



Telecommunications Carriers' Forum

Response to Consultation on Copyright (Infringing File Sharing) Regulations 2011

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Response to Consultation on

Copyright (Infringing File Sharing) Regulations 2011

Introduction

1. This response is made by the Telecommunications Carriers' Forum (**TCF**). TCF members provide more than 90% of the internet connections in New Zealand. Our members are 2degrees, Airnet, BayCity Communications, CallPlus, Compass Communications, Enable Networks, FX Networks, Kordia, Northpower, Telecom New Zealand, TeamTalk, TelstraClear, TrustPower, Vector Communications, Vodafone, Woosh and WorldxChange.
2. The TCF has been integrally involved in the development of the principal legislation, the Copyright (Infringing File Sharing) Amendment Act 2011 (**Act**) and its predecessor legislation, the Copyright (New Technologies) Amendment Act 2008. For example, we developed a draft code of practice (**draft code**) to deal with many of the issues now proposed to be dealt with in the Copyright (Infringing File Sharing) Regulations 2011 (**Regulations**). A copy of the draft code as it existed immediately prior to the Government's announcement in late February 2009 that it was to suspend section 92A, remains available on the TCF site.¹ The experiences gained from that work and TCF members' understanding of how the complex processes envisaged by the Act will need to be put into practice in their businesses, give us a unique perspective.
3. Whilst TCF members remain concerned at a number of aspects of the Act itself, we accept that it has now been passed. The fact that account suspension has not been brought into force is a good decision on which Parliament is to be congratulated. As we have indicated previously, account suspension would carry significant issues for IPAPs and involve much greater cost.
4. The greater fear now is that the next steps will not balance the regulatory burden fairly as between IPAPs who must operate the processes, and rights owners who are the beneficiaries of those processes and the owners of the private property rights being protected. The Discussion Document suggests such an imbalance.
5. In particular, the suggestion at paragraph 24 and elsewhere in the Discussion Document, that IPAPs should not be entitled to recover their set-up costs, is, in our view:
 - 5.1 Contrary to section 122U of the Act;
 - 5.2 A complete misinterpretation of the cost analyses that TCF members have supplied to officials previously;
 - 5.3 Unreasonable;
 - 5.4 Illogical; and
 - 5.5 Unfair.

¹ <http://www.tcf.org.nz/library/2e53bf81-d6c4-4735-9ed0-740e8b2c6af3.cmr> (last accessed 9 May 2011)

6. The TCF's strong view is that set-up costs should be able to be amortised in the fees that rights owners pay an IPAP for performing its functions under the regime. We will expand on this later in our response as we answer the specific questions raised in the Discussion Document.

Answers to specific questions

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| Q1 | If regulations were not made, are the possible implications noted above correct, and why? |
| Q2 | Are there any other possible implications if regulations are not made? Why do these arise? |
| Q3 | What benefits, if any, might arise from not providing regulations? Why do these arise? |

7. A significant amount of the complexity in the draft code arose because there was no regulatory backing for the process. In particular, to protect their customers, TCF members saw the need to put in place mechanisms to ensure that notices submitted by rights owners were adequate and that the process was not abused by notice submitters with ulterior motives. Inevitably, this would have meant labour intensive checking of the bona fides of notice submitters and of their notices. In particular, because any rights holder from any jurisdiction could submit a notice, a substantial amount of manual checking would have been involved, adding substantial cost. At the time, TCF members estimated that the cost of running the processes envisaged by the draft code would have been approximately \$100 per notice.
8. We therefore agree with the assessment of downside risks noted in paragraphs 8(a)-(f) in the Discussion Document and consider it imperative that the Regulations be implemented to deal with the relevant processes in the Act.

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| Q4 | Should the suggested requirements be included in regulations? Should there be any other information requirements and why? |
| Q5 | Which (if any) requirements should not be included and why? |

9. The TCF considers that rights owners need to provide all the information referred to in paragraph 13 of the Discussion Document (and more – see below). It is important to remember:
 - 9.1 The IPAP can only proceed on the basis of information provided to it and will be relying entirely on that information in sending an Infringement Notice alleging copyright infringement to one of its customers. This is not something to be taken lightly. An IPAP's relationship with its customer may be irreparably damaged if it acts on information later found to be incorrect;
 - 9.2 Notices provided by rights owners are accorded a presumptive status by section 122N of the Act. That benefit imposes a countervailing duty on rights owners to provide scrupulously accurate information; and
 - 9.3 There is a strong drive for Tribunal decisions to be heard on the papers so notices provided by rights owners may effectively be treated by the Tribunal as the only evidence of infringement.

