

**COPYRIGHT (INFRINGING FILE SHARING)  
AMENDMENT BILL (“The Bill”)**

**SUBMISSIONS BY**

**RECORDING INDUSTRY ASSOCIATION OF  
NEW ZEALAND (RIANZ)**

**AND**

**INDEPENDENT MUSIC NZ (IMNZ)**

**23 June 2010**

## **EXECUTIVE SUMMARY**

The key issues covered in these submissions are::

### **(1) Introduction**

RIANZ represents 60 major and independent record companies, over 1000 imprint labels and more than 1100 New Zealand recording artists and producers and over 95% of commercially released recorded music in NZ. IMNZ represents 83 record labels, all of which are 100% NZ owned, and 85% of NZ recorded music.

(paras 1 – 4)

### **(2) Need for the Bill**

Online copyright infringement has had and continues to have a significant negative effect on New Zealand's music, film, television, software and other creative industries. For example, in the period between 2004 and 2009 the combined value of all albums and tracks sold by New Zealand artists has almost halved.

The current high costs that a copyright owner faces when bringing proceedings against illegal downloaders for infringement through the Courts means that it is uneconomic to effectively pursue and reduce illegal peer-to-peer file sharing.

The Bill proposes an efficient, low-cost and credible regime to deter individuals from infringing copyright. RIANZ and IMNZ however propose some modest amendments to the current Bill to ensure that it meets its aims to ensure that the measures, procedures and the remedies to reduce illegal peer-to-peer file sharing are effective and dissuasive.

(paras 5 – 24)

### **(3) Temporary internet account suspension**

Various international studies have shown that a graduated response mechanism combined with the threat of account suspension is the most effective way to reduce repeated online infringement of copyright. These studies have shown that effective sanctions, and in particular account suspension, are critical to achieve meaningful deterrence.

The power of a District Court to suspend an account holder's internet account for up to six months is a justified and proportionate remedy as compared to the current alternatives, as well as to the impact that illegal file sharing has on copyright owners, the New Zealand economy and New Zealand's relationship with other countries.

(paras 25 – 45)

**(4) The International Context**

A graduated response mechanism with deterrent sanctions similar to that proposed in the Bill has been proposed or implemented in a number of countries. The current Bill is in line with this international evolving best practice approach.

(paras 46 – 54)

**(5) Scope of these submissions with reference to the Bill**

- (A) **Qualifying incidents of infringement:** Notifications to Internet Service Providers (“ISPs”) from all copyright owners should count towards the graduated response process, not just infringements relating to one particular copyright owner.

This is to ensure that the Bill can be effective, especially for New Zealand copyright owners, and so that it is consistent with the graduated response mechanisms used overseas.

The Bill should also make clear that the definition of “copyright owner” includes both the copyright owner and his authorised agent.

(paras 58 – 84)

- (B) **Fees payable to ISPs:** Each party should bear its own costs and rightholders should not be expected to pay fees to ISPs for complying with their obligations under the law. Notwithstanding, if such fees are charged, regulations should be put in place to limit maximum rates.

(paras 85 – 103)

- (C) **Challenging infringement notices:** Section 122G should be amended to ensure that challenges to infringement notices go to an independent person authorised by the Copyright Tribunal.

This is to ensure that the graduated response mechanism set out under the Bill retains integrity for all parties involved. Furthermore, the grounds upon which a challenge can be brought by an account holder should be expressly defined.

(paras 104 - 112)

- (D) **Infringements detected while a challenge is pending:** New infringements detected while a challenge to an infringement notice is pending should count towards the process.

(paras 113 – 116)

- (E) **Content of infringement notices:** Infringement notices should include an educational element providing information about copyright, legitimate alternatives, and how to secure a wireless account.

(paras 117 – 122)

- (F) **Time frames regarding ISP obligations:** ISPs should notify copyright owners immediately of issued enforcement notices.

(paras 123 – 125)

- (G) **IP address matching:** ISPs should be required to match IP addresses to every reported infringement.

(paras 126 – 131)

- (H) **Copyright Tribunal rules:** The process should be expeditious and cost-efficient. The Tribunal should therefore only allow oral hearings where it considers that it is appropriate.

The Tribunal should also have the power to order full reimbursement of any ISP fees paid by copyright owners.

The Tribunal should also retain a discretion to increase the amount payable by an account holder to include a deterrent to further infringing activities or where the infringing activity by the account holder warrants such an increase.

(paras 132 – 141)

- (I) **District Court rules:** To ensure that the Bill provides an efficient, low-cost and credible regime, it is suggested that an application by a copyright owner to suspend an internet account be brought by way of an originating application. If the application to suspend an account has to be brought by way of ordinary proceedings in the District Court, there would be no advantage at all to the copyright owner to proceed under the regime prescribed by the Bill.

(paras 142 – 147)

These issues of concern are explained below in more detail, including suggested amendments to the Bill's current provisions.

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## **(1) INTRODUCTION**

1. These submissions are jointly presented by the Recording Industry Association of New Zealand (RIANZ) and Independent Music NZ (IMNZ).

### **RIANZ**

2. RIANZ is the trade representation body for the New Zealand recorded music industry. RIANZ represents 60 major and independent recording companies and more than 1,000 imprint labels that account for more than 95% of the sales of commercially-released recorded music in New Zealand. Importantly, RIANZ also represents more than 1100 New Zealand recording artists and producers.

### **IMNZ**

3. IMNZ represents 83 recording labels all of which are 100% New Zealand owned. IMNZ represents 80-85% of New Zealand recorded music and aims to preserve cultural diversity in the domestic market. It operates to assist its member labels with domestic and export sales and in representation before select committees or other bodies.
4. Both RIANZ and IMNZ appreciate the opportunity to make this submission. Both RIANZ and IMNZ wish to be heard in support of these submissions. As per the covering letter, we would also appreciate the Committee considering our request with regard to availability for any appearance before the Committee.

## **(2) NEED FOR THE BILL**

5. As the Government has recognized, repeated online copyright infringement has had and continues to have a significant negative effect on New Zealand's music, film, television, software and other creative industries. RIANZ and IMNZ support the Government's continued commitment to legislation that seeks to enable New Zealand copyright owners being able to effectively enforce their copyright.

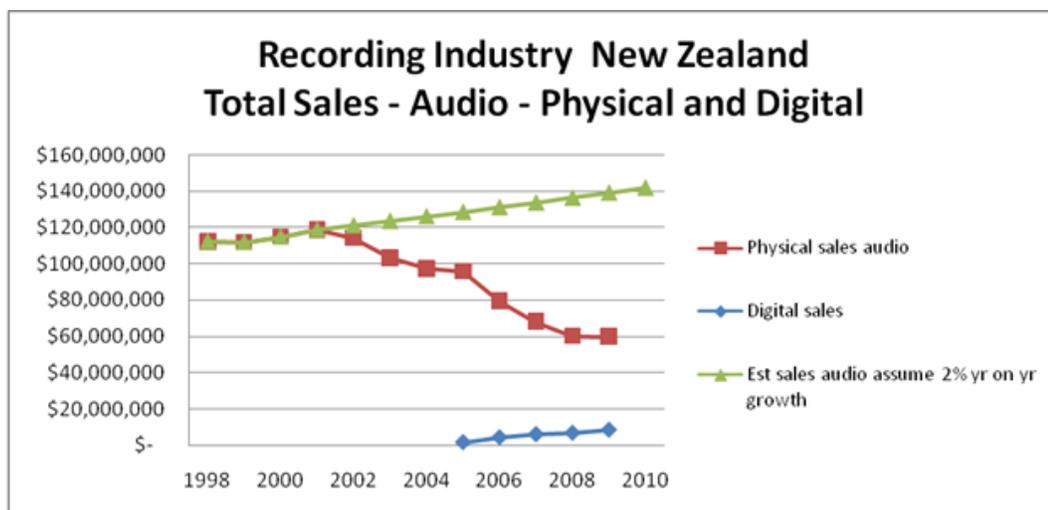
### *Decrease in sales for international and New Zealand artists/labels*

6. The direct impact that P2P file sharing has on the record industry and its recording artists (including local New Zealand labels and artists) is substantial. Sales figures for the New Zealand music industry<sup>1</sup> (including New Zealand and international artists) show that for the period from 2001 to 2009, the total value of album and individual track audio sales dropped from \$119 million to less than \$70 million per year by 2009.
7. In the years 1999-2000 and 2000-2001, the value of all artists' combined album and individual track sales in New Zealand grew 2% and 3% respectively. However, with the increase of illegal P2P file sharing, in 2002 the value of sales dropped by 4% against the 2001 sales figures. By 2003, the value of all sales dropped by an additional 10% and have been dropping every year since.

