

7 August 2009

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Ministry of Economic Development
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Via Email

Dear Joshua

**SUBMISSION BY THE TELECOMMUNICATIONS CARRIERS' FORUM IN RESPONSE TO
MINISTRY OF ECONOMIC DEVELOPMENT S92A PROPOSAL**

Introduction

1. This submission is made by the Telecommunications Carriers' Forum (TCF) and has been shared with and is supported by ISPANZ. TCF members provide more than 90% of the internet connections in New Zealand. Our members are BayCity Communications, CallPlus, Compass Communications, FX Networks, Kordia, Telecom New Zealand, TelstraClear, TrustPower, Vector Communications, Vodafone, Woosh and WorldxChange.
2. The TCF appreciates the opportunity to respond in this submission to the proposal published by the Ministry of Economic Development on 14 July 2009 with respect to section 92A of the Copyright Act 1994 (**MED proposal**). Some TCF members may also make their own submissions.
3. The primary focus of this submission is on issues that directly impact TCF members, although, as a result of our experience with the previously proposed TCF Internet Service Provider Copyright Code of Practice (**TCF draft Code**), we do offer some observations on other aspects of the MED proposal.
4. This submission is therefore divided into 4 parts:
 - 4.1 Important issues from TCF members' perspective and suggested solutions to those issues;
 - 4.2 Other issues which TCF members have with the MED proposal, again with some suggestions for consideration;
 - 4.3 Observations on wider aspects of the MED proposal; and
 - 4.4 Answers to the specific questions raised in the MED proposal (see Appendix 1). Some questions are not directly relevant to TCF members and have therefore not been answered.
5. We should first note that we regard the MED proposal as a significant improvement on the previous position under s92A.
6. It was clear during the TCF draft code consultations that neither ISPs nor their customers wished ISPs to be put in the position of *policing the internet* or of having to adjudicate between the competing claims of rightsholders and customers. It is pleasing that that some of those concerns have been recognised in the MED proposal. In particular, the TCF fully supports the introduction of an expert independent adjudicator such as the Copyright Tribunal.

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7. It remains the TCF's strong view that ISPs should not be required to *intermediate* in disputes between third parties or to take on a quasi law enforcement role, whether with respect to copyright or any other sphere. The introduction of the Copyright Tribunal removes the adjudication concern in this instance but it still does leave ISPs in a position where they are required to adapt their systems and then operate a process so as to play an active part in assisting a third party rightsholder to enforce its rights.

Important Issues

Cost benefit vs. notice and notice alternative

8. There are costs involved in instituting and running any process. It should be recognised however that there is a significantly increased cost in proceeding with the process envisaged under phases 2 and 3 of the MED proposal. In fact, significant increase in cost for ISPs comes even earlier, at what might be called stage 1B -the cease and desist letter stage in the process. In the balance of this submission, for ease of reference, we will refer to the first notice as phase 1A and the second cease and desist notice as phase 1B. Where no distinction between those two sub-phases is necessary we continue to refer to both together as phase 1.
9. Components of overall cost include:
 - 9.1 The establishment of the internal resource and systems necessary for the Copyright Tribunal to take on this extensive and novel jurisdiction (this will not be able to be recovered out of fees charged to rightsholders on a cost recovery basis);
 - 9.2 ISPs' changes to their technology systems, development of internal policies to comply, in particular, with phases 1B, 2 and 3, and costs of implementation;
 - 9.3 ISPs' ongoing costs in running phase 1B, 2 and 3 processes in particular, some of which will not be able to be automated and which will therefore require additional personnel.
10. An alternative would be a simpler notice and notice system. Effectively, this is phase 1A of the MED proposal as a standalone.
11. If it is decided to proceed now with a full phase 1B, 2 and 3 system, then that will be a decision based on a regulatory impact assessment which supports Government expenditure in the overall public interest. However, that does not recognise the costs that ISPs will incur as private businesses. It is therefore submitted that if phases 1B, 2 and 3 are adopted, the above costs to ISPs in assisting in the enforcement of third party rights should be compensated.
12. That is analogous to the approach taken when an ISP is called upon to assist a surveillance agency under the Telecommunications (Interception Capability) Act 2004 (see section 18 of that Act **attached** as Appendix 2). If it is considered appropriate for ISPs to be recompensed for their actual and reasonable costs in assisting public benefit law enforcement agencies under that statute, then it must be even more appropriate for rightsholders seeking to protect private rights to cover ISPs' costs.
13. TCF members would be prepared to bear the lower costs if ISPs were engaged solely in phase 1A style notice and notice.
14. Overseas evidence suggests that a significant proportion of users would be likely to cease infringing on receipt of a phase 1A style notice. We enclose an article in which this is highlighted by the Business Software Alliance with respect to Canadian experience.
15. We note also that the UK Department of Culture, Media and Sport's *Digital Britain Report* http://www.culture.gov.uk/what_we_do/broadcasting/6216.aspx rejects a repeat infringer penalty regime and proposes notice and notice.
16. The reality of course is that no-one knows if any particular system will be effective or not. The TCF's concern therefore is that the significant costs for ISPs and Government referred to above could be incurred only to find that a full phase 1-3 system works little better than a phase 1A standalone might have. Conversely, if, after a period of, say, 24 months, it is found that a notice and notice system has not resulted in a satisfactory reduction in infringement, it