10. Rights owners' notices should therefore provide **complete** and **accurate** information to justify reliance by IPAPs, account holders and the Tribunal. Therefore, in addition to the requirements set out in paragraph 13 of the Discussion Document:
 - 10.1 At subparagraph (a) the name of a contact person should also be given. This might be useful to enable direct contact between rights owners and account holders. The TCF is uncertain what is intended by paragraph 13(b) – a requirement to correctly identify the IPAP. If, by the explanation for this in paragraph 14 of the Discussion Document, it is intended that the rights owner might be able to send a notice to an IPAP who does not allocate the IP address in question and somehow have that IPAP send it on to the “correct IPAP”, then this is rejected by the TCF. A person who is not the IPAP in respect of the IP address in the rights owner's notice has no responsibility to do anything with that notice – the notice is invalid. A rights owner must send its notice to the person who allocates the IP address in question – that is fundamental to the entire process.
 - 10.2 The TCF took a different approach in the draft code by endeavouring to cater for so called “downstream ISPs” but this approach has not been taken in the Act. If the recipient of a rights owner's notice is not an IPAP, or is not the correct IPAP with respect to that IP address, then the recipient has no obligation to do anything with the notice.
 - 10.3 It would be useful however for a rights owner to indicate where it has gathered public data indicating that an IP address is within an IPAP's allocation, so that, if that information is incorrect, the IPAP can correct it (for example in APNIC's database or any other IP address registry).
 - 10.4 The information to be given at paragraph 13(d) of the Discussion Document – time and date of alleged infringement – must be very accurate. It needs to indicate start and end time (down to the second in NZ standard time and date), given that IP addresses can be dynamically assigned to different account holders at different times.
 - 10.5 The notice should specify the protocol and/or application that has allegedly been used to file share (e.g. p2p; BitTorrent). We note that most international notices currently received by TCF members identify this.
 - 10.6 We do not understand the suggestion in paragraphs 13(f) and 13(g) that an address for service and confirmation of any agent's authorisation need be given only once. Large rights owners or their agents will use standard forms with this information included and it will be unlikely to change very often. Conversely, since IPAPs need to check that each notice contains all mandated information, if these details are not included, the IPAP will have to undertake an additional check to see if they already have that address. It would be far simpler to have these details given in each notice. This will also encourage rights owners to make sure that their address details are always up to date and agents to ensure that they do have authorisation.
 - 10.7 The TCF welcomes the addition of the information in paragraphs 13(f) and 13(i). In fact we have previously submitted that notices should be sworn or at least a

statement added to the effect that a knowingly false notice would constitute an offence. Our concern here is that anything which causes our customers to be falsely accused will engender complaints to IPAPs given that we are the conduits. Therefore, anything which can be done to discourage the false notice practices that have occurred overseas is beneficial. Wording which triggers a penalty in such circumstances would be consistent with the DMCA and Australian legislation. We note that overseas experience is that sometimes ISPs receive more than one notice for the same alleged infringement because they receive a notice from an agent and another from the copyright owner. This is another of the reasons we consider agents should confirm authorisation in each notice they send.

- 10.8 Paragraph 13 does not appear to include a payment requirement. This needs to be added. Section 122C(3)(e) explicitly provides that an IPAP need not comply with its obligations in respect of matching IP addresses if the rights owner has not paid / agreed to pay the required fee. Accordingly, it is the TCF's view that unless an IPAP has **agreed** to accept notices on credit, 122C(3)(e) requires contemporaneous payment. It is possible that TCF members alone or jointly may choose to enter into such arrangements with rights owners or their agents but, until they do, payment should be made when the notice is submitted. This is also important when an IPAP considers automating submission of rights owner notices by way of web interface or the like. If contemporaneous payment is required, provision of an online payment mechanism may be worthwhile. If it is not, and an IPAP is faced with having to process notices from rights holders / match IP addresses and send Infringement Notices, without any guarantee of payment and having to match later payments with notices, it will be difficult to automate the payment process - adding further cost.