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<sup>1</sup> RIANZ figures collected from its members on the number and value of albums and tracks sold each year.

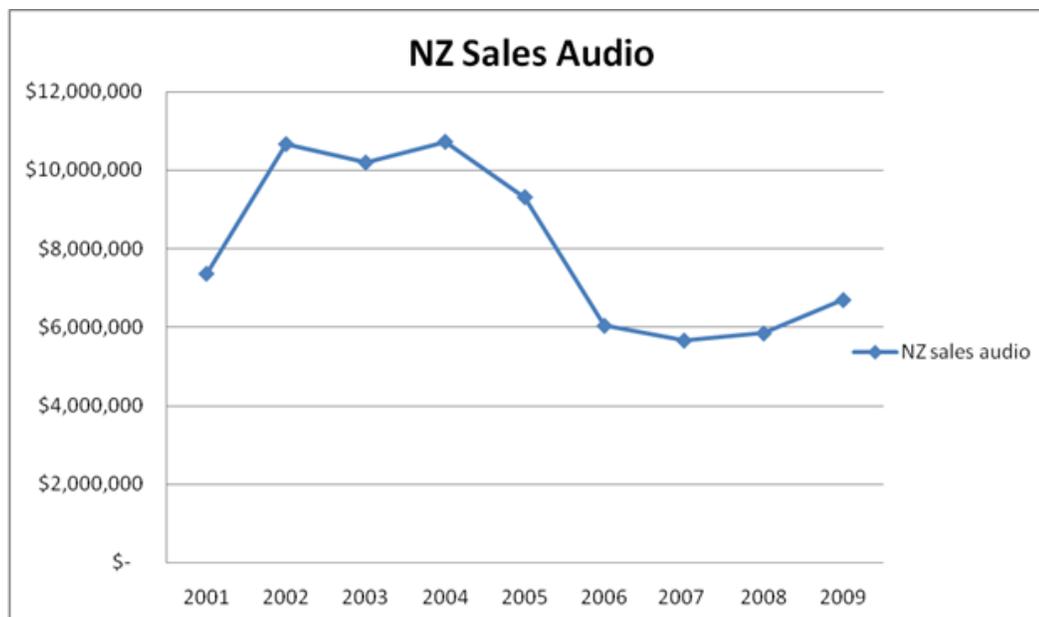
8. The following graph shows the decrease in the value for all artists' album and individual track sales in New Zealand for the years 2002 to 2009. It also shows where the value of all album and individual track sales would have been had the market continued to grow at a rate of 2% each year.



9. As noted above, the graph shows the total value of all artists' combined album and individual track sales has substantially decreased.
10. Although in 2005 the music industry launched a legal digital download market, this market has been growing slowly. The value of all artists' album and individual track sales in 2009 was almost more than \$50 million **less** than where it was at its peak in 2001.
11. Copyright owners have been working to develop and implement new business models for digital delivery of music to consumers. However, any income received from these developments has come nowhere close to offsetting the loss in sales and income that artists and labels have suffered – despite claims to the contrary.

*Decrease in sales for New Zealand artists and labels*

12. When we turn to the value of sales for only New Zealand artists and labels, the sales figures show that New Zealand albums and tracks sales has almost halved between 2004 and 2009. This coincides with the period of substantial and ongoing illegal downloading of music via P2P file sharing.
13. Although there has been a slight increase in the sale of New Zealand music from 2007 to 2009, the steady reduction of local industry sales to such a low value means that a few successful New Zealand albums can distort the overall picture of the local market. For example, the top 3 selling local albums of 2008 (of more than 250 local artist albums released that year) sold less than 60,000 in total, whereas the top 3 albums of 2009 (of more than 250 local albums released that year) sold more than 85,000 in total. Nonetheless, the current value of **all** New Zealand artists' and labels' sales in 2009 was still only 6/10ths what it was in 2004.
14. The following graph shows the value of New Zealand artists' and labels' audio sales for the period 2001 to 2009:



15. This very substantial decrease in sales has had an enormous impact on New Zealand artists and New Zealand labels. Even before the onset of illegal downloading, most New Zealand artists and labels had low earnings. The effect of illegal downloading diminished further the ability of New Zealand artists to make a living.
16. The impact of P2P file sharing on New Zealand's music industry has also directly undermined both the previous Labour Government's and the current National Government's policy of encouraging and investing in New Zealand's creative industries.
17. The need to properly and adequately address the continuing illegal downloading, and thus protect New Zealand's creative industries, also has broader ramifications for New Zealand's economy and its relationship with other countries.
18. The lack of an effective enforcement regime for copyright owners means that those owners not only lose a vital source of income, but also that the broader economy as a whole loses in reduced economic growth and tax revenue.
19. The current ease of file sharing also impacts on the viability and growth of lawful alternatives and stifles the development of new business models for creative industries and content providers. Such models would provide greater choice and value for New Zealand consumers. There are numerous new business models being developed and implemented around the world, including "all you can eat" subscription services and advertising supported services such as "Spotify". No such models have yet been implemented in New Zealand, despite rigorous and on-going efforts by the local industry. This is primarily because the development and implementation requires significant investment and a reasonable projection of sustainability and revenue growth. Such a projection is impossible in a small economic market where illegal downloading is widespread.

20. The impact of file sharing needs to be addressed by robust and effective legislative intervention. As noted in the report *Digital Britain*<sup>2</sup>, the consequence of the current revolutionary changes in communications infrastructure capability, mass participation in the digital world, widespread adoption and use of digital devices and services “will be a flowering of distribution, production and creation of all sorts of content”<sup>3</sup>. However, as recognised in that report, these changes need to be underpinned by implementing a comprehensive digital framework which includes strong legislative support for the creative industries.
21. The *Digital Britain* report also noted that these developments required the creation of a regulatory framework to ensure that Britain is seen as an attractive destination for mobile investment in content, applications and services<sup>4</sup>. These same comments would equally apply to New Zealand.
22. RIANZ and IMNZ support the objectives set out in The Cabinet Proposal issued on 16 December 2009 (the “Cabinet Proposal”), which seeks to enact a bill that “provide[s] an efficient, low-cost and credible regime to deter individuals from infringing copyright through using peer-to-peer (“P2P”) file sharing technologies” and to “ensure measures, procedures and remedies are effective, proportionate and dissuasive”.
23. In general, the Bill establishes a positive framework for addressing infringing file-sharing. The Bill is also in line with the international trend of developing “graduated response” regimes involving notification and ultimate sanctions for noncompliance including suspension. It allows a copyright owner to take action against a repeat P2P infringer by seeking the temporary suspension of the infringer’s internet account in the District Court. This available sanction process is more reasonable for all concerned (including the copyright infringer) than the costly and time consuming alternative of commencing legal proceedings pursuant to existing law. We discuss the necessity of the available sanction of internet account suspension in appropriate circumstances in more detail in section (3) below.
24. However the Bill requires further modest amendments in order to achieve its aims. It is essential that the issues set out in these submissions be addressed to ensure that the Bill’s graduated response mechanism achieves what it sets out to do: improving current enforcement measures which – as the Government acknowledges – are ineffective at remedying the problem of repeated online infringement.

### **(3) TEMPORARY INTERNET ACCOUNT SUSPENSION**

25. International studies in various countries show that an enforcement regime that includes the sanction of internet account suspension is the most effective solution to repeated online infringement of copyright. This *threat* of the inconvenience of account suspension serves as a significant deterrent, even though other means of accessing the internet remain available to the account holder.
26. Research conducted for the New Zealand Federation Against Copyright Theft (NZFACT) in 2008 found that 70 per cent of internet users in the country aged

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<sup>2</sup> Final report, June 2009, pages 105 to 106.

<sup>3</sup> Page 106, para 5.

<sup>4</sup> Page 107, para 7.

between 15 and 30 would stop file sharing copyright infringing movies if their ISP could suspend or terminate their internet account for breaking the law.

