



6 March 2009

## **Internet Service Provider Copyright Code of Practice – TCF Consultation Draft**

Google is grateful for the opportunity to present its comments in response to the Telecommunications Carriers' Forum's (TCF) Consultation Draft of the *Internet Service Provider Copyright Code of Practice* (the **Draft Code**). Google wishes to also take this opportunity to express its concerns regarding the recent amendments to the Copyright Act 1994 (the **Act**), in particular section 92A. In Part 1 of this submission, Google provides its views on copyright and its relevant international experience with copyright in an online environment.

In Part 2 of this submission, Google provides preliminary comments on a number of issues raised by the Draft Code. In a number of places in Part 2, Google provides recommendations to the TCF, as well as suggestions for alternative drafting of the Draft Code noted as underlined text. Google would also be able to provide a marked-up version of the Draft Code if this would assist the TCF in its consultation process on the Draft Code.

Google would be pleased to provide further information on either of these Parts.

### **Summary of Google's submission**

In Part 1 of this submission, Google addresses the following key points:

- Google is strongly committed to preserving the Internet's fundamental openness and protecting the benefits to technology innovation and content creation that are gained from this openness.
- Google supports a flexible and adaptable legal and regulatory framework that aims to provide an effective balance between the interests of rights holders' copyright protection and users' self-expression, in order to promote an environment favourable to innovation,



creativity and diversity.

- Google has a number of concerns around the new section 92A and the impact the section 92A obligation is likely to have on the balance of interests served by copyright law:
  - » Section 92A undermines the incredible social and economic benefits of the open and universally accessible Internet, by providing for a remedy of account termination or disconnection that is disproportionate to the harm of copyright infringement online.
  - » Section 92A puts users' procedural and fundamental rights at risk, by threatening to terminate users' Internet access based on mere allegations and reverse the burden of proof onto a user to establish there was no infringement. In Google's experience, there are serious issues regarding the improper use and inaccuracy of copyright notices by rights holders.
  - » Section 92A could impose significant burdens on ISPs, as it threatens to require enforcement of policies based simply on rights holders' allegations of infringement.

In Part 2 of this submission, Google addresses the following key points:

- As the Draft Code is a voluntary industry code of practice, Google submits that the Draft Code should expressly acknowledge that becoming a Party is not necessary or relevant for compliance with section 92A.
- There are numerous types of ISPs falling within the scope of the Act, therefore a 'one size fits all' approach to section 92A compliance is impractical and could impose excessive cost and procedural requirements on ISPs. Google submits that the Draft Code should clarify and confirm that there may be a variety of ISP termination policies that meet the requirements of section 92A.



- User education is stated as a “primary purpose” of the Draft Code, though there is little reference to education about users’ rights, including limitations and exceptions enabling lawful use of copyright protected works, in addition to their obligations. Google submits that the Draft Code clarify the concept of ‘user education’ to include this information.
- The Draft Code provides for notification and termination based solely on allegations of infringement, without an independent evaluation of evidence and determination of infringement. Google submits that the Draft Code should provide for greater independence in the process, as well as including acknowledgement of the possible defences and exceptions to copyright infringement.
- Whether a Party is in compliance with the Draft Code does not indicate whether that Party is meeting its obligations under section 92A. Google submits that the Draft Code should expressly state this, and in this context should also remove the particularly severe and serious enforcement measures for non-compliance with the Draft Code.
- The Draft Code provides for ‘Processing Fees’, but these are not further detailed in the Draft Code itself. Google submits that the Draft Code should include additional details of any fees and the basis for those fees.



## **PART 1: Copyright on the Internet**

### **Introduction to Google**

Google initially became familiar to most Internet users as the provider of the Google search engine and subsequently as the provider of email, instant messaging and specialised search and information services, including Google News, Google Maps and Google Finance. Google is also the provider of the well known YouTube service, a platform for people to watch and share original videos through a web experience, which includes video content from New Zealand users featured on [youtube.co.nz](http://youtube.co.nz).

Google's breakthrough technology and continued innovation serve its mission of 'organising the world's information and making it universally accessible and useful to the public'. Google's business model has focused on what is known as the 'long tail' of the Internet – the millions of individuals and small businesses that cater to niche interests and markets. Google's services endeavour to democratise the means of accessing, creating and communicating information across local, national and global boundaries.

