



NEW ZEALAND INSTITUTE FOR THE STUDY
OF COMPETITION AND REGULATION INC.

s 92A of the Copyright Act & the Institutional Role of Internet Service Providers (ISPs) and the Copyright Tribunal

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Context for the paper

1. Copyright owners lobby for a legal solution to the perceived threat posed by digital technologies.
2. The Copyright (New Technologies) Amendment Act 2008
 - i. First attempt: s 92A and the 3 strikes policy – now abandoned.
 - ii. Second attempt: a reviewed policy proposal document – good try but has flaws.
3. This paper argues for abandoning both the above – economic analysis indicates a preference for a contractual solution.



Outline of presentation

- Brief background to the problem and the reviewed s 92A process.
- Traditional copyright principles and why they should not be abandoned.
- An economic analysis.
- An economic solution.



The problem

- Infringement of copyright is facilitated by digital technologies.
 - Cheap to produce multiple copies
 - Copies indistinguishable from ‘original’
 - Speedy distribution of multiple copies via internet
- Copyright owners argue that **ISPs** are in the best position to locate and stop infringers.



Is this a sound legal argument?

(is it in accordance with traditional copyright policy and principles?)



History of Copyright Law



Copying - then

- First statutory protection - the Statute of Anne 1709 - protected books.
- **Exclusive** right of publication to the author of a book for 14 years.



The Development & Expansion of Copyright Law Parallels Technology



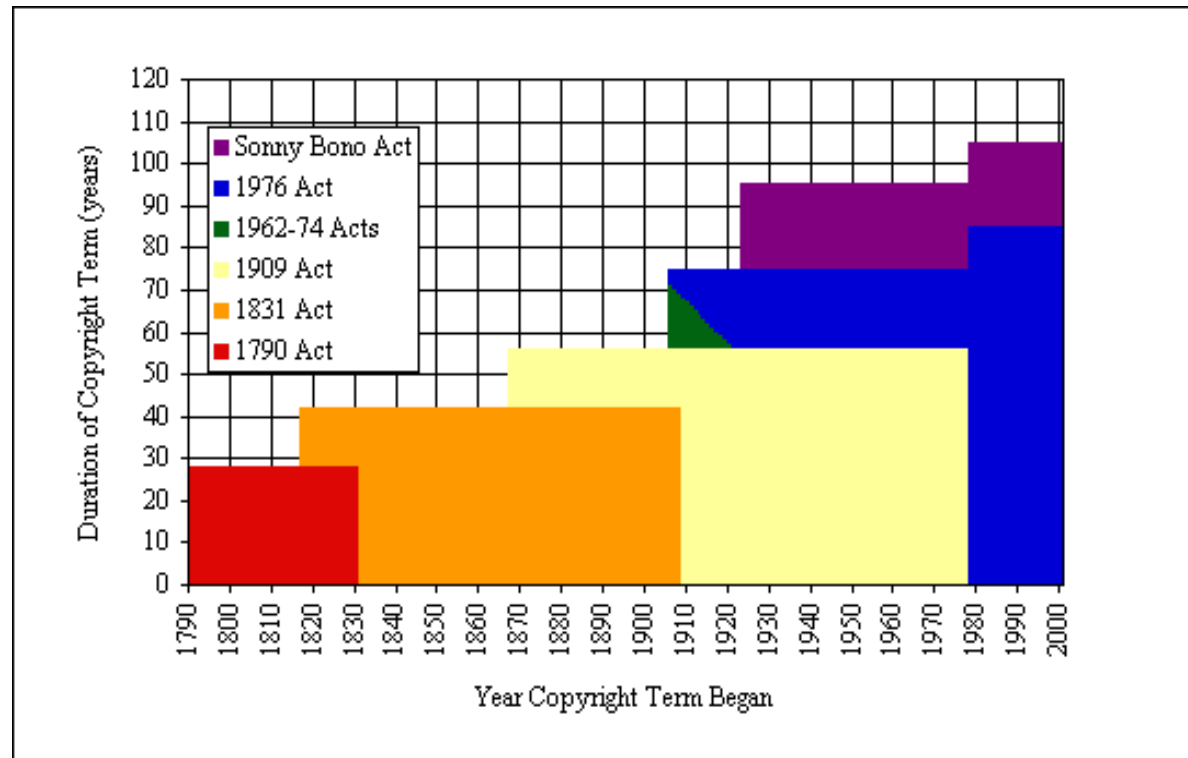
Copyright - now

Copyright Act 1994, s 14: “Protects **original works** of the following descriptions:

- (a) literary, dramatic, musical, or artistic works:
- (b) sound recordings:
- (c) films:
- (d) communication works:
- (e) typographical arrangements of published editions.”



