

InternetNZ comments in response to the Government's proposed approach to illegal peer-to-peer file sharing

Introduction

1. This document provides comments in response to the paper "Illegal Peer-to-Peer File Sharing" from the Minister of Commerce to the Cabinet's Economic Growth and Infrastructure Committee, which was released to the public on Wednesday 16 December 2009 ("the paper").
2. The purpose of this document is to highlight some issues of detail with the matters covered by the paper, to raise questions for clarification in some cases or to recommend minor variations which are consistent with the overall approach set out in the recommendations agreed by Cabinet.
3. This document will be provided to the Minister of Commerce and to the Ministry of Economic Development, and will be published by InternetNZ in January 2010, in keeping with our open and transparent approach.

Policy approach

4. InternetNZ congratulates the Government on the much improved approach to dealing with illegal peer-to-peer file sharing set out in the paper.
5. The approach now adopted deals with many of the concerns that InternetNZ and others had with the previous section 92A of the Copyright Act 1994, and provides a framework that should be workable.
6. InternetNZ reiterates its opposition in principle to any inclusion of termination or account suspension in the law. We will canvass the arguments regarding termination again at Select Committee.

Notice regime

Notices

7. **Paragraph 23** of the paper sets out the notices that form part of the regime. From this paragraph onwards it is not clear whether account holders will receive multiple copies of each type of notice, or can only receive one of each type. A hypothetical case will illustrate the issue.
8. Consider an account holder who rights holders allege has made multiple copyright infringements - say fifteen infringements are detected in a given day.
9. Does the account holder receive fifteen first education notices? Or do they receive one notice relating to the first allegation received by the ISP from rights holders? Do multiple infringements in a short time period serve to

generate over time all three notices, or do separate instances of infringement do this?

10. Some of these matters are covered in more depth below, but InternetNZ's general view is that instances of infringement should be separated by the periods set out for different notices, and notices should relate to infringement that happened during the period they can be sent, not before - according to the timelines set out in subsequent Paragraphs.
11. We believe this approach gives effect to the Minister's policy intention, but welcome feedback on this broad point which is further clarified below. We would welcome a discussion with drafting or policy officials on this matter.
12. **Paragraph 24** refers to the form of notice that an ISP will be required to send to an account holder. InternetNZ recommends that the regulations mandate the essential information to be included, but that ISPs otherwise be able to prepare notices in their particular style and in accordance with their own individual processes. We note also that there is a focus on wireless, which is understandable given that lack of wireless security is often used to argue against over-reliance on IP address based evidence. However, wireless is by no means the only situation where security lapses occur and need not therefore be singled out in this context.
13. InternetNZ welcomes and fully supports the need for the notices to be primarily educational and would expect an educational component to remain even for the later notices. Anecdotal reports from overseas have highlighted overly threatening notices by rights holders as a reason why users have lost respect for copyright.
14. **Paragraph 28** notes that the notice regime is not intended to apply in situations where an Internet connection cannot reliably be assumed to be under the control of the account holder. The examples given are in a hotel or at an Internet café.
15. InternetNZ suggests that in the drafting of the bill, it be made explicit that in situations where many individuals are making use of Internet services provided through an account due to the nature of the activity conducted by the account holder (such as a wireless hotspot, a hotel or a public library), the new regime does not apply to the account holder. Rights holders would remain able to take court action if they believed significant offending was taking place at such a location.

Counter-Notice

16. InternetNZ suggests that the form of counter-notice also be outlined in regulations so that an emphasis is put on ensuring as much evidence as possible is included at an early stage. This is useful to discourage illegitimate disputes, to allow legitimate disputes to be recognised by rights holders and in preparation for any Tribunal proceeding.

Timeframes

17. **Paragraph 34** sets out timeframes for notices. InternetNZ has several concerns to raise in respect of this paragraph.

18. The first line of the paragraph states that first notices are to be sent "*at least* 20 working days after the ISP receives evidence...".
19. InternetNZ assumes from the context of the paper that this should instead say that notices are to be sent "*within* 20 working days after the ISP receives evidence...". Subject to comments below with respect to the sequencing of notices, InternetNZ also questions whether 20 working days is necessary here when the Telecommunications Carriers' Forum draft code arrived at a 5 working day period.
20. As a matter of principle, InternetNZ believes that each consecutive notice type should only be able to be sent based on new evidence of infringement occurring after the relevant time limit. Otherwise an account holder that is alleged to have infringed twice on the same day could receive one notice for the first alleged infringement and then a cease and desist notice for the second without having had any opportunity to investigate or adjust its behaviour. This renders the educational focus of the staggered notice system nugatory in some circumstances, which we presume was not the intention.
21. Therefore, second notices (cease and desist notices) should only be able to be sent at least 10 working days after the first education notice has been sent, based on a new infringement that has occurred at least 10 working days after the first notice is sent. The same approach should be taken with the third notice. This is all the more important when it is noted that the time period starts to run when the notice is sent not when it is actually received.
22. InternetNZ believes that this is consistent with the general approach set out in the paper. We would welcome clarification of the policy intent if it is not consistent with our interpretation as set out here.
23. Paragraph 35 specifies a 9 month limit before notices *go stale*. However, it is unclear whether this is a rolling 9 months of a period which must re-start altogether. For example, working from notice one, if notice two is in month 7, notice 3 in month 10 and notice 4 in month 11, does this mean that notices one and two have become stale (because the process beginning at notice one was not completed within 9 months) or does it mean that only notice one is stale? If the former, then under the above example, the account holder is only at the cease and desist stage, whereas if the latter rule applies, the rights holder under the current proposal would be able to apply to the Tribunal or Court.
24. This is an opportune point to also raise the issue of the type of notice since, if certain notices go stale and others do not, the account holder may effectively be at an earlier stage than its next notice would suggest. For example, if a first and second notice expire before the account holder gets to the third notice, then does the ISP, on receiving a further notice, send a cease and desist (when the account holder will already have had one of those)?
25. Decisions such as this may seem somewhat minor but from the perspective of an account holder receiving notices, InternetNZ is concerned to reduce confusion as much as possible. Also, importantly, the more that an ISP must stop to assess what stage it is at rather than simply automatically sending out notices, the more it will drive cost into its processes.

