

The Chair  
**Cabinet Economic Growth Committee**

## **Copyright (Infringing File Sharing) Amendment Act Regulations**

### **Proposal**

1. This paper proposes that regulations are made to prescribe a number of matters under the Copyright (Infringing File Sharing) Amendment Act 2011 (the Act).

### **Executive Summary**

2. The Act requires Internet Service Providers (defined in the Act as internet protocol address providers, IPAPs) to match allegations of copyright infringement via file sharing networks to their internet account holders (account holders), and send warning notices based on those allegations. The Act also extends the jurisdiction of the Copyright Tribunal to hear claims of copyright infringement resulting from file sharing, and make compensation based awards of up to \$15,000.
3. Section 10 of the Act inserts new sections 234(eb-eh), allowing for a number of technical and administrative matters to be prescribed by regulation. I propose that regulations are made for the following purposes:
  - a. Prescribing the information that rights owners need to provide to IPAPs in order to trigger the notice process;
  - b. Prescribing the form and content of notices that IPAPs send to account holders;
  - c. Prescribing the fee that IPAPs may charge copyright owners for performing the functions required by the Act;
  - d. Prescribing the method by which the Copyright Tribunal determines the amount of an award for copyright infringement arising from file sharing; and
  - e. Prescribing the necessary application fee to take a claim to the Copyright Tribunal.

## Background

4. The Act received the Royal Assent on 18 April 2011, and will come into force on 1 September 2011. The Act sets up a new enforcement measure for rights owners to use against those internet users who infringe copyright via file sharing networks. The process allows a rights owner to ask an IPAP to match allegations of copyright infringement via file sharing to their account holders. An IPAP is then required to send a series of infringement notices to their account holders, which will include the allegations of infringement, and educate notice recipients. If an account holder receives three notices, the copyright owner may elect to take a claim to the Copyright Tribunal. The Tribunal may award up to \$15,000.
5. The Act has been through a long development process since its predecessor, section 92A of the Copyright Act 1994, was stopped from coming into force in late 2009. There has been a significant amount of public debate and consultation on the regime in the Act.
6. In order to properly implement the regime, a series of technical and procedural requirements are necessary. These were not appropriate for inclusion in the Act itself as they are detailed, and, due to the fast changing nature of technology, may need amendment from time to time. The Ministry of Economic Development has worked closely with IPAPs and rights owners to ensure that the proposals include the necessary technical detail. A four week public consultation process was also undertaken. 58 submissions on the proposals in this paper were received from major rights owners, IPAPs, internet advocates and members of the public. Many practical suggestions from submitters have been incorporated into the proposals.

## Comment

7. Section 10 of the Act (new sections 234(eb-eh)) allows for a number of technical and administrative matters to be prescribed by regulation. I propose that regulations are made for the following purposes:
  - a. Prescribing the information that rights owners need to provide to IPAPs in order to trigger the notice process;
  - b. Prescribing the form and content of notices that IPAPs send to account holders;
  - c. Prescribing the fee that IPAPs may charge copyright owners for performing the functions required by the Act;
  - d. Prescribing the method by which the Copyright Tribunal determines the amount of an award for copyright infringement arising from file sharing;
  - e. Prescribing the necessary application fee to take a claim to the Copyright Tribunal; and

- f. Prescribing minor procedural matters relating to claims at the Copyright Tribunal.
8. Making regulations in these areas will provide greater certainty to all parties concerned over the technical and administrative aspects of the regime. It is also important for regulations to ensure that persons receiving notices are given enough information to properly understand their rights and obligations under the regime.
9. The proposed regulations will also minimise compliance costs for IPAPs and right holders. Both parties confirm that their costs in using the process or meeting their obligations under the regime would be higher if regulations were not made to standardise certain matters, and they were required to determine or negotiate the details amongst themselves.

### **Information showing allegations of infringement**

10. File sharing involves the direct or indirect transfer of copyright works via dedicated internet networks. Copyright owners currently gather evidence of alleged copyright infringement via file sharing by using legal detection software. The Act provides, in order to trigger the notice process, that a rights owner should provide an IPAP with information that identifies an IP (internet protocol) address at which infringement of its copyright is alleged to have occurred. The Act does not otherwise specify what information should be provided to IPAPs or how it should be provided. These matters are left to regulation (new section 234(eb) of the Act refers).
11. The benefit of prescribing information requirements in regulation is that it will reduce compliance costs by reducing the number of transactions between IPAPs and right owners. For example, it will avoid correspondence between IPAPs and right holders about what information an IPAP needs to identify a customer.
12. I propose that the regulations prescribe that rights owners should provide the following information to IPAPs:
  - a. Name, email address and New Zealand telephone number of rights owner;
  - b. Physical New Zealand address for service of rights owner;
  - c. Internet protocol address/addresses showing the internet location of the infringing activity;
  - d. Identification of the relevant file sharing protocol or software that has allegedly been used. This was suggested by submitters as being beneficial for both IPAPs in performing matching and account holders in understanding the nature of the allegation;
  - e. Name of the copyright work that has allegedly been infringed and name of the owner of that work (this may be different to the rights owner where a rights owner is a representative for several copyright owners);

- f. Any other unique identifiers or file numbers that identify the work that has allegedly been infringed;
  - g. A description of the type of copyright work or works that are alleged to have been infringed and the restricted act or acts that have allegedly been performed in breach of copyright;
  - h. Identification of the internet protocol addresses that the IPAP is responsible for allocating to its customers. If the allegations do not relate to an internet protocol address the IPAP is responsible for, then the IPAP should not be required to perform matching or send notices;
  - i. The New Zealand date and time of infringement. Due to the fact that internet protocol addresses are often reallocated to different users periodically, the time of infringement should be expressed down to the second;
  - j. Where a rights owner is an agent or representative body for a group of copyright owners, a signed statement of authorisation from the copyright owner or their duly licensed representative (for example, the copyright owner's record label). This requirement is important to ensure that the person providing that information to the IPAP is authorised by the copyright owner or their licensed representative to act on their behalf. This will mitigate in part the risk that false allegations are forwarded to IPAPs;
  - k. A statement that to the best of the rights owner's knowledge, the information provided to the IPAP is true and correct;
  - l. Digital or physical signature of the rights owner accompanying the information; and
  - m. Where an IPAP sets up a dedicated technical process for processing allegations provided by the rights owner (such as a web form), a requirement for the rights owner to use that process in absence of an agreement to the contrary. IPAPs suggested this should be included as it would be more costly to receive the information in a different format from each rights owner.
13. While the suggested requirements are detailed and are likely to be somewhat onerous for both rights owners to collect and IPAPs to process and store, I consider it important that the information is as detailed as possible. Submitters on the regulations did not consider this to be a problem, and stressed the need to ensure that the information provided to an IPAP was as detailed and robust as possible.
14. Less prescriptive requirements are likely to have serious negative consequences, such as increasing the likelihood that false or malicious claims are forwarded to IPAPs. I am therefore of the view that this level of detail is necessary to ensure the regime remains credible.

