

Challenges Enforcing Copyright Online

New technologies continue to provide fresh challenges for enforcing copyright in the digital environment. We would like to hear about peoples' experiences from, and challenges for, enforcing copyright in the digital environment, such as the internet.

Conversation-starters:

- › What are your biggest challenges enforcing copyright in the digital environment and why? