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1 Introduction

- 1.1 The Creative Freedom Foundation ("CFF") welcome this opportunity to respond on the Copyright (Infringing File Sharing) Regulations 2011 Discussion Document.
- 1.2 The CFF is a charitable organisation that was founded in 2008 by NZ artists and technologists Bronwyn Holloway-Smith and Matthew Holloway in response to changes in New Zealand law that risked undermining artists' interests and the public's rights in the name of protecting creativity.
- 1.3 We represent thousands of New Zealand artists including musicians, film makers, visual artists, designers, writers, & performers. The CFF currently has approximately 20,000 members, of whom more than 10,000 are artists.
- 1.4 Our primary goals are:
 - a) the education of New Zealand artists about emerging issues within New Zealand that have the potential to influence their collective creativity;
 - b) advocacy to ensure that their views are taken into consideration; and
 - c) the promotion and encouragement of activities that support and build the New Zealand arts community, positive relationships within that community and/or the positive well-being of that community.

2 The issue in context

- 2.1 The Internet is the most efficient copying machine the world has ever known. Most copyright law was written for the century when copying music (and books, and movies) was expensive but possible. Now it's inexpensive and widely accessible. Rather than being a threat, new technologies offer artists new avenues and opportunities to export their work to broader audiences. It would be unsustainable to allow private entities to rely on Government intervention to support their outdated business models, at the expense of those who generate and consume creative works.
- 2.2 Copyright has shifted from regulating an industrial manufacturing process to regulating what people do in their homes. Laws targeting people's behaviour within the four walls of their homes, on private internet connections, will always present unique challenges and trade-offs. New Zealand's recent amendments to the Copyright Act 1994 ("the Act") have constituted a significant change, which must be borne in mind when considering the wider impacts of the proposed regulations.

3 We support copyright policy that reflects the interests of both the public and artists

- 3.1 Given the ease of copying that the internet affords, copyright law depends more than ever on public awareness of not only the obligations it imposes, but the justifications for those obligations. Reasonable, transparent and straightforward enforcement processes and sanctions will be integral in maintaining and building public understanding of, and respect for, copyright. Unmeritorious infringement claims, unfair processes or disproportionate sanctions can be corrosive to the public trust in copyright. This in turn harms the artists that benefit from copyright's protections, in two ways:
 - a) the public will consider artists' legitimate interests as being contrary to their own and refuse to recognise them; and
 - b) at the same time, the sphere of artistic expression available to those who create will be limited by the expanding reach of copyright.
- 3.2 A recent *HorizonPoll*¹ showed that 89% of New Zealanders were opposed to having to prove "valid reasons" for their innocence. To assume these statistics are illustrative of the

¹ <http://www.nbr.co.nz/article/89-oppose-guilty-until-proven-innocent-file-sharing-law-aw-91574>

response of infringing file sharers would be naïve. Rather, the opposition to this approach is based on a more fundamental concern for the preservation of natural justice². This being the case, we remain deeply concerned by the premature optimisation in s122MA and that Internet Termination remains (albeit in an inactive form). As we do not view these elements as being essential to the law we submit that this law has unnecessarily caused harm to public respect for copyright which is detrimental to artists.

- 3.3 A copyright regime that is insensitive to the public demands of modern copyright law will continue to erode public trust in copyright, proving to be easily bypassed and as ineffectual as alcohol prohibition.

4 Principles

4.1 CFF's submissions has been framed with the following principles in mind:

- a) The regime should educate users of copyright works as to the legal avenues through which they can electronically access those works.
- b) The regime should educate users of copyright works as to their rights (eg, fair dealing), as well as their obligations.
- c) The regime should ensure that unmeritorious or spurious infringement claims are minimised, so that only the legitimate claims are espoused.

5 Specific Comments

5.1 We submit that the architecture of the enforcement framework be such that it discourage unmeritorious or spurious claims of copyright infringement³.

5.2 This issue is especially of concern to artists and legitimate users of creative content in New Zealand, since the recent amendments to the Act have not included provisions that would provide the subject of an unmeritorious claim to counterclaim. Without this statutory safeguard, it is for the enforcement mechanism to ensure that only valid claims are made by rights owners.

Q4. Should the suggested requirements be included in regulations? Should there be any other information requirements and why?

5.3 We submit that the statement referred to at paragraph 13(h) be a statement that is either sworn or affirmed consistently with the Oaths and Declarations Act 1952. Valid claims of infringement would not be adversely affected by this requirement, save that they would have the document witnessed by a lawyer or justice of the peace, for which service we understand no fee is required.

