longdin suggests, this provision can be extended to the infrastructure provider and transmitter, thus releasing them from primary liability under the cable programme service provisions.<sup>26</sup> Maybe the Courts would adopt this interpretation in order to circumvent the bizarre outcome resulting from a strict application of the provisions.

<sup>23</sup> *The Shetland Times v Willis* [1997] EMLR 277 (OH).

<sup>24</sup> Clive Gringras “Copyright: Interim Interdict – Declarator sought that Headline Hypertext Link to Web Site constitutes Copyright” (1997) 19(2) EIPR D49.

<sup>25</sup> Louise Longdin “Copyright and On-line Service Providers” [2000] NZLJ 180, 182.

<sup>26</sup> Louise Longdin “Copyright and On-line Service Providers” [2000] NZLJ 180, 182.



(b) Broadcasting

When it comes to wireless communication, the situation changes, because the wireless transmission obviously does not involve a cable and cannot be a “cable programme service”. The broadcasting right is therefore a distinguishable exclusive right under the Copyright Act.<sup>27</sup> However, under s 3(3)(a), a person can only be held to broadcast if he or she has any responsibility for the contents of the broadcast. Therefore, providers of wireless services face a much lower risk of primary liability.

(c) Communication to the public

The MED has recognized the need to replace the illogical distinction between cable programme services and broadcasting by a technology-neutral definition. The right of communication to the public would then encompass any kind of transmission (by any means or combination of communication technologies, or via interactive, on-demand services). This would also be one of the key changes to make the Copyright Act compliant with the WIPO Internet Treaties.<sup>28</sup> The proposal would change liability issues under the broadcasting / cable programme law significantly, as will be described below.<sup>29</sup>

<sup>27</sup> Copyright Act, s 16(f).

<sup>28</sup> Ministry of Economic Development “Digital Technology and the Copyright Act 1994: Policy Recommendations – Cabinet Paper” (18 June 2003) para 19, available on the MED’s website <[www.med.govt.nz](http://www.med.govt.nz)> (last accessed 17 August 2004).

<sup>29</sup> See Part II C Risk analysis.

Joint tortfeasance is a common law doctrine similar to the United States theory of contributory infringement.<sup>30</sup> According to Scrutton LJ, persons are considered joint tortfeasors when “their respective shares in the commission of the tort are done in furtherance of a common design”.<sup>31</sup> Because copyright infringement is often treated as a tort, the doctrine is also applicable in copyright law.<sup>32</sup> This requirement is higher than under the comparable contributory infringement doctrine. Under United States law, contributory liability can be established if the defendant “induces, causes or materially contributes” to the infringing conduct of another “with knowledge of the infringing activity”.<sup>33</sup> In the Internet context, the doctrine was applied to *Napster*, a provider of a peer-to-peer network, which enabled its users to share copyrighted music files.<sup>34</sup> However, under New Zealand law, the threshold is much higher and demands that both tortfeasors are engaged in a concerted action.<sup>35</sup> Merely assisting by providing the means for copyright infringement would most likely be insufficient to hold an ISP liable as a joint tortfeasor.<sup>36</sup> The argument made in *Napster* is conceptually more related to the authorisation doctrine.

### **B Secondary liability**

Secondary liability under New Zealand law may arise out of (1) vicarious liability, out of (2) the special secondary liability provisions of the

<sup>30</sup> Paul Apathy “Napster and New Zealand: Authorisation under the Copyright Act 1994” 2002 VUWLR 287, 315. Clive Elliott “Content on the Internet – the competing rights of control and access” (2002) 11 TLF 129 appears to be of the same opinion.

<sup>31</sup> *The Koursk* [1924] 140, 157 (CA) Scrutton LJ; *Crystal Glass Industries v Alwinco Products* [1986] RPC 259, 268 (CA).

<sup>32</sup> Susy Frankel and Geoff McLay *Intellectual Property in New Zealand* (1ed, LexisNexis Butterworths, Wellington, 2001), para 5.27.

<sup>33</sup> *Gershwin Pub Corp v Columbia Artists Management Inc* 443 F 2d 1159, 1162 (CA NY 1971).

<sup>34</sup> *A & M Records Inc v Napster Inc* 239 F 3d 1004 (9th Cir 2001).

<sup>35</sup> *CBS Songs Ltd v Amstrad Consumer Electronics Plc* RPC 567, 607 (HL) Templeman LJ.

<sup>36</sup> Paul Apathy “Napster and New Zealand: Authorisation under the Copyright Act 1994” 2002 VUWLR 287, 291.



Copyright Act,<sup>37</sup> or due to (3) "authorisation" of infringing conduct of a third party.<sup>38</sup>

### 1 Vicarious liability

Under United States law, vicarious liability requires that the defendant had the right and ability to exercise control over the directly infringing party and had a financial interest in the activity.<sup>39</sup> Under this doctrine, the operator of a swap meet was held liable for not preventing trade with pirated music tapes on their premises.<sup>40</sup> Conversely, vicarious liability is much stricter under New Zealand law. Traditionally it was only applied in cases of employer/employee or principal/agent relationships.<sup>41</sup> However, the concept of agency in the context of vicarious liability was recently extended to unusual constellations such as foster parents acting as agents for the Crown.<sup>42</sup> The main arguments for imposing vicarious liability in this case, which involved child abuse committed by the foster parents, were that the Crown was under a special statutory obligation to protect the child, and that it had increased the risk of sexual abuse by placing the child in a private home where it could not be monitored as fully as in a governmental institution.<sup>43</sup> The Court was apparently heavily influenced by the undesirability of an outcome that would have left the child without compensation. Thus, it is unclear whether this case could be of particular importance with regard to vicarious liability of ISPs for copyright infringement, given that the doctrine was applied in a rather narrow sense in the past.

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<sup>37</sup> Copyright Act, ss 35-39.

<sup>38</sup> Copyright Act, s 16(i).

<sup>39</sup> *Shapiro Bernstein & Co v H L Green Co* 316 F 2d 304 (2d Cir 1963).

<sup>40</sup> *Fonovisa Inc v Cherry Auctions Inc* 76 F 3d 259 (9th Cir 1996).

<sup>41</sup> The same can be said about the United Kingdom. See *Credit Lyonnais Bank Nederland NV v Export Credits Guarantee Department* [2000] 1 AC 486, 494 (HL).

<sup>42</sup> *S v Attorney-General* [2003] 3 NZLR 450 (CA).

<sup>43</sup> *S v Attorney-General* [2003] 3 NZLR 450, 470 (CA) Blanchard J.

## 2 Secondary infringement provisions

Sections 35 to 39 of the Copyright Act deal with secondary infringement. Potential liability for ISPs is extremely limited, because most of the provisions require that there is a physical object in which the infringing copy is embodied.<sup>44</sup> Cases of digital copying are therefore out of the scope of most of those provisions. However, it is arguable that ISPs may be liable under section 37(2) if they can be said to “transmit the work by means of a telecommunications system”.

Nonetheless, secondary infringement always requires a certain degree of knowledge of the third party’s infringing conduct. ISPs may be found liable if they “knew or had reason to believe”<sup>45</sup> that they were, for example, distributing infringing copies. This test of constructive knowledge<sup>46</sup> is objective and involves a standard of knowledge derived from “facts from which a reasonable person ... would arrive at the relevant belief.”<sup>47</sup> The standard of constructive knowledge under the secondary infringement provisions already poses the question of how an infringement notice may give the recipient a “reason to believe” that infringement has occurred. This issue will be discussed in detail below.<sup>48</sup>

## 3 Authorisation

The authorisation of others to infringe copyright is considered an infringing act itself pursuant to section 16(i) Copyright Act. Although “authorisation” is dealt with in Section 16 among other forms of primary infringement, its

<sup>44</sup> For instance, section 36 Copyright Act reads: “Copyright in a work is infringed by a person who ... possesses ... an object that is ... an infringing copy of the work.”

