

THE UNIVERSITY OF AUCKLAND

SUBMISSION

On the **COPYRIGHT (INFRINGING FILE SHARING) AMENDMENT BILL**

To the **COMMERCE COMMITTEE**

Introduction

This submission on behalf of the University of Auckland (the University) is made by staff responsible for copyright whose office address is Office of the Vice Chancellor, 24 Princes Street, Private Bag 92019, Auckland. Contact details for the authors of this submission are set out below.

The University requests the opportunity to have representatives appear before the Committee to speak on its submission as the University has serious concerns as to the implementation of the provisions in the Bill.

Universities are involved in all aspects of the proposed legislation despite the stated intent to exclude Universities from certain provisions. They are both generators and consumers of copyright materials and legitimately make use of file sharing software in the process of undertaking research. The University seeks to balance the rights of copyright owners and users to promote the creation of new works and the generation of knowledge for the benefit of society.

Universities will be disadvantaged by the proposed changes in the Copyright Act 1994 (the "Act").

The University is aware of and generally support comments made by LIANZA regarding the impact of amendments on libraries.

In drafting this submission the authors have sought advice from senior staff responsible for the provision of internet services within the University.

Summary

In its statutory role as critic and conscience of society the University supports the generally accepted view that access to the Internet has now become a fundamental human right.

The University notes the intent of the Bill, as stated in the Explanatory Note, that Universities be excluded from the Infringing file sharing regime, however we have serious concerns that:

1. The Bill as worded is not consistent with the Explanatory Note ; and
2. If universities, libraries, schools and similar organisations are excluded from the definition of ISPs they are potentially liable as account holders.

This then raises the potential for the University to have its account terminated.

Moreover termination is both difficult to enforce and less effective in our experience than a pro-active education programme. Where file sharing has been detected and legitimate file sharing excluded, the University has explained the legal implication to the staff member or student and to date has not had to issue any repeat warnings.

The University as an ISP

At any period of time, the University provides close to 40,000 enrolled students and staff with access to the Internet through two main providers, Telstra Clear and the KAREN high speed research network. The University offers Internet access in a number of ways, fixed and wireless and through a number of different models, staff, student and subscriber.

The relationship between the University and those providers is complex and depends on and involves a multitude of network links. The University 'subscribes' to various external sources for services which ensures a high rates and volumes of data transfer are available to the institution. The University also charges special fees to those users who require a higher volume and faster rate of data transfer. While the University does not charge each user (except for the high volume, faster rate of transfer users) we are aware other universities do charge in the manner of a "traditional ISP".

The University currently controls a range of 65,534 unique IP addresses which it allocates to access points in the University and to halls of residence. These IP addresses are registered to the University and rights owners seeking to enforce their rights come directly to the University. Information on which organization has which IP addresses allocated to it, is freely and publicly available. Any infringement notice will be sent to the University as it provides the IP addresses in order for users associated with the institution to access the internet. The University records the Network Flows and utilises signature-based analysis of the traffic as does a commercial ISP. The Explanatory Note states "Only traditional ISPs are in a position to perform evidence matching and notice functions." The University performs "evidence matching and notice functions." In fact only the University can perform these functions in relation to allegations of infringing file sharing by its users.

The University thus has serious concerns about its status and the definitions of an ISP as drafted in the Bill. It will be apparent from the information provided that the University has essentially all the characteristics of an ISP and will be the entity that is contacted if illegal file sharing is alleged. Although the Explanatory Note accompanying the Bill states that Universities are excluded from the definition of Internet service provider in the Act for the purpose of the Infringing File Sharing regime the University meets virtually all the tests for an ISP including charging some users.

Further the two definitions of ISPs in s 92 and s 122 are confusing. To be an internet service provider under s 92 and then excluded under s 122 as an ISP or internet service provider is confusing. How the safe harbour provisions in s 92B will apply to infringements under s 122 is also confusing if the University is excluded from the definition of an ISP in s 122.

Regardless of whether the University falls under the definition of an ISP, the potential compliance costs of providing information about the use of our systems, will divert scarce resources from the core

business of the University to provide teaching and undertake research. The Bill as drafted makes the operative provisions of the Bill unclear or overly complex. The legislative compliance costs of keeping track of the various quarantine periods, expiry periods, on-notice periods, separate notices from rights owners and counter notices could be significant and the time frames difficult to meet. Failure to meet these requirements may jeopardize any safe harbour provisions for the ISP, exposing the University to significant liability.

The University goes further than do most ISPs in that it takes a strong position on copyright infringement and has a strict Acceptable Use policy, which does not allow the network to be used for copyright infringement and disciplines those users who breach the Policy.

