



Submission to the Commerce Select Committee
on the
Copyright (Infringing File Sharing) Amendment Bill

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Key Points

- This Bill is a major improvement on the legislation it seeks to replace.
- Infringing file sharing is happening (and cannot be condoned), but it is important to consider the effects of it before deciding how to tackle it.
- The copyright content industries are doing exceptionally well, given the global economic situation. Sales are up and more money than ever before is going to Kiwi artists.
- This success shows that file sharing is not having a damaging impact on the industry, and that the evidence presented to that effect has been deemed unreliable by, among others, the United States government.
- Because the impact of file sharing does not seem to be major, Parliament should not take major, complicated and expensive steps to address it. It should not allow the content industry to seek aid in propping up an unsustainable business model.
- The best way to tackle file sharing would be to impose a notice and notice regime, where those found infringing get told their activity has been picked up.
- **This approach would reduce costs** (to the Crown, to the ISPs, to the content industry and to citizens) **while reducing file sharing by as much as 70%**. It would create the opportunity for all involved to collaborate on educational messages, particularly to younger New Zealanders who are just starting to use and create digital content.
- If the Committee cannot countenance such a change to the Bill, the regime it sets out should be broadly workable (with technical changes to improve it), with one major exception.
- **Whatever happens, Parliament should not impose termination (account suspension) as a remedy for infringing file sharing. The remedy would be disproportionate to the problem, and would not solve it.**

The submission and appendices which follow provide the background, rationale and evidence for these points.

A. Introduction

1. This submission is from InternetNZ (Internet New Zealand Inc).
2. We request the opportunity to make a presentation to the Commerce Select Committee in support of this submission.
3. InternetNZ is a membership-based not-for-profit organisation with the management responsibility for the administration of the .nz domain name registry, a critical component of the Internet infrastructure in New Zealand.
4. Our mission is to protect and promote the Internet in New Zealand. We advocate the ongoing development of an open and uncaptureable Internet, available to all New Zealanders. The Society is non-partisan and is an advocate for Internet and related telecommunications public and technical policy issues on behalf of the Internet Community in New Zealand – both users and the Industry as a whole.
5. In developing this submission, InternetNZ has consulted with its members and with other parties, including ISPANZ (the Internet Service Providers Association of New Zealand (Inc)).
6. Further, we organised seminars in Wellington and Auckland on 25 and 26 May 2010,¹ to encourage discussion of the Bill and debate the issues it raises. These seminars were well attended and InternetNZ hopes the discussions they have generated will lead to other, reasoned submissions to the Committee on the Bill. They have helped InternetNZ ensure its own position is well considered.
7. In addition, we commissioned Rick Shera of Lowndes Jordan to prepare a report analysing the Bill in an international context. That report is attached as Appendix I to this submission and is referred to as the *Lowndes Jordan report*.
8. All of this builds on InternetNZ's significant involvement in digital copyright developments on an ongoing basis since the Copyright (New Technologies and Performers Rights) Amendment Bill was first introduced in 2006.

B. Framework for InternetNZ's analysis

9. The programme for the seminars referred to above² provides a useful template for assessing the Bill. As with any proposed regulatory response, one must always ask:
 - 9.1 What is the problem that this regulation is trying to fix and does the size of that problem justify a regulatory response?
 - 9.2 If regulation is needed, then what form should that regulation take – what are

¹ <http://internetnz.net.nz/content/copyright-seminars-may-2010>

² http://internetnz.net.nz/system/files/pages/2010/InternetNZ_Copyright_Seminar_-_programme.pdf (PDF download)

the critical policy issues that need to be balanced?

- 9.3 Assuming regulation is needed, does the actual regulation itself do what is intended or does it require change?

C. Do we need it at all?

Main proponent industries are doing better than most

10. There is increasing doubt whether this legislation is needed at all. As the Lowndes Jordan report notes, the US Government's General Accountability Office (GAO) has concluded that none of the often repeated estimates suggesting massive losses being suffered by the music recording and film industries can be relied on. Echoing the US GAO, this lack of real justification is acknowledged in the Regulatory Impact Statement (RIS) for the Bill:

We are unable to accurately estimate the costs to the industry from illegal P2P file-sharing since attempts to scale the problem have been fragmented or based on limited data sets. It is also complicated by the changing business environment. ... As revenues drain way from the industry, businesses are struggling to adapt. Consumers have reacted to these changes in a ways that the industry has not anticipated ...³

11. The RIS then proceeds to justify the need for regulation by reference to the commissioned reports and studies of those with economic interests at stake, such as RIANZ and NZFACT. As with similar studies overseas, InternetNZ does not accept that reliance should be placed on these.⁴ They are:

11.1 commissioned by interests that see regulation as essential to reshape the consumer behaviour to which (as the RIS recognises) they have failed to adapt;

11.2 private studies, the methodology and actual results of which have not been subject to independent review.

12. Despite that, the RIS concludes that because **some** illegal file sharing is taking place, we must "do something". The problem is that if one does not know the size of the problem or its nature then it is impossible to gauge whether there really is a need for a regulatory response, or, if regulation is required, what it should look like.

13. Conversely, we do have some facts we can point to, which show that the actual state of affairs in the creative content industries is best characterised as one of broad economic success:

³ Page 4 of Regulatory Impact Statement at <http://www.med.govt.nz/upload/71375/copyright-ris.pdf>

⁴ Although, this "side" of the copyright debate is not alone in this. Those agitating for copyright relaxation are also not immune to using questionable statistics to support their case.

- 13.1 IFPI's own figures show that New Zealand and Australia are havens of responsible behaviour already. 2009 sales of physical media were down 2.4%; digital sales up a whopping 41.4%; performance rights returns up 8.6% - for an **overall revenue increase of 3.5%**.⁵
- 13.2 For the last reported 2008/2009 year, APRA/AMCOS increased revenue by 6% and had a record A\$183 million available for distribution.⁶ **Distributions to New Zealand and Australian music creators increased by 10% in 2008/2009.** This builds on similar year on year increases for previous years.⁷
- 13.3 **Global movie box office ticket sales were up 7.6% for 2009,** to a record US\$29.9 billion.⁸
14. All this at a time when we were experiencing one of the worst recessions in the world's history, and in the absence of the previous section 92A legislation which was said at the time to be essential for the industry's continued economic success.

A temporary problem alleviated by updating business model

15. As the above statement from the RIS also notes, the other issue is that these industries are undergoing a period of rapid change. When they do move to cater for that demand, the problems clearly diminish. For example, we see that APRA/AMCOS' **revenue from digital downloads rose a huge 67% in the 2007/2008 year,** reflecting the then recent introduction and penetration of iTunes in both markets.⁹
16. There is therefore a danger in regulating for a problem that may only be a temporary result of a disruptive technology upsetting traditional business models. Clearly, file sharing is that ... or was. But, as legitimate digital channels become available and file sharing itself comes to be seen as an opportunity for efficient distribution rather than a threat,¹⁰ it seems likely that a tipping point will be reached. Reduction in physical media sales will be offset by sales of digital works. At that stage, the need for outdated copyright protection based on the control of distribution channels for scarce physical goods, can give way to a more flexible approach. In New Zealand at least, for music, that tipping point may already have been reached.
17. One can only hope that TV and film distribution catches up soon. The continuing artificiality of region controls (outlawed in Australia), delayed country by country distribution and differential pricing, combined with the industry's continued legal

⁵ <http://paidcontent.co.uk/article/419-09-music-sales-shed-1-billion-u.s.-downloads-stagnant/>

⁶ http://issuu.com/apraamcos/docs/yearinreview09/1?mode=a_p

⁷ http://www.apra-amcos.com.au/downloads/file/About/APRA_AYearInReview.pdf

⁸ <http://www.businessweek.com/news/2010-03-10/global-box-office-sales-rose-to-a-record-29-9-billion-in-2009.html>

⁹ *Ibid*, footnote 7 at p 8

¹⁰ US based Multimedia Intelligence estimated in 2008 that growth in legitimate use of p2p will outstrip illegitimate use by a factor of ten to one and some reports now indicate that p2p is the most used protocol on the internet
http://www.multimediainelligence.com/index.php?option=com_content&view=article&id=133:p2p-traffic-to-grow-almost-400-over-the-next-5-years-as-legitimate-p2p-applications-become-a-meaningful-segment&catid=36:frontage

attacks, simply increases cynicism and lack of respect for copyright – contributing to the very problem it is trying to avoid.

18. As Brett Cottle, the CEO of APRA/AMCOS said in a 2008-2009 report:

Instead of focussing on notice and takedown regimes, we should be developing notice and sign-up regimes. Long debated in the press, the issue has not traditionally attracted the attention of the record industry or ISPs.

The time has arrived for a major rethink of our approach to P2P file-sharing and a renewed focus on the benefits of copyright.¹¹

Wider copyright debate needed ahead of any regulation

19. These arguments apply to copyright as a whole, as well as to this Bill in particular. The balance between protection of property rights via the granting of a limited time monopoly and the interests of the wider community in propagation of ideas, creativity and innovation needs to be explored. Too often it seems that copyright is used to stifle those unrepresented community benefits at the behest of well-funded lobby groups representing vested interests.
20. An informed debate about the limits to copyright is needed, rather than a debate which starts with the premise that protection must always be strengthened. Fair use, copyright term, the use of TPMs to protect delivery channels rather than the work itself, privacy impacts of copyright – all these issues and more need airing in New Zealand.
21. The problem with this Bill is that we have not had that debate and yet the Bill prejudices the result by imposing a further copyright enforcement regime. Not only that, but it creates a completely new form of copyright liability where none was present before. In doing so, the Bill is likely to restrict community and public access to the Internet. If copyright is a balancing act, then it must be asked why are we ignoring that balance with this Bill?
22. Why are we ploughing ahead with a regulatory response to the problem, which, if it really is a problem at all, is completely unquantified? We know that the regime will not cure the hard-core infringer problem that the supporters of graduated response systems use as justification for further copyright restrictions. In fact, it will probably make things worse as people lose further respect for copyright. Why are we not at the same time creating workable fair use provisions which would in all likelihood have far more success in creating respect for copyright and creativity and would preserve that much needed balance?
23. In InternetNZ's view we should not proceed with the Bill until we have had that debate in a wider context.

¹¹ *Ibid*, footnote 6 at p 4.

24. Our fear is that if we do proceed, for the above reasons and those set out in the Lowndes Jordan report, five things will happen:
 - 24.1 Innocent people will be subjected to penalties;
 - 24.2 Community and public access to the Internet will reduce;
 - 24.3 Hard core infringers will take steps so that they are not caught (e.g. encryption) and will game the system (e.g. by switching between ISPs);
 - 24.4 ISP costs will increase and, because they are difficult to predict (being correlated with notice volume), may not be covered by notice fees. This means innocent ISP customers will foot the bill for the enforcement of third party copyright owners' rights;
 - 24.5 As a result public respect for copyright will be further corroded, particularly among young people.
25. Ultimately, those who suffer will be the very creators copyright is supposed to protect.

D. If we do need it, what should it look like?

26. If we are going to proceed, we need to preserve balance as best we can. When the Copyright (New Technologies and Performers) Amendment Bill first proposed sections 92A-92E in 2006, InternetNZ argued for a notice and notice system. We repeat that call.

