

ARTICLE

Public Law Ramifications of the Copyright (Infringing File Sharing) Amendment Act 2011

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This article discusses the new fast-track regime introduced to tackle online copyright infringement. The regime is targeted at peer-to-peer software, which shares files directly between computers. It is a technically complex area, and this article questions whether the information provided to pursue a claim can be technically correct, if the regime is practically robust and if it is appropriate in light of the New Zealand Bill of Rights Act 1990. Approaches in several jurisdictions are analysed and compared to the New Zealand regime, and the current workability of these jurisdictions' responses is discussed. This article also considers other issues surrounding the controversial legislation, such as its introduction, the calculation of awards and the concerning onus of proof.

I Introduction

This article is not an endorsement of copyright infringement. Nor is it a defence for those who infringe copyright. I will, however, call into question the approach adopted to deal with infringers and the resulting balance between copyright and freedom of speech. Copyright continues to have an intrinsic societal value to encourage creativity and allow artists to enjoy the fruits of their labour. What I question is whether the response to date is the best possible system in today's Internet-based environment.

A relatively quick and easy way to flout copyright laws is sharing copyrighted materials over the Internet using file-sharing software, such as the Torrent method. This enables users to share files directly between computers over the Internet. Whereas previously copyright holders could take action against the central host, such as Napster and Grokster,¹ the Torrent method only involves end users.

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1 *Metro-Goldwyn-Meyer Studios Inc v Grokster Ltd* 545 US 913 (2005); and *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242, (2005) 222 FCR 465.

There has been a wave of global responses to monitoring and responding to this growing concern. New Zealand has introduced its own copyright infringement legislation in response. This article will address:

- the use of urgency to introduce the Copyright (Infringing File Sharing) Amendment Act 2011 (CIFSAA);
- process concerns relating to the legislation;
- the relationship between the CIFSAA and freedom of speech;
- whether the CIFSAA is a justified limitation on freedom of speech;
- the practical effectiveness of the legislation; and
- alternative options to prevent infringement.

Prior to CIFSAA, the legal recourse against an individual was to take a conventional infringement claim in the High Court. The difficulty with this is that identifying the infringer is often costly, lengthy and complex. Former Minister of Commerce the Hon Simon Power stated: “[i]nfringement using [peer-to-peer] file sharing technology is prolific and the current enforcement regime provided for in the [Copyright] Act has not been an effective deterrent.”² This is partly because copyright has traditionally focused on large-scale commercial infringers, and is not well suited to individual infringers.

The standard court penalties for an individual infringer are often disproportionate towards the end user that the rights holder takes action against. An example is the United States case of Jammie Thomas-Rasset, found liable for infringement of 24 songs. The awards in several damages hearings varied between USD 1,920,000 and USD 54,000 (the final figure arrived at).³

In New Zealand, the Copyright (New Technologies) Amendment Act 2008 inserted s 92A into the Copyright Act 1994, which allowed suspension of accounts:

- (1) An Internet service provider must adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the account with that Internet service provider of a repeat infringer.
- (2) In subsection (1), *repeat infringer* means a person who repeatedly infringes the copyright in a work by using 1 or more of the Internet services of the Internet service provider to do a restricted act without the consent of the copyright owner.

Section 92A was introduced by Supplementary Order Paper 193 on 1 April 2008 during the Committee Stage (that is, after Select Committee recommendations and the second reading).⁴ As a result, there was no public feedback on its introduction, but New Zealand saw its own Internet blackout and protests.⁵ Section 92A was inserted into the Copyright Act but never came into effect, and CIFSAA was introduced to repeal that provision and put in place a more elaborate system.⁶

2 Simon Power *Illegal Peer-to-Peer File Sharing: Proposal* (Ministry of Economic Development, Cabinet Paper) at [18].

3 See generally *Capitol Records Inc v Thomas* 579 F Supp 2d 1210 (D Minn 2008).

4 Supplementary Order Paper 2008 (193) Copyright (New Technologies) Amendment Bill (102–2) at 3.

5 Michael Fox “Protest over ‘ludicrous’ Internet law at Parliament” (3 March 2009) Stuff <www.stuff.co.nz>.

6 Copyright (Infringing File Sharing) Amendment Act 2011, s 4 repealed s 92A of the Copyright Act 1994 before it came into force.

II Public Perception of Use of Urgency

Urgency has become a routine way to read and accelerate the passage of legislation due to relatively few hours to work through the “legislative log jam”.⁷ Urgency is, as several critics have pointed out, not the best vehicle to routinely speed up the passage of legislation.⁸ Not only may it lead to a perception of the government “ramming through” legislation to avoid public comment,⁹ but it also removes the stand-down periods between the readings. These stand-down periods allow legislation to proceed through the House at an appropriate speed and give both members of the House and members of the public the opportunity to comment on and interact with the debate.¹⁰

Applying urgency to multiple stages may undermine the government’s democratic mandate by reducing the opportunity for the public to comment on the passage of legislation. It was speculated that CIFSAA was accorded urgency to limit discussion about the Bill, given the misinformation and lack of understanding that arose during the parliamentary debate.¹¹

The general public was not aware CIFSAA was being debated until the day of debate, and it passed its third reading the next morning. This seriously inhibits the public’s ability to give feedback, participation and comment. Although there was an extensive Select Committee hearing process, there does not appear to be sufficient reason to truncate the parliamentary process and shorten the possible wider public debate and commentary on progress of the legislation in this case. Public debate via Twitter and other live updates indicated that members of the public would have contributed to commentary on the progress of legislation if it had been available, and would also have corrected the lack of technical understanding displayed during the debate.¹²

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- 7 Interview with Peter Dunne, United Future MP (6 October 2010) in Claudia Geiringer, Polly Higbee and Elizabeth McLeay *What’s the Hurry? Urgency in the New Zealand Legislative Process 1987–2010* (Victoria University Press, Wellington, 2011) at 54; Sascha Mueller “The Busy House: Alternatives to the Urgency Motion” (2011) 9 NZJPL 167 at 189; and Sascha Mueller “Where’s the Fire?: The Use and Abuse of Urgency in the Legislative Process” (2011) 17 *Canta LR* 316 at 317.
 - 8 See David Farrar “Use of Urgency” (12 April 2011) *Kiwiblog* <www.kiwiblog.co.nz>. See also Mueller “The Busy House”, above n 7, at ch 6; and Mueller “Where’s the Fire?”, above n 7, at 326.
 - 9 See New Zealand Press Association “Copyright law ‘will not change’” (7 June 2011) *Stuff* <www.stuff.co.nz> which stated that “[t]he law was widely ridiculed when National rushed it through Parliament under urgency”.
 - 10 Geiringer, Higbee and McLeay, above n 7, at 142; and Mueller “Where’s the Fire?”, above n 7, at 319.
 - 11 The Hon Simon Power famously referred to the Internet as the “Wild West” in a review of new media: Simon Power “Law Commission to review regulatory gaps around ‘new media’” (press release, 14 October 2010). Jonathan Young also compared today’s Internet to Skynet from the movie *The Terminator*: (12 April 2011) 671 NZPD 18099. Alarming, when the committee of the Whole House debated the Bill, Katrina Shanks said that “I do not think people understand it is illegal to file share”: (12 April 2011) 671 NZPD 18101. The debate was referred to as having “almost surreal levels of technical ignorance”: Chris Keall and Alex Walls “Internet file sharing law passes after loopy debate” *The National Business Review* (online ed, Auckland, 13 April 2011). See also Martin Kay and Andrea Vance “Controversial Internet file-sharing law passed” (14 April 2011) *Stuff* <www.stuff.co.nz>.
 - 12 See, for example, Keall and Walls, above n 11: “[o]pponents have re-ignited a campaign” protesting s 92A. See also Kay and Vance, above n 11.

III Process

CIFSAA sets out a fast-track process for rights holders who have traced infringement resulting from the use of file-sharing software to an Internet protocol (IP) address.¹³ Once the IP address has been provided to the Internet Protocol Address Provider (IPAP),¹⁴ the IPAP sends out a warning letter on up to three occasions—a Detection Notice, a Warning Notice and an Enforcement Notice. Following the Enforcement Notice, the rights holder can make a claim in the Copyright Tribunal.

A Absolute liability of the account holder, and defences

The account holder of the Internet account in question receives the notices, is taken to the Tribunal and may potentially be fined. Technical possibilities such as account hacking, WiFi cracking or trojaned machines do not seem to have been contemplated.¹⁵ In New Zealand, the warnings are delivered the same way that the IPAP usually bills their client, often by e-mail.¹⁶ It would be possible for the warning e-mails to be filtered out by a spam filter. In France, where the HADOPI regime is already active and includes a similar liability section, a second warning is sent by registered letter. This provides evidence that an infringement notice was received.

