



Before the Select Committee on Commerce
House of Representatives
Submission of the
INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE
on
COPYRIGHT (INFRINGING FILE SHARING) AMENDMENT BILL
June 16, 2010

The International Intellectual Property Alliance (IIPA) appreciates the opportunity to provide comments on the Copyright (Infringing File Sharing) Amendment Bill (the “Bill”).

Introduction

IIPA is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries – business, software, films, videos, music, sound recordings, books and journals, and interactive entertainment software – in achieving stronger copyright laws and enforcement worldwide. IIPA is comprised of seven trade associations (listed below), each representing a significant segment of the copyright community.

All IIPA members, and indeed all creators and copyright owners, are seriously adversely affected by the pervasive phenomenon of online copyright infringement, including acts of infringement that would fall within the Bill’s broad definition of “file sharing.”¹ As governments around the world have recognized, a key ingredient in an effective legal response to

¹ The Bill’s definition extends well beyond the colloquial usage that is limited primarily to peer-to-peer (p2p) services. While the definition includes the situation in which copyright material “is made available on the Internet by a user in a form in which the material may be downloaded by 1 or more other users,” a capability that often makes use of p2p technology, it also extends to “where material is downloaded from the Internet,” even using a client-server protocol, and “where material . . . is transferred, directly or indirectly, via the Internet from one user to another user,” which embraces use of e-mail, chat, instant messaging services, and many other means of transfer. Sec. 122A(1) (definition of file sharing).

this phenomenon is to create strong incentives for Internet Service Providers (ISPs) to cooperate with right holders in dealing with online infringement.

The Bill constitutes an important step forward toward codifying such incentives in New Zealand's law. It also has the potential to contribute to other critical features of an effective legal response, notably by educating individual consumers about the illegal character of online infringement, and by providing realistic and deterrent consequences for consumers who choose persistently to engage in this activity after being warned. Whether this potential is realized depends to a considerable extent upon the further resolution of a number of issues posed by the Bill.²

A Step Forward

IIPA views the Bill as a step forward because it corrects, at least in part, some of the most fundamental flaws exemplified by its immediate predecessor, the government's draft proposals of July 2009.³ In particular, the Bill proceeds from a clear recognition that the only party with access to the critical data needed for an effective response to illegal file sharing is the ISP. The Bill seeks to clearly spell out the responsibilities of the ISP to compile, maintain, correlate, retain and disclose that data. It largely succeeds in this task.

Another fundamental flaw of the 2009 draft was the unrealistically slow pace at which it proposed that a "graduated response" system proceed. Many of the time frames in the Bill have been significantly reduced, which is commendable. For example, an ISP subscriber would have one week rather than 30 days to challenge an infringement notice received. However, in a number of cases, yet further reductions should be considered in order to bring the process into greater synchrony with "Internet time." For example, seven days should rarely be needed for an ISP to act on a right holder complaint by forwarding a detection or a warning notice to its subscriber; and surely one business day (rather than a full week) would be sufficient for it to forward a challenge received from a subscriber to the relevant right holder.⁴

Significant Flaws Remain

Despite these and other improvements, however, IIPA submits that significant design flaws still remain that would compromise the effectiveness of the Bill if it were enacted in its current form. We base this conclusion upon the extensive hands-on experience of IIPA members

² It may also turn on the breadth of the safe haven accorded to service providers who comply with the new legislation. That safe haven, as spelled in section 92B, amounts to complete immunity from any copyright remedies, including injunctive relief. IIPA urges New Zealand to tailor the safe haven to preserve the availability of injunctive relief against a service provider in appropriate cases. This would conform to the framework established by most other countries with regard to service provider liability.

³ See <http://www.med.govt.nz/upload/68683/proposal-document.pdf>.

⁴ Similarly, the Government should review whether three full weeks between the "warning" and "enforcement" notice stages is really needed, since the subscriber by that time will already have received at least two infringement notices and will have had ample time to take corrective action (such as securing wireless networks, removing malware, or implementing parental or policy controls).

with widespread online infringement in many countries, and with the solutions proposed (and in some cases implemented) by various governments in seeking to encourage inter-industry cooperation to deal with the problem. Two of these flaws with the Bill are overarching and deserve discussion at this point.