### **Open Internet**

Google is strongly committed to preserving the Internet's fundamental openness and protecting the benefits to technology innovation and content creation that are gained from this openness. As the Internet becomes increasingly essential as the fundamental communications infrastructure, promoting and nourishing the Internet's openness is paramount. Google believes that the opportunities for freedom of expression, creativity and access to information are the greatest benefits that the Internet offers to consumers and, more broadly, to society.

Innovation and free expression have thrived in an online environment because the Internet's architecture enables any and all users to generate new ideas, content and technologies. The Internet has dramatically lowered the barriers for any individual to develop transformative



technologies and has created unparalleled avenues for social discourse across national and international boundaries. It is gaining a crucial role in the daily life of users and progressively leading to a major shift in users' habits, from passive media consumption to active content selection and creation. Along with facilitating access to information, entertainment content and public services, the Internet constitutes a central means of communication and self-expression in both personal and professional life (email, VoIP, blogs, instant messaging etc). In this way, the Internet is creating opportunities for a more participative society, and providing enormous potential for creativity and availability of new content.<sup>1</sup>

## **Copyright legislation**

### *Protection of copyright on the Internet*

Copyright's core goal is to benefit the public by providing adequate incentives for the creation and dissemination of creative works, and it plays a number of extremely important roles: part cultural policy, part innovation policy, part consumer protection policy and part competition policy. In order for copyright to fully achieve its purpose, it must balance the interests of rights holders' copyright protection and users' self-expression, promoting an environment favourable to innovation, creativity and diversity. Google has always supported legislation and regulation that aims to provide an effective balance.

While inadequate copyright protection can reduce incentives to create, excessive copyright protection can stifle creativity, choke innovation, impoverish culture and block free and fair competition. As both an intermediary and an innovator in online technologies, Google supports a flexible and adaptable legal framework that provides those who create and invest in new technologies the freedom to innovate without fear that their efforts will be hindered by an overly restrictive approach to copyright. Copyright must have sufficient flexibility so that new, legitimate and socially desirable uses, enabled by new technologies, can flourish.

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<sup>1</sup> Note also that the UN has recognized broadband as an essential utility for individuals, in the *United Nations Conference on Trade and Development Information Economy Report*, UNCTAD/SDTE/ECB/2006/1, Nov 2006.



Google considers that a focus of any legislative or regulatory framework should be to ensure that all stakeholders can realise the benefits of the Internet, and maximise the scope and potential for innovative content services to emerge out of New Zealand. Depriving users from access to the Internet will sharply limit efficiency gains and productivity improvements in the economy, encumber innovation, and undermine the social benefits of the Internet.

#### *ISP liability provisions in the Copyright Act 1994*

Google supports the Government's efforts to bring New Zealand's copyright framework up to date with recent developments and innovations in online technology. The recent amendments to the Act, which include protection for ISPs against liability for copyright infringement on the Internet, are issues that Google has experience with in other jurisdictions.

#### *Google's relevant experience with copyright online*

Google strongly supports the rights of both content creators and users. Google considers that the most effective way to improve access to online content and to address rights holders' interests in the online environment is through the development of innovative content services and tools.

Google is proactive in informing its users about copyright and infringing content online, while also working to assist rights holders in protecting and exploiting their copyright online. Google supports the promotion of consumer understanding of copyright, as evidenced by Google's well-developed policies and guidelines on copyright and copyright infringement, as well as the tips and articles for users in complying with copyright while using Google's products.<sup>2</sup>

Google works to notify users of their requirements to comply with copyright when uploading content. As stated in its copyright policy, Google requires users, when uploading content online,

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<sup>2</sup> For example, see: YouTube 'Copyright Infringement Policy': <http://www.google.com/support/youtube/bin/answer.py?answer=55772&topic=13656>; and YouTube 'Copyright



to confirm that they either own the copyright to the content or are authorised to deal with the content. Google respects the rights of copyright holders and provides them with the opportunity to notify Google of an instance of copyright infringement. Google makes it clear to users that infringing content will be removed by Google once it becomes aware of any unauthorised use of copyright protected material.

Google has also created and continues to develop powerful tools that enable artists and creators to manage and control their copyright online. For example, Google has recently developed the YouTube Video Identification Tool, which identifies matches between user uploads and copyright protected material and gives rights holders the ability to maximise the use of their content according to their individual preferences.