<sup>45</sup> For example, see section 37 Copyright Act.

<sup>46</sup> The differences between actual and constructive knowledge and their implications are analysed in detail below, see Part IV C 1 The knowledge standard.

<sup>47</sup> *Raben Footwear Pty Ltd v PolyGram Records Inc* (1996) 35 IPR 426 (FCA).

<sup>48</sup> See Part II C 3 Hosting providers.



nature is much closer to concepts of secondary infringement. Frankel and McLay have characterised it as "copyright's unknown quality".<sup>49</sup>

There have not been many cases that decided the meaning of the word "authorise" under the Act in New Zealand. One of the leading cases under the Copyright Act 1962 was *Koolman*,<sup>50</sup> where the operator of a coffee bar was held to have authorised the public performance of copyrighted music played by a band, for which he received an admission fee. English Courts have interpreted authorisation as "sanction, approve or countenance".<sup>51</sup> However, authorisation does not have to amount to "condoning".<sup>52</sup> It is generally held that the authoriser has to have a certain degree of control over the infringing conduct or over the facilities used for infringement.<sup>53</sup> One of the leading decisions in the technology field is *University of New South Wales v Moorhouse*.<sup>54</sup> It involved the provision of self-service photocopying machines in the University library. The Australian High Court stated:<sup>55</sup>

A person that has under his control the means by which an infringement may be committed and who makes it available to other persons, knowing, or having reason to suspect, that it is likely to be used for the purpose of committing an infringement, and omitting to take reasonable steps to limit the use to legitimate purposes, would authorise any infringement that resulted from its use.

However, this definition is contrasted by the statement made by Lord Templeman in *CBS Songs Ltd v Amstrad Consumer Electronics Ltd*, "authorisation means a grant or purported grant, which may be express or

<sup>49</sup> Susy Frankel and Geoff McLay *Intellectual Property in New Zealand* (1ed, LexisNexis Butterworths, Wellington, 2001), para 5.11.7.

<sup>50</sup> *Australasian Performing Right Association Limited v Koolman and Another* [1969] NZLR 273.

<sup>51</sup> *Falcon v Famous Players Film Co* [1926] 2 KB 474.

<sup>52</sup> *CBS Songs Ltd v Amstrad Plc* [1988] AC 1013, 1055 (HL); *Amstrad Computer Electronics Plc v British Phonographic Industry Ltd* [1986] FSR 159, 207 (UKCA).

<sup>53</sup> Louise Longdin "Copyright and On-line Service Providers" [2000] NZLJ 180, 183.

<sup>54</sup> *University of New South Wales v Moorhouse* [1976] RPC 151, 157 (HCA).

<sup>55</sup> *University of New South Wales v Moorhouse* [1976] RPC 151, 157 (HCA) Gibbs J.



implied, of the right to do the act complained about.”<sup>56</sup> A similar reasoning, however in the context of the United States rule of contributory liability, was made by the Court in *Sony Corporation of America v Universal City Studios Inc*:<sup>57</sup>

The sale of copying equipment ... does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes, or, indeed, is merely capable of substantial noninfringing uses.

In his examination of these cases in respect to their applicability to New Zealand law, Apathy suggested that the approach taken in *Amstrad* appeared to be “much closer to the correct interpretation of ‘authorise’ than *Moorhouse*.”<sup>58</sup> According to his analysis, authorisation amounts to a misrepresentation of the right to a work, thereby leading others to infringe. This is in line with the interpretation of authorisation given in the recent Canadian case *CCH Canadian Ltd v Law Society of Upper Canada*.<sup>59</sup> Like *Moorhouse*, the case involved photocopying machines that were maintained by the Law Society and made available for use to the visitors of the Law Society’s library. In *CCH*, the Court ruled that the *Moorhouse* approach was inconsistent with the concepts of authorisation under British and Canadian law. McLachlin CJ wrote:<sup>60</sup>

In my view, the *Moorhouse* approach to authorization shifts the balance in copyright too far in favour of the owner's rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole.

She concluded that the Law Society did not have sufficient control over the conduct of its patrons to say that it “sanctioned, approved or countenanced

<sup>56</sup> *CBS Songs Ltd v Amstrad Consumer Electronics Plc* RPC 567, 604 (HL) Templeman LJ.

<sup>57</sup> *Sony Corporation of America v Universal City Studios Inc* 104 S Ct 774, 785.

<sup>58</sup> Paul Apathy “Napster and New Zealand: Authorisation under the Copyright Act 1994” 2002 VUWLR 287, 315.

<sup>59</sup> *CCH Canadian Ltd v Law Society of Upper Canada* (2004) CarswellNat 446 (CSC).

<sup>60</sup> *CCH Canadian Ltd v Law Society of Upper Canada* (2004) CarswellNat 446, para 41 (CSC) McLachlin CJ.



the infringement".<sup>61</sup> This was mainly because the relationship between the library and its patrons was not like a master/servant or employer/employee relationship and because the library did not have any control over the works the clients chose to copy. Because the New Zealand authorisation provision is similar to the Canadian one,<sup>62</sup> this case is of particular importance to the position in New Zealand. Without doubt this understanding of the concept of authorisation is advantageous for ISPs, because an "expansive interpretation would severely handicap Internet service providers".<sup>63</sup>

### *C Risk analysis*

Potential liability for ISPs under current New Zealand law can arise out of a number of sources. Although ISPs may be overly risk-adverse, an assessment reveals that in reality the dangers of liability are smaller than generally assumed. The risks may also vary depending on the role of the ISP in respect to the infringing conduct of a subscriber.

#### *1 Content providers*

ISPs that make infringing material available on the Internet themselves will be held liable just as any other direct infringer. In cases where the ISP is responsible for the content it publishes on its web sites, there are no significant differences to other forms of direct infringement. Consequently they should not be treated differently, and the Position Paper does not suggest a liability exception for such activities.

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<sup>61</sup> *CCH Canadian Ltd v Law Society of Upper Canada* (2004) CarswellNat 446, para 45 (CSC) McLachlin CJ.

<sup>62</sup> Copyright Act RSC 1985 (Canada), c C-42.

<sup>63</sup> Susy Frankel and Geoff McLay *Intellectual Property in New Zealand* (1ed, LexisNexis Butterworths, Wellington, 2001), para 5.11.7(c).

The majority of ISPs offer access to the Internet, either solely or together with other services such as hosting. Subscribers can hook up their computers to the provider's network, which is directly connected to the Internet, thus enabling the subscriber to browse web sites. The necessary transmissions between the subscriber's computer and the servers hosting the web sites occur through the ISP's system.

Under the current law, the chances of being held liable for merely providing access to the Internet are rather small. Secondary infringement is usually out of question, because ISPs will usually lack the required actual or constructive knowledge of the infringement. They will usually have no "reason to believe" that they are distributing infringing copies, because the relevant knowledge test requires more than a suspicion that infringement occurs.<sup>64</sup> The sheer amount of transmitted data makes it unfeasible for access providers to monitor their systems, especially because the transmission occurs within a few seconds, which is certainly not sufficient to decide on such a multi-faceted legal question as copyright infringement. Moreover, it would be rather absurd to argue that the ISP had "authorised" the infringement in the absence of any knowledge.

An ISP that merely acts as a conduit to the Internet will not be found directly liable for distributing infringing copies in the absence of any additional volitional or knowledge elements, as in the bulletin board operator cases. A more realistic danger could arise under the cable service programme provisions, because the scope of these provisions is not entirely clear. This is however a general issue of defective legislature. It would be a reasonable reaction of the Courts to refuse the application of these provisions in respect to ISPs, who might as well be able to argue that they run their services "for persons providing broadcasting or cable programme services", thus releasing them from liability under the statute itself.

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<sup>64</sup> *LA Gear Inc v High-Tech Sports Plc* [1992] FSR 121, 129 (EWHC) Morritt J.



