

**SOMETHING FOR
NOTHING: COPYRIGHT,
ISP LIABILITY AND P2P
FILE SHARING**

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TABLE OF CONTENTS

| | |
|---|---------------|
| I. THE DIGITAL ERA, COPYRIGHT AND THE P2P CHALLENGE | 4 |
| A. File sharing technology | 5 |
| B. P2P users' attitude to copyright law | 8 |
| C. The impact of P2P file sharing on copyright holders in the digital entertainment industry..... | 9 |
| D. The benefits of P2P file sharing technology | 11 |
| II. CURRENT REMEDIES FOR COPYRIGHT OWNERS | 13 |
| A. Liability of P2P file sharers for copyright infringement committed using P2P file sharing networks | 15 |
| B. Liability of P2P file sharing network providers for copyright infringement committed by P2P file sharers..... | 16 |
| C. Liability of internet service providers for copyright infringement committed by subscribers using P2P file sharing networks | 27 |
| III. STATUTORY REGULATION OF INTERNET SERVICE PROVIDER LIABILITY | 31 |
| A. United States | 32 |
| B. Australia | 41 |
| C. New Zealand..... | 42 |
| 1. Section 92A Review Policy Proposal | 47 |
| 2. Goals for a revised Section 92A | 51 |
| (a) <i>Statutory protections for internet service providers</i> | 53 |
| (b) <i>Statutory protections for subscribers</i> | 54 |
| (c) <i>Statutory remedies</i> | 55 |
| (d) <i>Statutory definitions</i> | 57 |
| (e) <i>Further matters</i> | 59 |
| IV. ALTERNATIVE MEASURES FOR PROMOTING COPYRIGHT | 61 |
| A. Collective licensing | 63 |
| B. Non-commercial use levies | 65 |
| C. A shift in focus for copyright law? | 66 |
| V. CONCLUSION | 68 |
| VI. APPENDICES | 71 |
| Appendix A: Section 53 Copyright (New Technologies) Amendment Act 2008..... | 71 |
| Appendix B: 17 USC § 512(a), (c) and (i), Digital Millennium Copyright Act 1998.... | 74 |
| VII. SELECTED BIBLIOGRAPHY | 77 |

I. THE DIGITAL ERA, COPYRIGHT AND THE P2P CHALLENGE

In recent years, copyright law has met a formidable challenge in the form of peer-to-peer (P2P) file sharing technology. Unlimited numbers of copyright-protected digital works such as films, music and television broadcasts can be distributed instantly, free, and in perfect replication, by anyone with access to a computer. Digital files are not subject to the tight physical controls that characterise analog works, and copyright infringement cannot be policed by conventional means. File sharing technology has ongoing implications for both the future of creative production and the future of the entertainment industry that profits from the sale of copyright works.

The main legal issue that has arisen from file sharing technology is copyright holders' loss of control over their exclusive rights to reproduce¹ and communicate² digital copyright works. In the past, copyright holders were able to maintain tight physical controls over the distribution of copyright works.³ File sharing has tipped the balance against copyright holders in favour of expansive access to digital works. Digital works are not a scarce resource, and consumption of a work by one individual does not preclude the availability of that same work for simultaneous consumption by another, or many others. The ease of copying and distribution has altered social attitudes towards copyright works to the point where ignorance of copyright laws is widespread, and individuals justify breaking the law on the basis that 'everyone else is doing it.'

¹ Copyright Act 1994, s16(1)(a).

² Copyright Act 1994, ss16(1)(f) and 33.

³ S Helmer and I Davies, "File-sharing and downloading: goldmine or minefield?" (2009) 4 Journal of Intellectual Property Law & Practice, 51.

Ineffective attempts to mitigate copyright infringement through litigation against individual P2P file sharers and file sharing network providers have led to demands for legislative changes to reassert control through third parties. Internet service providers⁴ have been persuaded to take greater responsibility for infringement committed by their subscribers, in exchange for statutory safe harbour immunity from liability upon compliance with certain obligations. Legislative solutions implicating internet service providers may provide a short-term solution to the P2P challenge, but advances in technology and content delivery mean that radically different approaches are desirable to ensure the continued relevance of copyright law as it applies to digital works.⁵ The difficult hurdle that must be overcome to reduce copyright infringement through file sharing is for copyright holders to persuade would-be infringers that high quality, legal copyright works are accessible at a fair price, and it is not worthwhile for infringers to obtain the same works by illegal means.

A. File sharing technology

P2P file sharing technology allows one computer connected to the internet to search for and access files on the hard drive of another computer that is similarly connected. While the architecture of P2P networks varies, they share common characteristics including the ability for users to search for files, and elect which files are made available to other users of the network. There is no obligation to exchange files. Thus,

⁴ For the purposes of this dissertation, ‘internet service provider’ will be used synonymously with the terms “online service provider” (Copyright Act 1976, United States) and “carriage service provider” (Copyright Act 1968 (Cth), Australia).

⁵ W Fisher, “The Proposer’s Opening Remarks” *Economist Debates: Copyright and wrongs: Statements* <<http://www.economist.com/debate/days/view/310>> updated 5/5/09, accessed 14/5/09.

P2P providers use the economies of scale provided by digital technology to facilitate the transfer of files from one user to many. Effectively, file sharing is no more than the ‘anonymous copying’ of files.⁶ This has significant implications for copyright law.

Copyright holders identify and gather evidence copyright infringement by using software that monitors the transmission of files on P2P networks and tracks the names of files in which they hold copyright.⁷ Each identified file is then matched against the internet protocol⁸ address of the file sharer who is engaging with the file. Without the support of an internet service provider, who is able to match the relevant internet protocol address to the name and address of one of its subscribers, copyright holders cannot discover the true identity of file sharers. However, reliance on internet protocol addresses is problematic. They are not fixed, and may be dynamically re-allocated by an internet service provider each time a computer reconnects to the internet. Furthermore, file sharers have also developed technologies to ‘mask’ their internet protocol addresses, making them effectively anonymous against copyright holders seeking to gather evidence of copyright infringement.

The detrimental impact of file sharing on copyright began with the rise of the P2P network Napster, which revolutionised the consumption of music by allowing users to share digital music files in the .mp3 format. First generation ‘centralised’ P2P file-sharing networks such as Napster allowed users to make available copyright works for download by other users. Napster stored a list of the filenames of available works that users could search for on the network. The files remained on the users’ computers, while just the list was present on Napster’s servers. However, without

⁶ S Liebowitz, “File-Sharing: Creative Destruction or just Plain Destruction?” (2006) 49 Journal of Law and Economics 1, 4.

⁷ Copyright holders have contracts with companies such as “BigChampagne Media Measurement” to police P2P networks for evidence of infringement of copyright <<http://bcdash.bigchampagne.com>> accessed 10/10/09.

⁸ An internet protocol address is the method by which computers are identified on the internet. Every computer connected to the internet is identifiable with a unique string of numbers separated by periods.

Napster's servers facilitating the search function, users would not have been able to share files.⁹ The centralised architecture of the system could be analysed against existing copyright law doctrines because exercise of control over the distribution of copyright works was attributable to the party operating the server. Because Napster did not copy the files itself, it could not be directly liable for copyright infringement. Instead, copyright holders relied on secondary liability doctrines of contributory and vicarious infringement to enforce copyright. In February 2001, Napster was shut down after an injunction was granted to copyright holders.¹⁰

The void left by Napster was quickly filled by second generation 'decentralised' networks such as Grokster and KaZaA. Unlike Napster, these file sharing networks functioned without a central server, and this raised new problems for copyright law. Once the file sharing software was downloaded, the providers had no ongoing control over the use made of their file sharing software. This broke down the existing secondary liability doctrines, and mandated the creation of a new doctrine focussed on the behaviour of the provider rather than the function of its network.¹¹

More recently, third generation 'anonymous' P2P providers such as The Pirate Bay¹² and BitTorrent¹³ have developed. The providers do not control a network or a server, and do not directly provide connections between users. Instead, they facilitate sharing by providing users with a simple index of information about the location of infringing files stored elsewhere on the internet. The providers have no control over or specific knowledge of the activities of users, and are far removed from any copyright

⁹ G Finch, "From Napster to Kazaa: What the Recording Industry Did Wrong and What Options are Left" (2004) 9 Journal of Technology Law and Policy 183, 191.

¹⁰ *A&M Records, Inc v Napster, Inc* 114 F Supp 2d 896 (ND Cal 2000); affirmed in *A&M Records, Inc v Napster, Inc* 239 F 3d 1004 (9th Cir 2001)

¹¹ *Metro-Goldwyn-Meyer Studios, Inc v Grokster, Ltd* 545 US 913 (2005) ("*Grokster*")

¹² <http://thepiratebay.org/>

¹³ <http://www.bittorrent.com/>

infringement that is committed. This makes the application of copyright laws to these providers exceptionally difficult.

B. P2P users' attitudes to copyright law

Copyright holders are finding it increasingly difficult to obtain remuneration for their creative efforts in an online environment where digital copyright works are readily available for free. Recent generations of consumers who have grown up with personal computers and the internet have been labelled 'digital natives'.¹⁴ They tend to have little respect for intellectual property rights, and have been conditioned to the idea that online content is free to be shared. Breach of copyright in an intangible digital work is not viewed in the same way as theft of a tangible physical work. Young downloaders think that "getting free music is easy and it is unrealistic to expect people not to do it."¹⁵ A recent Finnish study¹⁶ found that most P2P file sharers are aware that they are breaking the law, and most also consider illegal file sharing morally wrong. However, they felt that the risk of getting caught was low. A survey of New Zealand internet users conducted by internet service provider TelstraClear has shown that copyright infringement is widely, but not frequently, practised. Forty-six percent of the households surveyed had P2P file sharing software installed on a home computer. Despite this, respondents showed sympathy for artists and an appreciation for

¹⁴ U Gasser and J Palfrey, *Born Digital: Understanding the First Generation of Digital Natives*. (New York, Basic Books, 2008) 19.

¹⁵ A Lenhart and M Madden, "Teen Content Creators and Consumers" Pew Internet and American Life Project, (2 November 2005) <http://www.pewinternet.org/Reports/2005/PIP_Teens_Content_Creation.pdf> accessed 25/5/09.

¹⁶ H Hietanen, A Huttunen, and H Kokkinen, "Criminal Friends of Entertainment: Analysing Results from Recent Peer-to-Peer Surveys" (2008) 5 SCRIPTed 31, 34 <<http://www.law.ed.ac.uk/ahrc/script-ed/issue5-1.asp>> accessed 3/10/09.

copyright ownership, with only 15% of respondents stating that ease of access to content via the internet should mean it is available for free.¹⁷

C. The impact of P2P file sharing on copyright holders in the digital entertainment industry

The rise of file sharing technology exposed a lack of preparation on the part of copyright holders to the commercial opportunities afforded by these technological developments. After years of economic loss and infringement of copyright in digital works, the entertainment industry is recognising the need for new ways to combat the tide of infringement.

The International Federation for the Phonographic Industry estimates that 95% of music downloads are unauthorised, and 60-80% of internet traffic transmitted through internet service providers is comprised of file sharing of copyright material.¹⁸ Online music piracy is estimated to cause \$12.5 billion of economic loss worldwide every year.¹⁹ The general consensus from econometric studies is that file sharing brings about some degree of financial harm to copyright holders,²⁰ but how many illegally downloaded works represent actual economic loss is impossible to calculate.

¹⁷ TelstraClear, *Survey of New Zealanders' Opinions on Accessing and Copying Content* (July 2009) Baseline Consultancy <<http://www.telstraclear.co.nz/company-info/media-release-template.cfm?newsid=348>> accessed 23/9/09.

¹⁸ International Federation of the Phonographic Industry, *Digital Music Report 2009* (2009) 22 <<http://www.ifpi.org/content/library/dmr2009.pdf>> accessed 12/5/09.

¹⁹ S Siwek, "The True Cost of Copyright Industry Piracy to the U.S Economy" (2007) Institute for Policy Innovation, Policy Report 189 <www.ipi.org> accessed 23/9/09.

²⁰ Studies by Liebowitz (2006), Rob and Waldfogel (2006), and Zentner (2006) have found evidence that file sharing directly harms record sales. A study by Oberholzer-Gee and Strumpf (2007) reached the opposite conclusion, but the methods of that study have been questioned.

There is disagreement between the entertainment industry and analysts over the degree to which P2P file sharing actually affects legal sales of music online or in physical form. A recent Canadian study²¹ found a strongly positive relationship between use of file sharing networks and frequency of CD purchases. In a similar study conducted by the BI Norwegian School of Management, a group of file sharers legally downloaded ten times as many works as they downloaded in breach of copyright.²² Where there are easy, affordable and lawful ways to procure goods, consumers will take them.²³

There is also doubt about the extent to which file sharing undermines creative production.²⁴ However, at least to the extent that the marketplace for illegally-obtained works dwarfs the legal marketplace,²⁵ this indirectly affects creative production by compromising investment in it.

²¹ B Andersen and M Frenz, "The Impact of Music Downloads and P2P Filesharing on the Purchase of Music: A Study for Industry Canada" (2007) Intellectual Property Policy Directorate for Industry Canada <http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/eng/h_ip01456.html> accessed 14/5/09.

²² J Cheng, "Study: pirates biggest music buyers" *Ars Technica* (20 April 2009) <<http://arstechnica.com/media/news/2009/04/study-pirates-buy-tons-more-music-than-average-folks.ars>> accessed 8/10/09.

²³ UK Department for Media, Culture and Sport, *Digital Britain Final Report*, (June 2009), 110 <http://www.culture.gov.uk/images/publications/digital_britain_finalreportjun09.pdf> accessed 18/6/09.

²⁴ Nearly seventy percent of musicians believe that file sharing is a minor threat or no threat at all to creative industries. See M Madden, "Artists, Musicians and the Internet," Pew Internet and American Life Project, (5 December 2004) 21 <<http://www.pewinternet.org/Reports/2004/Artists-Musicians-and-the-Internet.aspx>> accessed 5/10/09; Y Benkler, 'Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production' (2004) 114 *Yale L.J.* 273, 351-352: "Much of the flow of revenue to artists – from performances and other sources – is stable even assuming a complete displacement of the CD market by P2P distribution... [I]t would be silly to think that music, a cultural form without which no human society has existed, will cease to be in our world [because of illegal file swapping].")

