

Submission

Copyright (Infringing File Sharing)
Amendment Act

Regulations

Tech Liberty
<http://techliberty.org.nz>
17th May 2011
PO Box 5641, Lambton Quay, Wellington

About this submission

The Act establishes a new system to enable Rights Holders to enforce their intellectual property rights within the context of Internet file sharing. It creates a regulatory burden on IPAPS (Internet Service Providers) to process infringement notices, and expands the role of the Copyright Tribunal to enforce punitive damages against those who have received repeated infringement allegations.

This submission is in response to a discussion document issued by the Ministry for Economic Development (MED) on aspects of the Act relating to the envisaged notices and procedures. This does not include how the tribunal is expected to operate or come to decisions.

While aspects relating to the working of the Tribunal have been left to the Ministry of Justice to decide, we will nonetheless comment here on related implications from the notice regime MED are discussing, as the two are deeply intertwined due to the way the Act is written.

Tech Liberty does not condone the infringement of copyright by any parties. We note, however, that the degree to which ordinary citizens are willing to infringe copyright suggests a general market failure and that those generating content need to understand their customers better.

We also note that there is a growing belief that copyright provisions have already overstepped the limits of what society can gain from the existence of copyright, and that current approaches are going too far into private gain over society as a whole.

About the submitter

Tech Liberty's mission is to defend civil liberties in the digital age. We are a group dedicated to protecting people's rights in the areas of the Internet and technology. We make submissions on public policy, help to educate people about their rights, and defend those whose rights are being infringed.

Oral Submission

Tech Liberty would like to be heard on this submission.

Contact Details

Enquiries can be directed to Tech Liberty's spokesperson, Thomas Beagle, on 021-80-50-40 or at thomas@techliberty.org.nz. Questions about this submission can also be directed to David Zanetti, on 021-402260 or at david@techliberty.org.nz.

General comments on the Discussion Document

The Act in general has received robust and detailed debate in the public, and while it has improved with each round of consultation, we remain concerned at a number of assumptions and misunderstandings still present within. These assumptions continue to appear in the drafting of regulations which re-open debate around a number of thorny issues:

- the expectation that ISPs have a responsibility to enforce the rights of third parties,
- the obligations and costs on ISPs to enforce those rights; and
- the standards of evidence required by Rights Holders.

ISPs are not in a position where any reasonable expectation of enforcement can be made of them. The design of the Internet prevents ISPs from any meaningful inspection or control of end user behaviour. This runs contrary to the expectations many non-technical people have of how the Internet works, but regardless of any regulations or laws passed the technical nature of the Internet remains unchanged.

It is also important to note that increasingly worldwide public opinion is transforming to view the Internet as a basic human right and tenant of free communication. This expectation elevates ISPs to *common carrier* status, and like other critical infrastructure, must not interfere with any use of the service, and must treat all users in a disinterested and agnostic way.

We have two completely different sets of expectations emerging, depending on the users involved and nature of their usage of the Internet, with ISPs caught in the middle.

To complicate matters further, the definition of what constitutes an “ISP” is fluid and varies depending on how users gain access and what other parties are involved. We do not traditionally consider a Public Library as an ISP but they share significant similarities in how much control they can reasonably assert over their users while providing internet services.

The Act attempts to work around these problems in two ways. First, the introduction of a clumsy replacement definition called an Internet Protocol Address Provider (a term which only exists in this Act, and in the discussion document which changes it in to the term ISP), and secondly by making anyone not an IPAP liable for all infringement regardless of any further layers in providing access involved.

We are generally opposed to the vicarious liability the Act envisages, and urge that in discussion of these regulations the chilling effect of such liability on ISPs, quasi-ISP organisations such as libraries and universities, and ordinary citizens

providing shared access to children, siblings, flatmates and guests, is taken into account.

The Discussion Document re-opens a division of costs between ISPs and Rights Holders for the enforcement of third party rights, in the form of pushing implementation costs on to ISPs and suggesting a split in the fees to cover ISP costs in processing allegations made by Rights Holders.