In the United Kingdom case of *Media CAT Ltd v Adams* (ACS:Law),¹⁷ Birss J was not in favour of absolute liability and believed “that the process of linking copyright infringement to a named individual by pinpointing an IP address associated with that person was extremely problematic”.¹⁸ He went on to pose more questions than answers, again underlying the problematic nature of attempting to prove infringement in the online environment:¹⁹

What if the defendant authorises another to use their Internet connection in general and, unknown to them, the authorised user uses P2P software and infringes copyright? Does the act of authorising use of an Internet connection turn the person doing the authorising into a person authorising the infringement within s16(2) [of the Copyright Designs and Patents Act 1988 (UK)]? ... Then there is the question of whether leaving an Internet connection “unsecured” opens up the door to liability for infringement by others piggy backing on the connection unbeknownst to the owner. Finally what does “unsecured” mean? Wireless routers have different levels of security available and if the level of security is relevant to liability—where is the line to be drawn?

13 An Internet Protocol address [IP address] is a unique identifier assigned to a single Internet connection. For example, several computers may connect to the same Internet connection in a household or office, and all will be allocated the same IP address.

14 *Internet Protocol Address Provider* is defined in the Copyright Act 1994, s 122A, and is essentially a primary provider of the IP address, such as TelstraClear and Orcon.

15 WiFi hacking: someone *cracks* a WiFi connection illegally and is then able to use it without your knowledge. Trojaned machines: a computer with a *Trojan horse* infection which gives a hacker remote access to your computer and can infringe copyright using your computer without your knowledge, thus using your IP address.

16 Copyright Act 1994, s 122C(5).

17 *Media CAT Ltd v Adams* [2011] EWPC 6, [2011] FSR 28 [ACS:Law].

18 Kelly Fiveash “Patent judge hits out at legal tactics used against file-sharers” (9 February 2011) The Register <www.theregister.co.uk>.

19 *ACS:Law*, above n 17, at [30].

Another potential issue that was not considered is the “fair dealing” defence provision that applies to the Copyright Act as a whole. For example, a defence could be raised that downloaded material will be used for academic studies, research or private study.²⁰ However, no “fair dealing” defences can be raised under CIFSAA if infringement has occurred.

Under CIFSAA, if a person’s IP address has been used to infringe material, there is no option but to find them liable for infringement. Whatever the nature of award, there will still be some stigma attached to the process, including possible publication of a party’s name as a “pirate”. As yet, no cases have been brought before the Tribunal, and I suggest any defence will be reflected in the award that the Tribunal orders against the infringer.

An analysis of the 2013 Copyright Tribunal decisions suggests that many infringers are unaware of the peer-to-peer (P2P) software in use, and unaware of technical defences. There were several queries over evidence such as the IP address, proving that the WiFi connection had not been hacked, and that the infringing material was not present on the computer. Similarly, many respondents were unaware of the fact that one download may sit passively in the file-sharing software, yet continue to trigger infringement notices. However, all of the respondents declined to appear in person—mainly because, it seems, there were uncertain of how to proceed with a defence.²¹

B *Calculating awards*

Under the current regime, the Tribunal must order an account holder to pay a rights owner a sum if there was an infringement of the rights owner’s copyright at an IP address of the account holder, and if the three notices were issued in accordance with CIFSAA.²² The Copyright (Infringing File Sharing) Regulations 2011 provide that the Tribunal may order payment of the lesser of \$15,000, or specified costs and an amount that is “appropriate as a deterrent against further infringing”.²³

Given the mandatory language in the Copyright Act and permissive language in the Regulations, I suggest that the Tribunal may have more discretion available to it than first appears: the \$15,000 or alternative provided for are not definitive. The Tribunal may decide that an alternative (lesser) fine is appropriate, for example if the account holder has had his account hacked.

The award issued to the rights holder consists of the compensation for the cost of purchasing the music, a contribution towards the fees paid by the rights holder to the IPAP, reimbursement of the application fee to the Copyright Tribunal and an additional sum as a deterrent against further infringing.²⁴

A summary of 2013 decisions of the Copyright Tribunal awards, and the positions taken by the respondents, is provided in Schedule 1.²⁵ The amount of the award varies between \$255.97 and \$914.35 across the 17 cases so far. Generally speaking, those who admitted liability and engaged in the proceedings received a lesser deterrent sum (which is the most discretionary award). There is also some ambiguity on how to calculate the first head, the

20 Section 43.

21 Two cases that raise these issues are *Recording Industry Association of New Zealand Inc v Telecom NZ 2688* [2013] NZCOP 13; and *Recording Industry Association of New Zealand Inc v Telecom NZ 4451* [2013] NZCOP 15.

22 Copyright Act, s 122O.

23 Regulation 12.

24 Regulation 12(2).

25 See Schedule 1 below.

compensation for purchasing the music. The practice seems to be to award the cost of purchasing the offending music track in the iTunes store. If one track repeatedly triggers more than one infringement notice, the cost is multiplied—but not in a couple of the cases.²⁶ While this is the least significant amount of the award, I would suggest that there would need to be a tightening of the guidelines for calculating awards.

C *Method of collecting data*

The method of detecting infringement is set out in a Recording Industry Association of New Zealand Inc (RIANZ) submission to the Ministry of Economic Development.²⁷ The IP addresses provided by a “third party copyright infringement company” includes “number of shared files, list of shared files and various information files to prove the making available of the infringing files”.²⁸ This does not seem to correspond with the legislation, as “infringement” is defined as “an incidence of file sharing that involves the infringement of copyright in a work by a user”.²⁹ It would therefore seem possible for a user to receive a notice of infringement even if there has been no actual “infringement”—just that the user may have files available and ready for infringement.

A study carried out by the University of Washington discussed the fallibility of IP monitoring, and found a “potential for false positives and implication of arbitrary addresses”.³⁰ The study’s authors managed to “frame” a printer for copyright infringement by modifying information provided to the P2P network. They also discussed direct detection, which is more conclusive, and indirect detection, which is less conclusive but requires fewer resources; indirect detection highlights computers on the network, but the list of computers is inconclusive as to whether they are actually exchanging data.³¹ The method described by RIANZ appears to be indirect detection.

This provides some worrying concerns about the robustness of any data provided, especially given the onus of proof provision.

D *Onus of proof*

Firstly, this has been widely reported as “guilty until proven innocent”.³² As Patricia Leong points out, this is a misconception as the regime is civil, not criminal.³³ What the Act does do is establish a presumption that each notice brought to the Tribunal is factually correct.

26 *Recording Industry Association of New Zealand Inc v Telecom NZ* 3728 [2013] NZCOP 8; and *RIANZ v Telecom NZ* 3760 [2013] NZCOP 14.

27 Recording Industry Association of New Zealand Inc “Submission to the Ministry of Economic Development on the Copyright (Infringing File Sharing) Regulations – Fee Review” at [40]–[49]. The submissions are dealt with in more detail below.

28 At [45] (emphasis added).

29 Copyright Act, s 122A, definition of “infringement”.

30 Michael Platek, Tadayoshi Kohno and Arvind Krishnamurthy *Challenges and Directions for Monitoring P2P File Sharing Networks, or Why My Printer Received a DMCA Takedown Notice* (University of Washington, Technical Report UW-CSE-08-06-11, 1 June 2008) at [6].

31 At [2] and [6.1].

32 See, for example, Rick Shera “NZ’s Copyright Proposal: Guilty until you prove you’re Innocent” (5 November 2010) l@w.geek.nz <lawgeeknz.posterous.com>; and the “presumption of guilt” referred to in Chris Keall “Google wants NZ file sharing law changed” *The National Business Review* (online ed, Auckland, 18 July 2011).

33 Patricia Leong “Legislation Notes: The Copyright (Infringing File Sharing Amendment Act) 2011: A Fair and Effective Regime?” (2011) 17 Auckland U L Rev 313 at 317.

Section 122N sets out that:

- (1) In proceedings before the Tribunal, in relation to an infringement notice, it is presumed—
 - (a) that each incidence of file sharing identified in the notice constituted an infringement of the rights owner’s copyright in the work identified; and
 - (b) that the information recorded in the infringement notice is correct; and
 - (c) that the infringement notice was issued in accordance with this Act.
- (2) An account holder may submit evidence that, or give reasons why, any 1 or more of the presumptions in subsection (1) do not apply with respect to any particular infringement identified in an infringement notice.
- (3) If an account holder submits evidence or gives reasons as referred to in subsection (2), the rights owner must satisfy the Tribunal that, in relation to the relevant infringement or notice, the particular presumption or presumptions are correct.

The Copyright Act itself has certain ownership presumptions for literary, dramatic, musical or artistic works; the name appearing on the work is presumed to be that of the author.³⁴ The presumptions in CIFSAA go further, with a presumption that infringement actually occurred.

The initial burden is on the accused to disprove or “give reasons” that there was an incidence of file sharing. There are several technical reasons why someone may be found liable as set out above,³⁵ which a technically challenged person may not even be aware of. American experience suggests infringement notices are “flawed, easy to generate, often meritless, and an inadequate substitute for a full trial on the merits”.³⁶

Most of the respondents in the 2013 Copyright Tribunal cases have been unable to grasp the reality of any technical shortcomings, and many displayed computer illiteracy. The high onus of proof, in an area so technically challenging and difficult to understand, makes it almost an impossibility for a respondent to provide any form of rebuttal.

