

**COMPETING WITH FREE: THE NEW
ZEALAND RESPONSE TO THE
PROLIFERATION OF P2P FILE-
SHARING**

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I. P2P File-Sharing and Copyright in the 20th Century

A. Introduction

Peer-to-peer file-sharing¹ poses a unique challenge to copyright owners, who are legally guaranteed the exclusive right to reproduce and communicate their digital copyright works.² Copyright owners have invested enormous amounts of time and money in legal battles to enforce their rights and stem P2P file-sharing.³ However, the pace of technology has outstripped the ability of existing legal frameworks to adapt.⁴ Even where copyright owners have been successful in enforcing their copyright, they have often suffered public-relations disasters.⁵

Legislatures have experimented with a variety of approaches to curb P2P file-sharing, spurred on by the lobbying efforts of the entertainment industry.⁶ New Zealand has chosen to adopt a graduated response regime, by implementing the Copyright (Infringing File-sharing) Amendment Act 2011.⁷ Graduated response regimes target P2P file-sharers with the assistance of Internet Service Providers.⁸ As the issue of file-sharing is very complex, there have been claims the CIFSAs will be ineffective, surrenders copyright law to the entertainment industry and is draconian in nature.

This dissertation aims to evaluate the effectiveness of the CIFSAs. By analysing the failure of the existing copyright framework and previous approaches to address P2P file-sharing the motivation behind the introduction of the CIFSAs can be revealed.

¹ Peer-to-peer file-sharing will be referred to by the widely used acronym P2P file-sharing in this dissertation.

² Copyright Act 1994, s 16(1).

³ Cade Metz “Legal Battle Over File-sharing Continue” (2005) ABC News <<http://abcnews.go.com>>.

⁴ Stuart Helmer and Isabel Davies “File-sharing and downloading: goldmine or minefield?” (2009) 4 *Journal of Intellectual Property Law and Practice* 51 at 51. Also see Victoria McDonald “Stirring the Waters: Whether The Pirate Bay case and the Thomas-Rasset Case Will Impact File Sharing and Piracy in Sweden and the United States” (2011) 20 *Transnational Law and Contemporary Problems* 563 at 595, who finds that “court cases have clearly not stopped piracy, and no law has yet dissuaded file sharers from illegal downloading.”

⁵ Helmer and Davies, above n 4, at 55.

⁶ Carolina Rossini and Yana Welinder “All Nations Lose with TPP’s Expansion of Copyright Terms” (2012) *Electronic Frontier Foundation* <www.eff.org>. Also see Chris Keall “Govt thwarts film, movie industry lobbyists by keeping copyright infringement notice fee at \$25” *The National Business Review* (2012) <www.nbr.co.nz>.

⁷ The Copyright (Infringing File Sharing) Amendment Act 2011 will be referred to as the CIFSAs.

⁸ Internet Service Providers are those organisations or businesses that provide access to the Internet. An Internet Service Provider will be referred to by the widely used acronym ISP in this dissertation.

Understanding this motivation will complement the stated purposes of the CIFSA, in determining *exactly* what the regime was intended to address over-and-above that expressly identified by Parliament. The legal, practical and policy issues with the legislation can then be examined to determine just how effective the CIFSA is likely to be in addressing its purpose. Based on the outcome of this assessment, it can then be evaluated whether alternative approaches are required or adjustments can be made to address any shortcomings with the CIFSA legislation.

B. The Technology of P2P File-Sharing

P2P file-sharing permits an unlimited number of Internet users to simultaneously upload and download data from any computer, anywhere in the world.⁹ Users operating within a P2P network are called peers. BitTorrent technology (the most popular file-sharing technology) allows peers to connect to swarms of other peers over a network through virtual directions found in torrent files. Torrent files can be easily accessed via a website.¹⁰ No single peer directly transfers an entire file to another peer, but every peer transfers and receives segments of data until downloaders receive enough data to constitute an entire file. Contemporary P2P file-sharing networks are decentralised. When downloading data a peer is accessing information on the hard drive of another peer's computer connected to the network. Each peer retains a high degree of control over what data is made available for sharing, but no one peer controls the network.

P2P file-sharing networks were not always so decentralised. The first-generation network¹¹ Napster¹² was centralised, as Napster's internal servers were required to allow users to search for files and transmit data. Napster was shut down on a secondary liability claim by failing to prevent infringement given it had the power to

⁹ Marty Hansen, Covington & Burling (Washington D.C.) "Web 2.0: A Brief Overview of Issues and Challenges" (Fordham University School of Law Sixteenth Annual Conference on Intellectual Property Law and Policy, Fordham University School of Law, Fordham 27/28 March 2008). Hansen argues the world now operates in a world of Web 2.0, where users use the Internet in a new age of creativity, information sharing and collaboration.

¹⁰ The Pirate Bay (<http://thepiratebay.se>) is one of the most popular directory websites containing torrent files.

¹¹ P2P file-sharing networks are typically described as having gone through three generations of development.

¹² Napster continues to operate at <http://www.napster.com>. Napster pioneered the transfer of music using the .mp3 format.

do so.¹³ A second-generation of more decentralised networks quickly emerged that operated without servers, only providing the software necessary to transmit data between users.¹⁴ However, copyright owners further extended the doctrine of secondary liability to shut down services that operated in this manner.¹⁵ Today we have the third-generation of P2P file-sharing services. With the development of a P2P file-sharing BitTorrent protocol BitTorrent clients emerged, allowing users to distribute large amounts of data over the Internet. Facilitative index servers, such as The Pirate Bay,¹⁶ provide users with an index of information where infringing files can be located. Third generation file-sharing providers have very little to no control over the activities of users and have no way of knowing whether services and software are used for legal purposes. With no authority controlling the transmission of transient digital files over unstructured virtual networks, it is extraordinarily difficult to enforce copyright.

C. The Attitudes of P2P File-Sharers

A combination of copyrighted material becoming easily accessible and increasingly tech-savvy consumers has altered the attitude of Internet users, who consider file-sharing harmless and have little empathy for copyright owners.¹⁷ File-sharers justify their illegal activities in a number of ways. Many infringers feel the entertainment industry unfairly subjects consumers to high costs and fails to respond to consumer demand for high quality content. This is especially the case where copyright owners choose to charge the same price for digital works as physical works.¹⁸ Many file-sharers infringe in response to this perceived injustice. The entertainment industry fostered this cynicism by engaging in legal attacks on infringers,¹⁹ but has recently

¹³ *A&M Records, Inc v Napster Inc* 239 F 3d 1004 (9th Cir 2001).

¹⁴ David McGuire “At a Glance: MGM v. Grokster” (2005) The Washington Post <www.washingtonpost.com>. Second generation file-sharing providers such as Morpheus and Kazaa operated with a lack of servers for the principal purpose of avoiding secondary liability for the infringement of copyright as incurred by Napster.

¹⁵ *Metro-Goldwyn-Meyer Studios Inc v Grokster Ltd* 545 US 913 (2005). This case is discussed below.

¹⁶ See <http://thepiratebay.se/>. The Pirate Bay will be referred to by the widely used TPB.

¹⁷ Jeff McClintock “Submission to the Commerce Select Committee on the Copyright (Infringing File Sharing) Amendment Act 2011” at 1. This lack of empathy can be especially detrimental for small start-up businesses and software companies.

¹⁸ TelstraClear “Summary of New Zealander’s opinions on accessing and copying content” (2009) TelstraClear Media Releases <www.telstraclear.co.nz>.

¹⁹ InternetNZ “Submission to the Commerce Select Committee on the Copyright (Infringing File Sharing) Amendment Act 2011” at 5. Also see Anna Kingsbury “Losing Control in Cyberspace?”

ceased its practice of suing individual users due to the disproportionate backlash in doing so.²⁰

File-sharers also feel that their activities have minimal impact when weighed against the size of the entertainment industry. There is a lack of recognition of the cumulative effect of many infringements.²¹ Infringers also argue that ‘everyone is doing it’. A TelstraClear study reporting that 46% of NZ households have P2P file-sharing software installed²² reveals the power this perception has in normalising file-sharing. The fact a further study found P2P file-sharers *know* what they are doing is illegal and morally wrong²³ reinforces the strength of this justification. Finally, a younger generation of technologically able infringers, or “digital natives”²⁴, perceive the Internet as a zone of freedom and anonymity and have a natural inclination to download.²⁵ Any attempt by copyright owners to enforce their rights in cyberspace is met with staunch resistance.²⁶ Therefore, the attitude of P2P file-sharers needs to be considered when evaluating the effectiveness of the CIFSAs.

D. The Consequences of P2P File-Sharing

There are arguments and empirical evidence for and against the assertion that P2P file-sharing is a threat to copyright owners. The entertainment industry has a wealth of data that indicates P2P file-sharing has a negative collective impact on sales. In terms of the music industry, from 2004 through 2009 it is claimed approximately 30 billion songs were illegally downloaded.²⁷ In America, music sales have dropped

(2004) New Zealand Law Journal 151 at 151 and Albert Kovacs “Quieting the Virtual Prison Riot: Why the Internet’s Spirit of ‘Sharing’ Must be Broken” 51 Duke Law Journal 753 at 754. Kovacs argues that Internet users file share in “revolt” against the “prison” of copyright law.

²⁰ Sarah McBride and Ethan Smith “Music Industry to Abandon Mass Suits” (2008) The Wall Street Journal <<http://online.wsj.com>>.

²¹ Helmer and Davies, above n 4, at 56.

²² TelstraClear, above n 18.

²³ Herkko Hietanen, Anniina Huttunen and Heikki Kokkinen “Criminal Friends of Entertainment: Analysing Results from Recent Peer-to-Peer Surveys” (2008) 5 SCRIPTed 31 at 34.

²⁴ Urs Gasser and John Palfrey *Born Digital: Understanding the First Generation of Digital Natives* (Basic Books, New York, 2008) at 19.

²⁵ Kovacs, above n 19, at 754. Kovacs argues that because in cyberspace Internet users can operate independent of their true identity they transcend moral and legal boundaries applicable in the real world.

²⁶ McDonald, above n 4, at 563.

²⁷ Recording Industry Association of America “Scope of the Problem” (2012) RIAA – Piracy Online <www.riaa.com>.

53%, from \$14.6 billion in 1999 to \$7.0 billion in 2011.²⁸ Other data suggests music sales in Europe have plunged from €7 billion in 2001 to €4.5 billion in 2009, with countries reporting a coinciding decrease in investment in talent.²⁹ A study found that 1.2 million jobs in the European Union could be lost over the next five years if file-sharing continues unabated.³⁰ There is an endless supply of evidence and international studies revealing the negative effects of P2P file-sharing.³¹

In New Zealand studies show that the film and television industry contributed \$2.54 billion to the economy and almost 22,000 jobs in 2008,³² while also increasing innovation and having economic spill-overs for tourism.³³ With approximately 150,000 illegal file shares in New Zealand each month³⁴ P2P file-sharing is clearly also a local concern. Any loss in industry profits acts as a disincentive for copyright owners to invest and threatens the health of the entertainment industry.³⁵ For example, The New Zealand Video Dealers Association Inc. reports a 13% decline in rentals between 2008 and 2010, with piracy seen as the main cause.³⁶ Reading Cinemas also reports admission numbers have fallen over 20% since 2005 against a substantial increase in

²⁸ Ibid.

²⁹ IFPI "Submission to the European Commission on the Green Paper on Cultural and Creative Industries 2010" at 5.

³⁰ TERA Consultants *Building a Digital Economy: The Importance of Saving Jobs in EU's Creative Industries* (prepared for the International Chamber of Commerce's BASCAP Initiative 2010) at 5.

³¹ See Kai-Lung Hui and Ivan Png "Piracy and the Legitimate Demand for Recorded Music" (2003) 2 Contributions to Economic Analysis & Policy 11, Stan Liebowitz "Testing File-Sharing's Impact by Examining Record Sales in Cities" (2008) 54 Management Science 852, Stan Liebowitz "File-Sharing: Creative Destruction or just Plain Destruction?" (2008) 49 Journal of Law and Economics 1, Stan Liebowitz "The Metric is the Message: How much of the Decline in Sound Recording Sales is due to File-Sharing?" (Working Paper, University of Texas at Dallas, 2011), Rafael Rob and Joal Waldfogel "Piracy on the Silver Screen" (2007) 55 Journal of Industrial Economics 379, Alejandro Zentner "File-sharing and International Sales of Copyrighted Music: An Empirical Analysis with a Panel of Countries" (2005) 5 Topics in Economic Analysis & Policy 21, Alejandro Zentner "Measuring the Effect of File-sharing on Music Purchases" (2006) 49 The Journal of Law and Economics 63. Also see Stephen Siwek "The True Cost of Sound Recording Piracy to the U.S. Economy" (2007) The Institute for Policy Innovation <www.ipi.org>.

³² PricewaterhouseCoopers *Economic contribution of the New Zealand film and television industry* (prepared for NZFACT 2009).

³³ Ministry of Economic Development Evaluation Team *Discussion Paper Growth and Dynamics of the New Zealand Screen Industry* (2012) at 33 and 36. The paper specifically notes a number of case studies that have benefited from a healthy local entertainment industry, such as Weta Digital that has built a reputation as a world-leading digital and visual effects company.

³⁴ NZFACT "Submission to the Commerce Select Committee on the Copyright (Infringing File Sharing) Amendment Act 2011" at 2.

³⁵ Ministry of Economic Development *Copyright (Infringing File Sharing) Amendment Bill Regulatory Impact Statement* (2011) at 2 and 7.

³⁶ New Zealand Video Dealers Association Inc. "Submission to the Commerce Select Committee on the Copyright (Infringing File Sharing) Amendment Act 2011" at 1. The Association does admit some profit is lost through consumers switching to legitimate channels.

illegal downloads.³⁷ Profit margins are shrinking in New Zealand just as they are globally.

Opponents to anti-piracy legislation argue that P2P file-sharing is not the threat copyright owners make it out to be. First, opponents argue that the publicised losses exploit skewed data and are hugely inflated due. The United States Government Accountability Office has cast significant doubt on the financial numbers asserted by entertainment organisations as representing actual infringement losses.³⁸ The industry might report a decline in the physical sales of CDs and films, while failing to reveal an increase in total revenue due to digital sales.³⁹ Furthermore, when copyright owners argue that the market for CDs has shrunk by nearly 50% over the past five years,⁴⁰ this may simply mean that the switch to digital distribution has been successful. The Ministry of Economic Development⁴¹ in its Regulatory Impact Statement on the CIFSAs was unable to accurately measure if P2P file-sharing was costing the entertainment industry due to this ever-changing digital business environment.⁴² Even those suffering losses, such as the United Video Franchise in New Zealand, concede that a significant drop in physical videos being hired may be attributed to customers choosing to purchase digital content legitimately.⁴³ Similarly, Roadshow Entertainment (NZ) Ltd argues that illegal piracy affects 25% of its current revenue, but admits it is “hard to put an exact dollar figure on this impact.”⁴⁴

Alternatively, opponents argue profits are actually increasing. For example, APRA/AMCOS⁴⁵ increased its revenue by 6% in 2009,⁴⁶ with revenue having been

³⁷ Reading Entertainment “Submission to the Commerce Select Committee on the Copyright (Infringing File Sharing) Amendment Act 2011” at 1.

³⁸ United States Government Accountability Office *Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods* (prepared for Congressional Committees 2011) at 27.

³⁹ Matthew Perry “Submission to the Commerce Select Committee on the Copyright (Infringing File Sharing) Amendment Act 2011” at 3.

⁴⁰ Denis Olivennes *Elysée Agreement for the development and protection of creative works and cultural programmes on the new networks* (prepared for the Ministère de la Culture et de la Communication 2007) at 1.

⁴¹ The Ministry of Economic Development will simply be referred to as the MED where appropriate. The MED is now part of the newly formed Ministry of Business, Innovation and Employment.

⁴² Ministry of Economic Development *Regulatory Impact Statement*, above n 35, at 4.

⁴³ United Video Franchise “Submission to the Commerce Select Committee on the Copyright (Infringing File Sharing) Amendment Act 2011” at 1.

⁴⁴ Roadshow Entertainment (NZ) Ltd “Submission to the Commerce Select Committee on the Copyright (Infringing File Sharing) Amendment Act 2011” at 1.

⁴⁵ The Australasian Performing Right Association (APRA) collects and distributes licence fees for the public performance and communication of its members' musical works. The Australasian Mechanical

steadily increasing for years.⁴⁷ The International Federation of the Phonographic Industry⁴⁸ reported unprecedented global expansion in the music industry internationally in 2011.⁴⁹ In terms of film, in early 2012 the movie “The Avengers” had the biggest opening debut in North American cinematic history.⁵⁰ Therefore, one can understand how opponents argue that financial losses are exaggerated.

Secondly, opponents argue that the figures repeated ad-nauseam by copyright owners are based on the false assumption that each illegal download amounts to a lost sale. This over-inflates losses. For example, the Motion Picture Distributors’ Association of New Zealand Incorporated contends that the movie “X-Men Origins: Wolverine” was downloaded an estimated four millions times pre-release, resulting in a loss of US\$28.7 million based on the 2009 average ticket price of US\$7.18.⁵¹ This is clearly based on the assumption *every* infringer would pay the full purchase price to view the film, which is not necessarily the case.

Thirdly, there is evidence that P2P file-sharers are more likely to legitimately purchase content.⁵² File-sharers commonly try-before-they-buy. In 2009, a study into economic and cultural effects of file-sharing showed a net positive economic effect.⁵³ While some artists did lose sales, there was an overall positive effect on purchasing. Therefore, P2P file-sharing does not necessarily harm sales.

Copyright Owners Society (AMCOS) collects and distributes mechanical royalties for the reproduction of its members' musical works.

⁴⁶ APRA|AMCOS “A summary of APRA and AMCOS’ 2009 financial year results” (2009) APRA|AMCOS <<http://issuu.com/apraamcos/>> at 3. This made a record \$183 million available for distribution to its members.

⁴⁷ Ibid, at 6.

⁴⁸ The International Federation of the Phonographic Industry will be referred to as the IFPI.

⁴⁹ IFPI “Digital Music Report 2012” (2012) IFPI <www.ifpi.org>.

⁵⁰ Pamela McClintock “Box Office Report: 'Avengers' Even Bigger With \$207.4 Million Opening” (2012) The Hollywood Reporter <www.hollywoodreporter.com>.

⁵¹ Motion Picture Distributors’ Association of New Zealand Incorporated “Submission to the Commerce Select Committee on the Copyright (Infringing File Sharing) Amendment Act 2011” at 1.

⁵² See Jacqui Cheng “Study: pirates biggest music buyers. Labels: yeah, right” (2009) ArsTechnica <<http://arstechnica.com/tech>> for a study by the BI Norwegian School of Management and Birgitte Andersen and Marion Frenz “The Impact of Music Downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada” (2007) Industry Canada <www.ic.gc.ca> for a study by the Department of Management at the University of London.

⁵³ TNO: Netherlands Organisation for Applied Scientific Research, SEO Economisch Onderzoek and IViR *Economic and cultural effects of file-sharing on music, film and games* (prepared for the Ministries of Education, Culture and Science, Economic Affairs and Justice 2009) at 3.

Fourthly, P2P file-sharing can actually *grow* content markets by making works more widely available. The website TPB is popular with artists who upload their content for free in order to promote their work.⁵⁴ Smaller artists in particular use P2P file-sharing to exploit the digital frontier and make a living without a big recording label.⁵⁵ Therefore, Internet piracy can act as a promotional tool for Internet-savvy copyright owners willing to engage with a technologically adept fan base.

Taking into account the arguments above, it could be contended there is a lack of evidence that supports the assertion of losses suffered as a result of Internet piracy. The preponderance of evidence does suggest that piracy *has* affected sales to a degree. However, the question remains as to why a legislative response is required if there is *no clear evidence* that this effect has been disproportionately damaging.⁵⁶ The answer is presumably that the entertainment industry *perceives* P2P file-sharing as a serious threat to a business model founded on physical distribution. Ultimately, it is this perception that matters and will result in further efforts to curb illegal file-sharing.

⁵⁴ James Plafke “The Pirate Bay Launches Free Promotion Platform for Artists” (2012) Geekosystem <www.geekosystem.com>.

⁵⁵ Nick Broughall “The Pirate Bay Offering Free Promotion For Musicians” (2012) GIZMODO <www.gizmodo.com.au>. Many artists find it liberating to make a living without being attached to a recording label.

⁵⁶ Ministry of Economic Development *Regulatory Impact Statement*, above n 35, at 4.

II. The Background to the Introduction of Targeted Legislation (the CIFSA)

A. The Failure of New Zealand's Existing Copyright Framework

Prior to statutory amendment in New Zealand,⁵⁷ a copyright owner's only means of redress against infringing file-sharing was under the Copyright Act 1994.⁵⁸ Under the Copyright Act, copyright is an exclusive property right that protects original works.⁵⁹ Files transferred via P2P file-sharing typically come within the definition of an original work.⁶⁰ A copyright owner could attempt to enforce its copyright by taking action against either a P2P file-sharer, a P2P provider or an ISP. However, a copyright owner faced, and still would face, a number of issues when enforcing its copyright against these parties solely under the Copyright Act.

1. Seeking Remedies Against Infringing P2P File-Sharers

A P2P file-sharer who downloads and uploads a work commits the restricted acts of copying⁶¹ and communicating⁶² respectively and is liable for primary infringement of copyright.⁶³ However, as Internet users can only be identified by their Internet protocol addresses⁶⁴ this made obtaining the identity of P2P file-sharers extraordinarily difficult.⁶⁵ Gathering convincing evidence of infringement⁶⁶ and identifying infringing IP addresses is difficult enough due to the transitory nature of IP

⁵⁷ In the form of the Copyright (New Technologies) Amendment Act 2008 and CIFSA.

⁵⁸ The New Zealand Copyright Act 1994 will be referred to as the Copyright Act where appropriate.

⁵⁹ Copyright Act 1994, s 16(1).

⁶⁰ *Ibid*, s 14. Original works include literary, dramatic, musical or artistic works as well as communication works, sound recordings and films.

⁶¹ *Ibid*, ss 2 and 16(1)(a).

⁶² *Ibid*, ss 2, 16(1)(f) and 33.

⁶³ *Ibid*, s 16(1). A copyright owner has the exclusive right to the performance of a restricted act.

⁶⁴ James and Wells Intellectual Property "Submission to the Commerce Select Committee on the Copyright (Infringing File Sharing) Amendment Act 2011" at 2. Internet protocol addresses will be referred to as IP addresses.

⁶⁵ Volker Kitz, Max Planck Institute for Intellectual Property (Munich) "Private Peers – What Role Should Privacy Law Play in Learning the Identity of P2P Users? The European Case" (Fordham University School of Law Sixteenth Annual Conference on Intellectual Property Law and Policy, Fordham University School of Law, Fordham 27/28 March 2008).

⁶⁶ Copyright owners engage such companies as BigChampagne Media Measurement (<http://bcdash.bigchampagne.com>) and PeerMedia Technologies (<http://peermediatech.com>) to track IP addresses of infringing users by monitoring the transmission of files and identifying the IP addresses that interact with them.

addresses⁶⁷ and monitoring deficiencies.⁶⁸ To then identify the actual infringer, an IP address needs to be matched to a user by that user's ISP. However, under the Copyright Act ISPs had no legal obligation to disclose the personal identity of users.⁶⁹ Without an identifiable defendant copyright owners could not enforce their copyright.

Copyright owners *could* apply to the High Court for "particular discovery".⁷⁰ This allows an intended plaintiff (the copyright owner) initiating proceedings to apply for an order that a third party (an ISP) disclose the identity of an intended defendant (the P2P file-sharer). However, this process is resource-intensive and of little practical value if required for each and every P2P file-sharer. Affidavits and notices need to be filed with each application and the High Court must determine the information is "necessary".⁷¹

In England, obtaining the identity of infringers is similarly difficult under the Court Procedural Rules.⁷² There is the option for copyright owners to seek a *Norwich Pharmacal Order*⁷³ that forces third parties to disclose information and has been used to force ISPs to disclose the details of IP address users.⁷⁴ However, they are no less resource-intensive than other methods.⁷⁵ In the United States, an effective subpoena

⁶⁷ IP addresses are typically assigned by an ISP to account holders. However, account holders can change or hide their IP addresses with rudimentary software (see discussion of Virtual Private Networks and similar evasion technology below under Increasing Use of Evasion Software and Technology).

⁶⁸ Tadayoshi Kohno, Arvind Krishnamurthy and Michael Piatek "Challenges and Directions for Monitoring P2P File Sharing Networks, or, Why My Printer Received a DMCA Takedown Notice" (paper presented to HotSec '08, San Jose, July 2008). This study revealed that monitoring strategies used in identifying infringing IP addresses are not necessarily accurate and can return false positives.

⁶⁹ Volker Kitz, above n 65.

⁷⁰ High Court Rules, rr 8.20 and 8.21.

⁷¹ Ibid, rr 8.20 and 8.21. In determining necessity the High Court must also determine it would be "impossible or impracticable" for the copyright owner to lodge a successful claim without the information.

⁷² Civil Procedure Rules, pt 31.16 and 31.17. These rules are similar in nature to the New Zealand's High Court Rules.

⁷³ *Norwich Pharmacal Co and Others v Customs & Excise Commissioners* [1974] AC 133. Lord Reid at 175 found that "if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing, he may incur no personal liability, but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of wrongdoers."

⁷⁴ Graham Smith *Internet Law and regulation* (4th ed, Sweet & Maxwell, London, 2007) at 441.

⁷⁵ For a *Norwich Pharmacal Order* the applicant is still required to establish on a reasonable basis that a wrong has actually been committed, that disclosure from the third party is required to enable action against the wrongdoer, that the respondent is not a mere witness (i.e. is involved in innocent facilitation) and the order is necessary in the interests of justice on the facts of the case.

procedure allows for the disclosure of personal details of infringers simply of illegal online activity.⁷⁶ However, this procedure cannot be used against P2P file-sharers.⁷⁷

Therefore, the Copyright Act alone was, and still is, of little value to copyright owners wanting to take action against P2P file-sharers for primary infringement of copyright. Without the willing co-operation of ISPs, identifying each infringer is uneconomic.⁷⁸ Comparative jurisdictions offered no real solution. Finally, even if the identity of the file-sharer is obtained, there is no real means of identifying which user of an IP address committed the act of infringement as an IP address does not correspond to a specific person.⁷⁹

2. Seeking Remedies Against P2P Providers

A P2P provider⁸⁰ that provides any software or equipment that assists the performance of a restricted act may be held liable for “authorising” the infringing conduct of another.⁸¹ The secondary liability sections 35 to 39 of the Copyright Act are unlikely to apply to P2P providers, being ill suited to apply in respect of digital works. The New Zealand courts have not yet assessed the liability of P2P providers under the law of authorisation, but an examination of liability in comparable jurisdictions reveals that bringing a claim against P2P providers under the Copyright Act may be futile.

⁷⁶ Digital Millennium Copyright Act 17 U.S.C. § 512(h). The process is administrative in nature with the subpoena being issued by the clerk of any United States District Court. A copyright owner is only required to sign a declaration specifying that the information will be used solely to protect copyrighted material.

⁷⁷ Only the identity of those who infringe copyright under Digital Millennium Copyright Act 17 U.S.C. § 512(h) in storing copyrighted material can be sought, not those who infringe under Digital Millennium Copyright Act 17 U.S.C. § 512(a) which captures the actions with P2P file-sharers. See *Recording Industry Assn of America v Verizon Internet Service* 351 F.3d 1229 (DC Cir 2003) at 1233 where the United States Court of Appeals for the District of Columbia Circuit determined the subpoena process could only be issued to ISPs engaged in storing material on its servers. In *Charter Communication, Inc v Recording Industry Association of America, Inc* 393 F.3d 771 (2005) Murphy J recognised this flaw.

⁷⁸ Ministry of Economic Development *Regulatory Impact Statement*, above n 35, at 1.

⁷⁹ *Roadshow Films Pty Ltd v iiNet Limited* [2012] HCA 16 at [16]. Also see Art Neill “Does a New Wave of Filesharing Lawsuits Represent a New Business Model for Copyright Owners?” (2011) 14 *Journal of Internet Law* 8 at 9.

⁸⁰ References to P2P providers largely refer to those providers of digital P2P file-sharing technology or services that aid file-sharers in engaging in P2P file-sharing. However, the term P2P providers is also used more widely to encompass *any and all* providers of technology or products that aid in the infringement of copyright, not necessarily digital or P2P technology or software (such as the manufacturers of tape-deck recorders that allowed purchasers to copy music from one cassette tape onto another).