## Form and Content of Infringement Notices

15. The Act requires an IPAP to match the information provided by a rights owner to the relevant account holder and then send them a series of infringement notices.
16. Notices must provide relevant information in order to properly identify the alleged infringements, and also educate the account holder about their rights and obligations under the new process. Notices will also provide general information about copyright.
17. The process also allows an account holder to challenge an infringement notice directly with a copyright owner before a subsequent notice is sent. Notices must therefore include the relevant information to enable an account holder to challenge a notice.
18. The Act specifies some requirements for the form and content of notices, and inserts new sections 234(eb) and (ec) to allow further details to be prescribed by regulation. I propose that the regulations prescribe that the following must be included in an infringement notice, to ensure that account holders will be able to understand the full extent of the allegation, and therefore be in a position to properly contest it:
  - a. All information about alleged infringements that is provided to the IPAP by the rights owner under regulations;
  - b. An information pack or link to relevant information drafted by the Ministry of Economic Development (MED) and housed on its website. This will include information about all aspects of the regime, including the account holder's rights and obligations, general copyright information, and information on internet security. It is appropriate that the Government play a role in ensuring the public is properly educated about the new process, as a key objective of the file sharing regime is to educate internet users about copyright infringement resulting from file sharing. This will also avoid the risk, despite best endeavours, that information provided by an IPAP or rights owner will be insufficient for an account holder to understand their rights and obligations under the regime. It will also reduce compliance costs for IPAPs and rights owners;
  - c. A unique notice identifier provided by the IPAP which includes the type of notice (be it detection, warning, enforcement) and a notice number. IPAPs have requested this requirement to enable easier tracking of notices;
  - d. IPAP contact details and any covering information an IPAP may wish to provide;
  - e. Any relevant account holder information that would usually be provided in IPAP correspondence; and
  - f. The prescribed form for challenging a notice.

19. In respect of the challenge process, new section 122G inserted by section 6 of the Act specifies that a challenge must be in the prescribed form. I propose that the regulations prescribe the following requirements are included in the challenge form and rights owner responses, to ensure that IPAPs are able to effectively process challenges with a minimum of processing by the IPAP:
  - a. That the challenge or response must include the unique notice identifier for the relevant notice (including the type of notice (be it detection, warning, enforcement) and a notice number);
  - b. That an account holder challenge is made using the process specified by the IPAP sending the infringement notice; and
  - c. That any rights owner response is made via the method specified by the IPAP.

### **Cost recovery by IPAPs**

20. Both rights owners and IPAPs will incur costs in meeting their obligations under or using the regime. The Act allows an IPAP to charge a rights owner for performing the functions required under the new process, but does not specify the nature of the fee or provide sufficient certainty about what costs are recoverable. New section 234(eh) provides that regulations may prescribe the fee or the method of calculating the fee.
21. In November 2009 Cabinet agreed that IPAPs should meet their own costs in collecting, maintaining and processing data to meet their obligations under this process, but that they would be able to charge a fee per notice to recover the administration costs of issuing notices (EGI min (09) 249 refers).
22. IPAPs have repeatedly submitted that they should be able to fully cost recover through the notice fee, and gave estimates during the Select Committee process of between \$14 and \$56 per notice, depending on the amount of automation they could build into their systems, and the number of notices that might be sent. In its submission on the regulations consultation document, the Telecommunications Carriers Forum (TCF), whose members provide more than 90% of the country's internet connections, suggest an average notice fee of \$40.
23. Rights owners argue that IPAPs should not be able to recover their costs. The Recording Industry Association of New Zealand (RIANZ) submission on the consultation document suggests a fee of \$2 per notice would be appropriate. Rights owners note that they will meet the costs of gathering evidence, and argue that if they have to pay IPAP costs then the regime will not provide an affordable enforcement mechanism.
24. This disagreement between rights owners and IPAPs on cost recovery was a key driver for the development of the Act. Rights owners and IPAPs could not voluntarily agree on the sharing of costs under such a regime. The question of cost sharing has also caused significant controversy in other jurisdictions (specifically the United Kingdom, which has decided that rights owners should pay 75 per cent of IPAP costs) that have legislated for similar notice regimes.

25. IPAPs are in a unique position to facilitate the effective enforcement of copyright over their networks, as they are the only ones that can identify alleged infringers. While I consider that IPAPs have some responsibility to act because of this position, and therefore bear some of the cost, I do not consider they should be entirely responsible as suggested by rights owners. Rights owners will be using the regime to aid the effective enforcement of their rights, and therefore must bear a significant proportion of the implementation costs.
26. However, I do not consider that rights owners should bear the full implementation costs of IPAPs. IPAPs are being granted a safe harbour from third party liability that could occur as a result of their customers' file sharing activity. In Australia, legal action over this issue has been taken against one IPAP, resulting in significant legal costs for both parties<sup>1</sup>.
27. I consider that the fee should serve the following functions:
  - a. Ensure that the regime is a more cost effective enforcement measure for rights owners than what is currently available through the courts;
  - b. Ensure that rights owners are able to pursue a reasonable number of allegations through the notice process, thereby educating internet users;
  - c. Mitigate the risk of false or malicious allegations being forwarded to IPAPs, and prevent IPAPs from being inundated such that they find it difficult to comply with the regime; and,
  - d. Allow IPAPs to recover a reasonable proportion of the costs of implementing the regime.

### *Proposal*

28. I propose that the fee should be prescribed by regulation. If a fee is not set then fees will need to be negotiated by rights owners and IPAPs, who have previously been unable to agree on this issue. Both rights owners and IPAPs are in favour of setting the fee in regulations. I note also that continued disagreement on the fee issue between rights owners and IPAP would put the effectiveness of the regime at risk.
29. I also propose that an IPAP is able to charge a fee per allegation the rights owner forwards to them, rather than per notice sent to an account holder. The per allegation approach is preferred because an IPAP will not know whether they will be required to send a notice to an account holder until they have performed matching and compliance work. It would be difficult for IPAPs to therefore bill rights owners subsequently. This is the favoured method of IPAPs.
30. I propose that the fee is \$20. I note that this amount will allow an IPAP to recover more than the simple administration cost of issuing a notice, as agreed by Cabinet in 2009. The parties may still agree to negotiate a lower fee amongst themselves.

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<sup>1</sup> The issue is being appealed through the Courts and is therefore yet to be determined.

## *Review*

31. I also propose, due to uncertainty surrounding notice volumes, that the fee is reviewed after six months of the Act being in force.