Google suggests that s 122N(1) should be removed and the Tribunal should have to “make a positive finding of infringement”, and “provision for penalties to be imposed on rights owners who make false declarations and/or bad faith claims”.³⁷ Google’s initial submission to the Telecommunication Carriers’ Forum on the old s 92A indicated that of 57 per cent of notices sent to it under the United States Digital Millennium Copyright Act (DMCA) were from businesses targeting competitors, and 37 per cent “were not valid copyright claims”.³⁸

The ACS:Law case exemplifies how claims may lack merit.³⁹ In 2009–2010, the law firm ACS:Law sent out several thousand letters accusing people of infringing copyright. In parliamentary debate, Lord Lucas referred to it as “blackmail”,⁴⁰ and Birss J was highly critical of the claim after ACS:Law filed proceedings against 26 *infringers* and then

34 Section 126.

35 For example, WiFi hacking, Trojaned machines and problems with the detection process.

36 Michael P Murtagh “The FCC, the DMCA, and Why Takedown Notices Are Not Enough” (2009) 61 *Hast LJ* 233 at 257.

37 Keall, above n 32.

38 Google “Submission on TCF Draft ISP Copyright Code of Practice” at note 3.

39 *ACS:Law*, above n 17.

40 (26 January 2010) 716 GBPD HL 1309.

attempted (unsuccessfully) to drop the case after proceedings started. At the hearing, evidence was not produced as it was “in storage”, and the case went no further.⁴¹

As the CIFSAA regime is strict liability, there are significant obstacles to bring sufficient “reason”, especially if someone is not represented so may not be aware of the possible defences. Possible defences could be:

- (1) that the file was not, in fact, infringing material (which may be difficult to show);
- (2) that the IP address was incorrectly recorded or linked (which may be impossible to prove, although doubt can be cast on the methods of recording infringement);
or
- (3) that the computer was not engaged in a file-sharing activity, even though it had a copy of infringing work on it (which may also be impossible to definitively prove, but again doubt can be cast on the method of recording infringement).

More emphasis should be put on the need for the claimant/plaintiff to prove their case to avoid legal “fishing expeditions” such as the ACS:Law situation. If the industry was to successfully lobby for a drop in the fee to issue a notice to the IPAP, this would raise even more significant concerns as there is no sanction for incorrectly filed notices. There is also no “unjustified proceedings” clause in case the accuser has an unmeritorious claim, as is found in the Copyright Act itself.⁴²

E Hearing “on the papers” & representation

Unless there has been an opposition, liability for infringement is almost a *fait accompli* once the copyright holder puts in their application. In the New Zealand system, a lawyer is only allowed by consent of the Tribunal.⁴³ The reasons given for this were twofold:⁴⁴

- (1) as a reflection of the quick nature of dealing with the process, such as in the Disputes Tribunal; and
- (2) if a party is “substantially prejudiced”, the Tribunal could allow representation by a lawyer.

Given that the majority of infringement notices have been issued by RIANZ for music, and possibly will be by the New Zealand Federation Against Copyright Theft (NZFACT) for movies,⁴⁵ it seems hard to imagine a scenario where there will not be an individual “substantially prejudiced” when faced with such an industry group.

There is also an assumption that the hearing at the Copyright Tribunal will be on the papers.⁴⁶ I suggest that, as a result of the onus of proof and other process concerns, the accused should automatically be invited to appear before the Tribunal (with legal counsel, if desired) to explain whether there are any circumstances which may rebut the presumption (even though these circumstances may be limited).

41 Jane Wakefield “Net piracy gets its day in court” (25 January 2011) BBC News <www.bbc.com>.

42 Section 130.

43 Copyright Act, s 122M.

44 Copyright (Infringing File Sharing) Amendment Bill 2010 (119–2) (commentary) at 4–5.

45 NZFACT is a lobby group representing Hollywood film studios. However, NZFACT has declined to issue fines in such a “tiny market”: Chris Keall “One of the first ‘third strike’ notices withdrawn; no movie notices Sent” *The National Business Review* (online ed, Auckland, 19 April 2012).

46 Copyright Act, s 122L.

F *Possible account termination*

Under s 122P, the threat of Internet disconnection looms. While it cannot come into force until it has been enacted by an Order in Council acting on advice of a Minister, and a disconnection order will only be issued by a judge, this is the area that has received most criticism both from within New Zealand and from an international point of view. A United Nations Special Rapporteur was highly critical of, and “deeply concerned” with, “graduated response” legislation, such as in France and the United Kingdom.⁴⁷

New Zealand is currently negotiating the Trans-Pacific Partnership, which includes among other issues the status of copyright protection. Should the termination clause be required for “international obligations” as a result of “trade negotiations on measures to address illegal P2P file sharing of copyright protected works”,⁴⁸ it would be possible for New Zealand to enact the suspension provision under s 122P by Order in Council without public approval or a majority parliamentary vote. The New Zealand government should be reluctant to take such a step as it will face significant international and domestic criticism and backlash, such as the initial resistance against implementing s 92A.

IV Freedom of Expression

A *Is copyright law on file-sharing a justified limitation on freedom of expression?*

Bernt Hugenholtz comments, “the potential conflict between copyright and free speech has long been ignored in European law” and suggests a reason for the debate not being discussed in depth: there is an internal balance between freedom of speech and copyright because both promote speech.⁴⁹ Graham Smith confirms “the appropriate balance in this area is found exclusively within the internal mechanisms provided by the copyright statutes”, and that “copyright can be constrained by the external mechanisms provided by fundamental rights”.⁵⁰ Thus the fine balance of protecting copyright entails curtailment of freedom of expression as a necessary limitation.

A recent judicial review in the United Kingdom of the Digital Economy Act 2010, which contains graduated response provisions for infringing file sharing, found that:⁵¹

... Parliament, through current copyright legislation, has already struck a balance between, on the one hand, the aim of providing incentives to actual and potential creators of audio-visual material, and, on the other, the potential welfare loss to ... consumers Existing copyright legislation may strike that balance in a way that is controversial or open to criticism. However, in my view, Parliament, when considering measures such as the contested provisions, ... is entitled to proceed on the basis that existing copyright law does

47 *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue A/HRC/17/27* (2011) at [49].

48 Power, above n 2, at [105(5)].

49 P Bernt Hugenholtz “Copyright and Freedom of Expression in Europe” in Rochelle Dreyfuss, Harry First and Diane Zimmerman (eds) *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford University Press, Oxford, 2001) 343 at 350–351.

50 Graham Smith “Copyright and freedom of expression in the online world” (2010) 5 *JIPLP* 88 at 89.

51 *R (on the application of British Telecommunications Plc) v Secretary of State for Business, Innovation and Skills* [2011] EWHC 1021 (Admin), [2011] 3 *CMLR* 5 at [249].

strike a fair balance between the interests referred to. In the context of such measures, Parliament does not have to re-calculate that balance. Indeed, there would seem to be serious practical and political difficulties with any such re-calculation.

The question to be considered in New Zealand is, given the process concerns, whether the external mechanism in the case of file-sharing has tipped the balance too far in favour of copyright and to the exclusion of freedom of expression in New Zealand.

B *The Internet and expression of freedom*

There is concern that invoking greater censorship over the Internet, a medium that offers a platform for entrepreneurs, will “discourage budding Internet entrepreneurs”, as discussed in the United States backlash to the 2011 proposed Stop Online Piracy Act and Protect Intellectual Property Act (now both retracted), which led to a wave of blackouts amongst the online community, including the famous Wikipedia blackout.⁵²

The United Nations Human Rights Council adopted a resolution on 5 July 2012 that:⁵³

Affirms that the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice

The Special Rapporteur report also recognised the Internet as:⁵⁴

... a key means by which individuals can exercise their right to freedom of opinion and expression, as guaranteed by article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Given these international concerns, and the move in several countries to protect Internet freedom or access to the Internet as a basic human right or at the very least a “freedom of expression” forum,⁵⁵ any move to limit freedom of expression in relation to the Internet should not be taken lightly.

C *Are P2P activities an expression of freedom?*

The New Zealand Bill of Rights Act (NZBORA) provides that “[e]veryone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.”⁵⁶

52 Associated Press “US senators back down on online piracy” (20 January 2012) Stuff <www.stuff.co.nz>.

53 Sarah Korones “United Nations declares Internet freedom a basic human right” (8 July 2012) SmartPlanet <www.smartplanet.com>; and *The promotion, protection and enjoyment of human rights on the Internet* A/HRCRes/20/8 (2012).

54 *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, above n 47, at [20].

55 At [65]. The Special Rapporteur outlines that: “[i]n some economically developed States, Internet access has been recognized as a right. ... Estonia passed legislation in 2000 declaring Internet access a basic human right. ... France effectively declared Internet access a basic human right in 2009. ... Finland passed a decree in 2009 stating that every Internet connection needs to have a speed of at least one Megabit per second”.

