

Regulatory Impact Statement

Application of Sections 122A to U of the Copyright Act 1994 to Mobile Networks

Agency Disclosure Statement

- 1 This Regulatory Impact Statement has been prepared by the Ministry of Business, Innovation and Employment.
- 2 It provides an analysis of options with regard to section 122S of the Copyright Act 1994. This section excludes “cellular mobile networks” from the three notice file sharing regime contained in sections 122A to U of the Copyright Act 1994. Without any further action, the exclusion will automatically lapse on 1 October 2013 (the status quo).
- 3 The Ministry’s preferred option is to extend the exception for cellular mobile networks in 122S, via Order in Council, for a two year period (until 1 October 2015). At present, the costs that internet service providers would incur if the exclusion were to lapse appear disproportionate to the volume of infringing file sharing occurring across mobile networks. Because of this low volume, including mobile in the regime at this point in time is unlikely to result in additional deterrence or reduction of infringing file sharing.
- 4 The Ministry did not consider the option of making the exclusion permanent to be appropriate because mobile broadband networks and the devices that access them continue to develop at a rapid pace. This development could make file sharing across mobile more attractive to potential infringers in the near future.
- 5 The main gaps in the Ministry’s analysis are as follows:
 - a. The Ministry has not been able to obtain accurate data on the proportion of total mobile users that have the ability to use file sharing networks, or the availability of file sharing software for mobile devices,
 - b. It is difficult to state the percentage of overall mobile peer-to-peer file sharing traffic that infringes copyright, due to the fact that peer-to-peer networks also have legitimate uses.
 - c. The analysis of the costs of implementing the three notice file sharing regime that would be incurred by internet service providers is based on industry estimates; it is difficult to predict these costs accurately or to verify them against any similar benchmarks due to the novel nature of the three notice regime.
 - d. It is difficult to predict whether and how quickly the volume of file sharing infringement occurring on mobile internet networks will increase in future.

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Status Quo and Problem Definition

- 6 Sections 122A to U of the Copyright Act 1994 (the Act) set out a three notice regime (the regime) aimed at deterring peer-to-peer file sharing (file sharing) that infringes copyright. Currently, the regime does not apply to file sharing that occurs via internet access that is provided across cellular mobile networks (mobile). This is achieved through an exception set out in section 122S of the Act.
- 7 Without any further government action, the regime will apply to mobile from 1 October 2013 (the status quo). Section 122S of the Act repeals the exception for mobile from this date. Section 122S also provides power to the Minister of Commerce to amend the relevant date via Order in Council.
- 8 The objective of the exception for mobile was to ensure that the costs of implementing the file sharing regime were not disproportionate to the volume of illegal file sharing that was occurring. At the time the legislation was put in place, file sharing across mobile was significantly less widespread than across fixed line internet services. It was determined that the compliance costs would outweigh any benefits from applying the regime to mobile.

Background

Operation of the three notice regime

- 9 The three notice regime in the Act can only be used in respect of copyright infringement that occurs via file sharing networks. At issue is a specific method of sharing files that involves multiple internet users sharing pieces of a file between each other over a dedicated internet protocol. These networks allow fast and widespread dissemination of information via the internet and are often used to share copyrighted material.
- 10 The regime allows rights owners to send evidence of an internet user infringing copyright via a file sharing network to an internet service provider (ISP). Upon receipt of such evidence, the ISP is required to match it to the account holder who was using the relevant Internet Protocol (IP) address at the time. They are also required to send a series of infringement notices to that account holder within prescribed timeframes. If an account holder receives a third notice, the rights owner can choose to take enforcement action at the Copyright Tribunal, who may make monetary awards of up to \$15,000.
- 11 The regime has been in operation since 1 September 2010. The Copyright Tribunal began issuing monetary awards early in 2013.

Legislative history

- 12 The decision to exclude mobile networks from the regime was made by the Commerce Select Committee in 2010, after submitters raised concerns about the costs of implementation for mobile outweighing any benefits. At the time, mobile internet speeds and the cost of data were considered to be barriers to significant amounts of infringing file sharing occurring. The Committee made the following comment in their report:

“At present, speed and cost constraints mean there is relatively little copyright infringement via mobile devices and networks, and we are advised that cellular mobile service providers would face significantly higher costs in complying with the proposed regime, and difficulty matching account details for their “pre-pay” customers. At present, therefore, we conclude that the costs of applying the regime to mobile devices would outweigh the benefits. It is likely, however, that this balance will change in the future as technology develops.”

- 13 In addition, the availability of file sharing software for mobile devices was limited at the time the legislation was passed. This meant it was uncommon for mobile users to access the file sharing networks that the regime targets. A two year exclusion was determined to be an appropriate time frame in which to reassess whether technology had advanced to the point that mobile file sharing infringements were more widespread and should therefore also be covered by the regime. We note that the United Kingdom also took a decision to temporarily exclude mobile networks from a similar regime.