Copyright Now: A Much Expanded Term



But Traditional Features of Copyright Law Persist Today

- State grants legal rights in the copyright property - a bargain with the copyright owner.
- **Automatic** protection - no formalities.
- **“Original”** – different meanings in different jurisdictions.
- Certain **“public good”** uses permitted during the term of copyright:
 - Fair dealing for research, criticism, etc, education, libraries, etc.



The Copyright Owner's Side of the Bargain.

In cases of infringement – it is her **responsibility** to satisfy the court:

1. Copyright exists in her work- 'originality'
2. She is the owner of that copyright.
3. Alleged infringer's causal connection- opportunity.
4. Copying or authorising copying of the whole or a substantial part of her work.
5. Not one of the 'public good' uses.

The State then keeps to its side of the bargain and **enforces** those rights.

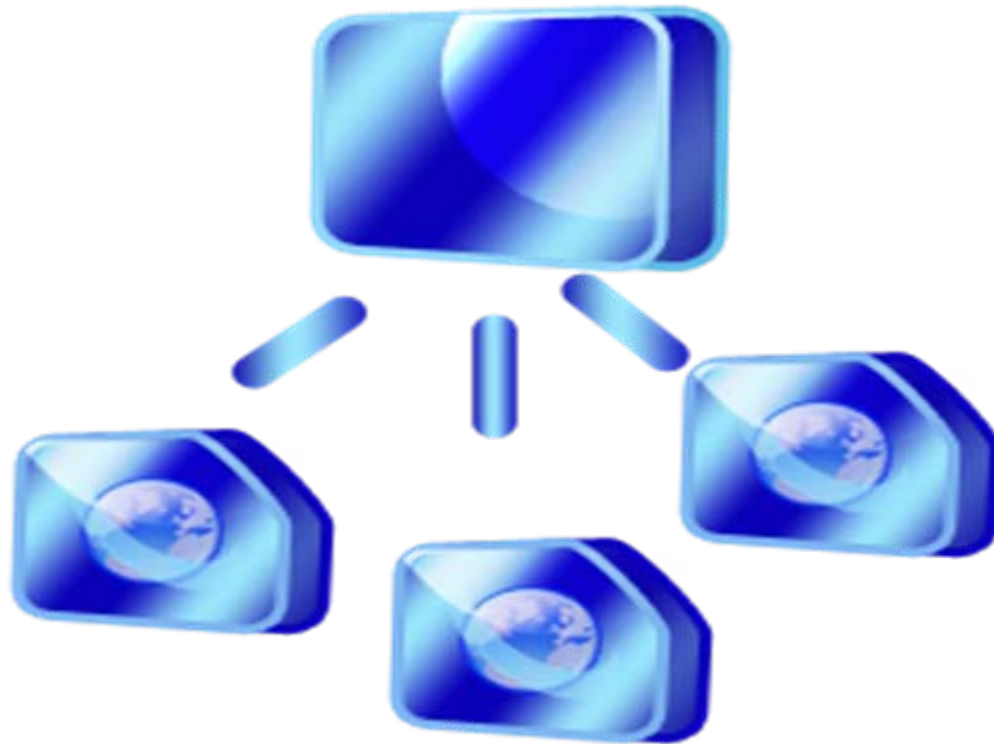


The Copyright Owner's Side of the Bargain

- Has not been altered by the Courts, despite new technological means of infringing - the photocopier, the double deck tape recorder.
- Should internet technologies alter this bargain?