56 Section 14.

To consider whether there is a potential right to be prima facie protected, it must first be established whether file-sharing or P2P activities entail freedom of expression. It is already clear that the Internet is a platform on which to express ideas, and receive and impart information.⁵⁷

Enrico Bonadio suggests that copyright should be relaxed when it comes to file-sharing technologies, as it is an important forum for distributing free software on which developers may want feedback and a platform for new artists to distribute their work free of charge in the hope of being noticed. He claims file sharing is an “engine of free speech”, and boosts and strengthens freedom of speech, artistic and cultural activities.⁵⁸

I submit that file-sharing and P2P activities are prima facie entitled to protection under s 14 of NZBORA. While I am not condoning copyright infringement and free distribution of content, any legislation restricting P2P activities will need to be “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.⁵⁹

D *The United Kingdom position*

The United Kingdom has similar provisions to NZBORA in the Human Rights Act 1998, which incorporates the European Convention on Human Rights (ECHR).⁶⁰ Article 10 of the ECHR provides that “everyone has the right to freedom of expression”, but qualifies the exercise of this freedom:

... since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... [or] for the protection of the reputation or rights of others ...

The Digital Economy Act 2010 (UK) (DEA) was introduced as a mechanism to try and curb online file infringement. The proposed regime provides that if three letters have been sent within a year, a copyright holder can apply to court for details of the infringer and then take further civil action. This could involve reducing Internet speed or temporarily cutting off access to the Internet.⁶¹

Following the DEA’s introduction, BT and TalkTalk filed judicial review proceedings.⁶² While the proceedings mainly revolved around liability of Internet providers, the court discussed what was claimed to be “a disproportionate restriction on ... the right to free expression or to impart and receive information”,⁶³ and discussed deference to the lawmaker. The Court attached substantial weight to the balance struck by Parliament as it was a “problem of social and economic policy” and therefore an area in “the particular province of the political branches”, and there had been a lengthy consultation process.⁶⁴

57 Enrico Bonadio “File sharing, copyright and freedom of speech” (2011) 33 EIPR 619 at 620.

58 At 623.

59 New Zealand Bill of Rights Act, s 5.

60 Schedule 1.

61 For a concise explanation, see Christopher Williams “Ofcom presses ahead with Digital Economy Act piracy crackdown” The Telegraph (online ed, London, 26 June 2012).

62 *R (on the application of British Telecommunications plc)*, above n 51. The case went on appeal, but the issue surrounding proportionality of the legislation to freedom of speech not discussed as the appeal mainly concerned issues surrounding ISP liability.

63 At [203].

64 At [210]–[211] and [213].

The Court also held that this is not a case where “there is a human right, or a fundamental EU freedom” and “the State is seeking to restrict or interfere with that right on grounds of general utility or welfare”.⁶⁵ While this statement would be problematic if applied in New Zealand, it is important to bear in mind that the DEA has a substantially different process than in New Zealand. The DEA keeps the process in the courts, only providing copyright holders the option to apply for the names of infringers in order to be able to bring a court proceeding more easily.

A report on the DEA was prepared by the London School of Economics, two days prior to the first instance BT hearing, which discussed the clash between copyright enforcement and innovation.⁶⁶ The report was critical of the Act as protecting an outdated business model, whereas it should be promoting P2P software as an innovative platform, particularly for software creation. It also highlighted that “[l]ike the creative industry, the DEA fails to acknowledge that peer-to-peer file-sharing is a lawful activity and is often used to share content that creators make freely available and to drive innovation in the sector.”⁶⁷

This report also suggests that there is a causation problem between associating declining sales with copyright infringement. Not every user who downloads a piece of music illegally would buy it instead.⁶⁸ Also, statistics prepared by the music industries do not include live stage shows (which accounts for around half of all profit),⁶⁹ nor does it take into account the general financial decline of world markets as part of the causation factor.⁷⁰

The Copyright Tribunal to date has not been able to quantify the loss suffered by the music industry. The “possible effect of the infringing activity on the market for the work” is a factor the Tribunal must take into account when setting the amount of the award intended to deter against further infringing.⁷¹ To date, however, the Tribunal has only gone as far as to admit that there is a “possibility that the market for the relevant work has been deleteriously affected”.⁷² The awards have been relatively minor, suggesting that the Tribunal puts little weight on this head.

E *The French position*

The French HADOPI⁷³ regime, an authority set up to monitor Internet infringement and impose sanctions, was introduced in 2009 and reviewed by the Constitutional Council (or Conseil constitutionnel) which, since 1971, has had the power to reject law where it violates the Declaration of the Rights of Man and of the Citizen. The Constitutional Council had serious concerns that the new law might not maintain constitutional fundamental

65 At [215].

66 Bart Cammaerts and Bingchun Meng *Creative Destruction and Copyright Protection: Regulatory Responses to File-sharing* (LSE Media Policy Project, Media Policy Brief 1, March 2011).

67 At [2.1].

68 At [1.1].

69 At [1.2].

70 At [1.1].

71 Copyright (Infringing File Sharing) Regulations 2011, reg 12(3)(b).

72 *RIANZ v Telecom NZ* 3663 [2013] NZCOP 7 at [39].

73 *Haute Autorité pour la diffusion des œuvres et la protection des droits sur Internet*.

freedoms and rights because HADOPI “lacked compliance” with procedural safeguards.⁷⁴ In summary, the Constitutional Council found that:⁷⁵

- (a) a restriction on the rights and liberties of electronic communication services could only be imposed by a judicial authority (not HADOPI, a non-judicial forum, as the introduced Act set out);
- (b) sanctioning procedures were too vague, given that an administrative body was imposing the sanctions rather than a judicial body, leading to potentially lessened constitutional freedoms and liberties;
- (c) the HADOPI authority could not protect intellectual property rights because it was an administrative body;
- (d) HADOPI may lead to “restricting the right of any person to exercise his right to express himself and communicate freely, in particular from his own home”;⁷⁶
- (e) it is a strict liability regime with a presumptive onus, which is problematic given technological concerns;
- (f) art 11 of the Declaration of the Rights of Man and of the Citizen of 1789 provides for “free communication of ideas and opinions”. The Constitutional Council found that this included access to online networks, and that while access to the Internet in itself was not a fundamental right, freedom to access public online communication services was a basic human right;⁷⁷ and
- (g) in summary, the limits on the fundamental freedom of expression rights should not be left to an administrative body set up to protect the rights of copyright holders.

As a result, the second version of the regime turned online infringement into a crime, and the process now has three steps: e-mail, followed by registered letter, followed by an “invitation” to appear before HADOPI who decides whether to lay charges. If charges are laid, the judge can then balance the rights of copyright holders with any potential limitation to that individual’s freedom of expression. A user who fails to secure his or her Internet connection can also be penalised.

Jeremie Zimmermann from advocacy group La Quadrature du Net suggested that the law will be ineffective.⁷⁸ The first person to receive an “invitation” to explain himself was Robert Tollot, who claimed his WiFi connection was hacked and that there was no evidence of infringement.⁷⁹ However, a HADOPI spokesperson said that “the evidence is the second warning”.⁸⁰ The outcome of Mr Tollot’s meeting has not been reported.

V New Zealand Bill of Rights Act 1990 (NZBORA)

Freedom of expression in NZBORA is a protected right, and any limitation of statute would need to be a “justified limit”. While recognising that the courts are also protecting property

74 Nicola Lucchi “Access to Network Services and Protection of Constitutional Rights: Recognizing the Essential Role of Internet Access for the Freedom of Expression” (2011) 19 *Cardozo J Intl & Comp L* 645 at 654.

75 As summarised in Lucchi, above n 74.

76 *Decision no 2009-580 Conseil Constitutionnel* ECLI:FR:CC:2009:2009.580.DC, 10 June 2009, at [16].

77 At [12].

78 “French downloaders face government grilling” (27 July 2011) BBC News <www.bbc.com>.

79 “French downloaders”, above n 78.

80 “French downloaders”, above n 78.

rights, the justified limitation still needs to be analysed. The New Zealand courts have adopted differing approaches to the balancing, but guidance can be found from several cases.

A *Interpretation of NZBORA*

In *R v Poumako*, the majority affirmed that an interpretation consistent with NZBORA took preference over any other possible alternative and “[i]t is not a matter of what the legislature ... might have intended.”⁸¹ They then applied a limited interpretation to the “home invasion” provision, by not applying the law before the new definition of “home invasion” had been enacted.⁸² The outcome was, in fact, not any different; the judge was still entitled to impose the sentence he did, so the limited interpretation made no practical difference.⁸³ On the other hand, the minority (Henry and Thomas JJ) held that the provisions were clear and unambiguous and the law should be applied, although Thomas J would have issued a declaration of inconsistency.⁸⁴

The majority view from *Poumako* is that as long as a meaning can be found somehow that can be fitted with a rights-consistent meaning, this is allowed under NZBORA, s 6, despite Parliament’s intentions.

This was followed by *R v Pora*, where the majority held that retrospectivity could either go back to the date announced in *Poumako* or further back to when minimum parole periods were introduced, but not before.⁸⁵ Regardless, it did not apply when Mr Pora was found to have committed the murder, so the minimum sentence provision was quashed.