Q6 What are the costs associated with gathering and storing the information that would be required? How are these costs calculated?

11. It is unclear whether the Discussion Document is referring to rights owners' costs or those of IPAPs. If the latter, TCF members have already provided substantial detail to officials as to their likely costs and deal with the costs issue in more detail below.

Q7 Is any other information regarding alleged infringements necessary to allow internet account holders to properly understand the allegations being made?

12. The TCF is not aware of any further specific information that might be required but this is a question more properly directed at account holders. However, our view is that account holders will need to be educated on this regime in general, in order to fully understand the allegations being made. We go into more detail on this at paragraph 19 of our response.

Q8 Which of the above is your preferred option [for forms of notice from rights owners to IPAPs], and why?

13. Our view is that option three (a combination of minimum information and a defined form) presents certainty with flexibility and is therefore the preferable option. Our preference would be for the Regulations to mandate a minimum set of requirements but also provide a non-mandatory form of notice. In that way, rights owners and IPAPs who do not have the resource to create their own forms and systems will be able to adopt and rely on the standard form, safe in the knowledge that they are complying.
14. On the other hand, larger rights owners, agents and IPAPs will be able to automate the process by using web forms, direct links or other mechanisms, provided they comply with the minimum information requirements. In those circumstances, (i.e. where an IPAP chooses to provide an industry standard interface), it should be a requirement that that interface be used by rights owners.
15. For example, over a number of years, overseas rights owners and ISPs have developed a standard called ACNS (Automated Copyright Notice Service).² This standardisation is good for rights owners and for IPAPs, partly because it helps speed up processing timeframes. This may seem an inflexible approach but it does address a significant TCF concern, expressed in our previous submissions, that some of the turnaround times in the Act are very short.
16. In addition to the minimum requirements set out in paragraph 20 of the Discussion Document, we would like to see the following:
 - 16.1 A requirement for IPAPs, rights owners and account holders to use a unique identifier for each Infringement Notice and challenge to that notice, such identifier to be allocated by the IPAP. Identifiers should indicate the IPAP, a notice number and also identify whether the Infringement Notice is a Detection, Warning or Enforcement Notice. Again, this will enable more efficient processing of notices and tracking through the process.
 - 16.2 It is the rights owner which is alleging infringement, not the IPAP, therefore any Infringement Notice sent by an IPAP must be expressed in neutral language. In particular, it is important that any requirement on IPAPs to include the statements referred to at paragraph 20(vi) and (vii), (i.e. those which allege that an infringement has taken place), needs to be couched in such a way that it is clear that the allegation is from the rights owner not the IPAP.
17. We are not aware of the consideration MED may have given to challenge notices. In our view those forms of notices should be dealt with in a similar way to rights owners' forms; i.e. a minimum level of information should be required with use of IPAP provided interfaces (if any are provided by the IPAP) also mandated. As suggested above, account holders should be required to use IPAP unique identifiers.

² See, for example, this PowerPoint document prepared by Universal Studios in 2003 - http://mpto.unistudios.com/xml/Automated_Copyright_Notice_System.ppt (last accessed 9 May 2011)

Q9	Are the requirements in option one above adequate and why? What other requirements should be included, and why?
Q10	Are the compliance costs of one option significantly higher or lower than others? If these costs are quantifiable, what are they, and how are they calculated?

18. Given our answer to question 8 above, we do not consider that questions 9 and 10 require an answer.

Q11	What information should be included with notices to ensure account holders are properly informed about the regime, and about copyright issues relating to file sharing or otherwise?
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19. It is clear that account holders, rights owners and IPAPs will require education about the new regime and will need independent assistance when questions arise. This is not something that can or should be provided by IPAPs. The primary beneficiaries of the regime are rights owners and it is, therefore, appropriate that they fund any education that is required initially and on an on-going basis. It is inevitable however that, TCF members' call centres will bear a significant burden. Anything that can be done to reduce this and the associated cost will be welcome.
20. In any event, the messages delivered need to be non-threatening and truly educational. Also, given the "public good" justification claimed for the legislation, we expect that officials will wish to have some oversight of educational messages, which will assist in ensuring independence.
21. Information provided should be targeted at businesses, home users, WiFi providers and institutions such as schools and universities.
22. Given TCF members' call centres are already experiencing questions about this regime, we are very keen to hear the plans MED / rights owners have in this respect, so that we can direct enquiries to the appropriate place.