would be possible to overlay phases 1B, 2 and 3 without having to alter the phase 1A process already in place. It is therefore not as if the system would need to be scrapped and a replacement introduced. By that time also, it is hoped that new commercial models for distribution of legal content will be better advanced.

17. Further, if a notice and notice approach is taken, many of the issues with the MED proposal fall away. However, if a phase 1A style notice and notice standalone is not accepted and the full phases 1B, 2 and 3 are also introduced, then, even if ISP's costs are covered, we still have some suggestions on the MED proposal. These are covered in the balance of this submission.

Process Suggestions

18. It appears to us that the process envisaged by the MED proposal has technical difficulties, in three key respects:

Moving from phase 1 to phase 3

- 18.1 The first possible design flaw that we see in the process relates to the number of infringements necessary before phase 3 can be invoked.
- 18.2 The process diagram attached to the MED proposal shows a linear path from phase 1 to phase 2 to phase 3.
- 18.3 However, the MED proposal itself, at paragraph 1) under the heading phase 3, seems to indicate that a rightsholder could move directly from phase 1 to phase 3.
- 18.4 We take it from this that once a rightsholder has sent its cease and desist letter at the conclusion of phase 1B (after two alleged infringements), it has a choice. It can either commence phase 2 and lodge an application with the Copyright Tribunal if it wishes to obtain the rightsholder's identity, or it can move straight to phase 3 mediation/remedy application to the Copyright Tribunal.
- 18.5 The upshot of that is that a customer could be found by the Copyright Tribunal to be a repeat infringer and have a remedy awarded against it after only two infringements. That does not seem to the TCF to accord with a regime designed to penalise people who infringe *repeatedly* (which underpins the current concept of what is thought of as repeat infringement, as per s92A(2)). It also seems a strange concept to have a cease and desist letter issued as a warning not to infringe further, but then not require any further infringement before taking enforcement action. We are not sure if this is what was intended.
- 18.6 To some extent this apparent relaxation of the repeat infringer standard may be ameliorated by the Copyright Tribunal being able to tailor any remedy to the scale of infringement. However, the TCF's submission is that 2 infringements over what could be a 9 month period should not warrant a rightsholder going to phase 3. The TCF's view is that such occasional infringement, whilst not to be condoned, does not justify ISPs' customers being subject to potentially very serious remedies. There should be at least another infringement required in all cases after the issue of a cease and desist letter.
- 18.7 There is also a technical process issue with a rightsholder being able to bypass phase 2. If the rightsholder does not have the customer's identity and contact details then we cannot see how the mediation and Copyright Tribunal processes in phase 3 will be able to be conducted. If it is suggested that the ISP will again need to be involved at this stage in providing that information to the mediator or the Copyright Tribunal then that adds further complexity and would presumably require a Copyright Tribunal order to the ISP anyway.
- 18.8 In what follows however, for ease of reference, we have commented as if phase 2 and phase 3 were options and only 2 infringements required to move to phase 3.