⁸¹ Copyright Act 1994, s 16(1)(i).

There are varying interpretations of what is required to authorise infringement. In the United States, the case of *Sony Corp v Universal Studios*⁸² established that if technology has a significant non-infringing use a provider could avoid secondary liability for contributory copyright infringement.⁸³ However, with the advent of P2P providers that provide technology used almost exclusively for infringing purposes the narrow interpretation in *Sony* has been distinguished. In *A&M Records Inc v Napster Inc*⁸⁴ and *Metro-Goldwyn-Meyer Studios Inc v Grokster*⁸⁵ P2P providers have been found liable for facilitating infringements by promoting their services, having actual or constructive knowledge of infringement, failing to reasonably prevent infringement and deriving a benefit.⁸⁶ Despite arguments of significant non-infringing use, it was found these actions amounted to *inducing* infringement.⁸⁷ This wide inducement standard of authorisation has been applied in the case of *Arista Records LLC v Lime Group*.⁸⁸

In the common law jurisdictions of Canada, England and Australia it is more difficult to establish authorisation on the part of P2P providers. The Supreme Court of Canada in *CCH Canadian Ltd v Law Society of Upper Canada*⁸⁹ determined that permitting the use of photocopying equipment that might be used to perform a restricted act does not authorise infringement. This narrow application limited instances of authorisation to those cases where P2P providers have a high degree of control over

⁸² *Sony Corp v Universal Studios* 464 US 417 (1984).

⁸³ Contributory copyright infringement in the United States is the functional equivalent of authorising infringement under the Copyright Act. *A&M Records Inc v Napster Inc*, above n 13 at [20] noted that to be liable for contributory copyright infringement one must be “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.”

⁸⁴ *A&M Records Inc v Napster Inc*, above n 13.

⁸⁵ *Metro-Goldwyn-Meyer Studios Inc v Grokster Ltd*, above n 15.

⁸⁶ In *A&M Records Inc v Napster Inc*, above n 13 at [22]. Similarly, in *Metro-Goldwyn-Meyer Studios Inc v Grokster Ltd*, above n 15, at 8 and 24 the fact Grokster issued promotional material highlighting the infringing services it provides and aimed to profit from the promotion of unlawful activities allowed the court to infer a patently illegal objective.

⁸⁷ *A&M Records Inc v Napster Inc*, above n 13 and *Metro-Goldwyn-Meyer Studios Inc v Grokster Ltd*, above n 15 distinguished *Sony Corp v Universal Studios*, above n 82. In *A&M Records Inc v Napster Inc*, above n 13, at [23] it was found that the matter of infringing versus non-infringing use was immaterial when there was clear knowledge of infringement and failure to act.

⁸⁸ *Arista Records LLC v Lime Group LLC* 715 F. Supp. 2d 481 (SD NY 2010). In *Arista*, LimeWire’s awareness of substantial infringement by users, its efforts to attract infringing users and assist infringement, its dependence on infringing use for the success of its business and its failure to mitigate infringing activities were evidence of *inducing* infringement.

⁸⁹ *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339.

users. The leading English decision of *CBS Songs Ltd v Amstrad Consumer Electronics Plc*⁹⁰ also adopted a narrow view of authorisation, viewing authorisation as granting another the *right* to infringe. The manufacturer of a tape recorder was found to have conferred the *power to copy*, but not the *right to copy*.⁹¹ Notably, *Twentieth Century Fox Film Corporation & Anor v Newzbin Ltd*⁹² has applied the narrow view taken in *Amstrad* more broadly. In *Newzbin* a website indexing links to infringing material authorised infringement because a reasonable member of the public would infer the site was appearing to grant the *right and authority* to copy.⁹³ Therefore, the narrow interpretation of authorisation applied in *Amstrad* has the potential to be applied more widely.

Finally, in Australia the courts have adopted a wide interpretation of authorisation. In *University of New South Wales v Moorhouse*⁹⁴ the High Court of Australia found that a university authorised infringement by making photocopiers available to student within the university library. The university had control of the photocopiers, made them available knowing they could be used to infringe and omitted to take reasonable steps to prevent infringement.⁹⁵ The case of *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* further emphasised the importance of knowledge as a crucial factor in finding authorisation.⁹⁶ In Australia a provider's power to prevent infringement and failure to take reasonable steps is probative evidence of authorisation. It may be that the most recent High Court of Australia case of *Roadshow Films Pty Ltd v iiNet Limited*⁹⁷ narrows the law of authorisation. The Court held that an ISP did not have the *power to prevent infringement*. However, in comparison to ISPs, P2P providers have a considerable degree of control and involvement in the provision of services.⁹⁸

⁹⁰ *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013.

⁹¹ Additional factors *Amstrad* considered were the fact the tape recorder had clear non-infringing uses and Amstrad had no control over the recorders once sold

⁹² *Twentieth Century Fox Film Corporation & Anor v Newzbin Ltd* [2010] EWHC 608 (Ch).

⁹³ *Ibid*, at [90]. This was largely due to the sheer proportion of links that led to infringing material.

⁹⁴ *University of New South Wales v Moorhouse* [1976] RPC 151.

⁹⁵ These requirements for authorisation were codified in sections 36(1A) and 101(1A) of the Copyright Act 1968 (Cth).

⁹⁶ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 65 IPR 289 at [370] and [402]. The Australian Federal Court was careful to note that the absence of knowledge is not necessarily a defence.

⁹⁷ *Roadshow Films Pty Ltd v iiNet Limited*, above n 79.

⁹⁸ *Universal Music Australia Pty Ltd v Cooper* (2006) FCAFC 187 at [41]-[45]. In *Cooper* the Full Federal Court found that the owner of a website hosting infringing files had considerable power to prevent infringement.

Therefore, one issue in New Zealand for copyright owners seeking to enforce their rights against P2P providers is whether the courts would apply a wider or narrower interpretation of authorisation. The New Zealand Court of Appeal has been hesitant in adopting a particular interpretation.⁹⁹ However, even if a successful action were made against a P2P provider it would likely be of little practical value. The litigation process arguing authorisation would likely be resource-intensive, especially given P2P providers are becoming increasingly aware of what steps are required for them to avoid liability.¹⁰⁰ Furthermore, digital P2P providers operating illegally are notorious for their lack of resources and tangible assets, making a successful enforcement a largely pyrrhic victory. Even in the event a P2P provider is forced out of business completely, through the granting of an injunction or otherwise, another is likely to emerge in its place.

3. Seeking Remedies Against ISPs

Bringing a claim against ISPs for primary or secondary infringement of copyright is just as difficult under the Copyright Act.¹⁰¹ An ISP is a more concrete entity with assets, resources and a customer base. However, it is unlikely ISPs would be liable for primary infringement in New Zealand. Despite an ISP technically performing the restricted acts of copying and communicating¹⁰² copyrighted data in the transmission of data through its systems, the Copyright Act appears to require a *deliberate* doing of a restricted act.¹⁰³ This approach is logical, as it is technologically and economically

⁹⁹ See *Heinz Watties Limited v Spantech Pty Ltd* (2006) 8 NZBLC 101,679 at [36]. The Court of Appeal was hesitant to determine whether authorisation should be defined narrowly as per the English case of *CBS Songs Ltd v Amstrad Consumer Electronics Plc*, above n 99, or wider as per the Australian case of *University of New South Wales v Moorhouse*, above n 94.

¹⁰⁰ As more cases are brought before the courts P2P providers are quickly learning what steps are required of them to avoid liability. For example, in *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd*, above n 96, at [254] Wilcox, J found that a P2P provider posting warnings in relation to the illegality of file-sharing was not adequate to constitute reasonable steps to prevent infringing when technical measures were available, such as keyword filtering. Any reasonable steps taken by the P2P provider were being overridden by the promoting of its services as a means to infringe (the “Join the revolution” campaign). The P2P provider’s actions in *Sharman* demonstrate an increasing awareness of what steps are required to avoid liability, whether it be issuing warnings or implementing technical measures.

¹⁰¹ The influence of sections 92B and 92C on ISP liability will be discussed below under Problems with Safe Harbor Regimes as a Legislative Solution.

¹⁰² Copyright Act 1994, s 16(1).

¹⁰³ *Ibid*, s 29. This argument is based on the wording, “does any restricted act”.

unfeasible for an ISP to monitor all data transmitted through its systems.¹⁰⁴ This approach is also consistent with leading United States case law.¹⁰⁵

Section 43A states that the transient reproduction of work does not infringe copyright if it is an integral part of the technological process, *only in cases* where the reproduction does not aid in the infringement of copyright.¹⁰⁶ This may imply that ISPs might be liable for primary infringement in providing transient transmissions, despite not *deliberately* performing a restricted act. Furthermore, the Federal Court of Australia in *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd*¹⁰⁷ has found a provider of network services was liable for *primary infringement* in performing the restricted act of copying, despite the subscriber making the copying request.¹⁰⁸ This case could be distinguished on the ground that the service provider did not simply provide the transient copying of copyright material, but rather provided the infrastructure for the “time-shifting”¹⁰⁹ of programming. This created a more enduring copy of the material and required a greater role on the part of an ISP.¹¹⁰ The Court has even indicated the particular circumstances of the case were *determinative*.¹¹¹ However, the implications of section 43A and the finding that a provider of networks services is liable for primary infringement may indicate ISPs could be liable for primary infringement in New Zealand.

¹⁰⁴ *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers* [2004] 2 SCRW 427 at [101].

¹⁰⁵ *Religious Technology Centre v Netcom On-line Communication Services* 907 F Supp 1361 (ND Cal 1995) is the leading United States case dealing with primary infringement of ISPs. *Netcom* found that it would be illogical for ISPs to be responsible for the actions of all their subscribers and that it was subscribers that created the copies. This case was endorsed by *The Cartoon Network v CSC Holdings & Cablevision* 536 F.3d 121 (2nd Cir 2008). Rares J in *Singtel Optus Pty Ltd v National Rugby League Investments Pty Limited* (No 2) [2012] FCA 34 at [62] – [65] concurred with this view, though this case has been overturned by the Federal Court of Australia on appeal in *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59.

¹⁰⁶ In *Munhwa Broadcasting Corporation v Young International 2009 Ltd* [2011] NZLR 779 at [83] the High Court found that to come within the section 43A exception to liability all three requirements of the section needed to be satisfied. This includes that the reproduction does not aid in the infringement of copyright.

¹⁰⁷ *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd*, above n 105.

¹⁰⁸ *Ibid*, at [55] to [65].

¹⁰⁹ *Ibid*, at [1].

¹¹⁰ *Ibid*, at [152]. The Federal Court noted that “Optus at all times retained possession, ownership and control of the physical copies made on the hard disc of its NAS computer until they were deleted by Optus after the expiry of 30 days from recording or by the subscriber before then.”

¹¹¹ *Ibid*, at [100]. The Federal Court noted that its concerns were “limited to the particular service provider-subscriber relationship of Optus and its subscribers to the TV Now Service and to the nature and operation of the particular technology used to question.” It accepted that “different relationships and differing technologies may well yield different conclusions to the “who makes the copy” question.” This may have been a subtle indication that the particular circumstances of the case differed from a traditional ISP and Internet user relationship.

Conversely, a copyright owner could turn to the authorisation provision of the Copyright Act.¹¹² If the judgment of *Roadshow* was applied in New Zealand this might exonerate ISPs from being held to have authorised the infringement of P2P file-sharers. In *Roadshow* the High Court of Australia found that although the ISP iiNet had the *technical and contractual power* to issue warnings and terminate accounts, this did not translate into the *power to prevent infringement*.¹¹³ Without the power to prevent infringement iiNet could not be held to have authorised P2P file-sharing. There was no evidence that warnings or termination would prevent infringement, as infringers could simply ignore warnings or switch providers. It could also not be established that iiNet had knowledge of infringement. The receiving of copyright infringement notices¹¹⁴ did not confer knowledge, as their credibility could be questioned.¹¹⁵ Therefore, as *Roadshow* narrowed the situations where a court is willing to find an ISP authorises infringement, it might be difficult for copyright owner to bring a claim against ISPs under the Copyright Act.

4. Summary of the Existing Copyright Framework

The Copyright Act prior to the CIFSAs did not, and still does not, allow copyright owners an effective legal framework to enforce their copyright against P2P file-sharers. The High Court of Australia in *Roadshow* recognised this, in finding that “the principles of the statutory tort of authorisation of copyright infringement are not readily suited to enforcing the rights of copyright owners in respect of widespread infringements occasioned by peer-to-peer file-sharing”.¹¹⁶ Representative agencies of copyright owners have also expressed how prohibitive the existing framework was.¹¹⁷

¹¹² Copyright Act 1994, s 16(1)(i).

¹¹³ The High Court of Australia did this in examining sections 36(1A) and 101(1A) of the Copyright Act 1968 (Cth) which were added by the Copyright Amendment (Digital Agenda) Act 2000 (Cth).

¹¹⁴ In Australia the Australian Federation Against Copyright Theft had sent notices of infringement to various ISPs.

¹¹⁵ This was due to the fact the infringement notices failed to explain how the information contained within them had been obtained.

¹¹⁶ *Roadshow Films Pty Ltd v iiNet Limited*, above n 79, at [79] per French CJ, Crennan and Kiefel JJ. The High Court of Australia even noted that redress would best be sought under specifically targeted legislation, expressly recognising the CIFSAs as an example.

¹¹⁷ Australasian Performing Rights Association and Australasian Mechanical Copyright Owners’ Society Limited “Submission to the Commerce Select Committee on the Copyright (Infringing File Sharing) Amendment Act 2011” at 1.

B. Problems with Safe Harbor Regimes as a Legislative Solution

Safe harbor regimes were created to protect copyright in the digital environment by casting obligations on ISPs. ISPs are perceived as having the capability to monitor and prevent infringement. In return for complying with their obligations ISPs receive immunity from liability, while failure to do so exposes them to liability. However, safe harbor regimes have proven to be ineffective at deterring P2P file-sharing and allowing copyright owners to enforce their copyright.

1. The Safe Harbor Legislation in the United States of America

The Digital Millennium Copyright Act¹¹⁸ created the first safe harbor regime. Compliance grants ISPs¹¹⁹ complete protection from monetary liability and limited protection from injunctive relief.¹²⁰ ISPs can obtain safe harbor immunity from both primary and secondary liability for four categories of digital activity that ISPs are typically involved with.¹²¹ However, the DMCA was not implemented with P2P file-sharing in mind and fails to adequately address the issue.

Section 512(a) protects ISPs for transmitting copyrighted material on behalf of P2P file-sharers. To obtain safe harbor immunity ISPs must have a policy that provides for the termination of repeat offenders in appropriate circumstances and accommodate copyright owners in protecting their copyright.¹²² However, it is not defined what it means to “reasonably implement” a termination policy, when

¹¹⁸ Digital Millennium Copyright Act 17 U.S.C. § 512. The Digital Millennium Copyright Act is referred to colloquially as the DMCA. Since the passing of the DMCA, Australia has enacted nearly identical safe harbor legislation in the Copyright Act 1968 (Cth), ss 116AA – 116AH. These provisions were enacted by Schedule 9 Part 11 of the United States Free Trade Agreement Implementation Act 2004 (Cth) and the Copyright Legislation Amendment Act 2004 (Cth).

¹¹⁹ Ibid, § 512(k)(1). ISPs come within the definition of “Carriage Service Provider” and are therefore subject to the requirements of the Act.

¹²⁰ Ibid, § 512(j). The safe harbor provisions do not specify an ISP would not be held to have infringed copyright if the criteria are fulfilled. The provisions simply limit the liability of the ISP against claims by copyright owners seeking monetary or injunctive relief.

¹²¹ Ibid, §§ 512 (a) to (d). § 512(a) protects ISPs who are passive conduits from liability for copyright infringement, even if infringing traffic passes through their networks. § 512(c) protects ISPs who cache infringing material, being the temporary copying of data by ISPs in order to transfer data. § 512(c) provides protection for ISPs storing infringing material, such as through web hosting services. § 512(d) provides protection for ISPs who provide search functions or directories that might link to infringing material.

¹²² Ibid, § 512(i).

“appropriate circumstances” exist and when a user is a “repeat infringer”.¹²³ This leaves ISPs in a difficult position where their obligations are uncertain.¹²⁴ The courts have been reluctant to define these requirements,¹²⁵ even noting that the legislature seems to have deliberately left the requirements vague.¹²⁶ Further ambiguities arise, where *Corbis Corp v Amazon.com Inc*¹²⁷ held that notices issued under the DMCA are not conclusive evidence of infringement by a user.¹²⁸

Therefore, if ISPs fail to act they can be accused of having an unreasonable termination policy, but if they rely on notices as evidence of infringement they might expose themselves to contractual liability by unreasonably terminating a subscriber’s account.¹²⁹ Because the obligations are vague, ISPs may make minimal or no effort at all to curb file-sharing without fear of repercussion, as their liability cannot be accurately predicted.¹³⁰ This means the DMCA may fail to deter P2P file-sharing through enlisting the assistance of ISPs *or* allow copyright owners an effective framework for enforcing their copyright against ISPs.

2. New Zealand’s Safe Harbor Legislation

New Zealand’s safe harbor regime¹³¹ faced similar shortcomings. In terms of safe harbor immunity for the hosting of material the New Zealand legislation is similar to that in the United States.¹³² In terms of liability for the provision of ISP services in

¹²³ Digital Millennium Copyright Act 17 U.S.C. § 512 (i).

¹²⁴ Bryan Mercurio “Internet Service Provider Liability for Copyright Infringements of Subscribers: A Comparison of the American and Australian Efforts to Combat the Uncertainty” (2002) 9 Murdoch University Electronic Journal of Law 19 at [18].

¹²⁵ Andres Sawicki, “Repeat Infringement in the Digital Millennium Copyright Act” (2006) 73 University of Chicago Law Review 1455 at 1455.

¹²⁶ *Corbis Corp v Amazon.com Inc* 351 F Supp 2d 1090 (WD Wash 2004) at 1104. Similarly, in *Perfect 10 Inc v CC Bill LLC* 481 F 3d 751 (9th Cir 2008) at [6] the Court of Appeals for the Ninth Circuit failed to clarify what a reasonably implemented policy consisted of, simply finding that a policy is reasonable if it provides for repeat infringers to be terminated. This failed to specify what is required to become a repeat infringer and what appropriate circumstances to terminate are.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*, at 1117.

¹²⁹ Sawicki, above n 125, at 1456.

¹³⁰ Digital Millennium Copyright Act 17 U.S.C. § 512(a).

¹³¹ Copyright Act 1994, ss92A – 92E. Section 92A has now been repealed. These provisions were introduced by section 53 of the Copyright (New Technologies) Amendment Act 2008.

¹³² *Ibid.*, ss 92C and 92D. An ISP may avoid liability under the Copyright Act for storing infringing material if it acts as soon as it knows, or has reason to suspect, it may be storing infringing material it deletes or prevents access to it. Knowledge is assessed with regard to whether the ISP received an infringement notice from the copyright owner and any other relevant factors.

relation to P2P file-sharing, or the “providing of connections for digital online communications”,¹³³ an extraordinarily wide protection is afforded to ISPs.¹³⁴ In the United States, implementing a policy for terminating repeat infringers is a precondition to safe harbor immunity.¹³⁵ In New Zealand, under section 92B, immunity¹³⁶ was granted to ISPs with no precondition attached.¹³⁷ Section 92A required ISPs to adopt a termination policy, but *not* as a precondition to safe harbor immunity.¹³⁸ The regime offered no incentive for ISPs to implement a termination policy.

The original Copyright (New Technologies and Performers’ Rights) Amendment Bill¹³⁹ *did* include the implementation of a termination policy as a precondition for immunity. However, the Commerce Committee recommended it be deleted, noting that ISPs could already terminate accounts if services were used illegally under contract,¹⁴⁰ and determined that section 92C already required ISPs to take down infringing *material*.¹⁴¹ This clearly overlooked P2P file-sharing. Section 92A was reinserted by Supplementary Order Paper 193¹⁴² as a stand-alone provision, but no longer as a precondition to safe harbor immunity. The legislature apparently envisioned section 92A would spur ISPs to band together and implement a voluntary code of practice to deal with file-sharing,¹⁴³ but this never eventuated.¹⁴⁴ Therefore,

¹³³ See the definition of “Internet Service Provider” under section 2(1) of the Copyright Act 1994.

¹³⁴ Copyright Act 1994, s 92B.

¹³⁵ Digital Millennium Copyright Act 17 U.S.C. §§ 512 (a) and (i).

¹³⁶ Copyright Act 1994, s 92B(3) grants immunity from civil and criminal liability but does not prevent applicants seeking injunctive relief.

¹³⁷ The phrase “without more” under section 92B(2) may have indicated action was required by ISPs in complying with section 92A. However, this was not made clear to ISPs, especially given the comparative clarity of section 92B(2A) as implemented by the CIFS.

¹³⁸ Copyright Act 1994, s 92A was implemented by Copyright (New Technologies) Amendment Act 2008, s 53 and required an ISP to “adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the account with that Internet service provider of a repeat infringer.”

¹³⁹ Copyright (New Technologies and Performers’ Rights) Amendment Bill 2006 (102-1).

¹⁴⁰ Copyright (New Technologies and Performers’ Rights) Amendment Bill 2008 (102-1) (select committee report) at 6. The Commerce Committee considered the standard terms and conditions of ISP contracts included such a provision. This is despite the fact ISPs do not actively monitor their networks and may not know (or care) if subscribers are infringing copyright.

¹⁴¹ *Ibid*.

¹⁴² Supplementary Order Paper 2008 (193) Copyright (New Technologies) Amendment Bill (102-3).

¹⁴³ Carmen Vietri “Section 92A on hold” (2009) Copyright Council of New Zealand <www.copyright.org.nz>.

¹⁴⁴ TelstraClear “Submission to the Commerce Select Committee on the Copyright (Infringing File Sharing) Amendment Act 2011” at 3. The scrapping of section 92A by the CIFS came about following public disapproval of the idea of termination and failure of ISPs and copyright holders to create a voluntary code of practice. This is despite the fact the Telecommunications Carriers’ Forum

just as in the United States, the safe harbor legislation in New Zealand did not create a clear incentive for ISPs to assist in deterring P2P file-sharing or provide copyright owners with an effective remedy against ISPs if they failed to do so.

C. Issues to be Addressed by an Effective CIFSA Regime

Based on the failure of the existing copyright regime and safe harbor legislation to address P2P file-sharing the CIFSAs must, first and foremost, give copyright owners *an effective means of obtaining a remedy* for the infringement of their copyright works by P2P file-sharers. This was recognised by the Commerce Committee, which explained that the CIFSAs “aims to provide copyright owners with a fast-track alternative to existing remedies under the Act.”¹⁴⁵ In doing so the CIFSAs must avoid any ambiguity, as observed in the United State legislation.¹⁴⁶

Secondly, the legislation should sanction the conduct of *P2P file-sharers*, by allowing copyright owners to make claims against the actual infringers. This would also likely have the effect of deterring infringing conduct. Overall, the CIFSAs must give copyright owners an effective means of enforcing copyright while targeting infringing P2P file-sharers. It must exist as a desirable alternative to copyright owners enforcing their copyright over third parties.

(whose members provides more than 90% of Internet connections in New Zealand) spent significant time and resources in attempting to develop such a code of practice.

¹⁴⁵ Copyright (Infringing File Sharing) Amendment Bill 2010 (119-2) (select committee report) at 1. This was also expressed in Ministry of Economic Development *Departmental Report on the Copyright (Infringing File Sharing) Copyright Amendment Bill* (prepared for the Commerce Committee 2010) at 7 and 8.

¹⁴⁶ Digital Millennium Copyright Act 17 U.S.C. §§ 512 (i).

III. The Copyright (Infringing File-sharing) Amendment Act 2011

A. The Mechanisms of the CIFSA

The CIFSA introduces a “special”¹⁴⁷ three-step regime intended to allow copyright owners to bring enforcement actions against P2P file-sharers. The relevant parties consist of the “account holder”¹⁴⁸, the “IPAP, or Internet protocol address provider”¹⁴⁹ and the “rights owner”.¹⁵⁰ Importantly, the “rights owner” includes copyright owners *or their nominated agent*. In this dissertation the term copyright owner will be used in place of “rights owner” for continuity.¹⁵¹

Under the regime, copyright owners have the initial responsibility to identify an infringement by an account holder and contact the relevant IPAP. The infringement must be reported within 21 days of the infringement.¹⁵² The information sent to the IPAP must identify triggering infringement, being the earliest infringement recorded.¹⁵³ The IPAP *must* complete a two-step process upon receipt of the notice, unless one of the exceptions identified below applies.¹⁵⁴ First, it must match the IP address identified by a copyright owner with an account holder. It must then issue the appropriate infringement notice within seven days of being notified of the infringement.¹⁵⁵ A “detection notice”¹⁵⁶ is sent to the account holder for the first

¹⁴⁷ Copyright Act 1994, s 122B.

¹⁴⁸ *Ibid*, s 122A(1). An “account holder, in relation to an IPAP, means a person who has an account with the IPAP.”

¹⁴⁹ *Ibid*, s 122A(1). The definition of IPAP covers those ISPs that, other than as an incidental feature of its main business activities offers Internet connection services, allocate IP address, charge account holders for services and are not primarily operated to cater for transient users. This definition is unique, differing from the standard definition of “Internet Service Provider” under section 2(1) of the Copyright Act 1994. The term IPAP will thus be used to differentiate from those ISPs not subject to the regime.

¹⁵⁰ *Ibid*, s 122A(1). This section defines “rights owner” as the copyright owner or nominated agent.

¹⁵¹ The reader must be aware that any reference to a copyright owner might also be a reference to a nominated agent of that copyright owner acting on its behalf under the CIFSA. For example, the NZFACT represents a number of international entertainment organisations in New Zealand, and may be contracted to send infringement notices on their behalf under the regime. In such a case the NZFACT acting as an agent in this manner would technically come within the definition of a “rights owner”, but will simply be referred to as a copyright owner.

¹⁵² *Ibid*, s 122C(3)(a).

¹⁵³ *Ibid*, s 122C(2).

¹⁵⁴ *Ibid*, s 122D(1).

¹⁵⁵ *Ibid*, s 122C(1)(b).

¹⁵⁶ *Ibid*, ss 122A(1) and 122D.

infringement, or first infringement after a 35 day “quarantine period”.¹⁵⁷ A “warning notice”¹⁵⁸ and “enforcement notice”¹⁵⁹ inform the account holder of his or her second and third infringements respectively and must be issued by the IPAP in the same circumstances described above, as long as the infringement occurred 28 days after the preceding notice.¹⁶⁰ The account holder has the right to challenge a notice within 14 days of receipt.¹⁶¹

An IPAP is *not* required to *match* an IP address to a particular account holder in five circumstances.¹⁶² Furthermore, if an IPAP *is* required to match the IP address to an account holder an IPAP is not required to *send* the notice when the infringement occurred within a 28 day “on-notice period”¹⁶³ or the copyright owner consents to a notice not being issued.¹⁶⁴ These stringent requirements are fundamental for the two-step process to proceed. Crucially, the CIFSA provides that IPAPs must now comply with the regime as a precondition to immunity from liability for acting as a conduit,¹⁶⁵ so there is an incentive for IPAPs to comply with the CIFSA.

If all three notices are issued in the prescribed forms¹⁶⁶ then within 9 months of the date of the detection notice¹⁶⁷ or 35 days after the enforcement notice,¹⁶⁸ whichever is

¹⁵⁷ Copyright Act 1994, s 122A(1). A “quarantine period” is the grace period of 35 days after an enforcement notice has been sent.

¹⁵⁸ Ibid, ss 122A(1) and 122E.

¹⁵⁹ Ibid, ss 122A(1) and 122F.

¹⁶⁰ Ibid, ss 122E(1) and 122F(1).

¹⁶¹ Ibid, s 122G.

¹⁶² Ibid, s 122C(3). These circumstances include when the copyright owner fails to pass on information of the infringement to the IPAP within 21 days of the alleged infringement, when the alleged infringement occurred after an infringement triggering a detection notice but before the date the notice was issued, or the infringement occurred during a quarantine period. An IPAP is also not required to match an IP address if the information provided by the copyright owner does not comply with the requirements of the CIFSA or the copyright owner does not agree to pay the IPAP the required fee.

¹⁶³ Ibid, s 122A(1). An “on-notice period” comes into effect for the 28 days following a preceding notice.

¹⁶⁴ Ibid, s 122C(4).