27. Similarly, a 2009 study by Synovate showed that 62% of New Zealand youths would probably stop accessing illegal movies online if they thought their connection could be terminated.
28. In the UK, a study by Harris Interactive in 2009 showed that the threat of a sanction will be twice as effective as a deterrent notice alone. While receiving a letter concerns 3 out of 4 file sharers, without follow up action the deterrent effect is substantially weakened. Similarly, according to a 2009 study by Entertainment Media Research, 80 per cent of consumers who downloaded music illegally would definitely or probably stop if a graduated response model was implemented.
29. In France, IPSOS research conducted in 2008 showed that 90% of consumers would stop downloading music from the internet if they received two warnings including information on the possible threat of a temporary account suspension from their ISP, and that among illegal downloaders, 88% would stop.
30. In Hong Kong, a 2009 study by APCO Asia showed that 82% of respondents said they would be likely to stop downloading unauthorised copies if there was a risk that internet access would be suspended after the implementation of a notice, warning and consequence scenario.
31. The inclusion of sanctions in a graduated response system is necessary as notices alone are unlikely to change behaviour; certainly not once the lack of any further consequences becomes widely known. This logical conclusion has been borne out by the above mentioned surveys which show that a graduated response system can effectively influence internet users' behaviour, however that sanctions are necessary in order to achieve this effect. A mere notice-sending regime does not suffice; there must be deterrent consequences which make people change behaviour and switch to legal services.
32. Account suspension would only rarely be imposed, and only against infringers who are unwilling to stop violating the law even after being repeatedly warned and provided with information regarding legal download alternatives. The possibility of the sanction being imposed is fundamental to the effectiveness of the process.
33. RIANZ and IMNZ recognise that there is a concern from some members of the public that the sanction of account suspension may impact on the right of freedom of expression contained in section 14 of the New Zealand Bill of Rights Act 1990 ("NZBORA"). This is a right that encompasses not only the right of freedom of expression but also the right to receive and impart information in public.
34. It has however always been recognised as part of Bill of Rights jurisprudence that all rights, including the right to freedom of expression, have limits. In fact, as noted by the authors of the leading text in New Zealand *The New Zealand Bill of Rights*<sup>5</sup>. The right of freedom of expression "has always been subject to extensive limitations".
35. Under the NZBORA, section 5 permits that justified limitations be placed on rights. Section 5 reads as follows:

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<sup>5</sup> Rishworth et al *The New Zealand Bill of Rights* (Oxford University Press, Melbourne) 2003 at page 308.

**“5. Justified limitations**

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

36. Accordingly, *if* it were accepted that access to the internet involved a fundamental right under section 14 of the NZBORA, the question would become whether the granting of a power to the Court to suspend an internet account for up to six months following repeated copyright infringement would constitute a limitation justified for those repeat copyright infringers, as compared to the impact that P2P file sharing has on copyright owners, the New Zealand economy and New Zealand’s relations with other countries.
37. The power that the Bill proposes to grant to the District Court to suspend an internet account at section 122O appropriately balances the interest of the account holder’s access to the internet against that person’s unlawful activities<sup>6</sup>. First, the suspension would only apply to one specific account using one particular communication medium. Second, when considering the seriousness of the infringing activities, the Court has the power to consider the evidence put before it by the copyright owner. The Court is then able to consider the infringing activities against the following factors in order to determine whether to suspend the account holder’s account or not:
- (a) The degree of the account holder’s 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
  - (c) Any other matter that may be specified in regulations<sup>7</sup>.
38. The power of the District Court to order temporary account suspension is a proportionate, balanced approach that is consistent with human rights principles. Access to the internet is important and desirable. But all rights must be balanced against each other, including the right to the protection of property as provided by copyright. This has been repeatedly confirmed by case law in various jurisdictions, including recently by the European Court of Justice in its decision in the *Promusicae v Telefonica* case in January 2008 (case reference C-275/06), in which the Court held that there is a need to balance and reconcile the right to privacy, the right to intellectual property protection and the right to effective remedies<sup>8</sup>.
39. With rights, such as freedom of expression, come responsibilities. RIANZ and IMNZ submit that the Bill’s proposed regime is appropriately balanced.
40. A copyright infringer who faces suspension of a particular internet account is not being denied access to the internet, just access via the account in question for a

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<sup>6</sup> Section 122O.

<sup>7</sup> Section 122O(3).

<sup>8</sup> The protection of intellectual property and copyright is governed by many international conventions and recognised as a fundamental right in many countries. For example, the Universal Declaration of Human Rights – which has been adopted by 48 States including New Zealand - includes copyright among the rights that States are to respect and secure in their “universal and effective recognition and observance”; Article 27(2) reads:

“Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

In the European Union, to cite another example, the Charter of Fundamental Rights of 2000 sets out in Article 17 that the protection of the right to property includes intellectual property; Article 17(2) of the Charter reads “Intellectual property shall be protected.”

period of time. To contend that a consumer has a right to internet access via one particular account also ignores the necessary contractual relationship which exists between that consumer and the relevant ISP.

41. RIANZ and IMNZ also reject the argument that by granting the Court power to order an account suspension, the effect of this would be to deny access to an “essential facility”. To begin with, it must be acknowledged that the internet is simply one means of communication—and the account suspended is simply one way of accessing it.
42. In any event, the District Court’s power under section 122O is carefully prescribed in order to take into account the interest of the account holder and his or her reliance on access to the internet through that particular account.
43. ISPs already have a contractual right in their service contracts with their customers to terminate service and a customer’s internet account if the customer uses the account to violate the law (including copyright) or fails to pay his or her bill. As far as RIANZ and IMNZ are aware, an ISP has never been restrained from terminating an internet account based on the ground that to do so would be to deny the account holder access to an “essential facility”.
44. Just as an ISP would send payment reminders to a non-paying customer before cutting off the service and the account, the regime proposed by the Bill would ensure that infringers would be warned and given the opportunity to change their behaviour in order to avoid any potential account suspension.
45. The powers that this Bill provides to the Court to suspend an account are less draconian than the power that any ISP already has under its contract with account holders to directly and without the involvement of a court terminate access for breach of contract – including for illegal downloading.

#### **(4) THE INTERNATIONAL CONTEXT**

46. There is a growing international consensus that the repeated infringement of copyright content online is a global problem that needs to be addressed by legislative intervention. More and more countries are recognising that these acts of infringement are most effectively addressed by “graduated response” mechanisms with deterrent sanctions available against repeat infringers who choose to ignore a series of notices and warnings.
47. Graduated response mechanisms or elements similar to those proposed in the Bill have been adopted to date in Chile, France, the UK, Taiwan and South Korea. Similar approaches are under discussion in a number of other countries either in government consultations or cross-industry negotiations, including at EU level and in several EU Member States, or have been adopted through court settlements or private agreements elsewhere, notably in Ireland and the US.
48. The graduated response mechanisms that have been adopted to date have all established ultimate deterrent sanctions to be applied against those who refuse to stop infringing even after repeated warnings and notices. These sanctions have included temporary suspension or termination of the account used to infringe.

49. For example, in France the “Creation and Internet” law, which entered into force in October 2009, enables copyright owners to send warnings to infringers through the administrative authority HADOPI. After two warnings within a time period of 6 months and a third infringement within 1 year, the authority will transfer the files of repeat infringers to the criminal courts, where a single judge will be empowered to order the suspension of internet access for up to one year, as well as other criminal penalties.
50. Similarly, in the UK, the Digital Economy Act 2010 (“DEA”) enacted in April this year, establishes a graduated response process leading to possible sanctions that can include temporary suspension of repeat infringers’ accounts. The DEA deals with a number of issues which are relevant to the Bill being proposed including:
- (a) The qualifying infringing activity that triggers an infringement notice;
  - (b) The definition of “copyright owner”;
  - (c) The fees payable by copyright owners and ISPs; and
  - (d) The types of challenges which can be made by account holders.
51. In Taiwan, a new law providing for graduated response took effect in July 2009, requiring ISPs to notify subscribers that their accounts will be terminated in whole or in part if they are subject to three notices of infringement.
52. In South Korea, a new law came into force in July 2009 authorising the Ministry of Culture to order online service providers to issue warnings to infringing accounts and suspend accounts after three warnings for the period of up to 6 months.
53. In addition to the countries mentioned above which are adopting graduated response regimes, our major trading partners Australia and the United States have powers under their respective Copyright Acts to require ISPs to adopt and reasonably implement a policy for the termination of repeat infringers’ accounts as a condition for eligibility for any ISP safe harbours.
54. The growing international consensus that a graduated response mechanism is the most effective and proportionate regime to counter illegal P2P file sharing affirms that the current Bill is in line with this evolving best practice approach.

