

GLOBAL INFORMATION SOCIETY WATCH 2011

INTERNET RIGHTS AND DEMOCRATISATION

Focus on freedom of expression and association online



This edition of Global Information Society Watch is dedicated to the people of the Arab revolutions whose courage in the face of violence and repression reminded the world that people working together for change have the power to claim the rights they are entitled to.

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The views expressed in this publication are those of the individual authors and not necessarily those of APC or Hivos

Printed in Goa, India
by Dog Ears Books & Printing

Global Information Society Watch
Published by APC and Hivos
South Africa
2011

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ISSN: 2225-4625
APC-201111-CIPP-R-EN-PDF-0105
ISBN: 978-92-95096-14-1

APC and Hivos would like to thank the Swedish International Cooperation Agency (Sida) for its support for Global Information Society Watch 2011.



NEW ZEALAND

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Introduction

Copyright law does not sound, on the face of it, the most likely area of policy to generate examples of social resistance. Yet since the introduction in 2007 of legislation updating copyright law, a diverse but high-profile campaign has developed in response to efforts by successive New Zealand governments to introduce a new penalty for residential copyright infringement. That penalty is disconnection: the prospect that a citizen caught infringing copyright via the internet might see their access to the network brought to an end.

The campaign was successful insofar as at the time of writing, disconnection had not been implemented in New Zealand. A small but determined campaign spawned new organisations, new forms of resistance to legislative change, and the widespread use of the internet to catalyse citizen action against changes that people did not support.

Suspicion remains that, under continuing pressure from the United States (US) – revealed on WikiLeaks¹ – renewed attempts will be made to bring disconnection into effect (for instance, during the negotiation of the Trans Pacific Partnership Agreement). Its presence today in the New Zealand legislation presents a low barrier should a future government seek to introduce it.

This report explores the background to the disconnection proposals, the efforts governments have made to pursue them, and the response that has developed.

Policy background

There are two parts to the background story of copyright reform that matter to this case: the international and the local context.

On the global scale there have been efforts since the mid-1990s to create new, tighter norms for the protection of intellectual property. The global baseline is the TRIPS Agreement,² part of the World Trade Organization (WTO) framework adopted in 1995. All WTO members including New Zealand are committed to its minimum levels of intellectual property (IP) protection. Broadly speaking, developed countries have been advocating stronger IP law since TRIPS, while developing countries have seen the TRIPS baseline as the appropriate level of IP protection.

In New Zealand these global debates have affected copyright law reform. The country is broadly seen as having an effective and high-quality IP law regime. The Copyright Act 1994 underwent a lengthy review starting in 2001, to (among other things) ensure the legislation was fit for the digital age. Changes were introduced into the Parliament in 2007 and passed in 2008, some of which added new “permitted acts” for citizens (e.g. format shifting of music from CD to computer equipment became lawful), but which also included the famed “section 92A” which forms the core of this case.

The rise, fall and rise of disconnection in New Zealand law

The focus of the case is on the efforts made in New Zealand to draw internet intermediaries into a role of protecting the rights of copyright holders.

Until the introduction of amendments to the Copyright Act in 2007, internet intermediaries such as internet service providers (ISPs) had been regarded as conduits for information their customers sought. As with the telephone or postal networks, carriers had no responsibility for the content: that lay with the sender or receiver, in line with relevant laws.

Arguments to push internet intermediaries into a role in enforcing copyright rely on this idea: they are uniquely well positioned to be able to monitor the information their customers are accessing, and have a responsibility to do so. Failing this, they should be responsive to the surveillance done by rights holders, and take action against their customers when copyright infringement occurs.

¹ Trans-Pacific Partnership Digest (2010) Wikileaks cables show NZ doubts, US Pressure on TPP, 20 December. www.tppdigest.org/index.php?option=com_content&view=article&id=276%3Awikileaks-cables-show-nz-doubts-us-pressure-on-tpp&catid=1%3Alatest-news&Itemid=1

² Agreement on Trade-Related Aspects of Intellectual Property Rights.

The 2007 amendments, passed by Parliament in 2008, made use of a series of safe-harbour frameworks to bring intermediaries into the fold. As initially drafted, three specific safe harbours were created. The first was a general protection for an ISP in the common carrier mould, the second a protection against liability for hosted material if it was taken down on becoming aware of it, and the third was an exemption for material cached in the course of the routine operation of the ISP.

All three provisions were reliant on what became section 92A of the Copyright Act. The language of the draft legislation, first introduced in 2007, was as follows:

92A Limitations on liability in sections 92B to 92D apply only to qualifying Internet service provider

The limitations on liability in sections 92B to 92D apply only in respect of an Internet service provider that has adopted and reasonably implemented a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers.³

As finally passed in 2008, the legislation specified that this clause would only come into effect on a nominated date. When Parliament's Commerce Select Committee reviewed the draft legislation, it recommended that the clause be deleted because:

[T]he standard terms and conditions of agreements between an Internet service provider and its customers usually allow for the termination of accounts of people using the services for illegal activity. Moreover, new section 92C already requires an Internet service provider to delete infringing material or prevent access to it as soon as possible after becoming aware of it.⁴

Internet rights advocates celebrated. However, in April 2008, with no public notice or further consultation, the government reintroduced the clause by means of a Supplementary Order Paper, and this clause was passed into law:

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

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

3 Copyright (New Technologies and Performers Rights) Amendment Bill 2007, as introduced by the Government of New Zealand.