5.4 Conversely, if the statement is not true and correct and it cannot be shown that the rights owner has reasonable grounds for belief in its truth or accuracy, this would be a factor that would be considered in:

- a) that rights-owner's liability for the costs of dealing with the infringement notice, being those of the IPAP, the subject of the notice and, if necessary, the Tribunal; and
- b) that rights-owner's credibility in advancing future infringement claims before the Tribunal.

5.5 A system that is open to abuse by design will cause harm to public respect for artists. The requirement that infringement claims be verified would be a costless means of ensuring that infringement claims are justifiable, and would reduce the burden that IPAPs, legitimate creative content users and the Tribunal would have to bear in dealing with unmeritorious or spurious claims.

² Section 122MA "valid reasons" is undefined and, in the case of a false allegation, proving innocence is expensive and difficult.

³ A University of Southern California report on US copyright infringement has found that over one third (37%) of claims of copyright are invalid. Within New Zealand Judge David Harvey has commented that 30% of copyright litigation fails due to a failure to prove ownership of copyright, or due to the copyright in question not being governed by New Zealand law.

RECOMMENDATION: That the statement referred to at paragraph 13(h) is either sworn or affirmed consistently with the Oaths and Declarations Act 1952.

- 5.6 In keeping with the above point, while full contact details with each allegation may be unnecessary, we submit that, to ensure that the 13(h) allegation provided by the rights owner continues to be accurate and reliable, it will need to be provided in the case of each alleged instance of infringement.

RECOMMENDATION: That all information provided by accusers, particularly in Paragraph 13(h), is provided in the case of each alleged instance of infringement.

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

- 5.7 We submit that the paragraph 20(vi) explanation of the notice should include those details as provided to the IPAP by the rights owner. It is a fundamental feature of natural justice that an individual is entitled to know the evidence of the case against them.
- 5.8 During this law's creation it was recognised that if copyright holders delayed in contacting IPAPs then the IPAP might be unable to associate an account holder because IPAPs periodically delete this information. Similarly, account holders periodically delete information identifying users. This supports the proposition that the account holder be provided those details as set out in the rights owner's claim to the IPAP. A failure to provide this information may mean that account holders are practically unable to identify users or defend themselves against false allegations, so this is essential.

RECOMMENDATION: That the regulations prescribe that account holders are sent all of the details (paragraph 15 a-j) of the rights owner's allegation.

- 5.9 There are overseas cases of ISPs (IPAPs) misidentifying account holders due to incorrect records⁴. The IPAP should share the information they gather when associating an IP address with an account holder in order to establish the chain of evidence.

RECOMMENDATION: That the regulations prescribe that account holders are sent the details of how their IPAP associated an IP address with their account.

Q8 Which of the above is your preferred option, and why?

- 5.10 We submit that Option 3 is appropriate, provided the standard form include the minimum requirements set out in Option 1, as well as our further suggested inclusions, as set out in response to Question 9 and 11, which we address together.

Q9 Are the requirements in option one above adequate and why? What other requirements should be included, and why?

Q11 What information should be included with notices to ensure account holders are properly informed about the regime, and about copyright issues relating to file sharing or otherwise?

- 5.11 We submit that the paragraph 20(v) reference to principle legislation should also refer to the portion of the Act setting out the "fair dealing" permissions for use of copyright works. As representatives of the creative community we consider this an essential inclusion.
- 5.12 An education programme targeting the obligations of users of creative content, without any reference to their rights, would be lop-sided and potentially result in an erosion of those rights - the public's rights in respect of creative content would effectively be accorded a lesser status in our copyright regime. Such an approach has not been

⁴ <http://www.which.co.uk/about-which/press/press-releases/product-press-releases/which-computing-magazine/2008/10/criminal-files/>

contemplated in the reform leading to these proposed regulations. Accordingly we submit that reference be made to rights, as well as obligations, in respect of copyright works.

RECOMMENDATION: That education around copyright be balanced by including information on legitimate content use (fair dealing) as well as infringement.

- 5.13 A focus of the regime is to educate the public about copyright. The notices therefore provide a direct opportunity for rights owners to inform those who have allegedly dealt with their works of the legal online alternatives available. Accordingly, we submit that the relevant notice specify what, if any, legal online alternatives are available.

RECOMMENDATION: That legal online alternatives be identified by the rights owner.

- 5.14 Account holders may be held vicariously liable for the acts of their users, virus-infected computers, hacked WiFi, and mistaken allegations. Filtering software on personal computers cannot identify hacked WiFi and just as most telephone services do not track users, nor do most IPAP account holders. Upgrading networks to track users, or to show that allegations of IP usage are false, costs approximately \$1500⁵.