Q12	What functions should an IPAP be able to recover costs for under clause 10(eh) Why? In answering this question you may wish to comment on the distinction between on-going and set up costs.
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23. The TCF is disappointed at the unheralded suggestion that IPAPs should bear their own set-up costs of this regime. As far as we are aware, this is the first time this has been suggested and is contrary to both the Act and the TCF's previous submissions on the point, which were accepted by the Select Committee and then reflected in the new legislation.

24. Section 122U(1) of the Act reads:

An IPAP may charge a rights owner for performing the functions required of IPAP under sections 122A to 122T

25. Section 122U(2) then allows the Regulations to prescribe a rate or method of calculating a rate for those charges. However, there is no indication whatsoever that if an IPAP incurs set-up costs those costs are not in performance of *the functions required of IPAP under sections 122A to 122T*. The IPAP would not be incurring those costs but for this regime. Nor is the TCF aware of any suggestion by the Select Committee or when the Bill was debated that Parliament intended such a distinction to be implied. Surely, if such a significant discounting of IPAP's costs had been intended, this would have been specifically referred to in the Act. Given that it is not, it is inappropriate to now retrofit the distinction in subsidiary legislation.
26. IPAPs are businesses. They do not condone copyright infringement and nor do they seek to profit from it. No New Zealand IPAP has been argued to be authorising or otherwise responsible for copyright infringement. The connotation that seems to underlie the Discussion Document – that IPAPs should bear some of the cost of this regime because they are somehow responsible for copyright infringements taking place – is rejected.
27. The regime does not benefit IPAPs (in fact it is an imposition on their businesses). In particular, the regime is intended to benefit rights owners and, in comparison to current remedies, will allow them to take action relatively quickly and cost effectively. We therefore cannot see any legal, economic or moral justification for the imposition of a cost on IPAPs. To put it bluntly, rights owners have consistently claimed significant benefits as a result of the introduction of the regime, so they seem more suited to bear the cost.
28. Conversely, in the years during which section 92A and now the Act have been debated, we have not seen one piece of evidence which justifies TCF members bearing any cost. No justification whatsoever is given in the Discussion Document. It is hard therefore to accept any cost-sharing by IPAPs is a reasonable conclusion.
29. Further, we cannot see the logic in distinguishing between an IPAP's set-up costs and on-going operational costs. The balance between each type of cost is a consequence of an IPAP deciding to deal with the regime in a different way but it is not an either/or scenario. Most costs will span both set-up and operational phases.
30. It is useful if we outline typical areas where costs will be incurred initially so this is better understood. Steps which it is likely most IPAPs will need to take include:
 - 30.1 Business process design – who is to do what and what workflows and resources are likely to be necessary to operate the regime;
 - 30.2 Training both at a senior level and then at a business facing level (customer relations staff, call centre staff etc);
 - 30.3 Recruitment of staff (recruitment fees and increased personnel costs);
 - 30.4 Legal and associated costs in changing standard terms; and
 - 30.5 Software and hardware design and implementation. Some of this may come as a result of providing automated web interfaces for input of data; others may be necessary anyway (e.g. to ensure logging and storage systems comply with section 122T).

Note that apart from software and hardware specifically used to provide web interfaces, all of the above set-up costs will be required for IPAPs to comply with the regime, whether they automate or not. Some of the costs will also be on-going (e.g. training) in addition to those detailed at paragraph 48 below.

31. To the extent that an IPAP does endeavour to automate some of the regime, it is likely to have a higher upfront cost but a lower on-going one. Conversely, an IPAP who does not automate will likely have lower upfront costs but, because it will handle each notice manually, have higher operational costs. It is illogical to penalise one IPAP in comparison to another on this basis. To the contrary, in our view the Regulations should be encouraging automation where appropriate, since this will make the regime more efficient for rights owners, IPAPs and account holders. The important point to note however; is that automation is just one potential component out of a range of costs that all IPAPs will incur.
32. Although automation is only one potential aspect of setting up this regime, if all set-up costs are disallowed, IPAPs will be less likely to automate since they will not be able to recover the costs of doing so. Since automation introduces efficiencies for all involved in the regime, this is not an optimal result.