4 Commentary, Copyright (New Technologies and Performers Rights) Amendment Bill 2007, as reported by the Commerce Select Committee, p. 7.

(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.⁵

In this way Parliament gave no guidance as to who would count as a repeat infringer, what sort of infringement would be included, who would judge that infringement had occurred, and what the practical effects of termination should be for the subscribers of a particular ISP.

Dubbed "guilt on accusation" by opponents, and seizing on comments by the minister steering the legislation through Parliament that access to the internet should be considered a human right,⁶ a community campaign grew – described in more depth below. Meanwhile, ISPs organised through the Telecommunications Carriers Forum negotiated with rights holder organisations in an attempt to implement the legislation despite the problems created by the drafting used.⁷

These negotiations did not succeed, and while they were underway a general election led to a change of government in November 2008. During the election and after, there were deferrals of the commencement of section 92A (from October 2008 to February 2009⁸ and then to March 2009),⁹ to try and leave time for the ISP-rights holder negotiations to succeed. Ultimately, however, they failed, and community opposition built to a crescendo.

The main focus of the opposition was around a campaign called #blackout¹⁰ – the hashtag was extensively used by opponents of the law on Facebook and on Twitter, and users of both social networks replaced their avatars with simple black squares. This campaign achieved significant media coverage in the lead-up to the intended commencement date, and was catalysed at the annual KiwiFoo camp, held north of Auckland in February 2009.

Faced with widespread opposition, the newly appointed minister responsible for the legislation

5 Section 92A of the Copyright Act 1994 as at January 2011, as inserted by section 53 of the Copyright (New Technologies) Amendment Act 2008.

6 Bell, S. (2008) Internet access a human right, minister says, *Computerworld*, 3 September. computerworld.co.nz/news.nsf/new/6DC929097F31FF8ECC2574B8006D45D8

7 tcf.org.nz/content/98c471de-49ff-4a9e-abb4-49f4b3eee201.html

8 Media release by Hon. Judith Tizard of 3 October 2008. beehive.govt.nz/release/copyright-new-technologies-amendment-comes-force

9 Comments by the prime minister at a media conference, as reported by the Creative Freedom Foundation, 23 February 2009. creativecommons.org.nz/story.html?id=170

10 See, for example, the article on Wikipedia regarding the campaign: en.wikipedia.org/wiki/New_Zealand_Internet_Blackout

announced¹¹ that it would be scrapped days before commencement at the end of March. A paper outlining a new proposal for dealing with infringing file sharing was developed by officials and experts, and released to the public in July 2009.¹²

This new framework set up a notice-based system, designed to tackle the major concerns the community had with the previous government's efforts: in particular, the absence of any decisions on infringement on the part of the justice system before penalties were imposed, and the strong and growing community view that the penalty of account termination or suspension was not a proportionate remedy to infringing file sharing.

ISPs would be required to pass notices on to their subscribers when lodged with them by rights holders or their representatives. Three types of notices were required, which ISPs would send based on the record of infringement in preceding weeks and months. After a final notice was sent, rights holders would have the option of taking a case before a (revised and expanded) Copyright Tribunal, which would have the ability to impose a financial penalty on repeat infringers of up to NZD 15,000.

This regime was carefully and vigorously scrutinised in parliamentary debate through 2010, including through select committee hearings which (replicating the 2007 debates) saw rights holder interests arguing that copyright infringing file sharing was causing them significant damage and required a strong legislative response. Community advocates again argued that nobody had presented evidence of economic harm to rights holders of a scale that justified such a policy.

One outcome of the select committee process was that draft clauses to include account suspension (for a period of up to six months, and on the decision of the District Court, and only at the same point or after enough infringement had occurred to allow rights holders to instigate proceedings in the Copyright Tribunal) were not directly implemented. Instead such a power was included, but only to become accessible if the government introduced it into regulation.

Another area that attracted considerable controversy – the inclusion of a new strict liability on account holders for any activity conducted on their internet accounts – was not removed during parliamentary scrutiny, despite widespread fears that this could have a chilling effect on provision of public

Wi-Fi services, or create difficulties for large providers such as universities and libraries.¹³

The remaining details of the new regime were outlined in regulations published in July 2011,¹⁴ which included the fees that rights holders would have to pay ISPs to process each notice. In consultations on the regulations, rights holders sought a very low fee,¹⁵ arguing that the education role that notices play would be maximised. ISPs argued¹⁶ that processing notices had real costs and that these should be met. The government set the fee at NZD 25, and when the regime commences on 1 September 2011 it will quickly become apparent what effect this fee has on the flow of notices – and on the arguments parties bring to a review, due six months later, as to whether the fee has been set at an acceptable level.