A separate issue that could cause liability is the transitory storage of information, commonly referred to as "caching". The MED considers that the current definition of copying is broad enough to include temporary storage of information, for instance in a computer's Random Access Memory (RAM).<sup>65</sup>

These issues appear to be properly addressed by the proposal. The proposed communication right resolves the absurd distinction between cable and wireless services. Furthermore, under the proposed clarification that the mere provision of physical facilities shall not attract liability, access providers should not be worried of potential liability.<sup>66</sup>

### 3 *Hosting providers*

Providers who offer to host a subscriber's web site on their servers are probably in the greatest danger of being held liable. In respect to primary liability, their situation is not significantly different from the one of access providers. Liability for inclusion of copyrighted works in cable programme services is the same issue as with access providers. Neither will primary liability for copying be a concern if there are no volitional elements as in the *Playboy* cases discussed above.<sup>67</sup>

Authorisation requires that ISPs act as if they had the right to permit the use of a copyright work, which will hardly be found in most cases, provided that New Zealand Courts will reject the argument made in *Moorhouse*. Due to the nature of the hosting service, an ISP may be more likely to have actual or constructive knowledge of subscriber's infringing actions. However, ISPs might be able to argue that they neither have actual knowledge nor reason to believe that the material uploaded by their

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<sup>65</sup> Position Paper, para 45.

<sup>66</sup> See also Part IV A Regarding primary liability.

<sup>67</sup> See Part II A 1 Copying.

subscribers infringes, due to their large number and the technical impossibility to monitor all uploaded material. As Longdin pointed out, ISPs should be treated at least as leniently as swap meet operators who are generally aware of the fact that copyright infringement *might* occur on their premises.<sup>68</sup> It is one of the features of swap meets and ISPs that somewhere or somehow infringement may occur. This is nothing more than common knowledge. Such general awareness could however convert to constructive knowledge after receipt of an infringement notice.<sup>69</sup> The interpretation of authorisation in *Moorhouse* would pose a certain risk of liability on ISPs. However, the more lenient approach of *Amstrad* and *CCH* seems to be the likelier one to be adopted by Courts, because it strikes a reasonable balance between copyright owners' interests and the public interest of availability of useful facilities like the Internet or photocopy machines.

The situation may change when ISPs are actually notified by copyright owners of alleged infringement. It is likely that they will then be found to have had at least reason to believe that there is infringing material hosted on their servers, although there is no automatism between receipt of an infringement notice and the inference of knowledge. As pointed out above, ISPs would have to determine and confirm the alleged copyright infringement, which is a legal issue that can be delegated to out-of-house counsel. In any case, it gives ISPs time to react to such notice and either remove access to the material or decide to bear the risk of liability, leaving it in the hand of the providers to minimise the risk of liability. In view of the comparatively narrow provisions, and because the "judiciary's reluctance to expand the protections afforded by copyright without explicit legislative guidance",<sup>70</sup> the liability risk can probably be characterised as manageable. Out-of-house counsel can furthermore function as a means of risk management, because erroneous advice given by lawyers will attract professional liability on their part.

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<sup>68</sup> Louise Longdin "Copyright and On-line Service Providers" [2000] NZLJ 180, 183.

<sup>69</sup> See Part IV C 1 The knowledge standard.

<sup>70</sup> *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd* [2003] 259 F Supp 2d 1029, 1046 (DC Cal).



### *III IS A SECONDARY LIABILITY EXEMPTION JUSTIFIABLE?*

It cannot be doubted that the risk of potential liability influences the way a person acts, in particular in business. Liability has always been the legal response to increased risks and potentially dangerous acts. There can be also no doubt that the Internet, with its decentralised structure, the immanent anonymity, and its incredible potential to reproduce digital information, poses an imminent risk to the rights of the makers of creative works. The damages suffered by these creators and by the industry based on their works are immense, and due to the problems encountered in holding the primary infringers liable, copyright is becoming more and more a right without proper enforcement mechanisms in the digital environment. Thus, it is questionable whether it is appropriate to respond to such a threat with exempting those from liability who are perhaps in the best position to combat it.

There are several ways to deal with the problem. There is the possibility of holding the one who facilitates the infringement accountable. This is, to the extent outlined above, the position in New Zealand under current law. There is also the possibility of letting copyright owners incur damages without providing a remedy. That is what the Position Paper proposes. Exempting ISPs from liability means that copyright owners will not have effective tools available to stop infringement. Primary infringement action, even if the identity of the infringer is discovered, will only provide a solution for an individual infringement case. It will not stop infringement from happening in the future through the means of other ISPs. With hosting services available at a few mouse-clicks, it takes virtually no time to set up the same website on another server. Access to the Internet is no longer reserved to a skilled technologic elite. Bearing this in mind, it must be also clear that notice-and-takedown procedures will never be able to provide a full solution to the problem without implementing protective mechanisms.



The persons in the relatively best position to exercise control are the ones who provide access to the Internet and offer hosting services. Thus, the idea that Internet Service Providers should be held liable arises from the observation that "copyright infringement is a very serious problem that needs to be stamped out ruthlessly".<sup>71</sup> Internet Service Providers control the means through which infringement occurs. However, it would be a crude misunderstanding of the Internet as a medium to put the blame on Internet Service Providers for merely providing the communication structures that facilitate infringement. Likewise, it would be absurd to hold a telephone company accountable for infringement occurring through their telephone lines. This argument though, however often made, is convincing only in respect to access providers. Hosting services are of a different nature. An access provider only provides the admission to material that already exists in cyberspace. The material would be accessible anywhere in the world, no matter whether the particular provider enables its subscribers to access it. Thus, the standard of protection for copyright owners would not be improved by imposing liability on such access providers. However, targeting the provider who hosts the material can, at least temporarily, stop the infringement, because it could provide for removal of the infringing material from the Internet. Therefore a host provider is not comparable to a telephone company, because hosting services are a prerequisite for making infringing material available.

This difference alone, however, would not be sufficient to justify liability. The reason for responsibility need not necessarily be based on fault. Tortious liability does not always require a wrongdoing, but it may also be based on the performance of a risky action. A car owner may be liable for the damage caused by the operation of the automobile. A dog owner may be liable for damages caused by the animal. Vicarious liability is imposed to employers for the conduct of their employees; principals may be liable

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<sup>71</sup> Alfred C Yen "Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment" (2000) 88 GEOLJ 1833, 1892.



for the acts of their agents.<sup>72</sup> One could easily think of more such cases, and the reason for liability is not fault, but the participation in a risk. However, law imposes liability only when the risk is disproportional to the average risk that every member of society has to bear. It imposes liability on those who participate in this risk and who benefit from it. It is important to note that liability is not meant as a punishment or deterrent in such cases. It is rather the price that is paid for the benefits connected to the risk. As a result, everyone has the choice to continue or to cease from participating in the risk. The decision will largely depend on the relation between the likelihood and the amount of damage or benefits that can be expected from the performance of the risky act. Liability thus strikes a balance between the benefits and the risks. If the relation is roughly in balance, liability, or, more precisely, potential liability will neither encourage unnecessary risky conduct nor deter risky conduct entirely.

Internet in New Zealand is still booming.<sup>73</sup> As the MED claims, New Zealanders are enthusiastic about using the Internet, and thus, the number of subscriptions is continually increasing. One must assume that New Zealand ISPs have done their homework and calculated the risk of potential liability. It cannot be doubted that the result is already a factor in the calculation of access and hosting fees. The factor may not be as great as for instance in the United States, due to the comparatively limited liability law as outlined above, but it is certainly part of the calculation. Therefore, it is hard to argue that liability acts as a deterrent to Internet use on the one hand if the statistics tell the opposite, and one can only conclude that the balance between liability risks and benefits is properly struck. Thus, the

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<sup>72</sup> It is true, though, that strict liability is not the most prominent feature of New Zealand's legal system.

