

Copyright (Infringing File Sharing) Amendment Bill

Government Bill

As reported from the Commerce Committee

Commentary

Recommendation

The Commerce Committee has examined the Copyright (Infringing File Sharing) Amendment Bill and recommends that it be passed with the amendments shown.

Introduction

The bill seeks to amend Part 6 of the Copyright Act 1994 to provide more effective means for copyright owners to enforce their rights against people involved in unauthorised sharing of copyright material via the Internet (infringing file sharing). It aims to provide copyright owners with a fast-track alternative to existing remedies under the Act. The bill would repeal section 92A of the Act, which was enacted by section 53 of the Copyright (New Technologies) Amendment Act 2008 but not brought into force.

We found that the bill raised complex issues around the challenges faced by rights holders in an environment of rapidly-developing technologies, which are changing consumer expectations and behaviours. We have attempted to strike a balance between the rights of copyright holders to have their intellectual property rights protected, and the

reality that the Internet has now allowed far greater access to copyrighted works through file sharing.

Our commentary covers the major amendments we recommend to the bill. Minor and technical amendments are not discussed.

Commencement

We recommend that the date for commencement in clause 2 be changed to 1 July 2011. This would provide 6 months for the bill to be implemented once it was enacted.

Interpretation

Clauses 4, 5, and 7 set out definitions for the purpose of the infringing file sharing regime. We recommend several amendments to the definitions, as outlined below.

Internet service provider

Clause 7 of the bill, inserting new section 122A, would provide a separate definition of “ISP, or Internet service provider” for the purpose of the infringing file sharing regime, with the aim of excluding universities, libraries, and businesses that provide Internet access but are not traditional ISPs. We consider that having two definitions of Internet service provider in the Act could cause confusion. We recommend that the definition in section 122A be replaced with a new term, “IPAP, or Internet protocol address provider”. This would avoid ambiguity and focus on the function of an Internet service provider that is relevant to infringing file sharing, namely the provision of Internet protocol addresses.

We note that if this alternative term were used, it would not be necessary to make any substitutions for existing definitions in the Act. We therefore recommend consequential amendments to clauses 4 and 5 of the bill so that section 92A of the Act could be simply repealed without substitution.

File sharing

We recommend that the definition of file sharing in section 122A(1) be amended by including reference to downloading or uploading material using networks or applications that allow material to be shared

among multiple users. This would avoid inadvertently capturing activities such as emailing or downloading that did not involve file sharing; if such activities breached copyright, they would be actionable under existing provisions in the Copyright Act.

Infringement

We recommend that the definition of copyright infringement in section 122A(1) be amended by removing the words “or part of a work”. While we understand that this phrase was included to address the fact that file sharing often involves getting small parts of a work from different sources, we do not believe it was the policy intention of the bill to change the general principle of copyright law, which is that a “substantial part” of a work must be dealt with in order to make a finding of infringement. We consider it appropriate that the bill would leave it to the Copyright Tribunal or District Court to determine whether a substantial part of a work had been copied or otherwise dealt with in ways that infringed the exclusive rights of copyright owners.

On-notice and quarantine periods

To fit with our recommendation in relation to section 122G that the timeframe for a challenge be extended by 7 days, we recommend (section 122A(1)) that the on-notice period be extended from 3 weeks to 28 days, and that the quarantine period be similarly extended from 4 weeks to 35 days.

Rights owner

We recommend that a definition of “rights owner” be included in the bill to encompass both individual copyright owners and groups of copyright owners who wish to designate a representative to take action on their behalf (section 122A(1) and new subsection 122A(1A)). We believe this accords with the policy intent of the bill, and would make it clear that enforcement action could be taken either by individual copyright owners or by an agent representing a group of copyright owners. This change would mean, for example, that enforcement action could be taken against an account holder who had received three notices recording infringements relating to three sound recordings by three different copyright owners, provided that those

owners had previously decided to be represented as a group in enforcing their rights.

Infringement notices

We recommend that clause 7, new section 122C, be amended by adding new subsection (1A) to make it clear that each detection, warning, or enforcement notice would relate to a single infringement, although it would list other infringements that had occurred since the previous notice. This would help to ensure that all parties knew that at the end of an on-notice period, the very next infringement would trigger the sending of the next notice.

Timeframes for notices and challenges

We have reviewed the timeframes prescribed in the bill, and recommend several changes in sections 122D to 122G to improve its workability. They entail extending from 1 week to 14 days the time an account holder would have to challenge a notice, and consequential changes to the on-notice and quarantine periods.

Process for challenging infringements

We recommend amendments to the challenge process set out in section 122G. As introduced, the bill would require ISPs (or, if renamed as we recommend, IPAPs) to consider each challenge and decide whether to forward it to a copyright owner for response, or accept or reject it themselves, on the basis of the nature of the challenge. We accept that this is not an appropriate responsibility for ISPs to bear. Accordingly, we recommend that ISPs should be required to send all challenges to the relevant copyright owner, who should respond to the challenges via the ISP. If the matter was a technical one that could only be dealt with by the ISP, then the ISP and copyright owner would be expected to consult accordingly.

Representation at hearings of Copyright Tribunal

We recommend that section 122M(3) be amended to provide that parties may not be represented by a lawyer, except in cases where a party would be substantially prejudiced. We believe this would serve the bill's purpose of ensuring that parties are fairly matched. For

example, a copyright owner representative could well be experienced in copyright law, which could unfairly prejudice an account holder unless legal representation were allowed for the account holder. We note that our proposed amendment would have a similar effect to section 38 of the Disputes Tribunals Act 1988.

Evidence of infringement at the Copyright Tribunal

We recommend the insertion of new section 122MA in recognition of uncertainty about findings of copyright infringement before the Copyright Tribunal, and where the burden of proof lies. This section provides, for the purposes of Copyright Tribunal awards, that an infringement notice establishes a presumption that infringement has occurred, but this would be open to rebuttal where an account holder had valid reasons, in which case a rights holder would have to satisfy the tribunal that the presumption was correct. We consider that such a change would fulfil more effectively the aim of having an efficient “fast-track” system for copyright owners to obtain remedies for infringements.