## **Method of calculating an award at the Copyright Tribunal**

32. The Act extends the jurisdiction of the Copyright Tribunal to hear claims arising from infringement of copyright via file sharing, and make monetary awards of up to \$15,000 dollars. New section 234(ef) provides that regulations may prescribe the method by which the Tribunal determines the amount of an award.
33. I consider that the regulations should prescribe a method by which the Copyright Tribunal will determine the amount of an award. This will provide some certainty to users of the system, and avoid the need for technical legal argument on the calculation of damages (which would be difficult for persons without legal representation).
34. I propose that awards include both a compensatory and a deterrent element. The inclusion of a deterrent element is needed to provide the incentive for infringers to curb illegal activity. The compensatory element would be based on the value of the work. The Tribunal would also have discretion to add a deterrent element to the award after considering the following factors (which are explained in more detail below):
- The flagrancy of the infringement;
  - The possible effect of the infringing activity on the market for the work; and
  - Whether the amount already recoverable by a rights owner under the Act for the fees associated with the regime would constitute an appropriate deterrent for further infringing; and any other circumstances the Tribunal considered relevant.
35. Flagrancy is a concept already included in the Copyright Act 1994. A Court currently has the ability to make an award of additional damages where purely compensatory damages would not repair the damage the rights owner suffered. In considering the amount of additional damages the Court may consider the flagrancy of the infringement.
36. I consider it important that the Tribunal has regard to the possible effect of the infringing on the market for the work. File sharing can have a series of effects on the market with varying degrees of significance. For example, the making available of a work to thousands of internet users is likely to be more detrimental to the market for that work than the download of one copy. Infringing copyright before the release date of the work is also likely to have significant negative effects on the revenue of a rights owner. The Tribunal should be able to consider these matters in deciding the amount of any deterrent element.

37. The Act allows the Tribunal to include notice fees and the Tribunal application fee in the amount of an award. In some cases this amount may constitute a sufficient deterrent. I therefore consider the Tribunal should take these fees into consideration when determining whether a deterrent element is necessary.

## **Copyright Tribunal**

### *Application Fee*

38. New section 234(ed) provides that regulations may prescribe the fee payable by rights owners for applications to the Copyright Tribunal. In determining the fee I have considered the following matters:
- a. The purpose of tribunals – to provide inexpensive, timely access to justice;
  - b. The appropriate level of cost-recovery based on public/private benefit of the dispute;
  - c. The cost model for the Tribunal (total funding, caseload and actual and projected) costs;
  - d. How the proposed fee sits within the fee structure across other tribunals;
  - e. Advice and Guidelines from the Office of the Auditor-General, Treasury and the Regulations Review Committee; and
39. Based on my consideration of these factors I recommend that the Tribunal application fee is set at \$200.

### *Copyright Tribunal procedures*

40. The Act is silent as to whether an applicant or appellant at the Tribunal can withdraw an application or any arguments raised in respect of an application. New Section 234(ee) enables regulations to prescribe the practices and procedures of the Copyright Tribunal in determining applications. I propose that regulations should allow either party to withdraw their application or arguments if they see fit.
41. Additionally, I propose that regulations clarify that a matter heard on the papers may be heard by 1 or more Tribunal members, as opposed to the three members required for a physical hearing. Section 122L(3) of the Act already provides that the Tribunal may determine its own procedures for determining an application made on the papers, subject to any regulations.

## **Consultation**

42. The Treasury and the Ministry of Justice have been consulted on the paper. The Department of the Prime Minister and Cabinet has been informed. The Ministry of Economic Development undertook a public consultation process on the matters discussed in the paper. 58 submissions were received from stakeholders, primarily from major rights owners and IPAPs. Some suggestions from submissions have been incorporated into my recommendations.

## **Fiscal Implications**

43. No fiscal implications arise from the proposals in this paper.

## **Human Rights**

44. The proposals in this paper appear consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

## **Legislative Implications**

45. The proposals in this paper will result in amendments to the Copyright (General Matters) Regulations 1995.

## **Regulatory Impact Analysis**

46. The RIA requirements apply to the proposals in this paper. The attached RIS outlines the impacts of the proposals.

## **Quality of the Impact Analysis**

47. The Deputy Secretary, Organisational Development and Support Branch, Ministry of Economic Development and the Regulatory Impact Analysis Review Panel have reviewed the Regulatory Impact Statement (RIS) prepared by the Ministry of Economic Development and associated supporting material, and considers that the information and analysis summarised in the RIS meets the criteria necessary for Ministers to fairly compare the available policy options and take informed decisions on the proposals in this paper.

## **Consistency with Government Statement on Regulation**

48. I have considered the analysis and advice of my officials, as summarised in the attached Regulatory Impact Statement and I am satisfied that, aside from the risks, uncertainties and caveats already noted in this Cabinet paper, the regulatory proposals recommended in this paper:

- Are required in the public interest;
- Will deliver the highest net benefits of the practical options available, and
- Are consistent with our commitments in the Government Statement on Regulation.

## **Publicity**

49. I recommend that this paper is published on the Ministry of Economic Development website, with an accompanying press release from myself as Minister of Commerce.

## Recommendations

50. It is recommended that the Committee:

- 1 Note that the Copyright (Infringing File Sharing) Amendment Act 2011 received the the Royal Assent on 18 April 2011, and will come into force on 1 Sepetmber 2011;
- 2 Note that regulations are required to prescribe a number of technical and administrative details necessary to implement the regime;

### *Infringement Information*

- 3 Agree that regulations be made to provide requirements for the infringement information a rights owner must provide to an Internet Protocol Address Provider when requesting an infringement notice be sent to an account holder;
- 4 Agree that the requirements for infringement information proposed in the regulations include:
  - 4.1 Name, email address and New Zealand telephone number of rights owner;
  - 4.2 Physical New Zealand address for service of rights owner;
  - 4.3 Internet protocol address/addresses showing the internet location of the infringing activity;
  - 4.4 Identification of the relevant file sharing protocol or software that has allegedly been used;
  - 4.5 Name of the copyright work that has allegedly been infringed and name of the owner of that work (this may be different to the rights owner where a rights owner is a representative for several copyright owners);
  - 4.6 Any other unique identifiers or file numbers that identify the work that has allegedly been infringed;
  - 4.7 A description of the type of copyright work or works that are alleged to have been infringed and the restricted act or acts that have allegedly been performed in breach of copyright;
  - 4.8 The New Zealand date and time of infringement, expressed down to the second;
  - 4.9 Where a rights owner is an agent or representative body for a group of copyright owners, a signed statement of authorisation to act from the copyright owner or their licensed representative;

- 4.10 A statement that to the best of the rights owner's knowledge, the information provided is true and correct; and
  - 4.11 Digital or physical signature of the rights owner accompanying the information.
- 5 Agree that regulations are made in relation to the processing of infringement information by Internet Protocol Address Providers;
  - 6 Agree that the requirements in relation to the processing of infringement information include:
    - 6.1 That the information sent to the Internet Protocol Address Provider identifies internet protocol addresses that the Internet Protocol Address Provider is responsible for allocating to its customers; and
    - 6.2 Where an Internet Protocol Address Provider sets up a dedicated system to process allegations, that the rights owner must use that system.