Q13	Is this assumption [that there will be a certain level of rights owner notices that will make IPAP automation worthwhile] correct? Why?
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33. It is correct that certain TCF members will look to automate as much of the regime as they can in order to make it more efficient for all involved. This is why we have submitted above that if an IPAP does provide an industry standard interface, it should be mandatory that such interface be used by rights owners and account holders challenging Infringement Notices. For example, using a web form so that rights owners can input notice information directly into a system which would then mandate that all fields be completed, accept payment, check on-notice periods, quarantine periods, rights owner identity and make IP matches, would be enormously useful where 1,000s of notices are expected. Factors which will influence a decision to automate or not are:
 - 33.1 The final requirements in the Regulations. Issues such as contemporaneous payment (which would therefore make online payment mechanisms worthwhile) and the provision of optional standardised forms will be influential.
 - 33.2 Whether IPAP automation and other set-up costs are able to be amortised across rights owner notice fees. If not, automation will be less likely.
 - 33.3 The number of notices to be received. The TCF has consistently requested this information and welcomes the request made for the information at questions 15 and 16 of the Discussion Document. We note that when the French HADOPI regime was introduced, it was reported that rights owners (primarily the film and music affiliates of New Zealand's own RIANZ and NZFACT) were sending 50,000 notices per day. On a per capita basis, that would mean New Zealand

IPAPs receiving an aggregate of just under 3,300 notices **per day**, well in excess of the 5,000 per month figure posited in the Discussion Document.³

Q14 If so, please give an indication of the threshold (based on the amount of information that would need matching, or the number of notices sent) over which it would become feasible to invest in an automated system?

34. In our view, this question overemphasizes the importance of automation. If it makes sense for an IPAP to automate certain parts of its system it will. But manual oversight of any automated parts of its system will always be required and there are other aspects that cannot be automated at all. The main point is that all set-up costs which are required to be incurred to enable an IPAP to comply with its obligations are recoverable.

Q15 How many infringements do you expect will be sent to IPAPs per month?
Q16 Where possible, please identify the proportion of infringements per IPAP.

35. These questions are for rights owners and do not require an answer by the TCF.

Q17 Is this [not specifying a fee in the Regulations] your preferred option and why?
Q18 What potential impacts would result if a fee was not specified, and why would these arise?

36. Whilst TCF members might be able to negotiate fee arrangements with larger rights owners or rights holder organisations such as RIANZ and NZFACT, the reality is that there are an unlimited number of rights owners, any one of whom could submit a notice. The fee setting and authorisation issue was considered in detail during discussions about a draft code and was one of the factors which prompted a two tier suggestion (pre-approved and non pre-approved rights owners). This option is by no means ideal however would mean that either, IPAPs would be able to set their own fees (unlikely to be acceptable to rights owners), or that separate negotiations would have to be entered into with multiple rights owners. This adds cost, delay and potential confusion in our view.
37. Having said that, if particular IPAPs and rights owners wish to agree separately on a fee which is different to one which is specified in the Regulations, they should be allowed to. Any specified fee should be made “subject to any private written agreement between an IPAP and a rights owner”.
38. The TCF’s view therefore is that provided flexibility can be preserved, notice fees should be mandated in the Regulations.

³ <http://lawgeeknz.posterous.com/french-copyright-holders-are-sending-50000-no> (last accessed 9 May 2011).

Questions 9 to 31 deal with various aspects and options with respect to calculation of notice fees. These questions have been answered together below.