<sup>73</sup> According to a study conducted by the research company IDC, the number of Internet users climbed from 2.14 million in 2001 to 2.5 million people in 2004. Cited in Richard Pamatua "Internet Shake-out" (2001) 2 *NZ INFOTECH WEEKLY* 7. According to an international study conducted in 2001, New Zealand users are among the most active users of the web. Cited in "Kiwis among highest users of Internet" (29 May 2001) *Computerworld*. The statistics compiled by *Internet World Stats* indicate that 55.4 per cent of New Zealand's population has Internet access, which puts New Zealand in 13<sup>th</sup> place worldwide. See <<http://www.internetworldstats.com/top25.htm>>.



main argument for the introduction of secondary liability exemption appears to be contradicted by reality.

What would happen if the risk of liability increased? It is likely that, in a first step, ISPs would indeed raise connection and hosting fees. It is equally likely that ISPs would think of ways to prevent secondary liability by targeting the problem at its roots. A few examples show how ISPs dealt with the problem of potential liability without the ability to resort to a liability exemption clause. The Finnish group of the International Federation of the Phonographic Industry (IFPI) and a number of Finnish ISPs came to an agreement upon the prevention of intellectual property rights infringements.<sup>74</sup> Under this agreement, ISPs have to block content and reveal the identity of the content provider upon infringement notification by IFPI. Upon repeated infractions, ISPs have to terminate its relations with the customer. In exchange, IFPI waives any liability claims and indemnifies the ISP for damages incurred because of invalid notification. In Argentina, a similar approach was taken in negotiations between the Argentine Industry Association of Record and Music Video Producers (CAPIF) and the Argentine Chamber of Data Bases (CABASE), which comprised several ISPs. Upon notification of alleged infringement, the ISP hosting the website would have five days to justify or remove the content. If the ISP failed to remove the content, a commission would be formed consisting of CAPIF and CABASE representatives. Only if the commission could not resolve the conflict the parties would be allowed to bring legal proceedings.<sup>75</sup>

If there was not a potential for liability, there would not be a great need to find mutual ways to resolve the interest conflicts between copyright owners and ISPs. The risk of being held accountable creates an incentive to enter negotiations. This risk forces ISPs to take responsibility not only in terms

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<sup>74</sup> Nils Bortloff and Janet Henderson "WIPO Workshop on Service Provider Liability: Notice and Take-Down Agreements in Practice in Europe" 7 <[www.wipo.org](http://www.wipo.org)> (last accessed 22 July 2004).

<sup>75</sup> Nils Bortloff and Janet Henderson "WIPO Workshop on Service Provider Liability: Notice and Take-Down Agreements in Practice in Europe" 9 <[www.wipo.org](http://www.wipo.org)> (last accessed 22 July 2004).



of compensation of damages incurred, but also in terms of prevention of such damages. There are technological means to prevent online copyright infringement to a certain extent. The Rights Protection System (RPS) is a technology that analyses the transmitted data and scans for unlawful content. If such content is found, the respective URL<sup>76</sup> is blocked.<sup>77</sup> Docking at the ISP's routers,<sup>78</sup> the system filters the respective websites and makes them inaccessible for any clients connected through those routers. Approaches like the RPS and related systems need the cooperation of ISPs to work. If ISPs do not implement such technology, the prevention of copyright infringement is impossible. Because ISPs control the facilities, they are in the position to adopt protective mechanisms. If the risk of being held accountable is significantly reduced, ISPs do not have any incentive to act. This would lead copyright owners incurring damages without having any factual power to prevent such damages in the future.

The justification for this result is the policy of ensuring cost-effective access to the Internet. However, effective protection of copyright, in light of a threat that appears to be greater than the invention of the letterpress, is a policy that is not sufficiently considered in respect to the proposed legislation. The reason for the existence of copyright in the common law system was the "encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies."<sup>79</sup> The legal protection provides the incentive to produce creative works. If the scope of this legal protection is so narrow that the enforcement of rights cannot be maintained in the digital age, this could in fact be a deterrent for future works and lead to the frustration of authors and the related industries. Electronic commerce, including the offering of digitised works, would become a particular risk and have a chilling effect on New Zealand's

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<sup>76</sup> The Uniform Resource Locator (URL) is the standardised address to access sources on the Internet.

<sup>77</sup> This is the so called "black listing" model, where access to specified sites is blocked. Another way is the "white listing" model, where access is only possible to listed sites. See also Rosa Julia-Barcelo "Liability for On-Line Intermediaries: A European Perspective" (1998) EIPR 20(12) 453.

<sup>78</sup> A router is a network device that forwards data packets to the next point of the network. It is essential for the operation of decentralised networks such as the Internet.

<sup>79</sup> British Statutes (1709) 8 Anne, ch XIX.



Internet economy. Thus, it is inevitable that any reform strikes a proper balance between the opposing interests. While the suggested clarifications as to primary liability are useful and take both sides into account, it appears not to be sufficiently regarded with respect to the secondary liability exemptions. There are other policy considerations which ought to be considered in this argument.

For instance, a policy worth considering could be the idea of spreading the losses. This is not unknown in New Zealand. For instance, section 14 of the Rehabilitation and Compensation Insurance Act 1992 bars claims for personal injuries. Victims of personal injuries are compensated by a fund financed by employers, earners, motorists and the government. The idea of spreading the losses among virtually the whole society appears to be justified in this case, because every member of the society participates in the risk of injuring someone else, while the victims are often left with insufficient legal remedies. Thus, the objective of the introduction of this alternative form of compensation was not the responsibility for the loss, but to cater for the needs.<sup>80</sup> Because of the nature of a fault-based tortious liability, in the majority of cases those needs were not met appropriately.<sup>81</sup> Therefore, legislation took a different path in addressing the issue. However, the idea of spreading the losses among society is not only limited to such exceptional liability models. Tortious liability for potentially risky behaviour has always worked as a way to spread the losses. Before the introduction of the accident compensation scheme, mandatory insurance for car owners already served a similar purpose. Because the victims used to have difficulties both in obtaining a judgment (because of the need to prove fault) and in collecting damages (because many defendants are financially unable to pay for large amounts of damages out of their own pockets), mandatory insurance provided care for the victims' needs.

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<sup>80</sup> Stephen Todd (ed) *The Law of Torts in New Zealand* (2ed, Brookers, Wellington, 1997) para 1.4.

<sup>81</sup> Stephen Todd (ed) *The Law of Torts in New Zealand* (2ed, Brookers, Wellington, 1997) para 1.4.



In many respects, the situation of copyright owners is similar to this situation. Obviously, suffering personal injury and the mere breach of a right are not comparable in its effects.<sup>82</sup> In both cases, an unlawful violation causes damages, for which adequate compensation is not available. While it is true that the situations are incomparable in their practical impacts, and that it would demean the victim of a car accident to compare them with an artist whose copyright is infringed upon, they have something in common. The common feature of rights, no matter if it is as essential as physical integrity or as luxurious as an intellectual property right, is that they require efficient legal protection. If the extent of this legal protection is not sufficient to offer a redress to victims for the loss of their rights or to allow enforcement of the right, the right is in danger of becoming meaningless. With such a widespread medium as the Internet, intellectual property rights, in particular, copyright is in permanent danger. Therefore, it would follow a similar doctrinal approach to hold the ones accountable who take part in creating this danger. The expected increase of fees will therefore put the burden on the shoulders of all Internet users.

This would also provide copyright owners with potentially more solvent defendants. Primary infringers often turn out to be incapable of reimbursing copyright owners for the huge damages incurred. The reason for this is that it is possible to cause enormous harm without a need for particularly great financial resources. ISPs, however, are much more convenient defendants if found liable. Especially larger ISPs create solid revenues through their services. Moreover, liability will almost certainly be covered by insurance companies rather than actually be paid at the ISP's expense, since insurance coverage is much more likely within a company doing business than with a private person. Thus, the insurance premiums will be part of the ISPs' fee calculation and ultimately be paid by the

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<sup>82</sup> A point could also be made that copyright is a legally created right. Although other jurisdictions certainly emphasise the moral aspects of copyright stronger, a discussion between legal positivism and natural law theories is clearly out of the scope of this paper, and it should be noted that all rights, including the right to physical integrity, ultimately exist by virtue of law.



subscribers. This effect would again amount to spreading the losses caused by the side-effects of the Internet's great merits.

New Zealand Courts have yet to deal with ISP liability issues. There has not been a single lawsuit involving ISPs and secondary copyright infringement rules in New Zealand until today. Therefore, it appears to be legitimate to ask how exactly a change of the law can be justified. A statutory change of law may be warranted if it responds to a development in case law that is unwanted. However, if the problem has not been severe enough to generate at least one judgment in this field, it is hard to defend legislation. The confusion about ISP liability results mostly from the assumption that overseas case law, predominantly of the United States, displays a problem that exists to the same extent in New Zealand. This is, due to the different law as outlined above, not the case. Moreover, legal confusion is often a prerequisite to the development of coherent case law. A clear definition of rules, should the issue ever arise, is what one should expect from New Zealand Courts. One should be content that clear, narrow rules will be found if Courts "closely analyse the nature of online conduct".<sup>83</sup>

It would be a legitimate question to ask whether New Zealand should refrain from adopting a position that has become the law in many western jurisdictions, among which are the most important economies like the United States or the European Community. Indeed, there does not seem to be an easy answer available. However, the development of the secondary liability exemptions has to be considered in their historical development. The development in the United States in particular has not been a steady one. Cases such as *Netcom* did not exactly suggest that ISP liability could become a major issue in the United States. It would have been arguable, and it was argued,<sup>84</sup> that the legislator should have left it to the Courts to

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<sup>83</sup> Ian C Ballon "Pinning the Blame in Cyberspace: Towards a Coherent Theory for Imposing Vicarious Copyright, Trademark and Tort Liability for Conduct Occuring over the Internet" (1996) 18 COMMENT 729, 766.

<sup>84</sup> Alfred C Yen "Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment" (2000) 88 GEOLJ 1833.



develop a coherent system of liability within the frame of tort law and the existing statutes. Some legal uncertainty would have been the negative consequence for the consistent development of the law. Before the DMCA was passed, an expert commission of the Clinton administration in fact argued in favour of the principle possibility that primary and secondary liability could be imposed on ISPs in a publication that became known as the *White Paper*.<sup>85</sup> However, this did not remain the predominant view of the legislator, which is why the DMCA came into effect.

The European Community was influenced by the development in the United States when it passed the Electronic Commerce Directive.<sup>86</sup> The introduction of the ISP exemption is therefore not automatically attributable to legal necessity, but to the pressure imposed by the United States on the European Internet economy. This mechanism is understandable alone because of the competition between both economies.

However, New Zealand's economy is on a much smaller scale. New Zealand's ISPs are for the largest part not subject to international competition.<sup>87</sup> Additionally, New Zealand's law is quite different. As shown above, the secondary infringement provisions and the concept of authorisation are very different from the law in the United States. In their comparative studies, commentators have argued that even a case like *Napster*, which could be characterised as a rather obvious case of secondary liability in the United States, would not apply to New Zealand.

In the case of the European Community, the Electronic Commerce Directive did not only serve the purpose of favouring a certain legal approach towards ISP liability, but also to unify the law in the member states and lower the barriers to trade, which is a reason why it does not

<sup>85</sup> Bruce A Lehmann *Intellectual Property and the National Information Infrastructure – The Report of the Working Group on Intellectual Property Rights* (1995) 114-124.

<sup>86</sup> Bill Thompson "Damn the Constitution: Europe must take back the Web" (2002) <<http://www.theregister.co.uk>>.

<sup>87</sup> The only internationally operating ISP listed on Yahoo's Small Business Directory is the New Zealand branch of AT&T. See also the list on <<http://www.newzealandisp.orcon.net.nz>>.

apply to New Zealand. In summary, the differences in terms of economy and copyright law justify that New Zealand goes its own way.



#### *IV THE POSITION PAPER'S PROPOSALS*

In the previous section it was argued that a general exemption for ISPs is neither necessary nor based on a balanced policy consideration. Even if one generally accepted the proposition that the current law is not appropriate to deal with the situation of ISPs, it can be doubted whether the proposed solutions of the Position Paper provide the best answer. While the suggestions regarding the (A) definition of ISPs and (B) primary liability appear to be quite a constructive amendment of the law, the provisions regarding (C) secondary liability especially and their impact on the liability law deserve a closer examination.

##### *A Definition of ISPs*

While New Zealand copyright law is entirely governed by the Copyright Act, the suggested exemptions are a special provision that exclusively target the issues related to the various forms of provision of Internet-related services. Because the term "Internet Service Provider" covers a broad range of entities, definition becomes an issue to determine which entities should be eligible for the exemption. The Position Paper proposes a definition based on the nature of the activity.<sup>88</sup> The secondary infringement provision deals primarily with ISPs who host information at the direction of third party subscribers. Contrary to transient copying and caching, hosting is an activity that goes beyond providing a mere access to the Internet itself by requiring a higher degree of participation by ISPs. By hosting subscriber's websites, ISPs make storage space on their servers available to third parties. The MED proposes that the definition of ISPs should be broad enough to cover entities, which are not generally considered to be ISPs, if they provide ISP services. The definition of ISPs as proposed by the MED would also provide for future developments. It

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<sup>88</sup> Position Paper, para 81.

could easily cater to new technologies such as WLAN<sup>89</sup> or UMTS,<sup>90</sup> because the definitions focus on the nature of the activity rather than on a formal status, and because the distinction between cable and wireless communication would be abolished.

### ***B Regarding primary liability***

The Position Paper addresses several issues in respect to potential primary liability for copyright infringement that could have an impact on the legal situation of ISPs.

#### *1 Transient copying and the reproduction right*

The current reproduction right under the Copyright Act includes the right to control digital copies of the work. The MED, in accordance with the majority of submissions made on the Discussion Paper, proposes to restrict that right if transient copying is part of an automated technical process and is intended to provide for an act otherwise permitted.<sup>91</sup> If copying serves this purpose, according to the MED the reproduction right is not significantly restricted, since it does not encourage the creation of new works.<sup>92</sup> The Ministry therefore suggests an exception directed towards transient copies.<sup>93</sup> Although it is likely that this exception will cover caching, the MED proposes an additional exception for the “common

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<sup>89</sup> Wireless local access networks (WLAN) use radio waves as carriers and are considered an alternative to cabled networks. It is expected that large future markets of WLAN lie in office environments and in the health sector. See also <[www.wlan.org](http://www.wlan.org)> (last accessed 20 July 2004).

<sup>90</sup> Universal Mobile Telecommunications System (UMTS) is a third generation mobile telephony standard. Its broadband capabilities make it an ideal carrier for large amounts of data and internet applications. See also <[www.umtsworld.com](http://www.umtsworld.com)> (last accessed 20 July 2004).

<sup>91</sup> Position Paper, para 46.

<sup>92</sup> Position Paper, para 47.

<sup>93</sup> Position Paper, para 49.



practice” of caching.<sup>94</sup> The Position Paper suggests that the exception clause should be modelled on the equivalent United Kingdom provision.<sup>95</sup>

Regulation 18 of the UK Electronic Commerce Regulations provides that a service provider is exempted from liability if it does not modify the information, complies with conditions on access to the information and with any rules regarding the updating of the information, does not interfere with lawful use of technology to obtain data on use of the information, and acts expeditiously to remove or disable access to such information upon obtaining knowledge of the removal of the initial source of the transmission.<sup>96</sup>

## 2 *Mere provision of physical facilities*

The MED suggests an amendment of the Copyright Act stating that the “mere provision of physical facilities for enabling or making a communication does not itself constitute an infringement of copyright, or an authorisation for such infringement.”<sup>97</sup> This is modelled on a similar provision of the WIPO Copyright Treaty.<sup>98</sup> The Canadian Supreme Court argued in *Canadian Association of Internet Providers v Society of Composers and Music Publishers*<sup>99</sup> that as long as the role of the ISP was limited to providing the “means necessary to allow data initiated by other persons to be transmitted over the Internet”, it would act as a “mere conduit”.<sup>100</sup> It would however go beyond such content-neutral provision of

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<sup>94</sup> Position Paper, para 85.

<sup>95</sup> Position Paper, para 86.

<sup>96</sup> Electronic Commerce (EC Directive) Regulations 2002 (UK), reg 18.

<sup>97</sup> Position Paper, para 84.

<sup>98</sup> WCT, art 8 Agreed Statement

<sup>99</sup> *Canadian Association of Internet Providers v Society of Composers, Authors and Music Publishers* (2004) SCC 45 (CSC).

<sup>100</sup> *Canadian Association of Internet Providers v Society of Composers, Authors and Music Publishers* (2004) SCC 45, para 95 (CSC) Binnie J.

physical facilities if an ISP has notice of infringing conduct and fails to respond by taking the material down.<sup>101</sup>

### 3 Analysis

The Position Paper addresses some of the crucial issues regarding possible liability for primary infringement, in particular transient copying and caching. Although legally independent forms of infringement, they cannot be separated from the essential functions of the Internet and have been characterised as the “digital equivalent to the right to read”, as far as the technically necessary storage of information in the RAM is concerned.<sup>102</sup>

The aspects of caching are slightly different from transient copying, because of the longer duration of the storage and because caching is not indispensable to the functioning of the Internet (while the storage of information in the RAM is an inevitable step to execute a program or view a web site). The MED argues that caching of frequently accessed websites makes access to Internet material more efficient and thus, more cost-effective.<sup>103</sup> Moreover, the current law would give copyright owners an unduly broad right, which could turn out to be a disincentive to Internet use.<sup>104</sup> The policy of endorsing fast, cost-effective usage of the Internet should prevail here over the interests of copyright owners. Transient copies are not of great economical importance for copyright owners. In reality, transient copying does not amount to a duplication of the, because from an Internet user’s point of view it does not matter whether the copy actually originates from the original website or from the ISP’s cache. In its effects, caching does nothing more than increasing the Internet’s operation speed. This is something that copyright owners also have an interest in, because it enables them to distribute their works over the Internet.

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<sup>101</sup> *Canadian Association of Internet Providers v Society of Composers, Authors and Music Publishers* (2004) SCC 45, para 127 (CSC) Binnie J.

<sup>102</sup> Position Paper, para 45.

<sup>103</sup> Position Paper, para 86.

<sup>104</sup> Position Paper, para 47.



Therefore, the limitation of the reproduction right cannot be expected to harm copyright owners or diminish their incentive to produce creative works and make them available on the Internet.

The proposed regulations also provide for clarity regarding the crucial primary liability issues addressed above. Primary liability for copying is practically ruled out under the new regime, with the noteworthy exception of the special bulletin board cases. In these cases, liability was justified on the basis of an additional, volitional element on part of the operators, who effectively supported and endorsed the infringing conduct of their subscribers. This justification for primary liability would likely apply under the proposed changes of the law.

ISPs will not face liability as cable programme service providers or broadcasters, especially if the unwarranted distinction will be replaced by a technology-neutral definition. The proposed clarification that the mere provision of facilities does not amount to primary infringement, will effectively release ISPs from any kind of potential liability, provided the ISP has no control over the content of the transmission.

### *C Regarding secondary liability*

ISPs should usually not face primary liability, and the above-mentioned suggestions certainly provide a bridge where the law has previously left gaps. However, as described above, the situation with respect to secondary liability is not as clear. Instead of changing the general rules governing secondary liability, that is the secondary infringement and the authorisation provisions in the Copyright Act, the MED suggests introducing an exception of the general rule. The suggested statutory exemption is tailored after the EC Directive. According to the Directive, as transformed into national law in the UK, ISPs are exempt from liability, where

- a. The service provider does not have actual knowledge of unlawful activity or information; or, where a claim for damages is made, the service provider is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful;
- b. Upon obtaining such knowledge or awareness, the service provider acts expeditiously to remove or disable access to the information; and
- c. The third party subscriber was not acting under the authority or the control of the service provider.

As far as the knowledge requirement is concerned, the MED suggests applying the “constructive knowledge” standard, because this is consistent with the existing secondary liability provisions.<sup>105</sup> A possible wording for subsection (a) could therefore be:

- a. The service provider does not know or has reason to know of unlawful activity or information;

While the proposal seems to be reasonable and balanced in respect to primary liability issues, the same cannot be said of the suggested changes of the secondary liability law. The proposal has several implications in relation to ISPs and copyright owners. While the provisions governing secondary infringement and authorisation remain unchanged, the proposal tries to reverse the unwanted results generated by the statutory mess. While this can be criticised from a doctrinal point of view, the prominent features of the exemption clauses, in particular the knowledge standard (A), in connection with the infringement notice factor (B), are also going to cause or maintain a wide range of vagueness and unaddressed practical problems.

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<sup>105</sup> Position Paper, para 93.



### 1 *The knowledge standard*

Under the proposed amendment of the Copyright Act, ISPs will only be able to avoid liability if they do not have constructive knowledge of the infringement.

Constructive knowledge commonly refers to facts from which a reasonable person in the same position as the ISP would infer that copyright infringement has occurred. This encompasses a party that "wilfully closes its eyes to the obvious and wilfully fails to make those inquiries that an honest and reasonable person in the circumstances would have made".<sup>106</sup> To establish a lack of knowledge, the defendant would have to show "subjective lack of awareness that the act constituting the infringement was an infringement of copyright; and that, objectively assessed, the respondent had no reasonable grounds for suspecting that the act constituted an infringement of copyright".<sup>107</sup>

This objective test is contrasted by the actual knowledge standard, which was adopted in the EC Directive. Actual knowledge means subjective knowledge of the defendant as well as knowledge of facts. It is not a requirement that the defendant draws the correct conclusions from those facts, just as an error in law is no defence.<sup>108</sup> As Harvey J put it, "[k]nowledge cannot mean in my opinion any more than notice of facts such as would suggest to a reasonable man that a breach of copyright was being committed."<sup>109</sup> It includes cases where parties "shut their eyes to that which is obvious".<sup>110</sup> Actual knowledge has to be evaluated on a case-by-case basis. ISPs cannot be said to have actual knowledge of an infringing

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<sup>106</sup> *Husqvarna Forest & Garden Ltd v Bridon New Zealand Ltd* (1997) 6 NZBLC 99,415, 102,244 Smellie J.

<sup>107</sup> *Milwell Pty Ltd v Olympic Amusement Pty Ltd* (1999) 43 IPR 32 (FCA).

<sup>108</sup> *Star Micronics Pty Ltd v Five Star Computers Pty Ltd* [1990] 18 IPR 225, 235 (FCA) Davies J.

<sup>109</sup> *Albert v S Hoffnung & Co Ltd* (1921) 22 SR 75, 81 (NSW) Harvey J.

<sup>110</sup> *LA Gear Inc v High-Tech Sports Plc* [1992] FSR 121, 128 (EWHC) Morritt J.



act just because they are generally aware that the information they transmit will contain infringing copies from time to time.<sup>111</sup>

The question arises when ISPs can be held to have constructive knowledge of an infringement. The MED suggests setting out the relevant factors for the determination of constructive knowledge in the legislation.<sup>112</sup> Because ISPs do not monitor the material they transmit, it is generally questionable whether a general awareness of copyright infringement occurring through their facilities can be sufficient to establish knowledge, since this knowledge has to be knowledge of facts.<sup>113</sup> This is supported by the view expressed by Morritt J in *LA Gear v High-Tech Sports*:<sup>114</sup>

“Reason to believe” must involve the concept of knowledge of facts from which a reasonable man would arrive at the relevant belief. Facts from which a reasonable man might suspect the relevant conclusion cannot be enough.