Recent history shows that graduated response is not needed in New Zealand

27. The four-year section 92A debacle has given us time to see that we do not need anything more than notice and notice (if we even need that). The figures quoted above clearly show that in that period, the New Zealand music industry, the primary target of illegal file sharing, has gone from strength to strength. Its revenue and distributions to music creators have increased significantly even during a very bad recession – a result that most other industries cannot match.
28. InternetNZ does not condone copyright infringement, but does acknowledge (as almost all those involved acknowledge) that no system will stop infringement altogether. Steps which increase respect for the creativity of others are key. But, because of the overly aggressive strategies adopted to date by certain copyright owners,¹² it may now take some time to reverse the scepticism that those strategies

¹²The Recording Industry Association of America (RIAA) last year decided that suing individual users was creating a backlash out of proportion to the benefit in doing so and so decided not to continue that strategy. However, in recent

have created as to whether some forms of copyright protection are useful or indeed necessary at all.

Education is the most effective measure

29. Education is generally accepted to be the most effective measure to combat infringing file sharing. It is therefore important not to try to implement a new system aimed at hard-core infringers, since that will fail. The cost and adverse consequences of implementing a new system aimed at penalising those infringers will therefore outweigh any benefit. And yet, the Bill does just that in accepting that termination will only be reserved for serious infringement.
30. Instead, any system should focus on education and on encouraging users who perhaps see infringement as socially acceptable but would likely modify their behaviour if “caught”.
31. In this context it is revealing to find that the New Zealand Federation Against Copyright Theft’s (NZFACT) figures indicate that 70% of New Zealanders would stop infringement if they were sent an educational notice, whereas only 61% would respond in the same way of threatened with disconnection of their internet access.¹³

New Zealand needs to be consistent with international best practice

32. It is also important for New Zealand to adopt a regime consistent with international best practice. On that point, after reviewing international developments in many jurisdictions, the Lowndes Jordan report concludes:

Following early adoption, or proposed adoption, of a three strikes regime without due process, in a number of countries, it is clear that the adverse consequences of such regimes are now better understood, not just by internet activists but by Governments themselves. As public scrutiny has been applied, as doubt has been raised about inflated loss numbers used by copyright owners and as it has come to be realised how important internet connectivity is, Governments have started to retreat from a three strikes model.¹⁴

33. Since the Lowndes Jordan report was written, we have had two new examples of notice and notice systems being adopted: in the UK in its Digital Economy Act¹⁵ and proposed in Canada’s newly introduced C-32 Bill.¹⁶ For the same reasons InternetNZ promotes, both Canada and the UK have shied away from a three strikes system.

months a new group has launched proceedings against over 10,000 unnamed “John Does” – see <http://arstechnica.com/tech-policy/news/2010/06/the-riaa-amateurs-heres-how-you-sue-p2p-users.ars>

¹³ Press release issued by NZFACT on 20 October 2009.

¹⁴ Lowndes Jordan report, para 25.

¹⁵ http://www.opsi.gov.uk/acts/acts2010/ukpga_20100024_en_1

¹⁶ <http://www.scribd.com/doc/32401372/Copyright-Bill-C32> see sections 41.25-41.27.

Internet access as a necessary utility

34. Also, in the years since New Zealand first started debating this, Internet access has moved from being a privilege to a necessary utility akin to water or electricity. Quoting the Lowndes Jordan report again:

In a recent survey conducted in 26 countries, almost 80% of the 28,000 people surveyed agreed that internet access should be a fundamental right,¹⁷ echoing the comments of then Minister Judith Tizard in New Zealand.¹⁸ The European Parliament's addition of Annex I to its Telecoms package and the push back in the ACTA negotiations are strong evidence of that.¹⁹

35. For these reasons, InternetNZ favours a notice and notice system (as do other stakeholders, such as the Telecommunications Carriers' Forum).
36. Where the problem and its scale are debatable, the incremental benefit in adding penalties to a notice and notice system just does not justify the massive increase in complexity and therefore cost.
37. The Bill has within it a notice and notice process, since that is the first step in any graduated response regime. All that would be required is for it to stop at the detection notice point. ISPs would receive notices from copyright owners, would match the details in those notices to their customers and would send educationally focussed notices to them.
38. ISPs would continue to log those notices and could report to copyright owners as to how many notices a particular customer has received (without revealing that customer's identity).
39. This has a number of benefits:
- 39.1 It will bring New Zealand into line with the UK and Canada and with informal practices of large multinational ISPs such as AT&T.²⁰
- 39.2 Copyright owners will be able to see repeat alleged infringers (anonymously) and take action against them if they wish. Currently, it is difficult for a copyright owner to find out how often any particular user of an ISP's services is infringing. This is because multiple infringement at one IP address may not be detected and, even if it is, the copyright owner has no way of telling if that IP address is being used by the same user - many ISPs dynamically assign the same IP addresses over and over again when users log on and off. Under a notice and notice system, the copyright owner can be advised of the number of notices an account holder has received without disclosing who that account holder is.

¹⁷ http://www.globescan.com/news_archives/bbc2010_internet/

¹⁸ <http://computerworld.co.nz/news.nsf/news/6DC929097F31FF8ECC2574B8006D45D8>

¹⁹ Lowndes Jordan report, para 26.

²⁰ <http://attpublicpolicy.com/wp-content/uploads/ATT-Comments-for-Joint-Strategic-Plan-3-24-10.pdf>

- 39.3 It will reduce costs for ISPs and therefore reduce the notice costs for copyright owners.
- 39.4 It will remove the need for the Copyright Tribunal and the Court, thereby removing significant Government funded cost. It is hard to see why the New Zealand Government should subsidise copyright owner industries such as music recording and film companies by granting them a taxpayer and ISP customer funded enforcement regime when, as music figures show, they do not need such a subsidy.
- 39.5 It will enable a more positive educational attitude to be taken to copyright. That can only be beneficial as new generations of New Zealanders become both creators and consumers.

E. If we must have graduated response, what needs to change?

40. If, despite these concerns, a graduated response regime is deemed necessary to provide copyright owners with a remedy, the Committee must ensure that the remedy is proportionate and it carries with it the requisite amount of due process and protection of user privacy. It is in this context that the Bill seeks to provide a balance.
41. As “graduated response” regimes go, that proposed by the Bill provides a reasonable balance – apart from termination as a remedy.
42. The main issue with the Bill is that termination is still included, since it is a disproportionate remedy for copyright infringement. Even if termination were to remain it would need significant change. In principle, if there is to be a remedial system rather than pure notice and notice, the Bill sets out a workable regime. However, as was seen with the Telecommunication Carriers Forum attempt to prepare a repeat infringer code, the issues are complex. There are therefore some areas that require change.
43. These are set out in detail in Appendix 2 to this submission which includes suggestions for changes to the Bill.
44. The main issues, apart from removal of termination, that need to be addressed, are:
- 44.1 The definition of ISP, whilst better confined than it was, will still catch entities that should not be classed as ISPs.
- 44.2 The critical definition of file sharing is too wide.
- 44.3 The due process in the new regime highlights the unwarranted lack of due process in the existing section 92C regime. The opportunity should now be

taken to redress that inconsistency especially given the evidence that alleged infringers are shifting from p2p to file locker type services.

- 44.4 The burden put on ISPs in having to run concurrent processes for each copyright owner will add significant cost to ISP services, resulting in a significant increase in the per infringement notice cost payable by copyright owners. It may also cause confusion.
 - 44.5 The process by which account holders are able to challenge allegations of infringement is inadequate.
 - 44.6 Account holders are still to be held liable for the actions of other users even where they have no control over what those users do when using that account and in circumstances where they do not have a relationship which justifies such liability.
 - 44.7 The standards and procedures by which the Copyright Tribunal and the Court will judge whether or not there has been infringement are ill defined and protection for alleged infringers need to be strengthened.
 - 44.8 In addition, there are various technical issues that need to be addressed to make the regime workable.
45. These issues are all more fully explained in the Lowndes Jordan report.

F. Conclusion

- 46. InternetNZ thanks the Government for the chance to contribute its advice and suggestions on the Bill.
- 47. InternetNZ is available to offer more detail or to meet with officials to explain the rationale behind the comments made in this submission.

Yours sincerely,



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Analysis of Copyright (Infringing File Sharing) Amendment Bill
(Prepared for InternetNZ by Rick Shera, Lowndes Jordan)

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Introduction

1. The massive losses claimed by the corporate side of the music and film industries to have been caused by infringing file sharing, have been doubted by many, including the US Government.¹ However, it is equally clear that copyright infringement is taking place online using the p2p protocol. For large scale commercial infringement, the Courts remain the best avenue for copyright owners to seek redress. However, for smaller scale infringement, copyright owners argue that the Court process is not quick enough and is too costly.
2. It has been recognised by all involved that no system will stop infringement altogether. Steps which increase respect for the creativity of others are key. But, because of the overly aggressive strategies adopted to date by certain copyright owners,² it may now take some time to reverse the scepticism that those strategies have created as to whether copyright protection is useful or necessary at all.
3. Education is generally accepted to be the most effective measure. It is therefore important not to try to implement a system aimed at die hard infringers, since that will

¹ The US Federal General Accountability Office has cast significant doubt on the numbers asserted in various reports to be represent infringement losses - see <http://www.gao.gov/new.items/d10423.pdf>

² The Recording Industry Association of America (RIAA) last year decided that suing individual users was creating a backlash out of proportion to the benefit in doing so and so decided not to continue that strategy. However, in recent months a new group has launched proceedings against thousands of unnamed "John Does" – see <http://thresq.hollywoodreporter.com/2010/05/hurt-locker-producer-to-sue-pirates.html>

fail. The cost and adverse consequences of doing so will therefore outweigh any benefit.

4. Instead any system should focus on education and on encouraging users who perhaps see infringement as socially acceptable but would likely modify their behaviour. In this context it is revealing to find that the New Zealand Federation Against Copyright Theft's (NZFACT) own figures indicate that 70% of New Zealanders would stop infringement if they were sent an educational notice, whereas only 61% would respond in the same way if threatened with disconnection of their internet access.³
5. It is for these reasons that InternetNZ favours a notice and notice system (as do other stakeholders such as the Telecommunications Carriers' Forum). The incremental benefit in adding penalties to a notice and notice system just does not justify the massive increase in complexity and therefore cost. Conversely, only proper recourse to due process and natural justice can really give any confidence that complex copyright infringement issues will be decided correctly. Copyright questions are far more complex than, say, domain name disputes, where a fast track *on the papers* penalty system has worked reasonably well.
6. If, despite these concerns, a process is required to provide copyright owners with a remedy, we must ensure that the remedy is proportionate and that the process carries with it the requisite amount of due process and protection of user privacy. It is in this context that the Copyright (Infringing File Sharing) Amendment Bill⁴ seeks to provide a balance. A mark-up of the changes that the Bill would make to the current Copyright Act 1994 is included with this paper.
7. As so called graduated response systems go, the system proposed by the Bill provides a reasonable balance – that is apart from termination as a remedy, which is disproportionate and would need substantial change even if it were to be included (which it should not).

International context

8. The Bill provides a model for New Zealand and which is also being looked at by other countries facing the same balancing act. This is very much an international discussion. A comparison to other regimes which have been implemented or which are proposed in other countries is therefore relevant.
9. **US** - In the US, copyright owners have attempted to suggest that they have reached or are about to reach agreement on a graduated response regime with ISPs. Whilst there may be isolated instances of ISPs adopting such an approach, there is no known widespread agreement, despite continued copyright owner pressure. A useful outline of the current state of play in the US is in a March 2010 letter from AT&T, one of the World's largest ISPs, to Victoria Espinel, the US Presidential IP Enforcement Co-ordinator.⁵ Apart from termination as a remedy, the New Zealand proposals reflect AT&T's suggestion of best practice.
10. **Canada** – Over the past few years, Canada has attempted to introduce new law to cater for the digital environment. However, vagaries of the Canadian system have meant that the proposed laws have lapsed with changes of Government. Reports are that another attempt will be made soon.⁶

³ Press released issued by NZFACT on 20 October 2009.