## **(5) SCOPE OF THESE SUBMISSIONS**

55. RIANZ and IMNZ believe that some further modest amendments are required to ensure that the Bill achieves its policy and legislative aims to provide “an efficient, low-cost and credible regime to deter individuals from infringing copyright through using P2P file sharing technology” and “to ensure measures, procedures and remedies are effective, proportionate and dissuasive<sup>9</sup>.”
56. Nine separate issues are dealt with in these submissions. These are:
- A. Qualifying Incidents of Infringement.
  - B. Fees payable to ISPs.

<sup>9</sup> The Cabinet proposal at paragraph 16.

- C. Challenging/Accepting infringement notices.
  - D. Infringements detected while a challenge is pending.
  - E. Content of infringement notices.
  - F. Timeframes regarding ISP obligations.
  - G. IP address matching.
  - H. Copyright Tribunal rules.
  - I. District Court rules.
57. In each case where we have raised an issue with the drafting of the Bill we have provided alternative wording designed to address the issue raised. These amendments are dealt with separately under each topic. A full set of the suggested drafting is set out in **Schedule 1** to this submission.

#### A. QUALIFYING INCIDENTS OF INFRINGEMENT

*Notifications to ISPs from **all** copyright owners should count towards the process, not just repeated infringements relating to one particular copyright owner. The Bill should also make clear that the definition of "copyright owner" includes both the copyright owner and his/her authorised agent.*

##### *(i) Qualifying event for sending an "infringement notice"*

58. As currently drafted, the Bill contains a serious defect which will prevent New Zealand copyright owners from being able to effectively bring enforcement action against repeat infringers of copyright.
59. Section 122E(1)(b) states that a warning notice can only be sent at least 3 weeks after the date that a detection notice was issued to the account holder "in relation to the **same** copyright owner". This limitation is also carried through to section 122F(1)(b) governing the issuing of an enforcement notice.
60. The limitation that all notices in the process must come from the **same** copyright owner will effectively make the legislation a white elephant for all but perhaps the largest copyright owners.
61. Given the global scale of on-line P2P file sharing activity - tens of billions of files are being shared annually by hundreds of thousands of people - and the substantial detection costs involved in identifying and evidencing infringing activity, the detection process will only ever deliver a very limited **sampling** of the overall infringing activity. This sampling of infringement downloading activity collected by copyright owners and their agents will lead to notification of copyright infringement being sent to ISPs and then prescribed infringement notices being sent by ISPs to their customers.
62. Even copyright owners with large repertoires of works, such as major record labels, would have great difficulty in linking the same account holder through this random sampling process to three separate acts of infringement against its copyrights within

the prescribed time frames, let alone smaller copyright owners such as self-releasing musicians or independent local record labels.

63. For example, for a New Zealand artist to be able to make use of the graduated response mechanism under the Bill as currently drafted, after sending a detection notice the artist would be required to locate the same account holder's IP address copying his music three weeks later in order to have a warning notice sent out to the account holder. The chances of locating the same account holder downloading the artist's copyright work again after downloading his or her music the first time would be extremely unlikely. Rather, an account holder would have moved on to copy some other artist's music. It would be even more unlikely for the artist to locate the same account holder downloading one of his copyright protected works yet again for a third time to trigger an enforcement notice. Therefore, despite the fact that the account holder is still infringing copyright, the artist would not be able to bring any action against the account holder.
64. To require that an individual copyright owner must identify an individual account holder three times for copyright infringement before being able to take any action, provides no real threat to the infringer because the chances of being caught are minimal. The infringer is effectively free to infringe with impunity against all other copyright owners until such time as he or she happens to receive three notices from each owner individually.
65. The requirement would also make the ISPs' record-keeping considerably more complicated, as they would need to keep separate information with respect to each individual copyright owner.
66. From a policy perspective, the Bill would not achieve its policy objective to "ensure measures, procedures and remedies are effective, proportionate and dissuasive" if it maintains this requirement.
67. Furthermore, such a restriction requiring the account holder to infringe the **same** copyright owner's works on three separate occasions before enforcement action can be brought is unprecedented globally and has not been discussed in any other country where a similar process has been considered or enacted. It would lead to New Zealand being out of step with the graduated response mechanisms currently in use or being proposed internationally. Further, it did not come up in the public discussions before the introduction of the Bill.
68. A key element of the Bill's deterrent effect is that the warning notices and enforcement notices in sections 122E(2)(d) and (e) and 122F(2)(d) and (e) include information on the *previous notices* received and other alleged infringements by the account holder. When a copyright owner applies to the Copyright Tribunal under section 122J, it can provide a copy of the enforcement notice that identifies any other alleged infringements by the account holder. This ensures that the account holder has full information on all infringing acts that have occurred and thus enhances the deterrent effect to motivate a change in the account holder's behaviour.
69. It is noted that under the graduated response mechanism set out by the Digital Enforcement Act 2010 in the UK, a "subscriber" (the definition of an account holder under the UK Act) is placed on a "copyright infringement list" where three copyright infringement notices from **any** copyright owner are sent to that subscriber. A copyright owner can request a copy of the copyright infringement list notifying of **all** the infringing acts that the subscriber has carried out, including any act against that

copyright owner. The copyright owner can then elect whether to seek damages from the subscriber for infringing acts against its copyright works.

70. If the Bill is modified as requested here, when an enforcement notice is sent out to an account holder which lists all alleged infringements by that account holder, the ISP must also send a copy of the enforcement notice to the relevant copyright owner<sup>10</sup>. As under the UK procedure above, the copyright owner can then decide whether to bring proceedings against the account holder for damages at the Tribunal or for a suspension of the internet account at the District Court.
71. In order for the Bill's regime to work effectively, it is vital that all detected infringements are counted towards the enforcement process. We strongly urge that the Bill stipulates that each identified infringement triggers a notification, regardless of whose copyright has been infringed. The only exception should be cases in which the notifications received by ISPs from copyright owners do not comply with the time frames set out in the Bill and/or do not comply with reasonable provisions set out in regulations made under section 234.
72. RIANZ and IMNZ submit that the provisions setting out detection notices, warning notices and enforcement notices (sections 122D, 122E and 122F respectively) be amended to reflect that infringement of **any** copyright owner's work, outside of a quarantine period, will trigger an infringement notice.
73. According, it is suggested that section 122D, regarding issuing detection notices, be amended as follows:

**"122D Detection notice**

- (1) An ISP must issue a detection notice ~~in relation to a copyright owner~~ to an account holder -
- (a) the first time the ISP matches the account holder with an IP address at which an infringement is alleged by a copyright owner to have occurred; ~~and~~
- (b) ~~the first time, following the end of a quarantine period, the ISP matches the account holder with an IP address at which an infringement is alleged by the copyright owner to have occurred.~~

74. As to section 122E, regarding warning notices, it is suggested that the words "in relation to the same copyright owner" in section 122E(1)(b) should be deleted. Section 122E(1) would read as follows:

**122E Warning notices**

- (1) An ISP must issue a warning notice in relation to a copyright owner to an account holder if -
- (a) the ISP matches the account holder with an IP address at which an infringement is alleged by a the copyright owner to have occurred; and
- (b) the infringement occurred at least 3 weeks after the date of a detection notice issued to the account holder ~~in relation to the same copyright owner~~, but before that detection notice expires.

75. In addition, the reference that the warning notice must identify any other alleged infringements by the account holder should remain, but the following words "against

<sup>10</sup> Sections 122F(2)(e) and 122F(4).

that copyright owner” should be deleted. Section 122E(2)(e) would therefore read as follows:

- “(2) A warning notice must be in the prescribed form (if a form is prescribed) and must –
- (a) ...
  - (d) identify the most recent detection notice issued to the account holder in relation to ~~the~~ any copyright owner (the preceding detection notice); and
  - (e) identify any other alleged infringements by the account holder ~~against that copyright owner~~ that have occurred since the date of the preceding detection notice.”

