

17 April 2015

**To**

Patrick Jordan-Smith  
Bypass Network Services Limited  
Auckland

**From**

Graeme Hall  
Anita Birkinshaw

**By Email**

**Global Mode**

1. We refer to your 15 April 2015 letter, which states that you "need a lot more detail" to understand why the Global Mode technology is unlawful.
2. The Global Mode service is illegal because its purpose is to circumvent legitimate technological protection measures. Those TPMs protect copyright content licensed for a particular territory. The Global Mode service infringes copyright by providing access to content neither you nor your ISP customers are licensed to communicate or distribute in New Zealand. You and your customers know that, but you proceed anyway because you can make money from free-riding off other people's copyright. That is why you offer the service; and why you have promoted it in the way that you have. For example, your website states:

We don't think the internet was designed to stop people from surfing websites globally, so while popular global content sites are usually blocked in your competitor's networks. Global Mode® lets your end users access websites in the US, UK and Asia without any local restrictions.

This increases customer loyalty and radically improves the cost to acquire new customers.
3. Obviously, neither you nor your customers need to offer Global Mode as part of your legitimate services. Again, you do so to secure an unfair advantage over rival business and others who have paid for the content in question. On that front, your website states:

Do you operate in a competitive market where there is no easy way to differentiate your broadband offering to consumers?

Global Mode® is designed for ISPs to increase market share & reduce churn. Global Mode® creates mind share and differentiates your company.
4. You can immediately withdraw the service. We expect you to do that.
5. In continuing to offer and promote Global Mode, you are the "but for" factor in the dissemination of unauthorised copyright works. That reality makes you liable for infringement

by communication to the public. And your actions also amount to authorising the unlicensed reproduction of film works on screens and within their subscribers' devices.

6. Furthermore, you continue to mislead the public about their legal rights to access content from those off-shore who have no right to stream it into New Zealand. In doing so, you continue to breach ss9, 10 and 13 of the Fair Trading Act 1986.
7. Our clients believe your eleventh hour request for details is a stalling tactic. Our instructions are to file and serve proceedings on Monday. If you give appropriate binding undertakings that you have extinguished Global Mode and won't replace it, then our clients may revisit the need for litigation. But at this stage, you give us no other option but to put the matter before the Court.
8. Again, our clients do not necessarily accept that you genuinely want us to provide further detail on legal matters. However, as a gesture of good faith, our clients have instructed us to provide you with further information about the basis for their proposed legal action, as set out below.

#### **Copyright infringement by communication of works to the public**

9. Our clients hold exclusive rights within New Zealand to make various copyright works available to the public for viewing via distribution platforms and video on demand services (the "**Copyright Works**").
10. The owners of copyright in the Copyright Works also grant rights to content distributors based outside New Zealand to communicate or distribute the Copyright Works in other territories. These distributors include video on demand providers such as Netflix USA, Hulu, Amazon Prime and BBC iPlayer ("**offshore providers**"). The offshore providers make the Copyright Works available to subscribers to their services by streaming the works. During the streaming process, the data and/or data file comprising the Copyright Work is reproduced on screen and in the device's memory.
11. The offshore providers are not licensed to distribute the Copyright Works in New Zealand and employ technological methods to restrict access to their content by consumers located in New Zealand ("**geo-blocking**").
12. Your Global Mode service is designed to enable users within New Zealand to overcome licensing arrangements and circumvent geo-blocking measures specifically designed to protect territorial copyrights. Global Mode masks the user's true IP address and substitutes a different one. It misleads the offshore provider into believing that the user is located in the required jurisdiction (such as the USA), thereby circumventing that provider's geo-blocking measures.
13. When Global Mode is used to stream a Copyright Work from the offshore providers, that work is a "communication work" under the Copyright Act 1994 ("**Act**") and the streaming itself is an act of communication to the public (being your ISP customers' subscribers).



14. The restricted act of communicating the work to the public was introduced to provide copyright owners with an explicit right to control the communication of works to the public over the internet.

#### **Authorisation of infringement of copyright**

15. You provide the Global Mode services to your ISP customers specifically and exclusively to enable their subscribers to overcome licensing restrictions and geoblocking measures in order to access, receive and view the Copyright Works from the offshore providers.
16. In offering and promoting Global Mode you are authorising the subscribers to reproduce the whole or a substantial part of the Copyright Works without the licence or consent of the Copyright Owners contrary to ss 16(a), 29 and 30 of the Act. As neither you, nor your ISP customers or their subscribers have permission to reproduce the Copyright Works in that way, there is no defence to the infringement allegations you will see in the Statement of Claim on Monday.
17. Global Mode has the sole or predominant purpose of circumventing legitimate technological protection measures, and is inevitably used to infringe copyright. The service is unnecessary for providing legitimate ISP services and you have the power to withdraw it, while still allowing end users internet access for non-infringing purposes. You have not only failed to take any steps to prevent the unlawful use of Global Mode but are openly promoting and making the service available to access offshore sites such as Netflix USA, Hulu and BBC iPlayer. For similar reasons, you are also liable as a joint infringer.

#### **Fair Trading Act 1986**

18. Statutory liability for misleading conduct under the Fair Trading Act 1986 can arise for false or misleading representations of fact or mixed fact and law, and also for misrepresentations of law simpliciter. What is critical is the effect or likely effect of the making of the statement on the person to whom the statement is made.
19. In this case, the New Zealand public is clearly being misled by your representations that:
  - (a) it is lawful for customers located in New Zealand to use Global Mode to access content from the offshore providers; and
  - (b) circumvention of geo-blocking measures in this way is permitted by New Zealand law (just like parallel importing of DVDs).
20. In providing the Global Mode service you are also misrepresenting to offshore providers that users in New Zealand are in fact located within the region serviced by those offshore providers.

#### **Conclusion**

21. We trust that the detail provided above satisfies your request for additional information.

22. Given the importance of the issues at stake, our clients are not prepared to entertain any further delays in the resolution of this matter. The legal position is clear and, unless you provide the undertakings sought in our 2 April letter by midday on 20 April 2015, our clients will file proceedings in the High Court without further notice to you.
23. Our clients do not take the prospect of legal action lightly. However, given that the Global Mode service is materially undermining the value of very significant investments that our clients have made and the fact it is now apparent from the numerous public statements made by you that Global Mode is legal, they have no option than to refer the matter to the Courts to be resolved. Such judicial clarification is in the interests of all concerned, including consumers of the Global Mode service.
24. In the interests of transparency, we can advise that our clients intend to seek an expedited hearing, in order to achieve certainty for all parties in the shortest possible time frame. Notwithstanding this, between the filing of the claim and the hearing, there will be ample time for you to reconsider your position and remove the Global Mode service.

Yours faithfully  
**Buddle Findlay**



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