Below, we provide an overview of some of the tools developed by Google for the YouTube service, which protect rights holders and inform users about the use of copyright protected works:

- YouTube offers an automated notification and take-down tool which enables rights holders to easily search for and identify YouTube videos that contain their content, and promptly remove them with the click of a mouse.
- YouTube also uses technology that creates unique identifiers of files that are removed from YouTube for reasons of copyright infringement, and prevents identical files from being uploaded to the YouTube website.
- YouTube informs its users about copyright and strongly discourages infringement (in a 'Copyright Tips' section of the YouTube website). There are clear and prominent messages concerning copyright ownership, notified to users at the point that users upload user-created content, as well as in YouTube's terms of use and via links to YouTube's copyright policies on every page of the YouTube website.

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Tips': [http://www.youtube.com/t/howto\\_copyright](http://www.youtube.com/t/howto_copyright).



- YouTube also provides a feature called 'AudioSwap' which enables users to illustrate their original videos with music that YouTube licenses from music publishers and record labels. The purpose of this is to give YouTube users easily accessible options for being creative and using licensed music in their user-created content.
- YouTube Content Management Tools: YouTube provides technology to enable rights holders to produce unique identifiers of their copyright protected audiovisual works. If such works are then identified, then rights holders are empowered by being able to decide what should be done with this content, including by managing and monetising it.

New innovative tools such as the ones developed by Google for YouTube are offering a way for users to be creative, by gaining access to wide range of content for free, and for rights holders to protect their content, by identifying, managing access and monetising it. These types of tools and services can only be implemented if the regulatory framework allows for the necessary flexibility for new methods of cooperation between Internet intermediaries and rights holders to develop.

#### *Section 92A of the Act*

Google understands that the Government intends to bring section 92A into force on March 27, extended from February 28, and applauds the Government's recognition of the need for further discussion and consideration around the serious issues that section 92A raises. Google has a number of concerns around section 92A and the impact such an obligation is likely to have on innovation, free expression and the overall balance among the interests served by copyright law.

#### *Google's concerns with section 92A*

As discussed above, Google supports the promotion of universal access to the Internet, viewing the Internet as a vital part of individuals' and businesses' daily lives. It is critical to ensure that the legal and regulatory environment preserve the essential openness of the Internet.

Google believes that section 92A conflicts with the underlying principles of an open and



universally accessible Internet, by providing for a remedy that is disproportionate to the harm of copyright infringement online. The remedy of account termination or disconnection is especially serious and disproportionate in this context. This is particularly true when considering termination of a user's entire Internet access.

Google further believes that section 92A raises concerns regarding the protection of users' rights. Mere allegations of copyright infringement should not trump users' rights. Copyright law is often complex and context sensitive, and only a court is qualified to adjudicate allegations of copyright infringement. Indeed, in Google's experience, there are serious issues regarding the improper use and inaccuracy of copyright notices by rights holders.<sup>3</sup> In this context, the responsibility should not fall to ISPs to determine cases of infringement.

Google believes that section 92A threatens to effectively reverse the burden of proof onto a user to establish that there was no infringement of copyright, which may put user's fundamental rights at risk. It also threatens to put substantial burdens on ISPs based on enforcement of such policies. This outcome may negatively affect innovation and deter users from creative expression on the Internet.<sup>4</sup>

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<sup>3</sup> A recent study undertaken in the United States reported on findings from takedown notices issued to Google under the Digital Millennium Copyright Act 1998 (US), concluding that over half (57%) of notices sent to Google for removal of material were sent by business targeting competitors and over one third (37%) of notices were not valid copyright claims. See J Urban & L Quilter, 'Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act', [http://mylaw.usc.edu/documents/512Rep-ExecSum\\_out.pdf](http://mylaw.usc.edu/documents/512Rep-ExecSum_out.pdf).

<sup>4</sup> These are a few examples of either mistaken or over-reaching notifications alleging copyright infringement online: "No Downtime For Free Speech Campaign", <http://www.eff.org/issues/ip-and-free-speech>; Letter to Google and YouTube from McCain/Palin 2008 campaign regarding takedown of political speech on YouTube, <http://www.eff.org/files/McCain%20YouTube%20copyright%20letter%2010.13.08.pdf>, October 13, 2008; "Viacom: Fair use is what we say it is", *Wired Blog Network*, <http://blog.wired.com/monkeybites/2007/08/viacom-fair-use.html>, August 31, 2007; "Boy dupes YouTube to delete videos", *The Sydney Morning Herald*, April 14, 2007.