²⁵ *Digital Music Report 2009*, 22. The IFPI calculates that illegal music files are traded annually worldwide at an estimated ratio of 20 illegal downloads for every track legally sold.

D. The benefits of P2P file sharing technology

The online architecture that underpins file sharing networks has the potential to be an efficient vehicle for the transmission of non-infringing digital files. The fact that the technology has been harnessed en masse to infringe copyright should not distort the bigger picture. P2P file sharing networks are a source for rare, obscure or unreleased digital entertainment works that are not subject to copyright, such as songs in which copyright protection has expired. For copyright holders themselves, P2P network traffic provides useful data. If reactions to a sample work offered for download are favourable, then a full version might be worth producing. To this end, P2P technology may incentivise further creative production. P2P market research firms also provide information about what works are popular downloads, and where.²⁶ This information influences important commercial decisions, such as an artist's choice of which song to release as a single. The expansion of file sharing technology may have reduced entertainment industry profits, but it has greatly improved the accessibility of creative works for a whole generation. The consumption and enjoyment of creative works is at an all-time high. Accordingly, New Zealand singer and copyright holder Neil Finn has referred to these new means of accessing creative works as "a glorious process".²⁷

Despite the formidable challenge that P2P has presented to the enforcement of copyright law, P2P technology may itself hold an alternative solution to the legal issues involved. File sharing technology presents the digital entertainment industry

²⁶ For example, "BigChampagne Media Measurement" <<http://bcdash.bigchampagne.com>> accessed 10/10/09.

²⁷ TVNZ CloseUp, "Download At Your Peril", 6 August 2009 <<http://tvnz.co.nz/close-up/download-your-peril-2891198/video>> accessed 7/8/09.

with a commercially useful distribution technology. The challenge is to find a way to exploit these revenue streams and offer digital entertainment works in a way that is attractive to would-be infringers, while achieving and promoting the goals of copyright law. This will require a fundamental re-think of the way that copyright holders and the digital entertainment industry do business, but the changes to the existing copyright law framework may not need to be so extreme.

II. CURRENT REMEDIES FOR COPYRIGHT OWNERS

Over the last decade, landmark legal battles with individual file sharers and P2P providers over copyright infringement have shaped both the legal and technological landscape of P2P file sharing. Copyright holders have invested large amounts of money in litigation to enforce their rights and attempt to bridge the divide between the social norms of file sharing and the legal norms of copyright. However, the victories achieved by the digital entertainment industry have been largely pyrrhic, and the public relations cost has been high. Copyright infringement has not decreased, and successful legal actions have pushed file sharers from one infringement-facilitating technology to another. In November 2008, the Recording Industry Association of America discontinued its policy of suing individual file sharers, although some trials are still pending.²⁸

At present, there has been no judicial consideration in New Zealand of breach of copyright committed through P2P file sharing. This reflects the relative insignificance of the New Zealand market to copyright holders, as well as the fact that the internet fosters a degree of anonymity that makes both identification of infringement and remedies against file sharers impractical.²⁹ However, those who upload and download copyright files without authorisation are clearly liable as primary infringers. P2P network providers who facilitate infringement are easier to

²⁸S McBride and E Smith, "Music Industry to Abandon Mass Suits", *The Wall Street Journal* (29 December 2008) <<http://online.wsj.com/article/SB122966038836021137.html>> accessed 10/8/09.

²⁹R Mann and S Belzley, "The Promise of Internet Intermediary Liability" (2005) 47 *William and Mary Law Review*, 239. See also the discussion in Part I regarding P2P file sharing technology.

identify and have deeper pockets, but their liability under New Zealand law is uncertain and enforcing judgments against them is problematic. A successful plaintiff may be able to recover damages or an account of profits against a provider, but obtaining injunctive relief would be futile, as another network or technology would quickly arise to replace it.

In New Zealand, copyright is an exclusive property right that protects original works, including literary, dramatic, musical or artistic works, sound recordings, films, and communication works.³⁰ The goal of copyright law is to balance the need to provide incentives for the creation of new works, with the need to ensure reasonable access to copyright works for consumers and follow-on creators. P2P file sharing clearly implicates copyright law, as the files that are shared qualify as “original works” protected by the Copyright Act 1994. This part will analyse the legal remedies³¹ currently available to copyright holders against individuals who infringe copyright using P2P file sharing networks, the liability of the network providers themselves, and the liability of internet service providers for infringement committed by their subscribers.

³⁰ Copyright Act 1994, s14(1)(a)-(d).

³¹ Liability for copyright infringement committed online via P2P file sharing frequently occurs across different jurisdictions, creating private international law challenges. Such issues are outside the scope of this paper. See G Austin, “Global networks and domestic laws: some private international law issues arising from Australian and US liability theories” in A Strowel, *Peer-to-peer File Sharing and Secondary Liability in Copyright Law* (Cheltenham, United Kingdom, Edward Elgar Publishing, 2009) 124.

*A. Liability of P2P file sharers for copyright infringement
committed using P2P file sharing networks*

Under the Copyright Act 1994, liability for primary infringement of copyright is strict and arises when a person engages in a restricted act³² in relation to a copyright work, without a licence. These are exclusive rights held by the copyright owner to reproduce, distribute and communicate the copyright work. The central reproduction right is the right to copy,³³ which is broadly defined in section 2:

“Copying—

- (a) means, in relation to any description of work, reproducing, recording, or storing the work in any material form (including any digital format), in any medium and by any means;”

All forms of digital reproduction and storage involved in P2P file sharing will fall within this definition. The downloading of a file by a user of a P2P file sharing network amounts to “copying”³⁴ in breach of section 16(1)(a) Copyright Act 1994. A user who makes a copyright work available by uploading a file to a P2P network infringes copyright by “communicating” that work.³⁵ It is unlikely that file sharers would be protected by one of the fair dealing exceptions provided by the Copyright Act 1994, as they typically do not act for any of the narrow purposes protected by sections 42 and 43. Normally, therefore, a P2P file sharer will be liable for primary infringement under New Zealand law.

³² Copyright Act 1994, s16(1)(a)-(h).

³³ Copyright Act 1994, s16(1)(a).

³⁴ Copyright Act 1994, s2 as amended by s4(3) Copyright (New Technologies) Amendment Act 2008.

³⁵ Copyright Act 1994, ss16(1)(f) and 33, as amended by ss12 and 18 Copyright (New Technologies) Amendment Act 2008, respectively.

B. Liability of P2P file sharing network providers for copyright infringement committed by P2P file sharers

A P2P network provider ('provider') may be liable for secondary infringement of copyright for providing the service or software that facilitates primary infringement by users of its network. Liability may arise out of the secondary liability provisions of the Copyright Act 1994,³⁶ or by authorisation of the infringing conduct of a third party.³⁷ A body of jurisprudence has developed in the United States and Australia to determine when the conduct of a P2P provider will attract secondary liability.

In the United States, secondary liability for copyright infringement is anchored in two common law doctrines, contributory liability and vicarious liability.³⁸ The first generation of centralised file sharing software met its demise as a result of Napster's liability for both contributory and vicarious infringement.³⁹ On the issue of contributory liability, Napster was found to have materially contributed to infringement by facilitating connections between its users.⁴⁰ Napster had actual knowledge of specific acts of infringement committed by its users and failed to take reasonable steps to block access to infringing material.⁴¹ Napster was also vicariously liable, as it gained a direct financial benefit from infringement and it had the right and ability to supervise infringement by monitoring song names, but failed to do so.⁴²

³⁶ Copyright Act 1994, ss 35-39

³⁷ Copyright Act 1994, s16(i). Although authorisation is dealt with in s16 alongside other forms of primary infringement, its nature is much closer to concepts of secondary infringement. This is because a finding that a P2P provider has authorised the infringing acts of its users will require an inference to be drawn based on some degree of knowledge and control on the part of the P2P provider.

³⁸ While vicarious liability exists in New Zealand, it is a narrow doctrine limited to a situation of agency or employment and is not relevant in assessing the liability of a P2P network provider.

³⁹ *A&M Records, Inc v Napster, Inc*, 239 F 3d 1004 (9th Cir 2001) ("*Napster*")

⁴⁰ *A&M Records, Inc v Napster, Inc*, 239 F 3d 1004 (9th Cir 2001) 1022.

⁴¹ *A&M Records, Inc v Napster, Inc*, 239 F 3d 1004 (9th Cir 2001) 1020-22.

⁴² *A&M Records, Inc v Napster, Inc*, 239 F 3d 1004 (9th Cir 2001), 1023-4.

The doctrine of contributory liability was extended and refined by the United States Supreme Court with the addition of a new ‘inducement’ standard in *Metro-Goldwyn-Meyer Studios v Grokster*.⁴³ The doctrine was widened to cover cases where a clear and culpable intention to induce infringement is shown. In *Grokster*, the plaintiff sued the defendant provider for both contributory and vicarious infringement. The Supreme Court held that:

“[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or affirmative steps taken to foster infringement, is liable... for the resulting acts of infringement by third parties.”⁴⁴

On referral back to the District Court, the defendant was found to have actively induced infringing use of its software by taking affirmative steps to promote it. First, the defendant had promoted the infringement-enabling virtues of its software by courting former Napster users, and it had extolled the ability of its software to access popular copyright music. Second, the defendant made no attempt to develop filtering tools or other mechanisms to reduce infringement using its software. Third, the defendant’s business model benefited from and was dependent on a high volume of infringement.⁴⁵ The Court emphasized the particular importance of the first element, and held that taken together, the three elements demonstrated a clear intention to promote infringement of copyright. In considering the liability of a provider, courts in the United States must now look beyond mere knowledge of infringing use to evidence of affirmative or culpable steps that a network may have taken to promote

⁴³ *Metro-Goldwyn-Meyer Studios, Inc v Grokster, Ltd* 545 US 913 (2005) (“*Grokster*”)

⁴⁴ *Metro-Goldwyn-Meyer Studios, Inc v Grokster, Ltd* 545 US 913 (2005) 918, 936 and 940.

⁴⁵ *Metro-Goldwyn-Meyer Studios, Inc v Grokster, Ltd* 545 US 913 (2005), 782. See J Ginsburg and S Ricketson, “Inducers and Authorisers: A Comparison of the US Supreme Court’s *Grokster* decision and the Australian Federal Court’s *KaZaA* ruling” (2006) 11 *Media & Arts Law Review* 1, 5.

infringement using the technology.⁴⁶

In England, Canada, New Zealand and Australia, a provider may be liable under a common law head of secondary liability or under statute for authorising infringing acts by users.⁴⁷ The leading English decision on secondary infringement of copyright is *CBS Songs Ltd v Amstrad Consumer Electronics Plc*.⁴⁸ The plaintiff brought actions against Amstrad, a manufacturer of twin-deck tape recorders, alleging that Amstrad had induced or authorised infringing use by purchasers of its product, and was a joint tortfeasor:

“Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design”.⁴⁹

Amstrad was not liable as a joint tortfeasor, as there was no evidence of a common design between Amstrad and purchasers of its product to infringe copyright. The advertising and sale of Amstrad’s machines did not amount to inducement to infringe, as Amstrad had no ability to procure any particular infringement by an individual after sale had occurred. Similarly, although a P2P provider provides the facilities for infringement, and may even invite it generally, it does not take active steps to procure infringement in individual cases.

⁴⁶ H Hasina, “Decentralised P2P technology: Can the unruly be ruled?” (2009) 23 *International Review of Law, Computers & Technology* 123, 124.

⁴⁷ Copyright in a work may be infringed by a person who without the licence of the copyright owner authorises another to do any of the acts restricted by the copyright. New Zealand, Copyright Act 1994, s16(1)(i); United Kingdom, Copyright, Designs and Patents Act 1988, s16(2); Australia, Copyright Act 1968 (Cth), ss36(1) and 101(1).

⁴⁸ *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013.

⁴⁹ *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013, 1058 per Lord Templeman citing *The Koursk* [1924] All ER 140, 157.

On the issue of authorisation, Lord Templeman defined the concept narrowly:

“An authorization means a grant or purported grant, which may be express or implied, of the right to do the act complained of.”⁵⁰

Amstrad was found to have conferred on purchasers the power to copy, but not to have granted a right to infringe copyright. The advertising documents accompanying the recorder warned that some acts of copying may require permission, and that Amstrad had no authority to grant such permission. The choice to use the recorder to infringe copyright was therefore the prerogative of the consumer, and Amstrad was not liable for authorisation.

In the leading Australian decision on authorisation, *University of New South Wales v Moorhouse*,⁵¹ the High Court of Australia took a different approach. The case concerned the liability of a university library for infringing acts committed by library users on a photocopier. Gibbs J held that authorisation requires that the defendant “sanction, approve, or countenance” the primary infringer’s act, and considered that:

“A person who has under his control the means by which an infringement may be committed – such as a photocopying machine – and who makes it available to other persons, knowing, or having reason to suspect, that it is likely to be used for the purpose of committing an infringement, and omitting to take reasonable steps to limit its use to legitimate purposes, would authorise any infringement that resulted from its use.”⁵²

It was held that the defendant had failed to take reasonable steps to limit the use of the photocopier to legitimate purposes, and was liable for authorisation. The library

⁵⁰ *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013, 1054.

⁵¹ *University of New South Wales v Moorhouse* [1976] RPC 151.

⁵² *University of New South Wales v Moorhouse* [1976] RPC 151, 157.

retained control over the photocopier at all relevant times, and because it could reasonably know or suspect that the machine would be used to infringe, it was liable for any resulting infringement. In contrast to *Amstrad*, the warning notices provided by the university about copyright infringement were found to be ineffective precautions that did not displace the inference of authorisation.

The *Moorhouse* approach has been emphatically rejected by the Supreme Court of Canada, which held on similar facts that authorising the mere use of equipment that could be used to infringe copyright does not amount to an authorisation to infringe. In *CCH Canadian Ltd v Law Society of Upper Canada*,⁵³ it was held that there was no evidence that the defendant library had exhibited “sufficient control” over library users to conclude that it had sanctioned, approved or countenanced the infringement.

The liability of a P2P provider for authorisation under *Amstrad* and *CCH* will turn on the architecture of the network involved. It is likely that a centralized P2P network provider such as Napster would be liable. Napster did not grant its users a right to infringe, but it was aware of specific acts of infringement and it failed to do anything in response, in a situation when it had an ongoing power to monitor and control the actions of its users. This would probably amount to an implicit grant of a right to infringe, or at least an implicit sanction, countenance or approval of infringement, falling foul of both the *Amstrad* and *Moorhouse* standards, respectively.