RECOMMENDATION: That documents provided by MED under *Question 8 - Option 3* include risk mitigation advice for account holders and estimated compliance costs.

| **Q17-35: Options for the method of calculating a fee**

- 5.15 If the fee is too low it will fail to deter “spamming” false allegations or it may encourage business models that profit more from tribunal awards, or threats and settlement offers, than from selling legal products online.
- 5.16 Far from being a hypothetical scenario in the UK a copyright holder was severely criticised in the House of Lords for what “amounts to blackmail ... You can get away with asking for £500 or £1,000 and be paid on most occasions without any effort having to be made to really establish guilt. It is straightforward legal blackmail”⁶. Lord Lucas went on to say “ACS Law and others threaten people with huge costs in court unless they roll over and give lots of money up front, so that people end up settling out of court. The problem is the cost of justice, which is a huge block. We have to remember that.”
- 5.17 Companies such as Digiprotect have a business model where they license content and purposely share it only to later accuse account holders of illegally downloading it⁷. German anti-piracy group DRS state that illegal downloads are 150 times more profitable than legal sales⁸. With a history of demanding \$1500-\$2500 settlements in 2010⁹, producers of the Academy Award winning *The Hurt Locker* recently sued 24,583 people¹⁰ for infringing copyright. If the accused opt for a \$2000 out-of-court settlement the producers profit \$50 million, comparing rather favourably to the \$17 million earned at the US box office.
- 5.18 Low fees or high awards and settlements will inevitably distort the content market. Accordingly the Tribunal should not serve to make piracy more profitable¹¹ for copyright holders than providing legal options online.
- 5.19 A fee within the range identified by IPAPs and MED will be accessible to artists while deterring those who wish to abuse the system. Therefore we support a fee of \$30.

RECOMMENDATION: That the fee be set at \$30.

5 ISPANZ estimate that 90% of New Zealand networks run NAT. Retaining NAT IP tables would involve a sophisticated router to identify users.

6 <http://www.wired.com/epicenter/2010/10/the-legal-blackmail-business/>

7 <http://www.techdirt.com/articles/20091012/0310056486.shtml>

8 <http://torrentfreak.com/illegal-downloads-150x-more-profitable-than-legal-sales-091009/>

9 <http://www.thedrmnews.com/movies-and-tv/more-news-on-hurt-locker-lawsuits-settlement-offers-and-legal-defence-options/>

10 <http://www.electronista.com/articles/11/05/25/hurt.locker.producers.to.recoup.claimed.losses/>

11 <http://www.homepagedaily.com/Pages/article9899-piracy-will-earn-hurt-locker-more-than-box-office.aspx>

RECOMMENDATION: That pre-Tribunal settlement offers be discouraged.

Q37 Are the considerations set out above appropriate for the Tribunal to consider and why?

- 5.20 Section 121 of the Act provides the current law around damages for copyright infringement. While 121(2) discusses the flagrancy of the infringement when determining additional damages, there are a number of other factors which are also considered, but which have not been alluded to in the discussion document. If it is proposed that the new damages regime is to deviate from the accepted and legislated means of calculating damages for copyright infringement then we submit that the contents of section 121 not be "cherry-picked" so as to avoid an unintended expansion or contraction of copyright.

RECOMMENDATION: That either flagrancy alone not form a consideration or the whole of Section 121 (including flagrancy) be considered by the Tribunal.

- 5.21 To be consistent with the Act any consideration of the value of works should not be strictly determined by local markets due to the global nature of the internet, and indeed of copyrighted works available to New Zealanders internationally. This would be consistent with parallel importing laws and the approach of region-free TPM allowances under s226¹² of the Act, which states:

A TPM does not include a...system to the extent that it controls geographic market segmentation by preventing the playback in New Zealand of a non-infringing copy of a work

A failure to consider overseas markets would codify regional boundaries in regulations which is undesirable and inconsistent with the Act.

RECOMMENDATION: That any value forming a consideration be determined from legal sources in any market internationally.

- 5.22 We understand this law reform process has been driven by concerns of lost sales due to illegal file sharing. It is fair to say that if no one thought they were losing money we probably wouldn't be dealing with these new regulations. What this means is that a narrow ideological view of copyright isn't sufficient – we need to consider the economic implications of the public's interest in cultural works, which necessarily incorporates the question of how best to support creators of those works.
- 5.23 An approach that favours market value over retail value would entrench existing business models and discourage them from adapting. For this reason we submit that, in Paragraph 50a, it is incorrect to suggest that "market value" is more appropriate than "retail value" when considering potential 'lost sales'.
- 5.24 Simply put, 'lost sales' through infringing file sharing for items never available for sale online cannot and should not form the basis of consideration of awards. First, they cannot be properly conceived as damages, and are more accurately a "windfall" in the hands of the rights owner, who had not made their work available for sale via a legitimate channel. Second, they do not correspond to the actual loss suffered by the copyright owner, as they almost never recover the total market value of the work, but only a component of it, with the rest shared among various intermediaries.
- 5.25 Instead, we submit the retail cost of legal online alternatives anywhere in the world (accessible to New Zealanders) should be the primary consideration in quantifying damages. This would encourage rights owners to provide items online to New Zealanders.
- 5.26 In addition, market value may be difficult to calculate impartially as values change from week to week during a content release. Online retail cost is transparent, impartial, easily accessible and indisputable.