Copyright Tribunal awards

Section 122N provides for the Copyright Tribunal to order an account holder to pay an award to a rights owner for an infringement, up to a maximum of \$15,000. We note that the bill provides for regulations to be made stipulating how the awards should be determined by the tribunal. While we concur with the regulation-making approach, we wish to record our expectation that the awards would include a punitive element and not be simply compensation-based. For the regime to be effective as a deterrent against illegal file sharing, we believe it is essential that awards be designed not merely to recompense rights holders for the value of the song or movie illegally downloaded, but also to include a punitive element.

We recommend amendments to section 122N(1) for purposes of general clarification.

We also recommend the insertion of new section 122N(4A) allowing the tribunal to decline to make an order of payment if it was satisfied that making an order would be “manifestly unjust” to the account holder. We considered carefully whether some account holders—for example, libraries and universities—should have an exemption or de-

fence on the grounds that they did not have control over an infringer. We rejected such an approach as we consider it important that all account holders take measures to ensure that infringing file sharing does not occur on their account. However, we accept that there will be some circumstances in which the order of a payment would be manifestly unjust.

Suspension of an Internet account

Section 122O of the bill provides for a District Court to order an Internet protocol address provider to suspend an account for up to six months if an account holder had continued to infringe copyright after receiving detection and warning notices. We considered at length whether Internet suspension is a proportionate or appropriate remedy for the harm caused by file sharing that infringes copyright, in the light of deeply divided opinion on this hotly contested issue.

Those in favour of Internet suspension (primarily rights holders) have emphasised its importance as a deterrent, and argued that without the ultimate sanction of suspension, the notice process would not be effective in changing the behaviour of people who infringe copyright by file sharing. Others, including Internet users and ISPs, have argued that suspension would be ineffective, and disproportionate to the harm done by copyright infringement. The argument has also been made that Internet access is a human right, or at least an essential utility and communication tool.

The majority of us recommend the new section 122PA, which would effect what we believe a workable compromise on this issue. The bill's provisions allowing for Internet suspension would be retained, with modifications, but would not be brought into effect immediately. If evidence indicated that notices alone (and the remedy through the Copyright Tribunal) were not having the desired deterrent effect, the suspension provisions could be activated by Order in Council. The majority of us believe this approach would create the right incentives, with the remedy of suspension able to be brought into effect if needed. We would expect an appropriate timetable for monitoring and review to be developed in consultation with rights holders. We note that a similar approach was recently adopted in the United Kingdom.

Exceptions to the remedy of suspension

As discussed in relation to Copyright Tribunal awards, we considered whether an exemption or defence from the remedy of suspension should be available to some account holders, such as libraries and universities, on the grounds that they cannot control all those who use their account. We do not favour exemptions, and consider that the onus should be on all account holders to take measures to ensure that infringing file sharing does not occur on their accounts. To avoid instances of injustice, however, we recommend the insertion of new section 122O(3)(d), to provide for the District Court to consider whether it would be manifestly unjust to suspend an account holder's account.

Suspension only of Internet aspects of an account

We recommend amendments to clause 7, section 122O, to clarify that suspension would apply only to the Internet aspects of an account. This would allow for the fact that, increasingly, accounts with Internet service providers include voice and television services as well as Internet access. We do not believe it was the policy intention of the bill that non-Internet aspects of an account should be suspended in response to infringing file sharing.

Cellular mobile Internet services

We recommend that the bill be amended, by the insertion of new section 122PB, so the regime would not apply to services provided by cellular mobile networks until 1 August 2013, or another date specified by Order in Council. At present, speed and cost constraints mean there is relatively little copyright infringement via mobile devices and networks, and we are advised that cellular mobile service providers would face significantly higher costs in complying with the proposed regime, and difficulty matching account details for their "pre-pay" customers. At present, therefore, we conclude that the costs of applying the regime to mobile devices would outweigh the benefits. It is likely, however, that this balance will change in the future as technology develops.

Our recommended amendment would exclude services provided via cellular mobile networks for an initial two years, subject to review; we consider that it would be appropriate for the Minister to have dis-

cretion to decide when (or whether) to bring the regime into effect for cellular mobile networks, on the basis of the monitoring of infringements reported by copyright owners. We believe this approach is the most appropriate means of allowing for the evolving state of technology as it relates to file sharing via cellular mobile networks and devices.

Cost recovery by Internet protocol address providers

While we do not propose amendments, we consider it important to comment on section 122R, which provides for Internet protocol address providers to charge a copyright owner for performing the functions required of them under sections 122A to 122Q. The fees, or method for calculating the fees, to be charged by IPAPs to copyright owners would be determined by regulation (clause 10, new paragraph (eh) of section 234).

We sought to determine the likely costs entailed in the proposed system, and therefore the likely level of fees to be charged to rights holders, as this would have an important bearing on the bill's usefulness for copyright owners seeking to enforce their rights. We received costing information from a number of ISPs, with the estimated "notice processing fee" ranging between \$14 and \$56 per notice; the variation depended on the size of the ISP, and whether their system would be manual or automated. This information would be considered further in the development of regulations.

We consider it important that ISPs should not seek to profit from the proposed regime by adding any form of surcharge to their costs of processing notices; the regime should operate purely on a cost-recovery basis. It may be relevant to note in the development of regulations that the United Kingdom has recently decided on a cost-sharing approach between rights holders and Internet service providers, at a ratio of 75:25 respectively.

Green Party minority view

The Green Party applauded the introduction of this legislation, as it began to address the significant failings of its predecessor.

The Green Party has always opposed, and continues to oppose, termination (account suspension) as a remedy for infringing file sharing. We believe it is disproportionate to the problem and would not solve

it. The compromise before the committee isn't a compromise on this issue at all. It is just a delay in implementation of this ill-considered remedy.