## **PART 2: TCF's Consultation Draft of the ISP Copyright Code of Practice**

### **Introduction**

While Google has serious concerns with section 92A, we support effective stakeholder cooperation and the development of industry self-regulation and co-regulation to improve the respect of copyright in the online environment. In this context, Google supports the TCF's efforts, in light of the anticipated section 92A amendment coming into force, to strike a balance between copyright holders' and users' interests in developing the Draft Code.

#### *Google's involvement in the TCF process*

The TCF has developed the Draft Code in order to assist ISPs in complying with their obligations under the new section 92A. As Google is likely to fall within the definition of an 'Internet service provider' under the Act, Google will have the option of becoming a party to the Draft Code and therefore takes this opportunity to submit its comments on the Draft Code.

#### *Timing for the development of the Draft Code*

Google notes the Government's recent decision to delay bringing section 92A into force until March 27, in place of the original date of February 28. Google supports this important acknowledgement of the serious implications of section 92A and of the need for further discussion and consideration of these issues by the industry and the Government.

This extended time period therefore provides the TCF and industry stakeholders with a significant opportunity to play an even larger role in determining the details and process around section 92A through the Draft Code. It is imperative that the Draft Code strikes the appropriate balance between the interests represented in copyright law.

### **Purpose and focus of the Draft Code**

The purpose of the Draft Code is to assist ISPs in section 92A compliance; however, it appears to



be directed towards only those ISPs acting as ‘Internet *access* providers’, rather than the all-encompassing definition of ‘Internet service provider’ set out in the Act. This interpretation is evidenced both through the purpose and principles sections of the Draft Code (Parts A and C) and the detailed processes set out in the Draft Code. For example, in clause 4.5.1, the drafting refers to “the ISP that directly *provides and controls* the Internet Account of a User”.

As a content host and provider of email, search and information services, Google does not fall neatly within the subset of ISPs that the Draft Code appears to be focused on. Instead of providing access to the Internet itself, Google acts as an intermediary to facilitate access for its users to the vast amount of content and information available on the Internet.

#### *Voluntary nature of the Draft Code*

The consequences of a narrower focus in the Draft Code may lead some ISPs to choose to not become a party to the Draft Code. Google notes that the Draft Code is a voluntary industry code of practice. The Draft Code itself acknowledges this to a limited extent in Part D (for example, in clause 5).

However, there remains potential for the Draft Code to form an ‘industry standard’ for compliance with section 92A. Although industry-wide self-regulation or co-regulation is often preferred, it is important to acknowledge that in the development of a code of practice for compliance with section 92A, not all ISPs can be dealt with under the same overall framework. Further, a number of ISPs may already be meeting their section 92A obligations through existing policies and Internet terms of use.

***Recommendation: The Draft Code should acknowledge that complying with the Draft Code is not necessary or relevant for compliance with 92A. In addition, some ISPs may have already developed a ‘termination policy’ and may therefore elect not to sign up to the voluntary Draft Code.***



*Multiple options for a 'termination policy' under section 92A*

Google submits that there is no single 'termination policy' which is appropriate for the numerous different types of ISPs falling within the definition in the Act. A 'one size fits all' approach to section 92A compliance may simply be impractical, imposing additional, perhaps excessive, cost and procedural requirements on ISPs and negatively impacting on their relationships with users and with rights holders.

A single, narrow approach would also encumber many industry participants in a way that discourages further innovation and stifles growth, as ISPs would be diverted from innovation and development towards seeking to comply with strictly defined provisions of an industry code. The lack of flexibility in such a narrow approach may also hamper the development of innovative business models that benefit rights holders, users and ISPs alike.

Part 1 explained Google's ongoing efforts in developing online tools, as well as implementing policies and terms of use, as evidence of Google's existing approach to copyright and infringement in an online environment. It is possible that, in addition to Google, a number of ISPs are also already in compliance with section 92A. This situation reinforces Google's view that there is no single 'termination policy' that is appropriate for all industry players in complying with section 92A.

***Recommendation: Because it has the potential to be viewed as a default industry standard, the Draft Code should clarify and confirm that there may be a variety of ISP termination policies that meet the requirements of section 92A.***

*Education of users*

The Draft Code includes recognition of the need for continued user education with respect to copyright. This is stated clearly both in the purpose (clause 1.3) and the principles (clause 4.5) sections, yet receives little attention elsewhere in the Draft Code. This is an area on which Google places great importance and dedicates significant resources towards the development of



online tools to educate and assist users, as described in Part 1. Google believes that the Draft Code must clarify that users must be fully informed about their obligations, but also about their rights under copyright, including limitations and exceptions that enable lawful use of copyright protected works.

