

The Chair

**CABINET ECONOMIC GROWTH AND INFRASTRUCTURE COMMITTEE**

**ILLEGAL PEER-TO-PEER FILE SHARING**

**PROPOSAL**

- 1 This paper makes recommendations for amendments to the Copyright Act 1994 (the Act) to provide a process for right holders to pursue repeat online copyright infringers who infringe copyright by downloading material using peer-to-peer file sharing technology while also ensuring Internet users have access to due process.

**EXECUTIVE SUMMARY**

- 2 Peer-to-peer (P2P) is a form of file sharing on the Internet whereby files are shared directly from digital device to digital device with or without an intermediate server. Sharing content files containing audio, video, data or anything in digital format using P2P technology software has become very common. However, much of the sharing happens without the permission of the copyright owner. This infringement of copyright can have the effect of depriving the copyright owner of revenue.
- 3 There are two major challenges for combating P2P copyright infringement. First there is a general problem of Internet-related copyright enforcement. Secondly, the absence of an intermediate server when P2P technology is being used creates an additional enforcement challenge. The scale of the infringing can be reduced by targeting the majority of offenders. This requires the involvement of Internet service providers (ISPs).
- 4 Section 92A was enacted by section 53 of the Copyright (New Technologies) Amendment Act 2008 as a response to this problem. It states that ISPs must adopt and reasonably implement a policy that provides for the termination, in appropriate circumstances, of the accounts with the ISP of repeat infringers. However, section 92A has not been brought into force, mainly because of concerns that primary obligations should be placed on right holders, not ISPs.
- 5 I am recommending that section 92A be replaced with a new system that places some of the obligations on right holders. There are three main measures in my proposed package of changes. First, right holders will be able to issue notices to P2P copyright infringers via ISPs. Secondly, if the person continues to infringe (there are three or more infringements), the right holder will be able take a complaint to the Copyright Tribunal (Tribunal) who will be able to award a penalty. The Tribunal process will be a fast track system which would enable members to make decisions based on the evidence provided by the parties (without a hearing). Hearings would only be required if the alleged P2P copyright infringer sought to defend the allegations in person. Thirdly, the Court, which already has various powers to deal with copyright infringements, would be given a new civil remedy to make orders suspending the copyright infringers' Internet account.

## BACKGROUND

- 6 P2P filing sharing technology is used, amongst other uses, to distribute copyright protected digital files without the authority of the copyright owner, such as music, movies, software and games.
- 7 There are a number of types of P2P file sharing technologies. Some allow users to connect to servers and share files directly with other connected users. Files are downloaded in pieces from several sources. Other P2P technologies allow for the downloading of files from a website accessible through a web browser (such as Limewire). Web-based storage sites allow people to upload files onto the website for anyone to download. Paying members may be provided with faster download speed times.
- 8 Bit torrent file sharing allows large amounts of data to be shared because each user both downloads and uploads the data. The files are broken into pieces and the uploader and downloader are not aware which pieces are being shared at any one time. Direct connect file sharing has a central hub, to which users connect and can download files directly from one user to another. Only whole files are shared.
- 9 Infringement of copyright is facilitated by digital technologies. It is cheap to produce multiple copies, copies are indistinguishable from the original, and the Internet speeds up distribution. The magnitude of the problem will make it too difficult for right holders to eliminate and the phenomenon is increasing despite current regimes to deal with copyright infringement. For example, for screen (movie and television) in New Zealand, New Zealand Federation Against Copyright Theft (NZFACT) estimated that there is approximately an average of 200,000 file shares per month. A recent NZFACT survey has found that two in five young people have downloaded illegal copies of movies for free and young men and those aged 15-17 are more likely to be the offenders.<sup>1</sup>
- 10 A lot of individuals consider that sharing and downloading files is harmless, but it impacts on creative industries, the New Zealand economy and the reputation of New Zealand with other countries. The recording industry in New Zealand is one of the creative industries being affected the most by illegal downloading. It is expected that a similar large scale effect will also damage the screen sector as broadband availability increases and broadband prices reduce.
- 11 Industry is also starting to tackle this issue with the development of new business models. Some commentators argue that moves to “stamp out” illegal downloading will be a disincentive to right holders developing new business models and innovative tools so that users can legitimately access a wider range of content whilst still offering protections for right holders. A strong regulatory response could discourage this innovation reaching New Zealand. However, the counter argument is that reducing illegal P2P file sharing will increase the take up and accessibility of new business models to New Zealand consumers that are being developed by creative industries (some of which are being introduced in other countries), as the economic viability of these new models will be much higher if the effects of illegal file sharing can be limited.

## Other Jurisdictions

- 12 Despite some countries having a requirement that ISPs adopt a policy for the termination of accounts of repeat infringers, for example, the United States and Australia, there is uncertainty about whether this scheme is effective in reducing illegal P2P file sharing.

---

<sup>1</sup> Survey undertaken by Synovate for NZFACT “Movie File Sharing Amongst Young New Zealanders”, September 2009

- 13 A number of other jurisdictions are in the process of considering a policy in this area. The United Kingdom is currently consulting on the issue and proposing a notice regime, including other technical measures to deal with repeat infringement (including suspension of subscriber accounts, where the Secretary of State deems such measures necessary). France has just passed a law where a third offence will allow a judge to order a one-year Internet suspension or a fine.

## **COMMENT**

### **Overall objectives of the review**

- 14 The objective of section 92A is intended to provide a framework for the development of a fair and effective system for dealing with behaviour which clearly infringes copyright recognising that this behaviour can be costly for New Zealand's creative industries.
- 15 This file sharing enables a user to have access to and upload other users' files. Because P2P file sharing takes place over a network, there is no website as such that is hosting information. This means that the notice and takedown provisions in the Act cannot be used to address the problem. While right holders could take legal action against those engaging in illegal P2P file sharing, it is difficult for them to identify any particular user and is therefore a time consuming process (having to get a court order for every infringement). P2P file sharing has been identified by the music and film industry as a growing problem in New Zealand.
- 16 The objectives of the review of section 92A have been to seek ways of addressing online copyright infringement by downloading through P2P file sharing and in particular to:
- Provide an efficient, low-cost and credible regime to deter individuals from infringing copyright through using P2P file sharing technologies;
  - Ensure measures, procedures and remedies are effective, proportionate and dissuasive; and
  - Tailor the regime to take into account New Zealand's existing judicial system and limited resources.

## **OPTIONS**

- 17 Options that have been considered in respect of the overall objectives of the review are discussed below:

### **Option 1: Status Quo**

- 18 Opting for the status quo would mean not bringing section 92A into force at all. The existing legal framework in the Act allows right holders to commence a civil action against an account holder and provides for remedies including orders to cease infringement and to award damages. Infringement using P2P file sharing technology is prolific and the current enforcement regime provided for in the Act has not been an effective deterrent. Therefore, this option is not recommended.

### **Option 2: First Notice Regime**

- 19 This option would require ISPs to only send one notice from a right holder to an account holder identifying that copyright infringement has occurred. This option could be monitored (over a 12-24 month period) and if there is unsatisfactory reduction in infringement, then the enforcement process (by either the Copyright Tribunal or court)

be implemented. The Telecommunications Carriers Forum (TCF) submitted that they would bear the lower costs if ISPs were engaged solely in the first notice system.

- 20 Although this option does have the benefit of being low cost, it is unlikely to offer enough deterrent to prevent illegal P2P file sharing. It has also been recognised in other jurisdictions that there needs to be some form of deterrent to prevent such behaviour and, therefore, I do not recommend this option.

### **Option 3: ISP suspension of an Internet account**

- 21 This option proposes that once a notice regime has been exhausted, an ISP would suspend an individual's Internet account. This was the original policy of section 92A which received a negative reaction from ISPs and the public. I consider that it is more appropriate that the right holders take an action against an alleged copyright infringer than the ISP and, therefore, I do not recommend this option.

### **PREFERRED OPTION**

- 22 The preferred option is a three pronged approach which includes a notice regime (incorporating three notices), with enforcement through the Copyright Tribunal, and the penalty of suspension of an Internet account through the courts. Where there has been a P2P copyright infringement, the notice process must be used prior to using enforcement action, either in the Tribunal or the court.