These proposals were and remain controversial in New Zealand. They have spawned the creation of several organisations dedicated to a different point of view: the Creative Freedom Foundation (CFF),¹⁷ providing a voice for artists who are technologically literate, and TechLiberty,¹⁸ aimed at protecting people's rights in the digital age, are two with the highest profile.

There has been an increase in community knowledge and organisation around the idea that people's rights may be at risk from policy making that does not take the fact of the internet's existence into account. While this community may not be terribly large, it has proved its ability to create significant interest, and apply significant pressure to governments.

The debate around whether access to the internet itself should be considered a right continues – the minister pursuing the copyright reform agenda, Simon Power, acknowledged this debate at a forum organised by InternetNZ and the NZ Human Rights Commission to discuss the internet's effect on human rights norms and laws.¹⁹ Parliament was

11 Media release by Hon. Simon Power of 23 March 2009. www.beehive.govt.nz/release/government-amend-section-92a

12 Media release by Hon. Simon Power of 14 July 2009. www.beehive.govt.nz/release/section-92a-proposal-released-consultation

13 Moya, J. (2011) New Zealand's "Three-Strikes" to End Public WiFi?, *ZeroPaid*, 18 April. www.zeropaid.com/news/93137/new-zealands-three-strikes-to-end-public-wi-fi

14 Available on the website of the Ministry of Economic Development at: www.med.govt.nz/upload/Copyright-Infringing-File-Sharing-Regulations-2011.pdf

15 Submission from APRA on the regulatory consultation document, available at: www.med.govt.nz/upload/77298/Australasian%20Performing%20Right%20Associations.pdf

16 Submission from the TCF on the regulatory consultation document, available at: www.med.govt.nz/upload/77298/Telecommunications%20Carriers%20Forum.pdf

17 www.cff.org.nz

18 www.techliberty.org.nz

19 Liddicoat, J. (2010) *Report on Human Rights and Internet Round Table*. www.hrc.co.nz/hrc_new/hrc/cms/files/documents/26-Aug-2010_11-10-14_HR_and_the_Internet_Roundtable_Jul_10.html

littered with reference to the internet as a right by opponents of the new legislation. Some media took the same line.

Conclusions

In New Zealand's case, the emergence of an informed community active on copyright and intellectual property law issues – largely organised through the internet itself – has had a real effect on policy.

If no such community had emerged – and without the options available for propagating its message through the internet, it would not have done – New Zealand would now have copyright legislation that allowed for people's internet accounts to be suspended due to infringing file sharing of copyright material.

The international context continues to evolve, with the US pursuing very significant changes to IP law in negotiations for a Trans Pacific Partnership Agreement (TPP) among nine countries including New Zealand. Such changes, if included in the final agreement, will lead this community to oppose ratification of the TPP by New Zealand.

With ongoing global pressure for tighter IP laws, these issues are likely to remain visible in trade negotiations, and the profile they now have in New Zealand will continue. Activists have used the open internet to fight changes that threaten its existence, and have succeeded: there is no doubt they will use it again, hoping for similar outcomes.

New Zealand's government has taken note. Conversations with negotiating officials indicate the government now uses the community response against the attempt to implement section 92A reforms as a sort of shield, ready to be deployed where other governments ask for dramatic changes to the intellectual property framework. They have used this argument along with another: that the lack of evidence justifying tighter laws means there is little valid reason to implement them.

In that sense, the New Zealand government and the activists are on the same side. Yet the government faces other economic interests for whom the prospects of a TPP – or of another ambition of New Zealand foreign policy, a bilateral free trade agreement with the US – are highly desirable, and who have a louder voice in the public sphere and around the cabinet table.

Action steps

- Use the internet – particularly communities connected through online social networks – to visibly challenge policies you oppose.
- Find robust evidence to back your case, and/or highlight the lack of such evidence backing your opponents' case.
- Work with mainstream media to amplify the message beyond the online community into mainline political and policy debate.
- Create open learning communities where new suggestions are positively received and are adopted where they show potential.
- Use “meatspace” (real-life) gatherings of activists to generate momentum, build personal networks and coordinate action. Social networks online amplify and expand momentum but they do not necessarily instigate it.
- Educate politicians and officials who make policy on information and communications technology (ICT) issues. Many of the mistakes in the New Zealand legislation emerged because those making decisions did not understand the terrain they were working in.
- Attack and undermine “us versus them” frames, and divide those who are on the other side where you can. For instance, in the New Zealand debate, the emergence of CFF was vital to undo claims that all artists sought tougher copyright legislation. ■

In the year of the Arab uprisings **GLOBAL INFORMATION SOCIETY WATCH 2011** investigates how governments and internet and mobile phone companies are trying to restrict freedom online – and how citizens are responding to this using the very same technologies.

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GISWATCH 2011 is the fifth in a series of yearly reports that critically cover the state of the information society from the perspectives of civil society organisations across the world.

GISWATCH is a joint initiative of the Association for Progressive Communications (APC) and the Humanist Institute for Cooperation with Developing Countries (Hivos).

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2011 Report

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