The Green Party asserts that there is a danger in heavy-handed regulation for a problem that may only be a temporary result of new technologies upsetting traditional business models.

The use of fines rather than Internet suspension is a more appropriate sanction for file sharing, and the punishments should be proportionate to the crime.

Citizens are not denied the right to use their telephones because they happened to be used in the commission of a crime, and this legislation should not set any precedent. Access to the Internet has become a necessity in an era when more and more public and private services are only provided online.

While supporting the bill in principle, the Green Party opposes the retention of termination in the legislation.

Appendix

Committee process

The Copyright (Infringing File Sharing) Amendment Bill was referred to the committee on 22 April 2010. The closing date for submissions was 17 June 2010. We received and considered 237 submissions from interested groups and individuals. We heard 28 submissions.

We received advice from the Ministry of Economic Development.

Committee membership

Hon Lianne Dalziel (Chairperson)

John Boscawen (until 8 September 2010)

Hilary Calvert (from 28 October 2010)

Charles Chauvel (until 21 July 2010)

David Clendon

Clare Curran

Hon Sir Roger Douglas (from 8 September until 28 October 2010)

Te Ururoa Flavell

Melissa Lee

Peseta Sam Lotu-Iiga

Hon Nanaia Mahuta (from 21 July 2010)

Katrina Shanks

Jonathan Young

Gareth Hughes replaced David Clendon for this item of business.

Copyright (Infringing File Sharing)
Amendment Bill

Key to symbols used in reprinted bill

As reported from a select committee

text inserted by a majority

text inserted unanimously

~~text deleted by a majority~~

~~text deleted unanimously~~

Hon Simon Power

Copyright (Infringing File Sharing) Amendment Bill

Government Bill

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The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the Copyright (Infringing File Sharing) Amendment Act **2010**.
- 2 Commencement**
This Act comes into force on ~~4 October 2010~~ 1 July 2011. 5
- 3 Principal Act amended**
This Act amends the Copyright Act 1994.

Part 1 Infringing file sharing

- 4 Interpretation**
The definition of **Internet service provider** in section 2(1) is repealed. 5
- 5 New section 92A substituted**
Section 92A (as inserted by the Copyright (New Technologies) Amendment Act 2008, but not in force) is repealed and the following section substituted:
- 92A Interpretation for sections 92A to 92E** 10
In this section and sections 92B to 92E, unless the context otherwise requires,—
“**Internet service provider** means a person who does either or both of the following:
“**(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. 15
“**(b)** hosts material on websites or other electronic retrieval systems that can be accessed by a user 20
“**Internet services** means the services referred to in the definition of Internet service provider.” 25
- 5 Section 92A repealed**
Section 92A (as inserted by the Copyright (New Technologies) Amendment Act 2008, but not in force) is repealed. 25
- 6 Internet service provider liability if user infringes copyright**
Section 92B is amended by inserting the following subsection after subsection (2):
“(2A) An Internet service provider does not infringe the copyright in the work, or authorise A’s infringement of the copyright in the work, merely because the Internet service provider knows of the infringement from information received as a result of anything done under **sections 122A to 122R**, provided that, in relation to the alleged infringement, the Internet service 30 35

provider complies with all its obligations under those sections and under any regulations made under **section 234(eb) to (eh).**”

~~(2) Section 92B(4) is repealed.~~

7 New heading and sections 122A to 122R inserted 5

The following heading and sections are inserted after section 122:

“Infringing file sharing

“122A Interpretation for sections 122B to 122R

“(1) In this section and **sections 122B to 122R**, unless the context otherwise requires,— 10

“account holder, in relation to an ~~ISP~~ IPAP, means a person who has an account with the ~~ISP~~ IPAP

“detection notice means a detection notice issued by an ~~ISP~~ IPAP to an account holder in respect of an alleged infringement against a ~~copyright rights~~ owner (*see* **section 122D**) 15

“enforcement notice means an enforcement notice issued by an ~~ISP~~ IPAP to an account holder in respect of at least 3 alleged infringements against a ~~copyright rights~~ owner (*see* **section 122F**) 20

~~“file sharing is where material—~~

~~“(a) is downloaded from the Internet; or~~

~~“(b) is made available on the Internet by a user in a form in which the material may be downloaded by 1 or more other users; or~~ 25

~~“(c) is transferred, directly or indirectly, via the Internet from one user to another user~~

~~“file sharing is where—~~

~~“(a) material is uploaded via, or downloaded from, the Internet using an application or network that enables the simultaneous sharing of material between multiple users; and~~ 30

~~“(b) uploading and downloading may, but need not, occur at the same time~~

~~“infringement means an incidence of file sharing that involves the infringement of copyright in a work; or part of a work; by a user~~ 35

“**infringement notice** means a detection notice, a warning notice, or an enforcement notice that—

- “(a) is issued to an account holder by an ~~ISP~~ IPAP; and
- “(b) identifies ~~the~~ a particular infringement that triggers the notice; and
- “(c) in the case of a warning notice or an enforcement notice, identifies any other infringements that have occurred since the date of the detection notice

5

“**IP address** means an Internet protocol address

“~~ISP, or Internet service provider, IPAP, or Internet protocol address provider,~~ IPAP, or Internet protocol address provider, means a person that operates a business that, other than as an incidental feature of its main business activities,—

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- “(a) offers the transmission, routing, and providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing; and

15

“(ab) allocates IP addresses to its account holders; and

- “(b) charges its account holders for ~~the services provided in paragraph (a) on a regular basis~~ its services; and

20

- “(c) is not primarily operated to cater for transient users

“**on-notice period** means the period of ~~3 weeks~~ 28 days beginning on the date of a detection notice or a warning notice ~~and ending with the close of the date that is 3 weeks later~~

Example

25

- (1) A detection notice is issued on Monday, 1 March. The on-notice period ends with the close of Sunday, ~~24~~ 28 March.
- (2) A warning notice is issued on Friday, ~~26 March~~ 16 April. The on-notice period ends with the close of Thursday, ~~45 April~~ 6 May.