39. The TCF's view is that this aspect of the regime should be kept as simple as possible. This encourages compliance and also reduces the cost of processing.
40. However, it must be fully understood that IPAP costs will be dramatically influenced by the number of notices they receive. Not only does this impact on decisions about automating the small parts of the process that can be automated but it will also impact numerous other cost centres in an IPAP's business. Personnel costs, training, call centres, customer management systems – all these and others will be directly impacted by volumes. Any fee set must therefore be reviewable quite soon after the regime is put in place. The TCF's view is that this needs to happen within six (6) months.
41. The TCF's preference is for a system which is different from any of the options presented in the Discussion Document. We would like to see:
 - 41.1 a flat fee for any notice submitted by a rights owner;
 - 41.2 which is payable when the rights owner submits that notice.
42. Any option which is based on a fee for the sending of an Infringement Notice (no matter what sort) will add a large logistical burden and will effectively mean that full fees cannot ever be paid at the same time a rights owner submits a notice. We say this because it is clear that a rights owner will not necessarily know at the time it submits a notice whether that will trigger an Infringement Notice at all or, if it does, whether that will be a Detection, Warning, or Enforcement notice. It is not until the IPAP matches the IP address to an account holder that this will become clear, particularly in the case of dynamically assigned IP addresses. Even then, the first time a rights owner officially becomes aware of the stage an account holder is at is when it receives a copy of the "strike three" Enforcement Notice from the IPAP under section 122F(5).
43. Any fee based on the sending of Infringement Notices (whether alone or combined with a flat matching fee), will raise the following problems:
 - 43.1 A rights owner will not know how much it was expected to pay and, obviously, could not make a contemporaneous payment without knowing the amount;
 - 43.2 The IPAP would appear to be expected to process the notice and then seek payment from the rights owner later (which, as we have indicated at paragraph 10.8 above, does not comply with the Act). We do not see why IPAPs should be required to assume a credit burden and risk by default; and
 - 43.3 Rights owners have no way of checking whether an IPAP's differential charge depending on the type of Infringement Notice is correct. In these circumstances, the TCF is concerned that some rights owners may use this uncertainty to resist payment.

44. Conversely, the following factors support a flat fee payable at the time the rights owner submits its notice to the IPAP:
- 44.1 Depending on how an IPAP runs the regime, there may not be much difference in cost between the different stages (so differentiating between different types of Infringement Notice may be unsupportable on a cost recovery basis);
 - 44.2 A significant proportion of an IPAP's costs will not be related to the actual sending out of an Infringement Notice (e.g. set-up costs and on-going training, customer relations, handling of challenge notices, information storage and retrieval, annual reporting etc). It is fairer for these costs to be amortised equally across all rights owners who submit notices to an IPAP rather than them being incurred disproportionately and therefore unfairly by a rights owner whose notice happens to trigger an Infringement Notice;
 - 44.3 In particular it would be unfair in our view for a rights owner who sends one notice that triggers an Infringement Notice and then 100 that do not (because those 100 are in an on-notice period) to bear the same cost as a rights owner who sends in just one notice;
 - 44.4 It will be less confusing for rights owners and for IPAPs and less susceptible to mistakes in payment and in processing;
 - 44.5 The chances of payment disputes arising will be much reduced; and
 - 44.6 It will encourage payment of fees contemporaneously with submission of notices to IPAPs. Not only is this a reasonable expectation for IPAPs but it will also reduce the number or interactions that are necessary for both IPAPs and rights owners because there will be no need for a separate payment transaction. Each such interaction carries a cost to both rights owners and IPAPs, whether it is handled automatically or manually. Since fees will also be subject to GST, multiple transactions also add to invoicing and GST processing costs. We should be aiming to keep the number of interactions to the minimum necessary to efficiently operate this regime.
45. In terms of the appropriate fee, officials seem to have misinterpreted costings given by TCF members previously. In any case, based on the 5,000 notices posted in the Discussion Document, information provided to date in our latest survey of TCF members, indicates per notice costs to cover all aspects of this regime envisaged under section 122U, are likely to be around \$40 where some degree of automation of rights owner notices submission and IP matching is included in the total IPAP cost. The TCF considers it important for the MED to recognise that the ability to automate varies widely between its members, as each member has different options (given the unique system and resource profile of their respective businesses) when it comes to building a solution that allows them to meet the requirements of the Act. For example, one TCF member has estimated that costs would be up to \$77 per notice, due to the fact that they are constrained to a manual process.
46. The assumptions that TCF members have used in determining their overall costs are set out in Appendix 1 to this response. Note that these assumptions and time calculations do not cover fixed costs (e.g. storage and retrieval capacity and annual reporting) or set-up activities.