In other cases concerning freedom of speech and the right to protest, *Brooker v Police* and *Morse v Police* respectively read down “disorderly” to involve conduct that disturbs public order and “offensive” as behaviour disturbing public order.⁸⁶

B *The test to adopt*

R v Hansen is the leading New Zealand Supreme Court test for a prima facie breach of s 14 of NZBORA for freedom of expression.⁸⁷ The majority test adopted by McGrath and Tipping JJ was essentially as follows:⁸⁸

- (1) What is the natural meaning to be applied (per McGrath J), or what was Parliament’s intended meaning (per Tipping J)?
- (2) Is there an inconsistency with a protected right given that meaning?
- (3) If yes, is the limit *justifiable* under s 5? This includes:
 - (a) rational connection;
 - (b) impairment of the right to a minimum; and
 - (c) proportionality to the objective.

81 *R v Poumako* [2000] 2 NZLR 695 (CA) at [37].

82 At [36]–[40].

83 At [41] and [45].

84 At [107].

85 *R v Pora* [2001] 2 NZLR 37 (CA).

86 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91; and *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1.

87 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

88 At [92] and [192]. This test was adopted in *Commerce Commission v Air New Zealand Ltd* [2011] NZCA 64, [2011] 2 NZLR 194 at [65]–[66], but looking at *Parliament’s* meaning at the first step, rather than the *natural* meaning.

(4) If inconsistent, is there another meaning from the statute that can be read consistently?

(5) If there is no alternative meaning, then the statute must be applied as under (1).

The *justifiable* test at step (3) was adopted from the Supreme Court of Canada's decision in *R v Oakes*.⁸⁹ The *proportionality* test and *alternative meaning* has also been recommended by the United Nations Special Rapporteur who stated that:⁹⁰

... any limitation to the right of freedom of expression must pass the following three-part, cumulative test:

- (a) It must be provided by law, which is clear and accessible to everyone ... ; and
- (b) It must pursue one of the purposes set out in article 19, paragraph 3, of the Covenant, namely (i) to protect the rights or reputations of others ... ; and
- (c) It must be proven as necessary and the least restrictive means required to achieve the purported aim (principles of necessity and proportionality).

C *Applying the test to P2P file infringement*

The majority test from *R v Hansen* is similar to the approach taken by Robert Danay, who has written on the subject and found that P2P is used for imparting and receiving ideas, and subject to art 10 of the ECHR. He conducted an analysis of whether the Copyright, Designs and Patents Act 1988 (UK) is directed to one of more of the objectives specified in it and shown to be necessary in a democratic society, and analysed whether the legislation met a proportionality test in terms of P2P file-sharing.⁹¹ I have compared some of his results to a New Zealand Hansen test below.

D *The Hansen test as applied to CIFSAA*

(1) Objective

CIFSAA protects property rights of the creator of a work, just as other property rights are protected in today's society. It reflects the nature of copyright law, which balances rights holders' interests against public access to works. As Danay suggests, there is a legitimate objective of promoting creativity and development of works and securing a just reward for the creators, which can be achieved by imposing a copyright scheme to protect rights holders.⁹²

(2) Is there inconsistency with a protected right?

Having discussed the fundamental nature of P2P software and the way in which it can be and is used to foster innovation, act as an engine of free speech, a cultural exchange and

89 *R v Oakes* [1986] 1 SCR 103 (SCC).

90 *Report of the Special Rapporteur*, above n 47 at [24].

91 Robert Danay "Copyright vs Free Expression: The Case of Peer-to-Peer File-Sharing of Music in the United Kingdom" (2005) 8 Yale JL & Tech 32.

92 At 52.

a “vital element of communication”,⁹³ there is a protected right under s 14 of NZBORA: freedom of expression. Strict scrutiny needs to be observed when limiting a right.

(3) If so, is the limit justifiable?

Even if there is inconsistency with a protected right, it may be “justified” under s 5 of NZBORA. The *Oakes* test was adopted in *Hansen v R* to discuss whether a limit is justifiable.

(i) Is there a rational connection between objective and limitation?

The statistics provided to link infringement to file sharing have been, at best, ambiguous.⁹⁴ The industry as a whole and the effect on the income of individual artists should be considered, not just the major industry labels and representatives. Many individual New Zealand artists do not support CIFSAA.⁹⁵ Some bands have found it useful to release free items online, and have increased their market share significantly following the experiment.⁹⁶ Some critics have argued that “many artists will greatly benefit from the unprecedented marketing opportunities generated by p2p technology”, and that “file-sharing becomes a free promotional tool”.⁹⁷

Danay suggests that P2P file sharing has had an effect “statistically indistinguishable from zero”,⁹⁸ any decline in sales is due to other economic factors, and even if sales decrease, there is still a question whether remuneration to the artist is reduced and that it leads to lesser creation.⁹⁹ Danay proposes that there is no rational connection between the Act’s objectives and the measures taken.¹⁰⁰

The claims by the copyright industry also do not appear to take into account that there are now options to buy only one or two songs from an artist (for example, via iTunes) instead of buying an entire CD, which would have a significant impact on revenue.

I do not suggest that there is no rational connection between the legislation’s objective and the limitation imposed, but it is tenuous. The infringement process is geared against the use of a platform that can equally be used by artists to promote their work.

93 Joshua A Cohen “Common Musical Sense: An Intellectual Call to Arms against the Recording Industry, Radio Deregulation, and Media Consolidation and their Threat to our National Culture and Democracy” <www.fitehouse.com> as cited in Danay, above n 91, at 48.

94 There has been a “lack of quality data” as identified by the Regulatory Impact Statement annexed to Power, above n 2. An NZFACT survey found that users say they will stop file-sharing if faced with notices: Dan Satherley “‘Skynet’ law will stop most illegal downloading - NZFACT” (1 September 2011) 3 News <www.3news.co.nz>. But the survey question does not ask whether people will stop infringing completely.

95 Creative Freedom “Submission to the Ministry of Economic Development on the Copyright (Infringing File Sharing) Regulations – Fee Review”.

96 Examples include the band Wilco in 2001, and Radiohead’s *Kid A* track released in 2000 on Napster which was downloaded for free in vast numbers, but still reached top of the United States sales charts. More recent examples are Radiohead’s 2007 *In Rainbows* and 50 Foot Wave’s January 2012 release of *With Love from the Men’s Room*.

97 Danay, above n 91 at 57.

98 Felix Oberholzer and Koleman Strumpf “The Effect of File Sharing on Record Sales: An Empirical Analysis” The University of North Carolina <www.unc.edu> as cited in Danay, above n 91, at 54.

99 Danay, above n 91, at 56–57.

100 At 53 and 61.

(ii) Minimal impairment

CIFSAA does not provide minimal impairment of freedom of expression. It imposes a Tribunal system which involves prima facie liability, little acknowledgement of the technical problems faced in the detection process, a fast-track process without representation and the threat of account termination. There are other solutions which were not considered as a response to infringement. While not endorsing infringement, it may be time to look at other business models to encourage people to purchase legal copies by providing easy-to-use, inexpensive and easily accessible global platforms of distribution, backed by an enforcement regime.

There is a significant chilling effect on the use of the Internet and P2P software: users may fear that their IP address will be erroneously accused of file-sharing, even if they are using P2P software for what they thought was a legitimate purpose. Therefore, many people will avoid such software and the benefits it can bring.

Danay suggests there are other methods which attempt “to secure remuneration for copyright owners without creating the danger of a free expression chill stemming from the imposition of harsh legal consequences”.¹⁰¹ Possible alternatives are discussed in more depth below.¹⁰²

(iii) Proportionality to the objective

As a whole, CIFSAA is not proportionate to its objective. Not only does it encroach on fundamental rights and provide a disincentive to use software and file-sharing that could otherwise be used to encourage innovation and freedom of expression and communication, it could also be potentially used by the copyright industry to send “spamming” notices. Fortunately, there is a small fee of \$25 involved to limit the amount of notices sent; if the fee were dropped to \$0 or \$2 as advocated by the Copyright Council, Society of Authors, RIANZ, APRA and Copyright Licencing,¹⁰³ it could lead to a “fishing expedition”.

I suggest that any enforcement system needs to re-introduce a fair balance between the copyright holder and the end user; the balance between protecting rights holders and the constitutional rights to communicate, share and search has been tipped too far towards the copyright holder. This can be done by altering the process to provide more safeguards for the alleged infringer.

(4) If the limit is not justified, is there another meaning that can be applied?

The courts, when faced with a dilemma between rigid application of a statute that comes up against restricting fundamental rights, may work hard to adopt an alternative position. There are several ways in which a court could limit the effect of CIFSAA:

101 At 61 (emphasis added).

102 See Part VII.

103 Copyright Council “Submissions to the Ministry of Economic Development on the Copyright (Infringing File Sharing) Regulations Fee Review”; The New Zealand Society of Authors “Submissions to the Ministry of Economic Development on the Copyright (Infringing File Sharing) Regulations Fee Review”; Recording Industry Association of New Zealand Inc, above n 27; APRA “Submissions to the Ministry of Economic Development on the Copyright (Infringing File Sharing) Regulations Fee Review”; and Copyright Licensing “Submissions to the Ministry of Economic Development on the Copyright (Infringing File Sharing) Regulations Fee Review”.