Infringement Information Silos Should be Opened Up

First, the Bill does not adequately respond to the realities of high-volume online infringement that targets a wide range of works. Under the Bill, an ISP is still likely to receive a plethora of evidence of online infringement by its subscribers before it has any obligation to take even the limited actions it is required under the Bill to perform.

If there were only a single copyright owner whose works were subject to extensive online infringement in New Zealand, it would be tolerable to require that there be at least three instances of alleged infringement by a particular subscriber, each spaced three weeks apart, before any remedial action could be taken, either by the Copyright Tribunal or by a court. But this is not the case. The subscriber who abuses her Internet access to infringe the copyright works of, for example, a film studio, is also highly likely (bandwidth permitting) to infringe the copyright works of other right holders: of sound recording producers, of publishers of business software applications, of videogame publishers, of publishers of text works. By the same token, few if any file sharers will specialize to the extent that they infringe only the works of one record label, one studio, or one publisher. It is far more common for these consumers to seek out the latest hits, or the range of titles that engage their interest, without regard to who owns the copyright therein.

The framework of the Bill does not reflect this reality. It requires the ISP to place each complaint received from a right holder into its own unique silo. When right holders A, B, C, D and E all detect infringement by subscriber Z on a single day, or even in a single online session, each complaint is handled completely separately, as if none of the other complaints existed. Each triggers a separate “detection notice” to the subscriber; each starts a separate clock running before a challenge is due; each opens a separate 21-day calendar before another infringement, of a work by the same right holder, can lead to a “warning notice.”

The requirement to run these processes on parallel tracks, never intersecting, has a number of inadvertent but detrimental consequences. In effect, they convert a “three strikes” graduated response system into one that tolerates ten, fifty, or hundreds of known, reported, documented and logged infringements by a single subscriber before meaningful consequences ensue. Such a system, in which the ISP can be informed of dozens or scores of instances of apparent infringement before it takes more than the first step toward requiring the subscriber to cease and desist, falls well short of describing a mode of constructive cooperation to deal with persistent copyright infringers. To this extent, the legislation fails to meet its goals.

Greater Transparency is Needed

The second significant flaw in the Bill’s system overlaps somewhat with the first. It rigorously requires that right holders be kept in the dark about the reality of repeat infringement until nearly the end of the graduated response process. A right holder who detects one hundred

instances of illicit file sharing over a 20-day period has no way to know whether it is complaining about one hundred subscribers, ten subscribers each infringing ten times, or one subscriber infringing one hundred times. Yet these are starkly different case examples, for which very different responses would be appropriate.

There are also questions about whether the challenge process would provide enough information for right holders to evaluate the merits of subscribers' objections to notices received. Much remains to be spelled out in the regulations. Unless subscribers are required to provide reasonably sufficient details and evidence for their belief that an infringement has not occurred, the right holder will be unable to carry out a full evaluation; this could provide an unintended incentive simply to reject the challenge, undercutting the purpose of the challenge procedure.⁵

Under the Bill, it is only after the right holder receives a copy of the enforcement notice issued under section 122F that it learns whether the subscriber, over the period of at least six weeks and possibly far longer since the first "detection notice" was sent, has infringed that right holder's works three times (the minimum), ten times, or one hundred times, and which works have been the subject of the infringement. Even then the right holder does not learn who the subscriber is. It thus remains ignorant of whether this is someone who previously persistently abused Internet access provided by another ISP before starting the entire process over again with the current ISP; whether this is someone that the right holder has previously encountered as an infringer in another setting; and of other facts that could assist it in making a rational decision about whether to pursue the matter in the Copyright Tribunal, before a court for suspension of the account under section 122O, or through a traditional infringement action.⁶

Finally, even if the right holder eventually learns (through a Tribunal or court order under section 122Q(3)(b)) the identity of the subscriber, no one may ever learn whether the same subscriber has been the subject of similar complaints from one, five, ten or twenty other right holders. This fact is highly relevant to whether the system has been effective in dealing with persistent, repeat infringements. Only one party knows this fact: the ISP. But that party is