47. Using those assumptions, some TCF members will also be submitting separately on their own cost structures.
48. We should also note that there are numerous actions IPAPs must take to comply with the regime or which will result from it and that need to be covered by notices, but which are not referred to in the Discussion Document. For convenience, we summarise all actions required of IPAPs as follows:
 - 48.1 Receiving a notice from a rights owner and checking that it complies with the Regulations (including whether it has been sent within the on-notice period);⁴
 - 48.2 Processing notice payment and invoicing;
 - 48.3 Matching IP address to one of its account holders;
 - 48.4 Determining whether an account holder has received a previous Detection Notice or Warning Notice from the same rights owner or agent (i.e. cross checking against logged rights owners as well) and then:
 - 48.4.1 Checking if any on-notice period has expired; and
 - 48.4.2 Deciding which type of Infringement Notice to send to the account holder;
 - 48.5 Sending a Detection Notice (assuming this is a “first strike”);
 - 48.6 Receiving any challenge from an account holder;
 - 48.7 Forwarding the challenge to the rights owner;
 - 48.8 Receiving the rights owner’s response to the challenge;
 - 48.9 Forwarding that response to the account holder;
 - 48.10 Updating records in the event that a challenge is accepted (as this negates the impact of the relevant Infringement Notice and records will have to be adjusted accordingly);
 - 48.11 Receiving calls at the IPAP’s customer call centre (even if rights owners or The Ministry of Economic Development sets up a call centre or funds an independent one);
 - 48.12 Repeating all of the above actions with respect to subsequent notices from the rights owner generating Warning Notices and Enforcement Notices;
 - 48.13 Likely escalating calls to call centres, as the process progresses through later stages, particularly if account holder alleges innocence. At this stage, both technical and/or legal questions may be relatively complex and, despite the fact that IPAPs are not responsible for the content of allegations, inevitably, they will be called on to provide guidance;

⁴This is not a check on the validity of the notice from a copyright law perspective, since that is not a role undertaken by IPAPs. Rather, this would be a check solely to ensure that the mandated information fields have been completed.

- 48.14 Editing an Enforcement Notice sent to an account holder so that it can be sent to a rights owner without any information identifying that account holder, in compliance with section 122F(5) of the Act;
- 48.15 Sending the edited copy of the Enforcement Notice to the rights owner;
- 48.16 Responding to a request from the Copyright Tribunal for copies of all notices, in compliance with section 122J(3);
- 48.17 Providing further evidence to the Tribunal. We note that the Tribunal processes are not being consulted on at this stage but we need to flag now that the per notice cost needs to cover the situation where the IPAP is called on by the Tribunal to provide further evidence. The obvious situation where this may occur is where an account holder alleges that it was not using its account at the time the infringement was alleged to have taken place. The only person who can answer that question is the IPAP and we therefore expect that this will not be an unusual circumstance;
- 48.18 Storing all information in accordance with section 122T(2) of the Act; and
- 48.19 Complying with the reporting obligations in section 122T(4) of the Act.
49. As we have indicated above, some IPAPs may wish to automate as much of the above as possible and will bear those costs in the set-up phase together with the various other set-up costs, whereas others will operate manually and bear greater costs on an on-going basis. However, all costs are:
- for performing the functions required of IPAP under sections 122A to 122T*
- and are therefore recoverable under section 122U.
50. With respect to the level of the fee, the TCF considers that it should be set at a level which recognises that members surveyed by the TCF are likely to have costs which equate to up to \$77 per notice as noted above in paragraph 45. The fee should be specified in the Regulations but should be:
- 50.1 Able to be varied by private agreement between a rights owner and an IPAP;
- 50.2 Subject to official review within six (6) months of the introduction of this regime and every year after that to determine if it is appropriate. The reality is that no-one can predict with any certainty how many notices will be received at what level both from rights owners and from account holders issuing challenges. Overall costs will vary considerably if any of the assumptions in the Discussion Document, or which IPAPs have proceeded on in Appendix 1, turn out to be incorrect.
- 50.3 Reviewed completely as part of the consultation which will be necessary prior to invoking section 122R (to bring the account suspension regime in sections 122P and 122Q into force) or section 122S (to apply the regime to mobile operators). As we have indicated previously, suspension would add a significant further cost layer and costs applicable to mobile operators may be very different to those of fixed line operators.