The “reasonable man” test was stated in *PolyGram Records v Raben Footwear*<sup>115</sup> as knowledge of “facts as would suggest to a reasonable person, having the ordinary understanding expected of persons in the particular line of business, that a breach of copyright was committed.” However, there are limits to what a defendant reasonably can believe. For instance, in *ZYX Music v King*,<sup>116</sup> the defendant relied on the declaration of the record company that a particular song, which was distributed by the defendant, did not infringe copyright. Because the similarities between the song and another song were obvious, the Court held that the defendant had reason to believe. It can be concluded that the knowledge requirement under the secondary infringement provisions requires the defendant to

<sup>111</sup> Louise Longdin “Copyright and On-line Service Providers” [2000] NZLJ 180, 183.

<sup>112</sup> Position Paper, para 94.

<sup>113</sup> *LA Gear Inc v High-Tech Sports Plc* [1992] FSR 121, 128 (EWHC) Morritt J.

<sup>114</sup> *LA Gear Inc v High-Tech Sports Plc* [1992] FSR 121, 129 (EWHC) Morritt J.

<sup>115</sup> *PolyGram Records Inc v Raben Footwear Pty Ltd* (1996) 35 IPR 426 (FCA).

<sup>116</sup> *ZYX Music GmbH v King* [1997] 2 All ER 129 (EWCA).



establish facts from which reasonable grounds for their belief can be inferred.<sup>117</sup>

Therefore, according to the MED, the crucial factor in establishing knowledge should be a notice given by the copyright owner of the alleged infringement.<sup>118</sup> The question arises whether a receipt of a notice claiming a copyright infringement can be sufficient to hold an ISP to have "reason to believe" that there is infringement. In *LA Gear*, Morritt J noted that the requirement implied "the allowance of a period of time to enable the reasonable man to evaluate those facts so as to convert the facts into a reasonable belief."<sup>119</sup> From these words, it appears to be very clear that unawareness cannot transform into constructive knowledge just by the mere allegation of infringement. An ISP must be given a reasonable time to react upon such notice. However, it appears to be difficult to determine such reasonable time, since there is a broad spectrum of potential cases. For instance, an ISP may receive a very detailed notice of a single, evident infringement, from which it might be obvious that there is an infringement. On the other end of the spectrum, an ISP might receive a mere general notice that a website contains an unspecified number of copyrighted files. In such a case, it might consume an enormous amount of time and resources for the ISP to arrive at a reasonable degree of belief of the copyright infringement.

These examples reveal that the suggested standard of knowledge bears a large potential of legal uncertainty. This is amplified further by questions of copyright ownership. To establish a copyright infringement claim, the plaintiff must be the owner of the relevant copyright. However, under the approach in *ZYX Music* and *Raben*, the ISP will have to show that it has reason to believe that the claimant is not the owner of the copyright. The evaluation of this legal question can be very complicated. Smaller companies may not have the human resources to make a reliable judgement

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<sup>117</sup> Susy Frankel and Geoff McLay *Intellectual Property in New Zealand* (1ed, LexisNexis Butterworths, Wellington, 2001), para 5.12.4.

<sup>118</sup> Position Paper, para 94.

<sup>119</sup> *LA Gear Inc v High-Tech Sports Plc* [1992] FSR 121, 129 (EWHC) Morritt J.



on this matter. However, the test of constructive knowledge is one of facts. If there is knowledge of the relevant facts to arrive at the relevant belief, "an error of law is no excuse."<sup>120</sup> It is an established rule that a person who deliberately takes the risk that something he does is wrong cannot "say later that he did not know that what he was doing was wrong."<sup>121</sup> If an ISP chooses not to comply with a claim to take down allegedly infringing material, at least after the reasonable period of time that the *LA Gear* approach provides, because it is in their opinion there is no infringement, they have to bear the risk that such opinion might be wrong. This leaves ISPs in a very vulnerable position, because any non-compliance with infringement notifications will bear a risk of liability. However, as pointed out before, this is already a feature of the current provisions. Unfortunately, the proposal does not remedy this situation, but leaves it to the ISP to decide whether an infringement notice is warranted.

## 2 *The infringement notice factor*

The pressure to comply with infringement notices is increased by another form of potential liability. ISPs have a contractual duty to provide Internet access or to host material to their subscribers. If an ISP blocks access to or removes material from the web to prevent liability for copyright infringement, this collides with their contractual duties in relation to their customers. Thus, if the blocking or removal of the material turns out to be unwarranted, ISPs may be found liable to their subscribers. Of course, ISPs will probably exclude liability in their service contracts anyway. However, implementing a liability exclusion clause will decrease the quality of the provided service, because customers are deprived of a contractual remedy. It also favours larger ISPs that may be able to afford the liability risk, and who are therefore not under the same pressure to exclude any liability to their customers. This could result in a fewer

<sup>120</sup> *International Business Machines Corporation v Computer Imports Ltd* [1989] 2 NZLR 395, 407, 418 (HC) Smellie J.

<sup>121</sup> *Sillitoe v McGraw-Hill Book Co (UK) Ltd* [1983] FSR 545, 557 (EWHC) Mervyn Davis QC.



acceptance of such contracts and, thus, fewer demand. In any case, if an ISP becomes known for careless blocking of material even in cases where the infringement is doubtful, this could damage the ISP's reputation and affect its market share.

Apart from the liability risk, the absence of a regulated notification procedure bears additional problems for ISPs. It can hardly be a valid aim of the legislation to force ISPs to act as censors. Especially because ISPs, at least when performing the functions at issue, merely provide the means that are necessary to access and make use of the Internet, they are not in the position to look out for potentially infringing material. Imposing such a duty would mean that ISPs would have to safeguard themselves against potential liability by hiring copyright experts, which they could hold liable if their assessment turns out to be wrong. There can be no doubt that this form of risk-management would increase the costs of Internet access, which is exactly what the legislation is supposed to prevent. If ISPs cannot resort to a reliably regulated way of dealing with infringement notices, the liability exemptions will hardly achieve the goal of offering some relief for ISPs in respect to copyright infringement liability.

Additionally, a non-formalised infringement notice process bears a risk of abuse. While encouraging ISPs to block the infringing material could be justified in cases of undisputed copyright infringement, there may be cases in which the ownership of the copyright itself is in question. With business models such as the online distribution of music files emerging, it is likely that an increased number of disputes over the copyright ownership may arise in the cyberspace environment. The allegation of copyright infringement could be a powerful tool to block a competitor's website for a significant period of time. The implications could be severe.

Imagine the following case: A big company runs an online music store on its own servers, and a smaller company runs a comparable website, which is hosted by an ISP, because the small company does not have the financial means to operate its own servers. Both companies have the license to offer



a certain popular song for download. It would be in the interest of the big company to raise copyright claims and thereby cause the ISP to take the small company's website (or at least the relevant song file) down. When the file is finally accessible again, the song may not be popular anymore (or at least not as demanded), thus enabling the big company to concentrate the stream of customers of that particular song onto its own website.

Potential liability, especially monetary liability, is a strong incentive to act. If the law grants ISPs a way to avoid liability, legislation has to ensure that such a resort is sufficiently guarded against abuse. The law has to provide for the prevention of unjustified use of the liability exemption provisions. That could be a corresponding liability of copyright owners for causing unwarranted blocking of material, or a requirement to file suit for copyright infringement if a dispute over the legitimacy of the claimed infringement arises.

The United States DMCA addresses the problem as follows:

17 USC section 512

...

(g) Replacement of Removed or Disabled Material and Limitation on Other Liability.

(1) No liability for taking down generally.

Subject to paragraph (2), a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

The subscriber has to be notified of the takedown of the material and has the opportunity to file a counter notification. The ISP has to forward the notice to the copyright owner. If the copyright owner does not file suit against the alleged infringer, the ISP has to cease blocking access after 14 business days.