*Form and content of notices*

- 7 Agree that regulations be made prescribing the information that must be included either in, or with, an infringement notice sent by an Internet Protocol Address Provider to an account holder;
- 8 Agree that the information in, or with an infringement notice must include:
  - 8.1 All information about alleged infringements that is provided to the Internet Protocol Address Provider by the rights owner;
  - 8.2 An information pack or link to relevant information drafted by the Ministry of Economic Development and housed on its website;
  - 8.3 A unique notice identifier provided by the Internet Protocol Address Provider which must include the type of notice;
  - 8.4 Internet Protocol Address Provider contact details and any covering information an Internet Protocol Address Provider may wish to provide;
  - 8.5 Any relevant account holder information that would usually be provided in Internet Protocol Address Provider correspondence; and
  - 8.6 The prescribed form for challenging an infringement notice and a description of the Internet Protocol Address Provider's preferred process for challenging that notice.

*Notice Fee*

- 9 Agree that regulations be made prescribing the rate and method of calculating the fees that may be charged by Internet Protocol Address Providers to rights owners under new section 122U of the Copyright (Infringing File Sharing) Amendment Act 2011;
- 10 Agree that the fee that may be charged by an Internet Protocol Address Provider may cover more than the administration cost for issuing notices;
- 11 Agree that the rate of the fee is 20 dollars;
- 12 Agree that regulations be made requiring that payment of the fee is calculated based on the number of allegations the rights owner asks an Internet Protocol Address Provider to process under new section 122C of the Copyright (Infringing File Sharing) Amendment Act 2011, unless an agreement has been made to the contrary between the rights owner and the Internet Protocol Address Provider;
- 13 Agree that the fee should be reviewed after the Act has been in force for six months;

*Challenge procedures*

- 14 Agree that regulations be made prescribing a form for challenging an infringement notice;
- 15 Agree that the contents of the prescribed form include the unique notice identifier of the infringement notice that the challenge relates to;
- 16 Agree that regulations be made that propose the procedure for challenging an infringement notice;
- 17 Agree that the procedure for challenging an infringement notice includes:
  - 17.1 That an account holder challenge is made using the process set out by the Internet Protocol Address Provider in the infringement notice to which the challenge relates; and
  - 17.2 That any response made by rights owner to a challenge is made via the method preferred by the Internet Protocol Address Provider.

*Copyright Tribunal*

- 18 Agree that regulations be made prescribing the methods of calculating the sum the Copyright Tribunal may order an account holder to pay under new section 122O of the Copyright (Infringing File Sharing) Amendment Act 2011;
- 19 Agree that the regulations require the sum to be based on the value of the works infringed and provide the Copyright Tribunal with a discretion to add an additional deterrent sum to the amount;

- 20 Agree that the Copyright Tribunal, when considering whether an additional deterrent sum is required and the amount of the deterrent sum proposed in the regulations, must consider the following factors:
- 20.1 the flagrancy of the infringement;
  - 20.2 the effect of the infringing on the market for the work;
  - 20.3 any amount awarded against the account holder to recompense the rights owner for its fees under the regime; and
  - 20.4 any other factors the Copyright Tribunal considers necessary.
- 21 Agree that regulations be made prescribing the fee payable by rights owners for applications to the Copyright Tribunal;
- 22 Agree that the fee is 200 dollars;
- 23 Agree that regulations be made to prescribe the practices and procedures of the Copyright Tribunal in relation to determining applications under new section 122J, as inserted by section 6 of the Copyright (Infringing File Sharing) Amendment Act 2011 Act;
- 24 Agree that the regulations provide that an applicant or appellant may, at any time, withdraw any application or arguments lodged with the Copyright Tribunal by giving written notice to the Copyright Tribunal;
- 25 Agree that regulations provide that an application heard on the papers may be heard by one or more Tribunal members;
- 26 Invite the Minister of Commerce to issue drafting instructions to Parliamentary Counsel to give effect to the above proposals;
- 27 Note that the Minister of Commerce intends to publish this paper on the Ministry of Economic Development's website subject to any necessary deletions justified in accordance with the Official Information Act 1982.

Hon Simon Power  
**Minister of Commerce**

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

## **Regulatory Impact Statement**

### **Agency Disclosure Statement**

This Regulatory Impact Statement has been prepared by the Ministry of Economic Development, in consultation with the Ministry of Justice (who prepared the section on the Copyright Tribunal application fee). It provides an analysis of options for regulations that will aid implementation of the Copyright (Infringing File Sharing) Amendment Act 2011 (The Act).

The Act sets up a notice process aimed at deterring file sharing that infringes copyright. A series of options for regulations under the Act have been considered. The overall impacts associated with not providing further regulations are:

- The Act will be very difficult, and therefore more costly, to implement;
- The public will not be able to properly understand the processes under the Act;
- The effectiveness of the the Act may be limited;
- The efficient working of the Copyright Tribunal may be frustrated.

It was difficult to assess the size of the impacts associated with the options set out in the analysis, as the number of notices sent under the regime, and their deterrent effect on the amount of infringing activity, is very difficult to predict. The number of notices has a direct correlation to the implementation costs of the regime. The analysis in this paper is therefore generally qualitative. However, those that will implement the Act (internet service providers and copyright owners), and the public, agreed with our assumptions as to the likely problems that would arise if regulations are not made. In particular internet service providers noted that a lack of detail would increase the complexity and cost of implementing the regime.

Of themselves, the options in this paper are unlikely to impose additional costs on businesses, impair private property rights, market competition, or the incentives on businesses to innovate and invest, or override fundamental common law principles. However, the principal legislation to which the regulations relate does impose significant costs on businesses. The preferred options in this paper aim to lower the implementation costs of the principal legislation by providing certainty to the parties implementing it.

George Wardle  
Acting Manager, Intellectual Property

## REGULATORY IMPACT STATEMENT

The Copyright (Infringing File Sharing) Amendment Act 2011 (the Act) amends Part 6 of the Copyright Act 1994 to provide a three notice process aimed at deterring online file sharing which infringes copyright. The Act comes into force on 1 September 2011.

Upon receiving copyright infringement information from a copyright owner or their licensed representative (defined in the Act as rights owners), an internet service provider (defined in the Act as internet protocol address provider, IPAP) will be required to match that information to the relevant account holder, and send up to three infringement notices within prescribed timeframes. Internet account holders will also have the opportunity to challenge notices within these timeframes.

After using the notice process, the Act will allow rights owners to take a claim to the Copyright Tribunal (the Tribunal) against an internet account holder they allege has breached copyright via file sharing.

This paper discusses options for regulations under the Act. To date there has been a high level of public interest and debate over the Act and we expect the regulations will attract a similar level of interest.

## STATUS QUO AND PROBLEM DEFINITION

### *Status Quo*

The Act provides for regulations to prescribe further details around the following aspects of the regime:

- The infringement information necessary to trigger the sending of notices. While the Act specifies that an IP address should be provided, it does not otherwise specify what information should be provided to IPAPs or how it should be provided. This is left to regulation;
- The requirements for the form and content of notices. While it is possible that the requirements in the Act are sufficient, there is no detail over the necessary education information that must be included with a notice;
- The fee an IPAP may charge a rights owner for performing the functions under the regime. There is currently no guidance as to the appropriate amount of the fee;
- The method by which the Tribunal determines a monetary award for copyright infringement via file sharing. The Act currently gives no guidance on the appropriate method;
- The Tribunal application fee. This is not currently specified; and

- Any procedural requirements necessary for claims at the Tribunal. The Act is currently silent as to whether an application or any arguments can be withdrawn.