In contrast, a decentralised P2P provider that relinquishes effective control over and knowledge of the specific actions of its users would seem to have a strong defence to both standards, provided it avoids saying or doing anything that could be taken as a grant of permission to infringe copyright. The defendant in *Moorhouse*

⁵³ *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 (“*CCH*”), at [42].

continued to exercise control at the moment of infringement, but control does not exist to the same degree where the vehicle for infringement is sold, as in *Amstrad*, or downloaded, in the case of a decentralized P2P provider which has no ongoing role in facilitating file sharing. The House of Lords in *Amstrad* distinguished *Moorhouse* on this basis.

Two cases involving the liability of P2P providers for authorisation of the infringing acts of their users have come before Australian courts. The three-pronged enquiry in sections 36(1A) and 101(1A) Copyright Act 1968 (Cth)⁵⁴ provides a non-exhaustive set of criteria against which to assess authorisation.⁵⁵ This was intended to codify and elucidate the pre-existing law of authorisation derived from the earlier common law and *Moorhouse*.⁵⁶

- (1A) In determining, for the purposes of subsection (1), whether or not a person has authorised the doing in Australia of any act comprised in the copyright in a work, without the licence of the owner of the copyright, the matters that must be taken into account include the following:
- (a) the extent (if any) of the person's power to prevent the doing of the act concerned;
 - (b) the nature of any relationship existing between the person and the person who did the act concerned;
 - (c) whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

In *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd*,⁵⁷ Wilcox J found the defendant provider liable. In analysing the defendant's conduct against the statutory criteria in section 36(1A), Wilcox J held that the warnings the defendant had provided to users were ineffective. The defendant had not implemented available

⁵⁴ Copyright Act 1968 (Cth), as amended by the Copyright Amendment (Digital Agenda) Act 2000. Sections 36(1A) applies to copyright in original literary, dramatic, musical and artistic works. Section 101(1A) applies to copyright in subject-matter other than works, such as audio-visual items.

⁵⁵ *Universal Music Australia Pty Ltd v Cooper* (2006) FCAFC 187 ("*Cooper*") at [81].

⁵⁶ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 65 IPR 289 ("*Sharman*") at [402].

⁵⁷ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 65 IPR 289

technical measures to reduce infringement, such as keyword filtering,⁵⁸ and it had exhorted users to increase their infringing activity through its “Join the Revolution” campaign. The defendant was found to have had the degree of control necessary to restrict infringement,⁵⁹ but it had not taken ‘reasonable steps’ to prevent infringing activity.⁶⁰ Wilcox J approved the continuing applicability of *Moorhouse*, and added another, non-statutory element to the authorisation analysis, that “[k]nowledge, or lack of knowledge, is an important factor in determining whether a person has authorized an infringement.”⁶¹ It was held that authorisation could extend beyond explicitly sanctioned copying to conduct showing inactivity or indifference, from which authorisation could be inferred.⁶²

The liability of a website owner for providing links to infringing materials was considered in *Universal Music Australia Pty Ltd v Cooper*.⁶³ The defendant was the registered owner of the domain name “mp3s4free.net”. Like Napster, the website did not have infringing files located on it, but the defendant posted links to files on other websites that he knew infringed copyright. The defendant, as well as the defendant’s internet service provider⁶⁴ and its employees, were held liable for authorising the infringement of copyright in the files by facilitating the copying and communication of them.

As the creator of the website, and the person in charge of its maintenance, the defendant was held to have had ‘considerable power’ to prevent infringement in terms of section 101(1A)(a).⁶⁵ The defendant had deliberately chosen to structure his

⁵⁸ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 65 IPR 289, at [254].

⁵⁹ Copyright Act 1968, s36(1A)(a)

⁶⁰ Copyright Act 1968, s36(1A)(c)

⁶¹ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 65 IPR 289, at [370].

⁶² *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 65 IPR 289, at [402].

⁶³ *Universal Music Australia Pty Ltd v Cooper* (2006) FCAFC 187

⁶⁴ See discussion in Part II(C).

⁶⁵ *Universal Music Australia Pty Ltd v Cooper* (2006) FCAFC 187, at [41-45].

website in such a way as to allow the automatic addition of links to infringing files by third parties. To this end, it was held that a provider cannot lawfully design a system to remove control over the actions of its users.⁶⁶ The defendant's website constituted an invitation to use the links to infringe copyright, and therefore the defendant did more than merely provide the facilities for infringement to occur.⁶⁷ As in *Moorhouse*, a disclaimer warning about copyright infringement did not constitute a reasonable step to prevent infringement for the purposes of section 101(1A)(c).⁶⁸

Despite the different standards of secondary liability for copyright infringement in the United States and Australia, the approaches taken in *Grokster* and *Sharman* demonstrate distinct similarities and invite a comparison of the scope for secondary liability of a P2P provider in each jurisdiction. The main differences are the consequences of inaction by a provider and the extent of a positive and ongoing 'design duty' on the part of the provider. The focus of the court in *Sharman* was on the 'reprehensible inaction' of the provider to properly create or revise the design of the software,⁶⁹ from which an inference of authorisation by omission could be drawn.⁷⁰ This is reinforced by section 101(1A)(c) Copyright Act 1968, which deems lack of action to be probative evidence of authorisation.⁷¹ In *Cooper*, the court went further and stated that a provider cannot lawfully design a system that is calculated to remove control over the actions of its users. In contrast, the United States Supreme Court in *Grokster* was more circumspect about attaching liability for design alone,⁷²

⁶⁶ *Universal Music Australia Pty Ltd v Cooper* (2006) FCAFC 187, at [41].

⁶⁷ Copyright Act 1968 (Cth) s112E.

⁶⁸ *Universal Music Australia Pty Ltd v Cooper* (2006) FCAFC 187, at [49-51].

⁶⁹ C Lee, "The Ongoing Design Duty in *Universal Music Australia Pty Ltd v Sharman Licence Holdings Ltd* – Casting The Scope of Copyright Infringement Even Wider" (2006) 15 *International Journal of Law and Information Technology*, 275-298, 286.

⁷⁰ B Clark, "Illegal downloads: sharing out online liability: sharing files, sharing risks" (2007) 2 *Journal of Intellectual Property Law & Practice* 402, 409.

⁷¹ *ibid*, 282.

⁷² *Metro-Goldwyn-Meyer Studios, Inc v Grokster, Ltd* 545 US 913 (2005), 933.

clearly influenced by the availability of the *Sony* defence of substantial non-infringing use.⁷³ Unlike *Sharman*, *Grokster* does not impose an ongoing, post-distribution duty on providers who have passed effective control over the software to the user.

In assessing the legal position of a P2P network for authorisation of infringing acts in New Zealand, it would be open to our courts to adopt the narrow approach in *Amstrad*. However, New Zealand courts have shown a preference for a wide interpretation of authorisation. In *Australian Performing Rights Association v Koolman*,⁷⁴ decided under the Copyright Act 1962, the operator of a coffee bar was held to have authorised the public performance of copyrighted music played by a band, for which he received an admission fee. By permitting the band to select the music it played, the court held that the defendant had impliedly authorised infringement of copyright in the music played. The approach taken in this case is closer to the approach in *Moorhouse*.

More recently, the Court of Appeal in *Heinz Watties Limited v Spantech Pty Ltd* explicitly reserved its position on the applicability of cases such as *Amstrad*, *Grokster* and *Sharman* to the New Zealand context:

“Finally, for the avoidance of doubt, we make it clear we are not to be taken as deciding on the exact extent to which the *Amstrad* case has modified the concept of authorisation or as deciding whether *Moorhouse* applies in New Zealand despite *Amstrad*.”⁷⁵

It was held that *Amstrad* was a decision on its particular facts, involving copying equipment that was outside the control of the authoriser and could be put to

⁷³ *Sony Corp. v Universal City Studios, Inc* 464 U.S. 417 (1984). The Supreme Court held that Sony was not contributorily liable for the distribution of the Betamax video recorder because it was ‘capable of substantial non-infringing uses’.

⁷⁴ *Australian Performing Rights Association v Koolman* [1969] NZLR 273, 275-276.

⁷⁵ *Heinz Watties Limited v Spantech Pty Ltd* (2005) 67 IPR 666, at [36].

substantial non-infringing uses as well as infringing ones. The defendant had ‘no control whatsoever over the use to which the equipment was put and where it could be used for both lawful and unlawful purposes’.⁷⁶ In contrast, in relation to the P2P context, courts in both the United States and Australia have found that providers have at least some capacity to restrict infringement.

The issue is whether the narrower approach in *Amstrad*, requiring an explicit or implicit grant of a right to infringe, should now be followed in preference to the *Moorhouse* approach that our courts have favoured. Canada has explicitly rejected the *Moorhouse* position. In *CCH Canadian Ltd v Law Society of Upper Canada*, McLachlin CJ explained:

“In my view, the *Moorhouse* approach to authorization shifts the balance in copyright too far in favour of the owner's rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole.”⁷⁷

For this reason, *Amstrad* should be followed in New Zealand as it strikes a more reasonable balance between copyright owners’ interests in protecting their works and the public interest in access to useful facilities, ranging from photocopying machines to the internet. It would also be open to a New Zealand court to follow *Sharman* and find a provider liable for authorisation on the basis of a failure to properly design or update its P2P software. However, this approach borders on the creation of a continuing duty of care. The House of Lords in *Amstrad* rejected the argument that *Amstrad* should be subject to a duty to take reasonable care not to cause or permit infringement of copyright. It is likely that this approach would have undesirable consequences for the freedom of development of digital technologies in New Zealand,

⁷⁶ *Heinz Watties Limited v Spantech Pty Ltd* (2005) 67 IPR 666, at [31].

⁷⁷ *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339, at [41].

and therefore it should not be adopted lightly. The creation of a duty to limit the infringing capabilities of new technologies is a step that is only appropriate for Parliament to take.

Whatever the legal test for secondary liability that is preferred, courts in other jurisdictions have now provided some guidelines as to what P2P providers must do to avoid liability. If a provider takes reasonably available steps to reduce the possibility and attraction of infringement, this may prevent an inference of authorisation. A P2P provider should avoid making reference to its software's ability to access copyright works, and should take reasonable steps to implement available technical measures to prevent infringement. The current Australian approach casts a continuing duty on providers to take reasonable steps to prevent infringement through available means, and warnings are likely to be insufficient to remove an inference of authorisation. In conclusion, it is likely that a decentralized P2P network could escape secondary liability in New Zealand under the Copyright Act 1994, provided it does not promote infringement through overt conduct or fail to take reasonable steps to prevent primary infringement once it becomes aware of it in a general sense. Liability for authorisation will be a question of fact,⁷⁸ relating to the inferences to be drawn from the defendant's conduct, and the extent of the provider's ability to monitor and control the activities of its users.

⁷⁸ *Australian Performing Rights Association v Koolman* [1969] NZLR 273, 274.

C. Liability of internet service providers for copyright infringement committed by their subscribers

Internet service providers generally hold a passive conduit position in respect of information sent or received by their subscribers using P2P networks. Actual knowledge of the transmission of infringing material is usually absent. Nevertheless, internet service providers could face primary or secondary liability for copyright infringement. Liability may arise both in respect of the mere provision of an internet connection to a P2P file sharer, or in respect of a subscriber who posts links to infringing files on a website that is hosted by the internet service provider.

Primary infringement may occur where an internet service provider temporarily reproduces, stores or distributes infringing material in the course of transmitting it to a subscriber engaged in P2P file sharing, and in doing so commits a restricted act of copying or communicating.⁷⁹ As a result of this uncertainty, exceptions to liability have been recognised in many jurisdictions for internet service providers that transmit infringing material but do not positively engage with it. The rationale for this exception is the technical and economic impracticality of an internet service provider monitoring the vast amount of material moving through the internet in order to avoid strict liability for primary infringement of copyright.⁸⁰

In the leading United States decision, *Religious Technology Centre v Netcom On-line Communication Services*,⁸¹ the United States District Court refused to hold a bulletin board operator directly liable for storing and transmitting copyright material

⁷⁹ Copyright Act 1994, ss16(1)(a), 16(1)(f), and 33.

⁸⁰ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers* [2004] 2 SCR 427.

⁸¹ *Religious Technology Centre v Netcom On-line Communication Services* 907 F Supp 1361 (ND Cal 1995) ("*Netcom*"), 1369-70.

at the direction of its users, as it was not found to have committed a positive and volitional act in relation to the copyright material. *Netcom* has been endorsed and followed on numerous occasions,⁸² and is effectively codified in sections 512(a) and s512(c) of the Copyright Act 1976, as amended by the Digital Millennium Copyright Act 1998 (DMCA).⁸³ *Netcom* overrules the suggestion in the earlier case of *Playboy Enterprises Inc v Frena*⁸⁴ that an internet intermediary exercising a conduit function could be held strictly liable for direct infringement. In New Zealand, infringement of copyright requires the “doing of a restricted act in relation to the work as a whole or a substantial part of it”.⁸⁵ This seems compatible with the *Netcom* requirement of a positive, volitional act in respect of a copyright work before strict liability for primary infringement can be established.⁸⁶

In New Zealand, secondary liability of an internet service provider for P2P file sharing may arise out of either the secondary liability provisions of the Copyright Act 1994,⁸⁷ or authorisation of the infringing acts committed by the internet service provider’s subscribers.⁸⁸ The potential liability of an internet service provider under the secondary liability provisions in the Copyright Act is extremely limited. The provisions are not well suited to assessing secondary liability in relation to digital works, as most of the provisions require the presence of a physical object in which the infringing copy is embodied.⁸⁹ However, an internet service provider will be liable

⁸² Most recently, *The Cartoon Network v CSC Holdings & Cablevision* 536 F.3d 121 (2nd Cir 2008).

⁸³ Digital Millennium Copyright Act, Pub L No 105–304, 112 Stat 2860 (1998); Copyright Act, 1976 (17 U.S.C § 512). In *Costar Group, Inc v LoopNet, Inc*, 373 F 3d 544 (4th Cir 2004) it was held that the DMCA did not supplant or pre-empt the decision in *Netcom*.