Information (digital) Goods



Property Rights & Economic Value

- Ownership: a bundle of **rights**
 - to use the property
 - enjoy income generated from legally permissible uses
 - to exclude others from using it
 - to transfer all or some of the rights associated with it in exchange for mutually-agreed compensation
- If the ownership of the rights is unclear, the incentives to create and trade the **optimal** quantity and type of goods will be lacking



Information (Digital) Goods

(Quah 2004)

- Non-rival
- Non-excludable
- Infinitely expansible
- Initially discrete

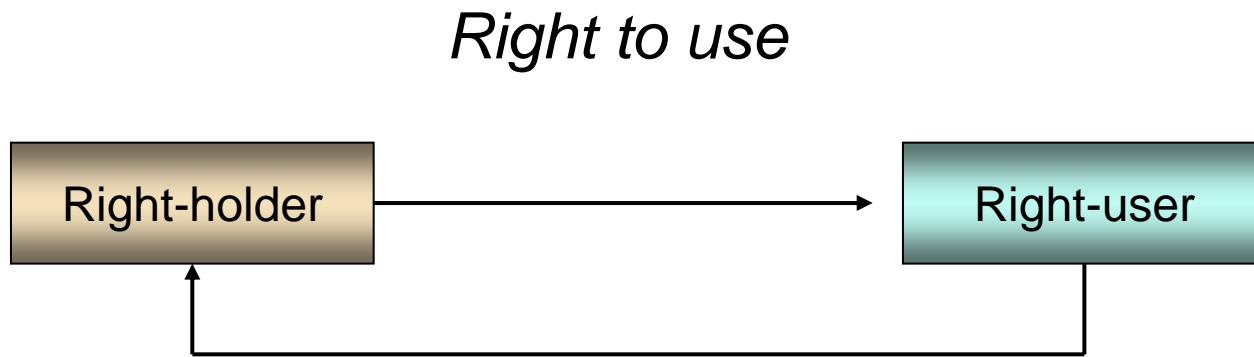


Economic Challenges

- Economic characteristics limit incentives to create and trade
- Trade can occur, but monitoring and enforcement of rights is **costly**
- All copyright works are information goods
- Copyright terms assist in **welfare-enhancing** creation and trade



The 'right to use' of Copyright Material



Obligation to abide by copyright terms

Monitoring and Enforcing Copyright Agreements

- Rights-holder must prove ownership and infringement
- Rights-user must prove use is within terms of agreement
- The more **opaque** is the action of (rights-user) usage (and infringement) to the right-holder, the more costly it is to establish that infringement has occurred
- The less likely it is that infringement can be detected, the more likely it is that a rights-user will infringe
- Optimal level of infringement



Technological Change

- New technologies have successively
 - **reduced** costs of infringing
 - **increased** costs of monitoring and enforcing
- Distinction: ‘copyright good’ and ‘carrier medium’
- Tangible medium: infringement **observable**
- Intangible medium: infringement **unobservable**



Why s 92A?

ISPs:

- provide the **infrastructure** for digital transmission of information (carrier medium)
- can identify the origin & destination of every digital transmission
- may therefore be able to assist in reducing the costs of monitoring and enforcing copyright agreements



Why not s 92A!