Sections 122C to 122O of the Act already prescribe some detail over these matters. The status quo would require those affected to rely on the provisions already in the Act.

### *Problem Definition*

Due to a lack of detail in the Act, the following problems are likely to arise without further regulation:

- IPAPs and rights owners will be unable to successfully implement the Act without further prescribed requirements for copyright infringement information and notices. If the information provided was inadequate, an IPAP would be required to correspond with a rights owner to get the necessary information. This would increase implementation time and costs for both parties;
- A lack of information in notices may mean that account holders will not be properly informed about the nature of the allegations, their obligations under the Act, or about the implications of file sharing that infringes copyright. This may make it difficult for account holders to contest claims in legitimate circumstances and put them at an informational disadvantage compared with a rights owner who is making an allegation;
- IPAPs and rights owners will not have sufficient certainty as to the appropriate fee that an IPAP may charge for performing the functions under the Bill. This is likely to involve complex and costly negotiations between both parties in order to reach a fee. The level of the fee will determine the number of notices sent and therefore has a direct impact on the effectiveness of the regime;
- A lack of requirements for the information that must be provided may result in the Tribunal having inadequate information with which to be able to determine a claim for copyright infringement; and
- The deterrent objective of the regime and the efficient working of the Tribunal may be frustrated if they are to rely on normal damages principles when determining claims.

While it was difficult to assess the size of these problems, the assumption that they would occur was tested with rights holders, IPAPs and the public during a four week public consultation process. Submitters agreed with our assumptions on the likely problems that would be created if regulations were not made. Specifically, IPAPs noted that their implementation costs would be much higher without further regulations, and that they would be in a position of extreme uncertainty as to the technical requirements necessary.

A key difficulty in assessing the size of the problems is that the number of notices that will be sent under the regime is unknown and difficult to predict. Due to the warning and education effect of the notices, the level of infringing may also drop substantially after an initial bedding in period, thereby reducing the number of notices.

Additionally, the amount of the fee that IPAPs are able to charge for a notice will dictate the numbers of notices copyright owners will send. For example, a high notice fee would result in low notice numbers, thereby decreasing the likely size of the impacts. We also note that the size of an IPAPs market share is likely to dictate the number of allegations they are asked to process. Different IPAPs will be impacted differently by the options in this document.

The impacts of each option can therefore only be estimated, and their size is both difficult to assess at this time, and likely to change once the Act is in force for a period of time. Monitoring the implementation of the the Act over the initial period will be very important to help re-assess the size of the impacts after an initial period, and we have recommended a review of certain aspects of the regulations discussed below.

## **OBJECTIVES**

The overarching objectives of the regulations are to:

- Provide certainty over the technical details of the Act;
- Limit implementation costs through certainty over the detail; and
- Ensure that the regulations do not frustrate the underlying policy objectives of the Act.

There are also differing objectives with regard to each aspect of the proposed regulations. We describe these more specifically under each heading below.

## **REGULATORY IMPACT ANALYSIS**

The impacts discussed in the following section are created by the Act to which the regulations relate. In considering options for the regulations we are bound by the fact that there are significant implementation costs resulting from the Act. Our preferred options try to mitigate the costs and impacts of the legislation by providing technical certainty to the parties using the system. The preferred options also aim to ensure the underlying policy objectives of the Act are achieved.

### **Requirements for infringement information**

The Ministry of Economic Development (MED) tested a range of information requirements during a public consultation process. The information provided to IPAPs must serve a series of objectives:

- To identify the rights owner making the allegation and ensure they are authorised to act;

- To enable the IPAP to identify the account holder, and to identify and describe the nature of the infringement and the work that has been infringed;
- To be of sufficient detail for an account holder to understand the allegations of infringement and be in a position to dispute those allegations where they have valid reasons; and
- To be of sufficient detail for the Copyright Tribunal to use the information when determining copyright infringement.

*Alternative option – No further regulation*

The Ministry does not consider that this option would be practical, as there is a simple lack of detail already included in the Act. A series of negative impacts could arise further if regulations are not made:

- Information necessary to perform the requirements of the Act may not be provided to IPAPs and therefore they will have to incur costs contacting the rights owner to get the information. There is a risk that IPAPs and rights owners disagree over the information that is required, requiring negotiation (and therefore cost) to get agreement. IPAPs also state that their costs may increase if their preferred method of accepting and processing the information is not used by rights owners;
- Without requiring that a rights owner must show they are the appropriate person to act, there is a danger that false or malicious claims may be filed by persons who have no relationship with the copyright owner. Some submitters note that this situation has been known to occur overseas;
- While the requirements that identify the relevant infringements are detailed and may be onerous for rights owners to collect and IPAPs to process, there is a risk that without such information allegations of infringement will not be accurate and will be difficult for IPAPs to match to account holders. Account holders may not be able to properly contest allegations made against them if they are not provided with adequate information identifying the infringements; and
- The Tribunal will use infringement notices (and therefore the allegations included within) as the basis for determining claims. Without ensuring this information is adequate the Tribunal may find itself in the position where it does not have enough information before it to properly determine claims. Public submissions noted that it is important that the information requirements are as detailed as possible to resolve these issues.

Due to the uncertainty over the number of notices that are likely to be sent, it is difficult to assess the size of the impacts, their effect on implementation costs, and their effect on the effectiveness of the regime. However, we are of the view that an absence of regulation under this heading is likely to significantly increase the complexity and compliance costs of the regime, and create risks that the regime will either not be credible or be subject to abuse.

*Preferred option*

We consider that a series of technical requirements are included in regulations under this heading. The requirements cover the following:

- Practical requirements for identifying the rights owner. The requirements also ensure that where a rights owner is a representative for a group of copyright owners, that rights owner is duly authorised to act;
- Detailed requirements that ensure the alleged infringements are identified and described in a robust manner; and
- Requirements that rights owners follow the preferred process of an IPAP for the sending and processing of information.

*Benefits of the preferred option*

The preferred option is likely to decrease the implementation costs of the regime for IPAPs and rights owners when compared with the status quo, as they will not be required to determine the necessary requirements for the information for themselves. The preferred requirements will also ensure an IPAP has sufficient information with which to match allegations to account holders, a key purpose of the Act.

It is also likely that detailed requirements will help notice recipients to understand the nature of the allegations being made against them, and provide them with sufficient information with which to contest claims of infringement in legitimate circumstances.

The preferred option, in conjunction with the notice fee (discussed later in this document) should also mitigate the risk of false or malicious claims being forwarded to IPAPs. A person wishing to use the system maliciously is likely to find it difficult and costly to meet the information requirements, therefore deterring them from making such claims. The requirement to pay the notice fee will act as a further barrier.