- 1 The definition of infringement was changed to: “an incidence of file sharing that involves the infringement of copyright in a work, ~~or part of a work~~, [sic] by a user”.¹⁰⁴ The standard copyright approach, which the Select Committee assumed would apply as a result, was that a “substantial” part of the work must be infringed.¹⁰⁵ But the legislation does not expressly say that a substantial part of the work must be infringed, so a court could potentially read this section as meaning the whole of a work if a user had infringed only a portion.
- 2 “[A]n incidence” of file sharing¹⁰⁶ is ambiguous, as file sharing involves multiple incidences between multiple computers, each computer typically providing a small portion of the complete file.
- 3 The definition of an IPAP was also amended to read “a person that operates a business that, other than as an incidental feature of its main business activities ...”.¹⁰⁷ There is a weak argument for interpreting IPAP narrowly. For example, Vodafone’s main business is cellular networks, and their coverage of broadband Internet could be seen as an “incidental feature” of its business activities.

While accepting that these are strained and unlikely interpretations, they would allow a court to find some leeway in certain circumstances to give preference to access to communication rather than enforce legislation that is contrary to fundamental rights.

Alternatively, a court might find that the parliamentary intention is clear, albeit inconsistent, and apply the law as in *Poumako* and in the majority decision of *Hansen*—a finding that the law was not justified did not prevent the application of the law.

Importantly, it should be in the hands of the courts, aided by legal counsel, to carry out this delicate balancing process. A fast-track process is not appropriate where fundamental rights are at stake.

VI Practical Effectiveness and the Future of Government Monitoring

To date, the industry which lobbied so hard to achieve CIFSAA has not made significant use of it. NZFACT has declined to take any part in the process due to the costs involved.¹⁰⁸ Some industry members claim they are not issuing as many notices as they could because the fees are too high.¹⁰⁹ It is understandable that the cost to issue a notice may not cover the cost of the work infringed. The New Zealand Society of Authors points out that it is not economically viable to pursue an infringer when an e-book costs between \$15–\$19 and the cost to issue an enforcement notice is \$25. As at 26 April 2012, RIANZ has issued 2,766 notices which have resulted in only three enforcement notices.¹¹⁰

In submissions to the Ministry of Economic Development, which has been carrying out a review of the \$25 enforcement notice fee, providers such as TelstraClear¹¹¹ and

104 Copyright (Infringing File Sharing) Amendment Bill, cl 7, definition of “infringement”.

105 At 3.

106 Copyright Act, s 122A, definition of infringement.

107 Section 122A, definition of “IPAP”.

108 The cost is a maximum of \$25 to lodge a notice with the IPAP who passes the notice on to the account holder and the cost to apply to the Copyright Tribunal is \$200: Copyright (Infringing File Sharing) Regulations 2011, regs 7–8.

109 The New Zealand Society of Authors, above n 103, at [Q2].

110 Recording Industry Association of New Zealand Inc, above n 27, at [52] and [62].

111 TelstraClear Submission at [Q23].

Telecom¹¹² noted that Internet use dropped immediately following the Act coming into force, but Internet usage levels have since climbed back up. The IPAPs have not monitored protocols such as file-sharing software, so cannot be sure of the effectiveness of the legislation. Even if they did monitor P2P networks, there would be no way to distinguish between legal and illegal use of the software. Independent research carried out by Shane Alcock from the University of Waikato found that since the legislation was introduced, web use as a whole has remained static, P2P use has declined and use of Remote access, Tunneling and File use (alternatives to P2P) have increased.¹¹³

The IFPI Digital Music Report 2012 looks at the result of HADOPI. After sending over 700,000 notices, “50 per cent [of survey respondents] said knowledge or receipt of a notice made them stop their illegal activity”.¹¹⁴ The report noted the awareness factor is working in New Zealand, as “seven in ten users claim they would stop on receipt of a notification with a sanction attached”.¹¹⁵

The IFPI report sees three approaches to tackling piracy: “providing attractive legitimate services, conducting education campaigns; and rights enforcement Access and services are evidently improving ... the real area for development is rights enforcement”.¹¹⁶ The introduction of HADOPI was accompanied by an undertaking by the film and music industries to “development of legal offerings on the Internet”; the film industry agreed to “shorten all release windows”, and “[t]he music industry agreed to remove technological protection measures and digital rights management from their products.”¹¹⁷

The French attitude seems to be changing. In a recent interview, Culture Minister Aurélie Filipetti announced budget cuts to HADOPI.¹¹⁸ While people halted P2P file sharing, TIME reports that “as HADOPI acknowledged, the reported drop in peer-to-peer activity was accompanied by a surge in people saying they’d turned to direct-download sites like Megaupload”.¹¹⁹ This has led to speculation that HADOPI will either be rescinded or kept but reduced to a shell.

Similarly, in the United Kingdom, “[i]t is widely accepted that [the Digital Economy Act] can only work if implemented alongside attractive legal content services and educational incentives.”¹²⁰ The Digital Economy Act will only come into force in 2014, when the online and mobile environment will presumably be substantially different from today.¹²¹

InternetNZ points out “Internet users everywhere expect to access content in a quick and convenient way because Internet technology makes that possible”.¹²² I would further add that people are prepared and willing to pay for services, but if they are simply not available in one country when they have been released and reviewed in other countries,

112 Telecom Submission at [Q23].

113 “Impact of the Copyright Amendment Act at NZNOG” (31 January 2012) WAND Network Research Group <www.wand.net.nz>.

114 IFPI *Digital Music Report 2012* (January 2012) at 17.

115 At 19.

116 Alexandra Duboff “IFP Digital Music Report 2012 – What’s the Story?” (2012) 23 Ent LR 96.

117 InternetNZ “Submission to the Ministry of Economic Development on the Copyright (Infringing File Sharing) Regulations Fee Review” at 5.

118 Bruce Crumley “Why France’s Socialists Won’t Kill Sarkozy’s Internet Piracy Law” (2 August 2012) TIME <www.time.com>.

119 Crumley, above n 118.

120 Ed Baden-Powell and Luke Anthony “Digital Economy—Act 2” (2012) 23 Ent LR 130 at 132.

121 Bobbie Johnson “UK says three strikes is coming, but not until 2014” (26 June 2012) Gigaom <www.gigaom.com>.

122 InternetNZ, above n 117, at 5.

many Internet users will want to access that content. For example, it is possible (although the legality is doubtful) to set up an iTunes account from New Zealand, which would give access to content that is restricted to the United States.¹²³ That content can be paid for. But even though a user is ready and willing to, and does, pay for it, it is by way of making a false declaration to iTunes, although it does not appear to directly contravene the iTunes terms and conditions.¹²⁴ If a user cannot work out how to do this, that is a driver towards file infringement simply to get access to overseas content that the user is reading or hearing about.

Education may be served by the introduction of legislation, but the accessibility of services requires further improvement. CIFSAA has certainly worked as an educational tool to highlight the issue of copyright infringement, but is a clumsy enforcement regime. The notices do not carry with them any real educational message, such as how to prevent file-sharing software from uploading or downloading copyrighted files.

There are also significant other ways to infringe copyright online, and this Act does little to stem the tide. “[P]irates are migrating to more secure sources, so the only people [a three-strikes regime] is really punishing are non-pirates and pirates who don’t know what they are doing.”¹²⁵ The Register sums up the common-sense position:¹²⁶

... Pierre Lescure – head of [France’s] commission into the “Future of Piracy” ... attaches “great importance” to the development of legal offers, and that the temptations to piracy are so great only a priest would not yield.

“The error of Hadopi was to focus on the penalty”, he told *Le Nouvel Observateur*. “If one starts from the penalty, it will fail”, he said, adding that the sanction of disconnection is, for now, unenforceable.

An enforcement regime is a matter of policy which the government should carefully consider, and also study the effectiveness of overseas responses before making any firm decisions. Wolfgang Kleinwachter comments that it is ultimately a political question on the stance to take:¹²⁷

Either we continue with a free and open Internet which has enabled historically unknown innovation, economic growth, social development and free communication, or we will make a U-turn towards a more regulated, restricted, censored and fragmented Internet where national policies of governments and commercial interests of corporations will reduce or strangle individual rights and freedoms.

VII Possible Alternatives

CIFSAA does a poor job of encompassing the interests of rights holders online for anything other than P2P systems, and there are already many more infringement alternatives that

123 Jeffrey Thurana “How To Create A US iTunes Account (& Access US-Only Contents) Without A Credit Card” (17 May 2011) *MakeUseOf* <www.makeuseof.com>.

124 Apple “Terms and Conditions” (3 December 2012) <www.apple.com>.

125 Drew Wilson “HADOPI Blamed for ISP Rate Hikes in France” (1 January 2011) *ZeroPaid* <www.zeropaid.com>.

126 Richard Chirgwin “France backs away from Hadopi” (6 August 2012) *The Register* <www.theregister.co.uk>.

127 Wolfgang Kleinwachter “Internet governance outlook 2012: Cold War or constructive dialogue?” (2012) 17 *Comms L* 14 at 14.

have arisen to circumnavigate P2P file sharing. CIFSAA also does not cover cellular networks, and given the rise of smartphones and tablets, this may lead to weaker protection.¹²⁸ On the other hand, CIFSAA also provides little procedural and rights protection for those who are accused of infringement.

