

New Zealand Telecommunications Forum

Submission by NZ Telecommunications Forum for the Copyright (Infringing File Sharing) Regulations – Fee Review

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Introduction

Thank you for the opportunity to submit on this important aspect of the Copyright (Infringing File Sharing) Regulations. This submission is made by the New Zealand Telecommunications Forum Incorporated (**TCF**) on behalf of its members: BayCity Communications, CallPlus, Chorus, Compass Communications, Enable Networks, FX Networks, Kordia, Snap!, Telecom New Zealand, TelstraClear, Vector Communications, Vodafone and Woosh. We understand some TCF members may also be making their own submissions.

TCF members provide more than 90% of the internet connections in New Zealand and most are IPAPs under the definition set out in section 122A of the Copyright Act 1994.

We consider this review to be important for two related reasons:

1. The level of the fee is a factor which influences the number of notices that copyright owners might send (although, as we note below, it appears not to be the only factor).
2. The number of notices TCF members must process has a direct bearing on resources needed to run the regime and therefore on their costs. TCF members have already incurred significant set-up costs which are not being recovered with the fee level capped at \$25 and that fee does not cover the average of their on-going costs. To date TCF members have not passed those costs onto their customers but this position cannot necessarily remain indefinitely, particularly if notice volumes increase significantly. Further, it is almost certain that TCF members would need to increase charges to consumers should there be any decrease in the fee. This effectively would mean innocent consumers subsidising copyright owner enforcement as costs are passed on in the form of charges that are higher than they would otherwise need to be.

The position then is much the same as it was when the TCF submitted on the draft regulations in 2011, when we estimated that average costs for TCF members to process notices and perform the other obligations required of them under the regime might be around \$40 per notice. If anything, the fee cap should therefore be increased, for the same reasons we emphasised then. Certainly, we can see no justification for the decrease that we understand some copyright owners are asking for, given:

1. Only one organisation, RIANZ, has even used the regime; and
2. Less than 2,000 notices in total have been sent in the 7 months from 1 September 2011 since the regime went live to 31 March 2012.

That just does not give a sufficient sample from which one could extrapolate anything. It does not provide any insight on what costs might be if the number of notices increased (or decreased for that matter). If we are to take an evidence based approach to regulation, the reality is that the paucity of use of the current regime forces us back to the same educated guesses we made in 2011. On that basis, we attach again the schedule to our 2011 submission, showing how TCF members calculated likely costs if notice levels reached the Ministry's posited 5,000 notices per month.

We should note in passing that TCF members applied significant resources and incurred substantial costs based on that Ministry number and on anecdotal reports of copyright owners detecting hundreds of thousands of alleged infringements. To now face the

suggestion that those unrecovered costs are to be increased by a lowering of the fee to suit copyright owners, many of whom have not bothered to use the current regime even once, is particularly galling.

Further, even with respect to RIANZ which is using the regime, volumes of notices fluctuate wildly (by as much as a factor of ten over a month) making it very difficult to resource the regime efficiently. Given the technical nature of the regime and the tight timeframes imposed, TCF members must keep a level of skilled staff available to respond to the maximum levels experienced to date, which means wasted resource (and further unrecovered costs) when volumes fall well below that.

With those general comments made, we proceed now to answer the specific questions raised in the Discussion Document (questions in bold followed by TCF answers). Note, all totals and figures are to the end of March 2012.

1. Are there other policy considerations apart from the ones outlined in the Discussion Document that you think should dictate what the notice fee is and whether it should be? If so what are these, and how should they affect the setting of the fee?

The Discussion Document proceeds on the basis that the notice fee is related solely to an IPAP's costs in running the regime and that set-up costs are therefore not a factor which can be taken into account in setting the fee level. We strongly disagree with that presumption. Set-up costs were and remain necessary to enable IPAPs to perform their obligations under the notice regime and should be able to be amortised over time. There is also a correlation between different levels of set up costs and ongoing operational costs – the more investment that is made up front in automation, the less that IPAPs would need to charge per notice to recover costs. Given this direct cost relationship, the MED's decision to exclude set-up costs from the fee setting has influenced some IPAP's decisions about how to deliver to these requirements, and directly contributed to both higher ongoing costs and the need for higher notice fees.

These initial set up costs have been very significant, with at least \$919,000 spent between CallPlus, Orcon, Telecom, TelstraClear and Vodafone alone. Given that the current notice fee level is not even allowing TCF members to recover on-going operating costs, this clearly suggests an increase in the fee is appropriate.

We recognise that another policy consideration could be to lower the notice fee, thereby reducing the cost to copyright owners of utilising this regime. We would strongly oppose such a move. Not only would it further exacerbate the significant funding shortfall experienced by IPAPs under the current notice fee, but there is no evidence that this would increase the efficacy of this solution. We note that the representatives of major copyright owners have reported that this regime has had a positive effect¹, even despite the relatively low level of notices that have been filed. This suggests that there is little, if any, direct correlation between the number of notices actually sent under the regime and the deterrence that it provides; or alternatively, that new online content distribution solutions are replacing the need for copyright infringement.