¹⁶⁵ Ibid, s 92B(2A). As implemented by the section 5 of the CIFSA. The discussion above in relation to ISP liability reveals that there are still questions surrounding the issue of ISP liability for primary infringement of copyright and secondary liability for authorising the infringement of copyright in New Zealand. However, the implications raised by section 43A of the Copyright Act 1994 and precarious state of the law of authorisation of copyright infringement in New Zealand appear to be enough of an incentive for IPAPs to comply with the regime in order to secure immunity under section 92B(2A). This is evidenced by the levels of compliance with the regime and numbers of notices sent by IPAPs identified below under Statistical Evaluation of Notices Sent and Actions of P2P File-Sharers.

¹⁶⁶ Ibid, ss 122D(2), 122E(2) and 122F(2).

¹⁶⁷ Ibid, ss 122D(3) and 122E(3).

¹⁶⁸ Ibid, ss 122D(f) and 122J(1)(a).

earlier, an application can be made to the Copyright Tribunal¹⁶⁹ for an enforcement order.¹⁷⁰ As long as the copyright owner files an application commencing the enforcement process within this timeframe it is immaterial whether any infringement notices expire in the interim.¹⁷¹ An application cannot be made if an account holder has lodged a challenge that has yet to be addressed.¹⁷² The enforcement action can be decided on the papers, but any party may request a hearing.¹⁷³ On application to the Tribunal there is a presumption that the three infringement notices submitted are accurate and issued in accordance with the CIFSAs. This presumption can be displaced by evidence submitted by the account holder.¹⁷⁴

If the Tribunal is satisfied all three infringement notices were issued correctly the Tribunal *must* order the account holder to pay a sum¹⁷⁵ of up to \$15,000.¹⁷⁶ The sum awarded *must* include a sum for every infringement identified in the enforcement notice.¹⁷⁷ This includes infringements recorded *over the entire three-notice period*, not simply the three triggering infringements.¹⁷⁸ This could include the many infringements recorded in the 28-day on-notice periods.¹⁷⁹ The Act also holds in reserve the power of the District Court to order the suspension of a repeat infringer's Internet account for up to six months.¹⁸⁰ This may be activated at a later stage by an Order in Council¹⁸¹ if existing sanctions prove ineffective.¹⁸²

¹⁶⁹ Copyright Act 1994, s 122I(1)(a).

¹⁷⁰ Ibid, s 122O. There is also the potential for a copyright owner to be able to seek the suspension of an account holder's Internet services under section 122P of the Copyright Act 1994 should the Governor-General through an Order in Council permit such actions under section 122R.

¹⁷¹ Ibid, s 122J(5).

¹⁷² Ibid, s 122J(1)(b). The Act allows 14 days for the account holder to challenge a notice and 14 days for the copyright owner to reply.

¹⁷³ Ibid, s 122L(1).

¹⁷⁴ Ibid, s 122N.

¹⁷⁵ Ibid, s 122O(1).

¹⁷⁶ Ibid, s 122O(4).

¹⁷⁷ Ibid, s 122O(2).

¹⁷⁸ Copyright (Infringing File Sharing) Regulations 2011, reg 12. Regulation 12 specifies how the sum is to be calculated. The sum must include a sum for the value of each work infringed, a sum taking into account any fees paid by the copyright owner to an ISP of the Tribunal throughout the three-notice process and a sum to act as a deterrent.

¹⁷⁹ Copyright Act 1994, ss 122E(2)(e) and 122F(2)(e). Under sections 122E(2)(e) and 122F(2)(e) a copyright owner must identify any other alleged infringements that have occurred since the Detection Notice in the Warning Notice and Enforcement Notice, including any infringements that occurred within an on-notice period.

¹⁸⁰ Ibid, s 122P.

¹⁸¹ Ibid, s 122R.

¹⁸² Paul Harper "Labour would scrap new web law" (2011) The New Zealand Herald <www.nzherald.co.nz>. Commerce Minister Hon Simon Power MP has stated that the suspension of Internet connection provision of the Act will not be brought into force unless the existing regime proves

B. Flaws and Shortcomings in the CIFSA Regime

The CIFSA responds to shortcomings in the existing legislative framework by attempting to create an effective fast-track regime for enforcing copyright and focusing liability on the actual infringers.¹⁸³ In the Regulatory Impact Statement it was noted the object was to create an efficient and less costly enforcement regime that effectively deters the P2P file-sharers.¹⁸⁴ Similarly, in the Explanatory Note to the Copyright (Infringing File-sharing) Amendment Bill, as introduced in 2010, the regime's stated aims are to educate, deter and sanction file-sharers while compensating copyright owners for damage sustained by file-sharing.¹⁸⁵ Therefore, in evaluating the effectiveness of the regime through assessing the CIFSA's legal, practical and policy shortcomings, it must be determined whether the CIFSA is able to give effect to these purposes.

1. Issues With the Legal Construction of the CIFSA

(a) Definitions in the CIFSA

(i) "Account holder"

The definition of an "account holder"¹⁸⁶ has the potential to exclude actual infringers from incurring liability. The focus on the account holder as opposed to the file-sharer is evident in the definition of "file-sharing", which need only be performed by a "user".¹⁸⁷ This indicates Parliament recognised that numerous users may access the Internet through the same account, but still provided for all infringement notices and

to be ineffective. It is expected the suspension provision will be reviewed in 2013, coinciding with the five-year review of the digital copyright amendments passed in 2008 (see Simon Power "Cabinet approves notice fee for copyright regime" (2001) The Official Website of the New Zealand Parliament <<http://beehive.govt.nz>>).

¹⁸³ InternetNZ "Submission to the Ministry of Economic Development on the Copyright (Infringing File Sharing) Regulations 2011 Fee Review" at 3.

¹⁸⁴ Ministry of Economic Development *Regulatory Impact Statement*, above n 35, at 1 and 8.

¹⁸⁵ Copyright (Infringing File Sharing) Amendment Bill 2010 (119-2) (Explanatory Note) at 2.

¹⁸⁶ Copyright Act 1994, s 122A(1). An "account holder" is defined as "any person who has an account with the IPAP".

¹⁸⁷ *Ibid*, s 122A(1).

orders for payments to be directed to account holders.¹⁸⁸ Clearly, this may result in account holders being held liable for the actions of P2P file-sharers.¹⁸⁹

Account holders have no clear means of defending themselves under the regime. In enforcement proceedings the information contained in infringement notices is presumed to be correct.¹⁹⁰ This includes the identification of the liable account holder. An account holder can *only* dispute an infringement notice by submitting evidence that shows the file-sharing did not breach copyright,¹⁹¹ that the information in the notice is incorrect or that the notice was not issued in accordance with the CIFSAs.¹⁹² An account holder cannot argue that someone else was responsible. The downloadable “Information for Account Holders” states that account holders contending someone else is responsible may “contest the claim at the Copyright Tribunal.”¹⁹³ However, it fails to explain *how* the CIFSAs permits an account holder to contest a claim on this ground.

It can only be assumed this refers to the Tribunal’s power to decline to make an order if it would be manifestly unjust to the account holder.¹⁹⁴ However, it is unlikely the Tribunal would permit account holders to utilise the manifestly unjust exception on the grounds they were not the infringer. Allowing this might undermine the strict liability nature of the regime and set a dangerous precedent. The CIFSAs implies the only time the identity of the user becomes relevant is in the event the Internet suspension provisions of the CIFSAs are implemented.¹⁹⁵ Furthermore, manifestly

¹⁸⁸ Copyright Act 1994, ss 122A(1) and 122O(1). See definition of “Infringement notice” and who can be ordered to pay a sum.

¹⁸⁹ Library and Information Association of New Zealand Aotearoa “Submission to the Commerce Select Committee on the Copyright (Infringing File Sharing) Amendment Act 2011” at 1. The Library and Information Association of New Zealand Aotearoa is particularly concerned about the lack of distinction between users and account holders given one computer terminal at a library can be used by thousands of users. A further circumstance in which this could occur is where a grandparent could be sent infringement notices for the actions of a grandchild file-sharing over a home network. Similarly, and even further removed, an account holder could be liable for the actions of a next-door-neighbour accessing his/her unsecured Wi-Fi network.

¹⁹⁰ Copyright Act 1994, s 122N.

¹⁹¹ *Ibid*, ss 42 and 43. These sections establish the fair dealing exceptions in New Zealand.

¹⁹² *Ibid*, s 122N(2).

¹⁹³ Ministry of Economic Development “Information for Account Holders: Notice regime under Sections 122A to U of the Copyright Act. How does it work?” (press release, 2012) at 4.

¹⁹⁴ Copyright Act, s 122O(5). This is the one exception to the Copyright Tribunal being *required* order an account holder to pay a sum to a copyright owner after a successful enforcement under section 122O(1) of the Copyright Act.

¹⁹⁵ *Ibid*, s 122P(4)(b). This section finds the identity of the actual infringer is a relevant factor when a District Court determines whether an Internet suspension is an appropriate sanction.

unjust is a high standard and there is an expectation that account holders should protect their networks from illegal activity.¹⁹⁶

Sending a challenge to a copyright owner may allow account holders to argue that another person was responsible.¹⁹⁷ The “Challenge Notice”¹⁹⁸ does not limit the potential grounds of challenge.¹⁹⁹ However, it is highly unlikely a copyright owner would accept the “it wasn’t me” defence²⁰⁰ as copyright owners have the sole discretion to reject a challenge.²⁰¹ The Recording Industry Association of New Zealand²⁰² has indicated it would not accept the argument as a valid challenge, as account holders should ensure a network is used for legal purposes.²⁰³ Therefore, the definition of an “account holder” could impose liability on non-P2P file-sharers. The CIFSAs are intended to operate as a *strict liability regime*, but this might impair the regimes’ prospects of deterring the actual file-sharers.

(ii) “File-sharing”

The definition of “file-sharing”²⁰⁴ refers only to the downloading or uploading from the Internet. This covers typical P2P file-sharing, but some file-sharing practices are private or do not require an Internet connection to allow the more primitive transfer of files.²⁰⁵ These include dead-drops²⁰⁶ or the transferring through file hosting

¹⁹⁶ Ministry of Economic Development “Information for Account Holders”, above n 193, at 7.

¹⁹⁷ Copyright Act, s 122G. A challenge must be made within 14 days of the receipt of a notice.

¹⁹⁸ Copyright (Infringing File Sharing) Regulations 2011, reg 6. All challenges are required to be in the form set out in Form 1 of the Copyright (Infringing File Sharing) Regulations 2011.

¹⁹⁹ Form 1 of the Copyright (Infringing File Sharing) Regulations 2011 simply states that account holders may challenge on the grounds “that the notice has been sent to the wrong account holder, or that some or all of the alleged infringements did not take place.” It also states a possible list of grounds will be provided, but refers to a “link to Ministry of Economic Development Internet site or attached information” that cannot be found.

²⁰⁰ InternetNZ “Frequently Asked Questions” (2012) 3strikesNZ <<http://3strikes.net.nz>>.

²⁰¹ Copyright Act 1994, s 122G(4). A challenge can be rejected at the sole discretion of a copyright owner and can only then be raised at the enforcement stage. Under section 122G(4)(a) reasons for a rejection must be provided, but there is no limit on what the grounds for rejection might be.

²⁰² The Recording Industry Association of New Zealand will be referred to as RIANZ.

²⁰³ RIANZ “Submission to the Ministry of Economic Development on the Copyright (Infringing File Sharing) Regulations 2011 Fee Review” at 12.

²⁰⁴ Copyright Act 1994, s 122A(1). “File-sharing” is defined as where “material is uploaded via, or downloaded from, the Internet using an application or network that enables the simultaneous sharing of material between multiple users.” Uploading and downloading may, but need not, occur at the same time.

²⁰⁵ Such private networks could include private localised ad-hoc networks or private Wi-Fi networks.

services²⁰⁷ amongst others.²⁰⁸ However, the legislation is seemingly designed to target illegal P2P file-sharers primarily using the BitTorrent protocol or similar. The definition is likely adequate in addressing this purpose, but it may be that alternative practices gain in popularity in response to the regime.²⁰⁹

(iii) “IPAP or Internet protocol address provider”

An “IPAP”²¹⁰ is a person that operates a business offering the transmission of connections, allocated IP addresses and charges account holders for services, not simply as an incidental feature of the main business activities. This definition was designed to exclude particular providers of Internet services such as restaurants, cafes and universities.²¹¹ This may allow file-sharers to exploit these service providers who have no obligations to forward infringement notices onto users.²¹² Copyright owners would simply have to rely on this small class of providers to prevent themselves from becoming a haven of illegitimate activity by implementing internal policies.²¹³ Universities in particular face this threat, potentially falling outside of the CIFSA and not coming under the definition of IPAP *or* account holder (although there is debate

²⁰⁶ The action of one party physically dropping off infringing material in a location with the intention for it to be picked up by another party at another time. One example is the dropping of a USB drive in a letterbox.

²⁰⁷ File hosting services (sometimes referred to as cyber-locker accounts) can be used to distribute or share files that need not be simultaneous, or involve multiple users, as is required of “file-sharing” under the CIFSA.

²⁰⁸ Susan Chalmers “The Graduate Reponse and Data Caps: Examining Legal and Commercial Controls for Infringing P2P in New Zealand” (2012) 89 Intellectual Property Forum 39 at 46 recognised that users may adapt to new infringement services that are harder to detect, such as cyber-lockers and the physical exchanging of USB thumb drives.

²⁰⁹ The fact legal action was taken against the file hosting service www.megaupload.com reveals how seriously the threats posed by the alternative practices are taken. See Andrew Couts “Megaupload shut down by feds: Why do we need SOPA?” (2012) Digital Trends < www.digitaltrends.com >.

²¹⁰ Copyright Act 1994, s 122A(1).

²¹¹ Copyright (Infringing File Sharing) Amendment Bill 2010 (119-2) (explanatory note) at 4. These services do not allocate IP addresses, but only provide services for transient users and the provision of Internet services is an incidental feature of their business activities.

²¹² For example, a university student may P2P file-share over a university network and that university, not coming within the definition of an IPAP, is not required to forward any infringement notices to that student.

²¹³ Interview with Mark Borrie, Information Security Manager at the University of Otago (the author, personal interview, 19 September 2012). Mark Borrie of the University of Otago Information Technology Services reported that the University of Otago and other New Zealand universities have implemented internal technological procedures in order to reduce P2P file-sharing.

on this matter).²¹⁴ These unique providers of Internet services not coming within the definition of an IPAP may pose a threat to the effectiveness of the regime.

(iv) “Rights owner”

Under the regime, all three infringements must be against the *same* “rights owner”²¹⁵ for that rights owner to be able to take an enforcement action.²¹⁶ As a rights owner includes an agent, a P2P file-sharer is not required to illegally download three works from the same *copyright owner*.²¹⁷ In New Zealand entities such as the RIANZ and the New Zealand Federation Against Copyright Theft²¹⁸ have been contracted as rights owners.²¹⁹ Therefore, the requirement that the three infringements be against the same rights owner does not undermine the strict liability nature of the regime where one agent represents the majority of copyright owners in New Zealand.²²⁰ However, it may mean the regime fails to accommodate copyright owners who cannot afford to

²¹⁴ Interview with Mark Borrie, above n 213. Mark Borrie of the University of Otago Information Technology Services reported that the University of Otago believes it does not come within the definition of “IPAP” or “account holder” under the CIFSA. The University of Otago only provides Internet services incidental to its primary education function thus is not an “IPAP”. The University of Otago also does not have a traditional account with an “IPAP”, but rather a wholesaler of IP addresses, therefore may also not be considered an “account holder”. This belief was reiterated by the University of Otago Registrar, Jan Flood (Email from Jan Flood to author regarding the University of Otago’s position on the Copyright (Infringing File Sharing) Amendment Act 2011 (14 September 2012)). Conversely, the University of Auckland’s copyright policy appears to imply that the university is an IPAP that would be required to forward notices onto students and staff (University of Auckland “On 1 September 2011 the Copyright (Infringing File Sharing) Act 2011 came into force” (2011) Notices <www.auckland.ac.nz>). Grant Wills of the Office of the Vice-Chancellor of the University of Auckland also indicated that the university is of the opinion it is an IPAP under the CIFSA (Email from Grant Wills to author regarding the University of Auckland’s position on the Copyright (Infringing File Sharing) Amendment Act 2011 (28 September 2012)). Alternatively, the Unitec Institute of Technology considers itself to be an account holder, potentially liable for \$15,000 (Unitec Institute of Technology “New Copyright Legislation Affects You” (2011) Student News <www.unitec.ac.nz>).

²¹⁵ Copyright Act 1994, s 122A(1).

²¹⁶ Ibid, ss 122E(1)(b) and 122F(1)(b). These sections state that a warning and enforcement notice can only be issued after 28 days after the preceding notice in relation to “same rights owner”.

²¹⁷ The New Zealand Society of Authors “Submission to the Commerce Select Committee on the Copyright (Infringing File Sharing) Amendment Act 2011” at 3. Without the “rights owner” definition a P2P file-sharer could theoretically receive many detection notices from many different copyright owners. For example, an account holder might illegally download a movie belonging to ABC Studios, another movie belonging to XYZ Studios and a song belonging to 123 Studios and receive a detection notice from all three respective copyright owners. In such a case, despite downloading three copyright works, the account holder would not progress in the three-notice regime.

²¹⁸ The New Zealand Federation Against Copyright Theft will be referred to as NZFACT.

²¹⁹ Alex Walls “Orcon, Vodafone, Telecom, TelstraClear receive infringement notices” (2011) The National Business Review <www.nbr.co.nz> and Keall, above n 6. These agencies have a longstanding relationship with international entertainment organisations with NZFACT having been appointed previously by the Motion Picture Association to undertake civil and criminal enforcement in New Zealand on its behalf (see Motion Picture Association “Submission to the Commerce Select Committee on the Copyright (Infringing File Sharing) Amendment Act 2011” at 3).

²²⁰ Motion Picture Association, above n 219, at 1.

employ an agent and have to establish three infringements all against *their* copyrighted works.

(b) The Infringement Notice Process of the CIFSA

(i) Notifying Respective Parties of a Cancellation of Notice

In the event of a challenge, the cancellation process under the CIFSA is not defined. When *rejecting* a challenge the rejection must be sent to the IPAP who forwards rejections to the account holder.²²¹ However, there is no equivalent procedure notifying the IPAP or account holder in the event a copyright owner *accepts* a challenge *or* fails to respond in which case a challenge is *deemed* to be accepted.²²² This is detrimental to the regime, as an IPAP is required to know what form of notice to issue to the account holder.²²³ Not knowing whether the previous notice was validly challenged makes this difficult. An IPAP that tracks challenges and has a comprehensive understanding of the CIFSA may infer that if it has not received a rejection,²²⁴ this is tantamount to acceptance and should adjust its records accordingly. However, IPAPs may not track challenges to this extent. In any event, an account holder is unlikely to understand the mechanics of the regime, so not receiving a response in relation to a challenge would leave an account holder in the dark. The Regulations do make provision for a “Response Notice”.²²⁵ These can be sent to account holders via an IPAP deeming a challenge to be accepted or rejected, but there is only an obligation to send a notice if the copyright owner *rejects* a challenge.²²⁶ In this regard, the CIFSA fails to ensure all parties are continually aware of their obligations and liabilities.

²²¹ Copyright Act 1994, s 122G(4).

²²² *Ibid*, s 122H(1).

²²³ Whether it be a Detection, Warning or Enforcement Notice.

²²⁴ Copyright Act 1994, s 122G(4).

²²⁵ Copyright (Infringing File Sharing) Regulations 2011, reg 3. A “response notice” means a notice sent by a rights owner, via an IPAP, to an account holder in response to a challenge by the account holder to an infringement notice. No reference to a “response notice” is made in the Copyright Act 1994.

²²⁶ Copyright Act 1994, s 122G(4). There is no corresponding obligation to send a notice in the event a challenge is accepted.

(c) Enforcement Issues

(i) Infringement Notice Technicalities

The requirements prescribing the form of infringement notices are onerous.²²⁷ This could be an issue, as at the enforcement stage the *slightest* non-compliance with the CIFSAs in sending a notice displaces the presumption that the notice was issued in accordance with the Act.²²⁸ An account holder could receive a non-compliant detection notice and at the enforcement stage submit evidence that the notice was not issued in accordance with the Act.²²⁹ The onus then switches to the copyright owner to satisfy the Tribunal that the notice was issued correctly.²³⁰ A minor administrative error would leave this onus unsatisfied,²³¹ in which case the Tribunal *cannot* order an account holder to pay compensation, only being able to do so if satisfied *all three notices* were issued in accordance with the CIFSAs.²³² Therefore, the onerous requirements of infringement notices may allow file-sharers to avoid liability on procedural technicalities.

(ii) The Copyright Tribunal's 'All-or-Nothing' Discretion

When the Tribunal orders an account holder to pay a sum it *must* include a sum in relation to every infringement included in the enforcement notice.²³³ The Tribunal has the discretion to not award a sum if it would be manifestly unjust,²³⁴ but there is no middle ground. Either a full sum is ordered, taking into account each and every

²²⁷ Copyright Act 1994, ss 122D(2), 122E(2) and 122F(2) set out the extensive requirements of the three forms of an “infringement notice”. The administrative burden this places on IPAPs and copyright owners is discussed below under Administrative Burden and Costs Faced by ISPs and Administrative Burden and Costs Faced by Copyright Owners.

²²⁸ Ibid, s 122N(1)(c).

²²⁹ Ibid, s 122N(2).

²³⁰ Ibid, s 122N(3).

²³¹ Ibid, s 122N(1)(c) requires notices to be issued “in accordance” with the CIFSAs. If Parliament determined substantial compliance would be sufficient it would arguably have used the phrase “substantially in accordance”. Conversely, there is the possibility the Copyright Tribunal might take a holistic approach when interpreting “in accordance” and find substantial compliance is adequate to prevent the CIFSAs being undermined by technicalities.

²³² Ibid, s 122O(1)(b).

²³³ Ibid, s 122O(2). Every infringement does not include those infringements successfully challenged under section 122H or those which would have had their presumption of validity displaced under 122N. Copyright (Infringing File Sharing) Regulations 2011, reg 12(2) sets out a formula for the calculation of the sum.

²³⁴ Ibid, s 122O(1).

infringement, or no sum at all. This could be intentional, ensuring a strict liability regime where the only escape is meeting the high manifestly unjust standard. Conversely, it could be that discretion is inherent in the phrase that the “Tribunal must *determine*”²³⁵ the sum for each infringement based on the formula provided. In the event the Tribunal *does* wield an ‘all-or-nothing approach’ this *might* create an effective strict liability regime that deters P2P file-sharers. *However*, the fact this could impose liability on account holders in a uniquely unfair position²³⁶ might also mean the Tribunal chooses to exercise its discretion and permitting certain file-sharers to go unpunished.

2. Practical Issues with Implementation

(a) Increasing Use of Evasion Software and Technology

The CIFSA establishes that the only way to identify a P2P file-sharer is through an IP address.²³⁷ This fails to consider that sophisticated Internet users can use evasion technologies to hide their IP addresses or encrypt data. In New Zealand there is clear evidence of users utilising these technologies since the implementation of the CIFSA.²³⁸ A Virtual Private Network²³⁹ is a popular evasion technology. VPN connections mask IP addresses by funnelling data being downloaded through a remote server machine.²⁴⁰ Technically, VPN users utilise these machines to do the illegal act of file-sharing. The illegitimately obtained data is then transmitted to the user’s computer via an untraceable network that encrypts the transmission. The

²³⁵ Copyright (Infringing File Sharing) Regulations 2011, reg 12(2).

²³⁶ For example, an account holder may have only ever downloaded three full copyright works of which the account holder should certainly be held liable, but may have also downloaded thousands of fragments of others. In such a case the account holder would be liable for each and every work identified (pending a discussion of the substantiality issue below under Partial Downloads). Similarly, the account holder may have had no knowledge of the infringing use of his/her account and find him/herself liable for thousands of illegal downloads.

²³⁷ Copyright Act 1994, s 122C(1).

²³⁸ Shane Alcock, WAND Research Group University of Waikato Computer Science Department “Impact of the Copyright Amendment Act” (paper presented at NZNOG, Christchurch, January 2012). Also see Donald Clark “File sharing law – NZ Downloaders Simply Switch Tactics” (2012) National Business Review <www.nbr.co.nz>. This follows a global trend in the proliferation of the use of evasion technologies as more nations adopt legal and regulatory approaches to prevent illegal P2P file-sharing (see Enigmax “Young File-sharers Respond To Tough Laws By Buying A VPN” (2012) TorrentFreak <<http://torrentfreak.com>>).

²³⁹ Virtual Private Networks will be referred to as VPNs.

²⁴⁰ Remote servers are typically situated outside of New Zealand, in jurisdictions with more relaxed copyright laws.

entire time the IP address of the user is hidden behind the IP address of the infringing machine.²⁴¹ Only the IP address of the VPN machine is exposed to third parties tracking any infringing activity. VPNs are cheap²⁴² and simple to use.²⁴³

Theoretically, a VPN provider could be threatened with legal action if infringing activity could be traced to one of its VPN addresses. A provider could be prompted to reveal the IP address trafficking the infringing material behind the VPN address.²⁴⁴ However, VPN providers typically assure users that they do not log IP addresses that connect to their servers or what traffic passes through them. As VPN providers simply *route* digital online connections, they are not required to store IP addresses under the CIFSAs.²⁴⁵

There are many other methods that ensure online anonymity. Proxy servers are similar to VPNs, in that a proxy server acts as an intermediary for requests from a client computer.²⁴⁶ Seedboxes²⁴⁷ are used specifically for P2P file-sharing purposes.²⁴⁸ Usenet²⁴⁹ is an unregulated network of anonymous individuals sharing information and material.²⁵⁰ Freenet²⁵¹ is a decentralised software network that allows users to

²⁴¹ Each time a user connects to the Internet through a VPN a new IP address is allocated under certain VPN providers, further concealing a user's online fingerprint

²⁴² VPN provider "HIDE MY ASS!" (<http://hidemyass.com/vpn/>) offers VPN services to Internet users for \$78.66 a year, offering over 32,000 usable and dynamic IP addresses to conceal a user's IP address.

²⁴³ Enigmax "Which VPN Providers Really Take Anonymity Seriously?" (2011) TorrentFreak <<http://torrentfreak.com>>. Further reviews offer additional methods to ensure anonymity online (see Enigmax "How To Make VPNs Even More Secure" (2012) TorrentFreak <<http://torrentfreak.com>>).

²⁴⁴ There is evidence in the blogosphere that VPN providers have been prompted to informally warn VPN users of their receipt of file sharing complaints, without actually forwarding an infringement notice that complies with the CIFSAs. See BIGdb71 "Not a strike, but a warning notice" (2011) 3StrikesNZ <<http://3strikes.net.nz>>.

²⁴⁵ Thomas Beagle "Interview – Cyberdodge VPN Service" (2011) Tech Liberty NZ <<http://techliberty.org.nz>>. VPN providers contend that they do not fall under the definition of an IPAP, as IPAPs are those providers who "offer the transmission, routing *and* providing of connections for digital online connections" (see Copyright Act 1994, s 122A(1)). VPNs typically only offer the routing of digital online connection, not the transmission or providing of connections.

²⁴⁶ SuperchargeMyTorrent "How It Works" (2009) SuperchargeMyTorrent <<https://superchargemytorrent.com>>. To an IPAP or third party monitoring a user it would simply appear as though an account holder is connected full time to one website or server, when in reality the entire Internet is open and available to the user who uses a server to upload and download material. The destination server that receives the web request does not receive any information about the end user's IP address.

²⁴⁷ Sharky "10 Reasons Why You Need a Seedbox" (2008) TorrentFreak <<http://torrentfreak.com>>.

²⁴⁸ Ibid. Seedboxes have been used specifically to evade the French HADOPI law discussed below under Comparative Legislation.

²⁴⁹ See <http://www.usenet.net/>.

²⁵⁰ Chip Salzenberg "What is Usenet?" (2012) Internet FAQ Archives <www.faqs.org/faqs/usenet>.

²⁵¹ See <https://freenetproject.org/index.html>.

anonymously share files.²⁵² Tor²⁵³ is a similar network, consisting of volunteer servers that transmit data worldwide to ensure online anonymity and prevent network surveillance or traffic analysis.²⁵⁴ These evasion technologies could clearly undermine the CIFSA regime by hiding IP addresses and IPAPs concede that no law will stop dedicated infringers.²⁵⁵

It is unlikely the use of evasion technology can be prevented. Banning the services would be impractical, as VPNs and proxy servers are used legitimately in schools and businesses to allow users to access internal networks and filter certain materials. VPNs also allow oppressed people to subvert draconian Internet censorship laws.²⁵⁶ IPAPs could stipulate evasion technologies are not permitted in their contracts, but users who would simply avoid IPAPs enforcing such policies. There have been some challenges made against VPN services,²⁵⁷ however challenges simply hasten the development of technological alternatives. There is little that can be done to prevent evasion technologies from undermining the CIFSA.