As noted above, ISPs have an extremely limited ability to control users. Shifting parts of the costs on to ISPs when they lack any reasonable ability to limit those costs (ie, by limiting infringing behaviour by users) forces ISPs to absorb costs that they will inevitably have to pass on to law-abiding customers.

Both the initial setup costs of implementing the system and the ongoing costs of processing each allegation are significant. It is also inconsistent that in an environment in which Government is spending billions of dollars to make Internet access faster, more universal, and more open to competition, that at the same time compliance costs that inhibit this progress are being increased. Many smaller ISPs may struggle to remain competitive while finding the investment needed to implement this regime.

This causes a net effect that while billions have been invested into making Internet access better and more competitive, the costs of this regime reduce competition and make Internet access more expensive, negating those billions spent.

We believe that all New Zealanders should have access to the Internet so they are able to access the increasingly Internet-centric nature of civil society. These regulations have the possibility to deny or limit access to that civil society.

Lastly, while the Document establishes that the Tribunal will use the information contained within the allegations to make a determination, it does not explicitly recognise that the Tribunal will be treating the notices as though they are evidence and not merely an allegation. The Rights Holder is not required to submit any evidence beyond a statement that they have asserted as 'believed true and correct'.

As the allegation will be accepted as though it is concrete proof of wrong-doing, we believe that the initial allegation must be held to that standard. A significant improvement to those allegations would be requiring auditing of Rights Holder systems involved in the generation of those allegations by appropriate independent bodies.

We remain opposed to the notion that an allegation made by a Rights Holder is proof of wrong-doing. We believe the burden of proof should rest on Rights Holders rather than placing an obligation on those they are accusing to prove their innocence, consistent with the common interpretation of the Bill of Rights and principles of natural justice.

Specific Discussion Document Questions

Status Quo and Problem Definition

Q1. If regulations were not made, are the possible implications noted above correct, and why?

The implications appear mostly correct. We do not, however, believe that the method of calculating the fines will be relevant to an end user who has received a notice. The most likely deterrent and point of most interest will be the maximum fine.

A number of the implications have already come to pass as part of the original S92A negotiations, which subsequently broke down. It appears reasonable to assume very little has changed since those negotiations.

Q2 Are there any other possible implications if regulations are not made? Why do these arise?

The Act does not address how the Tribunal will handle situations where a Rights Holder has conflated different users into a single allegation. ISPs may end up with significantly more work detangling the allegations than a clear set of regulations could provide.

Q3. What benefits, if any, might arise from not providing regulations? Why do these arise?

As noted earlier in this submission, we believe the current climate of en-masse infringement of copyright stems from fundamental market failures by rights holders. Without these regulations, and without increased enforcement, some content creators may break away and adopt the way other content industries have dealt with the market behaviour. This could render much of the need for this Act moot.

Options for information requirements

Q4. Should the suggested requirements be included in regulations? Should there be any other information requirements and why?

The requirements should be included in the regulations, although we suggest some modifications.

Section 13c needs clarification on what “relevant information” in relation to the IP address should be provided. We suggest at least the highest-layer protocol (ie, BitTorrent, HTTP, etc) and any client identification associated with it should be explicitly required.

13d should require inclusion of the timezone for the date and time of the allegation. We suggest this should be UTC as the primary reference, as a consistent time base which is not subject to ambiguities such as Daylight Saving. It should also be given in NZST/NZDT where possible, and should never be given in any other timezones. Where any doubt exists about the differences, the UTC

version should be given preference. Rights holders may be located in other countries, and giving times and dates in their local time zone may not have an obvious translation to NZST/NZDT or UTC.

13e should also include the full filename of the alleged infringing copy. This should consist of whatever name (if present) of any wrapper, as well as the file or files within any wrappers which are claimed to infringe. It should not be sufficient to simply assert an infringement based entirely on the filename of the outer-most wrapper or indexed name as this is an arbitrary text label and may not truly reflect the data contained within the wrapper.

It is also common practice for works with a high interest level to be faked, by renaming some other content (or even random data) to something which claims to be the highly sought after work.