#### **1. Notice Regime**

##### *Notices*

- 23 This option was part of the proposal consulted on in July 2009. It proposes that three notices (an education notice, a cease and desist notice and an advisory notice) are sent via the relevant ISP to an account holder, depending on when the alleged P2P copyright infringement occurred. Notices would be based on reasonable evidence of an alleged P2P copyright infringement provided by the right holder. The "reasonable evidence" required by the right holder will be prescribed by regulation but it will include, the IP address, type of work illegally downloaded through P2P file sharing and date the P2P copyright infringement occurred. Legal tracking software is currently used by right holders to provide this evidence.
- 24 As well as the notices specifying the details of the alleged P2P copyright infringement, the notices would provide information about copyright law; a statement that the notification is sent pursuant to the Act, and advice and guidance on securing wireless networks, because it may be the case that someone other than the account holder (or a person associated with the account holder) has accessed the Internet account and illegally downloaded files.
- 25 Under this proposal ISPs would become a conduit for the notice process. They would notify the account holders of the P2P copyright infringement using a notice, to be prescribed by regulation, and collect and retain data on the account holders for the purpose of recording the number of infringements. ISPs can only identify the account holder through the IP address, who may not be the P2P copyright infringer. ISPs will be required to:
- a Identify the IP addresses and match it to the account holder;
  - b Retain data of subscriber internet use for a minimum period of 20 working days so that the ISP can identify the account holder from the information provided by the right holder;

- c Retain data on infringements for a minimum period of 12 months so that the ISP will know when repeat infringement has occurred;
  - d Provide information to right holders about repeat infringement;
  - e Forward notices to account holders by post or electronically (the usual way ISP corresponds with its customer) within a reasonable timeframe; and
  - f Communicate with right holders where necessary.
- 26 The account holder will have been deemed to have received the notices once the notices have been sent by the ISP.
- 27 A number of submitters were concerned about how a right holder would know there had been repeat copyright infringement, considering that Internet Protocol (IP) addresses do not always remain the same (dynamic IP addresses). I have been advised that ISPs are able to match dynamic IP addresses with account holders and therefore, it is proposed that the ISP will determine when a repeat P2P copyright infringement has occurred, send the appropriate notice and inform the right holder of the infringement.
- 28 It is important to note that there will be some circumstances that may prevent a person from being identified by an ISP, for example, where an individual has used a computer at an Internet café, hotel or has routed their IP address through another country. In these cases and others, the ISP will not be able to match an IP address to an account holder and that person will not be held to account. However, this policy is intended to capture the majority of copyright infringements through P2P file sharing.
- 29 It is also important to note that the recent NZFACT survey found that more than 70 per cent of New Zealand youth would stop accessing illegal versions of copyright material if they received a notice from their ISP. International evidence is also consistent with these findings.

#### *Counter-Notice*

- 30 The account holder would be able to respond to any of the notices by way of a counter-notice. I am recommending that this response (counter-notice) be sent to the right holder via the ISP to ensure that the identity of the account holder is protected. However, I am also recommending that the account holder can also deal directly with the right holder if they wish.
- 31 The TCF has recently proposed that the account holder not use the ISP and send the counter-notice via the Tribunal to the right holder and vice versa. The TCF argue that involving the Tribunal as a neutral third party with whom the account holder has no relationship, is the most consumer-friendly option.
- 32 I do not support the TCF proposal. The Tribunal is not set up to be an administrative body. Rather, it is an adjudicative tribunal. An adjudicative tribunal should not perform the role of managing the relationship between the ISPs, right holders and account holders nor to pass notices between the relevant parties. Although the ISP is not directly involved in the dispute between a right holder and the account holder, under this option, the ISP is appropriately the conduit for the notice process and therefore, they should continue to act in this role for the counter-notice process.

### *Timeframes*

- 33 I recommend that there are prescribed timeframes for this process. Right holders will only be able to provide evidence to the ISP of the P2P copyright infringement that occurs within 20 working days of the alleged copyright infringement. This is to prevent a right holder from accumulating infringements to avoid ISPs receiving thousands of notifications from right holders that are not recent and potentially increasing costs to ISPs.
- 34 First notices (education notices) are to be sent at least 20 working days after the ISP receives evidence from a right holder that an infringement has occurred. Second notices (cease and desist notices) can only be sent at least 10 working days after the first education notice has been sent via the ISP to the account holder. The third notice (advisory notice) can only be sent at least 10 working days after the second notice and only after a third infringement has occurred.
- 35 A right holder will only have nine months from the issue of the first notice to take enforcement action in the Copyright Tribunal. After nine months, any P2P copyright infringements from the same account holder would start at the beginning of the notice process (first notice).
- 36 I consider these timeframes to be reasonable, because they will allow the account holder time to change his or her behaviour but also ensure the timeframes do not unnecessarily delay the process.

### **Key Issues:**

#### *Distribution and Recovery of Costs to ISPs*

- 37 ISPs have expressed concern about the cost of the regime and have indicated that they will need to upgrade their systems to perform the activities required. The majority of the cost is derived from the task of matching the IP addresses and the sending of notices to account holders. Officials have been advised by right holders that ISPs should expect approximately 15,000 notices a month in the first few months after the proposed legislation has come into force, and that this will reduce to approximately 1000 per month after six months or so. The reduction is assumed as a number of people will stop infringing after receiving the notices.
- 38 ISPs argue that they should be compensated for their actual and reasonable costs under this process. It is understood from advice and discussions with ISPs that for the most part they already have systems in place that will enable them to identify and match IP addresses and have some storage capacity.
- 39 I recommend that ISPs meet their own costs in collecting, maintaining and processing data to meet their obligations under this process. However, I recommend that right holders should pay a fee (notice fee), set by regulation, to the relevant ISP for every notice sent by the ISP, to cover the ISP's administration cost for issuing notices.

#### *Limit to number of notices sent in a prescribed period*

- 40 The notice fee also addresses ISPs' concern that identification of P2P copyright infringement by right holders (which could generate large volumes of notices) could overwhelm ISPs. Limiting the number of notices would be impracticable because a right holder may not be in a position to know the identity of the infringer, nor whether the infringement relates to a first notice or a repeat infringement notice.

I consider that there should be no limit on educating users about infringement, nor should there be any limitations on numbers of attempts to remedy the infringing behaviour.

### *Sanctions for right holders*

- 41 Concern has been expressed that there is no sanction on right holders who submit notices that are false, misleading, vexatious, and incorrect or simply fail to comply with the notice requirements, particularly where the right holder is based overseas.
- 42 I do not recommend sanctions. The content of the notices will be prescribed by regulation and the recommended notice fee should limit the scope for abuse.

## **2. Enforcement: Copyright tribunal – Claims up to \$15,000**

- 43 I propose that the Copyright Tribunal (Tribunal) be the adjudicative body to make decisions on any complaints taken by a right holder, where three or more P2P copyright infringements have occurred within the prescribed timeframes and the notice regime has been exhausted. The Tribunal will be able to award a penalty where P2P copyright infringement has occurred.
- 44 This meets the objectives of providing an efficient and relatively low cost system for right holders, which should provide a deterrent for the majority of illegal P2P copyright infringers who continue to infringe despite receiving notices.

### *Functions*

- 45 In order to take a complaint to the Tribunal, the loss must be quantified as being under \$15,000. Claims over \$15,000, which may be the more serious copyright infringer, will need to be pursued in the District Court, which has a jurisdiction up to \$200,000.
- 46 This amount mirrors the jurisdiction of the Disputes Tribunal and is considered to be sufficient to cover the majority of claims by right holders whilst still retaining an efficient regime. Although the claims will be of low value, they will often involve multiple transactions (for example a mixture of songs and movies).
- 47 The penalty would be payable by the copyright infringer to the right holder. The amount would be prescribed by regulation and the amount set would be of a compensatory nature (rather than a punitive fine which is considered to be a criminal penalty which should be imposed by the courts). This will provide certainty for the parties and reduces the need for a right holder to prove actual damage to them arising from the infringing activity. Suspension of the Internet is not an appropriate function of a tribunal, because ISPs, who are not a party to the dispute, have to take the action to suspend the Internet account and there are potentially issues under the New Zealand Bill of Rights Act 1990.
- 48 The Tribunal would decide based upon the evidence provided by the right holder and the account holder whether there has been P2P copyright infringement. The right holder must provide evidence of all the P2P copyright infringements within the relevant prescribed time period to the Tribunal.
- 49 The Tribunal will be a fast-track system where it may make decisions based on the papers submitted by the right holder and account holder (or on the papers submitted by the right holder if the account holder declines to respond) so it is more efficient and lower cost than a right holder taking an action in the courts. There will be prescribed timeframes for when an account holder should respond to an action and the Tribunal makes a decision. An account holder may request a hearing.

Any decision of the Tribunal would be able to be appealed in the High Court, but only on a question of law, which is the current provision relating to Tribunal decisions in the Act.

- 50 In order to protect the identity of the account holder (who at this stage is only an alleged copyright infringer) it is proposed that the Tribunal have the power to obtain the contact details of the account holder from the ISP and serve notice of the action on the account holder. This is to prevent right holders from taking action outside the Tribunal complaints process. If the right holder prefers to take court action outside this process, they can obtain an order from the court to require the ISP to provide the right holder with the account holder's contact details.

### *Impact on Tribunal*

- 51 The Tribunal currently consists of three members who are experts in intellectual property law. It meets on an ad hoc basis, in relation to licensing disputes. Its current workload is up to 1-2 complex cases per year. The proposals contained within this paper would obviously increase its workload requiring the appointment of up to three new members to the Tribunal.
- 52 The provisions in the Act that currently apply to the Tribunal will continue to apply where appropriate in relation to the extension of the jurisdiction.
- 53 The proposal presents funding implications for the Crown. The Ministry of Justice estimates that both Crown and departmental cost is estimated to be \$408,000 in the first year, \$838,000 in out years plus a one-off capital cost of \$201,000 in the first year based on the assumption that 1800 cases go to the Tribunal. However, these costs are indicative only and further discussions are required as more information is made available.
- 54 The right holder would be required to pay a fee to lodge the claim with the Tribunal but this fee would only cover a small proportion of the Tribunal's costs. This fee would be set at a similar level to the fee payable in the Disputes Tribunal. The Crown would also need to cover the cost of setting up the Tribunal for its extended jurisdiction.

