

Ministry of Economic Development

# Copyright (Infringing File Sharing) Regulations – Fee Review

Discussion Document – March 2012

***Disclaimer***

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## Background

Sections 122A to U of the Copyright Act 1994 (the Act) set out a three notice regime aimed at deterring file sharing that infringes copyright. Under the regime, rights owners can send evidence of copyright infringement occurring via file sharing networks to Internet Protocol Address Providers (IPAPs) by way of a rights owner notice. An IPAP is then required to match this evidence to the relevant account holder, and send up to three infringement notices to that account holder. Account holders can also challenge infringement notices via their IPAP. More comprehensive information about the notice process can be found at the following link: <http://www.med.govt.nz/business/intellectual-property/copyright/notice-process-under-sections-122a-to-122u-of-the-copyright-act-1994>

Clause 7 of the Copyright (Infringing File Sharing) Regulations 2011 (the Regulations) allows an IPAP to charge a rights owner up to \$25 for processing a rights owner notice. The fee was originally set based on estimated costs from IPAPs. The government decided to review the fee after the notice regime had been in force for six months.

## Scope of the review and considerations for submissions

When making submissions please recall that the scope of the review only includes the notice fee and its effect on the regime. We are not reviewing the file sharing regime or associated regulations more generally.

Where giving evidence of costs, please provide any working, or a description of how those costs are derived. For example, if staff costs are based on an average wage over an average number of hours, please state what these are. By “costs”, unless indicated otherwise we mean the direct costs of performing the functions required by the Act, and not related costs such as for providing technical infrastructure.

Some questions are aimed at understanding the extent of any deterrent effects of the regime in the first six months of operation. The Ministry expects that some assumptions will need to be made in order to answer these questions. Where this is necessary please explain the assumptions that lie beneath your answers.

The Ministry recognises that much of the information in submissions is likely to be considered commercially confidential by you. If you consider that your submission contains commercially or otherwise sensitive material that you wish the Ministry to withhold, we request that you clearly identify the relevant part of the submission and the applicable grounds under the Official Information Act 1982 by which the Ministry could withhold the information.

We have consulted the Ombudsman's Practice Notes on this issue, and those Notes advise that while your opinion will assist in our assessment of whether the information should be withheld, this is not necessarily decisive and there are other factors that we will be required to take into consideration when determining whether to publish your submission.

Please send all submissions via email to the IP Policy mailbox: [ip.policy@med.govt.nz](mailto:ip.policy@med.govt.nz), by the close of business on Monday 30<sup>th</sup> April.

## **Issues and objectives**

When the fee was initially set, the following policy considerations were taken into account:

- The extent to which IPAPs can recover the costs of performing their functions under the notice regime through the notice fee;
- The cost and volume of use of the regime by rights owners; and,
- The effectiveness of the regime in educating internet account holders and deterring file sharing that infringes copyright (assuming there is a relationship between infringement notice volumes and deterrence/education).

The current \$25 fee attempts to balance these policy considerations. The review intends to reassess whether the current balance is appropriate.

- 1) Are there other policy considerations apart from the ones outlined above that you think should dictate what the notice fee is and whether it should be changed? If so what are these, and how should they affect the setting of the fee?

Raising the fee would allow IPAPs to recover a larger proportion of the costs of the regime, while likely lowering the volume of use by rights owners, therefore limiting the regime's effectiveness. Conversely, lowering the fee would likely increase volume and effectiveness, while decreasing the proportion of costs recoverable by IPAPs.

In order to assess the impact of a change in the on the policy considerations set out above, this discussion document aims to:

- Gather evidence from rights owners and IPAPs of the actual costs of processing infringement evidence and sending notices, in order to establish how the regime has worked in the first six months. We are also seeking evidence as to the effectiveness of the regime as a deterrent during this time;
- Gather evidence to help estimate the effects of a change in the notice fee on costs, volume and effectiveness.