(b) Changing IPAPs as an Avoidance Strategy

As P2P file-sharers are identified by their IP addresses through a particular IPAP, account holders could change IPAPs to avoid progressing under the notice regime. Upon changing IPAPs and obtaining a new IP address an account holder is given a clean slate. As rights owner notices are not matched to an account holder's name, copyright owners are at no point aware of what notice stage account holders are at. There is also no way for an IPAP to know whether a new subscriber has already

²⁵² Ian Clarke "What is Freenet?" (2012) Freenet: The Free Network <<https://freenetproject.org>>.

²⁵³ See <https://www.torproject.org/>.

²⁵⁴ Tor "Tor: Overview" (2012) The Tor Project <www.torproject.org>. Within the Tor network, the final transmissions to the external Internet can be traced at the boundary of the network. However, the IP address of the server that engages in the final act is so far removed from the initial requesting IP address, the request having bounced through many servers across the world in the interim, that the request cannot be traced.

²⁵⁵ TelstraClear "Submission to the Commerce Select Committee", above n 144, at 4.

²⁵⁶ Jonathan Glater "Privacy for People Who Don't Show their Navels" (2006) The New York Times <www.nytimes.com>.

²⁵⁷ The online financial services giant PayPal has refused to offer services to particular VPN providers (see Ernesto "PayPal Bans BitTorrent Friendly VPN Provider" (2012) TorrentFreak <<http://torrentfreak.com>>) and governments have indicated that VPN services are in their crosshairs (see Ernesto "How Long Before VPNs Become Illegal" (2012) TorrentFreak <<http://torrentfreak.com>>).

received a notice in the past. The CIFSA fails to consider that users can utilise numerous IPAPs.²⁵⁸

The regime implies that copyright owners *can* continue a line of infringement notices against an account holder who changes IPAPs, with the Tribunal being required to order an account holder pay a sum for each infringement occurring “at *an* IP address of the account holder”.²⁵⁹ This indicates that the IP address need not have been the same for each infringement. However, the section could simply consider that IPAPs allocate dynamic IP addresses to account holders.²⁶⁰ Even if the regime could continue against an account holder who switches IPAPs, there is still the hurdle of tracking which stage of the notice-process each account holder is up to given their identities are known only by their first-instance IPAP. IPAPs or the government could operate a blacklist of account holders,²⁶¹ but this would likely raise privacy concerns.²⁶² Therefore, simply changing IPAPs could negate the CIFSA’s effectiveness.

(c) Administrative Burden and Costs Faced by IPAPs

IPAPs have many obligations under the CIFSA regime that are onerous, to the point that the regime may be impractical without modification. The obligations owed by IPAPs throughout the notice-sending process alone are extensive. An IPAP must match an IP address and issue a notice within seven days.²⁶³ In this time an IPAP must absorb the information received from the copyright owner, determine what notice to issue and issue it.²⁶⁴ IPAPs would also require procedures to match notices

²⁵⁸ Library and Information Association of New Zealand Aotearoa, above 189, at 1.

²⁵⁹ Copyright Act 1994, s 122O(1)(a)(ii).

²⁶⁰ TelstraClear “Submission to the Ministry of Economic Development on the Copyright (Infringing File Sharing) Regulations 2011 Fee Review” at 3. Dynamic IP addresses mean an account holder may receive a different IP address each time he/she utilises the Internet services of an IPAP.

²⁶¹ The state administers a ‘blacklist’ of account holders in France under the HADOPI law. This is discussed below under Comparative Legislation.

²⁶² Privacy issues are discussed below under Privacy Issues.

²⁶³ Copyright Act 1994, s 122C.

²⁶⁴ The fact the ISP must determine which notice is required to be sent itself is inherent in section 122C(1)(b), which stipulates that ISPs must issue the appropriate notice. Section 122F(5) also suggests that the only time a copyright owner is alerted to what stage the notice regime is up to in relation to a particular account holder is at the enforcement stage.

to copyright owners, check the time requirements have been met²⁶⁵ and update records. Complying with each step within seven days could stretch the resources of IPAPs.

Simply matching rights owner notices to particular IP addresses is “complex”²⁶⁶ and resource intensive.²⁶⁷ IPAPs must also deal with customer enquiries and complaints that impose a significant burden, even if modest in number.²⁶⁸ Furthermore, IPAPs face the threat of being inundated with a flood of notices that overwhelm their systems. The New Zealand Telecommunications Carriers Forum²⁶⁹ notes that if a small IPAP were to receive 1,000 notices in a single day²⁷⁰ it could not conceivably process them all within the required seven days. There is a very real threat of this occurring, with RIANZ noting that it would send 5000 more notices a month were the notice fee²⁷¹ to be dropped to \$2 from \$25.²⁷² This is exacerbated by the fact there is no cap on the number of notices a copyright owners can send to a specific IPAP or in relation to the same IP address. This is a particular concern to IPAPs who fear a sudden onslaught of computer-generated notices as witnessed in America.²⁷³ All of this exists alongside the pressure to comply with the CIFSAs under section 92B(2A), or risk being exposed to liability.²⁷⁴

In addition to this potentially oppressive seven-day timeframe,²⁷⁵ the requirements of the notices themselves are onerous. IPAPs must identify the rights owner, the date and circumstances of the alleged infringement, the date of the notice and explain the

²⁶⁵ This requires ensuring they have received the notice within 21 days of the infringement and that the infringement did not occur within an “on-notice period” or “quarantine period”.

²⁶⁶ Telecom Corporation of New Zealand “Submission to the Ministry of Economic Development on the Copyright (Infringing File Sharing) Regulations 2011 Fee Review” at 4. In instances where IPAPs allocate dynamic IP addresses determining which account holder was logged in on an infringing IP address at the exact time of infringement can come down to a matter of milliseconds.

²⁶⁷ Ibid, at 4. Telecom, as one of New Zealand’s largest ISPs reports having *manual* matching processes as opposed to automated.

²⁶⁸ TelstraClear “Submission to the Commerce Select Committee”, above n 144, at 7.

²⁶⁹ The New Zealand Telecommunications’ Carriers’ Forum will be referred to as the TCF.

²⁷⁰ In the event a successful action is brought before the Copyright Tribunal this could open the floodgates to a wave of claims.

²⁷¹ Copyright Act 1994, s 122U and Copyright (Infringing File Sharing) Regulations 2011, reg 7. IPAPs can require a maximum \$25 fee per “rights owner notice” received.

²⁷² RIANZ “Submission to the Ministry of Economic Development”, above n 203, at 1.

²⁷³ TelstraClear “Submission to the Commerce Select Committee”, above n 144, at 2.

²⁷⁴ As discussed above, it is contentious what degree of liability IPAPs would in fact face for the primary or secondary infringement of copyright.

²⁷⁵ Vodafone New Zealand Limited “Submission to the Ministry of Economic Development on the Copyright (Infringing File Sharing) Regulations 2011 Fee Review” at 5 and 7.

consequences to the account holder of further infringing and the challenge procedure.²⁷⁶ Infringement notices must also include a unique infringement notice number, contact details of the IPAP, a challenge notice form and a link to information on the CIFSA regime.²⁷⁷ Furthermore, the ambiguity of the requirements puts more pressure on IPAPs who must comply with the regime in order to retain a safe harbor. For example, when issuing an enforcement notice an IPAP must explain that an enforcement action can be taken, that no further infringements can be issued during the quarantine period and how the account holder may challenge a notice.²⁷⁸ Yet is undefined how extensive these explanations must be. Finally, on top of the notice procedure, IPAPs have obligations to retain information and file an annual compliance report.²⁷⁹ This requires disk space and record retention strategies that add to the cost of administering the regime.

The potentially unreasonable notice requirements and reporting obligations burdening IPAPs could ultimately undermine the effectiveness of the CIFSA. As IPAPs are fundamental to the regime there needs to be strong incentives for them to co-operate. Copyright owners contend the \$25 fee per rights owner notices alleviates the financial burden on IPAPs.²⁸⁰ This fee must accompany *every* notice the copyright owner sends,²⁸¹ thus creating a financial impediment to copyright owners drowning IPAPs in notices. However, evidence from IPAPs suggests that the \$25 fee is not adequate.

The MED has presumed that costs incurred in setting up and running the regime are not a factor.²⁸² However, the TCF has stated that *no* IPAPs' costs are being met by

²⁷⁶ Copyright Act 1994, s 122D(2).

²⁷⁷ Copyright (Infringing File Sharing) Regulations 2011, reg 5.

²⁷⁸ Copyright Act 1994, ss 122F(2)(g), 122F(2)(h) and 122F(2)(i).

²⁷⁹ *Ibid*, s 122T. ISPs must retain information on the allocation of IP address for 40 days and information on infringements for 12 months.

²⁸⁰ Copyright (Infringing File Sharing) Regulations 2011, reg 7.

²⁸¹ The fee must accompany every notice the copyright owner sends, not simply those which the IPAP forwards to account holders.

²⁸² Ministry of Economic Development *Copyright (Infringing File Sharing) Regulations – Fee review Discussion Document* (2012) at 3. The only costs considered were those incurred in sending notices. The Minister of Commerce has also determined the \$25 fee is an appropriate sum (see Craig Foss, Minister of Commerce *Copyright (Infringing File Sharing) Regulations - Review of Notice fee* (prepared for Cabinet Economic Growth and Infrastructure Committee 2011)).

the \$25 fee.²⁸³ Telecom²⁸⁴ contends the actual costs incurred in complying with the regime “well exceed”²⁸⁵ the compensation offered by the \$25 fee. There are a huge amount of additional costs incurred, as IPAPs need to be constantly prepared for an influx of notices or risk losing their safe harbor.²⁸⁶ CallPlus, Orcon, Telecom, TelstraClear and Vodafone²⁸⁷ report spending \$919,000 on additional set-up costs alone.²⁸⁸ Telecom notes it had spent \$523,416 in complying with the regime as at March 2012 and had only recovered \$24,150.²⁸⁹ Similarly, TelstraClear spent \$88,669.45 in establishment costs, which amounted to \$222.78 for each notice received by them as at 30 April 2012, and had only recovered 10% of the total costs.²⁹⁰

Given the significant setup costs incurred,²⁹¹ IPAPs propose raising the \$25 fee. The TCF proposes \$40 would be more reasonable,²⁹² Vodafone proposes \$30.50,²⁹³ TelstraClear proposes \$41.17²⁹⁴ and Telecom proposes \$104,²⁹⁵ while all predicting the real operational costs are significantly higher. Admittedly, these calculations are based largely on theoretical estimations, as the majority of IPAPs were yet to receive a rights owner notice under the regime.²⁹⁶ However, the fact RIANZ reported all

²⁸³ Telecommunications Carriers’ Forum “Submission to the Ministry of Economic Development on the Copyright (Infringing File Sharing) Regulations 2011 Fee Review” at 6.

²⁸⁴ Telecom Corporation of New Zealand operates as an IPAP in New Zealand.

²⁸⁵ Telecom “Submission to the Ministry of Economic Development”, above n 266, at 3.

²⁸⁶ Vodafone “Submission to the Ministry of Economic Development”, above n 275, at 10 and 13. Additional costs for Vodafone include educating customers, ongoing training of customer service agents, dealing with media interest and queries and time and resources spent on industry and regulatory submissions. Altogether Vodafone reports receiving 39 written queries, 11 contact centre calls and 7 direct calls as of April 2012.

²⁸⁷ CallPlus, Orcon Internet Limited, Telecom Corporation of New Zealand, TelstraClear and Vodafone New Zealand operate as IPAPs in New Zealand.

²⁸⁸ TCF “Submission to the Ministry of Economic Development”, above n 283, at 4.

²⁸⁹ Telecom “Submission to the Ministry of Economic Development”, above n 266, at 5.

²⁹⁰ TelstraClear “Submission to the Ministry of Economic Development”, above n 260, at 1.

²⁹¹ TCF “Submission to the Ministry of Economic Development”, above n 283, at 2.

²⁹² *Ibid*, at 2.

²⁹³ Vodafone “Submission to the Ministry of Economic Development”, above n 275, at 8.

²⁹⁴ TelstraClear “Submission to the Ministry of Economic Development”, above n 260, at 1. While this is the reasonable fee TelstraClear proposes \$255.42 per notice would more accurately reflect the cost incurred.

²⁹⁵ Telecom “Submission to the Ministry of Economic Development”, above n 266, at 4.

²⁹⁶ CallPlus “Submission to the Ministry of Economic Development on the Copyright (Infringing File Sharing) Regulations 2011 Fee Review” at 1. ISPs reported that only RIANZ appeared to have taken advantage of the regime at the time of submissions. Also see The New Zealand Society of Authors “Submission to the Ministry of Economic Development on the Copyright (Infringing File Sharing) Regulations 2011 Fee Review” at 4. Vodafone too noted that based on the small number of notices received it could not justifiably conclude the \$25 should be raised or lowered (see Vodafone “Submission to the Ministry of Economic Development”, above n 275, at 2).

IPAPs had charged the maximum \$25 reveals the costs incurred by IPAPs require \$25 or more to be recovered.²⁹⁷

It appears the administrative burden and costs on IPAPs may be too high. This is a serious issue, as if a successful claim is brought before the Copyright Tribunal the volume of notices may *increase*.²⁹⁸ This is going to reduce the effectiveness of the regime in two ways. First, IPAPs cannot continue incurring excessive financial costs forever, with the burden on IPAPs having a “direct bearing on resources needed to run the regime”.²⁹⁹ The argument that IPAPs and Internet users should share in the personal cost of enforcement to incentivise reducing infringement is misguided. It unjustifiably assumes IPAPs can reduce infringing and fails to consider that Internet access in New Zealand is already the 4th most expensive in the OECD.³⁰⁰ Similarly, the argument IPAPs profit from the infringing activity is flawed, with IPAPs contending that file-sharing is a serious drain on their infrastructure.³⁰¹ Secondly, the passing of costs onto IPAPs does nothing to win the support of a party that is crucial to the success of the regime. If IPAPs refuse to co-operate the regime may not be able to fulfil its purpose of providing copyright owners an effective means of redress against P2P file-sharers.³⁰²

(d) Administrative Burden and Costs Faced by Copyright Owners

Copyright owners too contend that they face unreasonable costs under the regime. Copyright owners initially incur costs in investigating infringing IP addresses using “outside investigators”³⁰³ to detect P2P file-sharing.³⁰⁴ Copyright owners are unwilling to disclose the cost of investigations,³⁰⁵ but NZFACT disclosed that it had spent \$900,000 on investigations and awareness campaigns since the introduction of

²⁹⁷ RIANZ “Submission to the Ministry of Economic Development”, above n 203, at 2.

²⁹⁸ TCF “Submission to the Ministry of Economic Development”, above n 283, at 2.

²⁹⁹ *Ibid.*, at 2.

³⁰⁰ OECD “OECD Broadband Statistics” (2011) OECD Broadband Portal <www.oecd.org>.

³⁰¹ Telecommunications Carriers’ Forum “Submission to the Commerce Select Committee on the Copyright (Infringing File Sharing) Amendment Act 2011” at 3.

³⁰² IFPI “Digital Music Report 2012”, above n 49, at 19.

³⁰³ NZFACT “Submission to the Ministry of Economic Development on the Copyright (Infringing File Sharing) Regulations 2011 Fee Review” at 4.

³⁰⁴ One method of detecting P2P file-sharing is the participation in a file-sharing network as a peer and tracking the IP addresses of peers who upload infringing material.

³⁰⁵ NZFACT “Submission to the Ministry of Economic Development”, above n 303, at 4.

the CIFSA.³⁰⁶ Costs are also incurred in the collating of information that must be sent in the rights owner notice. A copyright owner must provide personal details, the infringing IP address, the date, the time and all the circumstances of the infringement as well as a statement affirming that the information is correct.³⁰⁷ Precision is vital, as an accidental administrative error can invalidate a notice.³⁰⁸

NZFACT reports using automated services that create notices, but there are still set-up costs³⁰⁹ and not all copyright owners are likely to be able to afford such services. RIANZ notes the costs of administering the regime are “prohibitive”.³¹⁰ In particular, the \$25 notice fee has been identified as completely unsustainable³¹¹ and a serious impediment to enforcing legal rights.³¹² Copyright owners argue a fee of \$2 or less is required,³¹³ with authors in particular being unable to take advantage of the system.³¹⁴ NZFACT has argued for the outright elimination of a fee³¹⁵ and RIANZ notes it would have sent 5,000 more notices per month if the fee \$2.³¹⁶

Although there is no clear indication of the exact costs incurred by copyright owners utilising the regime it appears they are significant.³¹⁷ A regime that imposes a significant burden (financial or otherwise) on those desiring to enforce their copyright may not be effective. Significant costs limit participation in the regime to copyright

³⁰⁶ NZFACT “Submission to the Ministry of Economic Development”, above n 303, at 6. It is unknown whether this includes costs that would typically be incurred whether the CIFSA was implemented or not. This figure was calculated at May 2012.

³⁰⁷ Copyright (Infringing File Sharing) Regulations 2011, reg 4.

³⁰⁸ Copyright Act 1994, s 122N(1)(c). An administrative error can displace the presumption that the notice was issued in accordance with the CIFSA. This then puts the onus on copyright owners to establish the notice was issued in compliance with the CIFSA.

³⁰⁹ NZFACT “Submission to the Ministry of Economic Development”, above n 303, at 5.

³¹⁰ RIANZ “Submission to the Ministry of Economic Development”, above n 203, at 5. RIANZ argues that costs involved with utilising the regime prevent the organisation from educating and deterring users through the issuing of notices, noting at April 2012 that only 1% of infringers had been reached.

³¹¹ NZFACT “Submission to the Ministry of Economic Development”, above n 303, at 9.

³¹² Motion Picture Distributors’ Association of New Zealand, above n 51, at 2.

³¹³ Copyright Council of New Zealand “Submission to the Ministry of Economic Development on the Copyright (Infringing File Sharing) Regulations 2011 Fee Review” at 2.

³¹⁴ Society of Authors “Submission to the Ministry of Economic Development”, above n 296, at 3. Also see Publishers Association of New Zealand “Submission to the Ministry of Economic Development on the Copyright (Infringing File Sharing) Regulations 2011 Fee Review” at 2.

³¹⁵ NZFACT “Submission to the Ministry of Economic Development”, above n 303, at 2.

³¹⁶ Telecom “Submission to the Ministry of Economic Development”, above n 266, at 6.

³¹⁷ NZFACT “Submission to the Ministry of Economic Development”, above n 303, at 6.

owners who can afford to contract infringement detection services and comply with the right owner notice requirements.³¹⁸

(e) Administrative Burden and Costs Faced by the Copyright Tribunal

A sudden influx of cases may overwhelm the resources of the Copyright Tribunal, making it a poor mechanism through which copyright owners are expected to enforce their rights. However, the CIFS provides for the efficient management of enforcement claims. First, Tribunal decisions under the regime can be made on the papers,³¹⁹ before one member³²⁰ and under its own determined procedure.³²¹ Admittedly, any party can request a hearing.³²² This might stretch Tribunal resources were a large number of account holders to choose to appear personally,³²³ but the expense and strict liability nature of the regime would likely deter the majority from doing so.

Secondly, the Tribunal can presume that each incidence of file-sharing in a notice constitutes an infringement of copyright and that the notices were issued correctly.³²⁴ The Tribunal is not burdened by arguments in relation to matters of compliance. However, an account holder can introduce *any* evidence to rebut this presumption and require a copyright owner to satisfy the Tribunal each notice was issued correctly and contains accurate information.³²⁵ So the presumption may have little effect when an account holder is determined to contest the infringement notices.

Thirdly, the Tribunal has received more funding and had its membership expanded to six.³²⁶ The CIFS also provides for an application fee of \$200.³²⁷ The Law

³¹⁸ InternetNZ “Submission to the Ministry of Economic Development”, above n 183, at 2.

³¹⁹ Copyright Act 1994, s 122L(1).

³²⁰ Copyright (Infringing File Sharing) Regulations 2011, reg 11.

³²¹ *Ibid*, s 122L(3).

³²² *Ibid*, s 122L(1)(a).

³²³ *Ibid*, s 122M(2). Furthermore, courtesy of section 122M(1) the traditional jurisdictional provisions governing the Copyright Tribunal also apply under section 211 to 224.

³²⁴ *Ibid*, s 122N.

³²⁵ *Ibid*, s 122N(3). Section 215 of the Copyright Act also emphasises the wide array of evidence that can be tendered before the Tribunal.

³²⁶ Alex Walls “Copyright Tribunal to expand for new Internet law ... but will it still get snowed?” (2011) *The National Business Review* <www.nbr.co.nz>. The Tribunal membership was expanded by adding three extra members (from a chair plus two members to a chair plus five members) in recognition that it would be managing a larger caseload under the regime.

Commission has even proposed the creation of a Communications Tribunal or Commissioner who might oversee the regime.³²⁸ The membership of the Tribunal itself is also more than capable in dealing with P2P file-sharing issues effectively and expeditiously.³²⁹ Admittedly, there have been no enforcement actions testing the capabilities of the Tribunal at the time of writing this dissertation.³³⁰ However, the MED considers that even if the Tribunal becomes briefly overburdened, its workload would reduce over time as the CIFSA begins to deter file-sharers.³³¹

(f) Partial Downloads

Copyright owners may struggle to bring successful enforcement actions against account holders who only download *part* of a copyrighted file. An account holder commits an “infringement” under the CIFSA when he or she infringes the copyright in a work.³³² Copyright is infringed by the doing of a restricted act in relation to the work as a whole, or any *substantial* part of it.³³³ An account holder could contend that file-sharing does not infringe copyright, as in many cases only a fraction of, not a substantial part of, a work is copied. This would displace the presumption that each identified instance of file-sharing identified in a notice constitutes an infringement of copyright.³³⁴ The onus would then be on copyright owners to establish that file-sharing even 1% of a work constitutes substantial copying. Parliament *did* include infringing “part of a work” under the definition of infringement in the original Bill,³³⁵ but removed it before the final implementation. It also chose to ignore submissions

³²⁷ Copyright (Infringing File Sharing) Regulations 2011, reg 8.

³²⁸ Law Commission *The New Media Meet ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011) at [8.78].

³²⁹ Copyright Act 1994, s 206(1). The Tribunal Chairperson must have seven years practicing as a solicitor and the other five members are to be selected by Ministerial appointment. As at 2012, the highly regarded Professor Susy Frankel (Professor at Victoria University of Wellington) chairs the Tribunal backed by other reputable members such as Peter Dengate-Thrush (who also serves on the global Internet organisation ICANN) and Paul Sumpter (of the University of Auckland law school).

³³⁰ Although three claims have been brought before the Tribunal as at 4 September 2012 they are yet to be heard at the date of writing this dissertation. See Tom Pullar-Strecker “Studios make example of Kiwi downloaders” (2012) *The Dominion Post* <www.stuff.co.nz/dominion-post>.

³³¹ Ministry of Economic Development *Regulatory Impact Statement*, above n 35, at 12.

³³² Copyright Act 1994, s 122A(1).

³³³ *Ibid*, s 29(2)(a). “Copying” is a restricted act under sections 16(1)(a) and 30 and “communicating” is a restricted act under sections 16(1)(f) and 33. It is clear that a P2P file-sharer downloading a file copies a work and conversely communicates a work when uploading. If anything, copying under section 2(1) includes “reproducing, recording, or storing the work in any material form (including any digital format), in any medium and by any means” which could cover P2P file-sharing practices.

³³⁴ *Ibid*, s 122N(1)(a).

³³⁵ Copyright (Infringing File Sharing) Amendment Bill 2010 (119–1).

arguing that “infringement” should include the statement “regardless whether substantial part or not.”³³⁶ Despite these indicators of Parliamentary intent, a copyright owner could still contend “substantial” copying is committed by P2P file-sharers.

To establish “substantial” copying the courts have determined the quality, not quantity, of copying should be assessed.³³⁷ Therefore, determining whether “copying” 1% of a copyright work amounts to an infringement may turn on judicial discretion regarding the “quality” of infringing. Copyright owners could appeal to this discretion, in contending that permitting insubstantial downloading fails to recognise that the smallest download can have major ramifications. One hundred peers could upload 1% of a work each, granting countless file-sharers the benefit of an entire work, while avoiding liability on substantiality grounds. Although Parliament has provided that insubstantial copying is acceptable,³³⁸ the quality of copying in the context of P2P file-sharing might still result in a finding that the “essence”³³⁹ of the work is copied.

Furthermore, NZFACT has admitted that its evidence gathering methods cannot determine what percentage of a work is copied. Only 30 seconds worth of transferred media file is required to identify an infringing IP address.³⁴⁰ Without being able to assume every file-sharer “infringes” under the Act (there being a presumption of “substantiality”) the regime would be unworkable. Therefore, copyright owners could likely establish “substantial” copying,³⁴¹ with even the slightest download being found to have copied the “essence” of a work in a file-sharing context.

³³⁶ James and Wells, above n 64, at 5.

³³⁷ *Ladbroke (Football) Limited v William Hill (Football) Limited* [1964] 1 All ER 465, 469. In *Henkel KGaA v Holdfast New Zealand Ltd* [2007] 1 NZLR 577 at [44] the Supreme Court also found that “what amounts to a substantial part in an artistic work case depends more on qualitative visual impression rather than on quantitative analysis”. This case admittedly dealt with the substantial copying in relation to an artistic work, of which assessing the quality of copying is arguably more obvious than digital files. However, the judgment revealed the discretionary nature of determining substantiality, with the court finding the “essence” of the work must be copied.

³³⁸ Copyright Act 1994, s 29(2)(a). This was expressly identified in the case of *Steelbro NZ Ltd v Tidd Ross Todd Ltd* [2007] NZCA 486 where it was found that Parliament intended to permit insubstantial copying and that minor infringements should not be sanctioned.

³³⁹ *Henkel KGaA v Holdfast New Zealand Ltd* [2006] NZSC 102, [2007] 1 NZLR 577 at [44].

³⁴⁰ NZFACT “Submission to the Commerce Select Committee”, above n 34, at 10.

³⁴¹ This was envisaged by the Ministry of Economic Development who stated that the “policy intention was not to alter the substantial part doctrine” (see Ministry of Economic Development *Departmental Report*, above n 145, at 4. The Ministry believed it sufficient to allow the Copyright Tribunal or District Court to determine whether a substantial part of a work has been infringed through file-sharing.

(g) Transparency Issues

The CIFSAs make no provision for the transfer of information between IPAP and copyright owner during the notice process.³⁴² A copyright owner is not made aware of how the notices they are sending are progressing, or whether the IPAP is complying with its obligations.³⁴³ Copyright owners are only notified of progress when an enforcement notice has been issued.³⁴⁴ An IPAP could be consistently failing to forward notices onto account owners or be issuing them incorrectly. A copyright owner who keeps extensive records of infringing IP addresses may have a general idea which IP addresses should be at a particular stage of the notice process, but with IPAPs allocating dynamic IP addresses an IP address does not necessarily correspond with a particular account holder.³⁴⁵

The veil of secrecy surrounding IPAPs' actions may put copyright owners off participating in the regime. The bare requirement that IPAPs publish a report on compliance with the CIFSAs is not an adequate substitute for greater real-time transparency.³⁴⁶ Copyright owners would ideally be able to request information at any stage to ensure IPAPs are complying with their obligations.³⁴⁷ Contractual arrangements between IPAPs and copyright owners could provide procedures for greater transparency.³⁴⁸ However, as IPAPs are already subject to extensive requirements under the CIFSAs they may be unlikely to voluntarily accept more obligations. Because copyright owners cannot track the relationship between infringement and enforcement many may be deterred from engaging with the regime.

³⁴² The only time IPAPs and copyright owners are required to communicate throughout the *notice process* is in the sending of infringement notices (section 122C(1)) and when a notice is challenged and that challenge is responded to (sections 122G(3) and 122G(4)).

³⁴³ NZFACT "Submission to the Commerce Select Committee", above n 34, at 19.

³⁴⁴ Copyright Act 1994, s 122F(5).

³⁴⁵ Telecom "Submission to the Ministry of Economic Development", above n 266, at 4.

³⁴⁶ Copyright Act 1994, s 122T(4).

³⁴⁷ James and Wells, above n 64, at 7.