### **3. Extending the remedies of the court for P2P file sharing**

- 55 I propose extending the civil remedies that the court may order to include suspension of an Internet account for up to six months where P2P copyright infringement has occurred. It is a deterrent for serious P2P copyright infringers, where the notice regime has not been effective and a Tribunal action has not been or is not appropriate. A right holder could take an account holder directly to court without using the Tribunal.
- 56 Although a right holder can already take an action in the court against an illegal P2P copyright infringer, civil proceedings, (which include domestic and personal copyright infringement) only provide relief by way of damages, injunctions, accounts, or otherwise, as is available in respect of infringement of any other property right.<sup>2</sup> These remedies are not sufficient nor do they directly address the problem of P2P copyright infringement.
- 57 Only criminal liability under the Act for commercial infringement enables the court to order a maximum fine of \$150,000 for copyright infringement.<sup>3</sup> This is because fines are generally a criminal law penalty, whereas damages (of a compensatory nature) generally fit better with the civil nature of copyright law. Civil fines are rare in legislation, and where applicable, are available on the application of an enforcement agency.

---

<sup>2</sup> Section 120

<sup>3</sup> Section 131



As I am not recommending an enforcement agency, civil fines would not be an appropriate remedy. It would also be unusual and unsound for the Act to provide for civil fines only in respect of P2P file sharing.

- 58 As identified earlier, the courts are the most appropriate place to determine whether an Internet account should be suspended in relation to copyright infringement. This is to ensure that the ISP, as a third party, has a right to be heard in the proceedings, and natural justice issues, for example, the right to legal representation, and New Zealand Bill of Rights Act are taken into account. The NZFACT survey found that 62 per cent would probably stop illegal downloading if their internet connection could be suspended by an ISP.
- 59 The court would need to determine whether such a remedy is appropriate in the circumstances and would need to take into account some of the concerns raised by submitters in respect to vulnerable, essential services, and effects on businesses if their Internet was suspended due to the actions of an employee.
- 60 From 1 November, there are new District Court Rules that will provide for short trials which will lower the cost and reduce the time it takes for a trial. There is also the provision of judicial settlements which may mean that where there are disputes they do not require a trial. Therefore, these new rules could be used by the right holder when they take an action on P2P copyright infringement to the court.
- 61 However, this option will impact significantly on the contractual rights and obligations of ISPs and their account holders. Consideration will need to be given to terms and conditions within the contract and the effect of these in terms of a suspension. It is also not a favourable option for most submitters who argue that a suspended account holder may sign up with another ISP, or indeed the same ISP using a family member's or another householder's name. An account holder whose Internet service has been suspended may not necessarily be the person who took part in the illegal P2P file sharing. Suspension of an Internet account is also inconsistent with statutory remedies for other online conduct, e.g., spam or objectionable material and may therefore be disproportionate to the offence.
- 62 I recommend extending the civil remedies in the court to include suspension of an Internet account up to six months because it provides a significant deterrent against illegal P2P copyright infringement. Only having a suspension for a period of time should address some of the issues raised in submissions. I also recommend a regulation making power to set out the processes required to implement this remedy.

## **OTHER KEY ISSUES**

### *Definition of ISP*

- 63 The definition of ISP under the Act is intentionally broad because it applies to section 92C of the Act, which provides for notice and take down of stored material. It is therefore likely to include many organisations which are not traditionally considered to be ISPs. It would include for example, businesses, government departments, libraries, universities and schools. Therefore the ISP definition should remain as it is for the purposes of the safe harbour in sections 92B and 92C.
- 64 However, the proposal requires that ISPs match IP addresses and identify repeat illegal P2P copyright infringers. This would be impracticable for some of the organisations that are likely to be included in the current definition that may not hold such information which enables them to identify account holders.

- 65 Therefore, I recommend that an amendment be made to the Act which provides for a separate definition of ISP specifically applying to section 92A (retaining the current definition for other relevant provisions under the Act) that will restrict the provisions to appropriate ISPs who have the technical capability of identifying IP addresses with account holders, for example, Telecom and TelstraClear.

#### *Safe Harbour*

- 66 I recommend that the Act be amended so that ISPs are statutorily protected from an action by the right holder where they have complied with the provisions under the Act or any order by the Court to suspend an Internet account. This would be in line with the other relevant provisions within the Act and would ensure that the ISP complies with its requirements.

#### *Mediation*

- 67 It was proposed in the consultation document, that there be a requirement for mediation between a right holder and an account holder. Most submitters opposed this step in the process because they were concerned that it would prolong and add delay and further cost to the process. Even the supporters of this proposal accepted that it would not work if both parties did not agree to it.
- 68 Mediation is always an option whether or not the new process provides for it and the right holder could obtain the account holder's details through the courts and suggest that as a mechanism. However, I do not recommend that this option be made compulsory and agree that if it was, it would add to the delay and cost of the regime.

#### *Implementation period*

- 69 The TCF submitted that they would like to have an implementation time of three months after the Bill is enacted to get their systems in place. The Ministry of Justice have advised that it would prefer eight months after enactment to ensure the Tribunal processes are in place.
- 70 I recommend that the implementation period be six months (from the time the legislation is given Royal Assent). This should be a reasonable timeframe to ensure that all the appropriate processes, ISP systems, Tribunal processes, and regulations are in place.

#### *Relationship between 92A and 92C*

- 71 If an ISP knows or has reason to believe that a copyright infringement has occurred with respect to material that it stores (e.g., material on a website that it hosts) then it is required to take that material down or disable access under sections 92C and 92D of the Act (otherwise it will lose its safe harbour in section 92C(2)) of the Act.
- 72 An infringement that is dealt with by an ISP under sections 92C and 92D remains an infringement that may potentially be the subject of any section 92A process. The purpose of section 92A is to deal with P2P copyright infringement, not stored material that infringes copyright.
- 73 Therefore, I recommend that the legislation make clear that 92A is to only be used to deal with P2P copyright infringement and any copyright infringement dealt with under section 92C is excluded from the section 92A process.

### *Anti-Counterfeiting and Free Trade Agreement Trade Negotiations*

- 74 New Zealand is currently involved in negotiations with a number of trade partners<sup>4</sup> to develop a treaty known as the Anti-Counterfeiting Trade Agreement (ACTA). ACTA aims to establish an international framework for enforcing intellectual property rights in order to address more efficiently the growing problem of large scale trade in counterfeit goods and piracy. In particular, the ACTA is intended to establish, among the signatories, agreed standards for the enforcement of intellectual property rights by increasing international cooperation, strengthening the framework of practices that contribute to effective enforcement of intellectual property rights, and strengthening relevant enforcement measures.
- 74 One of objectives of ACTA is the establishment of an international standard for copyright enforcement in the digital environment, including measures addressing piracy on the internet.
- 75 Because participants are still in the early stages of negotiations, it is not clear what the final outcomes of negotiations will be, and whether New Zealand will become a party to the agreement once negotiations conclude.
- 76 New Zealand is also negotiating a Free Trade Agreement with the Republic of Korea and hopes to shortly begin negotiations on an expanded Trans-Pacific Partnership Agreement (TPP) with a number of countries, including the United States. While the intellectual property provisions for these trade negotiations are still under negotiation, New Zealand will be required to ensure that its legislation is consistent with the provisions of these agreements, once negotiations have concluded.

### **RISKS**

- 77 Although the preferred options provide more clarity about the process, roles and responsibilities of the parties, there may still be some dissatisfaction from some of the parties involved.
- 78 ISPs have expressed concern through the TCF's submission on the costs of implementing the regime and including suspension of the Internet as a remedy for repeat infringement. Ministry officials have consulted with ISPs to provide further clarity on the process and to minimise the compliance costs, including, providing that a right holder pays a fee to the ISP per notice.
- 79 A number of ISPs were concerned they would be forced to monitor Internet usage, or make decisions to suspend an internet account, when they currently do not perform these roles or are ill equipped to do so. The proposal in this paper will not require ISPs to monitor Internet usage or make decisions to suspend Internet accounts. Instead, the courts will determine whether an account holder's Internet access is suspended. This should allay a number of ISPs' concerns.
- 80 However, despite allaying these concerns, the potential suspension of an Internet account remains likely to be contentious. The majority of submissions were not in favour of this remedy. Most submissions suggested that this remedy would be disproportionate to the action, while other submitters suggested that individuals will find ways around suspension by either choosing another ISP or using encryption technology to remain undetected. A number of submitters also argued that the Internet is an essential service (like electricity) and therefore should not be disconnected. This debate will continue once the decisions in this paper are released.

---

<sup>4</sup> The other participants in the ACTA negotiations are Australia, Canada, the European Union, Korea, Japan, Mexico, Morocco, Singapore, Switzerland and the United States.

- 81 As addressed earlier in the paper, the current civil court remedies do not provide an adequate deterrent against illegal P2P copyright infringement and civil penalties in the court are not appropriate. Suspension as a remedy is being considered in some jurisdictions and will be implemented in France. The court will have discretion to consider the appropriateness of the penalty, and take into account some of the concerns raised in submissions.
- 82 Right holders have advocated for suspension of an Internet account throughout the process. Their preference is for a graduated response mechanism where there is a system of warnings that an account has been identified as infringing, with a clear message that the account will be terminated if the warnings are ignored. It is submitted that the proposal removes ISPs from the process at critical points and is overly long and complex. Right holders prefer that ISPs were responsible for terminating Internet accounts as they consider this method simple, effective and reasonable. They consider that the Tribunal would cause undue and unreasonable delay.
- 83 As identified earlier in the paper, I do not consider that it is appropriate for ISPs to suspend Internet accounts. Under an ISP suspension regime ISPs would decide whether to order termination based on regulations, and therefore could not take into account relevant circumstances of the account holder. The discretion to order suspension is more appropriately placed with a court who can adequately consider the arguments of both parties and any other circumstances in deciding whether to exercise its discretion to terminate. Right holders have argued that ISPs would not be in the role of “judge and jury” as the process does permit account holders to challenge notices. However, the ability to accept or reject the account holder’s response through a counter notice regime would not meet the standard of a court or take into account natural justice or the Bill of Rights Act.
- 84 At the opposite end of the spectrum, if suspension as a remedy was removed from the proposal altogether, it is likely that right holders would argue vociferously as they did when section 92A was removed during the previous select committee process.
- 85 Right holders may also express concern at having to pay a fee per notice. They argue that the cost of sending a notice should be set at a low level. Although the cost of sending the notice in itself may be low, the systems required to process and send notices are more substantial, for example some larger ISPs like Telecom indicate they will manually process notices.
- 86 The implementation period may also be raised as an issue by right holders who are eager for this regime to be in place as soon as practicably possible. However, to ensure that the regime is effective, there needs to be some time once the Bill has passed to get processes in place and six months is a reasonable time for that to occur.