Rightsholder does not know if customer has received other notices

- 18.9 The second process issue we have identified relates to a rightsholder's knowledge (or rather, lack of knowledge) of how many alleged infringement notices one customer has received.
- 18.10 Typically, where a rightsholder alleges infringement over a p2p network, the rightsholder will identify the infringement as occurring at an IP address. It will then be for the ISP to match that IP address to its customer if it can and to notify the customer.
- 18.11 However, to move to phase 2 or phase 3 under the MED proposal, the rightsholder must know that there has been a second alleged infringement by the same customer.
- 18.12 What seems to have been missed in the MED proposal is that the rightsholder will not necessarily know that except:
- 18.12.1 Where the rightsholder collects evidence of the subsequent alleged infringement occurring at the same IP address. This is possible but will often not be the case where the customer has been dynamically allocated different IP addresses each time it connects or if the customer happens to have more than one IP address; or
- 18.12.2 Where the rightsholder knows the actual identity of the customer either through other external evidence that it has collected or because the customer has decided to divulge its identity to the rightsholder (note however that the customer is not required to do this at phase 1 even if it disputes a notice).
- 18.13 Conversely, in a dynamic IP addressing situation, the rightsholder may think that the same customer has infringed more than once because the same IP address is used but, in fact, coincidentally, that IP address may have been used by two unrelated customers. It is only the ISP that will know this.
- 18.14 Further, the TCF's view is that it would be artificial to distinguish between different rightsholders and therefore that alleged infringements should be aggregated from all rightsholders. We raise this here because this also impacts on the ability of a rightsholder to know how many notices a customer has had. If rightsholder A has issued a notice alleging infringement and then another notice is issued by rightsholder B, and they are both matched by the ISP to the same customer, neither of the rightsholders will know that they could move to phase 2 or 3 with that customer.
- 18.15 In summary therefore, it seems to us that there will be many situations where the rightsholder will not know that it can move to phase 2 or phase 3 even though a customer to which that rightsholder has issued a notice has allegedly infringed more than once.
- 18.16 The solution to this is that the ISP will not only need to keep a running total of notices that a customer has received but, when responding to a rightsholder, will also need to advise how many notices that customer has received. The TCF is reluctant to suggest this since it does involve the introduction of further changes to ISPs' systems, another step in the process and more information to log and collect. However, if the phase 2 and 3 processes set out in the MED proposal are to work, then we see little choice but to adopt this procedure. This does introduce more cost to be recovered by ISPs however.

Alleged infringement should be recent

- 18.17 The third process design issue that is of particular concern to TCF members is that there is no stipulation as to how recent an alleged infringement notified by a rightsholder must be.
- 18.18 It is submitted that that any notification of an alleged infringement should be made within 30 days of the event alleged to be an infringement (for example, within 30 days of the downloading of an allegedly infringing copy of a song). We say this for 3 reasons:
- 18.18.1 The longer the period between the event and the rightsholder's notification, the more difficult potentially it will be for an ISP to match the IP or other

information to a customer. This is particularly the case for smaller ISPs whose systems may be of a more manual nature.

18.18.2 Without a timeframe, ISPs will not know the minimum time they must retain that information in advance of receiving a notice. (Once a notice has been issued and matched to a customer, the MED proposal indicates that all information would need to be kept for at least 9 months, until the notice, if not acted on further, expires).

18.18.3 For the customer, their receipt of the notification of alleged infringement needs to be close enough to the event for them to (a) investigate what has happened and (b) modify behaviour (particularly if the alleged infringement was that of another family member, an employee or someone else using the customer's connection, whether with its permission or not).

Other issues

19. The above are issues and suggestions that are important from TCF members' perspectives. In the following sections, we note other issues.

False, misleading, vexatious or incorrect notices

20. The TCF has a concern that there is no sanction on a rightsholder who submits notices which are false, misleading, vexatious, incorrect or simply fail to comply with the notice requirements. We anticipate that this could particularly be an issue with overseas rightsholders.

21. Again, the cost of addressing issues or failings in the notice could very well fall on the ISP in the first instance.

22. A filing fee payable by the rightsholder from which the ISPs' overall costs can be recovered may be part of the solution. However, the TCF suggests that consideration be given to reinstating the penalty regime that was taken out by Supplementary Order paper when the Copyright (New Technologies) Amendment Bill received its final reading in 2008.

23. Whilst there is no argument with a rightsholder sending a notice whenever it legitimately considers an infringement has occurred, ISPs are concerned that they do not get deluged with notices of dubious quality.

Implementation period

24. Allied to the above point re number of notices, the TCF requests that ISPs be given at least 3 months to implement processes following the passing of the amendment and any regulations before they are required to begin processing notices. This will enable ISPs to implement internal policies, any technology changes to be made, adjustments made to contractual terms to take account of the process if needed, and generally to prepare for the processing of notices. We expect that the Ministry of Justice will also need a similar period of time to operationalise the expanded role of the Copyright Tribunal.

Inconsistency between s92A and s92C

25. If an ISP *knows or has reason to believe* that a copyright infringement has occurred with respect to material that it stores (e.g., material on a website that it hosts) then it will take that material down or disable access under sections 92C and 92D of the Act (otherwise it will lose its safe harbour in section 92C(2)).

26. However, an infringement that is dealt with by an ISP under ss92C and D remains an infringement that may potentially be the subject of any s92A process. This is potentially confusing for everyone involved, particularly the ISP. If it receives a typical takedown notice, does it treat it as a notice under s92D and take the material down or does it follow the s92A process under the MED proposal? Conversely, does an ISP have *reason to believe* that an infringement has occurred under s92C before the Copyright Tribunal has ruled on a dispute under the s92A process?