Questions 36—52 (noting that there are no questions 41-50 inclusive)

51. These issues are not directly relevant to IPAPs and therefore are not answered by the TCF.

Conclusion

52. We would like to make the point again that setting up for this regime, particularly for large IPAPs, is not a trivial exercise. Numerous business processes need to be resolved and decisions implemented. Whilst certain aspects of this can be discussed and predicted, nothing can be finalised until the Regulations are in place. And even when these are finalised, until the regime commences on 1 September and there is more certainty around the number of notices from rights owners, IPAPs do not have certainty around how the regime will practically work.
53. IPAPs are therefore again faced with the prospect that no matter how hard they try, it may be impossible to be fully ready for the regime on 1 September, little more than three (3) months away. This is disappointing given the TCF's consistent advice over the last two (2) years that; 9-12 months lead-time would be needed from the time the legislation is finalised.
54. The costs issue is perhaps the most important to resolve from a TCF perspective. TCF members would welcome further dialogue with officials as to the thinking behind the distinction between set-up and on-going costs and look forward to providing input on the draft regulations when they do eventuate.

For information on any aspect of this response, please contact:

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APPENDIX 1 – ASSUMPTIONS IN CALCULATING OVERALL IPAP COSTS

Number of IPAP actions per month based on 5,000 rights owner notices received	Numbers	Activity
100% of all rights owner notices matched to an IP address	5,000	Receipt, checking mandated information is included, performing IP match, checking on-notice period and therefore whether Infringement Notice needs to be sent
Assumption: 66% of rights owner notices trigger a Detection Notice⁵		
No. of Detection Notices	3,300	Number of Detection Notices sent to account holders
Assumption: Averaged over all account holders, for every Detection Notice sent, there will be ONE contact made to an IPAP⁶ on basis that some account holders will make contact a number of times, some not at all		
No. of Contacts for Detection Notices (e.g. calls from account holders)	3,300	Number of contacts / customer interactions
Assumption: 50% of Detection Notices will be challenged⁷		
No. of challenges processes	1,650	Challenges to Detection Notices. Note that this step includes the challenge and the consequent interactions with rights owner and account holder
Assumption: 70% Drop off rate of repeat infringement – 70% will stop infringing after receipt of a notice⁸		
No. of Warning notices:	990	Number of Warning Notices sent
Assumption: Assumption: Averaged over all account holders, for every Warning Notice sent, there will be ONE contact made to an IPAP⁹ on basis that some account holders will make contact a number of times, some not at all¹⁰		
No. of Contacts for Warning Notices	990	Number of contacts / customer interactions
Assumption: 20% of Warning Notices will be challenged¹¹		
	198	Challenges to Warning Notices
Assumption: 70% Drop off rate of repeat infringement – 70% will stop infringing after receipt of a notice		
No. of Enforcement Notices:	297	Number of Enforcement Notices sent
Assumption: Averaged over all account holders, for every Enforcement Notice sent, there will be ONE contact made to an IPAP¹² on basis that some account holders will make contact a number of times, some not at all		
No. of Contacts for Enforcement Notices	297	Number of contacts / customer interactions
Assumption: 10% of Enforcement Notices will be challenged		
	30	Challenges to Enforcement Notices
Assumption: 5% - How often an IPAP will be required to provide copies of Enforcement Notices, evidence or some assistance at Tribunal level		
	15	Number of appearances / assistance requests with Copyright Tribunal

⁵ This assumes that a certain number of notices received will either be invalid or will be within an on-notice period.

⁶ TCF members expect that some of their customers will make contact more than once, whereas others will not contact them or will contact any independent call centre which may be established. Based on experience with other TCF members' customer complaint regimes and experience on rollout of new products, an average of 1 call per Infringement Notice is reasonable.

⁷ TCF members receive a reasonable number of queries on invoices and it is expected that there will be a significantly greater propensity to challenge Detection Notices.

⁸ The 70% drop-off rate is based on NZFACT and international evidence that approximately 70% of people who receive a notice will cease infringing.

⁹ TCF members expect that some of their customers will make contact more than once, whereas others will not contact them or will contact any independent call centre which may be established. Based on experience with other TCF members' customer complaint regimes and experience on rollout of new products, an average of 1 call per Infringement Notice is reasonable.

¹⁰ While there may be a drop-off in total number of different account holders making contact, we expect that at this level there will be more contacts per account holder as the issues become more complex

¹¹ We do not expect as many Warning Notices to be challenged and even less Enforcement Notices

¹² TCF members expect that some of their customers will make contact more than once, whereas others will not contact them or will contact any independent call centre which may be established. Based on experience with other TCF members' customer complaint regimes and experience on rollout of new products, an average of 1 call per Infringement Notice is reasonable.