⁸⁴ *Playboy Enterprises Inc v Frena* 839 F Supp. 1552 (MD Fla 1993). (“*Playboy Enterprises*”)

⁸⁵ Copyright Act 1994, s29.

⁸⁶ This view also accords with the English position, stated in the dicta of Laddie J in *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289, 91.

⁸⁷ Copyright Act 1994, ss35-39.

⁸⁸ Copyright Act 1994, s16(i).

⁸⁹ J Nebel, “MED’s Position Paper On Digital Technology and the Copyright Act: Legislation without a Solution?” (2005) 36 VUWLR 50.

under section 37(2) if it “communicates” a work, knowing or having reason to believe that infringing copies will be made by the recipient.⁹⁰ However, knowledge of the recipient third party’s infringing conduct would probably be absent in respect of the provision of conduit internet services to a P2P file sharer.

The liability of an internet service provider that goes beyond acting as a mere conduit and plays host to a website that facilitates infringing file sharing was considered in *Universal Music Australia Pty Ltd v Cooper*.⁹¹ The Federal Court found the internet service provider that hosted the defendant’s website liable for authorisation by ‘countenancing’ infringement.⁹² The internet service provider had the power to prevent infringement⁹³ by withdrawing the hosting of the website upon which infringing material was posted. Instead of taking reasonable steps to prevent infringement, or otherwise placing pressure on the defendant to stop his website being used for the predominant purpose of copyright infringement, the internet service provider had sought to achieve a commercial advantage from advertising on the website. Accordingly, the internet service provider was not able to invoke the protection in s112E Copyright Act 1968 for merely providing the facilities used by a third party to infringe copyright.⁹⁴

To avoid secondary liability for authorisation, a New Zealand internet service provider will need to avoid conduct raising a presumption in favour of authorisation by being seen to benefit directly from infringement by its subscribers. The specific interpretation given to authorisation will depend on the approach adopted by our courts to the conflicting decisions in *Moorhouse* and *Amstrad*. The expansive

⁹⁰ Copyright Act 1994, s37(2) as amended by the Copyright (New Technologies) Amendment Act 2008, s20.

⁹¹ *Universal Music Australia Pty Ltd v Cooper* (2006) FCAFC 187

⁹² *Universal Music Australia Pty Ltd v Cooper* (2006) FCAFC 187 at [61]-[65].

⁹³ Copyright Act 1968 (Cth), s101(1A)(a).

⁹⁴ *Universal Music Australia Pty Ltd v Cooper* (2006) FCAFC 187

Moorhouse approach may severely handicap hosting internet service providers,⁹⁵ who would have to take care to avoid sanctioning, countenancing or approving of infringement by their subscribers in any way.

Following the enactment of the Copyright (New Technologies) Amendment Act 2008, the scope of an internet service provider's liability for primary and secondary infringement of copyright for the provision of conduit internet services and transitory communications has been significantly narrowed by sections 92B, 92C and 43A of the Copyright Act 1994. An internet service provider that provides conduit internet services to an end user who commits a restricted act does not, "without more", infringe copyright and is not taken to have authorised infringement.⁹⁶ It is now up to the courts to decide what conduct will displace this presumption, and allow an inference of authorisation to be drawn. Similarly, the secondary liability of an internet service provider that hosts a website that facilitates file sharing⁹⁷ is limited to the situation where the internet service provider "knows or has reason to believe" that the material it stores infringes copyright and it does not, as soon as possible after becoming aware of the infringing material, delete it or prevent access to it.⁹⁸

⁹⁵ S Frankel and G McLay, *Intellectual Property in New Zealand* (LexisNexis Butterworths, Wellington, 2001) para 5.11.7(c).

⁹⁶ Copyright Act 1994, s92B.

⁹⁷ See for example the position of the internet service provider in *Universal Music Australia Pty Ltd v Cooper* (2006) FCAFC 187.

⁹⁸ Copyright Act 1994, s92C.

III. STATUTORY REGULATION OF INTERNET SERVICE PROVIDER LIABILITY

In many jurisdictions, governments have begun to acknowledge the economic and creative harm that online copyright infringement is causing. The United States led the way in attempting to address the problem through legislation with the enactment of the Digital Millennium Copyright Act (DMCA) in 1998.⁹⁹ Since then, similar legislation regulating the liability of internet service providers for copyright infringement has been enacted in Australia,¹⁰⁰ and analogous proposals are being considered in New Zealand, Canada, the United Kingdom, France and other countries. Copyright holders have lobbied to shift some of the burden of enforcing copyright from their shoulders by requiring internet service providers to take a more active role in monitoring infringement in exchange for statutory immunity from civil liability for infringement. Statutory regulation of internet service provider liability attempts to strike a compromise between the interests of internet service providers, who wish to limit their liability for copyright infringement, and copyright holders who wish to reduce infringement of their rights. This part will assess current proposals for

⁹⁹ Digital Millennium Copyright Act, Pub L No 105–304, 112 Stat 2860 (1998); Copyright Act, 1976 (17 U.S.C § 512). See Appendix B.

¹⁰⁰ Copyright Act 1968 (Cth), Part V Division 2AA, as enacted by Schedule 9 Part 11, United States Free Trade Agreement Implementation Act 2004 (Cth).

statutory regulation of internet service provider liability in New Zealand, and compare the proposals to existing regimes in the United States and Australia.

A. United States

The statutory regulation of internet service providers is contained in section 512 of the Copyright Act 1976.¹⁰¹ This section seeks to create a balanced regime that “provides strong incentives for service providers and copyright holders to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.”¹⁰² Internet service providers are given incentives to comply with the regime in order to limit their potential liability. The regime was intended to remedy the uncertain liability faced by internet service providers arising from conflicting decisions in *Netcom* and *Playboy Enterprises* as to whether they could be held strictly liable as primary infringers for activities conducted at the direction of their subscribers.¹⁰³ Additionally, section 512 provides protections for internet users against exploitation by copyright holders.

The regime limits the liability of ‘service providers’¹⁰⁴ whose facilities are used by subscribers for infringing purposes. Safe harbour immunity from both primary and secondary infringement of copyright is granted in respect of four

¹⁰¹ Digital Millennium Copyright Act, Pub L No 105–304, 112 Stat 2860 (1998); Copyright Act 1976 (17 U.S.C § 512).

¹⁰² C Sherman, General Counsel, RIAA. *The Copyright Infringement Liability of Online and Internet Service Providers: Hearing Before the Senate Comm. on the Judiciary* (4 September 1997) 105th Cong. 15.

¹⁰³ *Religious Technology Centre v Netcom On-line Communication Services* 907 F Supp 1361 (ND Cal 1995); *Playboy Enterprises Inc v Frena* 839 F Supp 1552 (MD Fla 1993). The safe harbours in 17 USC § 512(a) and 17 USC § 512(c) effectively codify the decision in *Netcom*, preserving immunity for internet service providers that transmit or host data automatically.

¹⁰⁴ 17 USC § 512(k)(1). The definition of ‘online service provider’ varies in accordance with the type of online activity for which safe harbour immunity is sought.

categories of online activity; transitory digital network communications;¹⁰⁵ system caching;¹⁰⁶ hosting and storage of information,¹⁰⁷ and information location tools.¹⁰⁸ The safe harbours do not create exceptions to infringement in respect of these activities, but instead provide a bar on monetary relief and a restriction on some forms of injunctive relief that would otherwise be available against infringing internet service providers.¹⁰⁹ Failure to qualify for a safe harbour does not create liability for copyright infringement, and does not affect the question of ultimate liability.¹¹⁰

Two of the safe harbour protections are available to an internet service provider in respect of P2P file sharing. The first is the protection for transitory digital network communications in section 512(a). This applies to a service provider who is an “entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.”¹¹¹ This applies where the internet service provider acts as a conduit for the internet connection of a P2P file sharer. The second relevant safe harbour is for hosting and storage in section 512(c). This provides immunity for “infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider”. This would cover the hosting of a website that provides links to infringing files, as was the case in *Cooper*. To obtain this safe harbour, the internet service provider must “respond expeditiously to remove, or disable access to, the material that is claimed to be infringing” once it obtains either actual or constructive knowledge of facts or

¹⁰⁵ 17 USC § 512(a).

¹⁰⁶ 17 USC § 512(b).

¹⁰⁷ 17 USC § 512(c).

¹⁰⁸ 17 USC § 512(d).

¹⁰⁹ 17 USC § 512(j).

¹¹⁰ *Perfect 10 v Cybernet Ventures, Inc* 214 F Supp 2d, 1174 (CD Cal 2002).

¹¹¹ 17 USC § 512(k)(1)(A).

circumstances from which infringing activity is apparent.¹¹² To facilitate the removal of infringing material, the internet service provider must designate an agent to receive notifications of claimed infringement from copyright holders.¹¹³

To obtain safe harbour immunity in respect of either section 512(a) or section 512(c), the internet service provider must have met the two conditions for eligibility in section 512(i). First, the internet service provider must have “adopted and reasonably implemented... a policy that provides for the termination in appropriate circumstances of subscribers and account holders... who are repeat infringers”.¹¹⁴ Second, it must accommodate and avoid interference with standard technical measures used to identify or protect copyright works. For an internet service provider trying to comply with section 512(i), these requirements raise three questions: first, when will ‘appropriate circumstances’ for termination exist; second, when is a subscriber to be considered ‘repeat infringer’; and third, what is required to ‘reasonably implement’ a termination policy. The courts have not provided a large amount of interpretive guidance,¹¹⁵ and it appears that the legislative intent was to leave the termination policy requirements and obligations of service providers loosely defined.¹¹⁶

The requirements were considered in *Corbis Corp v Amazon.com, Inc.*¹¹⁷ It was held that:

“Failure to properly implement an infringement policy requires a showing of instances where a service provider fails to terminate a user even though it has sufficient evidence to create actual knowledge of that user’s blatant, repeat infringement of a wilful and commercial nature.”¹¹⁸

¹¹² 17 USC § 512(c)(1)(C).

¹¹³ 17 USC § 512(c)(2).

¹¹⁴ 17 USC § 512(i).

¹¹⁵ A Sawicki, “Repeat Infringement in the Digital Millennium Copyright Act” (2006) 73 University of Chicago Law Review 1455.

¹¹⁶ *Corbis Corp v Amazon.com, Inc* 351 F Supp 2d 1090 (2004, WD Wash), 1100-01.

¹¹⁷ *Corbis Corp v Amazon.com, Inc* 351 F Supp 2d 1090 (2004, WD Wash).

This view accords with the legislative history of section 512(i), that shows that the legislative intent was that the policy be designed to convey to subscribers that “those who repeatedly or flagrantly abuse their access to the internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access”.¹¹⁹

In *Perfect 10, Inc v CC Bill LLC*,¹²⁰ The Court of Appeals for the Ninth Circuit set forth the standard for evaluating termination policies under the DMCA. It held that although section 512(i)(1)(A) does not define ‘reasonably implement’, a service provider ‘implements’ a policy if it has a working system for receiving infringement notices sent pursuant to section 512(c).¹²¹ Implementation is reasonable if the service provider terminates users who “repeatedly or blatantly” infringe copyright.¹²² A policy is not reasonably implemented “only if the service provider fails to respond when it has knowledge of the infringement”.¹²³ The Court stressed that a service provider is not obliged to affirmatively police its users for evidence of repeat infringement in order to satisfy the reasonable implementation requirement.¹²⁴

The courts have indicated that infringement in relation to multiple works on a single occasion will not suffice to trigger an internet service provider’s obligations. Repeat infringement should be determined on the basis of at least two positive identifications of infringement. In *UMG Recordings, Inc v Veoh Networks Inc*,¹²⁵ the

¹¹⁸ *Corbis Corp v Amazon.com, Inc* 351 F Supp 2d 1090 (2004, WD Wash), 1104.

¹¹⁹ *Ellison v Robertson*, 357 F3d 1072 (9th Cir 2004), 1076 citing US House of Representatives Report 105-551(II), at 61 (July 22, 1998).

¹²⁰ *Perfect 10, Inc v CC Bill LLC* 481 F 3d 751 (9th Cir 2008) (“*Perfect 10*”)

¹²¹ In *Ellison v Robertson* 357 F3d 1072 (9th Cir 2004) the service provider’s failure to notify subscribers of a change to the email address to which notifications were to be sent, and a failure to forward received messages from the old address, gave rise to a triable issue of fact as to eligibility for safe harbour protection.

¹²² *Perfect 10, Inc v CC Bill LLC* 481 F 3d 751 (9th Cir 2008), 758-759.

¹²³ *ibid*, 762.

¹²⁴ *ibid*, 760. See also 17 USC § 512(m).

¹²⁵ *UMG Recordings, Inc v Veoh Networks Inc* (2009 US Dist LEXIS 86932).

defendant did not terminate users who uploaded multiple infringing works identified in a single infringement notice, but did terminate the user's account if that user subsequently infringed. It was held that this approach met the legislative purpose of deterring infringement.

The courts have stated that there is a standard of reliability and verifiability that must be met in order to justify an internet service provider terminating a user's account, and that compliant DMCA notices may not, of themselves, necessarily provide evidence of repeat infringement sufficient to justify termination. Notices may be unreliable in the absence of a sworn declaration that the copyright holder has a good faith belief that the material is infringing. In *Corbis* it was held that:

“Although there may be instances in which two or more DMCA-compliant notices make a service provider aware of a user's blatant, repeat infringement, the notices alone do not make the user's activity blatant, or even conclusively determine that the user is an infringer.”¹²⁶

Accordingly, the burden of proof should rest on the copyright holder to show that it has a good faith belief that an identifiable subscriber has infringed copyright on at least two occasions and is therefore a 'repeat infringer'.

In respect of P2P file sharing activities that fall under section 512(a) or (c), the DMCA facilitates interaction between the internet service provider and the copyright holder to deal with infringing users. Section 512(h) DMCA aids copyright holders in identifying infringers by providing for disclosure of the personal details of the infringer that are held only by the internet service provider.¹²⁷ It establishes an ex parte procedure for copyright holders to apply to the clerk of a Federal District Court

¹²⁶ *Corbis Corp v Amazon.com, Inc* 351 F Supp 2d 1090 (2004, WD Wash), 1105.