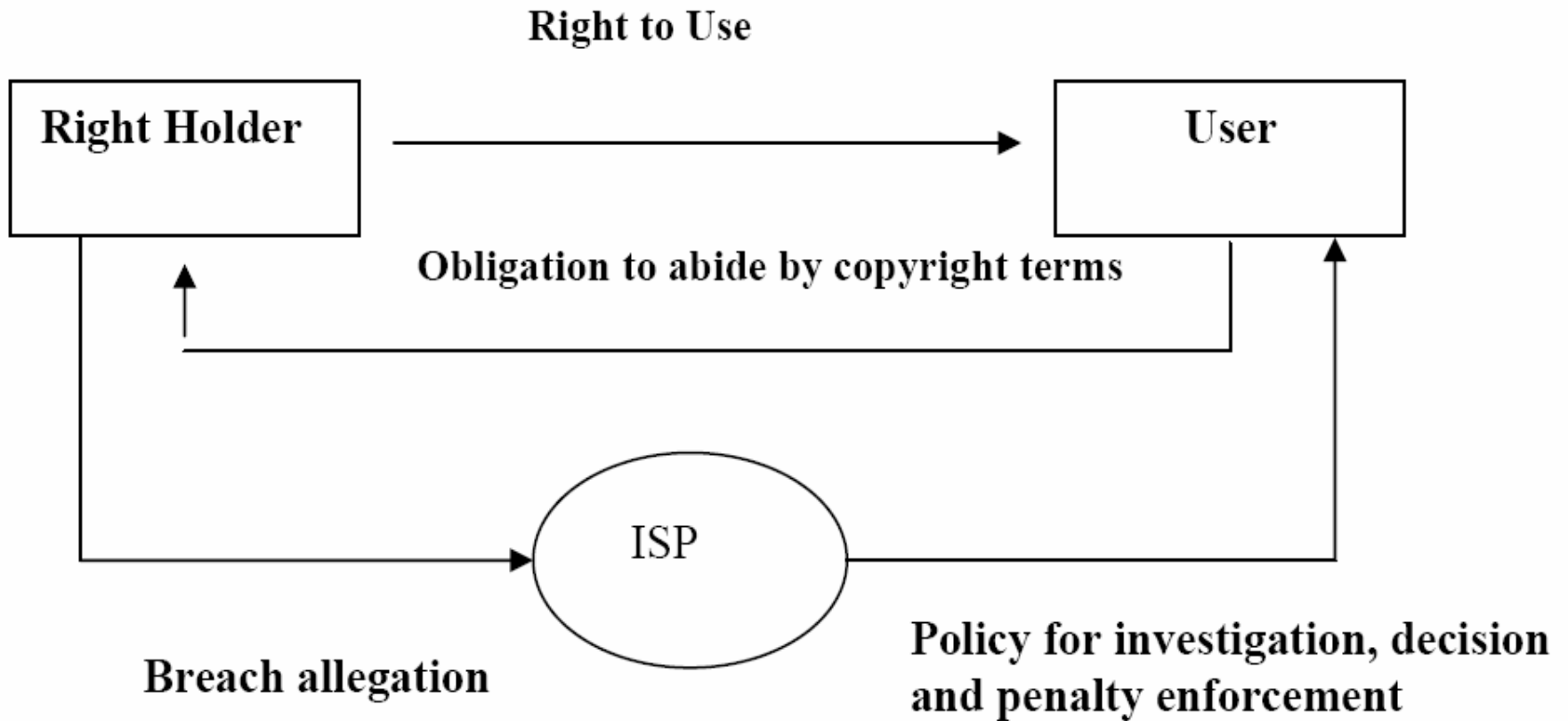
ISP can't:

- distinguish digital material subject to copyright from that not subject to copyright
- ascertain identity of individual rights holders and rights users
- evaluate/adjudicate legitimacy of claims of either infringement or agreed use
- detect or prevent infringements occurring via other ISPs or technologies (e.g. DVDs)

