

# Critics put new law on trial unfairly

The critics have got it wrong – and they also haven't noticed how bad the act is for copyright owners

**Richard Watts and Kate Walters**

A large number of alarmist claims have been made that recent amendments to the Copyright Act will see internet service providers (ISPs) cutting off the accounts of their users on the basis of mere accusations of copyright infringement.

Internet Service Providers Association of New Zealand president Jamie Baddeley said in a statement last week, "If section 92A is allowed to come in, ISPs will have to disconnect organisations such as businesses, public libraries, government agencies, etc, as a result of accusations that an employee has used their computers for illegal downloading."

Such criticism is characteristic of the reaction of numerous industry groups – another described the amendments as a "deeply flawed law that undermines fundamental rights and simply will not work."

The criticisms suggest the amendments will increase the potential liability for ISPs and hurt the average honest internet user. Neither claim is true.

s92A of the Copyright Act requires ISPs to adopt and "reasonably implement" a policy that the accounts of users, who repeatedly download or upload infringing music, movies, games, and other copyright material, be terminated in "appropriate circumstances."

Is this such a big step? After all, the

standard terms of use of any reputable ISP will already allow it to unilaterally take down any material it considers to be infringing copyright.

ISPs can also terminate a user's account if they believe the user is doing something illegal.

So surely there is no credible ISP that doesn't already have a policy for terminating accounts of users who repeatedly commit offences?

Another section of the act, s92C, limits ISP liability for copyright infringement, providing the ISP acts promptly to take down any material where they "know or have reason to believe" that material they are hosting is infringing copyright.

It is envisaged that ISPs will be put on notice by the issuing of a takedown notice (a notice of infringement), signed by the copyright owner (or the copyright owner's duly authorised agent).

Much of the criticism of s92A assumes that if an ISP receives a takedown notice then an account will instantly be terminated. This isn't so.

The section makes no mention of a takedown notice and certainly does not oblige ISPs to terminate the accounts of users when they receive such a notice.

On the contrary, it is more likely ISPs will take a conservative approach when determining whether there are appropriate circumstances to terminate an account – for example, only after they receive notification that the user has been found guilty in court and that there is evidence that the user has repeatedly offended.

This new section of the act can be legitimately criticised for being unclear and the government needs to move quickly to provide guidance. However, if interpreted sensibly, it shouldn't be

unfair or unduly onerous.

In any event, under s92C an ISP may be liable if it does not delete information as soon as it knows or has reason to believe that the stored material infringes copyright.

It does not follow that an ISP will, or should, take down material only because it receives a take-down notice.

A court is unlikely to decide that the ISP knew or had reason to believe that material infringed copyright in a work unless there is a reasonable basis for that belief.

The section actually states that, in reaching that decision, one "must take account of all relevant matters," only one of which is the existence of a valid takedown notice.

What the critics have missed is that the dangers associated with s92 may be greater for copyright owners. A notice of infringement will only be valid if

it is signed by the copyright owner or authorised agent.

When you consider the key people likely to be affected by illegal downloads are members of overseas-based film and television industries, then it may not be easy for them to provide timely and credible evidence that they are indeed the copyright owner and therefore have standing to issue a notice of infringement.

Providing sufficient evidence to such rights could be onerous indeed.

One criticism with which we wholeheartedly agree is the call for guidance on these new provisions.

As the recent media coverage has shown, these sections of the new act are not easy to understand and the industry is in great need of pragmatic guidance.

Richard Watts ([richard.watts@simpsongrimson.com](mailto:richard.watts@simpsongrimson.com)) is a partner and Kate Walters ([kate.walters@simpsongrimson.com](mailto:kate.walters@simpsongrimson.com)) is a solicitor at Simpson Grimson's intellectual property practice