27. We see two alternatives to deal with this:
- 27.1 If a notice and notice approach is taken for s92A then; modify s92C similarly so that the two processes are consistent. This would be the TCF's preference.
 - 27.2 If the full phase 1-3 process is introduced, exclude from the s92A process any infringement which is dealt with by an ISP under s92C. Otherwise not only is there the confusion referred to above but there is also the potential for the alleged infringer to be penalised for the same infringement even after it has been dealt with by means of a takedown.
28. The reality is that s92A is directed at p2p traffic type activity rather than hosting so we do not see that taking either of the above options will adversely affect the aim of discouraging repeat infringement.

ISP?

29. The MED proposal leaves open the definitions of *ISP* and *subscriber*. These are critical and the TCF found that breadth of those who were responsible for implementing s92A and those who were potentially impacted by termination drove many of the complexities in the TCF draft code.
30. It is the TCF's view that an ISP for the purposes of s92A should be confined to what one would normally think of as *traditional ISPs* - those who provide connectivity as part of their business. In Australia, the Copyright Act there refers to these as *carriage service providers*. Another option, which would confine the definition very specifically to IP address specific infringement would be to refer to any entity listed with APNIC as holding an IP address range (APNIC is the regional registry responsible for allocation of IP addresses ranges for New Zealand - see <http://www.apnic.net/>). Leaving the definition as it stands at present has at least two problems:
- 30.1 It catches businesses that are not going to be able to perform the technical IP address matching, logging and data management tasks that will be necessary even for phase 1, let alone phases 2 and 3.
 - 30.2 It means that there are many more entities in a chain of ISPs that directly or indirectly provide connectivity to the customer. For example, under the current definition, both a library and the carriage service provider providing it connectivity would be an ISP. This leads to confusion as to who is responsible for implementing the s92A process.
31. It should be noted that this issue does not arise under s92C since there can only be one host of stored material. Therefore the ISP definition for the purposes of the safe harbour in s92C can remain as it is. Further, whilst all TCF members will be *carriage service providers* or searchable via APNIC, the TCF considers as a general principle that the safe harbour in section 92B should continue to apply to the currently defined wide category of ISP.

Which ISP?

32. The chain of connectivity noted above also raises another issue. Even if s92A process requirements are confined to carriage service providers, there will still always be more than one entity that falls within that definition in respect of the connection provided to a customer. There will always be a network owner and a retailer of the internet service to the customer. Sometimes these will be the same entity (e.g. TelstraClear, Telecom (although operationally separated), Vodafone); sometimes not (e.g. FX Networks provides a network but does not provide internet services to end users). In some instances there will be other entities in the chain (for example where a wholesale service provider provides services to a retailer who on-sells them to end users or where a block of addresses in an IP address range is *sub-licensed* to another provider).
33. The consequence of the above is that in some cases it will not be immediately obvious which ISP should take responsibility for instituting a s92A process. In the TCF draft code this was dealt with by creating a category of ISP referred to as a *Downstream ISP*. This then enabled a notice from a rightsholder to be passed on to the ISP who had the ability to match the

evidence given to an actual end user. Whatever process is adopted, it needs to be made clear which entity has ultimate responsibility for passing the rightsholder's notice on to the end user.

Subscriber?

34. The answer to the question of who is a subscriber has a similar impact. If the definition of ISP is left as it is then all businesses or organisations that provide internet connectivity to anyone else (other ISPs, businesses, employees, students, library visitors etc) are both ISPs and subscribers (unless they are not obtaining any form of connectivity or network services from anyone else).
35. This adds significant complexity and was one of the large concerns that arose during the TCF draft code consultations. The consequence of the breadth of the definitions and coverage is that an entity providing internet connectivity to multiple users and yet which is a subscriber who has an *internet connection* could have that connection terminated and all users cut off because of the actions of just one infringing user. For businesses, educational institutions, households and any other group, that was submitted by most to be unfair and disproportionate.
36. To an extent this issue is a consequence of the termination remedy. For example, if fines alone were the remedy, then, in the TCF's view there would be nothing wrong with making a business vicariously liable for its employees and incurring a fine if it failed to comply with a full phase 1-3 process.
37. Finally on the issue of subscribers, the position of essential services and vulnerable customers needs to be considered. Again, this may only be relevant to a termination remedy.

