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## INTELLECTUAL PROPERTY

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## CLARIFYING COPYRIGHT CONFUSION FOR ISPS



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Internet service providers and website owners need to prepare for a controversial new copyright law which takes effect early next year.

The Copyright (New Technologies) Amendment Act 2008 updates New Zealand's copyright law in response to developments in digital technology. The main changes will affect internet service providers (ISPs) and the circumstances in which they will be liable for copyright infringement.

### Broad meaning of ISPs

The term ISP is given a broad definition under the Act to include any person who:

- (a) offers the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing (i.e. conventional ISPs but potentially also organisations who offer access to the internet such as libraries and internet cafes); or
- (b) hosts material on websites or other electronic retrieval systems that can be accessed by a user (i.e. content providers).

### Effect of the amendments

Once the amendments come into force on 31 October 2008, ISPs (including content providers):

- (a) will not be liable for copyright infringement in most cases; but
- (b) may be liable if they fail to take action in relation to allegations of copyright infringement.

### "Repeat infringers" of copyright

From 28 February 2009, when section 92A of the Copyright Act comes into force, ISPs will be required to have policies which deal with termination, in appropriate circumstances, of the accounts of "repeat infringers" of copyright (as defined in the Act).

Associate Commerce Minister Judith Tizard has suggested that the delayed implementation of section 92A is to "enable rights holders and ISPs time to reach agreement on how [the section] can be effectively implemented" — there is no formal requirement for section 92A policies to be drafted in conjunction with copyright owners or their representatives.

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Various media and online commentators have suggested section 92A introduces a “three strikes and you’re out” regime, meaning that an ISP must terminate the account of a customer who has had three allegations of infringement from copyright owners or their representatives. Such schemes have been enacted overseas and have been implemented voluntarily in other countries.

This is not the case. The New Zealand legislation does not contain a “three strikes” regime, but instead gives ISPs and content providers a great deal of latitude when drafting their policies. Section 92A does not provide prescriptive rules on the circumstances in which service must be discontinued, nor does it include regulations specifying the content of termination rules.

The section simply requires a policy to be in place and reasonably implemented.

## Preparing your section 92A policy

The way an ISP or content provider drafts its section 92A policy will have major implications for the operation of that organisation’s business after 28 February 2009, and may also have a significant effect on its potential liability to copyright owners.

The ISP liability sections, and section 92A in particular, have been criticised by ISPs and members of the wider IT industry. But many of the problems identified proceed from a misunderstanding of the legislation and could be resolved through a well-drafted policy.

It is important for all ISPs and content providers to develop policies in consultation with a legal adviser offering specific expertise in copyright law.

Please contact us if you would like more detailed advice regarding your business’s potential liability once the amendments come into force, assistance with preparing a section 92A policy, or to discuss any other matter.