13h is not a sufficiently high standard for an allegation which becomes proof once the Tribunal is involved. We believe this should be replaced with a sworn statement instead. The statement should also include that the file name given as part of the claim of infringement has been proven to contain the copyrighted work named. This is important because a filename does not necessarily mean that it contains the specific work claimed.

13i requires a signature but does not specify (except in the physical case) what this must consist of. While this is consistent with current New Zealand legislation on digital signatures, in this situation we believe the regulations need to spell out specific requirements. These requirements could potentially be used to automatically discard junk or abusive submissions, but without a clear specification they could not be used for this purpose. Such a specification needs to include PKI considerations to assist ISPs with such automated processes.

Q5. Which (if any) requirements should not be included and why?

Aside from the suggested changes above, all requirements listed should be included.

Q7. Is any other information regarding alleged infringements necessary to allow internet account holders to properly understand the allegations being made?

As noted above in remarks on section 13, some additional information should be included. In addition, we would suggest there should be a requirement that allegations be in an easily understood form and must not offer any kind of inducement to settle the allegation made. This is to ensure that account holders understand they are not obliged to reach a monetary settlement with the rights holder making the claim until the process has reached the Tribunal, and account holders are not pressured into settling on false claims, as has been the case for many allegations made overseas.

Form and Content of Notices and Challenges

Q8. Which of the above is your preferred option, and why?

Our preferred option would be 3. It would also be desirable for the Ministry to provide templates IPAPs could use or base their notice formats on. This would assist smaller ISPs to reduce the cost of compliance with these regulations.

Q9. Are the requirements in option one above adequate and why? What other requirements should be included, and why?

We do not believe the minimal set of options specified in section 20 are adequate. We believe that all information provided to the IPAP as part of the allegation must be provided to the account holder. This is to ensure that, for example, the account holder can establish a challenge for misidentification (eg, because the IP address claimed could not be in use by the account holder), or to assist the account holder with identifying the actual person responsible for the infringement.

Q10. Are the compliance costs of one option significantly higher or lower than others? If these costs are quantifiable, what are they, and how are they calculated?

We expect compliance costs would be similar for either option. In either situation some amount of information is being inserted into a template. The majority of the compliance costs will come from how this is inserted, not what is inserted, in addition to the actual identification of the account and dealing with notices which cannot be processed.

Q11 What information should be included with notices to ensure account holders are properly informed about the regime, and about copyright issues relating to file sharing or otherwise?

Notices should be careful to explain that an infringement relates to the actual file involved, and should be careful not to seem to assert that filesharing in and of itself is always illegal. Filesharing protocols can be used as legal methods of distributing content, and it is important these notices do not mislead account holders on what is actually being alleged.

Notices should not be used as a means to promote any specific service or alternative that rights holders or an IPAP may offer. That is, they must not be used as an advertising platform for alternate digital distribution methods.

Lastly, notices must not claim that all copying of copyright work is necessarily illegal. It should emphasise the importance of the specific license over the work. This is to ensure account holders are not misled into believing that copyright works can never be copied, and understand that the law allows some cases of copying and that some licenses over copyright works allow further activities.

For example, content under Creative Commons Attribution-Sharealike is still copyright, but able to be remixed and shared provided it is attributed and you maintain the same license as you received (ie, continue to allow others to remix your additions as well). Should someone not honour the license, they would be

facing a claim of copyright infringement, just as with any other more restrictive copyright license.

Rate of fee payable by a rights holder to an IPAP

Q12. What functions should an IPAP be able to recover costs for under clause 10(eh). Why? In answering this question you may wish to comment on the distinction between on-going and set up costs.

While we are not an ISP, we do have some comments on what costs should be covered by fees paid by rights holders.

It is important to note that the costs an ISP will incur in both setup and on-going are significant, and are to enforce the privately held rights of third parties. Given that ISPs are generally incapable of preventing any specific use of their network, it is important to recognise that creating a large, on-going, unrecoverable cost to operate will either be passed on to all customers, or may result in ISPs closing and therefore reducing competition in the ISP market.

Given that further proposals in the document suggest that in calculating damages awarded to rights holders at the Tribunal should include the cost of notices issued against the account holder, we see no reason to require ISPs to carry any portion of the cost at all.