## CONSULTATION

- 87 A proposal document was released in July 2009 with a three week consultation period. Submissions were received from approximately 113 parties. Consultations have been held with submitters on request. The Ministry of Justice has been consulted with, particularly on enforcement and fiscal issues.
- 88 This paper has been prepared by the Ministry of Economic Development in consultation with Treasury, the Ministry of Justice, the Ministry of Foreign Affairs and Trade and the Privacy Commissioner. The Department of Prime Minister and Cabinet have been informed.

## **FISCAL IMPLICATIONS**

- 89 The main additional costs arising from this paper are incurred to extend the jurisdiction of the Copyright Tribunal to consider complaints made from a right holder for P2P copyright infringement. If approximately 1800 cases went to the Copyright Tribunal, the Ministry of Justice estimates its costs at \$408,000 in 2010/11 with an additional one-off capital cost of \$201,000 in 2010/11 and \$838,000 the following years (including out years). There may be further capital costs incurred depending on the nature of the case management system used by the Ministry of Justice.
- 90 Officials consider that the estimated costs for extending the jurisdiction of the Copyright Tribunal are high because it is difficult to estimate these costs, which will depend on the nature and number of cases taken by the right holder. Cases are expected to reduce over the following years. It is too speculative to estimate how many will be defended by account holders and the number of those defended cases where the account holder elects to have a full hearing. In addition, right holders may only take serious cases to the Tribunal (which means fewer cases), but it is difficult to estimate the number of complex cases.
- 91 The Ministry of Justice have advised that cost recovery in a tribunal is generally set at 25% of the full cost. This means that the Crown would need to fund the remainder of the cost (75%) of the Tribunal. It is proposed that the fee to lodge a claim with the Tribunal will be set at about the same cost of the Disputes Tribunal, which is between \$30 and \$100 depending on the amount sought under the claim, so the majority of the costs of the Tribunal will fall to the Crown.
- 92 I recommend that further discussions be undertaken with the Ministry of Justice concerning some of its costing as more information is made available regarding the nature and number of cases.

## **HUMAN RIGHTS**

- 93 The proposals contained in this paper appear to be consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. Suspension of an Internet account could be inconsistent with the freedom to seek, receive and impart information and opinions of any kind in any form. A final view as to whether the proposals will be consistent with the Bill of Rights Act will be possible once the legislation has been drafted. The Ministry of Justice and the Ministry of Economic Development would work together on this issue to address consistency with the New Zealand Bill of Rights Act.

## **LEGISLATIVE IMPLICATIONS**

- 94 The recommendations in this paper require amending the Copyright Act 1994 to implement the proposal.

### **Need for legislation**

- 95 I propose that a Copyright Amendment Bill be included on the 2009 Legislation Programme with a priority of 5 – instructions to Parliamentary Counsel Office to be provided in the year. The Copyright Act has not been amended in the last year. This Bill is required to deter individuals from using peer-to-peer technology for copyright infringement purposes.

### **Compliance and Binding on the Crown**

- 96 The Bill will comply with the following:

- a Principles of the Treaty of Waitangi;
- b Rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
- c Principles and guidelines set out in the Privacy Act 1993;
- d Relevant international standards and obligations; and
- e LAC Guidelines: *Guidelines on Process and Content of Legislation*, a publication by the Legislation Advisory Committee.

97 The Copyright Act 1994 currently binds the Crown.

### **Associated regulations**

98 Regulations need to be made within three months of the Bill being enacted to give effect to the provisions in the Bill. Regulations will be required to provide for the template notices, set out what evidence is required from the right-holder to the relevant ISP, and set a notice fee.

### **Timeline**

99 The following represents a proposed timeline:

- a Requested enactment date: July 2010
- b Date of report back from Select Committee: 30 June 2010
- c Requested introduction date: February 2010
- d Approval for introduction by Cabinet Legislation Committee: February 2010
- e Assessment of the Bill's consistency with the New Zealand Bill of Rights Act 1990: January 2010
- f Final drafting instructions to Parliamentary Counsel Office: December 2009
- g Final policy approval obtained from Cabinet December 2009

100 The proposed Copyright Amendment Bill will bind the Crown.

### **REGULATORY IMPACT ANALYSIS**

101 The RIA and RIS for this proposal was prepared and assessed under the RIA requirements that applied prior to 2 November 2009. In forming its view, the Regulatory Impact Analysis Team (RIAT) acknowledges that MED is working within constraints, in particular prior policy decisions.

102 The RIAT considers that the analysis shows there is a case for intervention, but that, due to the uncertainty about the scale of harm done by illegal peer-to-peer file sharing, the impact analysis does not point to a preferred option.

103 The RIS is adequate with respect to the problem definition and consultation.

## **PUBLICITY**

104 I propose to make an announcement about the decisions taken pursuant to this paper by way of a media statement. This Cabinet paper and the attached RIS/BCCS are to be published on the Ministry of Economic Development website, subject to any necessary deletions justified in accordance with the Official Information Act 1982.

## **RECOMMENDATIONS**

105 It is recommended that the Committee:

- 1 Note that section 92A was inserted into the Copyright Act by section 53 of the Copyright (New Technologies) Amendment Act 2008 (the Amendment Act) and that the section would have required ISPs to have an account termination policy in appropriate circumstances for repeat copyright infringers;
- 2 Note that section 92A was never brought into force because of industry and internet user concerns;
- 3 Agree to amend the Copyright Act 1994 to replace section 92A with a new system which requires: a notice regime; right holders to take complaints to the Copyright Tribunal who may award a civil penalty; and, the Court's remedies to be extended so that it can, where appropriate, suspend the Internet service of an account holder;
- 4 Note that after three notices of the prescribed form and in the prescribed timeframe have been sent by the Internet Service Provider, the right holder may take an action in the Copyright Tribunal;
- 5 Note that New Zealand is currently involved in trade negotiations on measures to address illegal P2P file sharing of copyright protected works and that New Zealand will be required to ensure that its legislation is consistent with international obligations it enters into under treaties concluded as a result of those negotiations;

### *Notice Regime*

- 6 Agree to amend the Copyright Act 1994 to replace section 92A with a new notice regime that:
  - 6.1 requires right holders to use the notice regime where an infringement is a peer-to-peer copyright infringement;
  - 6.2 requires right holders to provide evidence of alleged peer-to-peer copyright infringement to relevant Internet Service Providers;
  - 6.3 requires Internet Service Providers to identify the Internet Protocol addresses, match these with the relevant account holder and forward the appropriate notice to the relevant account holders, within prescribed timeframes;
  - 6.4 allows account holders to send counter-notices disputing a notice, either to the right holder via the Internet Service Provider, or directly to the right holder;
  - 6.5 requires Internet Service Providers to inform the right holder when an account holder has received their first, second or third notice;

- 6.6 requires Internet Service Providers to retain data for specified time periods; and
- 6.7 requires Internet Service Providers to provide account holders details to the Copyright Tribunal as requested by the Copyright Tribunal.

#### *Copyright Tribunal*

- 7 Agree to extend and amend the provisions in the Copyright Act 1994 relating to the Copyright Tribunal, as required to implement the policy and in particular;
  - 7.1 allow the Copyright Tribunal to consider complaints up to the value of \$15,000 and extend its powers to:
    - 7.1.1 make decisions on complaints filed by a right holder which have occurred within a prescribed timeframe, to determine whether or not there has been a peer-to-peer copyright infringement;
    - 7.1.2 award a penalty as prescribed by regulation;
    - 7.1.3 order Internet Service Providers to provide the account holders contact details to the Copyright Tribunal;
    - 7.1.4 serve notices on alleged infringers;
  - 7.2 allow up to three new members to be appointed to the Copyright Tribunal, in order to make decisions on alleged peer-to-peer copyright infringements;
  - 7.3 make any amounts owed from a penalty awarded by the Copyright Tribunal enforceable as if they were Orders of the District Court;
  - 7.4 require that parties may not be represented by lawyers in the Copyright Tribunal hearings for peer to peer copyright infringement;
  - 7.5 agree that appeals from Copyright Tribunal decisions should be restricted to points of law, and that its decisions should apply without limit pending resolution of any appeals and judicial reviews; and
  - 7.6 prescribing the timeframes for the Copyright Tribunal process;

#### *Court*

- 8 Agree to amend the Copyright Act 1994 to:
  - 8.1 give the court the power to make an order to suspend the copyright infringers' Internet account for up to six months for peer-to-peer copyright infringement, which will be available only as a civil remedy;
  - 8.2 require that the court take into account any relevant circumstances when considering the suspension of an Internet account, for example multiple users of a shared account, effect on business and vulnerable account holders;