## **Options**

The Ministry has not yet formed a view on whether the notice fee should be changed, and if so, by how much. This is due to the fact that we do not yet have the necessary evidence of the impacts of the current fee on the policy considerations outlined above.

### *Retain the status quo*

The first option under review is retaining the status quo, keeping the fee at \$25.

### *Change the fee*

Option two would involve raising or lowering the fee.

## A) General Questions

- 2) Would you prefer to retain the status quo (a fee of \$25) or change the fee? Why?
- 3) If your preferred option is to change the fee, what should the fee be changed to? Why?
- 4) What effect, if any, do you consider your preferred option would have on:
  - Costs of using and complying with the Act?
  - Volume of rights owner notices?
  - The effectiveness of the regime in deterring file sharing that infringes copyright?

## B) Questions for IPAPs and rights owners on the status quo

*Rights owners:*

- 5) Please give a detailed description of how infringement evidence is gathered and the costs involved;
- 6) Please give a detailed description of the process followed in order to compile each rights owner notice and submit that notice to an IPAP;
- 7) Based on your answer to question 5 and 6, what is the average cost of compiling a rights owner notice? Please itemise and describe the costs that contribute;
- 8) How many rights owner notices have you sent per month since the regime came into force?
- 9) How many challenges have you received?
- 10) Of those challenges how many have you declined or accepted?
- 11) Has there been any trend in the reasons for challenges? If so what has that been?
- 12) How many enforcement notices have you received?
- 13) What change, if any, have you seen in the amount of file sharing that is occurring since the regime came into effect? How do you calculate this change, and what do you consider has caused it? Could any external factors, such as market conditions, have caused this change?

*IPAPs:*

- 14) Please give a detailed description of the process followed for each rights owner notice and any resulting infringement notices;
- 15) Please describe the process by which you allocate Internet Protocol addresses to customers, and the process of matching infringement evidence included in a rights owner notice to relevant customers;

- 16) Based on your answers to 14 and 15, what is the average cost of analysing one rights owner notice and complying with the Act in relation to that notice? Please itemise and describe the costs that contribute;
- 17) How many rights owner notices have you received per month since the regime came into force?
- 18) Of the infringement notices that you have sent to customers, what proportion have been detection, warning and enforcement?
- 19) How many account holder challenges have you received?
- 20) Where possible, please state the number of customer queries you have received in respect of infringement notices. Have you noticed any trend in the content of customer queries? If so, what has that been?
- 21) Are there other costs, apart from direct costs of processing evidence and sending/processing notices or challenges, that you incur in complying with the regime? If so, please describe what these are and why they occur;
- 22) Overall, what have been your implementation costs for the first six months of the Acts operation? What proportion of those costs have you been able to recover through the notice fee?
- 23) Has there been any fluctuation in the volume of peer-to peer traffic occurring on your network since the regime came into force? If yes, please describe. Why do you consider this fluctuation has occurred?

### **C) Questions for rights owners and IPAPs on the impacts of a change in the fee**

*Rights owners:*

Please provide estimated monthly rights owner notice numbers in accordance with the following table. We note that the number of actual rights owner notices that would be possible is likely to depend on a number of variables (such as the level of infringing).

Projected Fee (\$)	Projected total number of rights owner notices per month
<i>E.g. \$50</i>	<i>E.g. 1000</i>
2	
5	
10	
15	
20	
30	
35	
40	

*IPAPs:*

Please provide estimated monthly costs in accordance with the following table.

Projected monthly rights owner notice volume	Estimated monthly processing costs
100	
500	
1000	
2000	
5000	

- 24) Please provide a more general description of the estimated costs you would incur if you were to see an increase in volume of rights owner notices. Within your answer, please include the following:
- The capacity of your current system (by rights owner notice volume) without the need for extra resourcing such as staff or infrastructure;
  - Beyond current capacity, the level (or levels) of rights owner notice volume that if reached would require additional systems investment/resourcing;
  - A description of what additional costs arise from the direct cost of processing rights owner and infringement notices and challenges, and what costs would arise from other factors.