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“**quarantine period** means a period of ~~4 weeks~~ 35 days beginning on the date of an enforcement notice ~~and ending with the close of the date that is 4 weeks later~~

Example

35

- (1) An enforcement notice is issued on Monday, 1 March. The quarantine period ends with the close of Sunday 4 April.

Example—continued

(2) An enforcement notice is issued on Saturday 18 December. The quarantine period ends with the close of Friday 21 January.

“rights owner means—

“(a) a copyright owner; or 5

“(b) a person acting as agent for 1 or more copyright owners

“warning notice means a warning notice issued by an ISP IPAP to an account holder in respect of at least 2 alleged infringements against a ~~copyright~~ rights owner (see section 122E). 10

“(1A) If a rights owner acts as agent for 1 or more copyright owners,—

“(a) a reference to the copyright of a rights owner is to be taken as a reference to the copyright of any of the copyright owners for whom the rights owner acts as agent; and 15

“(b) a reference to infringement against a rights owner is to be taken as a reference to infringement against the copyright of any of the copyright owners for whom the rights owner acts as agent. 20

“(2) In this section and sections 122B to 122R, a reference to the date of an infringement, an infringement notice, ~~or~~ a challenge, or a response to a challenge is a reference to,—

“(a) in the case of an infringement, the date on which it is recorded by a ~~copyright~~ rights owner as having occurred; 25

“(b) in the case of an infringement notice, the date on which it is issued by the ISP IPAP;

“(c) in the case of a challenge made under section 122G, the date on which it is received from an account holder by an ISP IPAP; 30

“(d) in the case of a response to a challenge, the date on which the IPAP receives the response from the rights owner.

“(3) Despite section 35(6) of the Interpretation Act 1999, for the purposes of this section and sections 122B to 122R, periods 35

of time end on the day calculated, whether or not that day is a working day.

“(4) Examples used in this section and **sections 122B to 122R** are illustrative only. If an example is inconsistent with any provision, the provision prevails.

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“122B Overview of infringing file sharing regime

“(1) **Sections 122A to 122R** provide copyright rights owners with a special regime for taking enforcement action against people who infringe copyright through file sharing.

“(2) The regime provides that, at the instigation of copyright rights owners, ~~ISPs~~ IPAPs must issue infringement notices to alleged infringers.

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“(3) The 3 kinds of infringement notices, in the order in which they are given, are a detection notice, a warning notice, and an enforcement notice.

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“(4) After an enforcement notice is issued to an alleged infringer, the copyright rights owner may take enforcement action by seeking the following orders against the alleged infringer:

“(a) an order from the Tribunal for a sum of up to \$15,000:

“(b) an order from a District Court requiring the ~~ISP~~ IPAP to suspend the account holder’s Internet account for up to 6 months.

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“(5) Time limits apply to all stages of the regime.

“(6) This section is by way of explanation only. If any provision is inconsistent with it, the other provision prevails.

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“122C ~~ISPs~~ IPAPs to send infringement notices

“(1) If a copyright rights owner provides an ~~ISP~~ IPAP with information that identifies an IP address at which an infringement of its copyright is alleged to have occurred as a result of file sharing, the ~~ISP~~ IPAP must—

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“(a) match the IP address with the account holder to whom it related at the time of the infringement; and

“(b) issue the appropriate infringement notice to the account holder ~~within 1 week~~ no later than 7 days after receiving the information.

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Part 1 cl 7

Example

An IPAP receives infringement information on Monday 1 March.
The IPAP must issue the infringement notice before the close of
Monday 8 March.

- “(1A) If information from a rights owner indicates that more than 5
1 infringement against the rights owner has occurred, any
infringement notice sent to the account holder must identify
the infringement that triggers that infringement notice, which
must be the earliest recorded infringement for which the
infringement notice could be issued. 10
- “(2) An I~~SP~~ IPAP need not comply with the obligation in **subsec-**
tion (1)(a) to match IP addresses if—
- “(a) the alleged infringement occurred more than ~~1 week~~ 21
days before the I~~SP~~ IPAP received the relevant informa- 15
tion from the copyright rights owner; or
- “(b) the alleged infringement occurred after an infringement
that triggered a detection notice but before the date of
that detection notice; or
- “(c) the alleged infringement occurred during a quarantine
period applying to the account holder with respect to 20
the copyright rights owner; or
- “(d) the copyright rights owner has not complied with regu-
lations made under **section 234** that impose require-
ments on the information, or form of information, to be
provided for the purposes of **subsection (1)**; or 25
- “(e) the copyright rights owner has not paid, or has not
agreed to pay, a fee required by the I~~SP~~ IPAP, as per-
mitted by **section 122R**.
- “(3) An I~~SP~~ IPAP need not comply with the obligation in **subsec-**
tion (1)(b) to issue notices if— 30
- “(a) any of **subsection (2)(a) to (e)** applies; or
- “(b) the alleged infringement occurred within an on-notice
period applying to the account holder with respect to
the copyright rights owner; or
- “(c) the copyright rights owner agrees, or asks, that a notice 35
not be issued.
- “(4) Notices issued to account holders must be sent by whatever
method the I~~SP~~ IPAP uses to communicate with the account

holder for billing purposes, unless the account holder and ~~ISP~~
IPAP agree in writing to use a different method.