¹²⁷ See discussion in Part I regarding copyright holders' identification of infringement committed using P2P file sharing networks.

to issue a subpoena to an internet service provider to identify an alleged infringer. Upon receipt of a subpoena, an internet service provider is required to disclose information ‘sufficient to identify the alleged infringer’, such as a name and address details. This allows the copyright holder to send a notice of infringement to the allegedly infringing subscriber. However, this process is unavailable in respect of section 512(a) activities, including P2P file sharing.

In *Charter Communications, Inc v Recording Industry Association of America, Inc*¹²⁸ it was held that the subpoena process in section 512(h) could not apply to internet service providers acting as a conduit under section 512(a), but only to section 512(c) hosting and storage. In *Charter*, a strong dissenting judgment of Judge Murphy argued that the subpoena process is of ‘special value’ to copyright owners seeking to stop infringement through conduit service providers,¹²⁹ and the increasing use of P2P file sharing networks makes this subpoena power very significant. It was argued that the majority approach would undermine the legislative goal of promoting cooperation between internet service providers and copyright holders, by shielding internet service providers from liability in respect of conduit P2P file sharers without requiring their assistance to protect copyright.¹³⁰ Therefore, copyright holders seeking to identify alleged file sharers for whom an internet service provider acts only as a conduit must use more expensive, orthodox discovery processes to obtain the subscriber’s details. This may prevent the copyright holder from exercising their rights in a timely way.

¹²⁸ *Charter Communications, Inc v Recording Industry Association of America, Inc* 393 F.3d 771 (2005) (‘*Charter*’)

¹²⁹ *Charter Communications, Inc v Recording Industry Association of America, Inc* 393 F.3d 771 (2005), 778.

¹³⁰ *Charter Communications, Inc v Recording Industry Association of America, Inc* 393 F.3d 771 (2005) 782.

In respect of the safe harbour in section 512(c) for the hosting of websites that provide links to infringing material, section 512(g) DMCA provides protections for subscribers whose allegedly infringing material is taken down. Immunity is granted for internet service providers that remove or disable access to material in good faith, regardless of whether the material is ultimately found to be infringing.¹³¹ To secure safe harbour immunity, the internet service provider must inform the alleged infringer that their material has been taken down or access to it disabled. If the alleged infringer responds with a counter notice, the internet service provider is required to forward that notice to the copyright holder, and if the copyright holder does not file proceedings against the alleged infringer within ten working days, the internet service provider must replace the allegedly infringing material, or lose its safe harbour.¹³²

Furthermore, section 512(f) provides for liability for knowing material misrepresentation in respect of the infringement notices sent by copyright holders pursuant to section 512(c). This is beneficial to both internet service providers and subscribers, as it ensures that internet service providers are not inundated with false notices and that copyright holders make a genuine assessment of whether material is infringing before sending a notice. The function of section 512(f) in relation to section 512(c) hosting activity was exemplified in *Lenz v Universal Music Group Corp.*¹³³ The plaintiff in the case had uploaded a video of her toddler son dancing to the Prince song “Let’s Go Crazy” to the video hosting site YouTube.com. The copyright holder, Universal, sent a notice under section 512(c) alleging infringement of copyright in the song. YouTube duly removed the video and notified Lenz, who issued a counter notice pursuant to section 512(g), arguing the video was a non-infringing fair use.

¹³¹ 17 USC § 512(g)(1).

¹³² 17 USC § 512(g)(2)-(3).

¹³³ *Lenz v Universal Music Group Corp* 572 F Supp 2d 1150 (ND Cal 2008).

The video was reposted. Lenz then brought an action under section 512(f) against Universal for ‘knowingly misrepresenting’ that the video infringed Universal’s copyright. The court held that to proceed under the DMCA, the copyright owner first must evaluate whether the alleged infringer makes fair use of the copyright. It is possible that a similar judicial approach may be applied in assessing the actions of internet service providers terminating accounts of ‘repeat infringers’ under section 512(i).

In summary, the statutory processes in section 512 have proven to be of limited practical application to copyright holders seeking to enforce their rights against P2P file sharers. The DMCA reflects the pre-P2P internet architecture, and it was not intended to provide a general basis for addressing this and other technologies.¹³⁴ The DMCA was based upon the assumption that internet service providers would have a certain amount of control over what their subscribers stored on their networks and transmitted through them. Accordingly, internet service providers were given immunity from secondary infringement claims along with the authority and responsibility to remove potentially infringing material once notified of its existence.¹³⁵ However, the architecture of P2P file sharing networks effectively removes control from internet service providers. Where the internet service provider acts as a conduit and transmits infringing material,¹³⁶ that material is stored on the computer of the users, making it impossible for the internet service provider to access, let alone remove, the allegedly infringing material. This renders many of the DMCA processes inapplicable.

¹³⁴ *Recording Industry Association of America, Inc v Verizon Internet Services, Inc* 351 F 3d 1229 (2003); *Charter Communications, Inc v Recording Industry Association of America, Inc* 393 F.3d 771 (2005) 777.

¹³⁵ 17 USC § 512(c).

¹³⁶ 17 USC § 512(a).

Generally, the relative absence of litigation would suggest that section 512 has at least clarified the obligations of service providers in the online environment by outlining what is, and is not,¹³⁷ required in order to obtain and maintain safe harbour immunity.¹³⁸ The preliminary requirements for establishing safe harbour immunity have been broadly interpreted and are not onerous for internet service providers to implement. The courts have stressed that it is not intended that section 512 shift the burden of policing infringement of copyright to the internet service provider,¹³⁹ and internet service providers do not appear to have been unreasonably exposed to liability. To limit its liability for P2P file sharing through section 512(a), a service provider needs to do no more than adopt and implement a termination policy that complies with the statute. It remains incumbent on the copyright holder to establish a prima facie case of direct infringement, by proving ownership and infringement of copyright.

¹³⁷ 17 USC § 512(m).

¹³⁸ B 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 <<http://www.murdoch.edu.au/elaw/issues/v9n4/mercurio94nf.html#n33>> accessed 27/9/09.

¹³⁹ *Perfect 10, Inc v CC Bill LLC* 481 F 3d 751 (9th Cir 2008), 1176 ("The service provider need not act [on] or address difficult infringement issues".)

B. Australia

In Australia, ‘carriage service providers’ can benefit from safe harbour limitations on liability that mirror those of the DMCA. Safe harbours are set out in ss116AA – 116AH Copyright Act 1968.¹⁴⁰ A ‘carriage service provider’ includes a person who “supplies a listed carriage service to the public”.¹⁴¹ This definition is more restrictive than the DMCA definition of ‘service provider’¹⁴² that focuses on the nature of the activity and type of service provided, rather than the identity of the user of the service. The definition seems to exclude important facilitators of internet connections such as universities and government departments, which do not supply carriage services to the public at large, but do engage with copyright works through activities for which safe harbours are available.¹⁴³ However, these relatively new provisions are yet to be interpreted by the courts.

The Australian safe harbours are broadly similar to those of the DMCA, although there are some points of difference. There is no equivalent subpoena process for copyright holders to identify infringing users personally. However, internet service providers are given similar protections under the Copyright Regulations 1969.¹⁴⁴ Regulation 20V provides that internet service providers are not liable for damages for actions taken in good faith to comply with safe harbour conditions, while Regulation 20X states that civil actions are available against those who knowingly

¹⁴⁰ Copyright Act 1968 (Cth), Part V, Division 2AA as enacted by Schedule 9 Part 11, United States Free Trade Agreement Implementation Act 2004 (Cth).

¹⁴¹ Copyright Act 1968 (Cth), s10(1) states that ‘carriage service provider’ has the same meaning as in Telecommunications Act 1987(Cth), s87.

¹⁴² 17 USC § 512(k).

¹⁴³ Australian Vice Chancellors Committee Submission to Attorney General’s Department, *Safe Harbour Regime Review of the scope of Part V Division 2AA of the Copyright Act 1968* (2005) <<http://www.avcc.edu>> accessed 12/8/09.

¹⁴⁴ Copyright Regulations 1969 (Cth), Division 3A.7.

make material misrepresentations by not taking reasonable steps to ensure the accuracy of notices and counter-notices.

An internet service provider seeking to establish a safe harbour must implement a termination policy for repeat infringers as a condition of safe harbour immunity.¹⁴⁵ As under the DMCA, ‘repeat infringer’ is not defined. It is therefore open to Australian courts to follow the interpretation favoured by courts in the United States that a “repeat infringer” is not simply a person against whom there have been multiple unproven allegations of infringement.¹⁴⁶ Overall, it is likely that the availability of safe harbour immunity for internet service providers against file sharers will be analogous in Australia. In *Cooper*, prior to the entry into force of the statutory safe harbours but in contemplation of their arrival, the court held in obiter dicta that the defendant’s internet service provider would not have been entitled to safe harbour protection as it had not taken steps to implement a termination policy, and its employees had stated that they were indifferent to the use made of its services by the defendant.¹⁴⁷

C. New Zealand

New Zealand has followed the international legislative trend and has chosen to adopt a statutory internet service provider liability regime rather than leave the adjudication of online copyright infringement disputes to the application of existing laws. The regime is set out in sections 92A to 92E Copyright Act 1994, as amended by section 53 Copyright (New Technologies) Amendment Act 2008. The purpose of these

¹⁴⁵ Copyright Act 1968 (Cth), s116AH(1).

¹⁴⁶ *Corbis Corp v Amazon.com, Inc* 351 F Supp 2d 1090 (2004, WD Wash); *UMG Recordings, Inc v Veoh Networks Inc* (2009 US Dist LEXIS 86932).

¹⁴⁷ *Universal Music Australia Pty Ltd v Cooper* (2006) FCAFC 187, at [107].

sections is the creation of a system in which a copyright holder can enforce its exclusive rights and deal efficiently with repeat copyright infringement by internet users, without having to make a claim against an infringing user in the ordinary manner for an injunction or court order.¹⁴⁸

In adopting a safe harbour regime that is analogous to the United States and Australian models, New Zealand has two valuable precedents. However, it appears that the legislature has chosen to cobble together elements of the DMCA regime in an unusual manner. The rationale for this is unclear. Section 512 was a response to the particular uncertainty in United States copyright jurisprudence regarding the liability of internet intermediaries for direct infringement.¹⁴⁹ Transplanting this safe harbour regime to New Zealand in identical form would be dangerous and may implicitly create a basis for liability where none currently exists. In New Zealand, internet service providers do not necessarily face the same type of secondary liability,¹⁵⁰ and subscribers do not have the same ability to raise fair use as a defence. However, adoption of a modified internet service provider liability regime, to suit local conditions, is required to clarify the liability of New Zealand internet service providers for copyright infringement.

Sections 92C and 92D Copyright Act 1994 set out the storage safe harbour and infringement notice regime. These sections may apply to an internet service provider in respect of the hosting of a P2P provider.¹⁵¹ Under section 92C, an internet service provider does not infringe copyright in a work by storing infringing material

¹⁴⁸ J Katz, "Section 92A – To be or not to be" [2009] New Zealand Intellectual Property Journal, 543.

¹⁴⁹ See discussion of *Playboy Enterprises Inc v Frena* 839 F Supp 1552 (MD Fla 1993) and *Religious Technology Centre v Netcom On-line Communication Services* 907 F Supp 1361 (ND Cal 1995) in Part II.

¹⁵⁰ See discussion of internet service provider liability for copyright infringement in Part II.

¹⁵¹ See *Universal Music Australia Pty Ltd v Cooper* (2006) FCAFC 187 .

unless it knows or has reason to believe that the material infringes copyright,¹⁵² and it does not delete or prevent access to the material as soon as possible after becoming aware of it.¹⁵³ The wording suggests that, as under section 512(c) DMCA, both actual and constructive knowledge of infringement will suffice to displace safe harbour protection. In assessing knowledge, the court must take into account whether the internet service provider has received a section 92D notice of infringement in relation to the material.¹⁵⁴ This creates a point of practical difference to section 512(c) DMCA. Section 92C(3) does not create an automatic nexus between receipt of an infringement notice and the presumption of knowledge, requiring immediate action by the internet service provider to remove or disable access to the material, or lose its safe harbour. This section therefore places a New Zealand internet service provider in a difficult position. Upon receipt of a section 92D notice, it must decide whether the allegation of copyright infringement warrants the deletion or removal of a subscriber's material. Furthermore, with no protections for removal or disabling of access to material in good faith,¹⁵⁵ acting on the notice may leave an internet service provider open to liability for breach of contract to its subscriber, while failure to remove infringing material, once made aware of it by a section 92D notice, may cost the internet service provider its safe harbour immunity from suit by the copyright holder.

Section 92B prescribes the obligations and liability of an internet service provider in respect of the provision of "internet services" to a subscriber. "Internet services" are defined in section 92B(4) by reference to the section 2(1) definition of

¹⁵² Copyright Act 1994, s92C(2)(a)(i).

¹⁵³ Copyright Act 1994, s92C(2)(a)(ii).

¹⁵⁴ Copyright Act 1994, s92C(3).

¹⁵⁵ Compare 17 USC § 512(g).

“internet service provider”.¹⁵⁶ The definition clearly provides internet service providers with safe harbour protection for acting as a conduit for P2P file sharing activities, which fall within “transmission, routing or providing connections for digital online communications”.¹⁵⁷

The section 92B safe harbour seems to provide much wider protection for internet service providers than the equivalent safe harbour in section 512(a) DMCA. It states that an internet service provider ‘does not infringe copyright’ merely because a subscriber uses the internet services of the internet service provider. This appears to grant complete immunity from liability for infringement, not just a limitation on civil liability. Read in isolation, section 92B does not require any action by an internet service provider, and provides no incentive for an internet service provider to assist copyright holders in reducing infringement online.

In the original Copyright (New Technologies and Performers’ Rights) Amendment Bill,¹⁵⁸ adoption and implementation of a termination policy for ‘repeat infringers’ was intended as a precondition of an internet service provider obtaining safe harbour immunity in relation to each of the limitations on liability in sections 92B to 92D. The wording of the section 92A termination policy requirement, as well as the definition of ‘internet service provider’ in section 2, were directly borrowed from section 512(i) DMCA. The plain wording of section 92A appeared to grant similar latitude to internet service providers to implement a termination policy. However, the termination policy requirement in section 92A was functionally different from the DMCA equivalent. Compliance with section 512(i) is a prerequisite for a service provider to obtain a safe harbour, and doing so limits the liability of an

¹⁵⁶ Copyright Act 1994, s2(1), as amended by s4 Copyright (New Technologies) Amendment Act 2008.

