8 December 2010

Hon Simon Power, Minister of Commerce
Members, Commerce Select Committee
ICT Spokespeople, Parliamentary parties
Parliament Buildings
Wellington

By email.

Dear Minister, dear Members,

Issues for consideration - Copyright (Infringing File Sharing) Amendment Bill

We are writing as a small coalition of interested citizens to draw your attention to a number of improvements we would like to suggest to the Copyright (Infringing File Sharing) Amendment Bill, as reported back to the House in November 2010.

The attached briefing note suggests specific areas where changes could, in our view, give better effect to the policy intent of the Minister and the Committee (as expressed in the Bill's explanatory note and in various public statements), while avoiding some important negative consequences that arise from the way the Bill is drafted.

The three areas covered are:

- Section 122MA – avoiding the possible reversal of burden of proof
- Account holder liability for actions of unrelated parties
- Mechanism for introducing account suspension

The issues are canvassed in the attached briefing note, where the existing draft legislation is shown, the problem identified, and suggestions for changes made.

It is important to note that with this letter, we are not seeking to re-litigate the policy debates that led to the Bill as it exists. Instead, we simply wish now to help the Committee and the Government to make good law.

None of the individuals or organisations below resile from their general positions in respect of the Bill which they have identified publicly. We will instead raise issues of policy with you on an individual basis.

We are happy to discuss any of the matters contained herein with you or your staff, should that be of assistance.

With many thanks for your consideration,

The Undersigned:

Thomas Beagle, TechLiberty

Jordan Carter, InternetNZ

Mark Harris, Independent Technology Consultant

Peter Harrison, New Zealand Open Source Society

Matthew Holloway & Bronwyn Holloway-Smith, Creative Freedom Foundation

Colin Jackson, Independent Technology Consultant

Rick Shera, Lawyer

Alastair Thompson, Scoop Media

Lance Wiggs

Copyright (Infringing File Sharing) Amendment Bill

Areas of concern and proposed changes

Introduction

The Commerce Select Committee revisions to the Copyright (Infringing File Sharing) Bill [“the Bill”] have improved it over earlier drafts. There remain a small but critical number of concerns, where improvements could be made to clarify the intent of Parliament and prevent undesirable consequences from the way the legislation is currently drafted.

The three main areas of concern dealt with are the implications of new clause 122MA, account holder liability and account termination. In each area, we outline the relevant provisions in the Bill, the problems the provision/s give rise to, and our preferred approach for resolving the concerns we have.

Note that this paper does not include suggested legislative amendments to replace existing clauses – proposed amendments will be developed later.

1. Section 122MA

The Select Committee has recommended in clause 7 of the Bill a proposed new section 122MA for the Act, which is set out as follows:

“122MA Infringement notice as evidence of copyright infringement

> “(1) In proceedings before the Tribunal, an infringement notice is conclusive evidence of the following:
>
> - “(a) that each incidence of file sharing identified in the notice constituted an infringement of the right owner's copyright in the work identified:
> - “(b) that the information recorded in the infringement notice is correct:
> - “(c) that the infringement notice was issued in accordance with this Act.
>
> “(2) An account holder may submit evidence, or give reasons, that show that any 1 or more of the presumptions in subsection (1) do not apply with respect to any particular infringement identified in an infringement notice.
>
> “(3) If an account holder submits evidence or gives reasons as referred to in subsection (2), the rights owner must satisfy the Tribunal that the particular presumption or presumptions are correct.

We welcome the Minister’s statement that the intent of 122MA is “*in the event that an account holder challenges this (by submitting evidence or giving reasons) the presumption does not apply, and the burden is on the copyright owner to provide evidence that copyright infringement has taken place.”*

We share the Minister's intentions, but are concerned that the current wording of 122MA may not be interpreted in this way by the Copyright Tribunal, and/or the courts.

Our legal advice is that as worded, the clause could be interpreted as placing a significant burden on the account holder to prove that it has not infringed when all a rights owner has done is file its notices. This could leave the Tribunal needing to decide whether or not an account holder can "show" that their "evidence" or "reasons" rebut the propositions in sub-clause 1. That reversal of the usual burden of proof does not seem to have been intended.

We understand that the policy intention behind the addition of this section is to ensure a speedy handling of uncontested allegations in the Tribunal. We agree with that intention.

To maintain the policy intent but to remove the automatic presumption of guilt and the undue reversal of any burden of proof, the proposed section should simply state that where an account holder does not dispute an allegation of infringement (i.e. the Tribunal receives no response from the account holder after a Tribunal application is filed by the rights owner), the matters set out in the proposed sub-clause 1 will be conclusive evidence of infringement.