***Recommendation: Clarify the concept of ‘user education’ to include information about users’ rights, as well as limitations and exceptions that enable lawful use of copyrighted materials.***

*Suggested wording for the Draft Code*

Google submits that the Draft Code should expressly acknowledge the varied ways in which it may be appropriate for different ISPs to comply with their section 92A obligations. In this case Google recommends that the TCF recognise, and reflect in the wording of the Draft Code, that there may be a diverse range of termination policies – the voluntary Draft Code is only one of these many options – for compliance with section 92A.

In particular, Google submits that:

(i) clause 1 be amended to the following:

- 1.1 “provide a reasonable policy and process for Parties, as one option for compliance with section 92A...”
- 1.3 “assist Copyright Holders to educate internet Users and Downstream ISPs as to their rights and obligations with respect to copyright, including any limitations and exceptions that allow lawful uses of copyright protected works.”
- 1.4 “provide a policy and process to enable Parties to operate a fair system...”

(ii) that clause 1.5 be deleted, as the Draft Code should only seek to address the obligations and procedural responsibilities of those ISPs that are Parties to the Draft Code.



(iii) clause 4 be amended to the following:

4.3 “All ISPs are required to comply with the Act (whether or not they are Parties to this Code). The fact that an ISP is or is not a Party to this Code does not, either directly or indirectly, indicate whether an ISP is complying with the Act. When a Party passes a Copyright Holder Notice to a Downstream ISP, it therefore does so in reliance on such compliance and in particular in reliance on that Downstream ISP having and implementing a termination policy complying with section 92A of the Act, whether that termination policy is in the form of the policy and process set out in this Code or is an alternative policy to this Code.”

4.5 “A primary purpose of this Code is to assist in the education of Users and Downstream ISPs as to their rights and obligations with respect to copyright, including any limitations and exceptions that allow lawful uses of copyright protected works.”

(iv) clause 5 be amended to the following:

5 “The Code is a voluntary code of practice that is applicable to those ISPs that have agreed in writing to be bound by it.”

(v) the definition of ‘Downstream ISP’ be confined only to those downstream ISPs who are Parties to the Draft Code and that clause 24 be amended accordingly.

(vi) in a number of clauses, in particular in Part C (‘Principles’), the term ‘ISP’ is sometimes used in place of ‘Party’, which is the appropriate term for the Draft Code (except in the case of clause 4.3).

(vii) clause 60 be amended to read:

60 “In order to promote understanding of users’ rights and obligations with



respect to copyright, including limitations and exceptions, and the effective operation of this Code..."

### **Lack of independence in the policy and process**

#### *Policy and process based on allegations alone*

The Draft Code provides for a notification and termination process based solely on allegations of infringement of copyright made by rights holders. The process in the Draft Code following the notification stage allows for both the evaluation of evidence and the determination of infringement disputes by the Parties and Copyright Holders. These questions are more appropriate for an independent court to consider and finally determine and enforce.

Google is concerned that the Draft Code allows for termination without the exercise of an independent process for the consideration of allegations. This is particularly important as, in Google's experience, there are serious issues regarding the improper use and inaccuracy of copyright notices by rights holders, which raise serious concerns with regard to the right to freedom of expression.<sup>5</sup>

***Recommendation: Provide for greater independence in the evaluation and determination of allegations of copyright infringement, particularly in relation to evaluating any evidence of infringement, and establish greater safeguards against inaccurate and erroneous infringement notices.***

#### *Independent determination of copyright infringement*

In any determination of copyright infringement, there are detailed and complex questions of fact and law to be determined by a qualified court. These questions include:

- evaluation of the admissibility of evidence;

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<sup>5</sup> See notes 3 and 4 above.



- consideration of any defences and exceptions to infringement provided for under the Act (Part 3), in accordance with the appropriate legal standard of proof;
- the extent of the protection of the right to freedom of expression; and
- determination of the reasonable and proportionate remedy or sanction where infringement is proven.

In contrast to these important roles of an independent court, the Draft Code generally sets out a process which:

- allows parties to an infringement dispute to determine evidential questions themselves, or requires a third party ISP to determine such evidential questions, with reference in the Draft Code to “acceptable” or “sufficient” evidence but without any provision for independent review;
- makes no reference to the possible existence of defences to infringement or exceptions for the use of copyright works, effectively placing the burden of proof on users to establish there was no infringement of copyright;
- makes no reference to the need to safeguard users’ fundamental rights, such as freedom of expression; and
- requires Parties to impose a remedy of ‘account termination’ which, in many circumstances, may be disproportionate and likely to go beyond what a court would order as reasonable.