¹⁵⁷ Copyright Act 1994, s2(1).

¹⁵⁸ Copyright (New Technologies and Performers’ Rights) Amendment Bill, No.102-1 (2006). Sections 92B to 92D, as enacted in identical form, appear in Appendix A.

internet service provider. In contrast, implementation of a section 92A termination policy would have afforded no particular benefit to an internet service provider, and failure to do so carried no sanction. There were no apparent incentives for internet service providers to comply with this legal obligation.

The Commerce Committee, in considering the Copyright (New Technologies and Performers' Rights) Bill,¹⁵⁹ recommended that section 92A be deleted for two reasons. First, the standard terms and conditions of agreements between internet service providers and their subscribers usually allow for the termination of accounts of subscribers who use the services for illegal activity, including infringement of copyright. Second, section 92C already requires an internet service provider to delete infringing material or prevent access to it as soon as possible after becoming aware of it. Only the first of these two justifications applies to P2P file sharing where the internet service provider acts as a conduit. This suggests that the Select Committee did not have in mind the conduit role of an internet service provider in P2P file sharing.

Section 92A was later reinstated at the eleventh hour, in a modified form creating an independent legal obligation, by Supplementary Order Paper 193.¹⁶⁰ It is likely that this was a result of pressure from copyright holders for statutory regulation of internet service providers in relation to conduit functions that fell within section 92B but outside section 92C. It is unclear why a standalone legal obligation was desired, and why no sanction for non-compliance was included at this stage. The legislature may have had in mind that a voluntary industry code of practice for

¹⁵⁹ Copyright (New Technologies and Performers' Rights) Amendment Bill, as reported from the Commerce Committee, No. 102-2 (2006).

¹⁶⁰ House of Representatives, Supplementary Order Paper No. 193, Copyright (New Technologies) Amendment Bill (released 1 April 2008).

internet service providers would be agreed to, regarding how the termination policy should be implemented.

When the Copyright (New Technologies) Amendment Act 2008 came into force on 12 April 2008, the implementation of section 92A was deferred before being indefinitely delayed by the Government following widespread public debate and the failure of copyright holders and internet service providers to reach agreement on a voluntary code of practice. The section was publicly criticised for its vague wording and the perceived grant of power to internet service providers to disconnect their customers based solely on three unsubstantiated accusations of repeat copyright infringement. It became known as the “guilt upon accusation” law.¹⁶¹

1. *Section 92A review policy proposal*

In July 2009, the Ministry of Economic Development released a Section 92A Review Policy Proposal Document¹⁶² (“the proposal”) for consultation. The proposal outlines a revised section 92A, based on a prescriptive process for copyright holders to enforce their rights that would operate as an alternative to the filing of civil proceedings in the High Court. The process would not require internet service providers to implement an account termination policy. Instead, the proposal contemplates extending the jurisdiction of the existing Copyright Tribunal¹⁶³ (Tribunal) to adjudicate issues of repeat infringement as part of a three-phase ‘notice-and-notice’ procedure. The

¹⁶¹ Creative Freedom Foundation, “Artists Say No To Guilt Upon Accusation And Internet Termination” (6 August 2009) <<http://creativecommons.org.nz/library/media-release/creativecommons-nz-2009-08-06.pdf>> accessed 27/9/09.

¹⁶² Ministry of Economic Development, *Section 92A Review Policy Proposal Document* (July 2009) <http://www.med.govt.nz/templates/MultipageDocumentTOC___41169.aspx> accessed 30/9/09.

¹⁶³ Copyright Act 1994, Part 8. At present, the Copyright Tribunal has a narrow jurisdiction, limited to copyright licensing disputes.

proposal contains more safeguards from a subscriber perspective than the original section 92A, but it introduces costly administrative procedures that are unlikely to provide copyright holders with an efficient alternative means of enforcing their rights.

Phase One of the proposal allows copyright holders to allege infringement in a ‘first infringement’ notice. This notice, in prescribed form,¹⁶⁴ is sent to the internet service provider. The issuance of each notice must be based on ‘reasonable grounds’¹⁶⁵ and include sufficient detail to allow the internet service provider to identify the alleged infringer. The internet service provider must then forward the notice to its allegedly infringing subscriber, who has 30 days to respond by means of a ‘response notice’,¹⁶⁶ which goes to the copyright holder, who may accept or reject it. The first infringement notice remains valid for 9 months. If infringement continues during this period, the copyright owner may send a ‘cease and desist’ notice through the internet service provider, to which the subscriber again has 30 days to respond. To proceed to Phase Two, the copyright holder must be satisfied that ‘repeat infringement’ has occurred. This appears to require at least a third instance of infringement, following the sending of a first infringement notice and a cease and desist notice within nine months of the first notice.¹⁶⁷

Phase Two allows the copyright holder to apply to the Tribunal for an order requiring the internet service provider to disclose the name, contact details and other relevant information of the allegedly infringing subscriber, similar to the subpoena

¹⁶⁴ Copyright (General Matters) Regulations 1995 (SR 1995/346), Regulation 5B, as inserted by regulation 4 Copyright (General Matters) Amendment Regulations 2008 (SR 2008/352)

¹⁶⁵ Ministry of Economic Development, *Section 92A Review Policy Proposal Document* <http://www.med.govt.nz/templates/MultipageDocumentTOC___41169.aspx> accessed 30/9/09. ‘Reasonable grounds’ means ‘reasonable evidence’ (based on the facts available) of infringement based on reasonable enquiries.

¹⁶⁶ Compare 17 USC § 512(g)(2) and (3).

¹⁶⁷ Ministry of Economic Development, *Section 92A Review Policy Proposal Document* <http://www.med.govt.nz/templates/MultipageDocumentTOC___41169.aspx> accessed 30/9/09.

process under the DMCA.¹⁶⁸ At this stage, the copyright holder must supply evidence of repeat infringement to the Tribunal.

Phase Three allows a copyright holder to register an infringement complaint with the Tribunal. The copyright holder must agree to be bound by the decision of the Tribunal (subject to appeal to the High Court), pay a filing fee and provide evidence of (a) their entitlement to copyright, (b) repeat infringement by the subscriber, and (c) compliance with Phase One. The subscriber can opt to undertake mediation. If mediation fails, or the subscriber fails to respond, the Tribunal is convened and it may order relief by way of damages, injunctions, account of profits, fines or termination of the subscriber's internet connection.

Under the proposal, the obligations of an internet service provider are limited to conveying infringement notices, and releasing subscribers' details to copyright holders or effecting disconnection, should either be ordered by the Copyright Tribunal. The internet service provider is not required to adjudicate legal issues of infringement, but the administrative burden of the complex notice regime seems to undercut the very efficiency that statutory regulation seeks to achieve. It is unlikely that the Tribunal would be adequately equipped to cope with the number of copyright infringement disputes that could potentially arise under such a notice-and-notice regime that proceeds on the basis of unsworn accusations.

Submissions on the proposal express mixed views.¹⁶⁹ The proposal provides greater certainty to internet service providers, copyright owners and subscribers as to the process involved and the role of each party in it. The introduction of the Copyright Tribunal as an independent third party adjudicator will avoid the internet service

¹⁶⁸ 17 USC § 512(h).

¹⁶⁹ Ministry of Economic Development, *Section 92A Proposal Summary of Submissions* (August 2009) <<http://www.med.govt.nz/upload/69940/summary-of-submissions.pdf>> accessed 27/9/09.

provider needing to pass judgment on its own customers. The proposal requires a copyright holder to provide proof of ownership of copyright and proof of infringement before sanctions are imposed on subscribers, who have a right to respond to allegations. However, the proposal does not provide any sanction for false accusations by copyright holders, and many of the crucial terms remain undefined.

InternetNZ has proposed an alternative notice-and-notice regime¹⁷⁰ that strikes a better balance between the rights of copyright holders and internet service providers. It would allow copyright holders to enforce their rights against repeat infringers without the need for a new Copyright Tribunal. The regime would place two obligations on internet service providers, in exchange for safe harbour protection from liability. First, a notice obligation would replace sections 92A and 92C and require internet service providers to pass an infringement notice on to an allegedly infringing subscriber. The notice would be designed as a deterrent, and receipt of a notice would not lead to any further action. Lodgement of a notice would incur a filing fee for the copyright holder. This would deter copyright holders from sending vexatious notices, and help reduce the cost of the regime being passed on to subscribers. Second, internet service providers would be subject to a data retention obligation, which would require maintenance of an anonymous register of the internet protocol addresses of alleged infringers. Copyright holders could apply to the courts, using existing pre-proceeding third-party discovery procedures, for internet service providers to release of the details of subscribers alleged to have infringed copyright on at least three occasions.

¹⁷⁰ InternetNZ, *Submission to the Ministry of Economic Development on the Section 92A Review Policy Proposal Document for Consultation* (7 August 2009) available at: <<http://www.internetnz.net.nz/issues/submissions>> accessed 13/8/09. Based in part on the scheme proposed by the British government as part of its *Digital Britain Final Report*.

InternetNZ's proposal seems to satisfy the demands of copyright owners, internet service providers and subscribers without the need for the creation of a costly administrative body. The legislative requirements to implement such a regime would be minimal and simple, reducing complexity for all the parties involved. Copyright holders would be able to convey infringement notices to alleged infringers and obtain the details of those who breach their rights. Subscribers would not have their details released without a court order. However, it is not clear that copyright holders could be assured of a reduction in infringement based on the provision of notices alone. While there is evidence that notices have some deterrent effect,¹⁷¹ they are ineffective against determined repeat infringers.

2. Goals for a revised section 92A

New Zealand still has a long way to go to reach a workable copyright statute that provides a robust solution to the problem of copyright infringement by P2P file sharing. A revised section 92A must be credible, legally workable, technologically robust, and consistent with the reasonable demands of internet users in New Zealand. A DMCA-compatible framework is both legally and commercially necessary for New Zealand.¹⁷² However, legislation strengthening the position of copyright holders must be carefully balanced with subscribers' rights of access to the internet, and protections for internet service providers who have minimal control over their subscribers. The

¹⁷¹ UK Department for Media, Culture and Sport, *Digital Britain Final Report*, (June 2009) <http://www.culture.gov.uk/images/publications/digital_britain_finalreportjun09.pdf> accessed 18/6/09, at 111: "There is evidence that most people who receive a notification stop unlawful file sharing".

¹⁷² It is likely that implementation of an internet service provider liability regime will be a prerequisite for New Zealand's negotiation of a free trade agreement with the United States: NZPA, "Key: we still need a new internet copyright law" (2 March 2009) <<http://www.stuff.co.nz/technology/1755916>> accessed 3/10/09.

current provisions of the Copyright Act 1994 make it unlawful to infringe copyright. Copyright holders can already go to court to obtain relief where infringement can be proved. The creation of new processes for adjudicating copyright disputes is entirely for the benefit of copyright holders, to the detriment of other parties.

The statutory regulation of internet service providers in sections 92A-92C should be reworked to provide greater consistency between the sections and create legal incentives for internet service providers to assist copyright holders in enforcing their rights. As drafted, section 92A does not provide any incentive for internet service providers to assist copyright holders. Without such an incentive, the legislation will not achieve its goal of reducing copyright infringement online.

The most simple and effective means of providing a statutory incentive for compliance with the section 92A termination policy requirement would be to create a new statutory liability for internet service providers for copyright infringement, for which immunity would be available upon compliance with certain conditions. Compliance with a section 92A termination policy requirement should be a prerequisite for safe harbour immunity in sections 92B and 92C. To allow copyright owners to enforce their rights against P2P file sharers that infringe copyright in materials that internet service providers cannot remove or disable access to, and who are personally identifiable by no more than an internet protocol address, there should be an efficient process for copyright owners to obtain the details of allegedly infringing subscribers. At present, a copyright holder may apply to the High Court for an order of pre-proceeding third party discovery, but this is an expensive process that requires the applicant to have proceedings in contemplation. To satisfy the legislative purpose of reducing infringement, copyright holders should be able to obtain the

contact details of subscribers to convey infringement notices and attempt to prevent further infringement.

(a) Statutory protections for internet service providers

In respect of the hosting provision in section 92C, a revised copyright regime should provide protection for internet service providers from suit by their subscribers if the internet service provider disables access to allegedly infringing material in good faith. Without such protection, the copyright holder, an unrelated third party to the contract between an internet service provider and its subscriber, may interfere with that contract, amounting to a tort of interference with contractual relations.

If internet service providers are to bear the burden of a greater role in enforcing the private rights of copyright holders, they should bear as little of the cost as possible. A notice-based regime will result in substantial costs for internet service providers in identifying customers and processing and forwarding notices, even if these are in electronic form. The cost of gathering and presenting evidence of infringement should be met by the copyright holder. This may involve the setting of a filing fee to be paid by copyright holders for each notice in relation to an alleged infringement. This fee would need to be set at an appropriate level to cover processing costs and ensure that the financial burden of the legislation is not passed on to non-infringing subscribers.¹⁷³

¹⁷³ InternetNZ, *Submission to the Telecommunications Carriers Forum on the Draft Internet Service Provider Copyright Code of Practice* (6 March 2009), at 2.
<<http://www.internetnz.net.nz/issues/submissions/submissions-2009/2009-03-Copyright%20Code-sub-1.pdf/view>> accessed 27/7/09.

(b) *Statutory protections for subscribers*

To provide a balanced legal framework, a revised regime must include greater protections for subscribers alleged to have infringed copyright. In respect of the hosting function, section 92C(4) requires only that an internet service provider notify a subscriber that their material has been removed or disabled, after this has already taken place. There is no statutory procedure for subscribers to respond to a section 92D infringement notice in the first instance. An alleged infringer should be able to challenge an infringement notice on the grounds of misidentification of the account used to infringe, and non-infringing use. Issues relating to the former could be dealt with by the internet service provider itself, while substantive defences to infringement should be dealt with by the courts. The Ministry of Economic Development's proposal goes some way to remedying this by providing for a response notice to be sent by the alleged infringer directly to the copyright holder. However, the DMCA provides stronger rights for subscribers under section 512(g), by requiring the internet service provider to replace material unless the copyright holder files proceedings against the subscriber. This position should be adapted for the New Zealand context.

