Three Notice Regime For P2P - Section 92A Copyright Act

Posted on 17/12/2009 by Rosemary Wallis

New legislation is to be introduced into the New Zealand parliament in early 2010 to implement a new three notice regime to combat copyright infringement from peer to peer (P2P) file sharing over the internet. The government wants the legislation enacted by July 2010 and in force by the beginning of 2011.

The previous version of section 92A of the Copyright Act, enacted in late 2008, was put on hold, due to the objections of many, particularly internet service providers ("ISPs").

Commerce Minister, Simon Power, released a Cabinet paper yesterday which outlines the government's proposed new regime. The paper followed a consultation process earlier this year on a proposal for a revamped Copyright Tribunal with considerably expanded powers of enforcement.

What has emerged is a modified proposal which is a step back from that, with a "three strikes and you're out" notice regime, the Copyright Tribunal to have power to impose fines of up to $15,000, and the requirement for right holders to have recourse to the courts rather than the Copyright Tribunal for termination of

internet access in the case of serious offending.

The Government has also listened to concerns about the definition of the term "internet service provider" which was sufficiently broad as to capture many ordinary New Zealand businesses and organisations such as universities. This is to be narrowed in the new bill so that s92A applies only to those ISPs which have the ability to identify internet protocol ("IP") addresses.

The regime will work this way:

- Right holders can request ISPs to give notice to infringers to stop infringing activity. The notices are to be based on reasonable evidence of a P2P infringement.
- The first notice will inform the infringer that infringement has occurred ("an education notice"), and can be followed by two further notices, a "cease and desist notice" and an advisory notice if the infringement continues.
- Following three notices, the right holder can apply to the Copyright Tribunal for the imposition of a fine of up to $15,000.
- If serious and repeat infringement occurs, right holders can ask the court for a range of remedies, including the suspension of internet accounts for up to six months.

- Account holders accused of infringement can issue counter notices and seek a hearing if they consider they should not be penalised.

The Copyright Tribunal will only hold hearings where the alleged infringer defends the allegations in person: otherwise the decisions will be made on the papers filed by the parties.

An additional remedy will be given to judges enabling them to terminate internet access, following proof in court of serious infringement.

Dealing with copyright infringement on the internet involves balancing conflicting interests and concerns, and the proposals are most unlikely to please everyone. ISPs have been concerned at the costs and burdens of enforcing a notice regime. Only the ISPs have the internet addresses of the alleged infringers but users do not want their details handed over to right holders. Right holders are suffering serious economic loss due from technology which replicates and distributes widely in seconds. Delay and the high cost of extracting the details of individual infringers mean court proceedings are not practical except in extreme cases or individual cases brought purely as deterrents, “pour encourager les autres”. Finally, there is a widespread public perception by internet users that what comes to them over the internet is and should be free: unless or until there is a shift in that paradigm, losses from copyright infringement will be part of the

cost of doing business.

The Cabinet paper acknowledges that the proposed regime will not be effective against infringement taking place at internet cafes, hotels or where internet protocol addresses are routed through other countries.

ISPs will most probably dislike the requirement to retain data on infringement for 12 months so that they can determine whether repeated infringement will occur. Nor will they like the Government rejection of their proposal that counter-notices from alleged infringers travel via the Copyright Tribunal to right holders instead of directly.

The cost of the proposals is likely to be high: the paper suggests there will be 15,000 notices issued in the first month and taper off to about 1000 each month. There is to be a fee for each notice, as yet unspecified, but otherwise ISPs are required to meet the costs of collecting, maintaining and processing data.

There are reasonably tight time frames for the sending of notices: the first must be sent within 20 working days of the alleged infringement, the second at least 10 days after the first, and the third at least 10 days after the second. Any Copyright Tribunal claim must be filed within 9 months of the first notice.

The Copyright Tribunal is to get three new members to help with the workload. However the Tribunal is to be a lawyer free zone when it deals with P2P infringement, as is the case in the Disputes Tribunal, where lawyers are also excluded. Although copyright is one of the more complex areas of the law, this is presumably balanced by the low level of financial penalty which can be imposed, the same as that in the Disputes Tribunal.

Like most compromises, the proposal will most likely meet with considerable criticism. Whether the proposal represents the right balance of conflicting interests remains to be seen.