#### *Other Key Issues*

- 9 Agree to amend the Copyright Act 1994 to:



- 9.1 include a new definition of Internet Service Provider which is specific to peer-to-peer copyright infringement and that the current definition of Internet Service Provider in the Copyright Act 1994 continue to apply for the remaining relevant provisions under the Copyright Act 1994, where applicable;
- 9.2 include a safe-harbour provision so that Internet Service Providers who comply with the provisions under the legislation are protected from any action by right holders;
- 9.3 provide for regulations to be made for the following purposes:
  - 9.3.1 prescribing the form, content, procedures, requirements and other matters in respect of notices;
  - 9.3.2 setting the fee that the right holder must pay the Internet Service Provider to send a notice to an account holder;
  - 9.3.3 setting the fee payable by the right holder to the Copyright Tribunal to file a proceeding;
  - 9.3.4 setting the level of penalties that the Copyright Tribunal may order;
  - 9.3.5 prescribing the practices and procedures of the Copyright Tribunal for the purpose of its peer-to-peer copyright infringement jurisdiction; and
  - 9.3.6 any processes required in respect to the new court remedy to suspend an Internet account up to six months.
- 10 Agree that there should be an implementation period of six months once the Bill is brought into force;
- 11 Agree that a copyright infringement dealt with under section 92C is excluded from the recommended regime for section 92A;

#### *Financial*

- 12 Note the following indicative changes to appropriations within Vote Courts to enable the Ministry of Justice to extend the jurisdiction of the Copyright Tribunal to allow it to consider complaints on illegal peer-to-peer file sharing and award a penalty.

	\$m – increase/(decrease)				
	2009/10	2010/11	2011/12	2012/13	2013/14 & Out years
<b>Vote Courts</b> <b>Minister for Courts</b> Departmental Output Expense: Specialist Courts, Tribunals and Other Authorities Services (funded by revenue Crown)	-	0.156	0.334	0.334	0.334
Non Departmental Output Expense: Tribunal Members Fees and Expenses		0.252	0.504	0.504	0.504
<b>Total Operating</b>	-	<b>0.408</b>	<b>0.838</b>	<b>0.838</b>	<b>0.838</b>
<b>Total Capital</b>	-	<b>0.201</b>	-	-	-

;

- 13 Note that these funding proposals will be absorbed within current Vote Courts baselines.
- 14 Note that the Ministry of Justice may seek to address resourcing of outyears in the 2010 Budget Process.

#### *Legislation*

- 15 Approve the inclusion of a Copyright Amendment Bill 2009 on the 2009 Legislation Programme with a priority of 5 - instructions to the Parliamentary Counsel Office to be provided in the year;
- 16 Agree that the Copyright Amendment Bill will bind the Crown;
- 17 Note that I propose that the Bill be introduced into the House by 28 February 2010 and be passed by August 2010;
- 18 Invite the Minister of Commerce to issue drafting instructions to Parliamentary Counsel to implement the policy;
- 19 Authorise the Minister of Commerce to make consequential decisions and minor variations which are consistent with the overall approach in the recommendations of this paper; and

#### *Publicity*

- 20 Note that this paper may be publicly released on the Ministry of Economic Development's website.

Hon Simon Power  
**Minister of Commerce**

Date signed: \_\_\_\_\_

## **Regulatory Impact Statement**

### **EXECUTIVE SUMMARY**

The objective of section 92A is to put in place a regime that effectively deters people illegally engaging in peer-to-peer (P2P) file sharing. A process to deter illegal P2P file sharing needs to be efficient to reflect the relatively low value of most music, movie and software files which are shared illegally. It is often uneconomic for a right holder to take legal action against individuals because of the cost of court action. However, the extent of downloading and uploading by individuals is so prolific that right holders claim that it is having a substantial economic effect on their businesses.

Estimating the sales displacement effect however, is not straightforward. Technology is changing quickly and consumers are reacting to those changes in ways that the creative industry are struggling to understand and cope with. We have some relevant information on sales displacement, based on overseas data, but this should be treated as indicative only.

The best way to reduce illegal P2P file sharing is to amend the Copyright Act 1994 to create a low cost, centrally administered enforcement regime. The proposed amendments will provide for a notice regime warning account holders about the copyright infringement, allowing the Copyright Tribunal to award a penalty after three or more P2P copyright infringements and extend the civil remedies of the court so that an Internet account can be suspended for up to six months.

### **ADEQUACY STATEMENT**

The RIA and RIS for this proposal was prepared and assessed under the RIA requirements that applied prior to 2 November 2009. In forming its view, the Regulatory Impact Analysis Team (RIAT) acknowledges that MED is working within constraints, in particular prior policy decisions.

The RIAT considers that the analysis shows there is a case for intervention, but that, due to the uncertainty about the scale of harm done by illegal peer-to-peer file sharing, the impact analysis does not point to a preferred option.

The RIS is adequate with respect to the problem definition and consultation.

### **STATUS QUO AND PROBLEM**

#### **Background**

The UK has just released its impact assessment on P2P file sharing under its Digital Economy Bill. The Assessment notes that an important feature of creative industries like the music, software and film industries is that they are characterised by strong IP rights. Strong IP rights create an incentive to invest in the development of new and more innovative products since it permits individuals to capture the gains from the new products it creates.

However with illegal file-sharing the incentive to invest in new and mainstream artists is undermined because industry cannot capture all the gains generated from its investment. This is because the public good<sup>5</sup> nature of file-sharing and the spillover effects<sup>6</sup> which exist creates a free-riding problem whereby users may enjoy the benefits of file-sharing without

---

<sup>5</sup> Public goods are those goods which are non-rival and non-excludable in consumption. Non-rival in consumption means that one person's consumption of a good or service does not reduce the amount which can be consumed by another person, and non-excludable means that it is not possible to prevent another person from consuming it.

<sup>6</sup> Spillover effects arise when one person's actions have an impact on a third party.

paying the product's price<sup>7</sup>. The disincentive to invest in artists as a result of free-riding is a particular problem in the music, film and videogames industries because they are characterised by large investment costs and a relatively high risk of failure.

Other potential costs can also have serious impacts on individuals and businesses. Illegal file sharing sites increase a user's exposure to viruses, loss of business intellectual capital, and identity theft. The technical nature of file sharing technology allows access both ways. In other words, while it opens another server to download material, in return, it allows access to a downloader's computer.

Content companies spend vast amounts of money investing in the success of a product (e.g. film, song or videogame). These costs are typically in production, marketing and promotion of creating and selling content to the consumer (advance payment to artists, advertising costs, retail store positioning fees, press and public relations to the artist, television appearances and travel, publicity and internet marketing). The industry is characterised by large fixed costs and low variable costs. The increasing trend for creative content to be traded digitally may have seen a change in the investment cost structure. Overall, some costs have remained high like marketing costs but distribution and production costs have decreased with an overall effect of increasing variable costs relative to fixed costs which may give small, relatively less known artists more room for manoeuvre.

Record companies, for example, take on considerable risk as not all the artists which they invest money in actually succeed. Typically less than 15% of all sound recordings released will break even and fewer return profits. However when a recording makes it big, the financial returns can be very large and this then goes to finance the next round of investment. The small success rate is due to the nature of mass-media market in which exposure to the public is scarce and firms maximise audience by selecting a relatively small number of potential one-size fits-all super star artists.

The industry has largely blamed file-sharing for declining sales. However, most commentators agree that the decline in sales, particularly in the music industry, cannot be wholly attributed to illegal file-sharing, citing a host of other factors, including general macroeconomic conditions (e.g. consumer confidence, economic growth) and the substitution of traditional forms of entertainment for new activities such as video gaming, internet browsing, social networking and a growing trend for artists to release content for free. In return industry has argued that the fall in sales is so significant that it cannot be explained by these factors alone.

The digital provision of content has a number of advantages for consumers compared to more traditional ways of consuming content. Namely, it allows consumers to sample the product before buying it; to discuss the quality of the product online (e.g. social networking); it has lower transaction costs (e.g. lower costs for searching, can purchase it from home realising time savings); and in the case of music, enables unbundling (i.e. purchasing a song rather than the whole album).

It has been argued that some resistance by the content industry to offer content digitally may have exacerbated the problem of consumers turning to illegal downloading. Nearly 70% of illegal music downloaders in the UK agree that a basic reason for their unlawful behaviour is that legal downloading sources don't have the same range of content as illegal sources. The lack of supply of digital content may have led some consumers to use illegal sources of digital consumption. In fact, only in recent years the industry has started to embrace the digital provision of their products as an opportunity rather than a threat.

---

<sup>7</sup> A similar case arises with Research and Development (R&D) whereby a company cannot capture all the benefits of its R&D activity because it cannot fully retain the knowledge that it creates. Knowledge spills over to other companies through various mechanisms, including personnel changing jobs or copying.

## The New Zealand Situation

Internationally, illegal copyright infringement through P2P file sharing has been increasing, with New Zealand subject to the same trend. The main impacts are felt in the music, film and videogames sectors. As with other countries, however, New Zealand evidence has been difficult to gather.

The music recording industry in New Zealand is represented by the Recording Industry Association of New Zealand (RIANZ)<sup>8</sup>. RIANZ fosters the growth of the industry and provides avenues for artists so that music can be produced, promoted and distributed to the New Zealand public.

Screen production mainly consists of feature films and television series. Following on from box office successes such as *The Lord of the Rings* trilogy and *King Kong*, New Zealand continues to host many other international feature film, television, and television commercial productions from around the world.