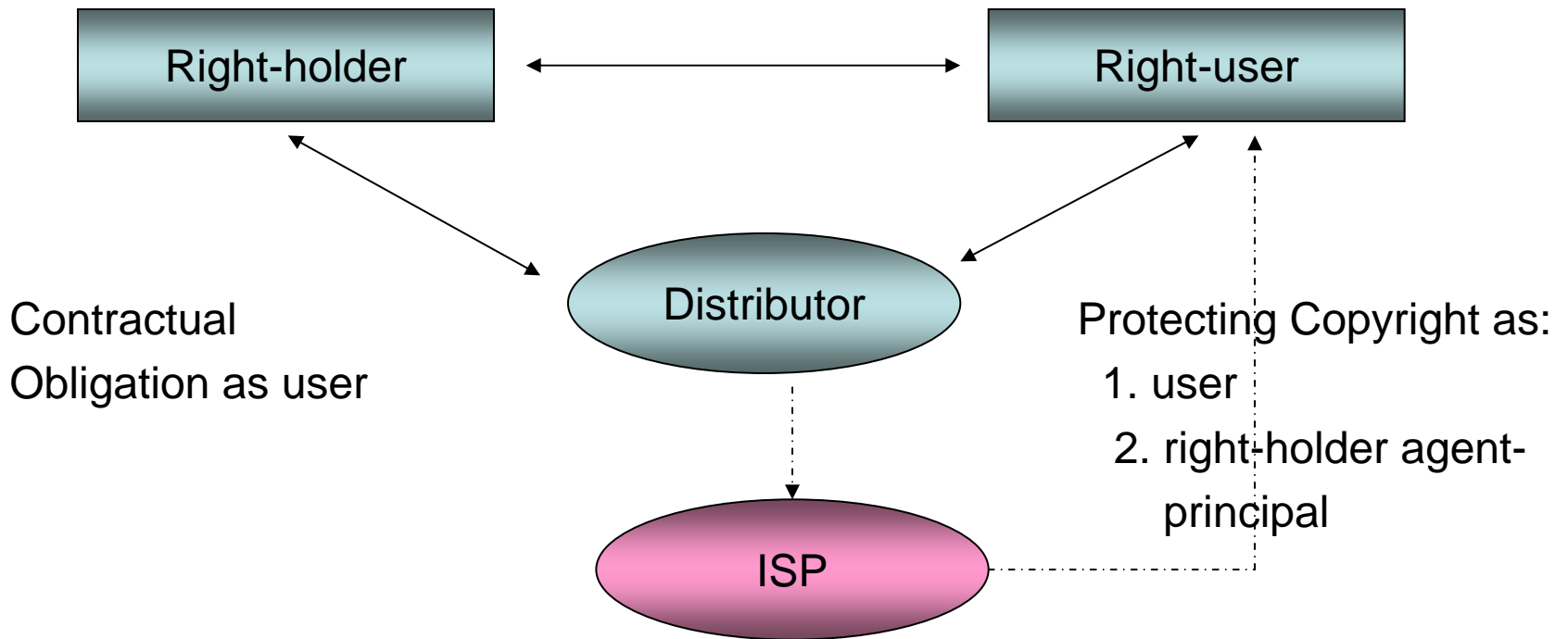
Whilst the internet may facilitate infringement, ISPs are **limited** in their ability to monitor and enforce as they are not party to the copyright agreement