76. The same references should be deleted in sections 122F(1)(a), (b) and (2)(d) and (e) with regard to enforcement notices.
77. Consequential changes would also need to be made in sections 122N and 122O that refer in their current form to three incidents of infringement against the same copyright owner. These provisions enable the Tribunal to require an infringing account holder to make a payment to a copyright owner, and, respectively, the District Court to suspend an account holder’s account. Slight amendments would also be needed to the definitions of “detection notices”, “warning notices” and “enforcement notices” at section 122A. Amended drafting of all of these provisions is provided in **Schedule 1**.

(ii) Definition of Copyright Owner

78. In addition to the above, the term “copyright owner” as used in the Bill in sections 122B through to 122R should be redefined to include the copyright owner’s agent. Under the current provisions, the term “copyright owner” is confined to a single copyright owner of, for example, a sound recording work.
79. This would also render the legislation ineffective for most copyright owners, as it would require each local artist or label to individually monitor P2P file sharing activity in order to identify and evidence infringing activity and to lodge an infringement notice with an ISP.
80. The appointment of an agent to act on a copyright owner’s behalf in relation to enforcement and licensing of copyright is a well accepted practice both internationally and in New Zealand. This is due to the practical difficulties that arise from the existence of many hundreds of thousands of separate copyright owners that own or control millions of individual copyright works such as sound recordings.
81. Each individual track of an album is a separate copyright work that can be infringed or licensed. The separate copyright owners accordingly appoint specialist agents to act on their behalf to bring enforcement proceedings or to license their works.
82. The legislation should be amended at section 122A to include in the definition of “copyright owner” the “copyright owner’s authorised agents”. For example, in relation to sound recordings, RIANZ would obtain mandates from all sound recording copyright owners to act on their behalf as their agent in New Zealand.
83. In the UK, the Digital Economy Act includes the *owner’s agent* in the definition of copyright owner covering an agent such as the BPI, the UK equivalent of RIANZ.

84. A similar definition of copyright owner should be inserted into the interpretation in section 122A. It is submitted that the definition of “copyright owner” should be:

“Copyright owner’ means –

- (a) A copyright owner within the meaning of s8 of the Act; or  
 (b) Someone authorised by that person to act on the person’s behalf.”

## **B. FEES PAYABLE BY ISPs**

*Each party should bear its own costs and rightholders should not be expected to pay fees to ISPs for complying with their obligations under the law. If such fees are charged, regulations should be put in place to limit maximum rates.*

85. Allowing ISPs to charge fees to copyright owners, as proposed in section 122R, could make the Bill’s new regime uneconomic as an alternative to litigation pursuant to existing law. We urge that copyright owners should not be required to pay fees to ISPs for fulfilling their obligations under the law.
86. As has been set out in earlier submissions, we believe that it is fair, reasonable and appropriate that each party bears its own costs in the Bill’s proposed regime, given that it provides benefits to all parties and furthers the public interest in ensuring that the internet functions within the law.
87. Accordingly, rightholders would pay for detecting and reporting acts of infringement, and ISPs would pay for communicating with their own subscribers, as they already do with regard to their accounts. Such a cost split would be the simplest and fairest way to operate the system and would ensure that the Bill’s stated aim to “compensate copyright owners for damage sustained from copyright infringement by file sharing” can be achieved.
88. As to the likely detection and notification costs incurred on the part of the copyright owner, these will be significant. Each infringement notice prepared by RIANZ and IMNZ, for example, will require an evidence pack. This evidence pack identifies the account holder’s, IP address, the copyright work(s) being infringed and the time and date of the infringing activity. RIANZ and IMNZ are likely to send 5,000 infringement notices a month to ISPs.
89. In addition to the cost of obtaining each evidence pack, RIANZ and IMNZ will need to dedicate significant personnel resources to preparing and sending infringement notices to ISPs.
90. It would be inequitable for the copyright owner having incurred the cost of detection and notification to the ISPs to then have to incur additional costs from the ISPs.
91. It is however equitable that ISPs incur some costs for the implication and operation of the graduated response regime established by the Bill.
92. The Copyright (New Technologies and Performers Rights) Amendment Act 2008 amended the Copyright Act by introducing a “safe harbour” provision for ISPs<sup>11</sup>. This

<sup>11</sup> See section 92B of the Copyright Act 1994.

safe harbour was in return for the introduction of s92A which was to require ISPs to implement a policy for terminating access of repeat offenders. Section 92A however was never brought to force.

93. Despite section 92A never being brought into force, the ISPs have received (under section 92B which was enacted), and will continue to receive through the introduction of sections 122A-R, the benefit of a safe harbour provision which prevents copyright owners from bringing proceedings for copyright infringement against ISPs.
94. The effect of this safe harbour provision means that New Zealand ISPs can avoid being party to costly litigation due to their roles in facilitating and authorising copyright infringement by their account holders.
95. For many years ISPs have benefited from the increased take-up of their broadband services, driven to a large part by the demand for illegal copies of entertainment content.
96. The graduated response system should not be seen as a favour to copyright owners, but rather it is a mechanism for furthering the public interest in enforcing copyright, educating the public and enabling the development of a lawful online marketplace.
97. It is strongly submitted that ISPs should take responsibility for helping to prevent their users from using the ISPs' services to break the law (and their own contractual terms and conditions with account holders). It is both fair and appropriate that a share of the overall cost of implementing a graduated response mechanism be borne by ISPs.
98. It is noted that in France, Taiwan, South Korea and Ireland, where graduated response mechanisms have either been legislated for or agreed to between copyright owners and ISPs, that there is no provision requiring that copyright owners bear the ISPs' costs.
99. In the UK, a public consultation on this issue is currently ongoing, and discussions are being held between Ofcom, ISPs and representatives for copyright owners. In the absence of an agreement or order from the Secretary of State to require a contribution by copyright owners to ISPs, the draft Ofcom Code states that "costs shall fall where they lie".<sup>12</sup>
100. Notwithstanding our submission on this point, if fees are to be paid to ISPs from copyright owners pursuant to section 122R, the substantial detection costs that copyright owners incur need to be taken into account along with the public policy considerations referred to at paragraphs 66 and 97 above.
101. If ISPs were allowed pursuant to section 122R to pass costs of performing the functions set out in sections 122A to 122Q on to copyright owners, this would considerably reduce or even eliminate any incentives for ISPs to create and use efficient notification mechanisms and make use of existing data processing systems and customer databases, resulting in higher costs overall. It would also result in an unfair benefit for ISPs, who, through their terms and conditions, are in the unique position to be able to pass on costs to those consumers whose accounts are used illegally.
102. If fees are set too high it would mean that smaller copyright owners, such as New Zealand recording artists and labels, would not be able to make use of the new

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<sup>12</sup> *Ofcom Online Infringement of Copyright and the Digital Economy Act 2010* dated 28 May 2010, cl 8.

regime and would likely be placed at a competitive disadvantage. Consequently, the status-quo – the current civil enforcement measures which are generally acknowledged to be ineffective - would remain in effect. If the fees are set too high, no copyright holders will use the process which will mean a huge waste of time and resource as well as failed legislation.

103. The fees payable by copyright owners for applications to the Tribunal are similarly problematic. As RIANZ has set out in earlier submissions, there should be no Tribunal fees, as the Tribunal process is intended as an alternative to private enforcement, implementing a public policy objective.

### **C. CHALLENGING/ACCEPTING INFRINGEMENT NOTICES**

*There should be clear criteria for ISPs to apply in accepting challenges by account holders to infringement notices. Challenges should be accepted only based on objective and defined determinations of fact.*

104. Section 122G is a fundamental provision of the Bill. This section provides an account holder with the ability to challenge an infringement notice that he receives. It also provides ISPs with the power to accept such account holder challenges to such notices.
105. There is a very real concern that the effect of account holder challenges and acceptance of them by ISPs could usurp the role of the Copyright Tribunal and/or the District Court. Worse it could allow ISPs to derail the entire process by simply doing nothing.
106. The first concern with s122G is what is meant by a “valid challenge” under s122G(3)? The Bill does not specify the basis on which an ISP can decide whether a challenge is valid or not. The easiest thing for an ISP to do is to simply accept a challenge from an account holder and therefore nothing further would happen.
107. The ISP has only to decide, in its own discretion, that a challenge raised by an account holder is not one that should be addressed by the copyright owner but is nonetheless valid. The ISP runs **no** risk of having its decision to “accept” a challenge questioned, as no other party in the process – specifically the copyright owner – has any awareness that a notice has been sent to any particular customer or that that customer has challenged the notice. This is a breach of the copyright owner’s right to natural justice as it denies the copyright owner the ability to test the account holder’s challenge or to overturn the ISPs acceptance of the challenge where it should never have been accepted.
108. Such a scenario is likely to occur in light of the ISP’s self-interest in preserving its relationship with its customers. The ISP runs no risk of an unhappy customer, and potentially a temporarily suspended customer, if it decides to simply accept all challenges.
109. Accordingly, where an account holder wishes to challenge an infringement notice, this should be heard by an independent body – as is required in the UK under the Digital Economy Act 2010<sup>13</sup>. This would ensure that the graduated response regime set out under the Bill would retain integrity for **all** parties concerned.