Screen production is a growth industry in New Zealand and a significant contributor to the economy. For the 2008 financial year, the screen industry recorded total gross revenue of NZ \$2,743 million. Television broadcasting (including distribution) had the highest gross revenue contributing \$NZ 1,155 million. The screen production sector, comprising screen production companies and contractors had revenue of \$1,266 million. Of the screen production subsectors, feature films was the biggest revenue earner, accounting for half (\$NZ637 million) of all screen production sector revenue.

Software and gaming technology is also affected by illegal P2P file sharing. Sidhe Limited is the largest game production studio in New Zealand, and has produced more than 20 high profile titles.

We are unable to accurately estimate the costs to the industry from illegal P2P file-sharing since attempts to scale the problem have been fragmented or based on limited data sets. It is also complicated by the changing business environment. The industry is in the midst of a technological revolution with an explosion of channels, formats, and business models. As revenues drain away from the industry, businesses are struggling to adapt. Consumers have also reacted to these changes in ways that the industry has not anticipated, increasing uncertainty in the industry.

Despite the lack of quality data, there is information that suggests a substantial problem. For example, the information presented above in the graph on music industry sales shows a dramatic decline in sales which can not be fully explained by the content being accessed in other (fee paying) formats or by consumers switching to other products.

RIANZ also commissioned a study earlier in 2009 to identify infringements by New Zealand users, using only a very limited list of copyright sound recordings. Over a period of 14 days, an average of almost 5,000 potentially infringing users was identified per day. The users are “potentially” infringing because although they were illegal downloads (through Limewire), RIANZ did not substantiate copyright ownership by going back to every copyright owner on the individual downloads. Wholesale trade statistics collected by the RIANZ<sup>9</sup> show a similar trend with digital sales only making up 9% of wholesale sales. This only partially offsets the huge drop in sales since 2001.

---

<sup>8</sup> RIANZ claims to represent approximately 95% of total recording audio market in New Zealand.

<sup>9</sup> See RIANZ website [www.rianz.org.nz](http://www.rianz.org.nz)

For screen (movie and television) in New Zealand, NZFACT<sup>10</sup> estimate that there are on average 200,000 file shares per month. LEK Consulting (2005) infer that the piracy costs could be as high as 25% of potential sales (\$70 million) based on overseas trends. Internet piracy via P2P file-sharing networks is a significant concern and accounts for the majority of New Zealand movie industry losses – an estimated \$33 million in lost consumer spending in 2005.<sup>11</sup>

### Overseas Evidence

Evidence from overseas markets has been as difficult to gather as it has for New Zealand. However, those who respond to surveys saying they have illegally download content also point to a widespread problem. The Digital Entertainment Survey (2008) estimates 6.5 million UK users have at some stage illegally downloaded content. Most illegal downloads are for music (29% of users), followed by movies and TV (21%) and games/software (15%).<sup>12</sup> (It should be noted that these are the only statistic presented in the UK Impact Assessment for the Digital Economy Bill.)

In the USA, researchers<sup>13</sup> attempted to profile those looking for files that could be illegally downloaded. They found that 15% of those trolling the internet were from government or the recording industry attempting to catch those involved in illegal downloading. This suggests that the industry is hurting enough (or believe it is) to put substantial funds into catching those participating in illegal downloading activity.

Furthermore, the BBC<sup>14</sup> reported that within 10 days of the game Spore being released, more than half a million people had downloaded a pirate version of the game using P2P technology. In comparison, legitimate sales of Spore have passed the 2 million units mark (the game retails for roughly NZ \$75).

Use of P2P file sharing technology is also likely to pose a security threat to corporates and individuals. According to Symantec in the first half of 2007, 15% of all potential infections were propagated by the file sharing software eDonkey in the UK.<sup>15</sup> File sharing has been linked to identify theft, theft of company data, and release of personal information.

According to Ipsos-MORI, in 2007, one in ten office employees are using the workplace to download music, two thirds of them illegally.<sup>16</sup>

With these pieces of information, we do have some indications of the seriousness and spread of illegal file sharing activity. However, there is still heated controversy over the scale of the sales displacement effect of illegal downloads. Any discussion of the subject on the internet produces pointed exchanges from often well informed participants. See for example the blog postings associated with a study by Andersen and Frenz (2007).<sup>17</sup>

Those who claim that the industry are over playing the issue of illegal downloading point to a number of factors which have contributed to the decline in physical sales. Consumers have better things to spend their money on and this has been helped, some claim, by uninspiring CD/DVD releases over the last few years. Also, bands have changed their marketing approach. Instead of going on tour to promote CDs, now bands release free downloads of

<sup>10</sup> NZFACT was established by the Motion Picture Association (MPA) to protect the film industry in New Zealand from the adverse impact of copyright theft.

<sup>11</sup> NZFACT media statement entitled “NZFACT Coordinates Launch of Te Re Maori Booklet Warning of P2P Filsharing Dangers” 9<sup>th</sup> February 2009.

<sup>12</sup> [http://www.entertainmentmediaresearch.com/reports/DigitalEntertainmentSurvey2008\\_FullReport.pdf](http://www.entertainmentmediaresearch.com/reports/DigitalEntertainmentSurvey2008_FullReport.pdf)

<sup>13</sup> [http://newsroom.ucr.edu/news\\_item.html?action=page&id=1673](http://newsroom.ucr.edu/news_item.html?action=page&id=1673)

<sup>14</sup> <http://www.news.bbc.co.uk/2/hi/technology/7772962.stm>

<sup>15</sup> Accessed from: [http://www.ifpi.org/content/section\\_news/20080307.html](http://www.ifpi.org/content/section_news/20080307.html)

<sup>16</sup> *ibid*

<sup>17</sup> <http://www.dime-eu.org/node/477>

their music to promote their tours and the merchandising that goes with it. The rise of the internet sellers has also played a part in the demise of high profile CD retailers over the past few years. In particular, Amazon.com has changed the buying behaviour of many consumers.

The costs of illegal downloading include losses to the industry of sales foregone, possible reduction in product offerings as revenues reduce which leads to the reduction of choice for consumers, wider transmission of viruses, security breaches, and possible trade impacts. The benefits are that consumers receive free goods and services.

With no obvious practical or theoretical guidance on the magnitude of the damage, the impact on sales of illegal file-sharing is an empirical question. Below we have set out a selection of studies that have attempted to objectively assess the sales displacement effect.

---

***Selection of studies estimating the sales displacement effect***

Studies	Sales displacement (% of tot revenue)	Industry	Country	Method
Oberholzer-Gee & Strumpf (2007) Journal of Political Economy	0%	Music	US	Actual downloads data
Blackburn (2004), mimeo	0%	Music	US	Actual downloads data
IPSOS (2007)	2%	Film & TV	UK	Survey data
Zenter (2006) Journal of Law and Economics	8%	Music	7 European countries	Survey data
Rob & Waldfogel (2006) Journal of Law and Economics	9%	Music	US	Survey data
Hennig-Thurau, Henning & Henrik Sattler (2007), Journal of Marketing	9%	Film	Germany	Downloads proxies data
Jupiter Research (2007)	17%	Music	UK	Survey data
Peitz and Waelbroeck (2004), mimeo	20%	Music	16 countries	Downloads proxies data

Source: Department for Business Innovation & Skills. Consultation on Legislation to address illicit peer-to-peer (P2P) file-sharing, 16<sup>th</sup> June 2009, p47.

---

Estimates range between 0% and 20% of total revenue for music and between 2% and 9% of total revenue for film and television. The figures from these overseas studies are very sensitive to the methodology used and the country and industry examined. It must be born in mind, therefore, that the scale of problem may be lower than some in the industry have claimed. In these circumstances it is important that any policy action taken to address the problem should not unnecessarily impinge on legitimate consumer access to material on the web and in particular, should not unnecessarily inhibit business innovation in the digital environment.

### **New Zealand in an International Context**

The issue of illegal P2P file sharing is receiving increasing attention internationally and many governments in other jurisdictions are taking action to address it. The United Kingdom is consulting on a similar regime as proposed in this paper, with notices and remedies including suspension of an internet account. France has passed a law with notices and suspension as the remedy. The United States, Australia, Singapore, and the Republic of Korea have included a provision similar to section 92A in their legislation.



New Zealand will need to ensure its regulations are on a par with its trading partners so that it can access the latest technology and avoid potentially damaging trade disputes. New Zealand is currently involved in negotiations with a number of trade partners to develop a treaty known as the Anti-Counterfeiting Trade Agreement (ACTA).<sup>18</sup> ACTA aims to establish an international framework for enforcing intellectual property rights to address more efficiently the problem of large scale trade in counterfeit goods and piracy, including copyright piracy on the internet. These negotiations are still in the early stages and it is not clear how the negotiations will proceed, and whether New Zealand will become a party to the agreement once negotiations conclude.

New Zealand is also negotiating a Free Trade Agreement with the Republic of Korea and hopes to shortly begin negotiations on an expanded Trans-Pacific Partnership Agreement (TPP) with a number of countries, including the United States. While the intellectual property provisions for these trade negotiations are still under negotiation, New Zealand will be required to ensure that its legislation is consistent with the provisions of these agreements, once negotiations have concluded.

However, it should be stressed that New Zealand supports the intent of these negotiations given that we have an interest in our creative industries being able to sell their works in offshore markets and not lose out to illegal peer-to-peer file sharing. In return, our trading partners legitimately expect to New Zealand to enforce its laws in the interests of their creative industries.