ISPs not party to Copyright Agreement



ISPs distinct from Distributors

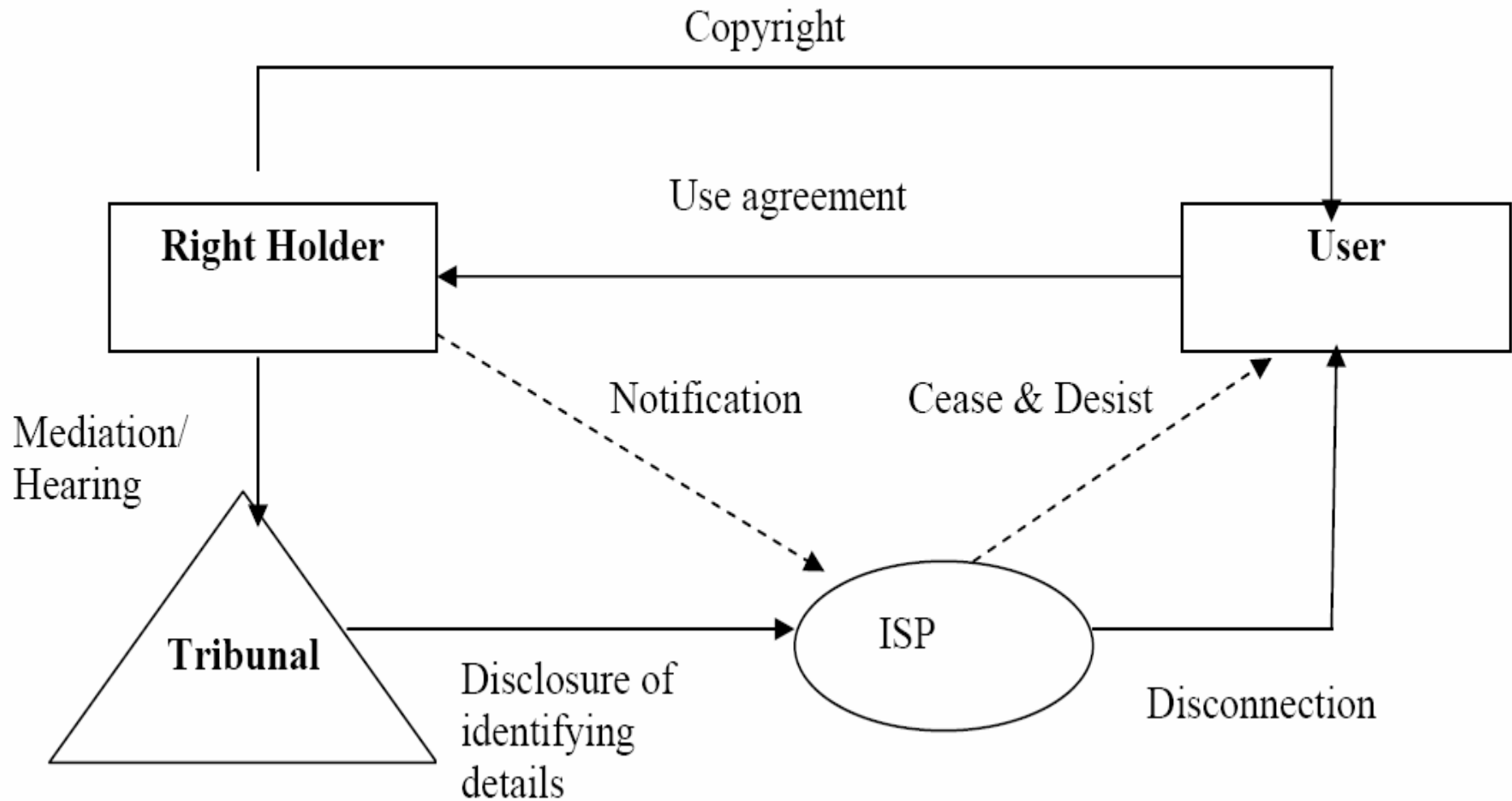


The Role of ISPs: Copyright Monitoring & Enforcement

- If such detection were technically or practically possible, there would exist mutually beneficial **contracts** between the ISPs and the right-holders to monitor and report on infringement.
- Lack of emergence of such contacts endogenously suggests that technology to undertake such monitoring does not exist or that more **efficient mechanisms** exist to achieve these objectives.



s 92A – The Current Proposal



Current Proposal

- Absolves ISPs from quasi-judicial responsibility
 - burden of proof lies with rights holders and rights-users
 - Tribunal has appropriate knowledge to assess claims of infringement
- Disconnection cannot occur until guilt is proven
 - but still captures non-infringing users of the disconnected account
 - one disconnection order will not necessarily shut down an infringer with multiple ISPs/internet identities
- What is an ISP?
 - liability of intranets, etc.



Current Proposal (cont)

- Requires ISPs to act on (unverified) rights-holder instructions
- No special information provided by ISPs that will reduce rights-user detection costs
- Who pays ISP costs?
 - if ISP customers alone – risk of ‘fishing expeditions’
 - increases costs to non-infringers
- Tribunal process costly
 - will address only very worst cases
 - few incentives to reduce minor infringing



Solution



Technology or Institutions?

- s 92A process has focused on:
institutions and enforcing penalties rather than **incentivising** compliance
- ISPs implicated because:
they are seen as part of the ‘problem’ and therefore assumed to be part of the ‘solution’
- But changing the ‘**carrier medium**’ has not altered the principles of copyright agreements
- Technology (carrier medium) rather than institutions or legislation may hold the answer