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<sup>13</sup> Section 124K.

110. Under the Digital Economy Act and draft Code, the grounds under which a challenge may be made is also specified.<sup>14</sup> This provides guidance to the account holder, copyright owner, the ISP and the person hearing the challenge, as to the type of challenges that may be made and facilitates the challenge process.
111. Accordingly it is submitted that, as in the UK, an independent person should be appointed by the Copyright Tribunal to consider challenges. Challenges should be made and accepted only based on objective and defined issues. The relevant grounds would be that:
- (a) The infringement notice does not relate to the account holder's IP address at the time of the apparent infringement; or
  - (b) The act constituting the apparent infringement to which the infringement notice relates was not done by the account holder and the account holder took reasonable steps to prevent other persons infringing copyright by means of his/her internet access service.
112. It is submitted that section 122G should be amended to read as follows:

**"S122G Challenging infringement notices**

- (1) An account holder may only challenge an infringement notice on the following grounds by sending a challenge, in the form prescribed in the regulations, to a person authorised by the Copyright Tribunal to hear a challenge, stating:
  - (a) that the infringement notice does not relate to the account holder's IP address at the time of the apparent infringement; or
  - (b) that the act constituting the infringement to which the infringement notice relates was not done by the account holder and the account holder took reasonable steps to prevent other persons infringing copyright by means of the account holder's Internet access service."
- (2) A challenge is not valid if it is received more than one week after the date of the infringement notice to which it relates.
- (3) The authorised person may require an account holder, ISP or copyright owner to provide it with such information or submissions as it may require for the purposes of determining the account holder's challenge.
- (4) The account holder's challenge must be determined on the papers unless the authorised person considers that a hearing in front of the Tribunal must be held.
- (5) Where the authorised person considers that the Tribunal must hear the account holder's challenge, the hearing must be held by a member of the Tribunal and not the authorised person.
- (6) Where the authorised person accepts or rejects the account holder's challenge, the authorised person must give reasons for accepting or rejecting the account holder's challenge.
- (7) Where the authorised person accepts or rejects the account holder's challenge, any party that is dissatisfied with the decision of the authorised person may appeal it to the Tribunal.
- (8) The Tribunal may determine its own procedure for hearing an appeal subject to any regulations.

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<sup>14</sup>

Section 124K(3) Digital Enforcement Act, cl 7.12 Initial Obligations Code.

- (9) Any appeal by a dissatisfied party must be brought within two weeks of receiving the authorised person's reasons for accepting or rejecting the account holder's challenge."

#### D. INFRINGEMENT DETECTED WHILE A CHALLENGE IS PENDING

*New infringements detected while a challenge to an infringement notice is pending should count towards the process.*

113. Section 122H(2) of the Bill currently provides that if a challenge is accepted, the correlating detection notice has to be cancelled, as well as "any subsequent infringement notices".
114. Where a detection notice is successfully challenged by the account holder, there is no reason why subsequent infringement notices should not count in the process. To do so would be to again turn a blind eye to detected infringement acts, send the wrong message to the public, and have a negative impact on the education aspect of the notices.
115. This loophole should be closed and the Bill should provide that in such a case, any subsequent "warning notice" should be counted as the first "detection notice" and again trigger the first on-notice period of the regime.
116. RIANZ and IMNZ submit that section 122H(1) should be deleted as a consequence of the proposed amendments to section 122G set out above. Section 122H would read as follows (amendments underlined):

##### **"122H Effect of challenge to, and cancellation of, infringement notice**

- (12) If a challenge to a detection notice is accepted by an authorised person or deemed to be accepted, -
- (a) the detection notice sent to the account holder is cancelled and treated as if it had not been issued; and
- (b) all infringements that occurred between the date of the infringement that triggered the detection notice and the date on which the detection notice is cancelled continue to trigger infringement notices, with the first such infringement triggering a new detection notice.
- (2) If a challenge to a warning notice or an enforcement notice is accepted by an authorised person -
- (a) the notice is cancelled and treated as if it had not been issued; but
- (b) if the challenge related only to an infringement that was not an infringement that triggered a notice, the notice is not cancelled but the infringement is treated as if it were not included in the notice.

## E. CONTENT OF INFRINGEMENT NOTICES

*Infringement notices should include an educational element providing information about copyright, legitimate alternatives, and account security.*

117. The Bill requires that detection and warning notices have a deterrent effect, making internet users aware of the detected acts of infringement and allowing them to reconsider and change their behaviour.
118. Independent research suggests that most infringers would stop infringing if they receive a warning that meaningful consequences will follow if they fail to stop – and we believe that the notice requirements and the consequences set out in the Bill are drafted in a way that this can be achieved.
119. We support the requirement for notices to include information as to how to bring a challenge, and on further steps and possible consequences. Even though we expect that the vast majority of challenges will only concern administrative or technical errors that can be immediately resolved by the ISP, this is an important element of any notice regime.
120. However, in order to accomplish the Bill's stated aim to educate the public about the file sharing problem, it is important that these notices also include information on:
  - (a) Copyright protection and its purpose;
  - (b) Informing users about the value of and the need to respect copyright;
  - (c) The damage caused by infringement; and
  - (d) The availability of legal services.
121. Notices should also provide an opportunity for account holders to learn how to ensure the security of their internet connection. This would benefit the internet community as a whole, as recognised by ISPs who generally include customer information on how to secure wireless connections on their websites and in customer correspondence.
122. RIANZ and IMNZ submit that wording should be included in the mandatory elements listed for detection notices and warning notices in sections 122D(2) and 122E(2) as follows:

### **§122D Detection notice**

- (2) A detection notice must be in the prescribed form (if a form is prescribed) and must -

...

- (g) include information about copyright and its purpose and value; and
- (h) include information on how to obtain lawful access to copyright protected content; and
- (i) include advice on how to protect an internet access service from unauthorised use; and
- (j) comply with any other requirements that may be prescribed in regulations.

## F. TIMEFRAMES REGARDING ISP OBLIGATIONS

*ISPs should notify copyright owners immediately of issued enforcement notices.*

123. RIANZ and IMNZ endorse the setting of reasonably short time frames between infringement notices. This would ensure that timely action can be taken by rightholders so as to limit the damage caused by infringing activities, while at the same time allowing the user enough time to react to an infringement notice and to change behaviour.
124. However, in order to establish appropriate time frames throughout the process, one remaining loophole needs to be closed: the Bill should set a time frame for ISPs to send copies of enforcement notices to rightholders under section 122F(4). It is important that enforcement notices are sent to rightholders "immediately", in order to allow copyright owners sufficient time to prepare and bring proceedings either through:
- (a) The Copyright Tribunal under s122N; or
  - (b) The District Court under s122O.
125. Section 122F(4) should be amended to read as follows (amendments underlined):

### 122F Enforcement notices

[...]

- (4) On issuing an enforcement notice to an account holder, the ISP must immediately and in no case later than 3 working days of issuing the enforcement notice send a copy of the notice to the relevant copyright owner, but must omit any information that discloses the name or contact details of the account holder.