2. Would you prefer to retain the status quo (a fee of \$25) or change the fee? Why?

3. If your preferred option is to change the fee, what should the fee be changed to? Why?

4. What effect, if any, do you consider your preferred option would have on:

- **Costs of using and complying with the Act?**
- **Volume of rights owner notices?**
- **The effectiveness of the regime in deterring file sharing that infringes copyright?**

TCF members would prefer that the fee cap be increased to the \$40 level that we submitted in 2011. This goes some way towards ensuring TCF members costs are fully covered and assists in amortising the significant set-up costs they have had to incur to meet their obligations under the regime.

We would not expect this to have a dramatic impact on the number of notices or the effectiveness of the regime. We say this because:

¹ IFPI's Digital Music Report 2012, page 3, available at: http://www.ifpi.org/content/library/DMR2012_key_facts_and_figures.pdf

1. Our understanding is that cost is not the main reason why NZFACT for example is not using the regime. For other copyright owners, we understand that it is the cost of detection which is the primary barrier rather than the per notice cost;
2. As noted above, the number of notices does not appear to have correlated with the effectiveness of the regime;
3. At \$40 the cost still pales into insignificance in comparison to costs of enforcement of a copyright owner's rights through the Courts or even via private cease and desist triggered negotiation. It would cost a copyright owner a lot more to send a lawyer's cease and desist letter to an alleged infringer and a notice probably has a similar effect. In that sense, a \$40 fee per notice provides a cost effective alternative for a copyright owner.

If, despite the above, it is decided to leave the fee at the current \$25 level, TCF members would reluctantly accept that. We strongly reject any suggestion that the fee should be lowered.

Questions 5-13 (inclusive) are for rights owners

14. Please give a detailed description of the process followed for each rights owner notice and any resulting infringement notices;

The process followed is that set out in the Act. All TCF members except CallPlus have continued with a predominantly manual process of receiving and passing on copyright owner notices and account holder challenges (as opposed to automating some or all parts of the process that are able to be automated).

15. Please describe the process by which you allocate Internet Protocol addresses to customers, and the process of matching infringement evidence included in a rights owner notice to relevant customers;

This may be answered confidentially by individual TCF members.

16. Based on your answers to 14 and 15, what is the average cost of analysing one rights owner notice and complying with the Act in relation to that notice? Please itemise and describe the costs that contribute;

Across TCF members who have responded to the TCF on this issue, the average cost is between \$50 and \$104. Individual TCF members may provide itemised cost breakdowns on a confidential basis.

17. How many rights owner notices have you received per month since the regime came into force?

Over all TCF members who have responded, there have been 2393 rights owner notices received.

18. Of the infringement notices that you have sent to customers, what proportion have been detection, warning and enforcement?

1581 infringement notices in total have been sent, of which 1495 have been detection, 83 have been warning and 3 have been enforcement. Note that there are various reasons why fewer infringement notices have been sent than rights owner notices received, including the fact that rights owner notices received during an on-notice period do not trigger an infringement notice.

19. How many account holder challenges have you received?

Across all TCF members who have responded, 69 challenges have been received.

20. Where possible, please state the number of customer queries you have received in respect of infringement notices. Have you noticed any trend in the content of customer queries? If so, what has that been?

No TCF member has collected specific information on this although the general feeling is that there have not been as many calls as had been expected because the volume of notices has not been as predicted and very few account holders have moved through the system to enforcement notice stage.

21. Are there other costs, apart from direct costs of processing evidence and sending/processing notices or challenges, that you incur in complying with the regime? If so, please describe what these are and why they occur;

Individual TCF members may respond confidentially on this.

22. Overall, what have been your implementation costs for the first six months of the Acts operation? What proportion of those costs have you been able to recover through the notice fee?

Across all TCF members who have responded, no IPAP's cost of operating this regime is being met by the \$25 notice fee. It follows that no TCF member who has responded has been able to recover any of its implementation costs. Individual TCF members may respond confidentially on this also.

23. Has there been any fluctuation in the volume of peer-to peer traffic occurring on your network since the regime came into force? If yes, please describe. Why do you consider this fluctuation has occurred?

Individual TCF members may respond confidentially on this.

Part C

The Discussion Document, in part C, also asks for details of costs at different notice volume levels.

As we have noted above, there is simply too little history and evidence on which to provide more accurate projections than those we provided last year (an average of approximately \$40 per notice). We stand by that submission and the attached methodology, in terms of potential costs might result from increased notice volumes.

For information on any aspect of this submission, 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 Notice²		
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 IPAP³ 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 challenged⁴		
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 notice⁵		
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 IPAP⁶ on basis that some account holders will make contact a number of times, some not at all⁷		
No. of Contacts for Warning Notices	990	Number of contacts / customer interactions
Assumption: 20% of Warning Notices will be challenged⁸		
	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 IPAP⁹ 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

² This assumes that a certain number of notices received will either be invalid or will be within an on-notice period.

³ 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.

⁴ 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.

⁵ The 70% drop-off rate is based on NZFACT and international evidence that approximately 70% of people who receive a notice will cease infringing.

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 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

⁸ We do not expect as many Warning Notices to be challenged and even less Enforcement Notices

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.