⁴ <http://legislation.govt.nz/bill/government/2010/0119/8.0/DLM2764312.html>

⁵ see <http://attpublicpolicy.com/wp-content/uploads/ATT-Comments-for-Joint-Strategic-Plan-3-24-10.pdf>

⁶ <http://www.globalnational.com/technology/Copyright+bill+coming+this+spring+heritage+minister/2922215/s>

Appendix 1

InternetNZ Submission on the Copyright (Infringing File Sharing) Amendment Bill 2010

11. **Australia** – As required under clause 29(b)(iv)(a) of its May 2004 Free Trade Agreement with the US,⁷ Australia implemented a full US style Digital Millennium Copyright Act (DMCA) regime.
12. In a direct copy of DMCA section 512(i)(1)(A),⁸ the Australian Copyright Act 1968 was therefore amended to provide that for an ISP to retain its safe harbour from liability for online copyright infringement, it:

*... must adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers.*⁹
13. Since 2004, ISPs and copyright owner organisations (the latter represented by the Australian Federation Against Copyright Theft (AFACT)), have become increasingly entrenched in their positions respectively against and for a three strikes style repeat infringer regime. Codes have been discussed but have not progressed and positions have been publicly flagged throughout.¹⁰ These arguments culminated in the iiNet case heard in 2009, for which a decision was handed down in February 2010.¹¹ The main finding in that decision was that iiNet had not authorised copyright infringement by its customers who had used BitTorrent to download infringing films and TV shows. However, Cowdroy J, in a detailed judgement on all aspects of iiNet's activities, also cast doubt on whether a three strikes regime without due process would be adequate for the purposes of section 116AH above.
14. AFACT has lodged an appeal in the case (to be heard in August 2010) and is also publicly pressuring the Australian Government to introduce new law to address the situation (using New Zealand as an example).¹²
15. **France** – The HADOPI regime, a form of "three strikes" adopted last year in France, is a far more regulated solution. It creates a centralised Government body, Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits sur Internet, to investigate and respond to complaints of infringement. That body may impose sanctions including 2-12 months suspension of a user from all internet access – not just with the ISP they were with when they allegedly infringed, but with all ISPs. How a suspension across all ISPs is to be enforced is unknown. Other problems with the French solution include: the lack of any real ability for a user to challenge the evidence presented by a copyright owner or the findings of the HADOPI itself, lack of privacy protection of alleged infringers and the disproportionality of a complete ban of internet access. It is probably too soon to draw any conclusions as to whether HADOPI is working but an academic study seems to suggest that it may not be.¹³

[tory.html](#)

⁷ <http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text>

⁸ <http://www.copyright.gov/title17/92chap5.html#512>

⁹ s116AH - http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s116ah.html. This then shows the genesis of the infamous New Zealand section 92A. Interestingly, in its original iteration in the Copyright (New Technologies) Amendment Bill, when that Bill was first introduced in December 2006, section 92A was proposed in the same way, as a pre-condition to an ISP having a safe harbour. However, when section 92A was re-introduced by way of supplementary order paper on April Fools day 2008, a little over a week before the Bill was passed (http://www.parliament.nz/en-NZ/PB/Legislation/SOPs/5/a/7/48DBHOH_SOP1090_1-Copyright-New-Technologies-Amendment-Bill.htm) it had become a more onerous positive obligation on ISPs to comply with that vague requirement.

¹⁰ See for example, IIA's pointed response to AFACT and others in April 2007

http://www.iaa.net.au/images/stories/letter_to_mipi_april07fnl.pdf

¹¹ *Roadshow Films Pty Ltd v iiNet Limited (includes summary)* (No. 3) [2010] FCA 24 (4 February 2010)

<http://www.austlii.edu.au/au/cases/cth/FCA/2010/24.html>

¹² <http://www.theaustralian.com.au/business/media/canberra-urged-to-join-net-fightback/story-e6frg996-1225855218786>

¹³ <http://arstechnica.com/tech-policy/news/2010/03/piracy-up-in-france-after-tough-three-strikes-law->

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16. **Italy** - In what appears to be a similar case to iiNet, it has been reported that Telecom Italy has successfully resisted APAV's (Italy's equivalent of NZFACT/AFACT) attempt to make it liable for p2p infringement by its customers and responsible for implementing sanctions against them. In an ironic twist, it is reported that the only order that APAV has obtained is that the ISP must send notices it receives from copyright owners to the local prosecutor, which is what iiNet was doing when it was unsuccessfully sued.¹⁴
17. **UK** – Although accompanied by similar public outcry to that experienced with New Zealand's s92A, in part because of the impending general election, the UK's Digital Economy Bill was rushed into law in March 2010.¹⁵ It provides for a notice and notice process but with the threat of a possible three strikes complete internet access termination regime to be introduced later by direction from the UK Government to OFCOM, the UK communications industry regulator. It also contains provisions enabling copyright owners to obtain ISPs' customer details and obtain injunctions directly against ISPs to block access.¹⁶ Now that the Liberal Democrats, who campaigned against internet termination as a remedy, are in coalition with the Conservatives, there may be some hope that the notice and notice system now in place will not be extended further.
18. **Ireland** – Eircom, Ireland's largest ISP, was sued by EMI and others for copyright infringement in the same way that iiNet was in Australia. During the hearing of the case, the parties settled, reportedly on the basis that Eircom will operate a three strikes repeat infringer termination regime, with no recourse to Courts. Apparently, the settlement will not be implemented unless other Irish ISPs also agree. To that end, BT and UPC, other major Irish ISPs, are being sued also with the case due to start on 10 June.
19. In the meantime, the Court has held that implementing the settlement arrangement will not contravene the privacy requirements of the European Data Directive as reflected in Irish law.¹⁷ It is interesting to note the rose coloured spectacles through which the Irish Judge views copyright owners compared to the more searching analysis of Cowdroy J in the iiNet case.
20. **European Union** - More generally in Europe, after protracted debate, the Telecoms Directive was passed by the European Parliament with the addition of Annex 1. Whilst not specifically requiring judicial consideration of any decision to terminate internet access, it does require adequate due process.¹⁸
21. **Korea** – Korea has had an archetypical three strikes repeat infringer law running for some time. On receipt of 3 allegations of infringement, an ISP is required to suspend internet access for 6 months. Its safe harbour protection from incurring liability itself is also conditional on taking technical measures to prevent infringement and on not knowingly transmitting or hosting infringing material. A user may challenge the copyright owner allegations(s) but only after the ISP has imposed a sanction and the user must then prove that their activity was not infringing - see part VI of a

[passed.ars](#)

¹⁴ http://torrentfreak.com/italian-isps-ruled-not-responsible-for-file-sharing-customers-100420/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Torrentfreak+%28Torrentfreak%29&asid=03cabdde

¹⁵ <http://www.publications.parliament.uk/pa/cm200910/cmbills/089/10089.i-iii.html>

¹⁶ A brief summary of the final changes to the law can be found here - <http://paidcontent.co.uk/article/419-digital-economy-bill-quick-guide-to-all-45-measures/>.

¹⁷ *EMI Records & Ors -v- Eircom Ltd* [2010] IEHC 108

<http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/7e52f4a2660d8840802577070035082f?OpenDocument>

¹⁸ <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/513&format=HTML&aged=0&language=EN&guiLanguage=fr>

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presentation by Chang Beom Yi of the Korean Internet and Security Agency (KISA) to the Korea Australia New Zealand Broadband summit November 2009, New Zealand at www.kanz2009.co.nz.

22. **Japan** – Japan has apparently implemented a three strikes regime similar to that of Korea by private agreement between ISP organisations and copyright owners.¹⁹
23. **ACTA** – Following international pressure (particularly the Wellington Declaration)²⁰ the official text of the latest draft of the Anti-Counterfeiting Trade Agreement (to which New Zealand would be a signatory) was made public after the last round of negotiations in Wellington.²¹ The latest text seems to retreat from termination as a default remedy. However, it is clearly still on the agenda.
24. Almost more concerning is the threat to introduce the US concept of *inducement* as a standard for copyright infringement by ISPs. This is then used as a stalking horse to maintain ISP safe harbours but only if ISPs agree to implement strong graduated response systems. More intrusive access to customer details and a stronger injunction regime are also mooted in the latest draft. If proposals suggested in the current draft agreement were to be accepted by New Zealand, the Bill would not go far enough and further changes would be required to the Copyright Act.

Summary of International Developments

25. Following early adoption, or proposed adoption, of a three strikes regime without due process, in a number of countries, it is clear that the adverse consequences of such regimes are now better understood, not just by internet activists but by Governments themselves. As public scrutiny has been applied, as doubt has been raised about inflated loss numbers used by copyright owners and as it has come to be realised how important internet connectivity is, Governments have started to retreat from a three strikes model.
26. In a recent survey conducted in 26 countries, almost 80% of the 28,000 people surveyed agreed that internet access should be a fundamental right,²² echoing the comments of then Minister Judith Tizard in New Zealand.²³ The European Parliament's addition of Annex 1 to its Telecoms package and the push back in the ACTA negotiations are strong evidence of that.
27. Korea's law and Japanese ISPs' and Eircom's respective agreements, represent a high water mark in terms of copyright owner freedom to make allegations leading to termination of internet access without recourse to Courts. France (and, if it is adopted, UK's) termination of all internet access is draconian and seems unworkable (although there is a small degree of due process involved). Overall however, these regimes must now be seen to be out of step. It is in this context that we need to ensure that New Zealand does not adopt what has already become an outdated law model.

Main Issues

28. The main issue with the New Zealand proposals is that termination is still included, since it is a disproportionate remedy for copyright infringement. Even if termination

¹⁹ see <http://blogs.zdnet.com/Ou/?p=1063>

²⁰ <http://publicacta.org.nz/wp-content/uploads/2010/04/WgtnDeclPetition.pdf>

²¹ http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf

²² http://www.globescan.com/news_archives/bbc2010_internet/

²³ <http://computerworld.co.nz/news.nsf/news/6DC929097F31FF8ECC2574B8006D45D8>

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were to remain (which it should not), it would need significant change (see paragraphs 76 to 87 below). In principle, if there is to be a remedial system rather than pure notice and notice, the balance of the Bill is acceptable. However, as was seen with the Telecommunication Carrier's attempt to prepare a repeat infringer code, the issues are complex. There are therefore some areas that require change.

29. The main issues, apart from removal of termination, that need to be addressed, are:
- 29.1 The definition of ISP, whilst better confined than it was, will still catch entities that should not be classed as ISPs (see paragraphs 30 to 35 below).
 - 29.2 The critical definition of file sharing is too wide (see paragraphs 36 to 43 below).
 - 29.3 The due process in the new regime highlights the unwarranted lack of due process in the existing section 92C regime. The opportunity should now be taken to redress that inconsistency especially given the evidence that alleged infringers are shifting from p2p to file locker type services (see paragraph 38 below).
 - 29.4 The burden put on ISPs in having to run concurrent processes for each copyright owner will add significant cost to ISP services, resulting in a significant increase in the per infringement notice cost payable by copyright owners. It may also cause confusion (see paragraphs 46 to 48 below).
 - 29.5 The process by which account holders are able to challenge allegations of infringement is inadequate (see paragraph 62 below).
 - 29.6 Account holders are still to be held liable for the actions of other users even where they have no control over what those users do when using that account and in circumstances where they do not have a relationship which justifies such liability (see paragraphs 74 and 75 below).
 - 29.7 The standards and procedures by which the Copyright Tribunal and the Court will judge whether or not there has been infringement are ill defined and protection for alleged infringers need to be strengthened (see paragraphs 68 to 73 and paragraphs 86 and 87 below).
 - 29.8 In addition, there are various technical issues that need to be addressed to make the regime workable.