The narrow focus of CIFSAA is just as well given the fundamental rights at stake. If the government bows to industry pressure and extends coverage to other forms of file-sharing, there will be further significant rights issues unless the issues in this article are addressed. Given the overseas experience, with France moving to reduce HADOPI's coverage and the 2010 United Kingdom legislation still not in force, the effectiveness of the New Zealand regime is highly doubtful. This is bolstered by the very low usage of the regime by the industry, with RIANZ effectively being the only participant.

A better enforcement regime is needed. The Ministry of Economic Development was initially supposed to review the digital provisions of the Copyright Act in 2013 to:¹²⁹

... assess whether the 2008 amendments encourage the appropriate balance between protecting intellectual property holders' rights to encourage innovation while ensuring there is good access and opportunities to use information on the Internet, which is also important for innovation.

A review could take into account the lack of balance that I have suggested. However, this review is now on hold until the Trans-Pacific Partnership Negotiations have been finalised.

One possible approach is put forward by Bonadio and Danay.¹³⁰ This involves a levy or tax system on users (via ISPs or media that could be used to share files such as computers, CDs, MP3 players etc) instead of a cumbersome and difficult-to-enforce exclusive right system. Such a system would, I suggest, be equally problematic to implement and potentially discriminatory against those not sharing files.

Perhaps a better system is that put forward very recently by William Wallace at George Washington University. He decides that a "coalition" is the best method to strengthen copyright:¹³¹

The objective of the Coalition will be to compensate rights holders by levying websites that facilitate P2P file sharing of sound recordings, and distributing the collected funds to rights holders in a percentage consistent with that rights holder's portion of the market.

In return for agreeing to a coalition, the website will receive immunity from civil and criminal liability.

While this may be a good solution for websites, it does not solve the problem where a website is not directly involved, as is the case with current P2P file-sharing. However, most torrents are found using a search function. There could be a "coalition" for providers of the search function and software. This is an area that needs more debate from the

128 See generally The New Zealand Society of Authors, above n 103; Copyright Council, above n 103; and Copyright Licensing, above n 103.

129 David Smol *Communications Portfolio Briefing for the Incoming Minister* (Ministry of Economic Development, December 2011) at 19 as cited in Chris Keall "Ministry to Adams: concern copyright law protects outdated business models" *The National Business Review* (online ed, Auckland, 6 July 2012).

130 Bonadio, above n 57; and Danay, above n 91.

131 William Wallace "Authorizing Piracy on the Cyber Seas: An Initiative to Compensate Rights Holders of Sound Recordings by Making Music Free" (2012) 44 *Geo Wash Intl L Rev* 141 at 157-158.

technology and legal industries on the best method to adopt, but this seems the most practical alternative to develop legal access.

Spotify (allowing music streaming for a monthly fee) and Quickflix (movie access for a monthly fee) have been introduced to New Zealand, which is a step in the right direction and along the lines proposed by Wallace.¹³²

In terms of enforcement, the United Kingdom position of allowing copyright holders access to infringers' names to conduct a court hearing is a move in the right direction, and does not have as many problems as the New Zealand proposition. The United States and Australian approaches require four to six alerts of copyright infringement to encourage education, after which the ISP may institute "mitigation measures" including temporary speed shaping, landing page redirection and educational information".¹³³ These *soft* approaches seem less problematic as they attempt to educate first and enforce second.

VIII Recommendation & Conclusion

To summarise, several CIFSAA provisions are problematic:

- (a) The absolute liability provision does not allow for defences such as WiFi cracking, Trojaned machines or another user of the account conducting the infringement, nor does it allow other defences found in the Copyright Act itself such as fair dealing, which balance freedom of expression, innovation and rights protection.
- (b) The method by which infringers are detected is potentially flawed by not detecting whether infringement is actually occurring and the potential for IP addresses to be falsified.
- (c) The reverse onus is unfair given the other process concerns, the presence of "bad faith" claims in other jurisdictions and the failure in New Zealand of copyright litigation due to failure to prove ownership of copyright. These presumptions are also more onerous than those found in the Copyright Act itself.
- (d) A hearing "on the papers" is problematic as a user may potentially receive notices by e-mail which never arrive because of a spam filter.
- (e) No representation being allowed unless by consent is unfair given the absolute liability, technical concerns and presence of a multinational corporation as the anticipated instigator of proceedings.
- (f) Balancing rights holders' interests against freedom of speech concerns is better dealt with by a court.
- (g) There is still the possibility of account termination, which has been widely criticised in the international forum.
- (h) There is no unjustified claim provision.

It is hoped that any further fast-track regimes that the Government sees fit to introduce do not clash with NZBORA, particularly the freedom of expression clause. It is also to be hoped that the shortcomings of this regime are addressed in the fastest possible timeframe. While the monetary awards against infringers have not been anywhere near the maximum award of \$15,000, the potential exists for the Copyright Tribunal to set an award of \$15,000 should they wish.

132 Wallace, above n 131.

133 Juha Saarinen "AFACT defends French three-Strikes regime" (10 August 2012) iTnews <www.itnews.com.au>.

Remedies for infringement are needed and any form of infringement is denying the copyright holder of potential income, but the drafting and implementation of the Act has grave consequences to freedom of speech and due process. While I do not deny protection needed for copyright, and the benefits associated with protection, CIFSAA does not provide adequate protection for end users. The process is better dealt with in the courts, and the shortcomings in the process need to be addressed.

Any regime intended to discourage unlawful infringement over the Internet should be accompanied by an incentive not to use infringing services by embracing the technology and providing legal alternatives. The sceptical view is that this may not be in the interests of the *middle men* of the entertainment industry, but the Internet has changed our society and will continue to do so. Comedian Louis C.K. recently released an album for USD 5 and made USD 1 million in the first few days and “saw that many people were willing to pay \$5 for an album instead of downloading it illegally”.¹³⁴

The importance of legal alternatives cannot be stressed enough. The Government should encourage rights holders to make available low-cost online alternatives at the same time as an enforcement and educational regime, otherwise users will find other ways to access the content illegally. Any rights enforcement must be equally balanced with education and an increase in legal access in today’s global environment.

I suggest that the presumptions and defences present in the Copyright Act should still be available to infringing file-sharers, to protect and enforce the balance between freedom of expression and copyright that the Copyright Act addresses. CIFSAA, as a standalone regime, removes these defences which work to enhance freedom of expression. Similarly, a fast-track method is not appropriate when considering NZBORA and freedom of expression concerns. The debate on how to protect copyright while still fostering innovation and creativity in a digital environment needs re-ignition.

Schedule 1

Claim number/ Parties	Date	Infringement details	Information provided by respondent	Amount awarded
<i>Recording Industry Association of New Zealand Inc v Telecom NZ 2592</i> [2013] NZCOP 1	29/01 /2013	One song triggering the Detection & Warning Notices; one song triggering the Enforcement Notice	Problems uninstalling uTorrent (the P2P software).	Reasonable cost of purchasing the songs: \$6.57 Contribution towards IPAP notices: \$50 [total cost to the applicant \$75+GST] Reimbursement of application fee: \$200 Deterrent sum: \$360 (\$120 per infringement) TOTAL: \$616.57

134 Dan Evon “Louis C.K. Releases New \$5 Special Online” (11 May 2012) Inquisitr <www.inquisitr.com>; and Dan Evon “Louis C.K. Tops \$1 Million From Beacon Theater Special, Gives Half to Charity, Staff” (22 December 2011) Inquisitr <www.inquisitr.com>.