A revised section 92A should borrow from the DMCA and create liability for knowing material misrepresentation in relation to infringement notices.¹⁷⁴ This would discourage the provision of false, misleading or vexatious notices by overreaching copyright holders. The lack of protections in New Zealand is problematic, as alleged infringers do not have the equivalent ability to raise fair use as a defence. The Copyright (New Technologies and Performers' Rights) Bill, as reported from the Commerce Committee, contemplated the creation of offences in relation to notices of

¹⁷⁴ Compare 17 USC § 512(f).

infringement.¹⁷⁵ Section 92CB would have made knowing or reckless authorisation of a false or misleading section 92D notice an offence, subject to a maximum penalty of a \$50,000 fine for an individual and a \$100,000 fine for a body corporate. This provision was removed by the same supplementary order paper that reinstated section 92A.¹⁷⁶ This offence provision should be replaced as part of a revised section 92A.

(c) *Statutory remedies*

Perhaps the most contentious issue for a revised section 92A is the range of remedies that should be available against a ‘repeat infringer’. The Ministry of Economic Development proposal contemplates a graduated range of remedies that may be awarded by the Copyright Tribunal to a successful claimant, including damages, injunctions, accounts of profits and fines as well as termination of a subscriber’s internet connection. Penalties for copyright infringement should be proportionate to the harm caused to the copyright holder, and should take into account the need to preserve New Zealand’s creative production and consumption.¹⁷⁷

The main criticism of the original section 92A was the perceived disproportionality of termination as a response to the harm caused by copyright infringement. Termination seems inconsistent with the statutory pecuniary penalties relating to other forms of illegal conduct online, such as sending unsolicited

¹⁷⁵ Copyright (New Technologies and Performers’ Rights) Amendment Bill, No. 102-2 (2006), Part 1, Cl 53.

¹⁷⁶ House of Representatives, Supplementary Order Paper No. 193, Copyright (New Technologies) Amendment Bill (released 1 April 2008).

¹⁷⁷ InternetNZ, *Submission to the Ministry of Economic Development on the Section 92A Review Policy Proposal Document for Consultation*, (7 August 2009) <<http://www.internetnz.net.nz/issues/submissions>> accessed 13/8/09.

commercial electronic messages.¹⁷⁸ There is a range of other technical measures, short of termination, available to internet service providers to reduce copyright infringement committed by their subscribers, such bandwidth throttling which reduces the speed of the subscriber's connection.¹⁷⁹ Termination, if it is to remain as a remedy, should be a last resort, and the threshold of 'appropriate circumstances' for which it can be implemented should be set high.

Termination goes far beyond removing the facility for the commission of copyright infringement, and it may infringe basic and fundamental rights. Termination limits freedom of expression by removing a subscriber's ability to 'seek, receive, and impart information and opinions of any kind in any form'.¹⁸⁰ Access to the internet is a valuable service. It should not be removed where it has not demonstrably caused significant economic damage to anyone.¹⁸¹ It is not clear that the termination amounts to a restriction on freedom of expression that is 'demonstrably justified in a free and democratic society'¹⁸² and is therefore consistent with section 5 of the New Zealand Bill of Rights Act 1990.

Termination may not even have the deterrent effect on infringement that copyright holders desire. It will lack impact on determined individual infringers, but it may have a disproportionately severe effect on subscribers such as businesses who rely on internet connections for commercial purposes. Termination would not be

¹⁷⁸ Unsolicited Electronic Messages Act 2007, ss 45-50, which provide for compensation, damages and pecuniary penalties in respect of the sending of unsolicited commercial electronic messages.

¹⁷⁹ UK Department for Media, Culture and Sport, *Digital Britain Final Report*, (June 2009) <http://www.culture.gov.uk/images/publications/digital_britain_finalreportjun09.pdf> accessed 18/6/09, at 112. Internet service providers in other jurisdictions have used these techniques to reduce P2P traffic during peak downloading hours. See N Anderson, "How Canadian ISPs Throttle The Internet", *Ars Technica* (21 January 2009) <<http://arstechnica.com/business/news/2009/01/how-canadian-isps-throttle-the-internet.ars>> accessed 22/9/09.

¹⁸⁰ New Zealand Bill of Rights Act 1990, s14.

¹⁸¹ InternetNZ, *Submission to the Ministry of Economic Development on the Section 92A Review Policy Proposal Document for Consultation*, (7 August 2009) at 4.5.

<<http://www.internetnz.net.nz/issues/submissions>> accessed 13/8/09.

¹⁸² New Zealand Bill of Rights Act 1990, s5.

permanent, and disconnected users would presumably be free to contract with another internet service provider. Forty-eight percent of respondents in the TelstraClear survey suggested that the greatest legal deterrent would be the prospect of receiving a fine for infringement, while only 43% percent believed that termination would have the same effect.¹⁸³ While fines seem superficially attractive, they would be difficult to collect from the subscribers upon whom they are most likely to be imposed.¹⁸⁴ Because of this, the imposition of a fine may need to be coupled with termination, and payment of the fine enforced as a prerequisite for obtaining internet services from another internet service provider.

For these reasons, graduated responses to infringement should be adopted, and termination ordered only if a combination of other remedies has failed to reduce infringement. The consequences of termination must be clearly set out in legislation, including the maximum period of disconnection and any limitations on reconnection with another internet service provider.

(d) Statutory definitions

Many of the terms and definitions in sections 92A to 92E are yet to be defined, or require clarification. The definition of “internet service provider” in section 2(1) Copyright Act is exceptionally wide and could apply to any person that provides a shared internet connection. This is likely to cause absurdities as the definition may

¹⁸³ TelstraClear, *Survey of New Zealanders’ Opinions on Accessing and Copying Content* (July 2009) Baseline Consultancy <<http://www.telstraclear.co.nz/company-info/media-release-template.cfm?newsid=348>> accessed 23/9/09.

¹⁸⁴ Ministry of Economic Development, *Section 92A Proposal Summary of Submissions* (August 2009) <<http://www.med.govt.nz/upload/69940/summary-of-submissions.pdf>> accessed 27/9/09.

catch parties who are incapable of enforcing the legislative requirements.¹⁸⁵ A technology-neutral definition of ‘internet service provider’ is required, which is wide enough to cover parties that are able to enforce a notice procedure, but narrow enough to provide certainty as to which entity involved in internet data transmission is responsible for implementing the statutory processes. Alternatively, a flexible approach that grants a power to the government to declare a specified body to be an ‘internet service provider’ may be preferable in order to future-proof the legislation as much as possible.

The words ‘repeat infringer’ are circularly defined as a person who “repeatedly infringes copyright in a work using one or more of the internet services of the internet service provider”.¹⁸⁶ This definition was intended to give internet service providers some flexibility to tailor their termination policies in accordance with their particular situation. While it has been proposed that repeat infringement will require at least three instances of infringement within a nine month period,¹⁸⁷ if termination is to remain as a statutory remedy, a threshold of repeat infringement which justifies disconnection will need to be clearly set out in legislation. It is uncertain whether ‘repeat infringement’ may cumulatively occur in respect of different online activities. It may be interpreted as requiring either repeat infringement in relation to a single copyright work, or repeat infringement in relation to separate works. As damage occurs to a copyright holder with infringement of each work, the former interpretation would defeat the purpose of section 92A, which is to implement a workable process to reduce copyright infringement.

¹⁸⁵ For example, the definition may apply to a parent (a ‘subscriber’) who sets up a wireless network within a home that facilitates ‘digital online communications’ and allows his children to connect to the internet on their own computers.

¹⁸⁶ Copyright (New Technologies) Amendment Act 2008, s92A(2).

¹⁸⁷ Ministry of Economic Development, *Section 92A Review Policy Proposal Document* <http://www.med.govt.nz/templates/MultipageDocumentTOC___41169.aspx> accessed 30/9/09.

Section 92A requires the presence of ‘appropriate circumstances’ for termination. It is unclear what circumstances may give rise to termination being inappropriate. This may be the case where a subscriber is also an ‘internet service provider’, and termination would result in the accounts of the subscribers’ customers also being terminated. Termination may be inappropriate in relation to publicly accessible wireless internet connections, through which anonymous users can infringe copyright without knowledge of the subscriber.¹⁸⁸ For this reason, it must be clarified who is a ‘subscriber’. No distinction is made between individual residential subscribers and large commercial subscribers with many users, both of whom could be caught by the definition.

(e) *Further matters*

There are broader issues relating to the workability of the legislation as most internet service providers and copyright holders identify individuals solely on the basis of internet protocol addresses. The fact that these addresses are not fixed makes gathering evidence of ‘repeat infringement’ of copyright very difficult. Section 92A will need to provide for the situation where an internet service provider cannot identify an infringing user due to the anonymous nature of the internet services provided (for example, in an internet café) or where the internet service provider does not have the technology to match the internet protocol address with the subscriber. To make the legislation workable, it may be necessary to impose a statutory requirement

¹⁸⁸ C Morris, “DCC’s Internet plan poses legal risk”, *Otago Daily Times* (10 August 2009) <<http://www.odt.co.nz/news/dunedin/69088/dcc039s-free-internet-plan-poses-legal-risk>> accessed 10/8/09.

on internet service providers to maintain infrastructure that facilitates the identification of subscribers on the basis of internet protocol addresses.

The proposed creation of a new Copyright Tribunal to adjudicate issues of copyright infringement is a costly and inefficient solution to the problems raised by P2P file sharing. However, some legislative change is needed to clarify the liability of internet service providers who provide conduit internet services for file sharing. There are no incentives for internet service providers to exercise their contractual powers to terminate the accounts of their paying customers. As drafted, section 92A does not improve the status quo. The most effective way to provide this incentive would be to hold internet service providers liable under statute for copyright infringement, and make compliance with section 92A a prerequisite for safe harbour immunity from civil liability.

Ultimately, any statutory regulation designed to curb the problem of copyright infringement through P2P file sharing is likely to provide no more than a transitory solution. Commercial models for distribution of digital entertainment works, which provide a stronger grounding for copyright law, are likely to be established by market forces in the near future.

IV. ALTERNATIVE MEASURES FOR PROMOTING COPYRIGHT

The problem of copyright infringement through P2P file sharing illustrates the difficulties in finding legal solutions to issues raised by new technologies. File sharing technology has proved to be a formidable challenge to the rights that are central to copyright law. Copyright holders have focussed on enforcement of their rights in favour of the development of alternative solutions to infringement based on commercial innovation of viable and attractive legal alternatives to file sharing. Governments proposing statutory regulation of internet service provider liability recognise that these regimes are a transitional measure for a new commercial environment: “The purpose of these powers is to encourage users of unlicensed P2P networks towards existing and future digital music services.”¹⁸⁹

The best means of protecting copyright for the future lies not with creating new legal avenues for enforcing existing rights. Instead, the focus should be the creation of new distributional structures that provide incentives for creative production and access to copyright works, and do not limit the development of potentially useful technologies. If a robust means of compensating and incentivising creative production can be attached to P2P file sharing technologies, then as a distributional channel, P2P is more than capable of satisfying the goal of access to creative works.

¹⁸⁹ UK Music, “Statement on Government’s proposed P2P file-sharing legislation” (15 September 2009) <<http://www.ukmusic.org/policy/163-uk-music-statement-on-governments-proposed-p2p-file-sharing-legislation>> accessed 30/9/09.

The legal experience with P2P file sharing provides a number of conclusions that should be the starting point for consideration of alternative measures. First, it is inevitable that some level of copyright infringement will continue as new technologies develop to put users beyond the reach of the law. This was exemplified by the general shift from centralised to decentralised P2P networks after *Napster*. More fundamentally, the architecture of the internet and the web of contracts by which individuals connect to it may change in future. This would further complicate the legal framework upon which to hang copyright litigation. Second, file sharing is not illegal per se and it has valuable non-infringing uses.¹⁹⁰ Third, there is genuine public interest in legal models that offer a similar experience to illegal file sharing by providing simple access to a broad range of works.¹⁹¹ Consumption of digital entertainment works is at an all time high and legal services such as the Apple iTunes Music Store¹⁹² have been highly successful. For these reasons, a shift in focus is needed from the use of legal solutions as a ‘stick’ for minimizing unauthorised use, to the adoption of commercial solutions as a ‘carrot’ for maximising authorised use.¹⁹³ The goal must be to improve the accessibility and quality of digital copyright works so that they are more attractive to would-be infringers who are inclined to go in search of “something for nothing”. This part will analyse a number of academic proposals for alternative models of commercial distribution of creative works.

¹⁹⁰ *Metro-Goldwyn-Meyer Studios, Inc v Grokster, Ltd* 545 US 913 (2005), 954-955 per Breyer J: “There may be other now unforeseen non-infringing uses that develop for peer-to-peer software, just as the home-video rental industry developed for the VCR”.

¹⁹¹ Swedish Performing Rights Society, “*Pirates, filesharers and music users: a survey of the conditions for new music services on the internet*” (February 2009) <<http://www.stim.se>> accessed 30/9/09.

¹⁹² <<http://www.apple.com/itunes/>> consumers pay US 99 cents to download a song.

¹⁹³ D Gervais, “The Price of Social Norms: Towards a Liability Regime for File Sharing” (2004) 2 *Journal of Intellectual Property Law* 39, 58.

A. Collective licensing

One alternative measure to advance the underlying goals of copyright law would be to alter the current scope of exclusive rights to create statutory exceptions for unauthorised private copying upon payment of equitable remuneration.¹⁹⁴ Copyright owners could eliminate or substantially reduce infringement of copyright if they were willing to make digital copyright works available on a licensed basis, and consumers were willing to pay for access to them.¹⁹⁵ It has been shown that New Zealanders are willing to pay for quality content, at the right price.¹⁹⁶ Under a voluntary scheme, internet service providers could be given immunity as an incentive to pay for blanket licences to communicate digital copyright works to their subscribers. A licence would give broad rights to copy, communicate and publicly perform the copyright work. With the possibility of direct author-consumer distribution, licences could function through a payment mechanism that bypasses intermediaries and provides remuneration directly to creative producers. This would be a significant break from the traditional position, and satisfy consumers' desires that creative producers receive the lion's share of profits for their creative efforts.¹⁹⁷ To ensure the licence does not operate as a tax, it would have to remain voluntary to ensure that subscribers could opt out. A licence applied to all subscribers would result in low-level consumers of creative works subsidising the consumption habits of other subscribers.