Section by Section analysis of the Bill

Definitions

ISP

- 30. It will be confusing to have two different definitions, side by side, for *Internet Service Provider*. In any case, the definition used for the purposes of the new repeat infringer regime in sections 122B-122R needs to change and that may influence the name itself.
- 31. As noted in the explanatory note to the Bill under the heading *ISP Definition* (p4), the intention is to catch only traditional ISPs and exclude universities, libraries, businesses and the like who are not in the ISP business. The definition goes some way towards this but it may still be argued that a university or library that charges for internet access is caught and that should not be the case. Given that the entire focus of the new regime is on infringing file sharing attributable to an IP address, it would be

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preferable to define an ISP by reference to that activity.

32. If this is not done, it is also possible for a situation to arise where a business is both an ISP and an account holder, which would then lead to the odd situation where it is supposed to give infringement notices to itself. For example, a university that charges for internet access can be said to be an ISP. It is also of course an account holder. There is obviously no need for the university to be giving itself notices. What is needed therefore is a clear and unambiguous distinction between an ISP and an account holder.
33. It is suggested therefore that the name *ISP or Internet service provider* in section 122A be changed to *IP Provider*. In addition, to make it clear that the business referred to is an ISP business, remove the second ambiguous *that* at the start of the definition and change the definition so it reads something like:

*means a person that operates a business **where that business is not merely incidental to another business or activity and...***

34. Change subparagraph (a) of the definition to read:

*offers the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, **via an IP address allocated by the IP Provider to the user**, of material of the user's choosing*

Internet Account

35. This also ties in with a suggested remedy to another issue. In New Zealand, many ISPs are also telecommunication companies and bundle voice and data services together on the one plan. If termination is to remain as a remedy, then it must be made clear that it is only a data account that may be terminated. To address this, the definition of account needs to be added to refer to the IP address. It could therefore read:

***account** means an IP address based connection allocated to a user by an IP Provider (other than an account of that IP Provider itself).*

File sharing

36. The new regime is intended to apply solely to **file sharing**. Confining it in this way is important since, as many submissions on the previous s92A pointed out, if it is not confined, there will be confusing overlap with the other ISP provisions in ss92B-92E. Unfortunately, the definition of file sharing is so wide that it captures many internet activities far beyond file sharing in the generally accepted sense. For example, it captures simple downloading, email, posting material to a website, blogging, making material available via social networking sites such as Facebook or cloud storage sites like Flickr for photographs, as well as standard sharing of files via the peer to peer protocol.
37. The new regime will therefore overlap with s92C which covers hosting and storage but which has a very different process associated with it. It may also overlap with section 92E which provides the safe harbour condition for caching, since the cache itself will have its own IP address. This is another reason for clarifying the ISP and account definitions as suggested above. Otherwise, whilst the ISP will have a safe harbour under section 92E, it will still be required to comply with this new regime and send itself notices where a copyright owner has identified the IP address of the cache. That

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would be a waste of time.

38. Ironically, the best way of addressing the overlap with s92C (in addition to changing the definitions) is to dispense with the distinction altogether and apply the new regime to storage and hosting under section 92C as well. This is important for various reasons:
- 38.1 It removes the inconsistency between a provision which has no due process around it (s92C) and the new regime, where there is due process.
- 38.2 It has been recognised that determining copyright infringement in the digital environment is complex and there is no reason for one regime to be safeguarded by due process and the other not to be. Section 92C is a classic Digital Millennium Copyright Act (DMCA) notice and takedown provision (although without even the protection of a DMCA counter-notice procedure). As such it is an invitation to an ISP to take a very risk averse approach and remove material as soon as it gets a complaint from a copyright owner. That is because section 92D makes specific reference to such notices as giving an ISP *reason to believe* that an infringement may have occurred. In those circumstances, unless the ISP removes the material, it risks being liable itself so most ISPs will remove material without attempting a costly and complex investigation of whether in fact there has been infringement. The lack of due process around section 92C is now totally out of step with the new regime and should not be allowed to continue.
- 38.3 This is particularly the case given suggestions that alleged infringers are shifting from p2p use to file locker services such as Rapidshare.²⁴ If that is true, we can expect to see more focus by copyright owners on section 92C processes. Users, account holders and ISPs in those situations deserve equal protection to that which they are to be given under this new regime.
- 38.4 It means that we do not need to try to predict how the internet will develop by making a distinction between various internet activities (transmission via p2p on the one hand and hosting and storage on the other). This is an artificial distinction – it should not matter what service a user is using – the process should be the same.
39. In any case, the definition of file sharing will have to be cut down so that it does not overlap with ss92B-92E.
40. The other problem with the definition of file sharing is that it includes downloading by itself. Filesharing of infringing material is argued by copyright owners to be a problem that needs a specific remedy because of the way infringing material is downloaded **and uploaded** at the same time. This creates what is called a swarm where material is propagated very widely and efficiently. This is a long way away from an individual simply downloading a small number of infringing works.
41. This, combined with the focus on the account holder rather than the user, means that there will be account holders who provide internet access anonymously but who will become liable for whatever those users download. That is unfair. If a fast track regime such as this is to be used to attack a particular problem, file sharing, then it should be confined to that – it should not be metastasized into a default regime for all infringement. So, the definition of file sharing should be confined to situations where the same work is downloaded and is at the same time made available for upload. It is not downloading which gives rise to the problem complained of by copyright owners; it is the rapid spread via the swarm created when users both download **and** upload. Copyright owners are able to see if the downloading user is also making the file

²⁴ http://www.channelregister.co.uk/2009/10/13/warez_hosting/

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available for upload when they conduct IP address based searches so identification of this type of infringer will not be any more difficult.

42. There may also be other unforeseen consequences of such a wide definition.

Infringement

43. The definition of **infringement** includes a very dangerous expansion of copyright protection which is inconsistent with established caselaw. One of the most complex issues in copyright is whether the copying in question has been substantial enough to be considered an infringement. This is measured primarily in qualitative terms but the proportion of a work copied will also be relevant.
44. The definition in the Bill runs roughshod over that complex balancing exercise. By referring to infringement in *part of a work* it suggests that each part of a work might be analysed to see if that part has been infringed, rather than looking at the work as a whole to see whether a substantial copying has taken place. Quite apart from the unwarranted expansion of copyright protection for parts of works, the practical conundrum also arises as to how the Tribunal or District Court is to know which part or parts of a work it must consider. If we take a song for example, does this mean that copying one bar from the chorus, which might not be infringement of the whole song, might nonetheless be infringement of the chorus under this definition? That would be a radical shift in copyright policy and is not something that should be attempted in this Bill (it should not be attempted at all, but certainly not in this Bill). The words, *or a part of a work* should be deleted from the definition.

Operative provisions of the Bill

45. Having looked at the definitions, we now come to operative provisions of the Bill itself. Again, for ease of reference, comments are made on sections in the order those sections appear in the Bill rather than trying to deal with the issues in order of importance.

Multiple copyright owners

46. A confusing aspect of the Bill is whether the infringement notice procedure is intended to match just one copyright owner alleging multiple infringements to an IP address or is intended to aggregate multiple copyright owners to that one IP address. This has major ramifications of course:
- 46.1 If each process from first detection notice through to enforcement notice and, ultimately, any penalty, is to run on a per copyright owner basis, then a person who infringes against multiple copyright owners will be treated more leniently in terms of getting to enforcement stage than a person who infringes multiple times against one copyright owner.
- 46.2 Conversely, when it comes to the penalty phase, it might be difficult to aggregate the claims of all copyright owners that have issued infringement notices and to apportion any reparation under 122N.
- 46.3 If the process is a separate one per copyright owner, then, in theory, it would be possible for processes involving several copyright owners to run concurrently and, ultimately, for each of those copyright owners to claim reparation up to \$15,000.

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This could result in a penalty which is far greater than \$15,000.

47. The Bill is a little unclear on this. For example:
- 47.1 The definition of *warning notice* in section 122A states that it is issued *in respect of at least 2 alleged infringements against a copyright owner*. This seems to suggest that each copyright owner is to be the subject of its own process.
- 47.2 Under section 122E(1)(b), a warning notice is only sent if the alleged infringement occurs *at least 3 weeks after the date of a detection notice issued to the account holder in relation to the same copyright owner* This also tends to suggest the possibility of multiple concurrent processes.
- 47.3 Clause 122D, which deals with the first notice to be sent – the detection notice – also seems to envisage a process for each copyright owner. However, it also says that a detection notice may not be sent until after a quarantine period has expired. A quarantine period is a period of 4 weeks following the final enforcement notice during which an application may be made to the tribunal. The idea is that the process starts again after an enforcement notice and quarantine period expires without any enforcement action being taken. But, it is not clear whether the quarantine period is for the one copyright owner or for others.
- 47.4 When it comes to enforcement action before the tribunal, the suggestion appears to be that **all** infringement notices for an account holder be provided by the ISP to the tribunal (see section 122J(3)). On the face of it, that suggests that all copyright owners are involved in the same process, at least at enforcement level.
48. Overall however, it does seem to be intended that there will be a separate process for each copyright owner. This is despite many submitters in earlier consultations suggesting that one process be used to accumulate all copyright owner allegations. The consequences of running concurrent processes are many. They include:
- 48.1 Multiple detection notices. Although some copyright in popular music and blockbuster film may be aggregated in the hands of a few copyright owners, there are of course an almost unlimited number of copyright owners who could avail themselves of this procedure. A user could therefore receive multiple detection notices for different types of works. Each, of these would presumably suggest to the user that if they “do it again” they will receive a warning notice and then an enforcement notice. But, instead, unless they allegedly infringe again with the same copyright owner, they will not receive those notices but, instead, multiple detection notices. This will be confusing.
- 48.2 If, by chance, the user is alleged to have infringed more than once against the same copyright owner but only once against others, it will be at stage 2 with the first one but at stage 1 with the others. This will also be very confusing.
- 48.3 Further, the various quarantine periods and on-notice periods applicable to each copyright owner may well overlap each other. Again, this will be confusing.
- 48.4 For an ISP, this will dramatically increase the scale of this process and consequent cost. Instead of just logging each allegation, notice and various events in the process against the account holder after matching to the IP address, the ISP will have to have separate logs for each copyright owner and keep track of all the timeframes for each. These include quarantine periods, expiry periods, on-notice periods, different notices and counter-notices etc. It could be faced with the strange situation where it is sending out detection notices, warning notices and enforcement notices to an account holder at the same time or even completely

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out of sequence. Given the confusion that this will cause account holders, it will also likely receive far more queries – again, at an increased cost to the ISP, which will then need to be recovered in notice filing fees.

- 48.5 There is potential for duplication at the Tribunal and/or the Court. If one user over a period of time receives enforcement notices with respect to different copyright owners, then each time that happens, a copyright owner might apply to the Tribunal and/or the Court. The Tribunal/Court could therefore end up receiving similar claims with respect to one IP address (one account holder), from different copyright owners.