Termination

38. The above is one of the reasons why the TCF does not favour termination as a remedy. There are other reasons such as proportionality and necessity of an internet connection for business, social interaction, day to day activity (banking etc) and education but the TCF is content to leave those arguments to others directly affected and better placed to make them.
39. However, from a TCF perspective, termination is not a favoured remedy for three other reasons:
 - 39.1 It will result in ISPs instituting a standard termination process. This will not always be straightforward where the customer obtains multiple services or products which are interrelated with its internet service. Even if it is straightforward, it still requires action on the part of the ISP, effectively to institute a penalty on behalf of a third party rightsholder. Again, this is a cost issue and would need to be added to any cost recovery component for ISPs.
 - 39.2 It is the only remedy that is actioned by the ISP (as opposed to fines, damages etc). Inevitably, this will mean that the ISP bears the brunt of the complaints that will flow and, if there does happen to be a termination based on incorrect evidence as has happened overseas, the ISP will be blamed. Not only is this unfair on the ISP but it also has the potential to add cost to call centres and customer relationship processes.
 - 39.3 Whilst for some people termination will be a significant imposition, for others, it will not. They will simply sign up immediately with another ISP or indeed with the same ISP again. Ironically, the TCF suspects that the typical p2p infringement younger demographic will be less impacted by termination. Therefore the complexity which termination drives into the process seems to the TCF to be hard to justify when compared to the benefit.

Safe harbour

40. If an ISP is to be required to take action under the s92A process, whether in its own discretion acting in good faith or at the direction of the Copyright Tribunal, then it needs to be statutorily protected from any action by the person affected.

41. This is another area however where there needs to be consistency between s92A and s92C. At present, there is no protection for an ISP who acts in good faith and takes down allegedly infringing content which is then found to not infringe. Again, ISPs are effectively acting in the interests of the third party rightsholder so it is unfair that they are not protected and it would be inconsistent to leave them exposed under one process when they are protected under the other.
42. Conversely, if the ISP does comply with the s92A process then that must be an absolute bar to a claim that it has infringed by providing an internet connection over which repeat infringement has taken place. It is unclear whether the exception in section 43A is sufficient for this purpose.

Customer information

43. The TCF supports disclosure of customer identity requiring a Copyright Tribunal decision if the process is to include anything beyond phase 1A notice and notice. This was a significant issue during the TCF draft code consultations.
44. However, it is unclear what restrictions will be placed on the use of such information. Again, the TCF anticipates that if a rightsholder that obtains such information uses it to then harass a customer, the ISP will be the one that endures the brunt of the customer's complaint. We assume also that that information will not be able to be retained by the rightsholder beyond the time necessary for the process to run its course.
45. Finally on this point, it should be noted that customer information is valuable in its own right and is commercially sensitive for ISPs. This necessitates both confidentiality and security on the part of any rightsholder receiving such information but also a prohibition on the rightsholder using this process to collect and aggregate customer data for its own commercial purposes. As business models change and are negotiated between content providers and ISPs this will become increasingly important.

Notice detail

46. No doubt this will be looked at in greater detail when legislation is drafted but we should note even at this stage that if ISPs are to be expected to match IP addresses to customers, very specific and accurate time-stamping with respect to the allegedly infringing event will be required. With respect to p2p infringement for example, that should detail, down to the nearest second, when the download/upload commenced and finished. The presentations that TCF members were given by RIANZ showed the type of evidence which the TCF considers necessary.
47. We note also that detail needs to be added with respect to any alleged infringer's dispute notice.
48. Some thought needs to be given to the content of the rightsholder notice. Again, from an ISP perspective, unless this is very clear, not confusing and is non threatening, it is the ISP that will be contacted for clarification or on a complaint. As a general principle, at this stage any complaint by a rightsholder in a notice is only an allegation of infringement and therefore, as has been seen overseas, threatening language tends to be counter-productive.
49. Finally, the format of notices should be specified with sufficient detail so that they can be standardised, which will allow ISPs to automate processing as far as possible should they wish.
50. If such notices are to be detailed in regulations rather than in an amendment to s92A, then the TCF would therefore appreciate being consulted. The same request is made with respect to any aspect of the process which is to be contained in regulations.

Mediation

51. The TCF generally favours mediation as a means of resolving disputes. However, in this instance it is not immediately obvious what a mediation would deliver in terms of agreed resolution and it would certainly add time to the process.
52. We are also concerned that a mediation might require input from the ISP, which again adds complexity and cost that an ISP would need to recover.