“Account holder”

We note the other term of concern is “account holder”. If the University is excluded from the regime as an ISP under s 122, it should also be excluded as an “account holder”.

If we are not an ISP for the purposes of the regime, then from the current wording of the Bill we are arguably an “account holder”. The definition of “account holder” is a person who has an account with an ISP. The University has accounts with a number of providers and would fall within the definition. The Bill does not differentiate between a domestic account holder who could be a single user and a University which has tens of thousands of users. Despite the best efforts of the University to control “file sharing” it is still possible for three of its users to have infringed, each on a single occasion, for which the University would be liable. This seems inherently unfair. The cost to Universities is not just in the damages it would be liable for but in the cost in time and resources in preparing a case to present to the Tribunal or the District Court.

The University is particularly vulnerable as an “account holder” because the effective sharing of large volumes of data generated by research necessitates the legitimate wide scale use of file sharing. This means the straightforward approach to the policing of the network by prohibiting the use of file sharing software is not possible.

Further if Universities are included within the definition of “account holders” they become liable to termination. It cannot have been the intention of Parliament that the University be terminated. Universities must be clearly excluded from the Infringing File Sharing regime both as ISPs and as “account holders”.

File sharing

The problem is further compounded by the broad definition of “File sharing” which captures many internet activities beyond what is currently accepted as peer to peer file sharing of films and music. The term “file sharing” as defined would also apply to downloads of print and graphic material by staff and students and to the electronic file transfer of such material including by email. This would capture not only the transfer of infringing material but also material which is legitimately transferred or downloaded under the fair dealing and educational provisions of the Act. For example films and sound recordings

can be copied and communicated for the University's educational purposes under s 45 of the Act. Communication works can be copied and communicated under s 48 of the Act or under Copyright Licences the University has entered into. The difficulty in determining whether a file is infringing or not means these decisions should not be left to the Tribunal to determine on the papers without benefit of legal argument. The cost to the University in time and money in defending such actions will also be significant.

Infringement

The above difficulties are further compounded by the separate definition of "infringement" in s 122A. What constitutes infringement is already set out in s 29 of the Act and makes it clear that copyright is only infringed to relation to copying the work as a whole or any "substantial" part of it.

In s 122 "infringement means an incidence of file sharing that involves the infringement of work or part of a work, by a user". While it may have been intended that s 122 refers back to s 29 it does not specifically do so. By the omission of the word "substantial" it implies that the copying necessary to create a file sharing infringement need not be "substantial". There is a body of established case law interpreting the meaning of "infringement". The definition of infringement should not differ for the purposes of the infringing file sharing regime.

Establishing Infringement

Many rights owners will be totally unaware that the University has numerous copyright licences permitting file transfer. If those rights owners are based overseas they may also be unaware of the University's educational and fair dealing rights under the Act. Therefore in making an allegation under the provisions of the Act they will require the University to justify rights it has been given under the Act or under the Copyright licences it has entered into. Claims of online copyright infringement can give rise to complex questions of law. See the Australian Federal Court decision in *Roadshow Films v iiNet Limited (No 3)* [2010] FCA 24 (4 February 2010). The University questions whether complex copyright matters can be determined fairly on the papers.

The Copyright Tribunal is required to determine the claim in the copyright owner's favour if it is "satisfied" that each of the 3 alleged infringements that triggered the three notices were infringements that occurred at an IP address of the account holder. Given that the Bill provides for decisions to be made generally on the papers (ie without a hearing), there should be a requirement for a claimant to prove its case to the civil standard.

Conclusions

The Copyright Act 1994 was already a complex piece of legislation and this Bill is making the Act more complex and difficult for both users and rights owners to understand. The Bill is setting up unnecessary and costly compliance regimes, rather than balancing the rights of copyright owners and users. Our experience over many years has shown that educating users is more effective than penalizing or punishing them. From the perspective of the University and taking into account the amount of

copyright material the University generates, the University believes that the compliance cost generated will detract from the teaching and research we undertake. Further it will take away a well tried and effective compliance regime. In other words it will add to costs without providing any demonstrable benefits.

Our experience suggests that rather than having a one size fits all regime, it may be more effective to exclude from s122 those institutions which can demonstrate that they had in place an appropriate means for monitoring and preventing illegal file sharing.

Two separate definitions for internet service providers must also be avoided. Likewise describing what constitutes infringement in s 29 and then providing in s 122 a definition of “infringement’ which is inconsistent with s 29 because s 122 does not refer to copying a “substantial” part of a work must be corrected.

The University would welcome the opportunity to develop alternatives to the provisions currently included in the Bill.

For the University of Auckland

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