Notice timing

49. In section 122A(2), it is difficult to understand why there are different standards of notice timing. For users, they are stuck with notice periods which are triggered by the date on the ISP's notices, whereas ISPs (and through them copyright owners) have the benefit of needing to actually receive user notices before they are valid. There is no reason for this. All notices should be valid within X days of being sent subject to the intended recipient being able to dispute receipt in limited circumstances.
50. The trigger for commencement of any notice period is important since some periods are relatively short, such that even a day's difference between the date of a notice and the date of receipt would make a material difference. In any case, since there are numerous dates and expiry dates throughout the process, each needs to be checked against this provision to ensure that reference to either the date of a notice or to the date of receipt is appropriate. Scenarios such as notice, challenge etc need to be worked through to ensure that the time periods for each operate as intended. In some places, they may not.
51. The wording in section 122A(2)(a) also needs to be changed to remove the ambiguity – is the date referred to the date when the alleged infringement occurred, or the date when the copyright owner discovered and recorded it? It should be the former, otherwise the aim of making sure notices are sent to users soon after an alleged infringement has occurred could be thwarted. An example of the confusion this causes can be seen in section 122E(1)(b) which refers to the date on which the infringement occurred rather than the date it was recorded by the copyright owner.

ISP unable to match allegation to IP address

52. An ISP can only take the required actions under this regime where it is actually able to match the IP address to an account holder who is one of its customers. There may be various reasons the ISP is unable to do this and, in those circumstances, the ISP must be excused from taking any further steps. Section 122C(2) therefore needs to be expanded to add the following exceptions:
- 52.1 If the IP address in question is not one that has been allocated by the ISP and is under its direct authority. In those circumstances, the IP address will likely be within an IP number block that has been allocated to another ISP and the first ISP will be unable to match to a customer.
- 52.2 If the ISP no longer retains records that will enable the match (having complied with any information retention requirement as currently set out in section 122Q);
- 52.3 If the account holder has not provided any address or other details necessary for

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the ISP to comply or has provided incorrect details;

- 52.4 If the number of notices is too high for the ISP to cope with. Note that this is exactly the problem now faced by even large ISPs such as Time Warner in the US.²⁵

Evidence collection period too short

53. The 1 week period in section 122C(2)(a) is too short. Whilst it is important for all concerned that the notice be sent to the user as soon as possible after the alleged infringement, to suggest that a copyright owner must detect that infringement, complete its investigation and send its allegation to the ISP in 1 week is unrealistic. A further week is allowed to the ISP to send out the notice, so if 2-3 weeks were allowed under section 122C(2)(a), that would give a total of 3-4 weeks, which seems a reasonable balance.

ISP costs

54. It is clear that there will be significant cost to ISPs in establishing and operating this system. Cost recovery is therefore important to prevent those costs, which are in effect costs of enforcing third party copyright owner rights, from being loaded onto innocent ISP customers. The requirement in section 122C(2)(e) that ISPs be compensated for their costs in this process is therefore welcome. However, for this to be effective, particularly for overseas copyright owners, rather than the ISP's obligation being triggered by *an agreement to pay*, that should be changed to refer to an agreement to pay **which has been accepted by the ISP**. ISPs should not bear any risk of non-payment unless they have agreed in advance to accept that risk.

Form of notices

55. It would appear that the form of the infringement Notices (detection notices, warning notices and enforcement notices) is to be set out in regulations. This will be useful since any standardisation that can be driven into the system will make it more understandable and will reduce costs.
56. Some details are included in sections 122D(2) (Detection), 122E(2) (Warning) and 122F(2) (Enforcement). Nowhere however is there any indication of any penalty for the issue of a false or misleading notice. Under the US DMCA, a false or misleading notice is classed as perjury and subject to penalty (and lawyers' fees in defending such a notice can also be claimed).²⁶ Similarly, in Australia, the issuer of a notice must undertake that they are doing so in god faith and have taken reasonable steps to ensure accuracy.²⁷
57. To bring New Zealand into line with other jurisdictions, there should be a similar declaration for the purposes of the Oaths and Declarations Act, which would then be actionable if falsely made. Better still, the fines for false or misleading notices which were removed from the Copyright (New Technologies) Amendment Bill by Supplementary Order paper 193 on 1 April 2008 should be reinstated.

²⁵ <http://arstechnica.com/tech-policy/news/2010/05/time-warner-cable-tries-to-put-brakes-on-massive-piracy-case.ars>

²⁶ See §512(3)(c)(A)(vi) here <http://www.copyright.gov/title17/92chap5.html#507>

²⁷ http://www.austlii.edu.au/au/legis/cth/consol_reg/cr1969242/sch10.html

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58. Notices sent by copyright owners, which trigger infringement notices, should also give contact details of a natural person who is responsible for issuing the notice and capable of making decisions with respect to use of the copyright work referred to. That way, an account holder may make direct contact with the copyright owner if they wish.

Expiry of Infringement Notices

59. The way in which notices expire seems a little harsh on copyright owners. Under section 122F(3) an enforcement notice expires 4 weeks after the date it is issued. Provided that an application is made to the Tribunal within that 4 week period, the expiry will not have any impact. However, if Tribunal proceedings are not initiated within that period, then as we read it, all infringement notices which were the subject of that enforcement notice will expire. It is not specified but it is assumed that this means that expired notices are of no effect and can no longer be actioned (although ISPs must still keep details – see section 122Q(d)).
60. To give an example - over a space of 6 months, a copyright owner issues 5 detection notices, then issues a warning notice for 2 further alleged infringements and, finally, issues an enforcement notice in response to another alleged infringement. If it does not apply to the Tribunal within 4 weeks, all of those notices will expire. This seems unnecessary. It is appropriate that enforcement notices should expire if not actioned but detection notices and warning notices need not expire except after the expiry of the 9 month long-stop period.
61. Further, it is unclear how expiry of a notice affects a copyright owner's right to apply to the District Court under section 122O. Conversely, there does not seem to be any cut-off date before which a District Court application must be made. Compare this to section 122J where Tribunal proceedings must be issued within 4 weeks of the enforcement notice otherwise it expires. What happens if Tribunal proceedings are not issued? Does this mean that District Court proceedings cannot be issued because the enforcement notice has expired under clause 122J?

Account holder challenge

62. The process around account holder challenge to infringement notices needs further work. In particular:
- 62.1 This is another area where the difference in treatment of dates may have an adverse impact. 1 week is too short anyway, but since the 1 week deadline for an account holder to submit a challenge commences on the date of the infringement notice being challenged, in almost all circumstances the account holder will have less than a week from the time it actually receives the notice.
- 62.2 In any case, 1 week is too short for a challenge period. For example, assume that an account holder has had a security issue over a period of a couple of months which has resulted in it receiving a warning notice. It calls its ISP but does not issue a challenge to the notices. The discussions with the ISP result in the problem being fixed and no further alleged infringements occur until, 6 months later, another problem occurs and, as a result the account holder is sent an enforcement notice. However, the account holder happens to be away at the time for a 10 day holiday. The account holder's ability to challenge the enforcement notice will have been lost. It can be argued that the account holder is not adversely affected because, if the copyright owner applies to the Tribunal,

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the account holder will have a right to argue its case there (although, as we will see later, there are suggestions that penalty at that stage is on a strict liability basis). To avoid unnecessary cases going to the Tribunal and to provide a more reasonable time period for account holders to challenge, at least 2 weeks should be given.

- 62.3 It is unclear how an ISP is to decide whether or not to forward the challenge to the copyright owner under section 122G(3). In any case, copyright owners will wish to know of all challenges. From an ISP point of view, this appears to require a manual decision making process which will just add cost and is unnecessary.
- 62.4 Further, it is hard to see why an ISP should be allowed to reject a challenge under clause 122G(4). It is possible that the challenge may be based on a security issue or some other aspect within the purview of the ISP, however, again, ISPs have made it clear that they do not wish to be put in a position of deciding whether or not an account holder's argument that it has not infringed is valid. It should be up to the copyright owner in all circumstances whether it accepts the challenge or wishes to pursue the matter to the Tribunal or Court.
- 62.5 In section 122G(4), assuming that the challenge has been sent to the copyright owner, it is suggested that the copyright owner will then notify the account holder if it rejects the challenge. This is not possible since the copyright owner will not have the account holder's contact details at this stage (see section 122F(4)).
- 62.6 Under section 122H, a challenge is deemed to be accepted if it is not rejected by the copyright owner or ISP within 3 weeks. This again underlines why the ISP should not be involved in this. If under section 122G(3) the ISP decided that the challenge was not something that need involve the copyright owner and the ISP then simply did nothing, the copyright owner's notice(s) would be cancelled, without it even knowing about it.
- 62.7 There does not seem to be any way that a copyright owner will know if an ISP accepts or rejects a challenge anyway, unless the above issues are dealt with.
- 62.8 Under section 122H(2) it is suggested that if a detection notice is validly challenged or is deemed to be accepted because it is not rejected, all subsequent notices will also be cancelled. It is hard to understand why subsequent notices are affected since they will relate to entirely new alleged infringements. It is also hard to understand why previous warning notices and detection notices are affected.
- 62.9 There is no form of notice specified for challenges. There should be for various reasons. This will assist account holders. It will also assist copyright owners to see exactly why an account holder is challenging. It will make it more difficult for account holders who wish to try to "game the system" to do so, if they are required to specify exactly why they say they have not infringed. It will create a better record for the Tribunal or Court should the matter proceed to penalty. It is also consistent with challenge regimes in the DMCA and Australia, for details required in a challenge or counter-notice to be specified by regulation.
- 62.10 Finally on this point, it is most unclear what is required for a challenge to be successful. It appears from the above that it is envisaged that a security issue (e.g. evidence of a hacked wifi connection) would be sufficient. However, that is not how the penalty regime seems to deal with matters.

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Concurrent jurisdiction of Copyright Tribunal and District Court

63. There are arguments for and against copyright owners being able to issue proceedings in the Tribunal or in the District Court or in both at the same time. It is suggested that, if the copyright owner wishes to initiate District Court proceedings, it should not be able to issue proceedings in the Tribunal. The District Court in those circumstances should also be able to award the same fines up to \$15,000 as the Tribunal (as an alternative remedy to termination; not a concurrent remedy). Otherwise, there could be a situation where the Tribunal and the Court are hearing the same evidence. It is even conceivable that they could come to different conclusions, which would bring the system into disrepute.
64. Note in this regard that the domain name dispute resolution procedures in New Zealand and overseas specifically provide that those processes will be stayed pending the outcome of any Court action. This would therefore leave the decision in the hands of the copyright owner – issue in the Tribunal or in the District Court but not both.

Material to be provided by copyright owner

65. In section 122J(e) a copyright owner should also be required to provide:
- 65.1 Evidence to justify its claim for an amount to be paid by the account holder. Any amount payable should be based on normal civil damages principles with proof provided of actual loss by the copyright owner (i.e. not a US style statutory damages regime); and
- 65.2 Confirmation that the copyright owner is not aware, having considered the matter, that any defence under the Copyright Act (e.g. for fair dealing) would be available. It is important to remember that in many situations the copyright owner will have more experience with respect to copyright matters than the account holder.
66. All evidence provided should be sworn in normal fashion. This is particularly important given the preference built into the regime for the Tribunal to decide matters on the papers (see section 122L).
67. In section 122J(3), not only should the Tribunal be satisfied that an enforcement notice has been sent but also that the procedural requirements in sections 122J(1) and (2) have been complied with. If the regime proceeds on the basis that each process is particular to each separate copyright owner, then section 122J(3) also needs to make it clear that the detection notices and warning notices that the ISP must deliver up to the Tribunal are only those of the copyright owner who is seeking to enforce the enforcement notice, not all such notices.

Tribunal procedure

68. In section 122K, it would be useful to have more clarity as to who must receive notice of proceedings and could be joined or appear. Currently this is entirely at the discretion of the Tribunal but it is unclear whether a copyright owner or account holder could apply for a third party to be joined.
69. It has already been noted that there needs to be clarity around whether the regime envisages one process per copyright owner or the aggregation of all copyright owners in a single process. If a single process was used, then all copyright owners could appear.