Tribunal process and considerations

53. The TCF is of course content to abide by the decisions of the Tribunal. However we note some aspects that are unclear that will need to be looked at when the process is finalised:
 - 53.1 If termination is retained, it is assumed that this will be treated as a remedy reserved for serious infringement and, as flagged in the MED proposal and noted above, perhaps not available for organisations. In fact, it is unclear what criteria the Tribunal would use to assess which of any of the remedies should be awarded and, if a financial one, at what level. In the TCF's view, significant penalties should be reserved for commercial infringement only. Fines have some attraction since they can be scaled according to the scale of the infringement.
 - 53.2 The potential seriousness of the remedies available also influences the burden of proof. The TCF does not have a particular view on this but notes that it is unclear whether this process and the Tribunal will confine itself to straight forward cases or will have jurisdiction to consider more complex copyright infringement disputes.
 - 53.3 If the Tribunal is solely to consider submissions lodged by the rightsholder and the alleged infringer online, then it might be argued that that is analogous to domain name dispute procedures under the .nz DRS run by InternetNZ or the UDRP run by WIPO. Those processes are reserved for obvious cases of cybersquatting and not for complex disputes. Whatever is decided, clarification of the Tribunal's processes is required.
 - 53.4 Further, if the process is to involve more than just consideration of evidence filed online, then it is quite possible that one or other party may seek to involve the ISP to substantiate evidence or to explain technical issues. TCF members are open to that but again cost recovery would be required.
 - 53.5 The above we suggest tends to point to the Tribunal only handling the most obvious of cases, which in turn suggests that both the onus of proof and the burden of proof should be reasonably heavily placed on the rightsholder. From what we have seen of RIANZ's evidence gathering processes for example, that should not be an issue for responsible rightsholders.
 - 53.6 If we are correct in our point made in paragraphs 18.1 to 18.6 above (that a rightsholder, having completed phase 1, then has an option of going straight to phase 3 rather than seeking the customer's identity under phase 2), then it is unclear how any mediation or Tribunal consideration in phase 3 will progress without the identity of the alleged infringer. This is even more of an issue when it comes to enforcement of a remedy such as a fine or damages.
 - 53.7 We note that there is no provision for a subscriber or an ISP to initiate a complaint to the Tribunal. Again this is consistent with the domain name dispute resolution procedures. However, this may again justify a penalty regime for rightsholders who do not comply with the requirements of the process. For example, what happens if a rightsholder does not abide by the privacy, confidentiality and use restrictions with respect to an alleged infringer's identity? Since there is no avenue of complaint to the Tribunal it could be argued that any such prohibitions are worthless as there is no penalty for their breach, particularly by overseas rightsholders.

Wider aspects

54. There has been a lot of discussion in recent times, both in New Zealand and overseas, about the need for new business models. This is not just an issue for music and films: newspaper owners allege that they are suffering at the hands of bloggers; authors and publishers of books are struggling to understand the impact of digitization by the likes of Google and Amazon and photographers complain of rampant infringement of their sole creative output. Indeed, the business models and geographically based distribution systems that copyright has traditionally protected (whether intentionally or not) are radically affected by the global internet.
55. It is the TCF's view that care needs to be taken in implementing measures to curb activities which in part may be a response to outdated business models. No blame is attached here - it behoves everyone involved, ISPs included, to work at development of new models which enhance and protect New Zealand's creative productivity. However, if we are to implement relatively complex and costly processes, we need to be sure that we are not doing so to address a problem which may to a large extent be solved by market forces. In particular, it is the TCF's view that given better, faster, reasonable cost access to the broad range of content (some of which is not available easily in New Zealand or is delayed in its release here) most people would take advantage of that rather than infringe, assuming they understood that they were infringing.
56. The TCF would like to see the Government put more effort into ensuring that content is readily available to New Zealanders and is not locked up behind geographic barriers. The internet does not respect such barriers and neither do New Zealanders who engage with friends and colleagues overseas whose access is not so constrained. TCF members have found it difficult in many instances to negotiate rights to carry such content -possibly because New Zealand is too small a market for overseas content owners to bother with. Whatever the cause, the end result is that New Zealanders have no choice but to go looking for that content in other ways. Not only is that a commercial opportunity lost for ISPs, content owners and creators but it also fosters a growing lack of respect for copyright. This impacts everyone in New Zealand and therefore legitimately warrants Government attention.
57. There is therefore much work to be done also in making people understand the impact of infringement on fellow New Zealanders and in promoting respect for creative effort, which is of course one of the underpinnings of copyright protection.
58. Traditional approaches of criminalising what are by themselves relatively minor civil infringements have, in the TCF's view, not worked and have in fact created an environment where attacks on copyright itself have flourished.
59. It is therefore the TCF's view that content creators and Government need to educate those using new technologies on these issues. ISPs are willing to assist with their own customers and the notices that will be sent under phase 1 will assist in educating people if drafted in that spirit. However this initiative needs to be wider than that and in particular it needs to be targeted at children who are moving into the digital environment.
60. TCF members looks forward to such initiatives and to being at the forefront of development of new business models. In the meantime, we again express our gratitude for the opportunity to comment on the MED proposal which we regard as a positive step forward in this debate.