<i>Recording Industry Association of New Zealand Inc v TCLE[A]-T5877102</i> [2013] NZCOP 2	05/02 /2013	One song triggering the Detection & Warning Notices; one song triggering the Enforcement Notice	The respondent's sons (aged 8 and 12) were responsible for downloading BitTorrent. Respondent had "very little computer literacy" and has now uninstalled BitTorrent.	Reasonable cost of purchasing the songs: \$7.17 Contribution towards IPAP notices: \$50 [total cost to the applicant \$75+GST] Reimbursement of application fee: \$200 Deterrent sum: \$300 (\$100 per infringement) TOTAL: \$557.17
<i>Recording Industry Association of New Zealand v CAL2012-E000614</i> [2013] NZCOP 3	19/02 /2013	One song on two occasions (triggering two notices); one song on another occasion (triggering another notice)	None — respondent took no part in proceedings	Reasonable cost of purchasing the songs: \$7.17 Contribution towards IPAP notices: \$50 [total cost to the applicant \$75+GST] Reimbursement of application fee: \$200 Deterrent sum: \$540 (\$180 per infringement) TOTAL: \$797.17
<i>RIANZ v TCLE[A]-T6054929</i> [2013] NZCOP 4	21/02 /2013	One song triggering the Detection & Warning Notices; one song triggering the Enforcement Notice	None — respondent took no part in proceedings	Reasonable cost of purchasing the songs: \$7.17 Contribution towards IPAP notices: \$49.99 [total cost to the applicant \$75+GST] Reimbursement of application fee: \$200 Deterrent sum: \$200 TOTAL: \$457.16
<i>Recording Industry Association of New Zealand v CAL2012-E000609</i> [2013] NZCOP 5	07/03 /2013	One song triggering the Detection; one song triggering the Warning & Enforcement Notices	Respondent serving in Afghanistan during the relevant time but has since taken steps to ensure that flat mates do not continue to file-share. <i>Note: The applicant waived its request for a deterrent sum to be awarded following this information.</i>	Reasonable cost of purchasing the songs: \$5.97 Contribution towards IPAP notices: \$50 [total cost to the applicant \$75+GST] Reimbursement of application fee: \$200 Deterrent sum: \$0 TOTAL: \$255.97
<i>RIANZ v Telecom NZ 3553</i> [2013] NZCOP 6	16/04 /2013	One song on two occasions (triggering two notices); one song on another occasion (triggering another notice)	Respondent's children were responsible. Parents told children not to download, but at least one child continued to do so. Parents will now supervise children's internet access. Offer to contribute to disbursements incurred.	Reasonable cost of purchasing the songs: \$6.57 Contribution towards IPAP notices: \$50 [total cost to the applicant \$75+GST] Reimbursement of application fee: \$200 Deterrent sum: \$60 (\$20 per infringement) TOTAL: \$316.97

<i>RIANZ v Telecom NZ 3663</i> [2013] NZCOP 7	22/04 /2013	One song on three occasions	Respondent said he was out at the time, and that the song was not on any of the laptops in the household. He “forgot” about the notices between when the first and second notices were received, and only took notice when the third and final notice was received.	Reasonable cost of purchasing the songs: \$1.79 Contribution towards IPAP notices: \$25 [total cost to the applicant \$75+GST; further reduced from the standard \$50 due to poor provision of information by IPAP] Reimbursement of application fee: \$200 Deterrent sum: \$50 TOTAL: \$276.78
<i>Recording Industry Association New Zealand v Telecom NZ 3728</i> [2013] NZCOP 8	27/06 /2013	One song, on six occasions (triggering three notices, but costing the applicant six times)	None — respondent took no part in proceedings	Reasonable cost of purchasing the songs: \$14.34 Contribution towards IPAP notices: \$100.01 [total cost to the applicant \$150+GST] Reimbursement of application fee: \$200 Deterrent sum: \$600 (\$100 per infringement) TOTAL: \$914.35
<i>Recording Industry Association New Zealand Inc v CAL2012-E000627</i> [2013] NZCOP 9	01/07 /2013	One song on two occasions (triggering Detection Notice); and one song on three occasions (triggering Warning/Enforcement notices)	Respondent said her daughter downloaded the tracks and did not understand how it could be illegal as uTorrent was a legal software with a legitimate website. She claimed not to have received the notices, which had apparently been sent by post and email.	Reasonable cost of purchasing the songs: \$11.95 Contribution towards IPAP notices: \$91.67 [total cost to the applicant \$125+GST] Reimbursement of application fee: \$200 Deterrent sum: \$500 (\$100 per infringement) TOTAL: \$803.62
<i>Recording Industry Association New Zealand v Telecom NZ 4296</i> [2013] NZCOP 10	16/07 /2013	One song on two occasions triggering two notices; one song on one occasion, triggering a third notice.	Respondent said that it was someone else who was using the internet connection, and that someone else was willing to take responsibility. He also claimed to take “every reasonable precaution to ensure illegal acts weren’t performed using the internet connection”.	Reasonable cost of purchasing the songs: \$7.17 Contribution towards IPAP notices: \$50 [total cost to the applicant \$75+GST] Reimbursement of application fee: \$200 Deterrent sum: \$300 (\$100 per infringement) TOTAL: \$557.17

<p><i>Recording Industry Association New Zealand v Telecom NZ 4366</i> [2013] NZCOP 11</p>	<p>19/07 /2013</p>	<p>One song on ten occasions, triggering the three notices</p>	<p>After the first warning, respondent did not go back on uTorrent. After receiving the second warning, respondent replied saying it was a mistake. After third warning, respondent uninstalled software when he or she realised what “seeding” meant. Respondent under severe financial difficulties. <i>Note: The applicant waived its request for a deterrent sum to be awarded following this information.</i></p>	<p>Reasonable cost of purchasing the songs: \$23.90 Contribution towards IPAP notices: \$166.69 [total cost to the applicant \$250+GST] Reimbursement of application fee: \$200 Deterrent sum: \$0 TOTAL: \$390.59</p>
<p><i>Recording Industry Association New Zealand v TCLE[A]-T6518151</i> [2013] NZCOP 12</p>	<p>23/07 /2013</p>	<p>One song on four occasions, triggering the three notices</p>	<p>After the first warning, respondent checked all computers and did not find the file. Respondent did not know what file-sharing software was. After the second notice, he or she contacted the IPAP, who said they would send out some information (which was never received). After the third notice, respondent again talked to their IPAP, who informed them of what file-sharing software was and how to find it. After conducting a further thorough search, they realised that the software on their son’s girlfriend’s laptop, which “seeded” using their internet connection whenever she visited. <i>Note: The applicant waived its request for a deterrent sum to be awarded following this information.</i></p>	<p>Reasonable cost of purchasing the songs: \$9.56 Contribution towards IPAP notices: \$66.67 [total cost to the applicant \$100+GST] Reimbursement of application fee: \$200 Deterrent sum: \$0 TOTAL: \$276.23</p>
<p><i>Recording Industry Association New Zealand Inc v Telecom NZ 2688</i> [2013] NZCOP 13</p>	<p>01/08 /2013</p>	<p>One song on five occasions, triggering the three notices</p>	<p>Respondent challenged enforcement notice, questioning the IP address. The IPAP confirmed his IP address at the time the notices were issued. Respondent said no one was at home when the notices were issued. No further argument after this initial challenge.</p>	<p>Reasonable cost of purchasing the songs: \$11.95 Contribution towards IPAP notices: \$99.98 [total cost to the applicant \$125+GST] Reimbursement of application fee: \$200 Deterrent sum: \$250 (\$50 per infringement) TOTAL: \$561.93</p>

<i>Recording Industry Association New Zealand v Telecom NZ 3760</i> [2013] NZCOP 14	20/08 /2013	One song on two occasions (triggering the Detection & Enforcement Notices); and one song, on one occasion (triggering the Warning notice)	Main submission from respondent was not taken into account as it was filed after the date for submissions was due	Reasonable cost of purchasing the songs: \$4.78 Contribution towards IPAP notices: \$50 [total cost to the applicant \$75+GST] Reimbursement of application fee: \$200 Deterrent sum: \$150 TOTAL: \$404.78
<i>Recording Industry Association New Zealand v Telecom NZ 4451</i> [2013] NZCOP 15	02/09 /2013	One song on three occasions, triggering the three notices	Respondent claimed that his sons had deleted uTorrent in 2012 and that they could not locate the application or the song. He or she said “we are not computer experts but know enough to know both are not on our computer”. Declined to appear in person as respondent said it was “pretty difficult to argue with the legal resources they have”.	Reasonable cost of purchasing the songs: \$7.17 Contribution towards IPAP notices: \$50 [total cost to the applicant \$75+GST] Reimbursement of application fee: \$200 Deterrent sum: \$300 (\$100 per infringement) TOTAL: \$557.17
<i>Recording Industry Association New Zealand v CAL2013-E000737</i> [2013] NZCOP 16	04/09 /2013	One song on two occasions (triggering Detection & Warning Notices); one song, on one occasion (triggering the Enforcement notice)	Respondent acknowledged liability. Tribunal pointed out that \$250 initially sought from applicant as a deterrent sum; this was subsequently changed to \$550 — had the respondent known this, respondent might have made more of an effort.	Reasonable cost of purchasing the songs: \$7.17 Contribution towards IPAP notices: \$50 [total cost to the applicant \$75+GST] Reimbursement of application fee: \$200 Deterrent sum: \$250 TOTAL: \$507.17
<i>Recording Industry Association New Zealand v TCLE[A] T7364885</i> [2013] NZCOP 17	04/09 /2013	Up to four songs on eleven occasions, triggering the three notices.	Respondent claimed to have uninstalled uTorrent after the first notice. After the second notice, respondent realised it had not uninstalled correctly, so respondent asked a friend to do it. After third notice, respondent contacted IPAP who told her how to uninstall it correctly. Respondent now says “I will only use my computer for [G]oogle searches, email etc from now on”.	Reasonable cost of purchasing the songs: \$26.29 Contribution towards IPAP notices: \$208.35 [total cost to the applicant \$275+GST] Reimbursement of application fee: \$200 Deterrent sum: \$0 TOTAL: \$434.64 <i>Note: Tribunal considered that the above was a sufficient penalty without adding a further deterrent sum.</i>