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70. The admonition in section 122L(4) that the Tribunal use reasonable efforts not to reveal identity and address details of account holders to copyright owners is welcome. However, as an added safeguard against later copyright owner abuse of such information, there should also be a prohibition the copyright owner using any such information which does come into its possession other than for the purposes of that particular proceeding.
71. In section 122M it is suggested that a party may not be represented by a representative (other than an employee etc). This is potentially unfair on both copyright owners and account holders. Many copyright owners in the film, TV and music industries for example licence copyright via collecting societies or organisations. Those organisations or their representative bodies commonly represent the copyright owner in this sort of enforcement activity. RIANZ and NZFACT here in New Zealand are examples of this. There is no reason why they should not be able to represent the copyright owner. Conversely, because copyright owners, particularly in these industries, have people who are experts in enforcement (often lawyers or ex law enforcement personnel), lay account holders who do not have that expertise will be at a significant disadvantage in arguing issues such as fair dealing or other permitted use, or substantiality, for example. Account holders should be entitled to legal representation to address that imbalance in expertise.
72. In section 122N no indication is given as to the standard of proof the Tribunal must adhere to. The reference to it being *satisfied* in subsections (1) and (2) is insufficient. It must be made clear that it must be satisfied of infringement under the Act on the balance of probabilities (i.e. the normal civil standard).
73. Further, in terms of the Tribunal's general procedures, it should observe principles of natural justice. So, for example, the same right must be given to an account holder to raise its defence as is given to the copyright owner to make its case on the balance of probabilities. If the Tribunal procedure is not to be made explicit in the Act, then there should at least be a statement of this principle of equality to guide the Tribunal and to rebut any suggestion that an aspect of the regime is intended to favour one party over the other (which it should not).

Account holder liability for actions of others

74. The Bill makes an account holder liable for any activities conducted using the account, whether or not they are directly responsible. So, in section 122N, fines may be levied and in section 122O the account may be suspended, even where the account holder has no involvement in the infringement. There are many situations in law where such vicarious liability applies and fines may be payable by one person in respect of another's illegal action (employer responsibility for employees is a typical one) but the common thread among them is that the person who is to be held vicariously liable has:
- 74.1 A legal relationship with the person for whom it may be held responsible;
- 74.2 The ability via that relationship to control the activities of the person for whom it may be held responsible.²⁸
75. These principles should also dictate when an account holder can be made liable for user actions. So, for example, a library that has no legal relationship with and no ability to

²⁸ See, for example, *A v Roman Catholic Archdiocese of Wellington & Ors* [2009] 1 LRC 211 (CA), where it was held that the Archdiocese was not vicariously liable for the actions of omissions of the manager of one of its orphanages.

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control the actions of users at public access terminals, should not be held liable for fines or termination, if those users should infringe. Standard vicarious liability principles should apply.

Termination

76. Termination is a disproportionate remedy. Internet access has become and will increasingly become a utility service, as necessary for us to go about our daily lives as electricity or water. The suggestion is sometimes made that if an internet account were to be terminated it would not matter because the account holder could simply use publicly available access points at internet cafes or libraries for example. But, we already know that internet access is essential in many interactions required by law. Examples include:

76.1 Filing company annual returns each year under the Companies Act. These may only be filed online. Filing requires the filer to have the company key, a password that allows any of that company's statutory, publicly available, records to be altered. Therefore, filing via a public access computer at a library or internet café, would be most inadvisable from a security perspective;

76.2 Many employers are required by law to file monthly PAYE records online. Again, it is inconceivable that an employer would do so via an unsecured publicly accessible computer;

76.3 The Personal Property Securities Act 1999, requires holders of security interests (e.g. hire purchase lenders, car financiers etc) to file financing statements online in the personal property securities register, or lose priority. Timing is critical since the order of registration on that register dictates who will have priority should the creditor default. Again, it would be inappropriate for a financier to have to file via a public terminal;

76.4 All land transactions in New Zealand must be effected online via the Landonline portal maintained by the Government agency, Land Information New Zealand. Access is enabled on a per computer per user basis with several layers of both technical security and authorisation by lawyers required. It would therefore not be possible for sales and purchase of land, mortgages or other transactions to be effected by lawyers for their clients if the per computer per lawyer access was lost. For a conveyancing lawyer in sole practice, internet termination therefore effectively means he or she cannot practice. Again, termination is disproportionate; monetary penalty would suffice;

76.5 Many other businesses are run entirely online now. Loss of internet access would have a catastrophic impact both at the user end and for the business itself. There are many examples, but a few include:

76.5.1 Domain name registrations and filing of domain name dispute proceedings;

76.5.2 Online auction businesses and general online listing and bidding;

76.5.3 Purchase of tickets (e.g. music concert ticket and Rugby World Cup tickets which often sell out quickly);

76.5.4 Cloud computing, software as a service generally. For example, many businesses run their accounts on xero, a New Zealand company

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challenging the world in SaaS accounting. Again, having to handle sensitive financial information via a public computer, if the business's private internet access was terminated, would be unworkable and inappropriate.

77. Many of these examples involve time sensitive transactions. It is simply not feasible to suggest that an account holder or user that has had internet access terminated must somehow find timely access some other way. Libraries and internet cafés are generally not open 24/7 in any case – another problem in an increasingly global marketplace.
78. It is also not always the case that someone who has their internet access terminated with one ISP will be able to sign up with another one (although, ironically, in situations where this is possible, it underlines how ineffective termination will be). In some parts of New Zealand, there is only one ISP available. Terminating internet access in those circumstances is tantamount to kicking that person off the internet.
79. Further, it is clear that the New Zealand Government, at both Central and Local Body level, is rapidly moving to an online model. Interactions with Government will increasingly only be able to take place via online portals secured by personal password access (not something one would ever want to entrust to a non-secure public access computer). Even voting itself is moving online. To suggest that a New Zealand citizen who infringes copyright might therefore, as a result, lose his or her ability to interact with Government on an equal footing with other New Zealand citizens is anathema. It is interesting to note also the pressure being brought to bear on Government both here and overseas to use cloud computing solutions, which will only increase the need for internet access.²⁹
80. Even if we thought of the internet as just another utility, it is very difficult to see how termination is appropriate. If criminal activity is undertaken using electricity and water supply (for example, growing cannabis), we do not cut off the criminal's power and water. Copyright infringement is not a criminal offence so it is even less appropriate to terminate in these circumstances.
81. Internet access is not just a utility however. Its ability to provide social and family connection across distances and time zones, educational and work opportunities, personal development and general societal benefits is a driver for the Government committing \$1.5 billion of taxpayer funds to its ultrafast broadband initiative. This capacity for improvement in the human condition, provided by the internet, takes it from a mere utility to a human right. 28,000 people in 26 countries see access as fundamental.³⁰
82. In addition, with the growth in VoIP, termination of internet access effectively becomes termination of telephone access, ultimately endangering property and personal safety through lack of access to the 111 system.
83. It is said that termination is a necessary ingredient to discourage infringement and yet NZFACT's own figures indicate that the greater benefit will come from the notice regime. In any case, monetary penalties are adequate in a myriad of other situations across New Zealand statute books – there is no reason whatsoever that they will not be

²⁹ See for example, the reported comments of Department of Internal Affairs, pressing for Government CIOs to be less timid in take-up of cloud solutions http://computerworld.co.nz/news.nsf/news/dia-official-says-privacy-security-different-for-cloud?opendocument&utm_source=topnews&utm_medium=email&utm_campaign=topnews. In this, New Zealand is part of a worldwide trend – see *The Cloudy Future of Government IT: Cloud Computing and the Government Sector Around the World* David C. Wyld, International Journal of Web & Semantic Technology (IJWest), Vol 1, Num 1, January 2010 - <http://airccse.org/journal/ijwest/papers/0101w1.pdf>

³⁰ See footnote 22 and associated text above.

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adequate as a remedy to discourage infringement in these circumstances. In other words, not only is termination disproportionate; it is also unnecessary.

84. The termination remedy should therefore be removed by deletion of section 1222O.
85. If, despite the above, termination is to remain as a remedy, it must clearly not be extended as per the HADOPI regime in France or the proposed regime in the UK, whereby an infringer is effectively cut off from all internet access altogether. It seems doubtful that this could be effectively imposed but that does not excuse the attempt.
86. There are also problems in any case with the suggested regime, if it is to remain:
 - 86.1 It is unfair and a breach of natural justice principles for a user who accesses the internet via an account holder's IP address to be penalised by having his or her internet access terminated without any right to be heard. Any user who will be adversely affected by a decision to terminate should be able to submit evidence to the Court and be heard.
 - 86.2 It is implied but it should be made clear in section 122O(1) the only account which may be suspended is the account of the account holder with the ISP that provides the IP address that is the subject of the enforcement notice. There should be no question whatsoever of termination of an account with any other ISP.
 - 86.3 Section 122(1) lacks the all important criterion as to when the Court is able to suspend. It almost seems to proceed on the basis of strict liability – if the notices have been sent then that is the end of it. That cannot be right. It needs to include a new section 122O(1)(c) to read along the lines of:

(c) beyond reasonable doubt, the actions referred to in the enforcement notice(s) that are the subject of the application each represent an infringement of a work referred to in those Notices
 - 86.4 Suspension of an internet account is more akin to a criminal penalty and therefore the higher criminal burden of proof should be applied (hence *beyond reasonable doubt* above).
 - 86.5 In section 122O(2), it is grossly unfair that the copyright owner is able to provide evidence but the account holder is not. In considering the seriousness of the infringing, the Court should take into account any evidence adduced by the account holder and users as well as that adduced by the copyright owner.
 - 86.6 The factors which could influence the Court in its decision as to whether to suspend should be made mandatory. In other words, the Court should be required to take those factors into account rather than having a discretion as to whether or not it does, as seems to be implied at present.
 - 86.7 Additional relevant factors should be included, such as:
 - 86.7.1 The degree of anyone else's reliance on access to the internet (i.e. other users);
 - 86.7.2 Whether the account holder has authorised the infringement under section under section 16(1)(i) of the Copyright Act;
 - 86.7.3 Any adverse impact of the suspension on the ISP who provides the account. For example, if suspension means that the cost of a phone or

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other device provided by the ISP is not recovered as it would have been had the account holder remained on a particular account plan for its term, then that should be taken into account;

- 86.7.4 Conversely, if an account holder will be subject to a monetary penalty under its contract with the ISP, for early termination, then that should weigh against such termination.

87. In addition, there should be circumstances where, despite the seriousness, suspension should not be awarded – an absolute defence along the lines of:

provided that suspension shall not be awarded where the account holder can show, on the balance of probabilities:

(a) the infringements complained of are the actions of a user that, apart from provision of internet access via the account itself, the account holder has no legal control over or responsibility for; and

(b) the account holder has not authorised the infringements under section 16(1)(i) of the Act; and

(c) the account holder has taken all steps reasonably available to it in the circumstances to prevent infringement using the account,

or that account holder or any user accessing the internet via the account needs access for health, safety or other reasons of vulnerability.

ISP obligations

88. In section 122Q(3), the prohibition on the ISP disclosing information to a copyright owner should be extended to a prohibition on disclosure to **anyone** except in the circumstances set out in sub-sections (a) and (b) of that section.
89. It is unclear what the objective of having ISPs publish the annual compliance report referred to in section 122Q(4) is. If that is to be a requirement, then more guidance needs to be given as to what is intended here and the information retention should be limited to that which is required for an ISP to comply with the regime.
90. In addition, if it is seen as a useful tool to assess the size of the infringement problem, for ISPs to keep information and report as envisaged in section 122Q(4), it would also be appropriate for any copyright owner that has used the system to publish statistics of how many of each type of infringement notices it has lodged, with which ISPs, and how many applications it has made to the Tribunal and the Court, plus total fines or suspensions it has obtained.