³⁴⁸ Email from Joanna Jalfron to author regarding Telecom New Zealand Ltd's position on the Copyright (Infringing File Sharing) Amendment Act 2011 (17 August 2012). Telecom has indicated IPAPs do enter into contractual agreements with copyright owners.

(h) Seven Day Timeframe

An IPAP must issue an infringement notice within seven days of receiving a rights owner notice.³⁴⁹ Copyright owners contend this is excessive, as in the event infringers are sharing pre-release movies³⁵⁰ overwhelming damage can be caused in seven days.³⁵¹ It is necessary to put a stop to infringing as soon as possible for the regime to effectively combat P2P file-sharing.³⁵² However, decreasing this timeframe would only be effective based on the assumption that infringers who receive a notice instantly stop file-sharing. This is clearly not always the case.³⁵³ It further assumes IPAPs have the capability to act immediately, when evidence shows IPAPs are already burdened by the requirements of the CIFSA.³⁵⁴ Seven days may be an appropriately balanced timeframe.

(i) Fishing for Liability

In the United States copyright owners have developed a practice of sending out legal material, often laced with incorrect information, to hundreds of potential infringers requiring them to settle or be sued.³⁵⁵ It has been referred to as the “dragnet approach to litigation.”³⁵⁶ Google has found that 37% of the notices it has received under the DMCA were invalid.³⁵⁷ This is despite the DMCA providing that copyright owners may be liable for making knowing misrepresentations in sending notices.³⁵⁸ The expectation is that many users will settle with copyright owners out of

³⁴⁹ Copyright Act 1994, s 122C(1)(b).

³⁵⁰ Pre-release movies are those movies that become available online through covert illegal means before being officially released and distributed worldwide.

³⁵¹ Motion Picture Association, above n 219, at 2. In seven days a file can be spread to hundreds of thousands of peers in a P2P swarm.

³⁵² Motion Picture Distributors’ Association of New Zealand, above n 51, at 2.

³⁵³ The effectiveness of notices on P2P file-sharing behaviour is discussed below under Assessment of the Overall Effectiveness of the CIFSA.

³⁵⁴ See the discussion of the Administrative Burden and Costs Faced by ISPs above.

³⁵⁵ There is an abundance of evidence in Internet forums and blogs illustrating instances of copyright owners fishing for liability and setting out advice for recipients. See Jody Lee Brunton “How to Handle a Copyright Infringement Notice” (2011) CopyrightInfringementNotice.Com <<http://copyright-infringement-notice.com>> and Nba-Base “Should I pay the copyright settlement?” (2011) FreeAdvice <<http://forum.freeadvice.com>> for two examples.

³⁵⁶ Julianne Pepitone “50,000 BitTorrent Users Sued for Alleged Illegal Downloads” (2011) CNN Money <<http://money.cnn.com>>.

³⁵⁷ Ted Gibbons “Google Submission Hammers Section 92A” (2009) New Zealand PCWorld <<http://pcworld.co.nz>>.

³⁵⁸ Digital Millennium Copyright Act 17 U.S.C. § 512(f). Also see Wendy Seltzer “Diebold Coughs up Cash in Copyright Case” (2004) Electronic Frontier Foundation <www.eff.org>. Notably, a case has

fear. Fortunately, the rights owner notices have extensive requirements under the CIFSA and must include a statement that the information provided is “true and correct”, verified by signature.³⁵⁹ These requirements, in addition to the \$25 fee,³⁶⁰ clearly act as a deterrent to the automating of notices and fishing for liability. Furthermore, IPAPs act as gatekeepers under the regime, not being required to forward non-compliant notices onto account holders.³⁶¹

3. Policy Issues with the CIFSA

(a) Barring Legal Representation

The CIFSA prevents a party being represented before the Tribunal in all but a few circumstances, expressly barring legal representation without leave from the Tribunal.³⁶² Although this streamlines the process, it is disproportionately unjust because account holders are not familiar with the regime.³⁶³ Comparatively, copyright owners, as corporations, *are* entitled to representation by their well-informed employees or to act through agencies.³⁶⁴ Furthermore, the potential penalties faced are substantial and justify legal representation.³⁶⁵ The fact an account holder is not barred from legal representation in an application to the District Court³⁶⁶ only emphasises the unreasonableness of the barring of legal representation before the

been brought against copyright owners for sending notices without checking if the use is “fair use” in *Lenz v Universal Music Group Corp* 572 F Supp 2d 1150 (ND Cal 2008).

³⁵⁹ Copyright (Infringing File Sharing) Regulations 2011, reg 4. A signature may be digital.

³⁶⁰ *Ibid*, reg 7.

³⁶¹ Copyright Act 1994, s 122C(3).

³⁶² *Ibid*, ss 122M(3) and 122M(4). Section 122M(3) does specify a number of circumstances in which representation is permitted, such as in the case of a minor or if the Tribunal believes it proper in the circumstances to allow representation. The Tribunal has indicated any application seeking leave for a representative to be a lawyer would be dealt with on a case by case basis under sections 122M(3)(e) and 122M(3)(f) (Email from the Copyright Tribunal to author regarding the exercise of the Tribunal’s discretion to permit a party legal representation (2 October 2012)).

³⁶³ David Harvey “Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011” at 12. Judge Harvey, speaking in a personal capacity, notes that copyright law is a highly complex and specialised area of law where legal navigation is required. Judge Harvey is a District Court Judge and the former Chairperson of the Copyright Tribunal in New Zealand.

³⁶⁴ Copyright Act 1994, s 122M(3)(a) allows corporations to be represented by an officer, employee or member of the corporation, who would clearly have a thorough understanding of the CIFSA and its intricacies. Furthermore, copyright owners are also entitled to engage agencies such as NZFACT and RIANZ to act on their behalf as “rights owners” (Copyright Act 1994, s 122A(1)). These agencies exist to represent the interests of copyright owner and would have in-depth knowledge on the CIFSA.

³⁶⁵ *Ibid*, s 122B(4)(a). An award of up to \$15,000 can be awarded as compensation.

³⁶⁶ *Ibid*, s 122P. A copyright owner can only apply to the District Court if section 122P, the Internet suspension provision, is brought into force (see Copyright Act 1994, s 122I(1)(b)).

Tribunal. Copyright owners might also decide to only bring enforcement actions before the Tribunal, even if District Court suspension orders were available, due to the benefit of account holders not having legal representation.

(b) Suspension of Internet connections

The potential for a District Court to suspend an account holder's Internet account is particularly concerning were the relevant provision to come into force.³⁶⁷ A BBC survey found 87% of Internet users felt Internet access should be a right³⁶⁸ and it has already been declared a fundamental right in a number of jurisdictions.³⁶⁹ A UN Report also considered "cutting off users from Internet access, regardless of the justification provided, including on the grounds of violating intellectual property rights law, to be disproportionate and thus a violation of article 19, paragraph 3, of the International Covenant on Civil and Political Rights."³⁷⁰ The Report was later affirmed by the Human Rights Council.³⁷¹ Internet access is increasingly recognised as a fundamental human right.³⁷²

In New Zealand the suspending of Internet access might infringe the rights affirmed in the New Zealand Bill of Rights Act 1990.³⁷³ The question is whether limiting these

³⁶⁷ Copyright Act 1994, s 122P. This section is not yet in force. Section 122R provides that no person may apply for such an order until the Governor General on the recommendation of the Minister implements the section by Order in Council. The provision permits a District Court to order an ISP to suspend an account holder's Internet account for a maximum of six months.

³⁶⁸ BBC "Internet Access is a 'Fundamental Right'" (2010) BBC News: Technology <<http://news.bbc.co.uk>>.

³⁶⁹ Internet access has been ruled a fundamental right in Estonia (see Colin Woodard "Estonia, where being wired is a human right" (2003) *The Christian Science Monitor* <www.csmonitor.com> and the Estonian Public Information Act 2000, s 33), France (see Ian Sparks "Internet access is a fundamental human right, rules French court" (2009) *The Daily Mail Online* <www.dailymail.co.uk> and *French Constitutional Council Review of HADOPI* Decision No. 2009-580 DC, 10 June 2009), Finland (Finland Ministry of Transport and Communications "1 Mbit Internet access a universal service in Finland from the beginning of July" (press release, 29 June 2010)), Spain (Sarah Morris "Spain govt to guarantee legal right to broadband" (2009) *Reuters U.S. Edition* <www.reuters.com>) and Greece (*The Constitution of Greece*, Art 5A(2)).

³⁷⁰ *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression Frank La Rue*, HRC Res 7/36, UN HRCOR, 17th sess, A/HRC/17/27, (2011) at [78].

³⁷¹ Permanent Mission of the United States "U.N. Human Rights Council on Human Rights and the Internet" (2012) IIP Digital <<http://iipdigital.usembassy.gov>>.

³⁷² David Kravets "U.N. Report Declares Internet Access a Human Right" (2011) *WIRED* <www.wired.com>.

³⁷³ The New Zealand Bill of Rights Act 1990 will be referred to as the NZBORA. Such rights likely to be infringed upon by the suspension of Internet services include the freedom of expression to "seek, receive, and impart information and opinions of any kind in any form" (NZBORA, s 14), the freedom to manifest one's religion or belief in "public or private" (NZBORA, s 15), the freedom of peaceful

rights is demonstrably justified in a free and democratic society.³⁷⁴ This requires showing that the limitations are *reasonable* and have a *rational relationship to the objective*,³⁷⁵ which is clearly to protect copyright and deter P2P file-sharing. The limitation is arguably reasonable given a District Court has a wide discretion to determine whether or not to suspend an account³⁷⁶ and further discretion to determine the length of the suspension.³⁷⁷ Internet access is also only suspended in relation to one account, without disentitling users from subscribing to the services of another IPAP. Furthermore, many IPAPs can already terminate services, so it is not an unreasonable concept.³⁷⁸ Finally, Hon Simon Power MP has indicated that the Internet suspension provision is a last resort measure,³⁷⁹ emphasising that the limitation would have a rational relationship with the objective.

Despite these arguments, suspending Internet service for any length of time would be difficult to justify. In the 21st century Internet services have been compared to a basic utility,³⁸⁰ no less important than the provision of water or electricity.³⁸¹ Businesses rely on the Internet for providing services, students for education and it is increasingly

assembly in the digital realm (NZBORA, s 16) and the freedom to associate (NZBORA, s 17) which could all potentially be defeated if one cannot freely access Internet services. See Jonathon Penney “Open Connectivity, Open Data: Two Dimensions of the Right to Seek, Receive and Impart Information” (paper presented to NZCIEL Lecture Victoria University, Wellington, July 2010) at 58 who concludes that section 14 *does* offer a kind of “freedom to connect” to the Internet protected from unjustifiable and unreasonable interference by the New Zealand government.

³⁷⁴ New Zealand Bill of Rights Act 1990, s 5.

³⁷⁵ The Court of Appeal in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at 16 and 17 found that in determining whether a limitation is demonstrably justified requires identifying the objective that the legislature was endeavouring to achieve and assess the importance and significance of that objective, ensuring that the way in which the objective is statutorily achieved is in reasonable proportion to the importance of the objective, the means used has a rational relationship with the objective, in achieving the objective there is as little interference as possible with the right or freedom affected; the limitation is justifiable in light of the objective.

³⁷⁶ Copyright Act 1994, s 122P(1). “May” implies discretion.

³⁷⁷ *Ibid*, s 122P(4). In determining the length of the suspension the Tribunal may take into account the degree of the account holder’s reliance on access to the Internet, the identity of the actual infringer (if known), any other matters that may be specified in regulations and whether it would be manifestly unjust to suspend the account holder’s account.

³⁷⁸ Michael Einhorn, Intellectual Property and Product Counsel, Google, Inc. “YouTube’s Content Identification Systems and the New Licensing Models They Enable” (Fordham University School of Law Sixteenth Annual Conference on Intellectual Property Law and Policy, Fordham University School of Law, Fordham 27/28 March 2008). Many ISPs reserve the right to suspend Internet access if subscribers use their services for illegal activity.

³⁷⁹ Harper, above n 182. Commerce Minister Hon Simon Power MP has stated that the suspension of Internet connection provision of the Act will not be brought into force unless the existing sanctions proves to be ineffective.

³⁸⁰ Lance Wiggs (co-founder of Pacific Fibre) “Submission to the Commerce Select Committee on the Copyright (Infringing File Sharing) Amendment Act 2011” at 1.

³⁸¹ BBC “Internet Access”, above n 368.

necessary for citizens to engage with government services.³⁸² It has also been liberating for those with sight difficulties in reducing social isolation and dependence.³⁸³ The Internet as a telecommunications network even comes within the definition of a “lifeline utility” under Schedule 1 of the Civil Defence Emergency Management Act 2002. In emergencies The Ministry of Civil Defence & Emergency Management has used Internet services to provide updates.³⁸⁴ There is sufficient evidence that limiting the aforementioned rights in relation is *unreasonable* given the Internet’s role in society.

The argument users can simply change IPAPs in the event of a disconnection, or access Internet services through public libraries, mobile devices or at work,³⁸⁵ fails to take into account the practicalities of everyday life. Furthermore, in many rural areas of New Zealand only one IPAP may provide coverage.³⁸⁶ The limitation on rights is also not likely *rational to the objective*, given it is unlikely to act as a significant deterrent to serious offenders³⁸⁷ who hide their identity.³⁸⁸ Disconnection could also affect innocent users of an Internet account, not simply the infringer. Finally, the provision interferes with the private contractual relationship between IPAP and subscriber. Therefore disconnection is likely an *unreasonable* limitation and not adequately tied to the objective of deterring file-sharing as is required under the NZBORA.³⁸⁹ It may be that the absence of an Attorney-General Report³⁹⁰ reporting an inconsistency with the NZBORA³⁹¹ is not fatal to this argument. The suspension provision was not in force at the time of the passing of the CIFS, so may not have affected its compliance with

³⁸² Fuseworks Media “Smart online Govt services to make it easier for public” (2012) Voxy <www.voxy.co.nz>. Many civil and government services are now moving online, meaning the Internet is required for citizens to exercise their democratic rights and civil liberties.

³⁸³ Royal New Zealand Foundation of the Blind “Submission to the Commerce Select Committee on the Copyright (Infringing File Sharing) Amendment Act 2011” at 4.

³⁸⁴ See <https://twitter.com/NZcivildefence> for New Zealand Civil Defence’s Twitter account.

³⁸⁵ NZFACT “Submission to the Commerce Select Committee”, above n 34, at 7.

³⁸⁶ Kiri Gillespie “Rural Broadband a Turn Off” (2012) The New Zealand Herald <www.nzherald.co.nz>.

³⁸⁷ Society of Authors “Submission to the Commerce Select Committee”, above n 217, at 4.

³⁸⁸ See discussion of evasion technologies above under Increasing Use of Evasion Software and Technology.

³⁸⁹ *Moonen v Film and Literature Board of Review*, above n 375, at 16 and 17

³⁹⁰ Ministry of Justice “Section 7 Reports” (2012) Human Rights – New Zealand Bill of Rights Act 1990 <www.courts.govt.nz>.

³⁹¹ New Zealand Bill of Rights Act, s 7. Under section 7 the Attorney-General is to report to Parliament on any Bills introduced that appear to be inconsistent with the NZBORA.

the NZBORA.³⁹² With a 2011 UN Report finding that “the Internet has become an indispensable tool for realizing a range of human rights, combating inequality, and accelerating development and human progress”³⁹³ it is unlikely that Internet suspension could be found to be a justifiable limitation on the rights contained in the NZBORA.

(c) Privacy Issues

The regime treats the identity of account holders as sensitive information. IPAPs³⁹⁴ and the Tribunal³⁹⁵ must not disclose the name or contact details of the account holder. An account holder’s details are only disclosed in three situations, each with a built-in safeguard.³⁹⁶ However, the requirement IPAPs retain information regarding the allocation of IP addresses and infringements³⁹⁷ might breach an account holder’s right to privacy at international law.

Recording the details and data activities of users has been found to be a violation of privacy rights. The Romanian Constitutional Court found a number of international instruments affirm the right to privacy in respect of data collection, including the United Nations Universal Declaration of Human Rights,³⁹⁸ the International

³⁹² It must be noted that *if* the Attorney-General assessed the Copyright (Infringing File Sharing) Amendment Bill 2010 (119-1) as it was introduced (as is required by section 7 of the NZBORA), this may be a more determinative factor. At this earlier stage the Internet suspension provision did exist as an *enforceable provision* (existing as section 122O). Only after the Commerce Committee reported back on the second Copyright (Infringing File Sharing) Amendment Bill 2010 (119-2) was the provision’s enforcement (now section 122P) made provisional on a date set by Order in Council. If the Attorney-General determined the first incarnation of the Bill was compliant with the CIFSA this might be a far more influential finding.

³⁹³ *Report of the Special Rapporteur*, above n 370, at [85].

³⁹⁴ Copyright Act 1994, s 122F(5). The account holders details must not be disclosed when the IPAP notifies the copyright owner of the issuing of an enforcement notice. Also see section 122T(3) which establishes an IPAP is not to disclose account holder information unless the account holder consents or the Tribunal orders disclosure.

³⁹⁵ *Ibid*, s 122L(4). This only applies to decisions made on the papers without a hearing.

³⁹⁶ *Ibid*, s 122J(3). Disclosure to the Copyright Tribunal of the account holder’s identity is only permitted when the Tribunal is satisfied that a valid enforcement notice has been issued. Similarly, disclosure to the copyright owner is only when an order is made against the account holder (section 122L(4)) or when the copyright owner applies for a District Court order for the suspension of the account holder’s account (section 122Q(2)) and the copyright owners gives an undertaking to the Court that the details will only be used for the purpose of seeking a suspension order (section 122Q(2)(c)).

³⁹⁷ *Ibid*, s 122T.

³⁹⁸ United Nations Universal Declaration of Human Rights (adopted 10 December 1948), art 12. Article 12 states “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

Covenant on Civil and Political Rights³⁹⁹ and the Convention for the Protection of Human Rights and Fundamental Freedoms.⁴⁰⁰ The Court determined the Romanian Constitution⁴⁰¹ reiterated these rights and found that requiring IPAPs to record personal data was unconstitutional. The Federal Constitutional Court of Germany too ruled that a German law,⁴⁰² implemented in compliance with a European Council Data Retention Directive,⁴⁰³ that permitted the storage of data was a violation of privacy and unconstitutional.⁴⁰⁴ There has been further international criticism of this Directive by authorities worldwide.⁴⁰⁵ Although there is no general right to privacy in New Zealand,⁴⁰⁶ international law and authorities indicate the storing of personal data is a serious issue.

(d) Arbitrary Nature of a Three-Notice regime

A three-strikes regime might roll off the tongue easily, but from a policy standpoint it is arbitrary. Should one file-sharer illegally download three works 29 days apart in relation to the same copyright owner he/she would be caught outside of the three on-

³⁹⁹ International Covenant on Civil and Political Rights (opened for signatures 16 December 1966, entered into force 23 March 1976), art 17. Article 17 states “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”

⁴⁰⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signatures 4 November 1950, entered into force 3 September 1953), art 8. Article 8 states “Everyone has the right to respect for his private and family life, his home and his correspondence.”

⁴⁰¹ Constitution of Romania, art 26. Article 26(1) states “The public authorities shall respect and protect the intimate, family and private life.”

⁴⁰² Gesetz zur Neuregelung der Telekommunikationsüberwachung und anderer verdeckter Ermittlungsmaßnahmen sowie zur Umsetzung der Richtlinie 2006/24/EG.

⁴⁰³ Directive 2006/24/EC on Data Retention [2006] OJ L 105/54. This Directive required ISPs to keep information on who communicated with who, when and where from for use in prosecuting “serious crimes” (left to be determined by respective national legislatures). See Volker Kitz, above n 65.

⁴⁰⁴ BBC “German court orders stored telecoms data deletion” (2010) BBC News: Technology <<http://news.bbc.co.uk>>.

⁴⁰⁵ See Letter from European Data Protection Supervisor Peter Hustinx to the Commission to the Council and the European Parliament regarding the Data Retention Directive 2006/24/EC (31 May 2011). The European Data Protection Supervisor considered the Directive fails to comply with the requirements of privacy and data protection law. Also see Joint Letter from Patrick Breyer et al. to Cecilia Malmström, European Commissioner for Home Affairs regarding the Data Retention Directive 2006/24/EC (22 June 2010). This letter revealed the concerns of Europe’s physicians, journalists, human rights groups, IT security firms and legal experts with the Directive.

⁴⁰⁶ See *Brooker v Police* [2007] 2 NZLR 91 at [164]. A tort of privacy has been found to exist (see *Hosking v Runting* [2005] 1 NZLR 1), but only in narrow circumstances. The recent development of the tort of intrusion upon seclusion (see the recent High Court case of *C v Holland* [2012] NZHC 2155) might be of use to account holders who do not wish their Internet activity to be stored, but it is still too early to tell if the tort will be upheld. Privacy Act 1993, s 6 subcl 1 specifies account holders *would* have to be made expressly aware of any information or data IPAPs gather on them, but under section 11 the Principles are not enforceable (apart from Principle 6 which allows applicants to see any information stored that relates to them).

notice periods and be liable. Should another illegally download 3000 works within an on-notice period then cease all P2P file-sharing activity he/she *might* have received *one* notice, which in of itself imposes no liability. The Tribunal’s ability to award compensation for each and every infringement at the enforcement stage⁴⁰⁷ is irrelevant when the latter file-sharer is not even brought before the Tribunal. In this way the three-notice regime does not take into account the severity of the infringement.

(e) Concurrent Jurisdictions

Under the regime, a copyright owner can initiate concurrent proceedings against a P2P file-sharer in the Copyright Tribunal *and* the District Court.⁴⁰⁸ This could bring the regime into disrepute were the Tribunal and Court to come to different conclusions on the same evidence.⁴⁰⁹ It may be preferable to require copyright owners to choose the jurisdiction of *either* the Tribunal *or* the District Court to avoid this issue.

E. Assessment of the Overall Effectiveness of the CIFSA

1. Assessment of the CIFSA’s Ability to Address the Issues Raised by the Existing Legislative Framework

An effective CIFSA should allow copyright owners to enforce their copyright *and* deter infringing by targeting P2P file-sharers. Based on the above legal, practical and policy issues it appears that the CIFSA *may* successfully create a fast-track procedure for the enforcement of copyright. However, these issues threaten its ability to effectively sanction P2P file-sharers and therefore address P2P file-sharing.

Many of the issues discussed actually *assist* in creating a strict liability regime. The definitions of an “account holder” and “rights owner” allow copyright owners to

⁴⁰⁷ Copyright (Infringing File Sharing) Regulations 2011, reg 12.

⁴⁰⁸ Copyright Act 1994, s 122I(1). Copyright owners may initiate proceedings in “both” forums under this section. This would clearly only apply in the event section 122P was brought into force by Order in Council

⁴⁰⁹ InternetNZ “Submission to the Commerce Select Committee”, above n 19, at 27.

initiate proceedings against a clearly identified defendant through a designated agent. Furthermore, the barring of legal representation, presumption of guilt and arbitrary nature of the three-notice regime together reduce delays. However, the shortcomings also impede copyright owners from enforcing copyright. Were evasion technologies to become more commonplace the regime may be wholly ineffective. Similarly, an account holder's ability to change IPAPs could become a routine strategy to avoid liability. The administrative burden faced by parties, ability of account holders to escape liability based on minor technical errors and the potential for account holders to raise a "substantiality" argument all have the potential to undermine the regime if not addressed.

Whether the Copyright Tribunal chooses to assert its all-or-nothing discretion in favour of account holders or copyright owners is yet to be seen, but may be a deciding factor. However, it appears that that CIFSAs regime has the potential to be an effective framework under which copyright owners can enforce their copyright against the *majority* of P2P file-sharers. The regime may not be as effective against P2P file-sharers who utilise evasion technologies and change IPAPs, but there is no evidence a great number of users utilise these technologies or strategies at present.

Comparatively, the regime likely fails in deterring P2P file-sharers. The \$15,000 fine and potential for the suspension of an Internet connection may have the most potential to deter infringing. However, the suspension provision is not in force and the CIFSAs emphasis on operating as a strict liability largely undermines this focus. The definition of an "account holder" clearly illustrates the insignificance of the *actual* infringer. The definitions of "file-sharing" and "IPAP" fail to cover all instances of file-sharing practices and potentially create safe-havens of illegal activity. Even the arbitrary nature of the three-notice regime does not take into account the severity of the infringements and thus fails to deter serial infringers. The emphasis on a streamlined regime may have come at the cost of not deterring actual infringers.

2. Comparative Legislation

The CIFSAs effectiveness can also be assessed against the comparative success of another three-notice regime. There are a number of graduated response regimes

implemented worldwide.⁴¹⁰ However, the most useful comparison is the French HADOPI⁴¹¹ law, on which there is the most data to date. This law created a new government agency (HADOPI), which hears complaints from copyright owners against an IP address and sends notices to the account holder. The first is an email message, after which the account holder's ISP must monitor the IP address and may install a filter. If within 6 months another offence occurs, a letter is sent. If within a year there is another offence, HADOPI can either bring a claim against the account holder in a French court or require an ISP suspend Internet access for up to one year and have the user blacklisted so that other ISPs cannot provide him/her with an Internet connection.⁴¹² The HADOPI is therefore similar in nature to the CIFSA.

There is evidence that the law has reduced infringing. The HADOPI administration⁴¹³ found that 95% of infringers stopped illegally file-sharing after one notice.⁴¹⁴ The research also found that numerous agencies reported file-sharing decreasing by 17% to 66% based on various methodologies.⁴¹⁵ The IFPI found that unauthorised P2P file-sharing declined by 26%.⁴¹⁶ A survey conducted by HADOPI also revealed that one in three people more regularly consumed legitimate material due to the HADOPI laws.⁴¹⁷ An independent study reinforced this, finding that iTunes song and album sales increased by 22.5% and 25% respectively, coinciding with an increased consumer awareness of HADOPI⁴¹⁸ prior to its implementation.⁴¹⁹

⁴¹⁰ In the United Kingdom the Digital Economy Act implements a three-notice regime, but the implementation of the Act has been delayed pending judicial review and the development of an implementing code (see BBC "Digital Economy Act's anti-piracy measures are delayed" (2012) BBC News: Technology <www.bbc.com>). Ireland too has a graduated response programme that has been in operation since October 2010 by the country's largest ISP in agreement with the music industry (see IFPI "Digital Music Report 2012", above n 49, at 18). Graduated response regimes have also been implemented in the Republic of Korea, Taiwan Province of China and Chile (Lilian Edwards "Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights" (paper presented to World Intellectual Property Organisation, Geneva, June 2011) at 31).

⁴¹¹ Haute Autorité pour la diffusion des œuvres et la protection des droits sur Internet 2009.

⁴¹² Monica Horten "Briefing on France's Creation and Internet law: The Political Battle for Online Content in the European Union" (PhD research, Draft Briefing, University of Westminster, Communications and Media Research Institute, 2008) at 4.

⁴¹³ HADOPI "1 ½ Years After the Launch" (2012) HADOPI <hadopi.fr>. The report was commissioned to evaluate the effectiveness of the law 17 months on from its implementation.

⁴¹⁴ Ibid, at 3.

⁴¹⁵ Ibid. Methodologies range from examining the audience levels of websites hosting P2P file-sharing data, to the numbers of users utilising P2P file sharing networks.

⁴¹⁶ IFPI "Digital Music Report 2012", above n 49, at 17.

⁴¹⁷ HADOPI, above n 413, at 6.

⁴¹⁸ Siwen Chen, Brett Danaher, Michael Smith and Rahul Telang "The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France" (Academic Study, Wellesley College Department of Economics and Carnegie Mellon University, 2012) at Abstract. This

This increase in song downloads in France surpassed the 10% and 8% increase in the United States and United Kingdom respectively in the same timeframe, emphasising the HADOPIs effectiveness.⁴²⁰

Finally, the first infringer was brought before the courts under the HADOPI law for a third strike and fined in September 2012.⁴²¹ The defendant claimed he was innocent and that his wife downloaded the copyrighted material.⁴²² Whether this indicates the strict liability regime is working, or unjustly punishing the innocent, is open for debate. Opponents would argue that after *three years* and *substantial investment* the law has only fined one *innocent* man. However, copyright owners would likely view any successful action under the strict liability regime as a victory. In any case, research suggests the HADOPI has addressed P2P file-sharing in France to a degree, signifying the CIFSA may be similarly effective.