As the required information is included in notices the Tribunal will use to determine claims, the preferred option will also mitigate the risk that the Tribunal does not have enough information with which to determine claims.

**Requirements for the form and content of notices**

Sections 122D to G of the Act give some requirements for the form and content of notices an IPAP will be required to send to an internet account holder. The notices have three key objectives:

- Acting as warnings where an account holder is alleged to have infringed copyright;
- Educating notice recipients about the practical aspects of the notice regime, and issues associated with copyright infringement; and
- Serving as the basis of evidence the Tribunal will consider when deciding whether to make a monetary award.

In addition, an account holder will be able to challenge an infringement notice with a copyright owner. Regulations may prescribe further details over the form and content of challenges.

#### *Alternative Option 1 – No further requirements*

This option would rely on the requirements in the Act for the form and content of notices. While it is possible that the requirements in the Act are sufficient, there is no detail over the necessary education information. If this information is not prescribed the education effect from the Act may be frustrated. It is also likely that cost will increase for IPAPs if no further regulations are made – they will be required to develop education information for themselves, or rely on rights holders to provide it.

There is also a risk that the infringement and education information that is provided will be inadequate, to the detriment of account holders trying to understand the regime. If regulations do not prescribe further detail on the education information that must be included, and require that the full range of infringement information is also given to them, an account holder may be unable to contest allegations of infringement in legitimate circumstances.

#### *Alternative option 2 – Standard form notices*

We also considered the option of standard form notices. IPAPs noted that standard form notices might be beneficial for smaller IPAPs, who possibly did not have the capability to draft their own notices. However we did not favour this option as it would be too restrictive, and would not allow notices to change over time.

#### *Alternative option 3 – Non-mandatory guidelines*

This option would involve a range of non-mandatory guidelines for the relevant education information. While this would provide flexibility for IPAPs, and to some extent provide them with an indication of the type of information that should be included, they would still have to draft the information for themselves, adding cost. We also consider that the risk that adequate information was not included might not be mitigated under this option.

#### *Preferred option*

Our preferred option is that regulations should set out the following requirements for inclusion in infringement notices:

- All information about alleged infringements that is provided to the IPAP by the rights owner in order to trigger the sending of a notice;
- A link to education information drafted by MED and housed on its website;
- Notice identification information and relevant account information; and
- A form or process for challenging an infringement notice.

Additionally, the preferred option requires that rights owners and account holders use an IPAPs preferred process for challenging notices and responding to challenges.

### *Impacts of the preferred option*

The preferred option should ensure that an appropriate amount of education information is provided to notice recipients. The Ministry will be able to ensure that the education information is accurate and unbiased, and drafted in a manner appropriate for the public. Survey evidence from overseas suggests that 70% of people who receive an education notice will curb infringement. Ensuring that appropriate information is included should therefore contribute to the effectiveness of the regime in deterring file sharing that infringes copyright.

This option should also decrease implementation costs for IPAPs, who would otherwise have to produce this information for themselves, or rely on rights owners to provide it to them.

IPAP costs will also be decreased by ensuring that their preferred method must be used when an account holder challenges a notice or a rights owner responds to that challenge. IPAPs are acting simply as a conduit for these challenges, and should therefore be able to process them in a manner consistent with their systems. It is therefore practical that account holders and rights owners comply with the preferred method of the IPAP.

By ensuring that all the infringement information provided to the IPAP is in turn provided to the account holder receiving the notice, the risk that the recipient is ill informed about the claims being raised will be mitigated. This will help the account holder to be in a position to contest claims of infringement where they have legitimate reasons.

### **Fee an IPAP can charge a rights owner**

Section 122U of the Act allows an IPAP to charge a rights owner a fee for performing the functions required under the Act. Regulations may prescribe the rate or method of calculating the rate of the fee. The fee should serve the underlying policy objectives of the Act. These include:

- Ensuring that rights owners are able to pursue a reasonable number of allegations through the notice process, thereby educating internet users;
- Ensuring that the regime is a more cost effective enforcement measure for rights owners than what is currently available through the Courts;
- Mitigating the risk of false or malicious allegations being forwarded to IPAPs and ensuring that IPAPs are not inundated with large volumes; and
- Allowing IPAPs to recover an appropriate proportion of the costs of implementing the regime.

There are significant costs involved in implementing the regime for IPAPs. Rights owners also have significant costs in gathering infringement information. In 2009 Cabinet agreed that IPAPs should meet their own costs in collecting, maintaining and processing data to meet their obligations under this process, but that they would be able to charge a fee per notice to recover the administration costs of issuing notices (EGI min (09) 249 refers).

However, IPAPs have repeatedly submitted that they should be able to fully recover the setup and on-going costs of the regime through the notice fee, while rights owners consider that the fee should only cover the small on-going cost of forwarding a notice to a customer. The level of the fee therefore represents a difficult tradeoff between the interests of IPAPs and the interests of rights owners.

The fee will directly influence the number of notices sent, and will therefore impact on the overall effectiveness of the regime. If the fee is set too high (resulting in a low number of notices being sent) it is likely that the warning and education aspects of the regime will be limited. As noted above, educating consumers about the issue through a notice may significantly reduce the amount of infringing activity.

However, if the fee is set too low, IPAPs are likely to be inundated with notices, making it difficult to comply with the regime. Setting the fee too low will also result in IPAPs not being able to recover their implementation costs, with the likely result that those costs will be passed on to consumers.

We also note that each IPAP will have different systems and levels of automation in implementing the system. This means that the costs of implementing the regime vary between IPAPs. Due to the difference in market share, it is also likely that smaller IPAPs will be asked to process notices less often. The rate of the fee will therefore impact each IPAP differently in terms of cost recovery. We consider that with time, IPAPs may be able to more fully automate their systems for processing notices. This may mean that implementation costs lower over time.

Additionally, we note that in attempting to split costs of a similar regime, the United Kingdom chose a ratio of 75:25 with rights owners responsible for the larger proportion.

#### *Alternative option*

This option would involve not setting a fee. There are potential negative impacts as both rights owners and IPAPs would not have sufficient certainty around the elements of the regime the fee could account for. This option may involve a series of negotiations between IPAPs and rights owners to determine the level of fee that would be charged, which would no doubt involve a series of other costs and impacts (e.g. legal costs) to determine this.

Furthermore, in absence of a fee, it is likely that the effectiveness of the regime itself will be inhibited. Rights owners will be unable to use the regime to any great extent if the fee is too high. This option is therefore not favoured by the Ministry.

*Preferred option**Amount of the fee*

Our preferred option is to set the fee at \$20. This number is both lower than the average full cost recovery fee of \$40 suggested by the Telecommunications Carriers Forum (TCF), whose members provide 90% of the country's internet connections, and higher than the \$2 (or lower) preferred fee of rights owners. We also recommend a review of the amount within six months, due to the difficulties in assessing the impacts of the fee on the effectiveness of the regime, and the likelihood that implementation costs will be passed on to consumers.