Rick Shera
Lowndes Jordan
24 May 2010

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Appendix 2

Detailed suggestions for amendments to the Copyright (Infringing File Sharing) Bill 2010.

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1. Introduction

The following are InternetNZ's suggestions for changes to the Bill, if it is decided, despite InternetNZ's strong preference otherwise, to proceed with the Bill and then not to confine it to a notice and notice regime.

The marked changes show insertions (underlined) and deletions (~~struck out~~) to the Bill as it has been introduced.

References are made to supporting analysis in the Lowndes Jordan Report (Appendix 1) and the body of InternetNZ's submission. Please note that InternetNZ has further developed some suggestions from the Lowndes Jordan report, primarily as a result of feedback and discussion at seminars held in May in Auckland and Wellington and discussion amongst InternetNZ members since then.

2. Definitions in the Bill

A - ISP

Suggest the definition of ISP in section 122A of the Bill be changed as follows:

~~ISP, or Internet service provider~~ **IPA Provider**, means a person (A) that operates a business ~~where that business is not merely incidental to another business or activity and where A that~~
 (a) offers the transmission, routing, and providing of connections for digital online communications, between or among points specified by a user, via IP addresses allocated by A to account holders whose identities are known to A, of material of the user's choosing; and
 (b) charges its account holders specifically for the services provided in paragraph (a) on a regular basis; and

(c) is not primarily operated to cater for transient users

(see Lowndes Jordan report, paras 30-34).

Note that since the Lowndes Jordan report was prepared, Ofcom has published a draft code under the UK Digital Economy Act. That draft code has a similar reference to the allocation of an IP address as a defining feature of an ISP.¹

B - Internet Account

Suggest the addition of a new definition of account in section 122A of the Bill

account means an IP address based connection allocated to a user by an IPA Provider (other than a connection of that IPA Provider itself).

(see Lowndes Jordan report, para 35)

C - File sharing

As InternetNZ sees it, there are three changes needed with respect to the definition of file sharing. These are needed to cater for overlap with sections 92C and D (notice and takedown) and section 92E (caching) and to focus more closely on the problem at hand – file sharing:

- Add due process to section 92C by applying this regime across the board. Officials at InternetNZ's seminars indicated that this might be a work project for the future but, in InternetNZ's view, if it is considered necessary to have due process around the new regime, then there is no justification for waiting to add it to the more traditional notice and takedown regime. Admittedly however, this would require a substantial rewrite of the Bill and the existing sections 92C and 92D. If that is not possible at this stage, then what it does suggest again is that we should not implement the full graduated response system. We should implement notice and notice and then build on that as necessary to cater for both the new file sharing regime and existing notice and takedown so that we do not have two totally inconsistent regimes side by side (see Lowndes Jordan report, paras 36-38).
- Confine the definition of file sharing strictly to p2p type activities where material is downloaded and able to be made available for upload at the same time. This is the most realistic change if the Bill is to progress within its current timetable. The definition of file sharing might therefore change as follows:

file sharing is where material—

- (a) is downloaded from the Internet by a user by means of an application or protocol that at the same time enables that user to share all or part of that material with other users over the Internet (whether or not that user does in fact enable such sharing at the time);~~or~~
- (b) ~~is made available on the Internet by a user in a form in which the material may be downloaded by 1 or more other users; or~~
- (c) ~~is transferred, directly or indirectly, via the Internet from one user to another user~~

(see Lowndes Jordan report, para 40)

¹ See the definition of *internet access service* on page 43 of the Ofcom code at <http://www.ofcom.org.uk/consult/condocs/copyright-infringement/condoc.pdf>

Add exceptions to section 122C(2) and amend section 92B(2A) (since there are other changes that need to be made to section 122C(2), we deal with this in sequence below).

D - Infringement

The definition of infringement in the Bill should be changed to read:

infringement means an incidence of file sharing that involves the infringement of copyright in a work, ~~or part of a work,~~ by a user

(see Lowndes Jordan report, paras 43 and 44)

3. Operative provisions of the Bill

A - Multiple copyright owners

Since the Lowndes Jordan report was prepared, officials have confirmed that separately channelled processes for each copyright owner are intended, but that an agent may effectively aggregate notice procedures for multiple owners. If it is intended that notifications sent to ISPs can be sent by copyright owners or their agents and that agents can take other actions, then certain sections, which refer to actions taken by **copyright owners**, may need to change. Alternatively, the definition of copyright owner for the purposes of this regime could be extended to read:

For the purposes of sections 122A-122R, unless the context otherwise requires, a reference to a copyright owner includes its agents

This would alleviate some of the issues raised in the Lowndes Jordan report at paras 46-48.

B - Notice timing

Section 122A(2) should be clarified and the same notice timing should be used for all participants (otherwise account holders receive even less time to react to infringement notices). We suggest that the section be changed to read:

(2) In this section and sections 122B to 122R, a reference to the date of an infringement, an infringement notice, or a challenge is a reference to,—

- (a) in the case of an infringement, the date on which it is alleged recorded by a copyright owner ~~to have as having~~ occurred;
- (b) in the case of an infringement notice, the date on which it is ~~issued by the ISP~~ received from an IPA Provider by an account holder;
- (c) in the case of a challenge made under section 122G, the date on which it is received from an account holder by an ISP; and for the purposes of subsections (b) and (c), receipt of a correctly addressed notice or challenge shall be deemed to have occurred no later than 2 working days after it has been sent .

Alternatively, each section which refers to a time period within which something is required to happen should be checked to ensure that that time period cannot be truncated unfairly by a

delay in a document being sent.

(see Lowndes Jordan report, paras 49 - 51)

C - ISP unable to match allegation to IP address/ Evidence collection period too short/ISP costs

As discussed at para 52 of the Lowndes Jordan report, there are various reasons why an ISP should not be required or may be unable to match an IP address and send out an infringement notice. Section 122C(2) needs to reflect this. Section 122C(2) would therefore be changed to add new sections 122C(2)(f)-(h) (and a consequent cross-referencing change would be made to section 122C(3)(a)). In addition, further changes need to be made to section 122C(2)(a) since the 1 week evidence collection period for copyright owners is too short (see Lowndes Jordan report, para 53) and to address ISP concerns over non-payment by copyright owners (see Lowndes Jordan report, para 54). We suggest the following:

- (2) An ISP IPA Provider need not comply with the obligation in subsection (1)(a) to match IP addresses if—
- (a) the alleged infringement occurred more than 4 2 weeks before the ISP IPA Provider received the relevant information from the copyright owner; or
 - (b) the alleged infringement occurred after an infringement that triggered a detection notice but before the date of that detection notice; or
 - (c) the alleged infringement occurred during a quarantine period applying to the account holder with respect to the copyright owner; or
 - (d) the copyright owner has not complied with regulations made under section 234 that impose requirements on the information, or form of information, to be provided for the purposes of subsection (1); or
 - (e) the copyright owner has not paid, or entered into a prior agreement with the IPA Provider pursuant to which it is obliged~~has not agreed~~ to pay, a fee required by the ISP IPA Provider, as permitted by section 122R; or
 - (f) the IP address in question is not one that has been allocated by the IPA Provider to one of its account holders or is one that is not, at the time it would be required to comply with subsection 1(a), under the IPA Provider's direct authority; or
 - (g) the IPA Provider no longer retains records that will enable it to match the IP address to one of its account holders (provided the IPA Provider has complied with the information retention requirements set out in section 122Q); or
 - (h) the volume of notifications received by the IPA Provider from or on behalf of copyright owners makes it unreasonable in the circumstances for the IPA Provider to comply within the period specified in subsection (1)(b), provided the IPA Provider uses reasonable commercial efforts to comply as soon as practicable.

D - Form of notices

All infringement notices and challenges should be declared under the Oaths and Declarations Act 1957, or at least the following wording should be added, for the reasons set out in the Lowndes Jordan report at paras 55-57. This can either be introduced in the Bill under sections 122D(2) (detection notice), 122E(2) (warning notice), 122F(2) (enforcement notice) and 122G (account holder challenge notice) or in regulations. Note also the need to have an overseas copyright owner submit to the jurisdiction of the New Zealand Courts, particularly

should an account holder wish to take court action itself:²

The information contained in this notice is to the best of my knowledge true and complete. This complaint is not being presented in bad faith and is presented solely for the purpose of [alleging/disputing] the copyright infringement referred to. I acknowledge that breach of this declaration shall constitute perjury under section 108 of the Crimes Act 1961. By the sending of this notice, the [copyright owner/account holder] submits to the jurisdiction of the Copyright Tribunal and of the New Zealand Courts.

Even if the declaration is not given the status of an oath with perjury consequences (as suggested above), some form of good faith confirmation should be included. In that case there should also be penalties set out in the Bill as there were in the original Copyright (New Technologies and Performers Rights) Bill returned by the Select Committee at the time. Those penalties related to section 92C but should now be applied to this regime. The text of that now deleted section is set out below. All that would be needed is for the section references to be updated to refer to the new regime:³

Offences in relation to notice of infringement

“(1) A person (*A*) commits an offence if—

“(a) *A* signs, or authorises another person to sign, a notice referred to in section 92C(2)(ba)(i); and

“(b) the notice is false or misleading in a material particular; and

“(c) *A* knows that the notice is false or misleading in a material particular or is reckless as to whether it is or not.

“(2) A person (*B*) commits an offence if—

“(a) *B* has signed, or has authorised another person to sign, a notice referred to in section 92C(2)(ba)(i); and

“(b) the notice is false or misleading in a material particular; and

“(c) after the notice is signed, *B* either knows that the notice is false or misleading in a material particular or is reckless as to whether it is or not; and

“(d) does not take all reasonable steps to withdraw the notice.

“(3) A person who commits an offence under this section is liable on summary conviction,—

“(a) in the case of an individual, to a fine not exceeding \$50,000; and

“(b) in the case of a body corporate, to a fine not exceeding \$100,000.

“(4) For the avoidance of doubt, if an individual acting on behalf of a body corporate commits an offence under this section, the body corporate also commits the offence.

In any case, notices should be standardised as far as possible by regulation. InternetNZ is pleased to see that it is intended that those regulations will be consulted on.

² This is consistent with the approach taken in the .nz domain name dispute resolution policy see <http://www.dnc.org.nz/content/drs.html> at paras B2.3.8 and B2.3.9

³ <http://www.legislation.govt.nz/bill/government/2006/0102/5.0/DLM1122643.html#DLM1122651>

E - Account holder challenge

The process around account holder challenge to infringement notices needs further work as discussed in the Lowndes Jordan report at para 62. InternetNZ suggests the following changes:

122G Challenging infringement notices

- (1) An account holder may challenge an infringement notice by sending a challenge, in the prescribed form, to the ISPIPA Provider that issued the infringement notice.
- (2) A challenge is not valid if it is received more than ~~1~~ 2 weeks after the date of the infringement notice to which it relates.
- (3) An ISPIPA Provider that receives a valid challenge to an infringement notice must immediately forward it to the relevant copyright owner ~~if the challenge raises an issue that should be addressed by the copyright owner rather than by the ISP.~~
- (4) The ~~ISP or~~ copyright owner (as appropriate) must consider every valid challenge and, if it decides to reject a challenge, must notify the IPA Provider ~~account holder~~ of that fact and the reason for the rejection.
- (5) If the copyright owner responds to a challenge, the ISPIPA Provider must immediately forward the response to the account holder.
- (6) If a challenge is rejected, it may be raised again by the account holder in any enforcement proceedings.