Current volume of file sharing occurring across mobile

- 14 Statistics New Zealand reports the total number of mobile broadband subscribers increased 34% in 2012 from 1.9 to over 2.5 million. This compares with figures from 2009, when Statistics New Zealand reported that only 5% of households had access to broadband via a mobile device. This evidence shows that there is a larger possible pool of mobile broadband users that could be infringing now than when the exception was put in place.
- 15 However mobile internet use is still low compared to fixed line use. The most recent Telecommunications Industry Questionnaire found data traffic to be around 65 times greater across fixed line broadband than mobile.
- 16 In addition, we are advised by ISPs that the current volume of peer to peer traffic occurring on mobile networks is proportionately low to that on fixed line services, suggesting that mobile peer-to-peer traffic is a very small component of peer-to-peer traffic overall. The figures below, provided by three current mobile providers, indicate this difference. These figures are also for all peer-to-peer traffic. There are legitimate uses for peer-to-peer protocols so it cannot be guaranteed that all of the traffic below is copyright infringement.

ISP	Proportion of Peer-to-peer use on fixed line	Proportion of Peer-to-Peer use on mobile
	<i>Withheld under s9(2)(b)(ii) of the Official Information Act 1982</i>	

- 17 ISPs are now beginning to launch 4G/LTE mobile networks, which will enhance both the speed and efficacy of mobile devices. This could make illegal file sharing more of an option on mobile networks. Currently, however, limited 4G device options and the cost of these devices are likely to limit the proportion of total mobile broadband users that will have access to these more efficient networks.

- 18 Our advice from ISPs is that a full transition to 4G/LTE is still some time away, and to some extent depends on the allocation of analogue television spectrum that is currently being progressed by the Ministry. *[Withheld under s9(2)(b)(ii) of the Official Information Act 1982*

]. Some ISPs considered that the regime may become appropriate for mobile if 4G is to significantly increase the volume of illegal file sharing occurring across mobile networks.

- 19 We also note that the cost of mobile data is still reasonably high compared to fixed line data. This is a further possible barrier to infringing occurring on mobile networks. While the cost of data is less of a barrier in respect of music and books (which are likely to be relatively small files) it is more of a barrier to significant amounts of film and television downloads occurring via mobile.
- 20 In summary, while mobile internet usage is increasing in New Zealand, there appears to be a low amount of file sharing occurring, when compared with other methods of internet access. This conclusion is important in terms of considering whether the options in this RIS are proportional to the volume of infringing occurring. It also limits the possible benefits that could flow from including mobile in the regime. We do however expect, and this is supported by the views of ISPs and rights owners, that developments in mobile technology could change this situation in the next 1 to 3 years.

Objectives

- 21 The principle aim of the regime is to reduce the extent to which copyrighted material is illegally shared across file sharing networks. In determining whether mobile networks should be subject to the regime, the Ministry weighed the potential reduction in illegal file sharing against additional compliance costs for mobile operators.

Options

- 22 The Ministry considered two options in respect of the upcoming lapse of the mobile exclusion in section 122S of the Act:
- a. Allow the exclusion to automatically repeal
 - b. Extend the period of the exception for mobile for a further two years.
- 23 A further conceivable option would be to permanently exclude mobile operators, however this option has not been considered in detail. Although section 122S gives the Minister power to exclude mobile networks from the regime outright, the Ministry does not favour this option due to developments in the 4G/LTE area which are likely to make file sharing easier, and also because mobile and smartphone usage has consistently risen since the regime came into force. Permanently excluding mobile from the regime could also incentivise infringers to move to mobile to escape the regime.

Option 1: Allow the exclusion to automatically repeal

- 24 This option would retain the status quo and would mean that ISPs have to comply with the regime from 1 October this year.

Impacts of Option 1: Costs of implementing the regime across mobile networks

- 25 Currently, the main providers of consumer mobile internet access that would be affected by a change to legislation resulting from the status quo are Vodafone, 2 Degrees, Telecom and CallPlus/Slingshot. Orcon provides mobile broadband but as this is only to a handful of rural customers they consider they would not face significant changes.

- 26 There are two circumstances relevant to the operation of the regime in which the provision of mobile internet access is distinct from regular fixed line internet access. In these circumstances, ISPs would be forced to incur costs to comply with the regime:

- a. *Pre-pay*: Many mobile subscribers do so via “pre-pay”. This means that no account relationship exists between the subscriber and the ISP. The ISP has no personal details for the subscriber and the only method of communication is likely to be via text message. [*Withheld under section 9(2)(b)(ii) of the Official Information Act 1982*

]. As the regime relies on a locatable “account holder” that is sent notices, it is currently not possible for ISPs to comply in respect of pre-pay customers;

- b. *IP address allocation*: We are advised that mobile providers only have limited IP addresses to which mobile internet access can be allocated. In order to account for a larger number of mobile subscribers than there is IP addresses, ISPs use “private” IP addresses – essentially a process of sub-dividing the use of one IP address between several different users. The outcome of this practice is that it is currently difficult for the ISP to match evidence of file sharing infringement provided by a rights owner to any specific mobile customer with certainty.