¹⁹⁴ L Guibault, "The Limit of Balancing Interests through Copyright Levies" in C Lenk, R Hoppe and R Andorno *Ethics and Law of Intellectual Property* (Ashgate Publishing, 2007), 232.

¹⁹⁵ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 65 IPR 289, summary per Wilcox J.

¹⁹⁶ TelstraClear, *Survey of New Zealanders' Opinions on Accessing and Copying Content* (July 2009) Baseline Consultancy <<http://www.telstraclear.co.nz/company-info/media-release-template.cfm?newsid=348>> accessed 23/9/09.

¹⁹⁷ J Pareles, "Pay What You Want For This Article", *New York Times* (9 December 2007) <http://www.nytimes.com/2007/12/09/arts/music/09pare.html?_r=1&pagewanted=2> accessed 20/9/09.

For New Zealand, the terms and conditions of a proposed licensing scheme could be determined by copyright holders and referred to the existing Copyright Tribunal. The scope of the rights contained in the licence scheme could be determined in accordance with Part 8 of the Copyright Act 1994, which currently provides for licensing schemes in respect of communication works.¹⁹⁸ Immunity could be granted to licensed internet users for the uploading and downloading of copyright materials, and to internet service providers for copying or communicating copyright material, unless a licence was available and the internet service provider was aware of that. The regime would be administered by an independent rights collective on behalf of copyright holders to receive licence fees from internet service providers. This would require a system for copyright holders to register and mark works and for internet service providers to track their transmission.

However, a voluntary licence system would not be a silver bullet, and there would be an inevitable degree of free-riding. It is difficult to know how the revenue should be collected from users. It would be administratively simple to collect a licence fee from monthly internet service provider subscriptions, but internet service providers are not well equipped to identify individual works being transmitted over their networks.

¹⁹⁸ Copyright Act 1994, s148(b).

B. Non-commercial use levies

Another alternative measure would be the creation of a system in which levies for private, non-commercial copying would be placed on products and services whose value is positively correlated with online copyright infringement. This type of model has the support of a number of leading academics including Neil Netanel¹⁹⁹ and Terry Fisher.²⁰⁰ Compulsory levies on equipment currently exist throughout Europe, and have done so for many years.²⁰¹ The levy would be the sole means of compensating copyright holders for the right to unrestricted non-commercial distribution, adaptation and editing of copyright works. Similar to a licence scheme, remuneration would be collected by an independent body and collecting societies would divide the proceeds among their members using digital tracking technologies.²⁰²

A levy system has a number of advantages. It is easy to administer, allows unhindered use of copyright works and free technological development, while also providing copyright holders with fair and equitable remuneration for their creative efforts. It would also decriminalise the entrenched habits of file sharers. However, it would transform copyright from a proprietary right to a universal liability system in which all users of certain products and services would subsidise the infringing uses of

¹⁹⁹ N Netanel, "Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing" (2003) 17 *Harvard Journal of Law & Technology* 1, 84.

²⁰⁰ W Fisher, *Promises to Keep: Technology, Law and the Future of Entertainment* (Stanford University Press, Palo Alto, 2004) 199-258.

²⁰¹ For example, the first private copying regime came into force in Germany as a result of successful litigation by performance rights organisation GEMA against audio equipment manufacturer Grundig: *Gema v Grundig* 1 ZR 8/54, 17 BGHZ 266, 279 [1955] GRUR 49.

²⁰² N Netanel, "Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing" (2003) 17 *Harvard Journal of Law & Technology* 1, 37-39.

a minority, may in fact encourage infringement amongst consumers who consider that they have already paid for the right to infringe copyright.²⁰³

C. A shift in focus for copyright law?

A more radical alternative solution may involve a shift in the nature of copyright itself. Until now, copyright holders have attempted to bring new infringing technologies within the reach of existing copyright law doctrines. Copyright law has historically proven to be flexible towards the disruption that new technologies create. In the future however, this is likely to become less and less possible. It may be that the weakening of current copyright protections is a necessary price to pay for technological advances.²⁰⁴ The reality of digital copying may require a narrowing of the scope of copyright law from the provision of wide moral and proprietary rights to a focus on a basic right of remuneration. Copyright law is not inherently a proprietary copyright regime²⁰⁵ and making the products of creativity proprietary on the internet has not worked well.²⁰⁶ Such a change would significantly undermine the liberal values of copyright, but the realities of digital technology are challenging basic assumptions about ownership and copying.²⁰⁷ For some copyright holders, replacing theoretical moral rights with enforceable remuneration rights seems to leave them better off. For others, the maintenance of exclusive rights remains the cornerstone of

²⁰³ N Blackmore, "Peer-to-Peer Filesharing Networks: The Legal and Technological Challenges for Copyright Owners" (2004) 55 *New South Wales Society for Computers and the Law: Journal*, [5.1]. <<http://www.nswscl.org.au/journal/55/Blackmore.html>> accessed 25/5/09.

²⁰⁴ L Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, (New York, Penguin Books, 2004).

²⁰⁵ N Netanel, "Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing" (2003) 17 *Harvard Journal of Law & Technology* 1, 31.

²⁰⁶ L Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, (New York, Penguin Books, 2004), 131; *Metro-Goldwyn-Meyer Studios, Inc v Grokster, Ltd* 545 US 913 (2005), 959-960 per Breyer J.

²⁰⁷ UK Strategic Advisory Board for Intellectual Property Policy, *Copycats? Digital Consumers in the Online Age* (April 2009) <<http://www.sabip.org.uk/sabip-cibersummary.pdf>> accessed 30/9/09.

any copyright system as it adapts to accommodate new means of exploitation.²⁰⁸ However, a decade of litigation to enforce exclusive rights against file sharers has been futile in changing social norms surrounding copyright, and the divide between consumers and copyright holders has widened.²⁰⁹ To bridge this gap, a new way forward is needed.

²⁰⁸ J Ginsburg, 'Copyright and Control over New Technologies of Dissemination' (2001) 101 *Columbia Law Review* 1613, 1613.

²⁰⁹ H Hietanen, A Huttunen, and H Kokkinen, "Criminal Friends of Entertainment: Analysing Results from Recent Peer-to-Peer Surveys" (2008) 5 *SCRIPTed* 31, 48 <<http://www.law.ed.ac.uk/ahrc/script-ed/issue5-1.asp>> accessed 3/10/09.

V. CONCLUSION

The rise in popularity of P2P file sharing has tested the limits of how copyright law is applied in the digital era. The powers to copy and communicate have given rise to an entrenched social norm of disrespect for digital intellectual property rights.²¹⁰ The delicate balance of copyright law been tipped, creating conflict between the legal rights of copyright holders and the values and habits of consumers of digital copyright works.

Efforts to stop file sharing through legal deterrents have not been successful. Litigation has been brought to uphold primary and secondary copyright law doctrines, and the courts have attempted to clarify the liability of file sharers, P2P providers and internet service providers. However, there is significant uncertainty, especially under New Zealand law, surrounding the extent to which copyright holders can enforce their exclusive rights. There is no bright line knowledge-based standard of liability for P2P providers, and there is divergence of judicial opinion over the actions a provider must take to avoid liability for authorising the infringing acts of file sharers. In line with the decision in *Amstrad*, New Zealand has the scope to adopt a doctrine of authorisation that is appropriate for copyright law as it is applied in the 21st century. The development of new copying and communications technologies is intimately connected with the law of authorisation and our courts must determine the extent to which the law should inhibit the development of technologies such as P2P file sharing. Liability for authorisation is a question of fact, and it will be inevitable in

²¹⁰ W Fisher, "The Proposer's Opening Remarks" *Economist Debates: Copyright and Wrongs: Statements* (6 May 2009) <<http://www.economist.com/debate/days/view/310>> accessed 14/5/09.

future cases that assessment of authorisation will take into account the need for socially useful technologies.

As existing legal processes and remedies have failed to reduce infringement, copyright holders have looked to legislatures to compel internet service providers to act as their officers in enforcement of their rights. This has raised issues as to what can be reasonably and practicably expected of the parties that are implicated in the commission of copyright infringement online. The DMCA regime in the United States appears to be functional and balanced generally, but its processes are not well suited to enforcing rights against P2P file sharers. For New Zealand, ensuring internet service providers take greater responsibility for the conduct of their subscribers, where they become aware of it, is a necessary step in the transition to a new digital copyright environment. New Zealand has become globally renowned for creative production in music, film and television. A robust intellectual property rights system is essential for the continuing growth of these sectors.²¹¹ However, the current proposals for reform of the Copyright Act 1994 do not provided an adequate solution. They are based upon the technologies, judicial and industry interpretations of today, all of which will be tested as technology develops. Termination of an internet connection remains a highly contentious remedy and it is not clear that it will have the desired deterrent effect on infringers. It remains to be seen whether internet service provider liability regimes will provide a robust framework for the future of copyright.

For the long term, a shift in focus is required from seeking to punish online customary habits with new litigation and new laws, to creating new habits that advance the underlying goals of copyright. Legal solutions cannot keep pace with technology, therefore over-regulation must be avoided for copyright law to remain

²¹¹ Hon Judith Tizard (7 December 2006) 636 NZ Parliamentary Debates 7045.

relevant and ensure that a generation of internet users are not criminalised. An alternative model of access to copyright works is needed which provides economic incentives for the creation and distribution of works of original expression²¹² and harmonises the interests of copyright holders and consumers to the extent possible. Such a model would convince many would-be copyright infringers that the rewards of participating in a legal manner are greater than those available by breaching the law.

So far, attempts to fix a commercial problem with legal solutions have been unsuccessful, but until a solution is found, copyright owners are entitled to such protective rights as the law affords them.²¹³ Once new commercial models become widespread, copyright law will continue to help strike a balance between the provision of incentives for creative production and access to creative works in the online environment.

²¹² N Netanel, "Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing" (2003) 17 *Harvard Journal of Law & Technology* 1, 84.

²¹³ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 65 IPR 289, summary per Wilcox J.

VI. APPENDICES

Appendix A: Section 53, Copyright (New Technologies) Amendment Act 2008

53 New heading and new sections 92A to 92E inserted

The following heading and sections are inserted after section 92:

“Internet service provider liability

“92A Internet service provider must have policy for terminating accounts of repeat infringers

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

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

“92B Internet service provider liability if user infringes copyright

“(1) This section applies if a person (A) infringes the copyright in a work by using 1 or more of the Internet services of an Internet service provider to do a restricted act without the consent of the copyright owner.

“(2) Merely because A uses the Internet services of the Internet service provider in infringing the copyright, the Internet service provider, without more,—

“(a) does not infringe the copyright in the work:

- “(b) must not be taken to have authorised A’s infringement of copyright in the work:
- “(c) subject to subsection (3), must not be subject to any civil remedy or criminal sanction.
- “(3) However, nothing in this section limits the right of the copyright owner to injunctive relief in relation to A’s infringement or any infringement by the Internet service provider.
- “(4) In subsections (1) and (2), **Internet services** means the services referred to in the definition of Internet service provider in section 2(1).

“92C Internet service provider liability for storing infringing material

- “(1) This section applies if—
 - “(a) an Internet service provider stores material provided by a user of the service; and
 - “(b) the material infringes copyright in a work (other than as a result of any modification by the Internet service provider).
- “(2) The Internet service provider does not infringe copyright in the work by storing the material unless—
 - “(a) the Internet service provider—
 - “(i) knows or has reason to believe that the material infringes copyright in the work; and
 - “(ii) does not, as soon as possible after becoming aware of the infringing material, delete the material or prevent access to it; or
 - “(b) the user of the service who provided the material is acting on behalf of, or at the direction of, the Internet service provider.
- “(3) A court, in determining whether, for the purposes of subsection (2), an Internet service provider knows or has reason to believe that material infringes copyright in a work, must take account of all relevant matters, including whether the Internet service provider has received a notice of infringement in relation to the infringement.
- “(4) An Internet service provider who deletes a user’s material or prevents access to it because the Internet service provider

knows or has reason to believe that it infringes copyright in a work must, as soon as possible, give notice to the user that the material has been deleted or access to it prevented.

- “(5) Nothing in this section limits the right of the copyright owner to injunctive relief in relation to a user’s infringement or any infringement by the Internet service provider.

“92D Requirements for notice of infringement

A notice referred to in section 92C(3) must—

- “(a) contain the information prescribed by regulations made under this Act; and
- “(b) be signed by the copyright owner or the copyright owner’s duly authorised agent.

“92E Internet service provider does not infringe copyright by caching infringing material

- “(1) An Internet service provider does not infringe copyright in a work by caching material if the Internet service provider—

- “(a) does not modify the material; and
- “(b) complies with any conditions imposed by the copyright owner of the material for access to that material; and
- “(c) does not interfere with the lawful use of technology to obtain data on the use of the material; and
- “(d) updates the material in accordance with reasonable industry practice.

- “(2) However, an Internet service provider does infringe copyright in a work by caching material if the Internet service provider does not delete the material or prevent access to it by users as soon as possible after the Internet service provider became aware that—

- “(a) the material has been deleted from its original source; or
- “(b) access to the material at its original source has been prevented; or
- “(c) a court has ordered that the material be deleted from its original source or that access to the material at its original source be prevented.

*Appendix B: 17 USC § 512(a), (c) and (i), Digital Millennium
Copyright Act 1998*

§ 512. Limitations on liability relating to material online⁸

(a) TRANSITORY DIGITAL NETWORK COMMUNICATIONS. — A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if —

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;

(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

(5) the material is transmitted through the system or network without modification of its

(c) INFORMATION RESIDING ON SYSTEMS OR NETWORKS AT DIRECTION OF USERS.—

(1) IN GENERAL. — A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider -

(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

(2) DESIGNATED AGENT. — The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

(A) the name, address, phone number, and electronic mail address of the agent.

(B) other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, in both electronic and hard copy formats, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

(3) ELEMENTS OF NOTIFICATION. —

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(B)(i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

(ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).

(i) CONDITIONS FOR ELIGIBILITY.—

(1) ACCOMMODATION OF TECHNOLOGY. — The limitations on liability established by this section shall apply to a service provider only if the service provider —

(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and

(B) accommodates and does not interfere with standard technical measures.

(2) DEFINITION. — As used in this subsection, the term "standard technical measures" means technical measures that are used by copyright owners to identify or protect copyrighted works and —

(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;

(B) are available to any person on reasonable and nondiscriminatory terms; and

(C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.

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