Should there be any questions on this submission or if further discussion is desired, please do not hesitate to contact me on 021 443 137.

Yours sincerely



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Appendix 1 - Answers to MED Questions (answers in italics)

Introductory Questions

1. Do you agree that the proposal in general terms provides for the potential to develop a fair, efficient and workable process for dealing with copyright infringement in the digital environment?

Our general views are set out in our submission

2. If you support the proposal in general, are there elements of the proposal that you believe could be significantly improved?

See our submission

Phase 1 Questions

1. Is reasonable evidence of copyright infringement an appropriate threshold level for a RH to send a first infringement notice and subsequently a cease and desist notice?

The TCF does not have a particular view on this but is concerned to ensure that the process is fair on ISP's customers.

2. Should there be a limit to the number of first infringement or cease and desist notices that RHs may send, and if so, in what period of time?

The TCF does not have a particular view on this but is concerned to ensure that the process is fair on ISP's customers.

3. How long should first infringement and cease and desist notices be valid for?

9 months seems reasonable.

4. Should RHs be able to allege infringement of multiple works?

Yes provided that they cannot be accumulated and the timing suggestions made in our submission are adhered to.

5. Should a subscriber be required to supply their contact details to the RHs in a response notice?

No, not without expert independent assessment of the complaint as proposed

6. Should sanctions be imposed against RHs for repeated intentional improper use of the notice procedure?

Yes - see paragraphs 22, 23 and 53.7.

7. Do you have any further comments with regard to Phase 1 generally?

See our submission. It might be preferable for ease of understanding if the two notice procedures currently in phase 1 were divided into two phases as we have done in our submission.

Phase 2 Questions

1. Should the Copyright Tribunal be given authority to order an ISP to provide a subscriber's contact details and any further information requested about the alleged infringer? If not, who should have this authority?

Provided that the Copyright Tribunal has the requisite degree of certainty that there has been two infringements by the same customer and the use of that information is strictly governed, the TCH has no issue with this. Note however that the TCF's position is that a phase 1A standalone may well be sufficient.

2. The level of evidence required for a RH to obtain a Copyright Tribunal order is based on the equivalent of obtaining a search warrant. Are there any reasons to depart from this threshold level?

The TCF has no particular position on this other than to note that access provided by a search warrant is given to a State enforcement body (e.g. police). Here, the access is being provided to a private rightsholder. Again, the TCF wishes to see that an appropriate balance is struck as between rightsholders and ISP customers.

3. Should repeat copyright infringement extend to infringement in a work or works owned by different RHs?

Yes - see paragraph 18.14 of our submission

4. Do you have further comments or are there any other issues that need to be addressed in this section?

See our submission generally.

Phase 3 Questions

1. Is mediation an appropriate step and is it an effective use of resources?

The TCF cannot see how this will work - see paragraphs 51 and 52 of our submission

2. How can the complaint registration process with the Copyright Tribunal be streamlined effectively, i.e. all communication online?

The TCF generally favours online processes but further detail of the Tribunal's adjudication procedures would be required before any conclusive comment could be made on this.

3. Is reasonable evidence of repeat copyright infringement (to be proved on the balance of probabilities during proceedings) an appropriate threshold level for a RH to register an allegation of infringement with the Copyright Tribunal?

The TCF has no position on this.

4. What remedies should be available to the Copyright Tribunal? In particular, should the Copyright Tribunal be able to order a fine to be paid or an account to be terminated?

The TCF does not consider termination an appropriate or useful remedy - see paragraphs 38 and 39 of our submission.

5. With regard to account termination, what is an appropriate period of time for disconnection to last?

It would be difficult, if not impossible, to police any mandatory disconnection period and that elevates termination to a very serious remedy indeed. The TCF has not considered this point in any detail and it was accepted very early on in its discussions with rightsholders that this would be unworkable. If any mandatory disconnection period is to be proposed, the TCF would likely be against it and anticipates that it would add very significant costs to ISPs and to the system as a whole.

6. Should parties to a dispute be entitled to appeal and if so, should this be to the High Court or to an appeals section of the Copyright Tribunal?

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The TCF has no position on this.