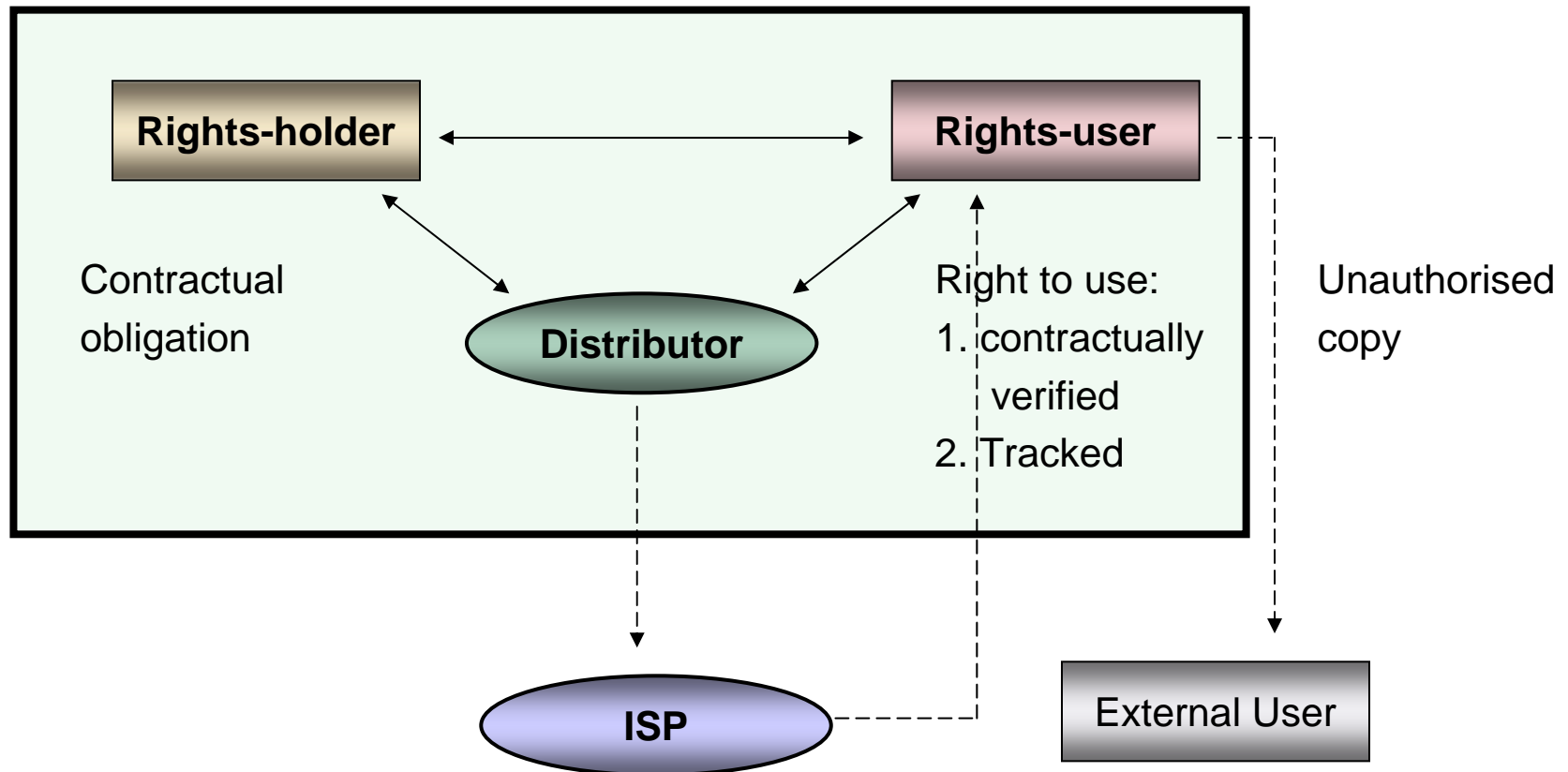


Have other contractual and/or institutional remedies emerged to address the ‘problem’?



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The 'Walled Garden' already exists e.g. iTunes



Distribution Model

- Electronic intermediation/distribution model enables:
 - **low cost** capture of all agreements between rights-users and the distributor/rights-holder
 - **transparent** evidence of rights-user agreement to terms of use



Distribution Model

- **Rights-holder** has incentive to make work available via a distributor because distributor can track all legitimate users
- **Rights-users** have incentive and ability to maintain audit trail of legitimate acquisition/use



Our Conclusion

Thus we conclude that the logical electronic intermediaries to facilitate the low-cost monitoring and enforcement of digital works subject to copyright are not ISPs but **distributors**.

Moreover, the simplicity and alignment of incentives of the **Walled Garden** model confirms that in principle, the traditional copyright law principles are **robust** to cope with changes in technology.