***Recommendation:* Remove references in the Draft Code to areas that are more appropriately the responsibility of an independent court and include acknowledgement of the possible existence of defences and exceptions to copyright infringement.**

*Suggested wording for the Draft Code*

Google submits that the Draft Code should include greater acknowledgement of users’ rights,



including reference to possible defences or exceptions to copyright infringement. Google further submits that the TCF provide for greater independence and safeguards for users throughout the notification and termination process, reflecting the roles that are appropriately held by a court in evaluating and determining questions of copyright infringement.

### **Enforcement measures and cost provisions in the Draft Code**

#### *Non-compliance with the Act and the Draft Code*

Every ISP's primary responsibility is to comply with its obligations under section 92A; the Draft Code is simply intended to assist ISPs in compliance with the Act. The Act provides for legislative remedies where an ISP fails to comply with section 92A; yet the Draft Code provides for further enforcement measures where a Party fails to comply with the Draft Code, in addition to any such measures found in the Act.

Google does not agree that additional enforcement measures are necessary in a voluntary industry code of practice. Where a Party is in breach of the Draft Code, this does not either directly or indirectly indicate that the Party is in breach of section 92A. Including such enforcement measures will not assist ISPs in complying with the Act, which is the central purpose for the Draft Code. In addition, Google is particularly concerned with the severity and seriousness of the three-stage enforcement measures set out in the Draft Code in light of the Draft Code's voluntary nature.

***Recommendation: The enforcement measures in the Draft Code (clauses 42 to 56) should also be deleted and possibly replaced with provisions more appropriate for a voluntary code of practice.***

#### *Comparison with non-compliance provisions in other industry codes of practice*

Google notes that in similar TCF-prepared industry codes of practice, enforcement measures are not included within the code. For example, the ISP Spam Code of Practice (the **Spam Code**) was



developed as a co-regulatory code of practice under the Unsolicited Electronic Messages Act 2007, building on the legislative requirements without imposing any additional specific enforcement measures. Under the Spam Code, complaints regarding breaches of the Spam Code are to be considered by independent, established dispute resolution bodies such as the Disputes Tribunal or the Court.

Google notes that in other industries, common sanctions for breaches of industry-wide codes may be contrasted with the severe sanctions set out in the Draft Code. In the advertising sector, industry participants agree to comply with the self-regulatory advertising codes and standards established by the Advertising Standards Authority (ASA). Any person may lay a complaint with the Advertising Standards Complaints Board regarding a breach of a code or standard. The remedy for an upheld complaint is the withdrawal or amendment of the advertisement that is the subject of complaint.

#### *Costs incurred in implementing the Draft Code*

There are likely to be significant costs imposed on ISPs in achieving section 92A compliance, which will be increased through the implementation of the Draft Code. These costs will have an even greater impact on smaller ISPs. The Draft Code establishes a 'Processing Fee', to be set by the TCF and paid for by rights holders to ISPs. However, there is little additional information in the Draft Code as to the structure or basis for this fee.

Google is concerned with the lack of detail included in the Draft Code in relation to the costs of implementation of the termination policy by each ISP. Google considers it important that any fee is sufficient to cover the full costs of implementation. If the fee charged is inadequate to cover these costs, there could be an unwanted pass-through of costs onto users.

***Recommendation: The Draft Code should have greater transparency, including additional detail as to the basis for any fees (e.g. the total cost of implementation) and the composition of the Processing Fee.***



*Suggested wording for the Draft Code*

As noted above on page 14, Google submits that clause 4 be amended to the following:

- 4.3 “All ISPs are required to comply with the Act (whether or not they are Parties to this Code). The fact that an ISP is or is not a Party to this Code does not, either directly or indirectly, indicate whether an ISP is complying with the Act.”

**Conclusion**

The above submission sets out Google’s preliminary comments on a number of the issues raised by the TCF’s Draft ISP Copyright Code of Practice and section 92A of the Copyright Act 1994.

Google would be pleased to provide further details on any of the issues raised in this submission and looks forward to constructively engaging with the New Zealand Government, the TCF and other industry players as it continues to consider these important issues for the legal and regulatory framework of copyright in New Zealand.

Kind regards

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