## G. ISP ADDRESS MATCHING

*ISPs should be required to match IP addresses to every reported infringement.*

126. Under the Bill, sanctions can be applied to account holders that repeatedly infringe copyright, either by:
- (a) A compensation award payable to a copyright owner pursuant to section 122N(2). Under this provision, the Tribunal order "must include a sum in relation to every infringement identified"; or
  - (b) An order by the District Court to suspend an account holder's account for a period of up to six months pursuant to section 122O(1). The Court, as part of considering whether or not to suspend the account, must be "satisfied that ... suspension of the account is appropriate in the circumstances, given the seriousness of the infringing" (section 122O(1)(c)).
127. For an assessment either by the Tribunal or the Court of what is "appropriate" in each individual case, **every** act of infringement must be taken into consideration.
128. For this reason, in cases where the alleged infringement occurred *after* an infringement that triggered a detection notice but *before* the date of that detection

notice, or where the alleged infringement occurred *during a quarantine period* applying to the account holder with respect to the copyright owner, there is no need to issue an infringement notice – and these instances are rightly covered under the current wording of section 122C(3)(a).

129. However, in these cases there is still a need for the ISP to match IP addresses. This is to enable a *complete record* of the number of infringements detected in relation to a particular account holder so that the Tribunal and the District Court can be fully informed when considering damages awards and suspension orders respectively.
130. It is submitted that sections 122C(2)(b) and (c) be amended to require ISPs to match all infringing IP addresses to account holders where requested by a copyright owner. Accordingly, it will only be in the cases where the copyright owner does not comply with all legal requirements (covered in subsections 122C(2)(a), (d) or (e)) would it not be necessary for ISPs to match IP addresses.
131. RIANZ and IMNZ submit that section 122C(2) should be amended by removing subsections 122C(2)(b) and (c) from section 122C(2), and inserting them in section 122C(3) to read as follows (amendments underlined):

**122C ISPs to send infringement notices**

- (1) If a copyright owner provides an ISP with information that identifies an IP address at which an infringement of its copyright is alleged to have occurred as a result of file sharing, the ISP must –
- (a) match the IP address with the account holder to whom it related at the time of the infringement; and
  - (b) issue the appropriate infringement notice to the account holder within 1 week after receiving the information.
- (2) An ISP need not comply with the obligation in subsection (1)(a) to match IP addresses if –
- (a) the alleged infringement occurred more than 1 week before the ISP 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~~
  - (db) 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
  - (ec) the copyright owner has not paid, or has not agreed to pay, a fee required by the ISP, as permitted by section 122R.
- (3) An ISP need not comply with the obligation in subsection (1)(b) to issue notices if –
- (a) any of subsection (2)(a) to ~~(c)~~ applies; 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
  - ~~(bd)~~ the alleged infringement occurred within an on-notice period applying to the account holder with respect to the copyright owner; or
  - ~~(ce)~~ the copyright owner agrees, or asks, that a notice not be issued.
- (4) Notices issued to account holders must be sent by whatever method the ISP uses to communicate with the account holder for billing purposes, unless the account holder and ISP agree in writing to use a different method.

## H. COPYRIGHT TRIBUNAL RULES

*The process should be expeditious and cost-efficient and the Tribunal should have powers to order full reimbursement of any ISP fees paid by copyright owners.*

### (i) Hearing to be on the papers unless the Copyright Tribunal orders otherwise

132. The Bill provides that the Tribunal's decisions will generally be made on papers only, unless a party requests a hearing. This option could encourage frivolous attempts to abuse or hold up the process.
133. A request for a hearing should require the Tribunal to determine whether a hearing should be held in the first instance, rather than allowing one as a matter of course. This would also be in keeping with the spirit of the Cabinet Proposal's stated objective to "provide an *efficient, low-cost and credible* regime to deter individuals from infringing copyright through using P2P file sharing technologies" (emphasis added).
134. RIANZ and IMNZ submit that section 122L(1) should be amended to read as follows (amendments underlined):

#### **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; and
  - (b) the Tribunal considers that a hearing should be held.

135. 122L(3) provides that the Tribunal may establish its own procedure for determining an application, subject to regulations. In order to keep the process as simple and expeditious as possible, it is important that the regulations set out a maximum time frame for doing so, so that the process does not become overly drawn out.
136. RIANZ and IMNZ submit that section 122L(3) should be amended to read as follows (amendments underlined):

#### **122L Decisions generally made on papers and without hearing**

- (3) The Tribunal may determine its own procedure for determining an application that is dealt with on the papers, subject to any regulations. The Tribunal must make an order under section 122N within 2 weeks of receiving an application under section 122J.

### (ii) Power to order payment of fees

137. In the event that fees are to be paid to ISPs despite our earlier submission that this ought not to be required, 122N(3) should be amended to allow the Tribunal to order an infringing account holder to reimburse the full ISP fee that the copyright owner incurred, not only a mere "contribution". It is appropriate for the party who caused the expense to cover the full amount of costs incurred.
138. RIANZ and IMNZ submit that section 122N(3)(a) should be amended to read as follows (amendments underlined):

**122N Tribunal order requiring payment to copyright owner**

- (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 all or part of the fee or fees paid by the copyright owner to the ISP under section 122R; [...].

*(iii) Power of Tribunal to order increased payment by the account holder*

139. The power of the Tribunal to order an account holder to make a payment due to his or her infringing conduct needs to be considered and expanded. The power of the Tribunal to order a payment from the account holder must not simply compensate the relevant copyright owner for the income it would have earned had the relevant works not been stolen by the infringer but had instead been legally purchased.
140. There needs to be a punitive element involved, otherwise the infringer is simply being asked to pay what he or she would have had to pay in order to purchase the works legally. The infringer still retains the stolen works, all he or she is being required to do is pay for them retrospectively and only those works owned by the particular copyright owner who brings the action. Effectively there is no financial risk in to the infringer in infringing.
141. The Tribunal should therefore expressly retain a discretion to increase the amount payable by the account holder to include a deterrent element. The retention of a discretion to the Tribunal is important here in order for the Tribunal to tailor the increased payment to the circumstances of the account holder's infringing activities. It is suggested that section 122N(2) be amended here as follows:

**"122N Tribunal order requiring payment to copyright owner**

- (1) ...
- (2) The sum specified in the Tribunal order must:
- (a) be in accordance with regulations made under this Act;
- (b) 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;
- provided that the Tribunal has a discretion to increase the sum that it specifies in its order to deter further infringement of copyright at the IP address or where the Tribunal is satisfied that the infringement of copyright at an IP address of the account holder is sufficient to warrant an increase in the sum specified in its order."

**I. DISTRICT COURT RULES**

*Clarifications are needed regarding the new District Court Rules and the preservation of copyright owners' existing legal rights.*

142. The Bill does not prescribe the process which a copyright owner must take in order to obtain an order from the District Court suspending an account holder's internet account. It is unclear whether the copyright owner has to initiate ordinary proceedings in the District Court, by way of a "notice of claim".

143. If this is the case, then the purpose of the Bill to provide a “efficient, low-cost and credible regime to deter individuals from infringing copyright” would again be defeated. On that basis, a copyright owner would need to follow the same process as he would be required to take as if he had brought ordinary proceedings for infringement of copyright pursuant to existing law. Therefore there would be no advantage at all to the copyright owner to proceed under the regime prescribed by the Bill.
144. RIANZ and IMNZ submit that pursuant to the Bill process, the copyright owner be able to bring an originating application to the District Court seeking an order for the suspension of an account holder account. Such an application, as with the Copyright Tribunal, would be on the papers with all evidence set out in affidavits filed by the copyright owner (or agent if the definition is amended) and the account holder.
145. Where issues as to evidence are contested, the District Court Rules provide a process where such evidence can be challenged. This is the appropriate course to take as opposed to requiring the copyright owner to commence ordinary proceedings by way of a notice of claim against the account holder.
146. RIANZ and IMNZ submit that District Court Rule 6.1, which sets out the Acts to which the originating application section of the District Court Rules apply, should also refer to section 122O of the Copyright Act. Section 122O should also be amended to state that the application is brought as an originating application. Section 122O would read as follows:

**“122O. Court order suspending account holder’s account**

- (1) A District Court may, on an originating application by a copyright holder, make an order requiring an ISP to suspend the account of an account holder for a period of up to six months if the Court is satisfied that ...”

147. In addition, the District Court Rules 2009 would be amended as follows:

**“District Court Rules 2009**

**6.1 Application of this Part**

- 6.1.1 An application to this court under any of the following enactments must be filed as an originating application under this Part.

...