2. Account holder liability

The Bill as drafted makes an account holder responsible for any activity that takes place using the account. So, for example:

- A library will be responsible for any infringement by users of public access terminals;
- Universities and schools will be liable for infringement by students;
- Air New Zealand will be liable for any infringement by koru lounge internet users;
- Free and community wifi providers will be responsible for infringements by anyone using an access point.

Vicarious liability for employers in respect of their employees or even householders for what goes on using their household utilities is well understood but an extension of that concept to public good access providers is very unusual.

The problem is that those public good providers do not have the ability to control or monitor the access they are providing, either at all, or without very large cost. They are not in a position to prevent infringing file sharing which could take place as separate occasional users infringe over the 9 month period in the Bill, despite their best efforts to prevent it.

To address this, a new section 122N(4A) has been added, which allows the Tribunal not to award any penalty if to do so would be "manifestly unjust". That helps but does not cure the problem.

First, what it means is that instead of being excluded altogether, public good access providers must submit to and appear before the Tribunal even if our proposal for section 122MA above is accepted. While they may not need to do so with legal assistance, there are still costs in terms of personnel time and possible travel and accommodation costs with respect to any appearance. Where free access is being provided this is a cost that is not recoverable.

Secondly, the standard “manifestly unjust” is an extremely high one. It is higher than beyond reasonable doubt – the standard for criminal liability. Effectively, an account holder would need to convince the Tribunal that to penalise it is so blatantly unfair that no-one would accept such a result. Where the account holder is providing a free public service that is a little like looking a gift horse in the mouth. Remember that the account holder is providing a free service and is completely innocent itself.

Thirdly, there is the potential for inconsistency and uncertainty that must inevitably follow any wide discretion such as this.

As a result, out strong fear is that two things will happen:

- public good providers will simply cease providing such access. No risk is worth taking when the service is already being provided for free. New providers will be discouraged from entering the market. This would be a great shame particularly for provision of free access to members of the public who would not otherwise be able to afford it.
- Those account holders that do remain will take whatever technical measures are available to them to prevent any file sharing whatsoever. That undermines the intent of these legislative changes to adopt a technologically neutral approach. P2P file sharing is a service which is increasingly being used for all sort of legitimate purposes.

We recognise however that there is a need for certainty and that creation of wide, undefined, exceptions might be used to defeat the Bill’s purpose.

Our suggestion therefore is that an exception be created for educational institutions, public libraries and free wifi access providers from the Government/local Government or not for profit sector. If this list were subject to change by regulation (either by removal, amendment or addition), then that would preserve flexibility to cope with unforeseen circumstances.

Note that while we would prefer that businesses who provide free access (like our Air New Zealand example above) also be excluded, they are better capable of making risk benefit decisions and do not fall into any neat exception. They are therefore more appropriately dealt with in the Tribunal’s discretion under section 122N(4A).

3. Provisions for Account Termination

The Select Committee has recommended in clause 7 a new section 122PA, which provides that account suspension as a penalty (created by 122P in the Bill) is not available until a date set by Order in Council, as follows:

“122PA Suspension orders and orders under section 122P not available until date set by Order in Council

> “(1) No person may apply to a District Court for a suspension order under section 122O, or for an order under section 122P, until after the date set by Order in Council under this section.

> “(2) The Governor-General may, by Order in Council made on the recommendation of the Minister, set a date after which applications for orders under sections 122O and 122P may be made.

The issue of concern is that there are no requirements for the Government to consult the public in making any such Order in Council, no set of criteria on which any such decision must be made, and not even any obligation to publish the fact of such an order being made until it is in force.

We do not support account suspension as a remedy, and therefore welcome the policy intent of the proposed section 122PA. We also note that the Minister’s press release responding to the Committee’s report said that a review of the situation with respect to infringing file sharing would occur in two years. Implicitly, that would be a public review and bringing section 122PA into force would only occur if the review showed it was needed – but this is only implicit.

We would prefer that any such Order require, as a matter of law, public consultation and a strong evidence base to justify it. Copyright law is a delicate balancing exercise of competing public and private interests and therefore any such change should, if our law is to be effective and fair, be subjected to input from all those affected.

In descending order of preference, our suggested changes are as follows:

1. Delete 122O, 122P and 122PA altogether, as termination is not a suitable remedy.
2. Include **statutory criteria** (stringent ones, regarding sound, neutral evidence of seriously increased infringement, and serious economic harm to New Zealand content providers) and statutory requirements for public consultation, and that the outcomes of the evidence and consultation be taken into account, before any such order is made.
3. Include statutory requirements for public consultation, and that the outcome of consultation be taken into account, before any such order is made.
4. The Minister publicly commit to consultation on any proposed order, following the planned review and before any decision is made.

ENDS