



20 March 2009

Hon. Simon Power
Parliament Buildings
Wellington

Via email

Copy Right Act – Section 92A

Dear Minister,

At yesterday's inaugural members meeting of the NZICT, the attached policy position was unanimously endorsed by NZICT members.

The NZICT would welcome the opportunity to discuss this further with you.

Yours sincerely,

A handwritten signature in black ink, appearing to read "K Ackhurst", enclosed within a simple rectangular box.

Kevin Ackhurst
Chairman NZICT

Cc Steven Joyce, Minister of Communications

NZICT GROUP

Section 92 of the Copyright Act

20th March 2009

NZICT Policy Position

This paper sets out the NZICT Group's view on Section 92A of the Copyright (New Technologies) Amendment Act (Act).

The Amendments

The Act passed into law in April 2008. The purpose of this Act is to amend the Copyright Act 1994 to better reflect the copyright challenges of our times, particularly in the area of illegal file sharing.

The wide spread infringement of copyrights by a large number of internet users is an issue that certainly requires attention and response. Arguably, the current court-based regime of protecting copyrights has its limitations, particularly in terms of efficiently dealing with the suspected infringement of the average offending internet user. The intent of this Act is to resolve these limitations by introducing an efficient and effective "sub-judicial" process, which can resolve these copyright issues in a fair and reasonable manner without involving the courts.

Section 92A of the amended Copyright Act introduces a "termination" regime, whereby Internet Service Providers (ISP) must have and reasonably implement a policy that provides for the termination of the internet accounts of repeat infringers in appropriate circumstances. This section of the Act comes into force on the 27th of March 2009.

The amendments to Act introduce a very wide definition of Internet Service Provider (ISP):

"An Internet service provider means a person who does either or both of the following things:

- a) Offers the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the users choosing:*
- b) Hosts material on websites or other electronic retrieval systems that can be accessed by a user"*

It is clear that the Government intends this definition to apply to "traditional", telecommunication services based, Internet Service Providers. However the particular wording of the definition arguably extends the obligations of this Act beyond such "traditional" ISPs to other organizations that provide internet services to users.

NZICT Principles

NZICT is uniquely placed to comment upon these amendments, as the impact of this legislation upon NZICT members is multi-faceted.

As many NZICT members are producers of digital content, NZICT should welcome the introduction of a regime that allows for the better protection of intellectual property rights. Further, as the creation of intellectual property drives innovation, economic growth and creates exportable value, NZICT should recognise that these amendments are in the best interests of the New Zealand economy.

However, NZICT members also recognise that the value of many of their products is created or enhanced by users having unfettered access to the internet. Accordingly, NZICT has an interest in preventing these amendments from denying New Zealand consumers and businesses from deriving the maximum benefit from these products. NZICT believes that the amendments should not place unreasonable burdens upon Internet Service Providers, via unnecessary costs or complexities, as the costs of such compliance will inevitably be passed onto consumers.

Recommended Positions

In line with the above positions, NZICT strongly supports measures to protect rights holder interests and believes that the amended Act is a welcome response to the challenges that the internet has created for intellectual property owners.

However, in light of the issues highlighted above, it would be preferable that the Act be further modified as follows:

1. Clarify the definition of Internet Service Provider, to ensure that the noted ambiguities are removed. NZICT would support an amendment that would correctly place these obligations upon those “traditional” Internet Service Providers.
2. The obligations on an ISP to act (and when it must act) are unclear. This is causing concerns for ISPs and for consumers. It would be in the interests of ISPs, consumers and rights holders to have a clear process. The duty for ISPs to act should not come into force until there is clarity around when they must act. ISPs should not be in the middle of the debate between rights holders and users.
3. The perceived disparity between abilities for rights holders to allege infringement and consumers to defend these allegations should be addressed by providing for an independent authority to adjudicate disputes between consumers and business, and the copyright holders. The Act is silent on how disputes over copyright should be resolved. Unfortunately, such disputes are likely to be numerous and complex, and therefore difficult to fairly resolve without an appropriately qualified third party. NZICT would support such an amendment, as it correctly balances the interests of users and copyright holders.
4. On this basis NZICT Group recommends that s.92A be suspended until the above issues have been addressed by the Government.