*When should the fee be calculated?*

During consultation on the regulations IPAPs suggested that calculating the fee based on the number of notices they eventually sent to account holders would be too difficult due to the fact that some work must be undertaken before a notice was sent. They request that payment should be calculated when they receive a request to process information from a rights owner, and should be made before any processing is done. We agree that the fee should be calculated based on the number of allegations sent by rights owners to IPAPs.

*Impacts of the preferred option*

We consider setting the fee at this level will allow rights owners to send a reasonable number of notices in the initial stages of the regime, while allowing IPAPs to recover a reasonable proportion of their implementation costs and prevent an unmanageable number of notices. A review of the fee after six months will consider whether the balance we have struck results in the underlying policy objectives of the Act being met.

We note that setting the fee at this level will result in significantly lower notice volumes than rights owners would wish to be able to pursue through the system. This may limit the effectiveness of the regime and the amount of public education that results. However, a lower number of notices at the outset will give IPAPs time to better develop their systems, which may result in lower overall costs after an initial bedding in period.

We also note that the preferred fee will not result in an IPAP being able to fully recover their implementation costs through the fee, the likely effect being that those costs will be passed on to consumers. We consider this necessary as setting the fee based on full cost recovery would mean that rights owners are unable to use the regime to any great extent. We consider that an appropriate balance has been struck between the interests of rights owners and IPAPs in the amount of the fee.

Additionally, setting the fee at this level is consistent with one of the underlying policy rationales of the Act, which is that the notice process should be a more cost effective enforcement measure than is currently available through the District Court. For example, if a rights owner was to take a person to the District Court for a half day hearing, the cost would be \$906 (this does not include a range of other fees necessary for the filing of Court documents, which can escalate quickly). The preferred fee should also help mitigate the risk that false or malicious claims can be made. As discussed earlier, the fee, coupled with the infringement information requirements, should act as a barrier to those who may try to use the system maliciously.

### **Copyright Tribunal Awards**

Under the Act, the Copyright Tribunal has the ability to award up to \$15,000 for infringement of copyright via file sharing. The award will have two elements, a compensation element for the value of the works infringed, and, where the Tribunal considers it necessary, a further element to deter future infringing. As there are no requirements included in the Act, the Tribunal would be likely to default to normal damages principles.

The underlying policy objective of the Tribunal is that it is intended to be fast track and efficient. This is proportionate to the relatively low damage caused by individual infringers. Regulations should ensure that the Tribunal is in a position to conduct claims in a less complicated manner than would be the case in the District Court. A further objective of the Tribunal is that its awards should act as a deterrent to future infringing. Regulations should ensure this objective is met.

#### *Alternative Option 1 – No regulations*

We do not favour the option of not regulating further, due to the fact that normal damages claims are complicated to prove. It is therefore likely that hearings based on normal damages principles would be lengthy and complex. Tribunal hearings under the regime are intended to be less complicated than those currently available in the Courts.

We also consider that account holders who are subject to claims should be in a position to contest those claims without requiring legal representation. Leaving the Tribunal to determine awards on normal damages principles may prevent an account holder from being able to argue their case effectively without legal representation.

We also consider that a lack of regulation providing for the deterrent element of an award will frustrate the effectiveness of the regime. If a person is only required to pay for the value of the work as if they had bought it, there would be no deterrent to future infringing.

### *Alternative Option 2 - Multipliers*

We also considered the option of prescribing a range of pre-determined sums, or a multiplier of the value of the works infringed, that the Tribunal could order over and above the compensation element of an award. This option would provide certainty to those who may be subject to claims of copyright infringement at the Tribunal, as to the possible amount of an award. It would also make the Tribunal's determination of the deterrent simpler. However, the negative impacts of this option are that multipliers are restrictive, and therefore the justice of each case might not be reflected in the amount of the award.

A subset of this option would be to set non-mandatory guidelines for the Tribunal to have reference to when determining the amount of a deterrent. This would provide some indication as to the amount, but allow the Tribunal limited flexibility to account for the justice of the case.

However we do not favour either option as we consider that the Tribunal will need a high level of discretion as to the amount. It is hard to predict what sort of deterrent is necessary in each instance, making even a non-mandatory indication of the amount of a deterrent hard to formulate.

We also consider that the impact of awards not reflecting the justice of each case is more significant than a lesser degree of certainty for the parties concerned. Awards that are viewed as arbitrary would discredit the regime.

### *Preferred Option*

This option would involve requiring the Tribunal to make a compensation based award via reference to the value of the works infringed, coupled with discretion to add a deterrent element to that award where appropriate.

In order to determine the need for, and amount of, any additional deterrent, the Tribunal would consider the flagrancy of the infringing, the effect of the infringing on the market of the work, any costs awarded against the person found to have been infringing, and any other factors they considered relevant<sup>2</sup>.

### *Impacts of the preferred option*

Without an additional deterrent element, it is likely that one of the objectives of the regime (which is to deter file sharing that infringes copyright) will be frustrated. This is because a person found to be infringing would simply be forced to pay something like the retail value of the work. Therefore, the preferred option should ensure that this objective is met.

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<sup>2</sup> Flagrancy is a concept already included in s122 of the Copyright Act 1994. A court may consider flagrancy when deciding whether additional damages are needed. Additional damages may be awarded where simple compensation for value does not reflect the true harm done to the copyright owner.

The preferred option also ensures that the Tribunal can retain some flexibility to account for the differing circumstances of each case when determining an award.

There are some negative impacts of the preferred option as it does not provide a high level of certainty to internet account holders or rights owners as to the possible amount of the additional deterrent. There are also potential disadvantages to this option, as the Tribunal will still have to consider submissions (which may be complicated) on the value of the work and the appropriate amount of the deterrent.

We note these negative impacts, but consider that the ability to account for the justice of each case is favourable over any additional procedural complexity that might result. The Tribunal is a competent body to hear copyright claims.

### **Copyright Tribunal Application Fee**

In order to take a claim to the Copyright Tribunal, the rights owner must pay a fee. The amount of the fee has been developed in consultation with the Ministry of Justice. When setting the fee the Ministry considered the following factors:

- The purpose of Tribunals – to provide inexpensive, timely access to justice;
- The appropriate level of cost-recovery based on public/private benefit of the dispute;
- The cost model for the Tribunal (total funding, caseload and actual and projected) costs;
- How the proposed fees sit within the fee structure across other tribunals; and
- Advice and Guidelines from the Office of the Auditor-General (OAG), Treasury and the Regulations Review Committee.

#### *Option 1 – No Fee*

The Ministry of Justice considered charging no fee for applications to the Tribunal, due to the fact that under the current jurisdiction of the Tribunal, parties that refer licensing scheme disputes do not have to pay any filing fees.

The advantage of this option is that all parties referring a dispute to the Tribunal will be treated on an equal footing, despite the different type of dispute being referred to the Tribunal.