### **Status Quo and Problem: Conclusion**

The proposed legislation will impact on individuals, creative industries, the New Zealand economy, and possibly trade agreements. Although there is an existing legal framework for dealing with copyright infringement under the Copyright Act 1994, for both civil<sup>19</sup> and criminal<sup>20</sup> offences, right holders complain that using the courts is time consuming and costly and it is not providing a sufficient deterrent. It is also not effective given the large number of illegal downloads and uploads taking place.

As shown in all other jurisdictions, it is simply impractical and uneconomic for right holders to take all breaches to court – the costs of court processes far outweigh the benefits of enforcement. For example, a single song purchased and downloaded legally from the iTunes website will cost between 95 cents and \$1.75, a CD between \$11.95 and \$29.95, movie rental 6 to 10 dollars and purchase of movies up to \$30.00. These prices are gross and don't reflect the net revenue flowing back to the creator of the work. However, New Zealand creative content distributors, producers and other license holders all receive a share of this revenue (including from content produced overseas but sold in New Zealand)<sup>21</sup>.

---

<sup>18</sup> The other participants in the ACTA negotiations are Australia, Canada, the European Union, Korea, Japan, Mexico, Morocco, Singapore, Switzerland and the United States.

<sup>19</sup> Section 120 of the Act, which provides that copyright infringement, is actionable by the copyright owner and that "all such relief by way of damages, injunctions, accounts, or otherwise is available to the plaintiff as is available in respect of the infringement of any other property right".

<sup>20</sup> Section 131 provides for criminal liability in relation to copyright infringement. A person who commits an offence against section 131 is liable to a fine of up to \$150,000 or imprisonment of up to 5 years. Criminal offending under the Act applies generally only to commercial infringement. P2P filing sharing generally occurs in the domestic setting for personal use. Section 131 would usually only apply where P2P file sharing was occurring for commercial gain.

<sup>21</sup> For example, independent New Zealand music distributor Rythmethod has a large roster of both New Zealand Artists and artists from overseas, which they distribute to the New Zealand consumer.

The current enforcement regime under the Copyright Act needs to be updated to address these problems. At the same time, the above analysis has demonstrated that while it is almost certain that problems exist, their size cannot be accurately measured at this time. This points to the need to adopt solutions to the problem that are low cost and flexible to administer, particularly as it is not at this time clear how many cases will be brought. It is also important that any system does not discourage either consumers from exercising their legitimate rights in the digital environment or businesses from innovating on the internet.

## **OBJECTIVES**

The objective is to significantly reduce illegal P2P file sharing of copyright protected works by ensuring that the Copyright Act provides:

- A more efficient and less costly civil enforcement regime for right holders against illegal P2P copyright infringement; and
- Civil enforcement measures, procedures and remedies that are effective, proportionate and dissuasive.

It should be noted that the options below have not been assessed in terms of their “distributional” impacts (e.g. between domestic and foreign businesses). Copyright law is intended to optimise the level of innovation and creativity that occurs in society. It seeks to provide appropriate levels of protection to all creative industries in all markets and the New Zealand economy benefits from the activities in New Zealand of foreign as well as domestic creative industries. At the same time, New Zealand industries benefit, sometimes significantly, from the presence of similar laws in other markets. It is important in this area that New Zealand recognises that it is part of a global IP protection system which benefits New Zealand creative industries that both seek to sell in the domestic market and to export. Taking a neutral approach in this respect also provides significant benefits to New Zealand consumers who can take advantage of the presence of both domestic and foreign copyright material.

## **ALTERNATIVE OPTIONS**

### *Option 1- Deferring legislation until other similar countries have enacted their legislation*

This option would not require legislative change at this time.

This option has the benefit of ensuring that New Zealand is consistent with other countries or that New Zealand could learn from the experiences of other jurisdictions.

A further argument against deferring is that extensive consultation has taken place on the policy proposals contained in this paper and it is judged that while not all groups are completely happy, there is consensus that the proposals represent a reasonable compromise. If the legislation were to be deferred, this process would almost certainly need to be repeated and there are no guarantees that the current level of consensus could be repeated in the future.

In the meantime, waiting also means that losses from illegal P2P file sharing are affecting New Zealand’s creative industries which in turn has an effect on New Zealand’s economy.

*Option 2 – Single Notice (Internet Service Providers would send out an education notice to account holders about illegal copyright infringement occurring over their internet account with no enforcement or enforcement delayed for 12-24 months)*

This option would require legislative change.

Part of the problem is that many small scale illegal file sharers are likely to be unaware that their actions breach copyright.

The majority of small scale infringers may stop infringing after receiving an education notice that informed them their actions were illegal. This may especially be the case in a family context where the infringer may not be actual the account holder. A Digital Britain survey shows that up to 70% of illegal file sharers would, at least initially, stop file sharing if they received an education notice.

However, it is likely that this rate of improvement could not be sustained if it were not backed up by the threat of some form of sanction should illegal file sharing not stop. Illegal file sharers would quickly understand that the only option open to copyright owners was to take them to court and that this would be unlikely in almost all cases of small-scale infringing.

At the same time, the Digital Britain survey and other anecdotal evidence from overseas jurisdictions suggest that 30% of illegal file sharers would not stop infringing if they received an education notice. Furthermore, larger scale infringers who are aware their actions are illegal are likely to infringe intentionally and on a commercial scale; and will affect New Zealand's creative industries the most. This option is therefore unlikely to be effective in reducing infringements from this group of file sharers, without some penalty as a result of ignoring notices. It is considered that a secondary remedy that provides a penalty such as those proposed in the Copyright Tribunal will give some enforceability to the notice system.

*Option 3 – Internet Service Providers would be required to suspend an Internet account for repeat infringement after the account holder is sent three infringement notices by the ISP, in appropriate circumstances*

This option would require legislative change.

Under this option ISPs, rather than the courts, would be required to make a determination on copyright infringement and it may be difficult for them to evaluate or adjudicate the legitimacy of an infringement claim by a right holder. Furthermore, it may not be the actual account holder who is the alleged infringer; it may have been another member of the same household, or in the case of a business, an employee.

This option is likely to provide a quick and easy remedy for rights holders who will be able to go straight to ISPs rather than seeking suspension in the courts. There would however be significant costs to ISPs of setting up systems and personnel to decide whether suspension is appropriate in each case.

This option also raises issues of proportionality because the remedy of suspension of an internet account may not be a proportionate response to the damage caused, and consumers would not be able to defend themselves. ISPs are not in a position to hear counter arguments of account holders which would be required by natural justice principles before limiting their right to access the internet. Such a decision is more appropriately put with an adjudicative body such as a court, not private parties.

Suspension is also inconsistent with statutory remedies for other online conduct, e.g., spam or pornography.

## **PREFERRED OPTION**

### **Description of the preferred option**

Under this option the Copyright Act would be amended to provide a new procedure for right holders to enforce their copyright against a person using an internet account for illegal P2P copyright infringement. This would be a notice regime, whereby notices are sent by ISPs to the internet account holders informing them of the use of their accounts for illegal P2P file sharing purposes based on claims of copyright infringements by right holders.

Right holders currently use software programmes to legally track P2P infringements. These programmes provide them with evidence of P2P infringements, identifying the Internet Protocol number the work was downloaded from, the type of work that has been downloaded and the date it occurred.

IP numbers identify the device that has downloaded the work, but cannot determine who the device belongs to. Only the ISP has the contact details of its customers and can correlate the IP number with the contact details of the account holder. The ISP will not be required to provide the contact details of the account holder to the right holder. This is the reason why the ISP must send the notices to the account holder so as to safeguard the identity of its customers. This preservation of identity continues throughout the process, unless the Tribunal makes an order against a person and then (as is current practice) provides those details as part of publishing its case on the website. Right holders will only obtain the details of the account holder if an account holder chooses to provide them directly, or the right holder obtains an order from the Court.

A first notice would be an educational notice; the second a cease and desist notice; and third an advisory notice, informing the account holder that there have been three or more infringements within the prescribed timeframes and the right holder may take a complaint to the Copyright Tribunal or the Court.

ISPs will act as a conduit and be required to:

- Identify the IP addresses and match it to the account holder;
- Retain data of subscriber internet use for a minimum period of 20 working days so that the ISP can identify the account holder from the information provided by the right holder;
- Retain data on infringements for a minimum period of 12 months so that the ISP will know when repeat infringement has occurred;
- Provide information to right holders about repeat infringement;
- Forward notices to account holders by post or electronically (the usual way ISP corresponds with its customer) within a reasonable timeframe; and
- Communicate with right holders where necessary.

Account holders who receive such notices will be permitted to respond to right holder allegations of infringement through a counter-notice either sent through their ISP or directly to the right holder.

Right holders will be required to pay a fee to the ISP towards the cost of issuing the notice.

The jurisdiction of the Copyright Tribunal would be extended to consider complaints made by right holders about alleged illegal P2P copyright infringement by the account holder, but

only after the advisory notice had been sent by the ISP. The Copyright Tribunal would be provided with the power to award a penalty which will be prescribed by regulation. The Tribunal will have the power to obtain customer details from ISPs where necessary to identify the account holder. Any account holder who received a notice that a complaint has been lodged with the Tribunal would be able to defend the allegation of copyright infringement through a hearing. An appeal on a question of law (which is consistent with the current legislation) would be able to be taken to the High Court.

Right holders will be required to pay a filing fee per complaint to the Tribunal.

Regulation making powers will provide for notices, prescribe the evidence from right holders, notice and Tribunal fees and the level of the penalty.