¹² <http://www.legislation.govt.nz/act/public/1994/0143/latest/DLM346899.html>

- 5.27 Market value is open to the market distortion effects such as those identified within this submission in paragraphs 5.17 and 5.18, whereas retail value is largely immune from this.
- 5.28 While the right to refuse to sell online is a principle upheld in copyright the range of valuing options, such as retail and market value, exhibit the fact that there is no equivalent right to one valuing scheme of awards over another.
- 5.29 New Zealanders are willing and able to use legal services where available. Put another way, it cannot simultaneously be the case that:
1. New Zealanders are causing significant loss to rights owners by using the country's internet infrastructure to access infringing copies of creative content online, and
 2. New Zealand lacks sufficient internet infrastructure to provide creative content online.
- 5.30 Either losses have been overstated or commercial rights owners have failed to exploit the opportunities that the internet affords. What we do know on this score is that New Zealanders simply don't have the legal options for accessing creative content online that are available in many other countries:
- a) New Zealand lacks access to legitimate online alternatives for accessing creative content such as Spotify, Hulu and Netflix. iTunes NZ lacks most movies available in the US and has no TV shows. We also lack Amazon Movies and MP3 Store, Samsung Bada Apps, Pandora Radio, Vudu, Vevo, Lovefilm, BBC iPlayer, ABC Player, and NBC Video.
 - b) New Zealand is at the tail-end of the global creative content supply chain – even popular movies such as *The Hurt Locker* can show at U.S. cinemas, be released on DVD in the US, win the Academy Award's Best Picture, and yet not appear in our country.
 - c) The United States has Netflix which accounts for 30% of residential bandwidth¹³ – showing that legal options have been widely adopted.
 - d) Korea has movie downloads released at the same time as DVDs.
- 5.31 Recently the Flicks NZ Cinema Census¹⁴ asked 4,000 people about whether or not they download movies without paying. Those who do so say they do in part because there is no legal alternative. What this points to is not a nation of scofflaws, but rather a significant unmet demand for the supply of creative content online.

In short, increased enforcement without legal alternatives is 'all stick, no carrot'.

- 5.32 The balance that must therefore be struck in drafting these regulations is the extent to which we continue to endorse an "old media" approach to creative content, in which a few control the channels through which creativity may pass, or a "new media" focus, that endorses and incentivises the use of new, more effective and more widely accessible means of creating and promulgating creative content.
- 5.33 The 2008 MED document, Digital Strategy 2.0¹⁵, sums this issue up most poignantly:

“We understand that widespread, high-speed broadband is essential for New Zealand to participate in the contemporary world – and we will deliver it. [...] We can embrace it and use the dynamic convergence of technologies to help fulfil our personal, social and economic objectives, or we can just muddle through – a beautiful, quaint microcosm of how life used to be.”

RECOMMENDATION: That the regulations prescribe that the retail value of a legal online alternative be of consideration.

¹³ While some (e.g. Forbes) dispute international bandwidth all agree that 30% of residential bandwidth is now used by Netflix: <http://wapo.st/lpRzxy>

¹⁴ <http://www.flicks.co.nz/features/the-2011-new-zealand-cinema-census/downloadingmovies/>

¹⁵ <http://www.med.govt.nz/upload/73583/Digital-Strategy.pdf>

5.34 When account holders with multiple users (eg libraries or universities) have made a good faith effort to prevent infringement of copyright works, this should form a significant consideration against an award of damages. This could be captured by notices including education not only as to how to comply with copyright law, but also information on how account holders with multiple users can secure their networks so as to prevent infringement of copyright works. Where such an account holder can show that have in fact carried out the steps required in the relevant notices, then they shall be freed from liability under the regime.

RECOMMENDATION: When account holders with multiple users have made a good faith effort to prevent infringement of copyright works, this should form a significant consideration against an award of damages. Such good faith effort may be measured against the account holder's efforts to institute recommendations for account holders with multiple users as set out in the relevant notices.