Key Issues: distribution and recovery of costs to ISPs

26. **Paragraph 37** notes the costs that ISPs will face in implementing the notice regime set out in the new framework. It mentions that cost is derived from the task of matching the IP addresses, and in sending notices.
27. There are further costs however, the most significant of which is the capital cost of amending an ISP's systems so as to enable these to keep track of the alleged infringements of customers, to ensure notices are sent consistent with the timelines set out as part of the new regime, and to provide on request details to the Tribunal and the Court.
28. There are other costs that will be incurred by ISPs. These includes costs of:
 - a. Forwarding counter notices to rights holders;
 - b. Logging and keeping all communications (which will be necessary for evidentiary purposes);
 - c. Logging the number and details of all notices an account holder has received;
 - d. Advising rights holders how many notices an account holder has received;
 - e. Fielding questions and complaints from account holders with respect to notices;
 - f. Ad hoc communications with rights holders (e.g. where a rights holder's notice is invalid or the ISP cannot match the IP address to any account holder);
 - g. Assistance to the Tribunal to identify account holders etc;
 - h. Actioning a suspension of an account holder's account if this is awarded by the Court.
29. All of these costs should be considered when the Minister sets the fees for notices.
30. **Paragraph 39** endorses fees for notices but states in its last sentence that "rights holders should pay a fee (notice fee), set by regulation, to the relevant ISP for every notice sent by the ISP...".
31. The key issue is "for every notice *sent*". The logic in **paragraph 40** is that the per-notice fee should be a deterrent for the excessive use of notices on the part of rights holders. However, as we have pointed out above, it is unclear if every notice from a rights holder triggers a corresponding notice from the ISP to the account holder. If that is the case, then there is no issue. However, if it is not the case, then there will be no correlation between the number of notices received by an ISP from rights holders, and the number of notices sent by an ISP to account holders.
32. InternetNZ suggests that the policy intent of cost recovery and use of the fee as a deterrent for excessive notice sending by rights holders would be best achieved by providing for the fee to be charged for each notice sent to ISPs by rights holders. This is also logistically more sensible since the fees will have to be paid by rights holders at the time they submit their notices to ISPs, unless otherwise agreed between them.

Key Issues: sanctions for rights holders

33. Paragraphs 41-42 deal with sanctions for rights holders. InternetNZ agrees that broadly speaking, the fee for notices (especially if adjusted as suggested in the previous paragraph) provides a useful deterrent for over-use of the notice system by rights holders.
34. However, even at cost recovery levels for ISPs, the fee will still not be large. InternetNZ therefore maintains its position that vexatious or misleading notices should be subject to penalty as they potentially are in the US and were in the original bill. InternetNZ will submit on this again at Select Committee.

Enforcement: Copyright Tribunal – Claims of up to \$15,000

35. Paragraph 43 suggests that the Tribunal should be able to award penalties once the notice regime has been exhausted.
36. We suggest that action in the Tribunal should only be on the basis of a further allegation of infringement after the third notice has been sent by the ISP to the account holder. This removes any uncertainty that a third allegation will immediately lead to a Tribunal complaint by rights holders. This extra step was included in the Telecommunication Carriers' Forum's draft code and was generally accepted by submitters on that code.

Functions

37. Paragraph 47 notes that the penalties ordered by the Tribunal are compensatory rather than punitive, consistent with the civil regime nature of this framework.
38. InternetNZ agrees with this approach, and suggests to the Minister that all penalties should be related to the market value of the material concerned, including where possible the cost of a digitally available version rather than one provided on physical media.
39. Paragraph 48 raises an interesting conundrum. It sets out a requirement that in a Tribunal action, the rights holder has to provide evidence of "all the P2P copyright infringements within the relevant time period" to the Tribunal.
40. The difficulty with this approach is that there may be more than one rights holder. Let us assume that rights holder A triggers a notice to an account holder, followed by two notices triggered by rights holder B. Rights holder A will never know that three notices have been sent so it will not know that it can take action at the Tribunal or Court. On the other hand, rights holder B will know that but it will not have any evidence of the infringement alleged by rights holder A. We do not imagine that it would be acceptable for the Tribunal to make an award based only on rights holder B's two notices.
41. InternetNZ would welcome the Minister's views on this and strongly recommends that the detailed implementation of this part of the framework be carefully discussed in detail with the Telecommunications Carriers' Forum, who made a reasonable effort to try and resolve such issues when developing a code under the previous Section 92A.