The disadvantage of this option is that the Tribunal would need substantial additional funding, since the caseload will increase dramatically from the one or two cases per year under the current jurisdiction, to an estimated 500 cases per year under the expanded jurisdiction. The expanded jurisdiction also requires more Tribunal members to be appointed. With an increase in the volume of cases before the Tribunal, the sitting hours and the registry and logistic support will increase the cost of running the Tribunal significantly.

An important consideration that weighs heavily against charging no fee is that the type of disputes and litigants involved in licensing scheme and file sharing matters are markedly different. Whereas in licensing scheme disputes a party may be a private person or a company, in file sharing disputes it will always be rights owners who file a complaint with the Tribunal. In some instances a rights owner may represent a group of copyright owners.

#### *Preferred option - \$200*

The second and preferred option was to determine a fee based on the cost model of the Tribunal. The Tribunal has received \$838,000 extra funding per year (in outyears) to account for its extended jurisdiction. The fee that the Ministry recommends under this option is \$200 per application.

We note that only rights owners making an application are required to pay this fee. It is important that account holders who have claims made against them are not deterred from contesting claims by a fee. The extended funding of the Tribunal therefore accounts for this. However, setting the filing fee at this level will also:

- provide an affordable option to rights owners, enabling them to take a reasonable amount of complaints to the Tribunal, whilst also preventing rights owners from taking trivial claims or inundating the Tribunal; and
- be consistent with one of the objectives of the Act, which is that the notice process should be a more cost effective enforcement measure than is currently available through the District Court.

The fee is within the range of comparable fees across the wider tribunals system, and is also significantly lower than the cost of a hearing in the District Court. The proposed fee will distribute the cost to operate the Tribunal between taxpayers and Tribunal users in a manner consistent with the OAG and Treasury guidelines, which recommend that full cost recovery should be departed from in the case of civil courts as this would likely prevent access to justice.

The Ministry of Justice Civil Court Fees Review 2003 reported that filing fees for particular specialist jurisdictions resulted in an approximate cost recovery rate of 13%. Charging a filing fee of \$200 will lead to a cost recovery of 6% in the first year based on an estimated case volume of 250, with cost recovery rising to 12% in outyears based on a volume of 500 cases per year.

While the 6% cost recovery in the first year falls under the approximate cost recovery rate of the specialist jurisdictions included in the Civil Court Fees Review, it should be noted that these jurisdictions are well established bodies where operating costs and caseloads are more stable. The Ministry of Justice also noted that the 6% cost recovery in the first year must be considered with the following factors in mind:

- The projected costs for the first year are much higher than in the outyears because of the logistic and system changes that the Ministry has to make to implement the expanded jurisdiction;

- The projected volume of applications in the first year will be much lower than in the outyears and therefore the corresponding revenue gained from that; and
- The first year operation will only cover the period from 1 January 2012 (due to the timeframes for three notices to have been sent) to 30 June 2012.

There is a projected budget shortfall of \$0.060m in the implementation year. This will be absorbed within the Ministry baseline.

The disadvantage of charging a fee is that rights owners making claims will sponsor those parties who are involved in licensing scheme disputes and who do not have to pay any filing fees.

### **Further Procedural Matters**

The Act also provides for regulations to prescribe any further procedural matters regarding Tribunal hearings. Currently, the Act is silent as to whether an applicant or an account holder contesting a claim can withdraw their arguments. We consider that regulations should prescribe that a claim or appeal may be withdrawn at any time by written notice to the Tribunal. Not providing such would result in Tribunal procedures becoming inefficient.

### **CONSULTATION**

The Ministry of Justice and the Treasury have been consulted on the proposals in this paper. The Department of the Prime Minister and Cabinet has been infromed. Key stakeholders and the wider public were consulted on the proposals during a four week submission process. 58 submissions were received. We note that there has been a significant level of public interest with regard to the Act and the proposals in this paper. We reccomend that this paper is published on the Ministry website and it is likely that further interest will result from this.

Many of the practical suggestions made in submissions by IPAPs were incorporated into the preferred options, as IPAPs are responsible for implementing the technicalities of the regime. Rights owners also consider that the technical requirements for information can be met and are consistent with the information they currently gather.

As noted above there was a significant difference in the submissions from IPAPs and rights owners over the rate of the fee. Rights owners preferred a nominal fee while IPAPs preferred a fee that would allow them to fully cover their implementation costs.

### **IMPLEMENTATION AND REVIEW**

A 6 month review of the notice fee is proposed. This review will also consider the need and frequency of any further reviews of the notice fee. This review is necessary due to the uncertainty in the volume of notices that will be sent under the regime. The fee may need amending after this initial period.

*[This sentence withheld under section 9(2)(f)(iv) of the Official Information Act 1982.]*

Additionally, in 2013, certain aspects of the Act itself must be reviewed. MED also intends to review the need and efficacy of the regulations during 2013, to ensure that they are facilitating the implementation of the Act in a manner which is least burdensome for IPAPs and rights owners.

### Annex A: Table of notice fee estimates provided by IPAPs

Two sets of notice fee estimates have been provided by IPAPs during the development of this regime. During the consultation process on the Regulations, IPAPs were asked to provide estimates based on 5000 notices per month for consistency.

#### Estimates given during the Select Committee process for the Act

IPAP	Estimated Notice Fee based on full cost recovery	Number of Notices Per month estimate is based on	Level of automation
Vodafone*	\$31.56	10,000	None
Vodafone*	\$19	10,000	Full
Call Plus*	\$36-\$42	2000	Partial
Woosh	\$13.90	2000	Majority

#### Current estimates given during consultation on options for the regulations

IPAP	Estimated Notice Fee based on full cost recovery	Number of Notices Per month estimate is based on	Level of automation
Telstra Clear	\$32	5000	Partial
Telecom	\$29	5000	Partial
Telecommunications Carriers Forum (surveyed across its members)	\$40	5000	Partial
Orcon	\$77	5000 (Orcon accounted for an extra 4 allegations matched to each customer between each notice. They noted that if this number was built into the 5000 total, their fee estimate would be 38).	None

#### Preferred fee amount submitted by rights owners

Recording Industry Association of New Zealand (RIANZ)	2	5000	(n/a)
New Zealand Federation against Copyright Theft (NZFACT)	2	5000	(n/a)
NZ Society of Authors	2	5000	(n/a)

**IPAP assumptions for the current estimates**

Total number of notices per month 5000

Number of detection notices – 3300

Number of Warning Notices, assuming a 70% drop off in infringement – 990

Number of Enforcement Notices, assuming a 70% drop off in infringement – 297

Number of challenges, based on the assumption that 50% of detection notices will be challenged, 20% of warning notices challenged, and 10% of enforcement notices challenged - 1878

It is assumed that one contact to the IPAP will be made per customer, on the basis that some account holders will make several contacts and some will make none. IPAPs state that their experience of rolling out new products has found that this is a reasonable expectation.

Number of times the IPAP is required to interact with the Copyright Tribunal, based on the assumption that this will occur for 5% of enforcement notices issued – 15.