- 27 These practical differences mean that ISPs, in order to be able to comply with the regime, would need to implement systemic changes in the way they provide mobile access.

- 28 ISPs state that it is difficult to provide accurate estimates of costs for implementing the regime in respect of mobile because the true costs can only be established once implementation is occurring. They also note that costs are likely to depend on the length of time available to implement the changes. The following table provides estimated implementation costs as submitted by some ISPs in order to account for the IP addressing issue noted above. ISPs were unable to provide estimates on changing their systems to enable the sending of notices to pre-pay customers:

ISP	Estimated implementation costs under option 1
	<i>Withheld under s9(2)(b)(ii) of the Official Information Act 1982</i>

- 29 ISPs can currently recover some of their implementation costs via the \$25 fee they charge to rights owners for processing infringement allegations. A review of the fee undertaken by the Ministry in 2012 found that the most efficient ISPs can recover between 70% and 80% of the on-going costs of implementing the regime through this fee. This percentage may drop if ISPs are to amortise the one off implementation cost that would be necessary to accommodate mobile networks through the fee, with the result that these costs may be passed on to consumers through higher subscription fees.
- 30 We note that the costs are likely to have a greater impact on major providers of mobile internet access, being Telecom, Two Degrees and Vodafone. CallPlus/Slingshot and Orcon have advised us that they would be less affected due to lower numbers of subscribers and lower likely volume of allegations that would need processing under the regime.

Impacts of Option 1: Likely volume of use by rights owners in respect of mobile infringements

- 31 Extending the regime to mobile may increase the capacity of the regime to reduce file sharing. However, this increase will only be relative to the volume of infringing that is occurring, and therefore the number of allegations that rights owners can make in respect of mobile networks. As noted above, the volume of peer-to-peer traffic is low, and because there are legitimate uses for peer to peer protocols, the volume of infringing occurring on mobile is likely to be lower than the total volume of traffic. We consider that this significantly limits the size of the possible additional benefit to the regime that would flow from including mobile networks.
- 32 The Recording Industry Association of New Zealand (RIANZ) is the only rights owner currently using the regime. RIANZ currently sends an average of [*Withheld under s9(2)(ba)(i) of the Official Information Act 1982*] notices in total per month for fixed line, across the five major ISPs that are currently implementing the regime. RIANZ anticipates utilising the regime for mobile if it was included, but could not say whether overall notice volumes would increase in this situation. RIANZ also accepted that a further exclusion of mobile would be appropriate, but considered that this should be for a one year period, given the increasing usage of mobile broadband.
- 33 In summary, if this option was chosen, the Ministry's view is that the costs that would be imposed on ISPs to make changes to their mobile networks would be disproportionate to the volume of file sharing that is occurring via mobile networks. The volume of file sharing allegations in respect of mobile that ISPs would be likely to receive from rights owners using the system is likely to be low, limiting any reduction in illegal file sharing.

Preferred option - Extend the period of the exception for mobile for a further two years

- 34 This option would extend the mobile exclusion for a further two year period, so that the regime would apply to mobile from 1 October 2015.

Impacts of the preferred option

- 35 The impacts of Option 2 are essentially absence of the impacts noted in Option 1. The Ministry prefers this option for the following reasons:
- a. This option would prevent ISPs from incurring costs to implement a regime in respect of a network across which there is limited file sharing taking place.
 - b. Two years appears to be an appropriate time frame in which the uptake of 4G/LTE mobile is to have developed to the stage that file sharing may become more widespread across mobile networks.

- c. In the event that two years is too long and a significant volume of file sharing infringement begins to occur on mobile earlier than 2015, the Minister of Commerce still has the power under s122S of the Act to bring forward the date by which the regime applies to mobile. This means there is a mechanism to account for any risks to rights holders created by this option.
- d. ISPs and RIANZ agree with a further extension, albeit that RIANZ would prefer the extension to only apply for one further year until October 2014. The Ministry considers a year to be too short a time frame in which to reassess whether the volume of mobile file sharing infringement has increased to a point where it should be included in the regime.

Consultation

- 36 The Ministry consulted with rights owners who are currently using the system and the four New Zealand ISPs that currently provide consumer mobile internet access. The evidence provided by these parties has been incorporated into this RIS.

Conclusions and Recommendations

- 37 The Ministry's recommendation is that the exclusion for mobile in section 122S of the Act is extended for a further two years, until 1 October 2015.

Implementation

- 38 The Minister of Commerce can implement options two via Order in Council. Any order should be gazetted on or before 3 September 2013, in order to account for the 28 day rule. If decision is taken to allow the exclusion to lapse, no further action is necessary.

Monitoring, Evaluation and Review

- 39 The Ministry will continue to monitor the following factors in respect of the mobile exclusion:
- a. The usage of mobile broadband in New Zealand and developments in mobile broadband network technology.
 - b. The volume of use of the three notice regime in respect of fixed line networks.
- 40 If the preferred option is chosen, the Ministry would again review the impacts of the exclusion lapsing in the first quarter of 2015.