42. Paragraph 49 notes that an account holder may request a hearing where they are the respondent in a complaint. It is not clear from the wording whether the account holder has a right to a hearing or whether this is at the discretion of the Tribunal. This should be as of right.

Extending the remedies of the Court for P2P file sharing

43. Paragraph 55 proposes an extension of the civil remedies of the Court to include suspension of an Internet account.
44. InternetNZ reiterates its opposition to this remedy as a matter of principle.
45. If the remedy is to remain, and given that there is no stated intention to ban citizens from opening an Internet account with another ISP (or in theory with the same ISP), then the six month period is illogical.
46. It is illogical because, given the nature of Internet access and the importance most people place on it, it is highly likely that the typical householder will move to secure alternative Internet access within a much shorter period than six months. Given the many legitimate uses for which the Internet has become so pervasive, it would seem likely any suspension of more than a few days to a week would lead to a new account being set up with a new provider.
47. There are some citizens for whom this would be difficult or impossible: those in rural or remote areas where there is not competitive access to ISP services. This would effectively mean that a given suspension would be a more severe penalty in such areas than in the urban areas where most New Zealanders live.
48. InternetNZ suggests that if the remedy is to be retained, a maximum period of a week would be a more logical one to include as a remedy for the Court to have available.

Other Key Issues

Infringement

49. Under the Act as it stands, unless someone (A) has legal responsibility and liability for the actions of another (B), A would not be liable for copyright infringement by B.
50. In some places in the paper it seems to be suggested that there will be no infringement where the holder of an internet account has not been involved in the infringement (e.g. para 28). In other places, the paper seems to envisage that an account holder's account could be suspended or damages awarded against them with respect to the actions of others. This needs to be clarified particularly at Tribunal level since it impacts heavily on the type of evidence that will need to be adduced.
51. If at Tribunal level it is anticipated that all that will be required is proof that the notices given by the rights holders are accurate without further evidence as to whether the account holder participated in or even knew about the

infringement, then that represents a significant extension to normal vicarious liability rules.

Definition of ISP and account holder

52. Paragraphs 63-65 set out the broad definition of ISP in the Act, and suggest a narrower definition for the purposes of this regime.

53. InternetNZ agrees with this, and suggests the following definitions for drafting officials to take into account:

"ISP" for the purposes of section 92A means, in respect of an account holder, the person who makes available, or procures the making available of, internet connectivity to that account holder and bills that account holder for that connectivity.

"account holder" means a person that is provided internet connectivity by or on behalf of an ISP and is billed by that ISP for that connectivity.

54. This suggestion is also intended to address the issue raised in the Telecommunication Carriers' Forum draft code with respect to *downstream ISPs*. Since there may be more than one service provider in the chain of connectivity to an account holder, it is important that there is clarity as to which ISP is responsible for administering the s92A regime. InternetNZ expects that in almost all cases, the most logical service provider will be the provider with the billing relationship.

Safe harbour

55. Paragraph 66 endorses the extension of a safe harbour (protection from liability) for ISPs who comply with the regime set out in the proposal.

56. InternetNZ supports this safe harbour, but as a matter of principle suggests that the safe harbour should protect ISPs from liability both from rights holders and from their own customers, where they are complying with the Act. The current wording only offers a safe harbour from rights holders.

57. This change would be consistent with the broad policy approach of the proposal, which endorses implicitly the idea that ISPs are mere conduits, and that copyright disputes are between rights holders and alleged infringers - the ISP is not seen as a party to any such dispute.

Consultation on Regulations

58. There are several areas where regulations will be **critical** to the efficacy of this regime in achieving its goals and in terms of the cost to participants. Notice essentials, Tribunal processes and suspension processes particularly will require detailed rules.

59. InternetNZ's strong preference is for those draft regulations to be available for feedback at the same time as the bill is open for submissions, since the regulation detail will shape perceptions and interpretation of the bill.

60. It would be preferable to delay introduction of the bill itself rather than attempt to review it in the vacuum that would be evident without draft regulations.
61. If it is not possible to consult on the bill and the draft regulations concurrently, InternetNZ strongly recommends that officials seek additional feedback from interested parties once the regulations are ready.

Conclusion

62. InternetNZ reiterates its congratulations to the Minister for proposing a much more reasonable and workable framework for dealing with peer-to-peer file sharing than he inherited from the previous Government.
63. InternetNZ would welcome the Minister's response to the matters raised in this document.
64. InternetNZ is available to meet with the Minister or officials to discuss any of the matters set out herein.

Yours sincerely



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