- (z) Section 122O of the Copyright Act 1994”

## SCHEDULE 1

### Suggested Amendments<sup>15</sup>

#### Section 122A – Interpretation for sections 122B to 122R

**“copyright owner”** means –

- (a) A copyright owner within the meaning of s8 of the Act; or
- (b) Someone authorised by that person to act on the person’s behalf.

**“detection notice”** means a detection notice issued by an ISP to an account holder in respect of an alleged infringement against a any copyright owner.

**“enforcement notice”** means an enforcement notice issued by an ISP to an account holder in respect of at least 3 alleged infringements against a any copyright owner.

**“warning notice”** means a warning notice issued by an ISP to an account holder in respect of at least 2 alleged infringements against a any copyright owner.

#### Section 122C – ISPs to send infringement notices

##### **122C ISPs to send infringement notices**

- (1) If a copyright owner provides an ISP with information that identifies an IP address at which an infringement of its copyright is alleged to have occurred as a result of file sharing, the ISP must –
  - (a) match the IP address with the account holder to whom it related at the time of the infringement; and
  - (b) issue the appropriate infringement notice to the account holder within 1 week after receiving the information.
- (2) An ISP need not comply with the obligation in subsection (1)(a) to match IP addresses if –
  - (a) the alleged infringement occurred more than 1 week before the ISP 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~~
  - (eb) 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
  - (ec) the copyright owner has not paid, or has not agreed to pay, a fee required by the ISP, as permitted by section 122R.
- (3) An ISP need not comply with the obligation in subsection (1)(b) to issue notices if –
  - (a) any of subsection (2)(a) to (c) applies; 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
  - (bd) the alleged infringement occurred within an on-notice period applying to the account holder with respect to the copyright owner; or
  - (ee) the copyright owner agrees, or asks, that a notice not be issued.

<sup>15</sup> With deletions shown by way of striking through the text, insertions are shown by underlying the new words proposed.

- (4) Notices issued to account holders must be sent by whatever method the ISP uses to communicate with the account holder for billing purposes, unless the account holder and ISP agree in writing to use a different method.

### Sections 122D - Detection Notices

#### **“S122D Detection notice**

- (1) An ISP must issue a detection notice ~~in relation to a copyright owner~~ to an account holder -
- (a) ~~the first time the ISP matches the account holder with an IP address at which an infringement is alleged by the a copyright owner to have occurred; and~~
  - (b) ~~the first time, following the end of a quarantine period, the ISP matches the account holder with an IP address at which an infringement is alleged by the copyright owner to have occurred.~~
- (2) A detection notice must be in the prescribed form (if a form is prescribed) and must -
- ...
- (g) include information about copyright and its purpose and value; and
  - (h) include information on how to obtain lawful access to copyright protected content; and
  - (i) include advice on how to protect an internet access service from unauthorised use; and
  - (j) comply with any other requirements that may be prescribed in regulations.

### Section 122E – Warning Notices

#### **122E Warning notices**

- (1) An ISP must issue a warning notice in relation to a copyright owner to an account holder if -
- (a) the ISP matches the account holder with an IP address at which an infringement is alleged by ~~the a~~ copyright owner to have occurred; and
  - (b) the infringement occurred at least 3 weeks after the date of a detection notice issued to the account holder ~~in relation to the same copyright owner~~, but before that detection notice expires.
- (2) A warning notice must be in the prescribed form (if a form is prescribed) and must –
- (c) ...
  - ...
  - (d) identify the most recent detection notice issued to the account holder in relation to ~~the any~~ copyright owner (the preceding detection notice); and
  - (e) identify any other alleged infringements by the account holder ~~against that copyright owner~~ that have occurred since the date of the preceding detection notice.”

## Section 122F – Enforcement Notices

### **122F Enforcement notices**

- (1) An ISP must issue an enforcement notice in relation to a copyright owner to an account holder if -
  - (a) the ISP matches the account holder with an IP address at which an infringement is alleged by the copyright owner to have occurred; and
  - (d) the infringement occurred at least 3 weeks after the date of a warning notice issued to the account holder ~~in relation to the same copyright owner~~, but before that warning notice expires.
- (2) An enforcement notice must be in the prescribed form (if a form is prescribed) and must –
 

...

  - (d) identify the most recent warning notice issued to the account holder in relation to ~~the~~ any copyright owner, and the preceding detection notice; and
  - (e) identify any other alleged infringements ~~against the copyright owner~~ that have occurred since the date of the preceding detection notice; and

...
- (4) On issuing an enforcement notice to an account holder, the ISP must immediately and in no case later than 3 working days of issuing the enforcement notice send a copy of the notice to the relevant copyright owner, but must omit any information that discloses the name or contact details of the account holder.

## Section 122G – Challenging Infringement Notices

### **“S122G Challenging infringement notices**

- (1) An account holder may only challenge an infringement notice on the following grounds by sending a challenge, in the form prescribed in the regulations, to a person authorised by the Copyright Tribunal to hear a challenge, stating
  - (a) that the infringement notice does not relate to the account holder’s IP address at the time of the apparent infringement;
  - (e) that the act constituting the infringement to which the infringement notice relates was not done by the account holder and the account holder took reasonable steps to prevent other persons infringing copyright by means of the account holder’s internet access service; or
- (2) A challenge is not valid if it is received more than one week after the date of the infringement notice to which it relates.
- (3) The authorised person may require an account holder, ISP or copyright owner to provide it with such information or submissions as it may require for the purposes of determining the account holder’s challenge.
- (4) The account holder’s challenge must be determined on the papers unless the authorised person considers that a hearing in front of the Tribunal must be held.
- (5) Where the authorised person considers that the Tribunal must hear the account holder’s challenge, the hearing must be held by a member of the Tribunal and not the authorised person.

- (6) Where the authorised person accepts or rejects the account holder's challenge, the authorised person must give reasons for accepting or rejecting the account holder's challenge.
- (7) Where the authorised person accepts or rejects the account holder's challenge, any party that is dissatisfied with the decision of the authorised person may appeal it to the Tribunal.
- (8) The Tribunal may determine its own procedure for hearing an appeal subject to any regulations.
- (9) Any appeal by a dissatisfied party must be brought within two weeks of receiving the authorised person's reasons for accepting or rejecting the account holder's challenge."

### Section 122H – Effect of challenge to, and cancellation of, infringement notice

#### **“122H Effect of challenge to, and cancellation of, infringement notice**

- (12) If a challenge to a detection notice is accepted by an authorised person or deemed to be accepted, -
- (a) the detection notice sent to the account holder is cancelled and treated as if it had not been issued; and
- (b) all infringements that occurred between the date of the infringement that triggered the detection notice and the date on which the detection notice is cancelled continue to trigger infringement notices, with the first such infringement triggering a new detection notice.
- (2) If a challenge to a warning notice or an enforcement notice is accepted by an authorised person –
- (c) the notice is cancelled and treated as if it had not been issued; but
- (b) if the challenge related only to an infringement that was not an infringement that triggered a notice, the notice is not cancelled but the infringement is treated as if it were not included in the notice.

### Section 122L – Decisions generally made on papers and without hearing

#### **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; and
- (b) the Tribunal considers that a hearing should be held.
- ...
- (3) The Tribunal may determine its own procedure for determining an application that is dealt with on the papers, subject to any regulations. The Tribunal must make an order under section 122N within 2 weeks of receiving an application under section 122J.

### Section 122N – Tribunal order requiring payment to copyright owner

#### **122N Tribunal order requiring payment to copyright owner**

- (2) The sum specified in the Tribunal order must:
- (c) be in accordance with regulations made under this Act;

- (d) 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;

provided that the Tribunal has a discretion to increase the sum that it specifies in its order to deter further infringement of copyright at the IP address or where the Tribunal is satisfied that the infringement of copyright at an IP address of the account holder is sufficient to warrant an increase in the sum specified in its order.

- (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~~ all or part of the fee or fees paid by the copyright owner to the ISP under section 122R; [...].

## Section 122O

### **"122O. Court order suspending account holder's account**

- (1) A District Court may, on an originating application by a copyright holder, make an order requiring an ISP to suspend the account of an account holder for a period of up to six months if the Court is satisfied that ..."

## District Court Rules 2009

### **6.1 Application of this Part**

- 6.1.1 An application to this court under any of the following enactments must be filed as an originating application under this Part.

...

- (z) Section 122O of the Copyright Act 1994"