3. Views of Interested Parties

The CIFSA's success hinges on the co-operation of IPAPs and copyright owners engaging with the regime. These parties should feel confident in the regime and that it operates in their best interests. IPAPs consider the CIFSA to be a definite improvement on section 92A,⁴²³ but doubt the CIFSA will deter infringing.⁴²⁴ They note advanced users can evade detection⁴²⁵ and that termination would be a disproportionate and unworkable remedy.⁴²⁶ They also feel the regime may turn

assertion was supported by the fact the observed sales increases were attributable to genres that, prior to HADOPI, experienced high piracy levels (such as Rap and Hip Hop) than for those that were less pirated (such as Christian music, classical, and jazz).

⁴¹⁹ Ibid, at 20. Publicity of the law alone was enough to alter user behaviour.

⁴²⁰ IFPI "Digital Music Report 2012", above n 49, at 10.

⁴²¹ Sarah Jacobsson Purewal "French piracy law claims first (innocent) victim" (2012) PCWorld <www.pcworld.com>.

⁴²² This amounted to an admission of guilt under the HADOPI law on the part of the account holder in failing to secure his Internet network.

⁴²³ TCF "Submission to the Commerce Select Committee", above n 301, at 4. Also see Helmer and Davies, above n 4, at 54. ISPs view any law that focuses on actual infringers rather than imposing liability and obligations on intermediary third parties as a step in the right direction.

⁴²⁴ TelstraClear "Submission to the Commerce Select Committee", above n 144, at 2.

⁴²⁵ Ibid, at 4.

⁴²⁶ TCF "Submission to the Commerce Select Committee", above n 301, at 15.

consumers away from the services of particular IPAPs.⁴²⁷ Finally, IPAPs believe they incur too many obligations under the CIFSA without being fairly compensated.⁴²⁸

In comparison, copyright owners view the CIFSA as an effective deterrent⁴²⁹ that addresses the habits of users⁴³⁰ and is a definite improvement on section 92A.⁴³¹ However, they consider that without shorter timeframes and more effective sanctions P2P file-sharing will continue unabated.⁴³² The \$25 notice fee is touted as a major obstacle, with RIANZ arguing the CIFSA's potential failure would be "completely attributable" to this fee.⁴³³ Even the \$200 application fee is considered as discriminating between financially viable copyright owners⁴³⁴ and creating an unnecessary expense.⁴³⁵

Therefore, neither party appears to have a high degree of confidence in the CIFSA. If the CIFSA's primary participants have no faith in the regime, this increases the chance it will be ineffective. Copyright owners may cease to use the framework and IPAPs might only begrudgingly comply with their obligations, if at all.

4. Statistical Evaluation of Notices Sent and Actions of P2P File-Sharers

The effectiveness of the CIFSA would best be evaluated by analysing the number of successful enforcement actions. Unfortunately, no successful claims have been recorded.⁴³⁶ Despite this, the number of notices issued reveals the degree of engagement by copyright owners to date. Available evidence shows that RIANZ has

⁴²⁷ Ibid, at 3.

⁴²⁸ Ibid, at 8.

⁴²⁹ Motion Picture Distributors' Association of New Zealand, above n 51, at 1.

⁴³⁰ NZFACT "Submission to the Commerce Select Committee", above n 34, at 6.

⁴³¹ Copyright Council of New Zealand "Submission to the Commerce Select Committee on the Copyright (Infringing File Sharing) Amendment Act 2011" at 2. Many copyright owners argue that prior to the regime there was no reasonably effective method for owners to enforce their rights against illegal file-sharing.

⁴³² NZFACT "Submission to the Commerce Select Committee", above n 34, at 3.

⁴³³ RIANZ "Submission to the Ministry of Economic Development", above n 203, at 12.

⁴³⁴ Society of Authors "Submission to the Commerce Select Committee", above n 217, at 4.

⁴³⁵ Ibid, at 3.

⁴³⁶ Although three claims have been brought before the Tribunal as at 4 September 2012 they are yet to be heard as at the date of writing this dissertation. See Pullar-Strecker, above n 330.

sent notices under the regime.⁴³⁷ NZFACT had not issued any notices by May 2012.⁴³⁸ RIANZ sent 2,766 notices from November 2011 to April 2012, an average of 395 a month,⁴³⁹ while noting this figure could easily reach 5,000 a month.⁴⁴⁰ The TCF recorded that its members had received 2,393 rights owner notices at April 2012.⁴⁴¹ Of the larger IPAPs, Telecom had received 1,238 infringement notices,⁴⁴² Vodafone 417⁴⁴³ and TelstraClear 398 notices by April 2012.⁴⁴⁴ This shows a degree of engagement by copyright owners, indicating that the regime is perceived as having the potential to be effective. By December 2012 more evidence of engagement will be available, with IPAPs being required to publish details of their compliance with the CIFSAs.⁴⁴⁵

The effectiveness of the regime can also be evaluated by its effect on the actions of P2P file-sharers. A study by WAND⁴⁴⁶ on P2P file-sharing levels in New Zealand found file-sharing activity dropped significantly in September 2011, but there was a 210% increase in evasion technology.⁴⁴⁷ This emphasised how difficult it is to determine the volume of P2P file-sharing when infringers conceal their activity. It is similarly difficult to separate legitimate and illegitimate Internet use. As TelstraClear concedes, a recorded drop in its overall traffic around September 2011 does not

⁴³⁷ InternetNZ “Submission to the Ministry of Economic Development”, above n 183, at 2. This was InternetNZs understanding at 27 April 2012. InternetNZ represents the wider New Zealand Internet community.

⁴³⁸ NZFACT “Submission to the Ministry of Economic Development”, above n 303, at 6.

⁴³⁹ RIANZ “Submission to the Ministry of Economic Development”, above n 203, at 11.

⁴⁴⁰ Ibid, at 7. RIANZ has stated that reaching this figure would require the reduction of the \$25 rights owner notice fee.

⁴⁴¹ TCF “Submission to the Ministry of Economic Development”, above n 283, at 5. The TCF does not represent all ISPs in New Zealand, therefore it must be assumed non-TCF members have also received notices. Of the 2,393 rights owner notices received by TCF members, the ISPs had together sent out 1, 581 infringement notices. 1,495 were detection notices, 83 warning notices and 3 were enforcement notices. They recorded having received 69 challenges in response.

⁴⁴² Telecom “Submission to the Ministry of Economic Development”, above n 266, at 5. Of those forwarded to account holders 772 were detection notices, 18 warning and 1 enforcement, while 23 challenges had been received.

⁴⁴³ Vodafone “Submission to the Ministry of Economic Development”, above n 275, at 9. Of those forwarded to account holders 205 were detection notices, 12 warning and 1 enforcement, while 14 challenges had been received (5 of those being spam challenges).

⁴⁴⁴ TelstraClear “Submission to the Ministry of Economic Development”, above n 260, at 4. Of those forwarded to account holders 221 were detection notices, 19 warning and 1 enforcement, while 7 challenges had been received.

⁴⁴⁵ Copyright Act 1994, s 122T.

⁴⁴⁶ WAND is a research group at the University of Waikato Computer Science Department.

⁴⁴⁷ Alcock, above n 238, at 14.

necessarily suggest the regime is effective, but may be the result of extraneous factors (even if the suggestion is strong).⁴⁴⁸

The IFPI reports P2P network activity falling 16% between September and November 2011 as a result of the CIFSAs, with 62% of P2P users reporting a change in behaviour.⁴⁴⁹ RIANZ also noted a modest drop in P2P usage around the introduction of the CIFSAs.⁴⁵⁰ However, this appears to be due to the publicity surrounding the introduction of the Act, rather than a change in the attitude of P2P file-sharers. Piracy levels began climbing to a pre-CIFSAs level after its introduction, then dropped again when there was publicity surrounding the sending of the first detection notices.⁴⁵¹ Copyright owners cannot rely on “successive bouts” of publicity to ensure the effectiveness of the regime.⁴⁵² NZFACT and Telecom both note that although file-sharing decreased in September 2011, it has fluctuated since and even increased in March 2012.⁴⁵³ RIANZ reports that P2P file-sharing activity is down 18% since August 2011, but 700,000 still infringe monthly⁴⁵⁴ and in February 2012 41% of Internet users were still accessing copyright infringing services.⁴⁵⁵ Although there is a degree of engagement with the CIFSAs, the above figures indicate the regime may not be effectively deterring file-sharing.

D. Recommendations

Many of the loopholes and ambiguities in the CIFSAs identified above *could* be remedied by amendment. For example, the phrase “whether substantial or not” could be added to the definition of “infringement”⁴⁵⁶ to resolve the issue of partial downloads.⁴⁵⁷ Further examples of amendments would include extending the

⁴⁴⁸ TelstraClear “Submission to the Ministry of Economic Development”, above n 260, at 7.

⁴⁴⁹ IFPI “Digital Music Report 2012”, above n 49, at 19.

⁴⁵⁰ RIANZ “Submission to the Ministry of Economic Development”, above n 203, at 1.

⁴⁵¹ Telecom “Submission to the Ministry of Economic Development”, above n 266, at 6.

⁴⁵² RIANZ “Submission to the Ministry of Economic Development”, above n 203, at 1.

⁴⁵³ NZFACT “Submission to the Ministry of Economic Development”, above n 303, at 7. NZFACT quotes figures from Peer Media Technologies. Also see Telecom “Submission to the Ministry of Economic Development”, above n 266, at 6.

⁴⁵⁴ RIANZ “Submission to the Ministry of Economic Development”, above n 203, at 12.

⁴⁵⁵ *Ibid*, at 1.

⁴⁵⁶ Copyright Act, s 122A(1). “Infringement” is defined as meaning “an incidence of file sharing that involves the infringement of copyright in a work by a user”.

⁴⁵⁷ James and Wells, above n 64, at 5. “Infringement” could be defined as meaning “an incidence of file sharing that involves the infringement of copyright in a work by a user *whether substantial or not*”. Section

definition of “file-sharing” to cover non-traditional file-sharing practices. The definition of “IPAP” could be amended to reduce the likelihood of safe havens emerging. Parliament could also tie up the loose ends regarding IPAP discretion, the notification of cancellations and the Copyright Tribunal’s all-or-nothing discretion.

However, with regard to the *major* issues impacting the effectiveness of the regime,⁴⁵⁸ the author recommends a wait-and-see approach be adopted. Despite this evaluation revealing that the CIFSA may only be successful at providing copyright owners with an effective enforcement framework, *not* in deterring file-sharing, there is the potential for the CIFSA to be successful in both regards in time. This wait-and-see approach is based on three rationales.

First, the comparative success of the HADOPI law and international evidence reveals notices alone *can* deter infringement.⁴⁵⁹ In South Korea, 70% of infringers report that they would stop infringing on the receipt of a notice.⁴⁶⁰ A further international study found that more than 70% of respondents would cease infringing if they simply received a letter from their ISP.⁴⁶¹ Given that Parliament also considers notices will act as an effective deterrent,⁴⁶² the CIFSA deserves more time to prove its effectiveness at addressing P2P file-sharing via notices.

Secondly, until a successful enforcement action has been taken against P2P file-sharers the effectiveness of the regime in deterring file-sharing cannot be sufficiently examined. Once file-sharers see enforcement actions being taken against them, the deterrent effect of the regime may become more apparent.⁴⁶³ Parliament seemingly

29(2)(a) of the Copyright Act 1994 might also require amendment to exclude infringements under the CIFSA regime from being required to meet the substantiality requirement.

⁴⁵⁸ It must be noted some of issues identified may not even be able to be addressed, such as the use of evasion technologies and potentially even the strategy of switching ISPs (although the HADOPI law does address this issue through the creation of a blacklist).

⁴⁵⁹ Department for Business Innovation and Skill and Department for Culture, Media and Sport *Digital Britain: Final Report* (prepared for Parliament 2009) at 111. The Report does not cite a source for this data.

⁴⁶⁰ IFPI “Digital Music Report 2012”, above n 49, at 17 and 22. The IFPI references figures released from the South Korean government.

⁴⁶¹ Entertainment Media Research “2008 Digital Entertainment Survey Full Report” (2008) Entertainment Media Research Reports <www.entertainmentmediaresearch.com>.

⁴⁶² Ministry of Economic Development *Regulatory Impact Statement*, above n 35, at 8 and Copyright (Infringing File Sharing) Amendment Bill 2010 (119-2) (Explanatory Note) at 2.

⁴⁶³ Sudip Bhattacharjee, Ram Gopal, Kaveepan Lertwachara and James Marsden “Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions” (2006) 49

prioritised providing copyright owners with an effective framework for enforcement,⁴⁶⁴ believing successful enforcement would ultimately deter file-sharing⁴⁶⁵ through the imposition of sanctions.⁴⁶⁶ Evidence also shows that 48% of New Zealanders consider a fine would be a significant deterrent.⁴⁶⁷ Research conducted for NZFACT in 2008 found that 70% of Internet users in New Zealand would stop illegally file-sharing if their IPAP would suspend their Internet access.⁴⁶⁸ Internationally, 70% users claim they would stop file-sharing if there is the possibility of any sanction⁴⁶⁹ and in Germany this number is as high as 81%.⁴⁷⁰ Consequently, the regime must be given the opportunity to act as a deterrent in addition to providing an effective fast-track mechanism.

Thirdly, any amendments addressing the major issues are going to prioritise the interests of one party over another. For example, in addressing the issue of the burden on IPAPs, lowering the \$25 fee would prioritise copyright owners' interests. Conversely, increasing the fee would prioritise the interest of IPAPs. Another example would be addressing the issue of legal representation. Disallowing legal representation creates a fast-track regime in the best interests of copyright owners. Allowing legal representation is in the best interests of account holders. Therefore, one rationale for a wait-and-see approach is the difficulty in addressing the major issues. Parliament has prioritised certain parties interests, largely that of copyright owners, over others under the CIFSAs.⁴⁷¹ The existing balance of interests should be

Journal of Law and Economics 91 at 111. An increased public awareness of major lawsuits being conducted against file-sharers was found to be far more effective at deterring file-sharing than education campaigns.

⁴⁶⁴ Copyright (Infringing File Sharing) Amendment Bill 2010 (119-2) (select committee report) at 1. The Commerce Committee emphasised the Act was to provide a “more effective means for copyright owners to enforce their rights against people involved in unauthorised sharing of copyright material via the Internet (infringing file sharing). It aims to provide copyright owners with a fast-track alternative to existing remedies under the Act.”

⁴⁶⁵ Ministry of Economic Development *Regulatory Impact Statement*, above n 35, at 1 and 8. The MED sought to deter infringing through the creation a “more efficient and less costly civil enforcement regime for right holders against illegal P2P copyright infringement”

⁴⁶⁶ Copyright (Infringing File Sharing) Amendment Bill 2010 (119-2) (select committee report) at 6. The Commerce Committee discusses the deterrent effect of the suspension of Internet connections in the event the CIFSAs in its current format proves ineffective.

⁴⁶⁷ TelstraClear “Summary of New Zealander's opinions”, above n 18.

⁴⁶⁸ NZFACT “One Warning will stop most youth from infringing movies online” (press release, 20 October 2009). This was based on a survey of New Zealand Internet users aged between 15 and 30.

⁴⁶⁹ IFPI “Digital Music Report 2012”, above n 49, at 19.

⁴⁷⁰ *Ibid*, at 17 and 22.

⁴⁷¹ James Griffin “An Historical Solution to the Legal Challenge posed by Peer-to-Peer File Sharing and Digital Rights Management Technology” (2010) 15 *Journal of Computer, Media and*

given an opportunity to succeed. The regime has a number of shortcomings, has failed to inspire the confidence of IPAPs and copyright owners and has proven relatively ineffective to date. However, for the above three reasons a wait-and-see approach should be adopted.

Telecommunications Law 58 at 58. Griffin contends that the interest of copyright owners have often been emphasised under the law, despite the fact the balance may be inappropriate.

IV. Alternative Approaches

In the event the CIFSA proves ineffective at addressing P2P file-sharing, an alternative approach may be required, either in place of the CIFSA or to work in tandem. There are many alternative approaches. Notice-and-notice systems operate in a number of jurisdictions, including the United Kingdom and Canada.⁴⁷² These systems are similar to the CIFSA, but stop at the detection notice stage. Despite not providing an enforcement mechanism they have shown to be effective⁴⁷³ and are popular with ISPs and Internet advocates.⁴⁷⁴ Other methods include poisoning P2P networks,⁴⁷⁵ creating rights databases for more efficient and transparent rights licensing⁴⁷⁶ and implementing digital rights management systems.⁴⁷⁷ A selection of more modern alternative approaches is discussed below.⁴⁷⁸

A. Alternative Prevention Strategies

1. Blocking Websites

Copyright owners are increasing lobbying governments and ISPs to block websites that enable access to infringing material. In April 2011, an Indian judiciary ordered

⁴⁷² Edwards, above n 410, at 29. In Canada, a notice-and-notice system has been in place since 2001 and in the United Kingdom a notice-and-notice system was adopted in 2008 by six ISPs

⁴⁷³ Entertainment Media Research, above n 461. Although Edwards, above n 410, at 30 argues that notice-and-notice systems do not deter dedicated infringers.

⁴⁷⁴ The TCF and InternetNZ both called for New Zealand to implement a notice-and-notice system to avoid the cost and complexity of a three-notice regime. See TCF “Submission to the Commerce Select Committee”, above n 301, at 15. Also see InternetNZ “Submission to the Commerce Select Committee” above n 19, at 17.

⁴⁷⁵ Poisoning strategies involve planting intentional decoys of pirated content into P2P networks, which have been shown to influence the perceived availability of content in the networks (see Andreas Weigend, John Chuang and Nicolas Christin “Content Availability, Pollution, and Poisoning in File Sharing Peer-to-Peer Networks” (paper presented to ACM Conference on Electronic Commerce (EC’05), Vancouver, June 2005) or planting corrupted files (see Alexandra Sims “Intellectual Property” (2006) *New Zealand Law Journal* 333 at 333).

⁴⁷⁶ IFPI “Submission to the European Commission”, above n 29, at 6.

⁴⁷⁷ Digital Rights Management systems use encryption technology or licensing restrictions that control access to digital information once sold (see Edwards, above n 410, at 63). There is ongoing debate regarding whether Digital Rights Management systems deter infringement and enable access to content (see Marty Hansen, above n 9) or increase piracy by making content less usable for end-users (see Dinah Vernik, Devavrat Purohit and Preyas Desai “Music Downloads and the Flip Side of Digital Rights Management” (2012) 31 *Marketing Science* 603 at 613).

⁴⁷⁸ It is outside the scope of the dissertation to discuss the many alternative approaches available.

11 websites to be blocked by Indian ISPs.⁴⁷⁹ In May 2011, the Supreme Court in Denmark upheld the blocking of TPB.⁴⁸⁰ In June 2011, the Malaysian Communications and Multimedia Commission ordered the country's ISPs to block ten file-sharing websites for violating Malaysian copyright laws.⁴⁸¹ In April 2012 the High Court in the United Kingdom ruled ISPs must block access to TPB.⁴⁸² These are only a number of examples, but reveal that website blocking is becoming increasingly popular.⁴⁸³

The effectiveness of blocking websites is questionable. In Belgium, after blocking access to TPB,⁴⁸⁴ the service's audience fell by 84%.⁴⁸⁵ Similarly, after blocking access to TPB in Italy, usage of the service fell by 74%.⁴⁸⁶ However, new websites quickly replace those blocked and blocks are often undermined.⁴⁸⁷ Even Dr Vint Cerf, one of the "founding fathers" of the Internet, argues that government attempts to regulate and censor the Internet are likely to fail.⁴⁸⁸

Figures also suggest that website blocking has no effect on P2P file-sharing. When TPB was blocked in the United Kingdom, ISPs reported traffic peaking in the days prior to the block, briefly dropping 11% after the ban, then rising back to pre-block volumes.⁴⁸⁹ TPB even reports receiving 12 million *extra* visitors the day after the ban

⁴⁷⁹ John Ribeiro "India Temporarily Restricts Use of SMS, Blocks Certain Websites" (2012) PCWorld <www.pcworld.com>. See *R.K. Production Private Limited v Bharath Sanchar Nigam Limited & Ors* HC Madras O.A. No. 230 of 2012, 29 March 2012 for the court order. The websites in question illegally distributed copyright works and were blocked on application by the Department of Information Technology.

⁴⁸⁰ Enigmax "Supreme Court Rules Pirate Bay Must Stay Blocked" (2011) TorrentFreak <<http://torrentfreak.com>>.

⁴⁸¹ Wong Pek Mei Kumar and Jo Timbuong "No more free downloads as MCMC blocks 10 file-sharing sites" (2011) The Star Online <<http://thestar.com.my>>.

⁴⁸² Rory Cellan-Jones "The Pirate Bay must be blocked by UK ISPs, court rules" (2012) BBC News Technology <www.bbc.com>. See *Dramatic Entertainment Ltd v British Sky Broadcasting Limited* [2012] EWHC 1152 (Ch) for the full judgment.

⁴⁸³ IFPI "Digital Music Report 2012", above n 49, at 19.

⁴⁸⁴ In September 2011 the Antwerp Court of Appeal ordered ISPs Belgacom and Telenet to block access to The Pirate Bay.

⁴⁸⁵ IFPI "Digital Music Report 2012", above n 49, at 19. This data was accrued between August and November 2011.

⁴⁸⁶ *Ibid.*

⁴⁸⁷ BBC "Pirate Bay vows to go underground over blocking threat" (2012) BBC News Technology <<http://www.bbc.com>>.

⁴⁸⁸ Pedro Fonseca "Cerf sees government control of Internet failing" (2007) Reuters: U.S. Edition <www.reuters.com>.

⁴⁸⁹ Dave Lee "Pirate Bay block effectiveness short-lived, data suggests" (2012) BBC News Technology <www.bbc.com>.

due to the publicity, before the block was actually enforced.⁴⁹⁰ This proved detrimental, as in the time it took ISPs to implement a block TPB was active in demonstrating circumvention methods to users.⁴⁹¹ The fact Internet users are advanced enough to bypass blocks⁴⁹² indicates blocking websites is not an effective solution.

Critics further contest that website blocking infringes on Internet freedoms and that copyright owners are deceitful in their lobbying tactics.⁴⁹³ Copyright lobbyists have argued for child pornography laws in jurisdictions for the sole purpose of opening the floodgates to further Internet censorship.⁴⁹⁴ Once copyright owners can show the Internet *can* be censored there is greater scope for censorship to operate in their favour. An anti-piracy spokesman in Denmark has even been quoted as stating, “child pornography is great”.⁴⁹⁵ These tactics lead many to view website blocking as baseless attempts to censor free content.⁴⁹⁶ Therefore, website blocking may not be a strategy that should be employed alongside the CIFSAs.

2. Curbing the Influence of Search Engines

Internet search engines play a vital role for those looking for unlicensed material on the Internet, so mitigating their influence is a key priority.⁴⁹⁷ Search engines could be lobbied to stop providing directions to infringing material. However, completely deleting website listings would very quickly undermine the credibility of a search engine. Copyright owners instead contend search engines should prioritise legitimate

⁴⁹⁰ Luke Westaway “Pirate Bay claims record number of visitors following ISP ban” (2012) CNet UK <<http://crave.cnet.co.uk>>.

⁴⁹¹ Enigmax “Pirate Bay Enjoys 12 Million Traffic Boost, Shares Unblocking Tips” (2011) TorrentFreak <<http://torrentfreak.com>>.

⁴⁹² A simple Google search is enough to reveal numerous methods of bypassing the blocking of a website. See James Bruce “5 Ways of Bypass the UK Pirate Bay Block” (2012) MakeUseOf.Com <www.makeuseof.com>.

⁴⁹³ Cellan-Jones, above n 482.

⁴⁹⁴ Rick Falkvinge “The Copyright Lobby Absolutely Loves Child Pornography” (2011) TorrentFreak <<https://torrentfreak.com>>.

⁴⁹⁵ Christian Engström “IFPI’s Child Porn Strategy” (2010) Christian Engström, Pirate MEP <<https://christianengstrom.wordpress.com>>.

⁴⁹⁶ BBC “Pirate Bay vows”, above n 487.

⁴⁹⁷ IFPI “Digital Music Report 2012”, above n 49, at 3.

sites in search results, with illegal content to be “forcibly demoted”.⁴⁹⁸ Currently the top results overwhelmingly link to unauthorised content.⁴⁹⁹

The scale of the problem is illustrated by the fact 23% of consumers regularly download music illegally using Google to find the content.⁵⁰⁰ In New Zealand, 54% of illegal file-sharers said they found infringing material through a search engine and in Ireland this figure was 49%.⁵⁰¹ Addressing the search engine issue would clearly work to deter infringing. Copyright owners have even banded together and submitted an anti-piracy code for search engines in the United Kingdom, proposing search engines prioritise and delist particular websites.⁵⁰²

However, search engines are designed to allow users to search for content, no matter what its subject matter, and may be reluctant to manipulate results. Their credibility depends on complex algorithms ranking results according to a particular user.⁵⁰³ Copyright owners argue that these algorithms *have* been manipulated in the past, such as ensuring the first link to appear in the search of “suicide” on Google is Samaritans’ helpline number.⁵⁰⁴ However, manipulating algorithms for the public good is different from determining which websites should be demoted based on an indiscriminate measurement of their illegal content.⁵⁰⁵ So it may be there is scope for search engines to have a more active anti-piracy role, but copyright owners have a lot of work to do to ensure their cooperation.⁵⁰⁶

⁴⁹⁸ BBC “Pirate Bay vows”, above n 487.

⁴⁹⁹ IFPI “Digital Music Report 2012”, above n 49, at 3.

⁵⁰⁰ Ibid, at 24.

⁵⁰¹ Ibid. IPSOS MediaCT was responsible for the research conducted in New Zealand in August 2011 and for the Ireland research in October 2011.

⁵⁰² British Recorded Music Industry, Motion Pictures Association, Producers Alliance for Cinema and Television, The Premier League and the Publishers Association “Responsible Practices for Search Engines in Reducing Online Infringement Proposal for a Code of Practice Executive Summary” (2012) Scribd <www.scribd.com>.

⁵⁰³ Stephen Levy “Exclusive: How Google’s Algorithm Rules the Web” (2010) Wired <www.wired.com>.

⁵⁰⁴ BBC “Google offers Samaritans link-up” (2010) BBC News: Technology <www.bbc.com>. Samaritans is a call centre available for those in need.

⁵⁰⁵ Peter Bradwell “Revealed: Proposed new powers over search results” (2012) Open Rights Group <www.openrightsgroup.org>. Internet rights groups fear that the measurement of illegal content on websites might be arbitrary were search engines to voluntarily co-operate with copyright owners or be required to by law, resulting in legitimate websites being demoted.

⁵⁰⁶ IFPI “Digital Music Report 2012”, above n 49, at 9.

3. Reliance on Data Caps

Susan Chalmers proposes that P2P file-sharing could be combated by increased co-operation between copyright owners and ISPs and the existence of data caps.⁵⁰⁷ The OECD reports that all Internet plans in New Zealand have data caps that limit the amount of data users can consume.⁵⁰⁸ These data caps arguably “serve as a natural limit on downloading”⁵⁰⁹ and restrict file-sharing. Statistics reveal nearly 80% of users were subscribed to Internet plans of 20GB or less in 2010.⁵¹⁰ Chalmers argues that based on the price of these plans it is uneconomical for Internet users to download files illegally. The price of data consumption in illegally downloading material in many cases outweighs the price of purchasing the content through legitimate channels.

Crucially, data caps do not have to limit *legitimate* digital offerings over the Internet. Digital services are increasingly offered in partnerships with ISPs.⁵¹¹ ISPs offer special promotions where particular digital services accessed over their networks do not use any data.⁵¹² Similarly, digital content providers operating in countries with data caps take measures to compress their materials so less data is used in the consumption of works.⁵¹³ Data caps therefore deter file-sharing, while also permitting legitimate content delivery.⁵¹⁴ It is in the best interest of users to seek content through legitimate channels in order to avoid using considerable amounts of data.⁵¹⁵

⁵⁰⁷ Chalmers, above n 208, at 47.

⁵⁰⁸ OECD “Prevalence of explicit bit/data caps among surveyed offers, by country” (2012) OECD Broadband Portal <www.oecd.org/Internet>.

⁵⁰⁹ Chalmers, above n 208, at 47.

⁵¹⁰ Statistics New Zealand “Internet Service Provider Survey: June 2010” (2010) Statistics New Zealand <www.stats.govt.nz>.

⁵¹¹ IFPI “Digital Music Report 2012”, above n 49, at 12. A high-profile partnership launched in late 2011 was Virgin Media’s tie-up with Spotify.