122H Effect of challenge to, and cancellation of, infringement notice

- (1) A challenge is deemed to be accepted if it has not been rejected by the relevant copyright owner ~~or ISP~~ within 3 weeks after the date of the infringement notice to which it relates.
- (2) If a challenge to a detection notice is accepted or deemed to be accepted,—
 - (a) ~~the that detection notice and any subsequent infringement notices sent to the account holder in relation to the same copyright owner are~~ is cancelled and treated as if they it had not been issued; and
 - (b) no infringements that occurred between the date of the infringement that triggered the detection notice and the date on which the detection notice is cancelled may be included in an infringement notice.

F - Concurrent jurisdiction of Copyright Tribunal and District Court

InternetNZ's view is that it would be preferable for copyright owners to elect whether to go to the Copyright Tribunal for reparation or go the District Court, which could award the same level of reparation (or termination if that remedy remains). Of course, if termination were removed as a remedy, then there would be no need for the District Court at all in this regime.

Since InternetNZ's strong preference is that termination be removed, we have not here documented changes that would be required to remove the concurrent jurisdiction. The changes to be made if termination is removed are set out further below.

G - Material to be provided by copyright owner

As indicated in the Lowndes Jordan report at paras 65-67, the process by which a copyright owner applies to the Tribunal needs to be clarified. We suggest the following:

122J Application to Tribunal

- (1) An application to the Tribunal for an order under section 122N may not be made after the end of the quarantine period or earlier than—
 - (a) 1 week after the date of the enforcement notice; or
 - (b) if a valid challenge is received, 3 weeks after the date of the enforcement notice.
- (2) The application must be in the prescribed form (sworn under the Oaths and Declarations Act 1957) and include or be accompanied by—
 - (a) a copy of the enforcement notice as forwarded to the copyright owner; and
 - (b) evidence that the copyright owner is the owner of the material in which copyright is alleged to be infringed; and
 - (c) a statement of which of the alleged infringements identified in the enforcement notice the copyright owner is seeking to enforce; and
 - (d) a copy of any challenges received by the copyright owner in respect of any of those alleged infringements, along with any responses by the copyright owner to those challenges; and
 - (e) a statement of the amount that the copyright owner is seeking from the account holder together with evidence of the loss it has suffered by virtue of the alleged infringement; and
 - (f) a statement that the copyright owner is not aware of any possible defence that the account holder or any user might have under the Act with respect to the alleged infringement, or, it is aware of a possible defence, its reasons why that defence should not be accepted; and
 - (fg) the prescribed fee for the application.
- (3) If the Tribunal is satisfied that an enforcement notice has been sent to the account holder in accordance with this Act and that the requirements of subsections (1) and (2) have been complied with, the Tribunal must order the relevant ~~ISP-IPA Provider~~ to produce to the Tribunal—
 - (a) the name and contact details of the account holder; and
 - (b) copies of the detection and warning notices sent to the account holder with respect to the copyright owner who has made the application under subsection (1).
- (4) The ISP must provide those contact details and notices to the Tribunal as soon as practicable, ~~along with any challenges that were received by it but not forwarded to the copyright owner, and any responses to those challenges.~~
- (5) If an infringement notice expires, and the notice relates to an application made in accordance with subsection (1), the expiry does not affect the continuation and completion of any proceedings.

H - Tribunal procedure

We suggest the following changes:

122K Notice of proceedings

- (1) The Tribunal must give notice of the proceedings, in the prescribed form, to the account holder and any parties that the Tribunal directs to be joined.
- (2) The notice of proceedings must—
 - (a) identify all the infringements in relation to which the copyright owner seeks an order; and
 - (b) specify the amount sought; and
- (c) set out the account holder's right to make submissions and request a hearing.
- (3) The parties to proceedings before the Tribunal for an order under section 122N are—
 - (a) the applicant copyright owner; and
 - (b) the account holder identified in the enforcement notice; and
 - (c) any other party that the Tribunal directs be added as a party in accordance with section 212(2) provided that in no circumstances shall an IPA Provider be joined.

122L Decisions generally made on papers and without hearing

- (1) Proceedings before the Tribunal for an order under section 122N must be determined on the papers unless—
 - (a) any party to the proceedings requests a hearing; or
 - (b) the Tribunal considers that a hearing should be held.
- (2) The papers on which the proceedings are determined are—
 - (a) the copyright owner's application to the Tribunal; and
 - (b) copies of the infringement notices sent to the account holder; and
 - (c) copies of challenges to any infringement notice, and any responses to those challenges; and
 - (d) the account holder's response to the application (which may include responses from users of the account), which shall be provided to the Tribunal within 2 weeks of the account holder receiving a copy of the application under section 122K(1); and
 - ~~(de) any additional information provided by the copyright owner, the account holder or any user of the account in question, provided within the time specified by the Tribunal; and~~
 - ~~(e) any submissions by the account holder made within the time specified by the Tribunal.~~
- (3) The Tribunal may determine its own procedure for determining an application that is dealt with on the papers, subject to any regulations and provided that any determination shall be made on the balance of probabilities.
- (4) The Tribunal must make all reasonable efforts to ensure that, unless it orders otherwise or an order is made against the account holder, the identity and contact details of the account holder are not disclosed to the copyright owner.

(5) If, despite subsection (4), the identity or contact details of the account holder are obtained by the copyright owner, it must not use those details other than for the purposes of the specific application to the Tribunal.

122M If hearing is held

- (1) If a hearing is held, sections 211 to 224 apply, other than sections 213(1) to (3) and 214(1) and (2).
- (2) Every party to the proceedings may appear personally and be heard.
- (3) A party may not be represented by a representative, except as follows:
 - (a) a corporation or unincorporated body of persons may be represented by an officer, employee, or member of the corporation or body, or a person who holds a majority interest in it:
 - (b) a person jointly liable or entitled with another or others may be represented by 1 of the persons jointly liable or entitled:
 - (c) a partnership may be represented by an employee of a partnership:
 - (d) a minor, or a person under a disability, may be represented by another person:
 - (e) if the Tribunal is satisfied that, for sufficient cause, a party is unable to appear in person or is unable to present his or her case adequately or that there is an unfair imbalance in copyright law expertise as between the copyright owner and the account holder.
- (4) A representative may not be a lawyer unless that person is an employee of the copyright owner or account holder, or unless the Tribunal gives leave.

122N Tribunal order requiring payment to copyright owner

- (1) The Tribunal must order an account holder to pay a copyright owner a sum if the Tribunal is satisfied on the balance of probabilities that—
 - (a) each of the 3 alleged infringements that triggered the infringement notices issued to the account holder were infringements of the copyright owner's copyright that occurred at an IP address of the account holder; and
 - (b) the 3 notices were issued in accordance with this Act,
 - unless the account holder can show on the balance of probabilities that at least one of the infringements was committed by a user of the account:
 - (c) who, apart from provision of internet access via the account itself, the account holder had no legal control over or responsibility for; and
 - (d) who the account holder has not authorised to commit that infringement in contravention of section 16(1)(i) of this Act; and
 - (e) the account holder has taken all steps reasonably available to it in the circumstances to prevent such infringements occurring.
- (2) The sum specified in the Tribunal order must be determined in accordance with regulations made under this Act and must include a sum in relation to every infringement identified in the enforcement notice that the Tribunal is satisfied was committed against the copyright owner at an IP address of the account

- holder.
- (3) If the Tribunal makes an order under subsection (1), it may also make an order requiring the account holder to pay to the copyright owner either or both of the following:
 - (a) a sum representing a contribution towards the fee or fees paid by the copyright owner to the ISP under section 122R;
 - (b) reimbursement of the application fee paid by the copyright owner to the Tribunal.
 - (4) The total amount ordered by the Tribunal to be paid by the account holder must not exceed \$15,000.
 - (5) An order made under this section may be enforced as if it were a judgment for a sum of money made by a District Court.
 - (6) The Tribunal may award costs against a party to the proceedings only if the Tribunal is satisfied that the party has engaged in conduct intended to impede the prompt determination of the proceedings.

(see Lowndes Jordan report, paras 68-75)

I - Termination

Termination is a disproportionate remedy and should be removed (see Lowndes Jordan report, paras 76-86). That would simply entail deletion of sections 122O and 122P of the Bill and consequent removal of references to suspension (as termination is referred to in the Bill).

If, however, termination is to remain, then for the reasons set out in paras 76-86 of the Lowndes Jordan report, we suggest the following changes:

122O Court order suspending account holder's account

- (1) A District Court may, on application by a copyright owner, make an order requiring an ISP to suspend the account of an account holder with the IPA Provider which has dealt with the relevantt enforcement notice for a period of up to 6 months if the court is satisfied that—
 - (a) an enforcement notice has been sent to the account holder in accordance with this Act in relation to infringements against the copyright owner and the Court is satisfied beyond reasonable doubt that each occurrence of file sharing referred to in that enforcement notice is an infringement; and
 - (b) the application for the order is made at least 2 weeks after the date of the most recent enforcement notice sent to the account holder in relation to infringements against the copyright owner; and
 - (c) suspension of the account is appropriate in the circumstances, given the seriousness of the infringing.
- (2) In considering the seriousness of the infringing, the court may consider any evidence put before it by the copyright owner, the account holder and any user of the account including any infringement notices relating to infringements against the copyright owner that have been sent to the account holder at any time.
- (3) When considering the circumstances, and determining the duration, of a

proposed suspension, the matters that the court may consider include, but are not limited to,—

- (a) the degree of the account holder's and any users' reliance on access to the Internet; and
- (b) the identity (if known) of the user who engaged in the infringements identified in the notices and whether the account holder authorised those infringements in contravention of section 16(1)(i) of this Act; and
- (c) any adverse impact a suspension may have on the IPA Provider who provides the account; and
- (ed) any other matter that may be specified in regulations-;

provided that suspension shall not be awarded where the account holder can show:

- (e) the infringements complained of are the actions of a user who, apart from provision of internet access via the account itself, the account holder has no legal control over or responsibility for; and
- (f) the account holder has not authorised the infringement in contravention of section 16(1)(i) of this Act; and
- (g) the account holder has taken all steps reasonably available to it in the circumstances to prevent infringement using the account,

or that the account holder or any user accessing the Internet via the account needs access for health, safety or other reasons of vulnerability.

J - ISP obligations

We suggest the following changes:

122Q Obligations of ISPIPA Providers

- (1) Every ISPIPA Provider must retain, for a minimum of 40 days, only such information on the use of the Internet by each account holder as will enable the IPA Provider to comply with sections 122A to 122R of this Act.
- (2) Every ISPIPA Provider must retain, for a minimum of 12 months, the following information:
 - (a) any information about infringements that is sent by copyright owners to the ISPIPA Provider for the purpose of matching the infringement to an account holder:
 - (b) copies of the infringement notices issued to an account holder:
 - (c) any challenges received by the ISPIPA Provider and any responses to those challenges:
 - (d) which infringement notices (if any) have been cancelled or have expired:
- (e) any orders made under section 122O suspending an account holder's account.
- (3) No ISPIPA Provider may release the name or contact details of an account holder to a copyright owner anyone unless—
 - (a) authorised to do so by the account holder; or
 - (b) required to do so by the Tribunal or a court or otherwise required by law.

- (4) On or before 31 December 2011, and annually thereafter, every ISPIPA Provider and every copyright owner who has triggered a detection notice must publish on its Internet site a report aggregating the information referred to in subsection 3, and in addition, copyright owners shall also publish details of all notifications they have sent to IPA Providers on a per IPA Provider basis ~~on its compliance with this section~~ during the period starting on 1 October in the previous year and ending on ~~30~~ September in the year of the report.