The practical experiences with this regime are quite encouraging. From the copyright owner's point of view, it is fairly uncomplicated to identify the ISP that hosts the infringing website by employing the WHOIS database.<sup>122</sup> After the contact information is ascertained, the infringement notice is filed via e-mail with the ISP's designated agent.<sup>123</sup> Copyright owners recognise that the notice-and-takedown procedure under the DMCA provide them with a useful tool to fight copyright infringement. In practice, the process has worked well, as ISPs are usually ready to cooperate in order to reach the "safe harbour".<sup>124</sup> From an ISP's perspective, the provision of a clear procedure on how to deal with potential infringement allows both parties to efficiently address the issue. Another positive feature is the liability on the part of copyright owners for any known misrepresentations made in relation to the takedown request. This prevents an abuse of the procedure and protects subscribers from groundless allegations, at least to a significant extent.<sup>125</sup>

As the Canadian Supreme Court noted in *Canadian Association of Internet Providers v Society of Composers* with respect to the lack of such a system in Canada, the enactment of a statutory notice-and-takedown procedure would be "a more effective remedy to address this potential issue".<sup>126</sup>

<sup>122</sup> Available at <[http://www.networksolutions.com/en\\_US/whois/index.jhtml](http://www.networksolutions.com/en_US/whois/index.jhtml)> (last accessed 30 August 2004).

<sup>123</sup> Under the DMCA, all ISPs are required to designate an agent responsible for the receipt of infringement notices. A database of registered agents is provided by the US Copyright Office at <<http://loc.gov/copyright/onlinesp/list/index.html>> (last accessed 30 August 2004).

<sup>124</sup> Batur Oktay and Greg Wrenn "WIPO Workshop on Service Provider Liability: A Look back at the Notice-and-Takedown Provisions of the US Digital Millennium Copyright Act One Year after Enactment" 13 <[www.wipo.org](http://www.wipo.org)> (last accessed 22 July 2004).

<sup>125</sup> However, according to Batur Oktay and Greg Wrenn "WIPO Workshop on Service Provider Liability: A Look back at the Notice-and-Takedown Provisions of the US Digital Millennium Copyright Act One Year after Enactment" 17 <[www.wipo.org](http://www.wipo.org)> (last accessed 22 July 2004), there appears to be a number of "sham infringement claims" to silence critics, for instance by the Church of Scientology relying on questionable copyrights. Under the DMCA regime this becomes more of an issue between copyright owners and alleged infringers if they oppose the takedown of the material, because the copyright owner has to file suit in this case to maintain the blocking of the material.

<sup>126</sup> *Canadian Association of Internet Providers v Society of Composers, Authors and Music Publishers* (2004) SCC 45, para 127 (CSC) Binnie J.



ISPs are arguably not in the best position to judge whether a copyright objection is well founded. A sensible alternative to a formalised notice-and-takedown procedure could thus be a "RightsWatch" model as it was proposed in Europe some years ago.<sup>127</sup> The idea involves a self-regulatory body that acts as a neutral mediator in copyright disputes and verifies copyright infringement notices. If it had widespread support among copyright lobbies and ISPs, it could provide for a reliable notice-and-takedown scheme. However, the prerequisite is also the major flaw of the model, because it never enjoyed extensive success in Europe.

It would be beneficial to have a formalised way of dealing with infringement claims in the online field. If the legislator opts for infringement liability exemptions, it would make sense to include such a formalised notice-and-takedown procedure. While cases like *LA Gear* suggest that under the present law there is also a certain period of time in which ISPs can assess the claim, the exact amount of time will always be subject to the Court's assessment of the facts in the actual case. The DMCA could provide a model that works in reality.<sup>128</sup> Leaving the problems related to notice-and-takedown fully unaddressed burdens ISPs unilaterally, and does not provide for the legal certainty the legislation is aiming at. If New Zealand decides that an ISP exemption is necessary at all, it would be well advised to take advantage of the practical procedural experiences of the United States. Nothing in the MED's proposal indicates that it has considered adopting this approach.

<sup>127</sup> Nils Bortloff and Janet Henderson "WIPO Workshop on Service Provider Liability: Notice and Take-Down Agreements in Practice in Europe" 30 <[www.wipo.org](http://www.wipo.org)> (last accessed 22 July 2004). See also the RightsWatch website <<http://www.rightswatch.com>> (last accessed 26 August 2004).

<sup>128</sup> According to a survey, a striking feature of the notice-and-takedown procedure is that the infringement notifications are almost never disputed. The counter-notification rate of the study, which involved 47,000 cases, was less than 0.009 per cent. See Smith & Metalitz LLP "Proprietary Survey of Clients in the Audiovisual, Business and Entertainment Software, Music and Publishing Industries" (April 2001), cited in "Combating Internet Copyright Crime" <<http://www.publishers.org.uk>>.



## V CONCLUSION

New Zealand is on its way to a legislation that is neither necessary nor likely to solve the problems it is supposed to address. Contrary to the assumption on which the legislation is based, ISP liability is not a key issue that will diminish the advantages of Internet usage and the promotion of electronic commerce in New Zealand. There is a reason why there has yet to be a single lawsuit involving ISP liability for copyright infringement.

The proposed law causes more problems than it addresses. The constructive knowledge standard, which ISPs have to meet in order to fall under the liability exemption clauses, is difficult to determine and bears many uncertainties. The parallel use of constructive knowledge both in secondary infringement provisions and in the exemption provisions causes a legal 'stalemate' that effectively removes the benefit of a liability exemption. Moreover, the position of ISPs will in fact be worse after the new law comes into force. If infringement notifications become a factor on which knowledge can be construed, this will affect the knowledge standard in respect to principle liability as well. The many problems connected to a non-formalised infringement notice system remain unaddressed in the proposed legislation, which will leave ISPs in the highly unfavourable position of having to assess liability risks not only in respect to copyright owners, but also to their subscribers. The need for a reliable risk-management will in fact increase the running costs for ISPs, who will have to safeguard themselves against those increased risks through the employment of out-of-house expertise or through insurance plans. Thus, the legislation will fail to support cost-effective access to the Internet.

This would not even be a problem, if it did not contradict the primary aim of the legislation. However, by emphasising cost-effective access as its prime rationale, the legislation fails to consider other policies, which are of equal importance in respect to copyright in the digital age. The Internet is an instrument, which bears unprecedented risks for copyright owners. However, the legislation shifts the risk unilaterally to copyright owners and



sparer the ones who benefit from the Internet the most: its users and companies making profits out of the Internet's popularity. Even if ISPs were held liable for secondary infringement, it cannot be doubted that the costs of those risks would be spread among the users through increased connection fees. However, it is well arguable to spread the risk among those who participate in and benefit from a risk, especially when the remedies available are of limited use.

The New Zealand government could have well left it to the Courts to determine reliable rules of secondary liability in the Internet context. Law, and especially intellectual property law, have proven to be able to respond to technological innovations in the past. The development of case law, one might think here of the example of negligence in respect to the introduction of automobiles, has the advantage of a careful assessment of the law and the thoughtful evaluation whether the law is still capable of addressing the relevant issues in a changed environment. This rather slow progress prevents half-cooked solutions which are mainly dictated by suspected needs and which fail to consider all the necessities and implications of a legal problem. If potential secondary ISP liability really poses a threat to the growth of Internet economy, the legislator would have been well advised to find out whether the threat is real and whether the threat is serious. An incomplete solution to the supposed problem is neither appropriate to support the goals identified by the Ministry nor does it show great confidence in the proficiency of New Zealand Courts in dealing with copyright law issues in the digital age.

Even if one is of the opinion that uncertainties in the law should be eliminated, this is not necessarily an argument in favour of a liability exemption. A better approach would have been to sort out the secondary liability rules. Providing clear rules is the real issue legislation should target, which would make exceptions of these rules superfluous.



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