7. How should costs be assigned in Phase 3?

Costs are a major issue for ISPs and are referenced throughout our submission. If anything beyond phase 1A (first notice to customer - notice and notice) is introduced, then, by analogy to the Telecommunications (Interception Capability) Act 2004, ISPs' costs should be recoverable.

8. Do you have any further comments with regard to Phase 3 generally?

See our submission generally.

Appendix 2

Section 18, Telecommunications (Interception Capability) Act 2004

18 Costs incurred in assisting surveillance agencies

(1) A surveillance agency must pay for the actual and reasonable costs incurred by a network operator or a service provider in providing assistance to the agency under section 13.

(2) A surveillance agency must pay the costs referred to in subsection (1) by the date specified for payment, whether in an invoice or other appropriate document given to the agency by a network operator or a service provider, being a date not less than 1 month after the date of the invoice or other appropriate document.

E-mail warnings deter Canadians from illegal file sharing

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[CBC News](#)

The entertainment and software industries have found an effective tool to deter some Canadians from downloading TV programs, movies, music and software. And it doesn't involve going to court.

A number of industry groups, mostly based in the United States, are relying on e-mail to get the message out that peer-to-peer file sharing is illegal. Thousands of the e-mails are being sent to Canadian users each month under a program known as "notice and notice."

Major Canadian internet service providers including Rogers, Bell and Telus have voluntarily agreed to distribute the notices to their customers on behalf of the industry associations. Telus forwards an average of 4,000 notices every month.

Stephen Harrington received a notice late last year after downloading a computer game from a bit torrent file-sharing site. (Bit torrent sites are used to share larger files, such as movies.)

Harrington wanted to play the game with his friends, liked it, and purchased it a few days later.

"Actually, I almost deleted it. But I read through and was quite surprised. But I was initially concerned," Harrington said.

The entertainment industry has long expressed frustration with Canada, and its unwillingness to modernize copyright laws.

"Canada's copyright laws regarding uploading and downloading are unclear, and that does present a number of challenges in curbing internet piracy," said Neil MacBride, a vice-president with the Business Software Alliance, a Washington D.C.-based industry association that fights software piracy.

The Business Software Alliance sent out about 60,000 "notice and notice" e-mails to Canadian internet users in 2006. "They've been most effective," MacBride said.

'Stop this infringing activity'

"If you're somebody who's [downloading] and you receive word that you're essentially using somebody else's property without their permission, it seems to have the desired effect — namely, people take it seriously and alter their behaviour accordingly."

The notices contain terse legal language: "This unauthorized copying and distribution constitutes copyright infringement under applicable national laws and international treaties. We urge you to take immediate action to stop this infringing activity and inform us of the results of your actions," reads one of the e-mails, sent by NBC Universal to Canadian internet users who were suspected of downloading a NBC television show.

Canadian users are tracked by IP address when content is downloaded from the internet.

"It doesn't have any significant legal weight in the sense that it doesn't mean they're facing a lawsuit immediately or even the claims of infringement have been proven," said leading internet law expert Michael Geist of the University of Ottawa.

But Geist said the "notice and notice" program has been successful in scaring people to stop downloading.

"I think they've proven surprisingly effective and in fact indications are that when subscribers receive these, a significant proportion will take down the offending content if, in fact, it is infringing," he said.

Harrington says he has not downloaded material using peer-to-peer sites since he received his e-mail notice, forwarded by his ISP, Rogers Communications. But he is concerned about privacy: What information are the ISPs passing along to the industry groups?

"The ISPs are the only ones who know what individuals are doing what, so they're trying to push that thin blue line and get to individual privacy that way," he said.

No privacy issues, ISPs say

Both Rogers and Telus maintain they do not pass any personal information, such as user name or address, to any of the groups initiating the notice e-mails.

"We protect the rights of our customers and the privacy of our customers and the information about our customers quite vigorously and we do not pass the information about our customers on to third parties," said Michael Lee, chief strategy officer for Rogers Communications.

The notice program in effect in Canada is essentially a tool to alert users that they are downloading what the industry groups see as copyrighted material. Even though tens of thousands of e-mails have been distributed over the last few years, no one has been prosecuted for copyright violation as a result of the notices.

"Notice and notice" differs from the "notice and take-down" program that's in place in the United States. There, when an industry group notices an alleged copyright violation, an e-mail similar to the ones being sent to Canadian users is forwarded to the American ISP. In most cases, the ISPs are forced to immediately take down the content or face penalties.

"I think notice-in-notice is a great alternative that really respects privacy and free speech much more than notice and take-down," said Ren Bucholz of the internet advocacy group Electronic Frontier Foundation.

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