“122D Detection notices

- “(1) An ~~ISP~~ IPAP must issue a detection notice in relation to a ~~copyright~~ rights owner to an account holder— 5
- “(a) the first time the ~~ISP~~ IPAP matches the account holder with an IP address at which an infringement is alleged by the ~~copyright~~ rights owner to have occurred; and
 - “(b) the first time, following the end of a quarantine period, the ~~ISP~~ IPAP matches the account holder with an IP address at which an infringement is alleged by the ~~copy-~~ right rights owner to have occurred. 10
- “(2) A detection notice must be in the prescribed form (if a form is prescribed) and must—
- “(a) identify the ~~copyright~~ rights owner; and 15
 - “(b) identify the alleged infringement that has triggered the issue of the notice; and
 - “(c) identify the date of that alleged infringement; and
 - “(d) state the date of the detection notice; and
 - “(e) explain the consequences to the account holder if further infringing occurs; and 20
 - “(f) explain how the account holder may challenge the notice; and
 - “(g) comply with any other requirements that may be prescribed in regulations. 25
- “(3) A detection notice expires 9 months after the date of the detection notice, unless ~~an enforcement notice is issued to the account holder in respect of further infringing against the copyright owner before that date, in which case the detection notice expires 4 weeks after the date of the enforcement notice~~ the notice expires earlier under **section 122F(3A)**. 30

“122E Warning notices

- “(1) An ~~ISP~~ IPAP must issue a warning notice in relation to a ~~copy-~~ right rights owner to an account holder if— 35
- “(a) the ~~ISP~~ IPAP matches the account holder with an IP address at which an infringement is alleged by the ~~copy-~~ right rights owner to have occurred; and

“(b) the infringement occurred at least ~~3 weeks~~ 28 days after the date of a detection notice issued to the account holder in relation to the same copyright rights owner, but before that detection notice expires.

Example

A detection notice is issued on Monday 1 March. It will expire with the close of Wednesday 1 December. A warning notice can be issued on Monday 29 March, and at any time up to and including Wednesday 1 December.

- “(2) A warning notice must be in the prescribed form (if a form is prescribed) and must—
- “(a) identify the copyright rights owner; and
 - “(b) identify the infringement that has triggered the issue of the warning notice; and
 - “(c) identify the date of that alleged infringement; and
 - “(d) identify the most recent detection notice issued to the account holder in relation to the copyright rights owner (the **preceding detection notice**); and
 - “(e) identify any other alleged infringements by the account holder against that copyright rights owner that have occurred since the date of the preceding detection notice; and
 - “(f) state the date of the warning notice; and
 - “(g) explain the consequences to the account holder if further infringing occurs; and
 - “(h) explain how the account holder may challenge the notice; and
 - “(i) comply with any other requirements that may be prescribed in regulations.
- “(3) A warning notice expires 9 months after the date of the preceding detection notice, unless ~~an enforcement notice is issued to the account holder before that date, in which case the warning notice expires 4 weeks after the date of the enforcement notice~~ the notice expires earlier under **section 122F(3A)**.

“122F Enforcement notices

- “(1) An ISP IPAP must issue an enforcement notice in relation to a copyright rights owner to an account holder if—

- “(a) the ~~ISP~~ IPAP matches the account holder with an IP address at which an infringement is alleged by the ~~copyright~~ rights owner to have occurred; and
- “(b) the infringement occurred at least ~~3 weeks~~ 28 days after the date of a warning notice issued to the account holder in relation to the same ~~copyright~~ rights owner, but before that warning notice expires. 5
- “(2) An enforcement notice must be in the prescribed form (if a form is prescribed) and must—
- “(a) identify the ~~copyright~~ rights owner; and 10
- “(b) identify the infringement that has triggered the issue of the enforcement notice; and
- “(c) identify the date of that alleged infringement; and
- “(d) identify the most recent warning notice issued to the account holder in relation to the ~~copyright~~ rights owner, and the preceding detection notice; and 15
- “(e) identify any other alleged infringements against the ~~copyright~~ rights owner that have occurred since the date of the preceding detection notice; and
- “(f) state the date of the enforcement notice; and 20
- “(g) explain that enforcement action may now be taken against the account holder; and
- “(h) explain that, unless the enforcement notice is cancelled, no further infringement notices may be issued in respect of infringements against the ~~copyright~~ rights owner until the end of the quarantine period; and 25
- “(i) explain how the account holder may challenge the notice; and
- “(j) comply with any other requirements that may be prescribed in regulations. 30
- “(3) An enforcement notice expires ~~4 weeks after its date of issue~~ at the end of a period of 35 days beginning on the date of the enforcement notice.
- “(3A) On the date that an enforcement notice expires under subsection (3), the preceding detection notice and warning notice also expire. 35
- “(4) On issuing an enforcement notice to an account holder, the ~~ISP~~ IPAP must send a copy of the notice to the relevant ~~copyright~~ rights

rights owner, but must omit any information that discloses the name or contact details of the account holder.

“122G Challenging infringement notices

- “(1) An account holder may challenge an infringement notice by sending a challenge, in the prescribed form, to the ~~ISP~~ IPAP 5 that issued the infringement notice.
- “(2) A challenge is not valid if it is received more than ~~1 week~~ 14 days after the date of the infringement notice to which it relates.
- “(3) An ~~ISP~~ IPAP that receives a valid challenge to an infringement notice must immediately forward it to the relevant copyright rights owner ~~if the challenge raises an issue that should be addressed by the copyright owner rather than by the ISP.~~ 10

Example

A warning notice is issued on Monday 1 March. A challenge sent before the close of Monday 15 March is valid and must be forwarded to the rights owner. A challenge received on or after Tuesday 16 March is not valid. 15

- ~~“(4) The ISP or copyright owner (as appropriate) must consider every valid challenge and, if it decides to reject a challenge, must notify the account holder of that fact and the reason for the rejection.~~ 20
- ~~“(5) If the copyright owner responds to a challenge, the ISP must immediately forward the response to the account holder.~~
- “(4) If the rights owner rejects the challenge,— 25
- “(a) it must send to the IPAP a response setting out the rejection and the reasons for it; and
- “(b) the IPAP must immediately forward the response to the account holder.
- “(6) If a challenge is rejected, it may be raised again by the account holder in any enforcement proceedings. 30

“122H Effect of challenge to, and cancellation of, infringement notice

- “(1) A challenge is deemed to be accepted if it has not been rejected by the relevant copyright rights owner ~~or ISP within 3 weeks~~ 35

before the close of the 28th day after the date of the infringement notice to which it relates.