⁵¹² See TiVo’s arrangement with Telecom (TiVo “Unlimited Freedom!” (2012) TiVo New Zealand: Unmetering <<http://myaccount.mytivo.co.nz>>), iSky’s arrangement with specific ISPs (NBR Staff “Everyone but Telecom: Sky TV names iSky partners” (2010) The National Business Review <www.nbr.co.nz>) and Orcon’s O Zone partnership with a number of content providers (Orcon “The Orcon O Zone” (2012) Orcon: At Home <www.orcon.net.nz>).

⁵¹³ Letter from Reed Hastings (CEO) and David Wells (CFO) of Netflix to shareholders regarding Netflix first quarter earnings for 2011 (25 April 2011).

⁵¹⁴ Chalmers, above n 208, at 49.

⁵¹⁵ One study shows in South Africa reveals that Internet users with data caps are very aware of their Internet usage and work to limit and prioritise Internet activity. See Marshini Chetty, Richard Banks, A.J. Brush, Jonathan Donner and Rebecca E. Grinter “You’re Capped! Understanding the Effects of Bandwidth Caps on Broadband Use in the Home” (paper presented to ACM annual conference on Human Factors in Computing Systems, Austin, May 2012).

This argument hinges on Internet users in New Zealand being subject to data caps, in addition to ISP and content provider co-operation. However, statistics reveal that the size of data caps in New Zealand are rapidly increasing and, in some cases, being abolished altogether. Users are quick to take advantage of increased caps, with 33% of Internet users admitting that their main motivation behind changing ISPs is the size of data caps.⁵¹⁶ Smaller ISPs already offer unlimited data packages,⁵¹⁷ larger ISPs are moving in the same direction⁵¹⁸ and there are rumours that data caps are becoming more competitive.⁵¹⁹ Therefore, how the ISP industry responds to consumer demand may undermine this deterrent factor.⁵²⁰ Despite this, the existence of data caps and co-operation between ISPs and content providers may work to deter infringing in the short-term.

B. Educating Users

Content industries have engaged prolifically in campaigns aimed at increasing awareness about the damage piracy causes. In New Zealand NZFACT,⁵²¹ RIANZ⁵²² and numerous other agencies⁵²³ seek to emphasise the importance of fairly compensating copyright owners.⁵²⁴ However, studies have found that simply highlighting the illegality of P2P file-sharing has little effect on the activities of file-sharers,⁵²⁵ only being effective when combined with national anti-piracy legislation.⁵²⁶ Despite this, a change in the focus of education might be more effective.

⁵¹⁶ 3 News Online Staff “Data caps top reason for switching ISPs – survey” (2012) 3 News <www.3news.co.nz>.

⁵¹⁷ See <http://wic.co.nz/>. It must be noted that even unlimited data plans are typically made subject to fair use policies that make unlimited downloading unfeasible.

⁵¹⁸ Siobhan Keogh “Orcon Announces Unlimited Broadband Plans” (2012) PCWorld <<http://pcworld.co.nz>>.

⁵¹⁹ Peter Griffin “Data-cap war: Good for consumer?” (2012) The Listener <www.listener.co.nz>.

⁵²⁰ One study reports that data cap models are *unlikely* to give way to unlimited plans completely due to infrastructure constraints. See Chetty, Banks, Brush, Donner and Grinter, above 515.

⁵²¹ See www.nzfact.co.nz.

⁵²² See www.rianz.org.nz.

⁵²³ IFPI “Digital Music Report 2012”, above n 49, at 26. The Music Matters campaign is an example of a campaign developed by a collective of artists and copyright owners to remind listeners of music’s enduring value. It encourages fans to consume music legally by highlighting the digital services that support artists.

⁵²⁴ See www.reportmusicpiracy.co.nz and www.lovemusic.co.nz for two agencies that promote artists and content providers in New Zealand.

⁵²⁵ Bhattacharjee, Gopal, Lertwachara and Marsden, above n 463, at 111. An increased public awareness of major lawsuits being conducted against file-sharers was far more effective at deterring file-sharing.

Educating consumers as to why copyright exists and upholding the purpose of copyright may go some way to addressing the cavalier attitude of infringing file-sharing. Throughout history, the government's role has been to protect copyrighted materials to encourage innovation, while at the same time creating incentives for the distribution of these works to the general public.⁵²⁷ However, with the advent of the Internet the balance has tended towards rigidly enforcing copyright rather than providing incentives for distribution. This is demonstrated by the fact copyright owners have been able to stubbornly resist digital distribution models, while still being granted legislative mechanisms to enforce their copyright against infringers.

As a result, consumers become ignorant as to the moral and legal justifications behind copyright.⁵²⁸ P2P file-sharers instead view copyright as concentrating power in the hands of a few, being largely unaware of the incentive it provides.⁵²⁹ It does not help that many perceive the New Zealand government as vulnerable to international pressure⁵³⁰ or lobbying by the entertainment industry.⁵³¹ Parliament must re-educate consumers and restore their faith in copyright as a legal framework that drives innovation, not a one-way-street that grants an ever-expanding monopoly over creative works.⁵³² This could be achieved through a mixture of education efforts and

⁵²⁶ Chen, Danaher, Smith and Telang, above n 418, at 20.

⁵²⁷ Carolyn Andrepont "Digital Millennium Copyright Act: Copyright Protections for the Digital Age" 9 *The DePaul-LCA Journal of Art and Entertainment Law* 397 at 397.

⁵²⁸ Christopher Jensen "The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms" (2003) 56 *Stanford Law Review* 531 at 565

⁵²⁹ Alexandra Sims "New Directions in Copyright" (2005) *New Zealand Law Journal* 417 at 417. Sims argues lawyers are often no longer involved in the construction of copyright law, but instead interested parties with own their agenda (such as IBM, Walt Disney and Microsoft) write the law.

⁵³⁰ Colin Jackson, Founder of InternetNZ "Submission to the Commerce Select Committee on the Copyright (Infringing File Sharing) Amendment Act 2011" at 5. Also see Susan Chalmers "Don't trade away our digital future" (2012) *InternetNZ* <<http://internetnz.net.nz>> and Jane Kelsey "NZ Government must act now to stop US dictating Internet liability laws through the TPPA" (2011) *TPP Watch* <<http://tppwatch.org>>. It appears New Zealand may be required to adopt a DMCA compatible framework under the Trans-Pacific Strategic Economic Partnership.

⁵³¹ Matthew Lasar "WikiLeaks: US offered to bankroll New Zealand piracy crackdown" (2011) *arstechnica* <<http://arstechnica.com>>.

⁵³² Haute Autorité pour la diffusion des œuvres et la protection des droits sur Internet Government Bill (Explanatory Memorandum) at 1. The French government expressly recognised that copyright law must not simply pander to copyright owners, but instead must encourage the development of legal offerings on the Internet.

legislative responses and may encourage P2P file-sharers to respect and uphold copyright law.⁵³³

C. Competing With Free

Addressing the attitudes of P2P file-sharers is the most effective means of addressing P2P file-sharing. Legislative responses do little to confront the *motivations* of infringers. As discussed above, the attitudes of P2P users typically arise out of frustration at the price of content and the inability to access it at their leisure.⁵³⁴ Particularly in New Zealand, a consumer may only turn to piracy when there is no legal alternative. The fact 95% of global music is illegally downloaded reveals how entrenched this attitude is.⁵³⁵

To combat this, the entertainment industry must capitalise on the opportunities provided by the digital age⁵³⁶ and reinvent their business and distribution models.⁵³⁷ Responding to consumer demand will naturally reduce the incentive to illegally file-share and the ability for P2P file-sharers to justify their conduct.⁵³⁸ The head of the ISP TelstraClear, Allan Freeth, summarises the issue with the entertainment industry, in arguing that “rather than investing in innovative ways to legally provide people with the content they want ... these companies choose to pressure governments into legislating.”⁵³⁹ Traditional business models are out-dated, flawed and require a disproportionate amount of legislative support.⁵⁴⁰

The entertainment industry has been slow to adapt, but is increasingly abandoning its physical distribution frameworks and developing digital distribution alternatives.⁵⁴¹

⁵³³ Joshua Mitchell “Promoting Progress with Fair Use” (2011) 60 Duke Law Journal 1639 at 1640 and 1670.

⁵³⁴ TelstraClear, above n 18.

⁵³⁵ IFPI “Submission to the European Commission”, above n 29, at 4.

⁵³⁶ Helmer and Davies, above n 4, at 51.

⁵³⁷ Andrepont, above n 527, at 420.

⁵³⁸ Nathan Torkington “Submission to the Ministry of Economic Development on the Copyright (Infringing File Sharing) Regulations 2011 Fee Review” at 1.

⁵³⁹ Allan Freeth “OPINION: What’s wrong with copyright?” (press release, 15 August 2011).

⁵⁴⁰ Ibid.

⁵⁴¹ IFPI “Digital Music Report 2012”, above n 49, at 10. As digital media was for a long time feared to be the killer of the music and film, the entertainment industry has been reluctant to embrace it.

Digital distribution allows copyright owners to synchronise global release dates⁵⁴² and reduce the time New Zealanders have to wait to see television shows from months to days.⁵⁴³ Digital business models also deliver music and film to consumers where and when they want it.⁵⁴⁴ The IFPI notes that international digital music services are now present in 58 countries, with the number having doubled since 2011, increasing total digital revenues by 8%.⁵⁴⁵ The most prominent online music video platform VEVO⁵⁴⁶ reports it is streaming 3.6 billion videos a month to 415 million users worldwide and has delivered more than US\$100 million in royalties to copyright owners.⁵⁴⁷

In New Zealand there has been a proliferation of services delivering digital content. Services such as Caspa,⁵⁴⁸ Quickflix,⁵⁴⁹ and Mubi⁵⁵⁰ have entered the New Zealand film market and Rara⁵⁵¹, Music Unlimited⁵⁵², Rdio⁵⁵³, Grooveshark⁵⁵⁴ and Spotify⁵⁵⁵ offer music streaming services. The IFPI reports an increasing number of service providers worldwide with paying subscribers increasing at a phenomenal rate.⁵⁵⁶ Together these services offer access to millions of songs and films and there is a further intention to increase availability.⁵⁵⁷ Furthermore, there are countless opportunities for revenue generation, from the embedding of adverts⁵⁵⁸ to a user-pays system.⁵⁵⁹

⁵⁴² Olivennes, above n 40, at 2. Efforts are underway in France to shorten the timeframe between a film's initial cinema release and the availability of the film for legitimate download. There is nothing preventing the same efforts to be made in New Zealand. However, these efforts are being met with staunch resistance from the cinema industry (see Juliette Garside "Vue seeks deal over movie release windows" (2011) *The Guardian* <www.guardian.co.uk>).

⁵⁴³ MediaWorks TV "FAST FOUR" (2012) *FOUR* <www.four.co.nz>.

⁵⁴⁴ IFPI "Submission to the European Commission", above n 29, at 2.

⁵⁴⁵ IFPI "Digital Music Report 2012", above n 49, at 3.

⁵⁴⁶ See www.vevo.com. VEVO shows premium high-quality videos of original music programming and live events.

⁵⁴⁷ IFPI "Digital Music Report 2012", above n 49, at 13.

⁵⁴⁸ See <http://myaccount.mytivo.co.nz>.

⁵⁴⁹ See www.quickflix.co.nz.

⁵⁵⁰ See <http://mubi.com>.

⁵⁵¹ See <https://rara.com>.

⁵⁵² See <https://music.sonyentertainmentnetwork.com>.

⁵⁵³ See www.rdio.com.

⁵⁵⁴ See <http://grooveshark.com>.

⁵⁵⁵ See www.spotify.com.

⁵⁵⁶ IFPI "Digital Music Report 2012", above n 49, at 11.

⁵⁵⁷ PC World Staff "Should you try Spotify? NZ music streaming services compared" (2012) *PCWorld* <pcworld.co.nz>.

⁵⁵⁸ Alexander Macgillivray, Intellectual Property and Product Counsel, Google, Inc. "YouTube's Content Identification Systems and the New Licensing Models They Enable" (Fordham University School of Law Sixteenth Annual Conference on Intellectual Property Law and Policy, Fordham University School of Law, Fordham 27/28 March 2008).

As a result of digital innovations, music digital album sales have grown steadily in recent years. The United States and United Kingdom report sales were up 19% and 27% respectively in 2011, with digital albums accounting for 31% and 24% respectively of total sales.⁵⁶⁰ Single-track download sales are also up 10% in the United States, 8% in the United Kingdom and 23% in France.⁵⁶¹ Digital sales have even surpassed physical sales in the United States, with download services seeing continued strong consumer demand.⁵⁶² In Europe digital sales now account for 13% of the European music market, up from 6% in 2006.⁵⁶³

Therefore, cultural industries *are* improving the variety, ease of access and pricing of legal content available on the Internet.⁵⁶⁴ These new strategies are not only economical, but address the attitudes behind P2P file-sharing. The more copyright owners provide high quality services at a reasonable price, the more P2P file-sharers will turn to legitimate channels.⁵⁶⁵ Developing innovative means of distribution of inexpensive and easily accessible material is therefore a significant anti-piracy tool, in addressing the *justifications behind the attitude* of P2P file-sharers.⁵⁶⁶ P2P file-sharers cannot infringe on the grounds there are no low-cost alternatives if inexpensive legal alternatives are made just as accessible as illegal downloads. It is admittedly easy to critique the industry for failing to implement digital distribution models,⁵⁶⁷ when even

⁵⁵⁹ These opportunities are discussed in Brian Fitzgerald, Professor at Queensland University of Technology Law School in Brisbane “Web 2.0: Creator Utopia – Platform Owners’ Paradise, or Still the Same?” (Fordham University School of Law Sixteenth Annual Conference on Intellectual Property Law and Policy, Fordham University School of Law, Fordham 27/28 March 2008).

⁵⁶⁰ IFPI “Digital Music Report 2012”, above n 49, at 10.

⁵⁶¹ Ibid.

⁵⁶² Ibid, at 6.

⁵⁶³ IFPI “Submission to the European Commission”, above n 29, at 1.

⁵⁶⁴ Olivennes, above n 40, at 2.

⁵⁶⁵ Helmer and Davies, above n 4, at 55. Also see Edwards, above n 410, at 63. The argument that people will pay for high quality reasonably priced material was also made evident in late 2011 when comedian Louis C.K. made a comedy special available for download online for \$5, free of any digital protection and with no corporate involvement. Although the material was quickly made available for illegal download by infringers, the number of legitimate purchases far outnumbered the illegal downloads and the comedian made \$500,000 in four days. See Matthew Ingram “What Louis C.K. Knows That Most Media Companies Don’t” (2011) Bloomberg Businessweek <www.businessweek.com> and Chris Hannay “Why Louis C.K.’s big payday proves the Internet has ethics” (2011) The Globe and Mail <www.theglobeandmail.com>.

⁵⁶⁶ Commission of the European Communities *Creative Content Online in the Single Market* (prepared for the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region 2007) at 7.

⁵⁶⁷ Ibid, at 4. The Commission recognised there a great many challenges raised by the online distribution of creative content.

an attractive digital marketplace is going to struggle to compete with “free”.⁵⁶⁸ Therefore, it is not proposed that the industry be without a legislative framework for the effective enforcement of its rights when necessary *or* that all infringement will stop. However, the major barrier to addressing the attitudes of P2P file-sharers may be the entertainment industry itself.⁵⁶⁹

⁵⁶⁸ IFPI “Digital Music Report 2012”, above n 49, at 16. Also see Australasian Performing Rights Association and Australasian Mechanical Copyright Owners’ Society Limited, above n 117, at 4.

⁵⁶⁹ Admittedly in New Zealand the comparatively slow Internet speed (see OECD “Average advertised broadband download speed, by country” (2012) OECD Broadband Portal <www.oecd.org/Internet>) is also a major hurdle to allowing consumers to efficiently download material or stream rented feature films in real time legally. See Jonathan King and Matthew Grainger of Index Films Ltd “Submission to the Commerce Select Committee on the Copyright (Infringing File Sharing) Amendment Act 2011” at 1.

V. Conclusion

This review has revealed that the CIFSA is a definite improvement on existing legal frameworks.⁵⁷⁰ It has also revealed that despite numerous legal, practical and policy issues, the CIFSA is likely to be effective at creating an efficient regime for the enforcement of copyright. Orientating the CIFSA in this manner has come at the expense of effectively deterring file-sharing. However, as there is the potential for the regime to be effective at deterring file-sharing in time, the regime should be given the opportunity to operate. Despite this, whether or not the CIFSA deters file-sharing, a legal solution alone is never going to be effective.⁵⁷¹

The reality is that the digital world is constantly developing and copyright law is particularly susceptible to “recurrent episodes of revolutionary technological transformation”.⁵⁷² Unless the social attitudes behind P2P file-sharing are addressed, copyright owners and legislatures are going to be fighting constant battles to keep pace with technological development. This review has shown that to address P2P file-sharing copyright owners need to offer legal alternatives *in addition to* legislatures providing legal frameworks for the enforcement of copyright.⁵⁷³ Copyright law must continue to provide a legal foundation in the market for creative works to exist.⁵⁷⁴ However, new digital distribution models must confront P2P file-sharers’ justifications for downloading through offering accessible and reasonably priced high quality content.⁵⁷⁵ Alternative models of distribution are copyright owners’ greatest anti-piracy tool.⁵⁷⁶

⁵⁷⁰ Neill, above n 79, at 17. Existing legal frameworks proved to be ineffective, with modest successes coming at great expense to copyright owners both materially and in the form of negative publicity.

⁵⁷¹ Nick Bilton “Internet Pirate Will Always Win” (2012) *The New York Times* <www.nytimes.com>.

⁵⁷² Jensen, above n 528, at 533.

⁵⁷³ *Ibid.*, at 562 and 568. P2P file-sharing cannot be addressed solely through digital distribution and non-infringing alternatives, but legal rules are still required to create a culture of law-abidingness. Also see Motion Picture Association, above n 219, at 3, where the Motion Picture Association argues legal frameworks are required to support creativity and economic growth, while also allowing the development of new online distribution models.

⁵⁷⁴ Marty Hansen, above n 9. A failure to provide clear and enforceable rights in copyright works may result in a market failing to emerge at all.

⁵⁷⁵ The New Zealand Television Broadcasters’ Council “Submission to the Commerce Select Committee on the Copyright (Infringing File Sharing) Amendment Act 2011” at 2.

⁵⁷⁶ Kovacs, above n 19, at 783.

The CIFSA may be an effective short-term solution to P2P file-sharing, at least until the next generation of file-sharing technology emerges. However, to truly address P2P file-sharing the entertainment industry and governments worldwide must act together to provide the business models and infrastructure for the digital distribution of content, while working to regain consumers' trust and respect for copyright law. The author finishes with a quote from the former European Commissioner for Information Society and Media, Viviane Reding:⁵⁷⁷

It is necessary to penalise those who are breaking the law, but are there really enough attractive and consumer-friendly legal offers on the market? Does our present legal system for Intellectual Property Rights really live up to the expectations of the Internet generation? Have we considered all alternative options to repression? Have we really looked at the issue through the eyes of a 16 year old? Or only from the perspective of law professors who grew up in the Gutenberg Age? In my view, growing Internet piracy is a vote of no-confidence in existing business models and legal solutions. It should be a wake-up call for policy-makers.

⁵⁷⁷ Nate Anderson "Record labels keep blaming P2P, but it's a hard sell" (2009) *arstechnica* <<http://arstechnica.com>>. Reding is now the European Commissioner for Justice, Fundamental Rights and Citizenship.

VI. Bibliography

Books

Gasser, Urs and Palfrey, John *Born Digital: Understanding the First Generation of Digital Natives* (Basic Books, New York, 2008).

McLay, Geoff and Frankel, Suzy *Intellectual Property in New Zealand* (Lexis Nexis Butterworths, Wellington, 2002).

Smith, Graham *Internet Law and regulation* (4th ed, Sweet & Maxwell, London, 2007).

Stokes, Simon *Digital Copyright Law and Practice* (3rd ed, Oxford, Portland, 2009).

Todd, Stephen (Ed.) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009).

Cases

Australia

National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd [2012] FCAFC 59.

Roadshow Films Pty Ltd v iiNet Limited [2012] HCA 16.

Singtel Optus Pty Ltd v National Rugby League Investments Pty Limited (No 2) [2012] FCA 34.

Universal Music Australia Pty Ltd v Cooper (2006) FCAFC 187.

Universal Music Australia Pty Ltd v Sharman License Holdings Ltd (2005) 65 IPR 289.

University of New South Wales v Moorhouse [1976] RPC 151.

Canada

CCH Canadian Ltd v Law Society of Upper Canada [2004] 1 SCR 339.

Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers [2004] 2 SCR 427.

England

CBS Songs Ltd v Amstrad Consumer Electronics Plc [1988] AC 1013.

Dramatic Entertainment Ltd v British Sky Broadcasting Limited [2012] EWHC 1152 (Ch).

Ladbroke (Football) Limited v William Hill (Football) Limited [1964] 1 All ER 465, 469.

Norwich Pharmacal Co and Others v Customs & Excise Commissioners [1974] AC 133.

Twentieth Century Fox Film Corporation & Anor v Newzbin Ltd [2010] EWHC 608 (Ch).

France

French Constitutional Council Review of HADOPI Decision No. 2009-580 DC, 10 June 2009.

India

R.K. Production Private Limited v Bharath Sanchar Nigam Limited & Ors HC Madras O.A. No. 230 of 2012, 29 March 2012.

New Zealand

Brooker v Police [2007] NZSC 30; [2007] 2 NZLR 91.

C v Holland [2012] NZHC 2155.

Heinz Watties Limited v Spantech Pty Ltd (2006) 8 NZBLC 101,679.

Henkel KGaA v Holdfast New Zealand Ltd [2007] 1 NZLR 577.

Hosking v Runting [2005] 1 NZLR 1.

Moonen v Film and Literature Board of Review [2000] 2 NZLR 9 (CA).

Munhwa Broadcasting Corporation v Young International 2009 Ltd [2011] NZLR 779.

Steelbro NZ Ltd v Tidd Ross Todd Ltd [2007] NZCA 486.

United States of America

A&M Records, Inc v Napster Inc 239 F 3d 1004 (9th Cir 2001).

Arista Records LLC v Lime Group LLC 715 F. Supp. 2d 481 (SD NY 2010).

Charter Communication, Inc v Recording Industry Association of America, Inc 393 F.3d 771 (2005).

Corbis Corp v Amazon.com Inc 351 F Supp 2d 1090 (WD Wash 2004).

Lenz v Universal Music Group Corp 572 F Supp 2d 1150 (ND Cal 2008).

Metro-Goldwyn-Meyer Studios Inc v Grokster, Ltd 545 US 913 (2005).

Perfect 10 Inc v CC Bill LLC 481 F 3d 751 (9th Cir 2008).

Recording Industry Assn of America v Verizon Internet Serve 351 F 3d 1229 (DC Cir 2003).

Religious Technology Centre v Netcom On-line Communication Services 907 F Supp 1361 (ND Cal 1995).

Sony Corp v Universal Studios 464 US 417 (1984).

The Cartoon Network v CSC Holdings & Cablevision 536 F.3d 121 (2nd Cir 2008).

Dissertations

Harrop, Matthew "Something for Nothing: Copyright, ISP Liability and P2P File Sharing" (LLB(Hons) Dissertation, University of Otago, 2009).

Walker, Nathaniel "Am I Authorised?: Facilitating File Sharing in the Digital Age" (LLB(Hons) Dissertation, University of Otago, 2010).

Emails, Interviews and Letters

Email from Grant Wills to Jared McIntosh regarding the University of Auckland's position on the Copyright (Infringing File-sharing) Amendment Act 2011 (28 September 2012).

Email from Jan Flood to Jared McIntosh regarding the University of Otago's position on the Copyright (Infringing File-sharing) Amendment Act 2011 (14 September 2012).

Email from Joanna Jalfron to Jared McIntosh regarding Telecom New Zealand Ltd's position on the Copyright (Infringing File-sharing) Amendment Act 2011 (17 August 2012).

Email from Tony Eaton to Jared McIntosh regarding NZFACT's position on the Copyright (Infringing File-sharing) Amendment Act 2011 (16 August 2012).

Interview with Mark Borrie, Information Security Manager at the University of Otago (the author, personal interview, 19 September 2012).

Joint Letter from Patrick Breyer et al. to Cecilia Malmström, European Commissioner for Home Affairs regarding the Data Retention Directive 2006/24/EC (22 June 2010).

Letter from European Data Protection Supervisor Peter Hustinx to the Commission to the Council and the European Parliament regarding the Data Retention Directive 2006/24/EC (31 May 2011).

Letter from Reed Hastings (CEO) and David Wells (CFO) of Netflix to shareholders regarding Netflix first quarter earnings for 2011 (25 April 2011).

International and United Nations Material

Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signatures 4 November 1950, entered into force 3 September 1953).

Directive 2006/24/EC on Data Retention [2006] OJ L 105/54.

International Covenant on Civil and Political Rights (opened for signatures 16 December 1966, entered into force 23 March 1976).

United Nations Universal Declaration of Human Rights (adopted 10 December 1948).

Internet Material

3 News Online Staff “Data caps top reason for switching ISPs – survey” (2012) 3 News <www.3news.co.nz>.

Andersen, Birgitte and Frenz, Marion “The Impact of Music Downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada” (2007) Industry Canada <www.ic.gc.ca>.

Anderson, Nate “Record labels keep blaming P2P, but it's a hard sell” (2009) *arstechnica* <<http://arstechnica.com>>.

APRA | AMCOS “A summary of APRA and AMCOS’ 2009 financial year results” (2009) APRA | AMCOS <<http://issuu.com/apraamcos/>>.

APRA | AMCOS “A summary of APRA and AMCOS’ 2008 financial year results” (2008) APRA | AMCOS <<http://www.apra-amcos.com.au>>.

BBC “Digital Economy Act's anti-piracy measures are delayed” (2012) BBC News: Technology <www.bbc.com>.

BBC “German court orders stored telecoms data deletion” (2010) BBC News: Technology <<http://news.bbc.co.uk>>.

BBC “Google offers Samaritans link-up” (2010) BBC News: Technology <www.bbc.com>.

BBC “Internet Access is a ‘Fundamental Right’” (2010) BBC News: Technology <<http://news.bbc.co.uk>>.

BBC “Pirate Bay vows to go underground over blocking threat” (2012) BBC News: Technology <<http://www.bbc.com>>.

Bilton, Nick “Internet Pirate Will Always Win” (2012) The New York Times <www.nytimes.com>.

Bradwell, Peter “Revealed: Proposed new powers over search results” (2012) Open Rights Group <www.openrightsgroup.org>.

British Recorded Music Industry, Motion Pictures Association, Producers Alliance for Cinema and Television, The Premier League and the Publishers Association “Responsible Practices for Search Engines in Reducing Online Infringement Proposal for a Code of Practice Executive Summary” (2012) Scribd <www.scribd.com>.

Beagle, Thomas “Interview – Cyberdodge VPN Service” (2011) Tech Liberty NZ <<http://techliberty.org.nz>>.

BIGdb71 “Not a strike, but a warning notice” (2011) 3StrikesNZ <<http://3strikes.net.nz>>.

Broughall, Nick “The Pirate Bay Offering Free Promotion For Musicians” (2012) GIZMODO <www.gizmodo.com.au>.

Bruce, James “5 Ways of Bypass the UK Pirate Bay Block” (2012) MakeUseOf.Com <www.makeuseof.com>.

Brunton, Jody Lee “How to Handle a Copyright Infringement Notice” (2011) CopyrightInfringementNotice.Com <<http://copyright-infringement-notice.com>>.

Carter, Zach and Grim, Ryan “SOPA Blackout Aims to Block Internet Censorship Bill” (2012) The Huffington Post <www.huffingtonpost.com>.

CBC News “E-mail warnings deter Canadians from illegal file-sharing” (2007) CBC News <www.cbc.ca>.

Cellan-Jones, Rory “The Pirate Bay must be blocked by UK ISPs, court rules” (2012) BBC News Technology <www.bbc.com>.

Chalmers, Susan “Don’t trade away our digital future” (2012) InternetNZ <<http://internetnz.net.nz>>.

Cheng, Jacqui “Study: pirates biggest music buyers. Labels: yeah, right” (2009) ArsTechnica <<http://arstechnica.com/tech>>.

Clark, Donald “File sharing law – NZ Downloaders Simply Switch Tactics” (2012) National Business Review <www.nbr.co.nz>.

Clarke, Ian “What is Freenet?” (2012) Freenet: The Free Network <<https://freenetproject.org>>.

Couts, Andrew “Megaupload shut down by feds: Why do we need SOPA?” (2012) Digital Trends <www.digitaltrends.com>.

Engström, Christian “IFPI’s Child Porn Strategy” (2010) Christian Engström, Pirate MEP <<https://christianengstrom.wordpress.com>>.