Setup costs will not just include obvious costs such as development of software changes to support resolving the allegation to an account holder, but could also include significant infrastructure costs and changes. Some ISPs may need to undergo significant design changes before they will be able to meet their obligations, and would be required to design such systems to a high standard. There are also costs incurred from hiring additional staff and additional infrastructure to support those staff.

Options for method of calculating fee

Our preferred option is option 2, but with the caveats outlined below.

Q19 Is this your preferred option and why?

Option 2 provides the most certainty for ISPs and rights holders on what fees will be charged, however, this option only makes sense if an allegation is limited to *one* claim of infringement.

The actual effort an ISP undertakes is identifying the account holder based on resolving the date, time, and IP address. Each combination is a unique effort to resolve. An allegation which, for example, specifies multiple dates, times and a single IP address would have to be resolved for each date and time, as it may identify different account holders.

Further, multiple allegations of works infringed would have to collapse multiple dates and times into a single range with the presumption they have to be the same account holder. However, since the rights holder has no visibility of when

account holders are connected to the Internet, this could be conflating multiple users. Therefore, a rights holder cannot simply assume that two infringements from the same address are the same account holder.

To avoid this complexity, notices need to specify only a single infringement, at a specific date and time. This is assured to be a single account holder.

This approach also avoids complexity about the method allegations are delivered to ISPs. If an ISP has an automated interface to submit allegations, the concept of a notice becomes fluid, as it could be interpreted that a single batch submission from the Rights Holder is a “notice” when the actual work to identify each date/time/address set increases with how many allegations were submitted.

At a glance this appears to be option 4, however option 4 presumes there is a base workload for processing notices regardless of number of allegations. We believe the vast majority of the cost will come from matching and processing the resulting match, and option 2 better reflects that view.

Calculation of Copyright Tribunal awards

Q36 Do you consider the Tribunal should have discretion to calculate the amount of an award and why? Should the Tribunal have discretion to include an additional element that acts as a deterrent to future infringing (a deterrent element)? Why?

We believe the only appropriate way to arrive at a number for damages where allegations have been proven is to allow the Tribunal to determine on a case by case basis.

Only the Tribunal will hear the full facts of the case and take into account what each situation warrants for damages.

Q37 Are the considerations set out above appropriate for the Tribunal to consider and why?

Most of the considerations are consistent with existing legislation and decisions. However, we would caution against two aspects.

Firstly, the distinction between “upload” and “download” is meaningless, since in many filesharing protocols all participants do both simultaneously. Therefore, we suggest that the Tribunal's considerations should explicitly not include a distinction between upload or download.

Secondly, the “market value” of the work is a highly debatable value to apply. In some cases that value is technically zero because it is not sold in this market, therefore it cannot have an actual value. Instead, such a market value would be based on conjecture provide by a rights holder on what they believe they could have sold a work for, or revenue they believe they could have made. This conjecture has been the subject of considerable debate, with a number of

studies finding that claims for market value made by Rights Holders are often unsupportable.

We would prefer the retail value of the local market, or where no local retail price exists, a comparable market, as the basis for damages. This reflects the fair or expected fair price for a given work.

Q38 Should the Tribunal consider other factors and why?

We believe, except as noted above, the factors outlined are sufficient.

Q39 What are the potential implications of the Tribunal calculating the award via the method described under this option? Why do these arise

The Tribunal being seen to have awarded damages fairly will ensure that the process has credibility and is respected by the public. In particular, we draw attention to statutory-damages based awards in other countries, which have awarded damages in the trillions of dollars. Such damage awards we believe appear so disproportionate to how ordinary people perceive the scale of infringement and the amount of actual damage done, that it undermines any attempt to change public behaviour.

Should the Tribunal continually award the maximum amount, we believe that the public will not find this credible.

Fixed awards could prevent this, however, we believe that to uphold principles of natural justice that the Tribunal should be free to make its own determinations (with some guidance on appropriate matters to consider). This could outweigh the potential loss of public support for the Tribunal.