Example

A detection notice is issued on Monday 1 March. A challenge is received by the IPAP on Monday 15 March. If the challenge is not rejected before the close of Monday 29 March, it is deemed to be accepted.

“(2) If a challenge to a detection notice is accepted or deemed to be accepted,—

~~“(a) the detection notice and any subsequent infringement notices sent to the account holder in relation to the same copyright owner are cancelled and treated as if they had not been issued; and~~

“(a) the detection notice is cancelled and treated as if it had not been issued; and

“(b) no infringements against that rights owner that occurred between the date of the infringement that triggered the detection notice and the date on which the detection notice is cancelled may be included in an infringement notice relating to that rights owner.

“(3) If a challenge to a warning notice or an enforcement notice is accepted or deemed to be accepted,—

“(a) the notice is cancelled and treated as if it had not been issued; but

“(b) if the challenge related only to an infringement that was not an infringement that triggered a notice, the notice is not cancelled but the infringement is treated as if it were not included in the notice.

“122I Enforcement action after issue of enforcement notice

“(1) A ~~copyright~~ rights owner may take enforcement action against an account holder who has been issued with an enforcement notice in respect of infringements against the ~~copyright~~ rights owner by doing either or both of the following:

“(a) applying to the Tribunal for an order under **section 122N** against the account holder:

“(b) applying to a District Court for an order under **section 122O** against the account holder.

“(2) Nothing in **sections 122A to 122R** affects the rights and remedies of copyright rights owners under any other provision of this Part in relation to any infringement of copyright, whether or not the infringement has been included in an infringement notice.

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“122J Application to Tribunal

~~“(1) An application to the Tribunal for an order under **section 122N** may not be made after the end of the quarantine period or earlier than—~~

~~“(a) 1 week after the date of the enforcement notice; or~~ 10

~~“(b) if a valid challenge is received, 3 weeks after the date of the enforcement notice.~~

“(1) After an enforcement notice is issued, any application to the Tribunal for an order under **section 122N** must be made—

“(a) before the end of the quarantine period for the enforcement notice; but 15

“(b) after either—

“(i) the last day on which a valid challenge to the enforcement notice could be made; or

“(ii) if a valid challenge has been made to the enforcement notice, the last day on which the challenge could be rejected. 20

Example

An enforcement notice is issued on Monday 1 March, and—

(a) by the close of Monday 15 March, no challenges have been received. The rights owner can apply to the Tribunal at any time after that, up until the close of Sunday 4 April (end of quarantine period); or 25

(b) on Monday 15 March, a valid challenge is received. Whether or not the challenge is rejected, the rights owner cannot apply to the Tribunal until after Monday 29 March (last day on which challenge could be rejected) and must do so before the close of Sunday 4 April (end of quarantine period). 30

“(2) The application must be in the prescribed form and include or be accompanied by— 35

“(a) a copy of the enforcement notice as forwarded to the copyright rights owner; and

- “(b) evidence that the ~~copyright rights~~ owner is the owner, or acts as agent for the owner, of the material in which copyright is alleged to be infringed; and
- “(c) a statement of which of the alleged infringements identified in the enforcement notice the ~~copyright rights~~ owner is seeking to enforce; and 5
- “(d) a copy of any challenges received by the ~~copyright rights~~ owner in respect of any of those alleged infringements, along with any responses ~~by the copyright owner~~ to those challenges; and 10
- “(e) a statement of the amount that the ~~copyright rights~~ owner is seeking from the account holder; and
- “(f) the prescribed fee for the application.
- “(3) If the Tribunal is satisfied that an enforcement notice has been sent to the account holder in accordance with this Act, the Tribunal must order the relevant ~~ISP IPAP~~ to produce to the Tribunal— 15
- “(a) the name and contact details of the account holder; and
- “(b) copies of the detection and warning notices sent to the account holder. 20
- “(4) The ~~ISP IPAP~~ must provide those contact details and notices to the Tribunal as soon as practicable, ~~along with any challenges that were received by it but not forwarded to the copyright owner, and any responses to those challenges.~~
- “(5) If an infringement notice expires, and the notice relates to an application made in accordance with **subsection (1)**, the expiry does not affect the continuation and completion of any proceedings. 25
- “122K Notice of proceedings**
- “(1) The Tribunal must give notice of the proceedings, in the prescribed form, to the account holder and any parties that the Tribunal directs to be joined. 30
- “(2) The notice of proceedings must—
- “(a) identify all the infringements in relation to which the ~~copyright rights~~ owner seeks an order; and 35
- “(b) specify the amount sought; and
- “(c) set out the account holder’s right to make submissions and request a hearing.

- “(3) The parties to proceedings before the Tribunal for an order under **section 122N** are—
- “(a) the applicant ~~copyright~~ rights owner; and
 - “(b) the account holder identified in the enforcement notice; and 5
 - “(c) any other party that the Tribunal directs be added as a party in accordance with section 212(2).
- “**122L Decisions generally made on papers and without hearing**
- “(1) Proceedings before the Tribunal for an order under **section 122N** must be determined on the papers unless— 10
- “(a) any party to the proceedings requests a hearing; or
 - “(b) the Tribunal considers that a hearing should be held.
- “(2) The papers on which the proceedings are determined are—
- “(a) the ~~copyright~~ rights owner’s application to the Tribunal; and 15
 - “(b) copies of the infringement notices sent to the account holder; and
 - “(c) copies of challenges to any infringement notice, and any responses to those challenges; and
 - “(d) any additional information provided by the ~~copyright~~ rights owner; and 20
 - “(e) any submissions by the account holder made within the time specified by the Tribunal.
- “(3) The Tribunal may determine its own procedure for determining an application that is dealt with on the papers, subject to any regulations. 25
- “(4) The Tribunal must make all reasonable efforts to ensure that, unless it orders otherwise or an order is made against the account holder, the identity and contact details of the account holder are not disclosed to the ~~copyright~~ rights owner. 30
- “**122M If hearing is held**
- “(1) If a hearing is held, sections 211 to 224 apply, other than ~~sections 213(1) to (3) and 214(1) and (2)~~ sections 213(2) and 214(1).
- “(2) Every party to the proceedings may appear personally and be heard. 35