Enigmax “Anonymous Targets Malaysia Over File-sharing Censorship” (2012) TorrentFreak <<http://torrentfreak.com>>.

Enigmax “How To Make VPNs Even More Secure” (2012) TorrentFreak <<http://torrentfreak.com>>.

Enigmax “Pirate Bay Enjoys 12 Million Traffic Boost, Shares Unblocking Tips” (2011) TorrentFreak <<http://torrentfreak.com>>.

Enigmax “Supreme Court Rules Pirate Bay Must Stay Blocked” (2011) TorrentFreak <<http://torrentfreak.com>>.

Enigmax “Which VPN Providers Really Take Anonymity Seriously?” (2011) TorrentFreak <<http://torrentfreak.com>>.

Enigmax “Young File-sharers Respond To Tough Laws By Buying A VPN” (2012) TorrentFreak <<http://torrentfreak.com>>.

Entertainment Media Research “2008 Digital Entertainment Survey Full Report” (2008) Entertainment Media Research Reports <www.entertainmentmediaresearch.com>.

Ernesto “How Long Before VPNs Become Illegal” (2012) TorrentFreak <<http://torrentfreak.com>>.

Ernesto “PayPal Bans BitTorrent Friendly VPN Provider” (2012) TorrentFreak <<http://torrentfreak.com>>.

Falkvinge, Rick “The Copyright Lobby Absolutely Loves Child Pornography” (2011) TorrentFreak <<https://torrentfreak.com>>.

Fonseca, Pedro “Cerf sees government control of Internet failing” (2007) Reuters: U.S. Edition <www.reuters.com>.

Fuseworks Media “Smart online Govt services to make it easier for public” (2012) Voxy <www.voxy.co.nz>.

Garside, Juliette “Vue seeks deal over movie release windows” (2011) The Guardian <www.guardian.co.uk>.

Gibbons, Ted “Google Submission Hammers Section 92A” (2009) New Zealand PCWorld <<http://pcworld.co.nz>>.

Gillespie, Kiri “Rural Broadband a Turn Off” (2012) The New Zealand Herald <www.nzherald.co.nz>.

Glater, Jonathan “Privacy for People Who Don’t Show their Navels” (2006) The New York Times <www.nytimes.com>.

Griffin, Peter “Data-cap war: Good for consumer?” (2012) The Listener <www.listener.co.nz>.

HADOPI “1 ½ Years After the Launch” (2012) HADOPI <hadopi.fr>.

Hannay, Chris “Why Louis C.K.’s big payday proves the Internet has ethics” (2011) The Globe and Mail <www.theglobeandmail.com>.

Harper, Paul “Labour would scrap new web law” (2011) The New Zealand Herald <www.nzherald.co.nz>.

IFPI “Digital Music Report 2012” (2012) IFPI <www.ifpi.org>.

Ingram, Matthew “What Louis C.K. Knows That Most Media Companies Don't” (2011) Bloomberg Businessweek <www.businessweek.com>.

InternetNZ “Frequently Asked Questions” (2012) 3strikesNZ <<http://3strikes.net.nz>>.

Keall, Chris “Govt thwarts film, movie industry lobbyists by keeping copyright infringement notice fee at \$25” The National Business Review (2012) <www.nbr.co.nz>.

Kelsey, Jane “NZ Government must act now to stop US dictating Internet liability laws through the TPPA” (2011) TPP Watch <<http://tppwatch.org>>.

Keogh, Siobhan “Orcon Announces Unlimited Broadband Plans” (2012) PCWorld <<http://pcworld.co.nz>>.

Kravets, David “U.N. Report Declares Internet Access a Human Right” (2011) WIRED <www.wired.com>.

Lasar, Matthew “WikiLeaks: US offered to bankroll New Zealand piracy crackdown” (2011) arstechnica <<http://arstechnica.com>>.

Lee, Dave “Pirate Bay block effectiveness short-lived, data suggests” (2012) BBC News Technology <www.bbc.com>.

Levy, Stephen “Exclusive: How Google’s Algorithm Rules the Web” (2010) Wired <www.wired.com>.

McBride, Sarah and Smith, Ethan “Music Industry to Abandon Mass Suits” (2008) The Wall Street Journal <<http://online.wsj.com>>.

McGuire, David “At a Glance: MGM v. Grokster” (2005) The Washington Post <www.washingtonpost.com>.

McClintock, Pamela “Box Office Report: 'Avengers' Even Bigger With \$207.4 Million Opening” (2012) The Hollywood Reporter <www.hollywoodreporter.com>.

MediaWorks TV “FAST FOUR” (2012) FOUR <www.four.co.nz>.

Metz, Cade “Legal Battle Over File-sharing Continue” (2005) ABC News <<http://abcnews.go.com>>.

Meyer, David “French copyright crackdown claims first victim” (2012) ZDNet <www.zdnet.com>.

Ministry of Justice “Section 7 Reports” (2012) Human Rights – New Zealand Bill of Rights Act 1990 <www.courts.govt.nz>.

Morris, Sarah “Spain govt to guarantee legal right to broadband” (2009) Reuters U.S. Edition <www.reuters.com>.

Nba-Base “Should I pay the copyright settlement?” (2011) FreeAdvice <<http://forum.freeadvice.com>>.

NBR Staff “Everyone but Telecom: Sky TV names iSky partners” (2010) The National Business Review <www.nbr.co.nz>.

O’Brien, Danny “France Declares Three Strikes Unconstitutional” (2009) Electronic Frontier Foundation <www.eff.org>.

OECD “Average advertised broadband download speed, by country” (2012) OECD Broadband Portal <www.oecd.org/Internet>.

OECD “OECD Broadband Statistics” (2011) OECD Broadband Portal <www.oecd.org>.

OECD “Prevalence of explicit bit/data caps among surveyed offers, by country” (2012) OECD Broadband Portal <www.oecd.org/Internet>.

Orcon “The Orcon O Zone” (2012) Orcon: At Home <www.orcon.net.nz>.

Patkar, Mihir “Hackers set June 9 deadline to unblock sites” (2012) *The Times of India* <<http://timesofindia.indiatimes.com>>.

PC World Staff “Should you try Spotify? NZ music streaming services compared” (2012) PCWorld <pcworld.co.nz>.

Pek Mei Kumar, Wong and Timbuong, Jo “No more free downloads as MCMC blocks 10 file-sharing sites” (2011) *The Star Online* <<http://thestar.com.my>>.

Pepitone, Julianne “50,000 BitTorrent Users Sued for Alleged Illegal Downloads” (2011) *CNN Money* <<http://money.cnn.com>>.

Plafke, James “The Pirate Bay Launches Free Promotion Platform for Artists” (2012) *Geekosystem* <www.geekosystem.com>.

Permanent Mission of the United States “U.N. Human Rights Council on Human Rights and the Internet” (2012) *IIP Digital* <<http://iipdigital.usembassy.gov>>.

Power, Simon “Cabinet approves notice fee for copyright regime” (2001) *The Official Website of the New Zealand Parliament* <<http://beehive.govt.nz>>.

Pullar-Strecker, Tom “Studios make example of Kiwi downloaders” (2012) *The Dominion Post* <www.stuff.co.nz/dominion-post>.

Purewal, Jacobsson “French piracy law claims first (innocent) victim” (2012) *PCWorld* <www.pcworld.com>.

Recording Industry Association of America “Scope of the Problem” (2012) *RIAA – Piracy Online* <www.riaa.com>.

Reisinger, Don “Finland makes 1Mb broadband access a legal right” (2009) *CNet News* <<http://news.cnet.com>>.

Ribeiro, John “India Temporarily Restricts Use of SMS, Blocks Certain Websites” (2012) *PCWorld* <www.pcworld.com>.

Rossini, Carolina and Welinder, Yana “All Nations Lose with TPP’s Expansion of Copyright Terms” (2012) *Electronic Frontier Foundation* <www.eff.org>.

Salzenberg, Chip “What is Usenet?” (2012) *Internet FAQ Archives* <www.faqs.org/faqs/usenet>.

Seltzer, Wendy “Diebold Coughs up Cash in Copyright Case” (2004) *Electronic Frontier Foundation* <www.eff.org>.

Sharky “10 Reasons Why You Need a Seedbox” (2008) *TorrentFreak* <<http://torrentfreak.com>>.

Shastry, Sangeeta “Internet piracy taking big toll on jobs” (2010) *Reuters U.S. Edition* <www.reuters.com>.

Siwek, Stephen “The True Cost of Sound Recording Piracy to the U.S. Economy” (2007) *The Institute for Policy Innovation* <www.ipi.org>.

Sparks, Ian “Internet access is a fundamental human right, rules French court” (2009) The Daily Mail Online <www.dailymail.co.uk>.

Statistics New Zealand “Internet Service Provider Survey: June 2010” (2010) Statistics New Zealand <www.stats.govt.nz>.

SuperchargeMyTorrent “How It Works” (2009) SuperchargeMyTorrent <<https://superchargemytorrent.com>>.

TelstraClear “Summary of New Zealander’s opinions on accessing and copying content” (2009) TelstraClear Media Releases <www.telstraclear.co.nz>.

TiVo “Unlimited Freedom!” (2012) TiVo New Zealand: Unmetering <<http://myaccount.mytivo.co.nz>>.

Tor “Tor: Overview” (2012) The Tor Project <www.torproject.org>.

Unitec Institute of Technology “New Copyright Legislation Affects You” (2011) Student News <www.unitec.ac.nz>.

University of Auckland “On 1 September 2011 the Copyright (Infringing File Sharing) Act 2011 came into force” (2011) Notices <www.auckland.ac.nz>.

Vietri, Carmen “Section 92A on hold” (2009) Copyright Council of New Zealand <www.copyright.org.nz>.

Walls, Alex “Copyright Tribunal to expand for new Internet law ... but will it still get snowed?” (2011) The National Business Review <www.nbr.co.nz>.

Walls, Alex “Orcon, Vodafone, Telecom, TelstraClear receive infringement notices” (2011) The National Business Review <www.nbr.co.nz>.

WAND Research Group University of Waikato Computer Science Department “Impact of the Copyright Amendment Act at NZNOG” (2012) WAND Network Research Group <www.wand.net.nz>.

Westaway, Luke “Pirate Bay claims record number of visitors following ISP ban” (2012) CNet UK <<http://crave.cnet.co.uk>>.

Woodard, Colin “Estonia, where being wired is a human right” (2003) The Christian Science Monitor <www.csmonitor.com>.

Wortham, Jenna “Public Outcry Over Antipiracy Bills Began as Grass-Roots Grumbling” (2012) The New York Times <www.nytimes.com>.

Journal Articles

Andrepoint, Carolyn “Digital Millennium Copyright Act: Copyright Protections for the Digital Age” 9 The DePaul-LCA Journal of Art and Entertainment Law 397.

Chalmers, Susan “The Graduate Reponse and Data Caps: Examining Legal and Commercial Controls for Infringing P2P in New Zealand” (2012) 89 Intellectual Property Forum 39.

- Griffin, James “An Historical Solution to the Legal Challenge posed by Peer-to-Peer File Sharing and Digital Rights Management Technology” (2010) 15 *Journal of Computer, Media and Telecommunications Law* 58.
- Hietanen, Herkko, Huttunen, Anniina and Kokkinen, Heikki “Criminal Friends of Entertainment: Analysing Results from Recent Peer-to-Peer Surveys” (2008) 5 *SCRIPTed* 31.
- Helmer, Stuart and Davies, Isabel “File-sharing and downloading: goldmine or minefield?” (2009) 4 *Journal of Intellectual Property Law and Practice* 51.
- Hui, Kai-Lung and Png, Ivan “Piracy and the Legitimate Demand for Recorded Music” (2003) 2 *Contributions to Economic Analysis & Policy* 11.
- Jensen, Christopher “The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms” (2003) 56 *Stanford Law Review* 531.
- Kingsbury, Anna “Losing Control in Cyberspace?” (2004) *New Zealand Law Journal* 151.
- Kovacs, Albert “Quieting the Virtual Prison Riot: Why the Internet’s Spirit of ‘Sharing’ Must be Broken” 51 *Duke Law Journal* 753.
- Liebowitz, Stan “File-Sharing: Creative Destruction or just Plain Destruction?” (2008) 49 *Journal of Law and Economics* 1.
- Liebowitz, Stan “Testing File-Sharing's Impact by Examining Record Sales in Cities” (2008) 54 *Management Science* 852.
- McDonald, Victoria “Stirring the Waters: Whether The Pirate Bay case and the Thomas-Rasset Case Will Impact File Sharing and Piracy in Sweden and the United States” (2011) 20 *Transnational Law and Contemporary Problems* 563.
- Mercurio, Bryan “Internet Service Provider Liability for Copyright Infringements of Subscribers: A Comparison of the American and Australian Efforts to Combat the Uncertainty” (2002) 9 *Murdoch University Electronic Journal of Law* 19.
- Mitchell, Joshua “Promoting Progress with Fair Use” (2011) 60 *Duke Law Journal* 1639.
- Neill, Art “Does a New Wave of Filesharing Lawsuits Represent a New Business Model for Copyright Owners?” (2011) 14 *Journal of Internet Law* 8.
- Piasentin, Robert “Unlawful? Innovative? Unstoppable? A comparative analysis of the potential legal liability facing P2P end-users in the United States, United Kingdom and Canada” (2006) 14 *IJLIT* 195.
- Rob, Rafael and Waldfogel, Joel “Piracy on the Silver Screen” (2007) 55 *Journal of Industrial Economics* 379.
- Sawicki, Andres “Repeat Infringement in the Digital Millennium Copyright Act” (2006) 73 *University of Chicago Law Review* 1455.
- Sims, Alexandra “Intellectual Property” (2006) *New Zealand Law Journal* 333.
- Sims, Alexandra “New Directions in Copyright” (2005) *New Zealand Law Journal* 417.

Vernik, Dinah, Purohit, Devavrat and Desai, Preyas "Music Downloads and the Flip Side of Digital Rights Management" (2012) 31 Marketing Science 603.

Zentner, Alejandro "File-sharing and International Sales of Copyrighted Music: An Empirical Analysis with a Panel of Countries" (2005) 5 Topics in Economic Analysis & Policy 21.

Zentner, Alejandro "Measuring the Effect of File-sharing on Music Purchases" (2006) 49 The Journal of Law and Economics 63.

Legislation

Australia

Copyright Act 1968 (Cth).

Copyright Amendment (Digital Agenda) Act 2000 (Cth).

Copyright Legislation Amendment Act 2004 (Cth).

United States Free Trade Agreement Implementation Act 2004 (Cth).

England

Civil Procedure Rules (England).

Estonia

Public Information Act 2000.

France

French Intellectual Property Code.

Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet 2009.

Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet
Government Bill (Explanatory Memorandum).

Germany

Gesetz zur Neuregelung der Telekommunikationsüberwachung und anderer verdeckter Ermittlungsmaßnahmen sowie zur Umsetzung der Richtlinie 2006/24/EG.

Greece

The Constitution of Greece.

New Zealand

Copyright Act 1994.

Copyright (Infringing File-sharing) Amendment Act 2011.

Copyright (Infringing File-sharing) Amendment Bill 2010 (119-1).

Copyright (Infringing File-sharing) Amendment Bill 2010 (119-2) (Explanatory Note).

Copyright (Infringing File-sharing) Regulations 2011.

Copyright (New Technologies) Amendment Act 2008.

Copyright (New Technologies and Performers' Rights) Amendment Bill 2006 (102-1).

High Court Rules (New Zealand).

New Zealand Bill of Rights Act 1990.

Privacy Act 1993.

Supplementary Order Paper 2008 (193) Copyright (New Technologies) Amendment Bill (102-3).

Romania

Constitution of Romania.

United States of America

Digital Millennium Copyright Act 17 U.S.C.

Stop Online Piracy Act H.R.3261.

Papers, Presentations, Seminars and Speeches

Alcock, Shane, WAND Research Group University of Waikato Computer Science Department "Impact of the Copyright Amendment Act" (paper presented at NZNOG, Christchurch, January 2012).

Bhattacharjee, Sudip, Gopal, Ram, Lertwachara, Kaveepan and Marsden, James "Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions" (2006) 49 *Journal of Law and Economics* 91.

Chen, Siwen, Danaher, Brett, Smith, Michael and Telang, Rahul "The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France" (Academic Study, Wellesley College Department of Economics and Carnegie Mellon University, 2012).

Chetty, Marshini, Banks, Richard, Brush, A.J., Donner, Jonathan and Grinter, Rebecca "You're Capped! Understanding the Effects of Bandwidth Caps on Broadband Use in the Home" (paper presented to ACM annual conference on Human Factors in Computing Systems, Austin, May 2012).

Edwards, Lilian “Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights” (paper presented to World Intellectual Property Organisation, Geneva, June 2011).

Einhorn, Michael, Intellectual Property and Product Counsel, Google, Inc. “YouTube’s Content Identification Systems and the New Licensing Models They Enable” (Fordham University School of Law Sixteenth Annual Conference on Intellectual Property Law and Policy, Fordham University School of Law, Fordham 27/28 March 2008).

Fitzgerald, Brian, Professor at Queensland University of Technology Law School in Brisbane “Web 2.0: Creator Utopia – Platform Owners’ Paradise, or Still the Same?” (Fordham University School of Law Sixteenth Annual Conference on Intellectual Property Law and Policy, Fordham University School of Law, Fordham 27/28 March 2008).

Hansen, Marty, Covington & Burling (Washington D.C.) “Web 2.0: A Brief Overview of Issues and Challenges” (Fordham University School of Law Sixteenth Annual Conference on Intellectual Property Law and Policy, Fordham University School of Law, Fordham 27/28 March 2008).

Horten, Monica “Briefing on France’s Creation and Internet law: The Political Battle for Online Content in the European Union” (PhD research, Draft Briefing, University of Westminster, Communications and Media Research Institute, 2008).

Kitz, Volker Max Planck Institute for Intellectual Property (Munich) “Private Peers – What Role Should Privacy Law Play in Learning the Identity of P2P Users? The European Case” (Fordham University School of Law Sixteenth Annual Conference on Intellectual Property Law and Policy, Fordham University School of Law, Fordham 27/28 March 2008).

Kohno, Tadayoshi, Krishnamurthy, Arvind and Piatek, Michael “Challenges and Directions for Monitoring P2P File Sharing Networks, or, Why My Printer Received a DMCA Takedown Notice” (paper presented to HotSec ’08, San Jose, July 2008).

Liebowitz, Stan “The Metric is the Message: How much of the Decline in Sound Recording Sales is due to File-Sharing?” (Working Paper, University of Texas at Dallas, 2011).

Macgillivray, Alexander, Intellectual Property and Product Counsel, Google, Inc. “YouTube’s Content Identification Systems and the New Licensing Models They Enable” (Fordham University School of Law Sixteenth Annual Conference on Intellectual Property Law and Policy, Fordham University School of Law, Fordham 27/28 March 2008).

Penney, Jonathon “Open Connectivity, Open Data: Two Dimensions of the Right to Seek, Receive and Impart Information” (paper presented to NZCIEL Lecture Victoria University, Wellington, July 2010).

Weigend, Andreas, Chuang, John and Christin, Nicolas “Content Availability, Pollution, and Poisoning in File Sharing Peer-to-Peer Networks” (paper presented to ACM Conference on Electronic Commerce (*EC’05*), Vancouver, June 2005).

Press Releases

Allan Freeth “OPINION: What’s wrong with copyright?” (press release, 15 August 2011).

Finland Ministry of Transport and Communications “1 Mbit Internet access a universal service in Finland from the beginning of July” (press release, 29 June 2010).

Ministry of Economic Development “Information for Account Holders: Notice regime under Sections 122A to U of the Copyright Act. How does it work?” (press release, 2012).

New Zealand Federation Against Copyright “One Warning will stop most youth from infringing movies online” (press release, 20 October 2009).

Reports

Commission of the European Communities *Creative Content Online in the Single Market* (prepared for the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region 2007).

Copyright (Infringing File-sharing) Amendment Bill 2010 (119-2) (select committee report).

Copyright (New Technologies and Performers’ Rights) Amendment Bill 2008 (102-1) (select committee report).

Department for Business Innovation and Skill and Department for Culture, Media and Sport *Digital Britain: Final Report* (prepared for Parliament 2009).

Foss, Craig, Minister of Commerce *Copyright (Infringing File Sharing) Regulations - Review of Notice fee* (prepared for Cabinet Economic Growth and Infrastructure Committee 2011).

Law Commission *The New Media Meet ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011).

Ministry of Economic Development *Copyright (Infringing File-sharing) Amendment Bill Regulatory Impact Statement* (2011).

Ministry of Economic Development *Copyright (Infringing File-sharing) Regulations – Fee review Discussion Document* (2012).

Ministry of Economic Development *Departmental Report on the Copyright (Infringing File Sharing) Copyright Amendment Bill* (prepared for the Commerce Committee 2010).

Ministry of Economic Development Evaluation Team *Discussion Paper Growth and Dynamics of the New Zealand Screen Industry* (2012).

Olivennes, Denis *Elysée Agreement for the development and protection of creative works and cultural programmes on the new networks* (prepared for the Ministère de la Culture et de la Communication 2007).

PricewaterhouseCoopers *Economic contribution of the New Zealand film and television industry* (prepared for NZFACT 2009).

TERA Consultants *Building a Digital Economy: The Importance of Saving Jobs in EU’s Creative Industries* (prepared for the International Chamber of Commerce’s BASCAP Initiative 2010).

TNO: Netherlands Organisation for Applied Scientific Research, SEO Economisch Onderzoek and IViR *Economic and cultural effects of file-sharing on music, film and games* (prepared for the Ministries of Education, Culture and Science, Economic Affairs and Justice 2009).

United States Government Accountability Office *Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods* (prepared for Congressional Committees 2011).

Submissions

Australasian Performing Rights Association and Australasian Mechanical Copyright Owners' Society Limited "Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011".

CallPlus "Submission to the Ministry of Economic Development on the Copyright (Infringing File-sharing) Regulations 2011 Fee Review".

Copyright Council of New Zealand "Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011".

Copyright Council of New Zealand "Submission to the Ministry of Economic Development on the Copyright (Infringing File-sharing) Regulations 2011 Fee Review".

Harvey, David "Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011".

International Federation of the Phonographic Industry "Submission to the European Commission on the Green Paper on Cultural and Creative Industries 2010".

InternetNZ "Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011".

InternetNZ "Submission to the Ministry of Economic Development on the Copyright (Infringing File-sharing) Regulations 2011 Fee Review".

Jackson, Colin, Founder of InternetNZ "Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011".

James and Wells "Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011".

King, Jonathan and Grainger, Matthew of Index Films Ltd "Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011".

Library and Information Association of New Zealand Aotearoa "Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011".

McClintock, Jeff "Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011".

Matthew Perry "Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011".

Motion Picture Association “Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011”.

Motion Picture Distributors’ Association of New Zealand Incorporated “Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011”.

New Zealand Federation Against Copyright Theft “Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011”.

New Zealand Federation Against Copyright Theft “Submission to the Ministry of Economic Development on the Copyright (Infringing File-sharing) Regulations 2011 Fee Review”.

New Zealand Video Dealers Association Inc. “Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011”.

Reading Entertainment “Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011”.

Recording Industry Association of New Zealand “Submission to the Ministry of Economic Development on the Copyright (Infringing File-sharing) Regulations 2011 Fee Review”.

Roadshow Entertainment (NZ) Ltd “Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011”.

Royal New Zealand Foundation of the Blind “Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011”.

Society of Authors “Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011”.

Telecom Corporation of New Zealand “Submission to the Ministry of Economic Development on the Copyright (Infringing File-sharing) Regulations 2011 Fee Review”.

Telecommunications Carriers’ Forum “Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011”.

Telecommunications Carriers’ Forum “Submission to the Ministry of Economic Development on the Copyright (Infringing File-sharing) Regulations 2011 Fee Review”.

TelstraClear “Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011”.

TelstraClear “Submission to the Ministry of Economic Development on the Copyright (Infringing File-sharing) Regulations 2011 Fee Review”.

The New Zealand Television Broadcasters’ Council “Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011”.

The New Zealand Society of Authors “Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011”.

The New Zealand Society of Authors “Submission to the Ministry of Economic Development on the Copyright (Infringing File-sharing) Regulations 2011 Fee Review”.

Torkington, Nathan “Submission to the Ministry of Economic Development on the Copyright (Infringing File-sharing) Regulations 2011 Fee Review”.

United Video Franchise “Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011”.

Vodafone New Zealand Limited “Submission to the Ministry of Economic Development on the Copyright (Infringing File-sharing) Regulations 2011 Fee Review”.

Wiggs, Lance (co-founder of Pacific Fibre) “Submission to the Commerce Select Committee on the Copyright (Infringing File-sharing) Amendment Act 2011”.

VII. Appendices

Appendix A: Terminology

APRA|AMCOS – Australasian Performing Right Association and Australasian Mechanical Copyright Owners Society.

CIFSA – Copyright (Infringing File Sharing) Amendment Act 2011.

DMCA – Digital Millennium Copyright Act 17 U.S.C.

HADOPI – Haute Autorité pour la diffusion des œuvres et la protection des droits sur Internet 2009.

IFPI – International Federation of the Phonographic Industry.

IP Address – Internet Protocol Address.

IPAP – Internet Protocol Address Provider (see Copyright Act 1994, s 122A(1)).

ISP – Internet Service Provider (see Copyright Act 1994, s 2).

MED – Ministry of Economic Development.

NZBORA – New Zealand Bill of Rights Act 1990.

NZFACT – New Zealand Federation Against Copyright Theft.

P2P – Peer-to-peer.

RIANZ – Recording Industry Association of New Zealand.

TCF – Telecommunications Carriers' Forum.

TPB – The Pirate Bay (<http://thepiratebay.se>).

VPN – Virtual Private Network.

Appendix B: Selection of Relevant Statutory Provisions

Copyright Act 1994

Section 29 – Infringement of copyright -

- (1) Copyright in a work is infringed by a person who, other than pursuant to a copyright license, does any restricted act.
- (2) Reference in this Act to the doing of a restricted act are to the doing of that act:
 - (a) In relation to the work as a whole or any substantial part of it; and
 - (b) ...

Section 92A – Internet service provider must have policy for terminating accounts of repeat infringers (now repealed by section 4 of the Copyright (Infringing File Sharing) Act 2011) -

- (1) An Internet service provider must adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the account with that Internet service provider of a repeat infringer.
- (2) In subsection (1), repeat infringer means a person who repeatedly infringes the copyright in a work by using 1 or more of the Internet services of the Internet service provider to do a restricted act without the consent of the copyright owner.

Section 92B – Internet service provider liability if user infringes copyright (as inserted by section 5 of the Copyright (Infringing File Sharing) Act 2011) -

- (2A) An Internet service provider does not infringe the copyright in the work, or authorise A's infringement of the copyright in the work, merely because the Internet service provider knows of the infringement from information received as a result of anything done under sections 122A to 122U, provided that, in relation to the alleged infringement, the Internet service provider complies with all its obligations under those sections and under any regulations made under section 234(eb) to (eh).

Section 122A – Interpretation for sections 122B to 122U (as inserted by section 6 of the Copyright (Infringing File Sharing) Act 2011) -

- (1) account holder, in relation to an IPAP, means a person who has an account with the IPAP.
- (1) file sharing is where:
 - (a) material is uploaded via, or downloaded from, the Internet using an application or network that enables the simultaneous sharing of material between multiple users; and
 - (b) uploading and downloading may, but need not, occur at the same time.
- (1) IPAP, or Internet protocol address provider, means a person that operates a business that, other than as an incidental feature of its main business activities
 - (a) offers the transmission, routing, and providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing; and
 - (b) allocates IP addresses to its account holders; and
 - (c) charges its account holders for its services; and

(d) is not primarily operated to cater for transient users.

Section 122N – Infringement notice as evidence of copyright infringement (as inserted by section 6 of the Copyright (Infringing File Sharing) Act 2011) -

- (1) In proceedings before the Tribunal, in relation to an infringement notice, it is presumed
 - (a) that each incidence of file sharing identified in the notice constituted an infringement of the rights owner’s copyright in the work identified; and
 - (b) that the information recorded in the infringement notice is correct; and
 - (c) that the infringement notice was issued in accordance with this Act
- (2) An account holder may submit evidence that, or give reasons why, any 1 or more of the presumptions in subsection (1) do not apply with respect to any particular infringement identified in an infringement notice.
- (3) If an account holder submits evidence or gives reasons as referred to in subsection (2), the rights owner must satisfy the Tribunal that, in relation to the relevant infringement or notice, the particular presumption or presumptions are correct.