The Copyright Act would also be amended to extend the remedies available to the courts to address repeated P2P copyright infringements to include suspension of an Internet account of up to six months, where appropriate.

Furthermore, the right holder would still be permitted to take an action in accordance with the current enforcement provisions available to the right holders under the Copyright Act to enforce their copyright in the court against an account holder who is alleged to have infringed copyright through the use of P2P file sharing technologies.

Officials consider that the proposed regime is proportionate to the damage infringement causes. Retaining the status quo and taking no action will have an effect on the creative industries due to the cumulative damage resulting from many single infringements, but large fines or internet suspension may be too harsh a penalty to the infringer if the damage from infringement is low. As described above, the proposed regime has several factors that work to ensure a penalty is proportionate, including:

- For an illegal downloader to get to the copyright tribunal, three infringements will need to occur within 9 months. This will increase the value of claims in the tribunal to a not insubstantial amount, and limit the chance for abuse of the process through vexatious claims for small amounts;
- The tribunal system will be quick and inexpensive for both right holder and infringer, in order to limit the danger that the costs of enforcement outweigh the relatively low damage caused by an infringement;
- As internet suspension is a limitation of consumers' rights, a right holder wishing to seek suspension as a remedy will have to go to the Courts, where the costs of enforcement dictate that claimants will only pursue enforcement if substantial damage has occurred.

### **Impacts of the preferred option**

In assessing the impacts of the preferred option, a key consideration is that the absolute harm caused by the problem represented by peer-to-peer file sharing cannot be measured at this stage. Given this situation, it is important that this option delivers an outcome that is "scalable" to the actual harm caused by the problem (ie the amount of activity undertaken by adjudication agencies can adjust in accordance with the number of cases taken). It is also important that consumers have opportunity for redress at each step of the process.

The preferred option should provide for these outcomes. The scale of adjudication activities will be determined by copyright owners and they will be required to meet particular standards of evidence at each stage of the process. For cases brought before the Copyright Tribunal,

copyright owners will also need to pay a fee which should deter frivolous cases. For both the notification process and the Copyright Tribunal, consumers will have the ability to contest the allegations that have been made.

Ultimately, it is of vital importance that the size of any sanctions imposed is proportionate with the harm caused by the offending. Remedies will be proportionate to the extent of the infringement. In the notification process, users will not be penalised at all if they choose to stop infringing. The size of the fines that the Copyright Tribunal can impose are modest (ie a maximum of \$15,000) meaning that it will be less appropriate for the Copyright Tribunal to be the ultimate arbiter on cases of serious offending. For lower levels of harm, the options that are available to Copyright Tribunal have been kept quite limited. At the same time, this option leads to potentially serious cases being considered by the court. The court will be required to determine whether the remedy is appropriate in the circumstances of each individual case.

Fiscal implications of extending the jurisdiction of the Copyright Tribunal are estimated to be \$408,000 in 2010/11 and \$838,000 the following years (including out years) plus a one-off capital cost of \$201,000 in 2010/11. If approximately 1800 cases went to the tribunal. This is only an indicative cost because it is unknown how many cases would be brought before the Tribunal.

Although extending the jurisdiction of the Copyright Tribunal may impact on the Ministry of Justice's resources, it is important that such a scheme is implemented, to help reduce the overall amount of illegal P2P file sharing. The Copyright Tribunal will use a fast-track system to reduce costs. Hearings will only be held on the request of the parties. It is anticipated that once this system is implemented there will be a reduction and so the impact on the Copyright Tribunal will be substantially reduced over a period of time. A filing fee to use the Tribunal will also provide some cost recovery to the Crown, although the majority of the cost will be borne by the Crown.

This proposal will place compliance costs on ISP businesses. There are costs involved in developing ISPs customer management systems to implement the regime, plus the per-transaction costs of processing each notice.

The ongoing yearly costs will be dependent on the number of notices received which is unknown at this time, but right holders will be required to pay a fee towards the administrative cost of issuing a notice to reduce the impact on ISP businesses.

A right holder would be able to enforce the debt through the Ministry of Justice Collections Unit. It is estimated that there may be between 1000 to 2400 cases taken to the Tribunal in the first year, with this reducing in subsequent years. Not all cases will result in an enforceable debt, and not all enforceable debts will need to be enforced. At this level, there would likely be some impact on the volume of civil enforcement proceedings. However, the Ministry of Justice Collections Unit has informed MED that these would appear to be manageable within the current case loads. Therefore no further funding is sought for civil enforcement proceedings as a result of this option.

It is recommended that the civil penalties of the court be extended to include suspension of an Internet service for six months. The Ministry of Justice Collections Unit have advised that it is not anticipated this will have an impact on the current court system.

One benefit of this option is that it will not impede the development of on-line markets in New Zealand and will allow New Zealand creators to distribute their works on the Internet. It will promote confidence in the use of online distribution channels as creators of copyright will have a low cost option available to deal with infringements.

At the same time, a major issue for some New Zealand creators previously was that the reliance on suspension by ISPs as a penalty would significantly impede access by consumers to their works as well as their ability to effectively distribute their works on the internet. These creators point out that the internet provides them with major new opportunities to develop and distribute their works in an innovative fashion. It is important therefore that any regulatory options do not cut across the ability of these creators to innovate and to exploit the advantages provided by the internet. They are not against regulation per se (indeed they support sensible regulation) but state that the regulation needs to be facilitative of the new environment. In this respect, they have a particular problem with option 3 which provides for ISPs suspending the accounts of repeat infringers. We believe that these views have significant merit.

This preferred option has the advantage that suspension will be used only in very limited circumstances, for cases of serious offending as determined by the court. As such, only a very small number of consumers would be impeded from accessing the Internet. Otherwise a range of measures would be used (ie notices and fines) that would allow almost all infringers to continue to use the internet unimpeded. (The option is in fact quite close to an option put forward by the Creative Freedom Foundation in the course of submissions to the Minister, although this body still opposes any sanctions based on suspension. The Creative Freedom Foundation represents New Zealand artists that are seeking to use the internet to distribute their works.)

The bringing into force of s92A is likely to increase the production of music, movies and games in New Zealand, as the producers of these works will have larger budgets to spread across the respective creative industries. Right holders also submit that there are increasingly less opportunities for new creators of content to be funded and introduced into the industry as a result of lower revenue. Right holders will therefore benefit as they will have more opportunities to create new works, and develop a larger base of creators.

It is also important that bringing s92A into force is likely to increase legal sales of music, movies and games in New Zealand. There is now some evidence that this is likely to occur. In Sweden for example, legal sales of music on the internet have increased since new anti-piracy legislation was introduced in April and the peer-to-peer file sharing website Pirate Bay was closed down. In the first 9 months of 2009, legal music sales increased by 18 percent with an 80 percent increase in digital sales and a 9 percent increase in physical sales (figures supplied by Billboard Magazine).

A follow on benefit is that the more the creative industries in New Zealand expand, the more opportunities for employment in the production, marketing and distribution of New Zealand works will arise. New Zealand creative industries are seen on a world stage as being at the forefront of innovation in the industry. Weta Digital in Wellington is an internationally renowned digital production company as a result of the *Lord of the Rings Trilogy*. By limiting the effects of illegal P2P file sharing on the creative industries' revenue, producers of creative works will have the budgets to be able to maintain their status as innovators, and in turn continue to bring the investment of large international customers into the New Zealand Market by offering technologically advanced production solutions.

The main benefit to New Zealand consumers is that more creative works will be available for purchase. This does not only apply to New Zealand works, as limiting the effects of illegal P2P sharing on distributors also allows them to bring more overseas works to the New Zealand market. Limiting the effects of illegal P2P sharing will also allow new creators to provide a wider variety and choice to the market for New Zealand produced music, films and games.

Implementation of section 92A may also increase the variety of ways consumers can access creative works in New Zealand. Limiting the effects of illegal P2P file sharing on the creative industries' revenue will give these industries the budgets to focus on new methods of access to works (for example paid Internet radio and web subscriptions to catalogues). These services are often slow to reach New Zealand consumers (for example the iTunes Store).

#### **IMPLEMENTATION AND REVIEW**

It is proposed that there be an implementation period of three months after the Bill is enacted to enable ISPs to upgrade their systems, and the Ministry of Justice to prepare for the extension to the Copyright Tribunal. Regulations will also be required to provide for template notices, set out the evidence that right holders must provide ISPs and set the level of liquidated damages.

The effectiveness and efficiency of this legislation would be evaluated through any changes in the:

- Trends and volumes of notices sent by ISPs;
- Evidence provided by right holders;
- Number and type of cases taken to the Tribunal (fast-track vs. hearings) and
- Number of complaints received about the process.

#### **CONSULTATION**

The proposal to create a notice process including right holders and Internet service providers and the Copyright Tribunal being the enforcement agency was consulted on in July 2009 by the MED. 113 submissions were received from right holders (Recording Industry Australia and New Zealand, New Zealand Film etc, MPA), the Telecommunications Carrier Forum (representing ISPs) and the public.

Stakeholders were broadly supportive of the proposal, although right holders preferred that ISPs were to terminate or suspend an Internet account after repeat infringement. ISPs and the public were generally not supportive of termination or suspension of Internet accounts at all.

In developing this proposal, the Ministry of Economic Development has consulted with the following government departments: The Ministry of Justice, The Ministry of Foreign Affairs and Trade, Privacy Commissioner and the Treasury. The Department of the Prime Minister and Cabinet has been informed.