- “(3) A party may not be represented at a hearing by a representative, except as follows:
- “(a) a corporation or unincorporated body of persons may be represented by an officer, employee, or member of the corporation or body, or a person who holds a majority interest in it: 5
 - “(b) a person jointly liable or entitled with another or others may be represented by 1 of the persons jointly liable or entitled:
 - “(c) a partnership may be represented by an employee of a partnership: 10
 - “(d) a minor, or a person under a disability, may be represented by another person:
 - “(e) if the Tribunal is satisfied that, for sufficient cause, a party is unable to appear in person or is unable to present his or her case adequately, the party may be represented by a representative approved by the Tribunal: 15
 - “(f) if it appears to the Tribunal to be proper in all the circumstances to allow the party to be represented, the party may be represented by a representative approved by the Tribunal. 20
- “(4) A representative may not be a lawyer, unless the Tribunal gives leave.
“Compare: 1988 No 110 s 38

“122MA Infringement notice as evidence of copyright infringement 25

- “(1) In proceedings before the Tribunal, an infringement notice is conclusive evidence of the following:
- “(a) that each incidence of file sharing identified in the notice constituted an infringement of the right owner’s copyright in the work identified: 30
 - “(b) that the information recorded in the infringement notice is correct:
 - “(c) that the infringement notice was issued in accordance with this Act. 35
- “(2) An account holder may submit evidence, or give reasons, that show that any 1 or more of the presumptions in **subsection**

(1) do not apply with respect to any particular infringement identified in an infringement notice.

“(3) If an account holder submits evidence or gives reasons as referred to in **subsection (2)**, the rights owner must satisfy the Tribunal that the particular presumption or presumptions are correct. 5

“122N Tribunal order requiring payment to ~~copyright~~ rights owner

“(1) The Tribunal must order an account holder to pay a ~~copyright~~ rights owner a sum if the Tribunal is satisfied that— 10

~~“(a) each of the 3 alleged infringements that triggered the infringement notices issued to the account holder were infringements of the copyright owner’s copyright that occurred at an IP address of the account holder; and~~

“(a) each of the 3 alleged infringements that triggered the infringement notices issued to the account holder— 15

“(i) was an infringement of the rights owner’s copy-
right; and

“(ii) occurred at an IP address of the account holder;
and 20

“(b) the 3 notices were issued in accordance with this Act.

“(2) The sum specified in the Tribunal order must be determined in accordance with regulations made under this Act and must include a sum in relation to every infringement identified in the enforcement notice that the Tribunal is satisfied was committed against the ~~copyright~~ rights owner at an IP address of the account holder. 25

“(3) If the Tribunal makes an order under **subsection (1)**, it may also make an order requiring the account holder to pay to the ~~copyright~~ rights owner either or both of the following: 30

“(a) a sum representing a contribution towards the fee or fees paid by the ~~copyright~~ rights owner to the ~~ISP~~ IPAP under **section 122R**;

“(b) reimbursement of the application fee paid by the ~~copy-
right~~ rights owner to the Tribunal. 35

“(4) The total amount ordered by the Tribunal to be paid by the account holder must not exceed \$15,000.

“(4A) Despite **subsection (1)**, the Tribunal may decline to make the order required by that subsection if, in the circumstances of the case, the Tribunal is satisfied that making the order would be manifestly unjust to the account holder.

“(5) An order made under this section may be enforced as if it were a judgment for a sum of money made by a District Court. 5

“(6) The Tribunal may award costs against a party to the proceedings only if the Tribunal is satisfied that the party has engaged in conduct intended to impede the prompt determination of the proceedings. 10

“122O Court order suspending account holder’s account

~~“(1) A District Court may, on application by a copyright owner, make an order requiring an ISP to suspend the account of an account holder for a period of up to 6 months if the court is satisfied that—~~ 15

~~“(a) an enforcement notice has been sent to the account holder in accordance with this Act in relation to infringements against the copyright owner; and~~

~~“(b) the application for the order is made at least 2 weeks after the date of the most recent enforcement notice sent to the account holder in relation to infringements against the copyright owner; and~~ 20

~~“(c) suspension of the account is appropriate in the circumstances, given the seriousness of the infringing.~~

“(1) A District Court may make a suspension order requiring an IPAP to suspend the Internet account of an account holder. 25

“(1A) A suspension order may be for any period up to 6 months.

“(2) The court may make an order under this section only if it is satisfied that—

“(a) at least 1 enforcement notice has been issued to the account holder in accordance with this Act; and 30

“(b) the account holder has, by way of file sharing (whether as recorded in that enforcement notice or otherwise), infringed the copyright of the rights owner; and

“(c) suspension of the account holder’s account is justified and appropriate in the circumstances, given the seriousness of the infringing. 35

- ~~“(2) In considering the seriousness of the infringing, the court may consider any evidence put before it by the copyright owner, including any infringement notices relating to infringements against the copyright owner that have been sent to the account holder at any time.~~ 5
- “(3) When considering the circumstances, and in determining the duration of a proposed suspension, the matters that the court may consider include, but are not limited to,—
- “(a) the degree of the account holder’s reliance on access to the Internet; and 10
- “(b) the identity (if known) of the user who engaged in the infringements identified in the notices; and
- “(c) any other matter that may be specified in regulations; and
- “(d) whether it would be manifestly unjust to suspend the account holder’s account. 15
- “(4) An application to a District Court for an order under this section must be made—
- “(a) by the rights owner whose copyright is alleged to have been infringed; and 20
- “(b) no later than 1 month after the rights owner receives the contact details of an account holder from an IPAP following an order made under **section 122P(2).**
- “122P Order requiring ~~ISP~~ IPAP to disclose account holder details** 25
- “(1) This section applies if a ~~copyright rights~~ owner wishes to apply for an order under **section 122O** against an account holder, but does not know the identity of the account holder.
- “(2) A District Court may make an order requiring an ~~ISP~~ IPAP to disclose to a ~~copyright rights~~ owner, as soon as practicable, the name and contact details of an account holder if— 30
- “(a) the ~~copyright rights~~ owner applies to the District Court for an order under this section; and
- “(b) the District Court is satisfied, on the basis of information included in the application, that an enforcement notice 35
has been sent to the account holder in accordance with this Act in relation to infringements against the ~~copy-
right rights~~ owner; and

“(c) the ~~copyright rights~~ owner has given an undertaking to the court that, if the account holder’s details are released to it, it will use that information only for ~~purposes as-
sociated with~~ the purpose of seeking and enforcing an order made under **section 122O**.