⁵ Other shortcomings in the Bill's provisions on the challenge procedures should be noted. Proposed section 122H(2) seems to give undue effect to an "accepted" challenge to a detection notice. While the particular alleged infringement which gave rise to this notice should be disregarded, this should not logically lead to effacement of all instances of infringement occurring prior to the date the detection notice is cancelled. Consider a subscriber who is subject to complaints about alleged infringements occurring on two successive days. Suppose the day 1 infringement gives rise to a detection notice, which is challenged, and the challenge is ultimately accepted. This should have no impact on the complaint regarding day 2 activity; indeed, a detection notice for that activity should immediately be issued. Furthermore, as worded, the section 122H(2)(b) effacement seems to apply to infringements of the works of ANY right holder that occur during the specified time period. Surely the rights of right holder B should not be compromised because of an ultimately cancelled detection notice issued at the behest of right holder A. A similar problem arises in section 122N(1). When an enforcement notice sets forth evidence of five, ten or twenty infringements by a subscriber (see section 122F(2)(e)), the right holder should not be sent back to square one simply because a challenge is ultimately sustained to any one of the three such infringements that fortuitously gave rise to an "infringement notice" under the Bill, at least so long as there are enough other validated instances of infringement by that subscriber. We urge that these flaws be corrected in later drafts of the Bill.

⁶ IIPA commends the Bill's drafters for the explicit assurance, in section 122I(2), that the new graduated response procedure does not foreclose any other remedy available to the copyright owner.

apparently barred from disclosing it to anyone, and has absolutely no incentive to take any action to prevent its system from continuing to be abused by this subscriber in this way, such as by cancelling the subscriber's account.⁷

A final cost imposed by the Bill's policy of enforced ignorance and siloing of complaints is that it will be extraordinarily difficult to learn whether ISPs are, in fact, fully discharging their responsibilities under the Bill. The bare requirement, in section 122Q(4), that ISPs publish a report on compliance with the Bill is not an adequate substitute for greater real-time transparency into the operation of the graduated response system by a particular service provider.

Solutions, Regulations, and Review

The solution to both these flaws in the Bill is to take the information about infringement out of the silos, and eliminate the forced ignorance that the Bill would impose on everyone but the ISP. Someone has to be in a position to connect the dots that result in a portrait of a persistent, repeat infringer of copyright, so that effective remedial action can be taken. That someone could be (and probably should be) the ISP itself; it could be the community of right holders, through the use of designated agents that can cumulate both complaints and responses to complaints of infringement of a broad range of works; or it could be a trusted third party, including the Tribunal or the court, to which the full dossier of the infringing activities of the subscriber could be revealed once a certain threshold level had been reached.

While the Bill sets out an outline which, with significant modifications as summarized above, could potentially provide an effective response to online infringement, much depends on how the outline is filled out, whether through more detailed statutory provisions or through regulations to be issued later. Among other issues:

- As noted above, the requisites of a "challenge" must be spelled out (section 234(ec)), to include adequate information to enable the right holder to evaluate the merits of the subscriber's position. Additionally, the circumstances (if any) under which an ISP might decline to forward a challenge to the right holder, on the ground that the challenge raises an issue that should be addressed by the ISP rather than by the copyright owner (section 122G(3)) must be clearly enunciated.
- The costs and fees imposed on right holders for utilizing the system (section 234(eh)) must be fair and reasonable, bearing in mind that the reduction of levels of abuse of online access services serves the interests of ISPs as well;

⁷ The Bill appears to be silent on whether an ISP could voluntarily adopt and enforce a policy (with full notice to its subscribers, and after appropriate due diligence) to suspend or terminate the accounts of subscribers, even if the policy were stricter than the system embodied in the Bill. Such a policy would epitomize the cooperative effort against online infringement that ought to be the primary goal of the legislation, and would also exemplify good corporate citizenship. IIPA urges that the permissibility of such policies be spelled out, and any unnecessary legal impediments to them be removed.

- Guidelines for the imposition of sanctions by the Tribunal (section 234 (ef)) must provide a real deterrent to illegal activities, and in particular must not be limited by the market price (if any) of the infringed works, and should include all costs incurred by the copyright owner.

Finally, due to the complexity of the system established by the Bill , and its novelty under New Zealand's law, the Bill should provide for a review of its operation within a set period after enactment, so that needed adjustments can be made.

Conclusion

IIPA commends the Government for the work it has done to fashion an effective and balanced approach in this complex area. As noted above, we view the introduction of the Bill as an important step forward, and we hope that if we can provide any further assistance in this regard, that you will not hesitate to call upon the undersigned.

Respectfully submitted,

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