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“122PA Suspension orders and orders under section 122P not available until date set by Order in Council

“(1) No person may apply to a District Court for a suspension order under **section 122O**, or for an order under **section 122P**, until after the date set by Order in Council under this section.

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“(2) The Governor-General may, by Order in Council made on the recommendation of the Minister, set a date after which applications for orders under **sections 122O and 122P** may be made.

“122PB Application of section 122C to cellular mobile networks

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“(1) An IPAP need not comply with either of the obligations in **section 122C(1)** in respect of the services it provides by way of a cellular mobile network.

“(2) **Subsection (1)** is repealed with the close of 31 July 2013 (but *see* **subsection (3)(c)**).

20

“(3) The Governor-General may, by Order in Council made on the recommendation of the Minister, do all or any of the following:

“(a) repeal this section:

“(b) repeal **subsection (2)**:

“(c) amend **subsection (2)** by replacing the date specified in that subsection with any other date, whether that date is earlier or later than the one it replaces:

25

“(d) revoke or amend any Order in Council made under this section (the **principal order**), but only if the repeal, amendment, or revocation effected by the principal order has not taken effect.

30

“(4) The powers in **subsection (3)** may be exercised more than once.

“122Q Obligations of ISPs IPAPs

- “(1) Every ~~ISP~~ IPAP must retain, for a minimum of 40 days, information on ~~the use of the Internet by~~ the allocation of IP addresses to each account holder.
- ~~“(2) Every ISP must retain, for a minimum of 12 months, the following information:~~
- ~~“(a) any information about infringements that is sent by copyright owners to the ISP for the purpose of matching the infringement to an account holder:~~
 - ~~“(b) copies of the infringement notices issued to an account holder:~~
 - ~~“(c) any challenges received by the ISP and any responses to those challenges:~~
 - ~~“(d) which infringement notices (if any) have been cancelled or have expired:~~
 - ~~“(e) any orders made under **section 1220** suspending an account holder’s account:~~
- “(2) Every IPAP must retain, for a minimum of 12 months, the following information:
- “(a) any information about infringements that is sent by rights owners to the IPAP for the purpose of matching infringements to account holders:
 - “(b) in relation to each of the IPAP’s account holders,—
 - “(i) any infringement notices issued to the account holder; and
 - “(ii) any challenges to infringement notices and any responses to them; and
 - “(iii) which infringement notices (if any) have been cancelled or have expired; and
 - “(iv) any orders made under **section 1220** suspending an account holder’s account.
- “(3) No ~~ISP~~ IPAP may release the name or contact details of an account holder to a ~~copyright~~ rights owner unless—
- “(a) authorised to do so by the account holder; or
 - “(b) required to do so by the Tribunal or a court.
- “(4) On or before **31 December 2011**, and annually thereafter, every ~~ISP~~ IPAP must publish on its Internet site a report on its compliance with this section during the period starting on

1 October in the previous year and ending on ~~31 September~~
30 September in the year of the report.

“122R Fees payable by ~~copyright rights owners to ISPs~~ IPAPs

“(1) An ~~ISP~~ IPAP may charge a ~~copyright rights~~ owner for per-
forming the functions required of ~~ISPs~~ IPAP under **sections** 5
122A to 122Q.

“(2) If regulations are made that prescribe a rate or rates, or a
method or methods for calculating the rate or rates, that may
be charged by an ~~ISP~~ IPAP, an ~~ISP~~ IPAP must not charge more
than the rate or rates prescribed by, or calculated in accordance 10
with, the regulations.”

8 Rights and remedies of exclusive licensee

(1) Section 123(1) is amended by omitting “sections 120, 121,
and 122 of this Act” and substituting “any of sections 120 to
122O”. 15

(2) Section 123(2) is amended by omitting “sections 120, 121,
and 122 of this Act” and substituting “any of sections 120 to
122O”.

Part 2

Related amendments to Parts 10 and 11 20

Copyright Tribunal

9 Membership of Tribunal

(1) Section 206(1) is amended by omitting “2” and substituting
“5”.

(2) Section 206(3) is amended by omitting “2” and substituting 25
“5”.

Regulations

10 Regulations

Section 234 is amended by inserting the following paragraphs
after paragraph (ea): 30

“(eb) prescribing the form, content, procedures, require-
ments, and any other matters relating to infringement
notices:

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- “(ec) prescribing the form of notice for challenging an infringement notice:
- “(ed) prescribing the fee payable by copyright rights owners for applications to the Tribunal under **section 122J**:
- “(ee) prescribing the practices and procedures of the Tribunal in relation to determining applications under **section 122J**: 5
- “(ef) prescribing the sum, or a method or methods of calculating the sum, that the Tribunal may order an account holder to pay under **section 122N**: 10
- “(eg) prescribing any matters necessary or desirable in relation to an order, or an application for an order, under **section 122O**:
- “(eh) prescribing the rate or rates, or a method or methods for calculating the rate or rates, for the fees that may be charged by ISPs IPAPs to copyright rights owners under **section 122R**.”. 15

Legislative history

23 February 2010
22 April 2010

Introduction (Bill 119–1)
First reading and referral to Commerce Committee
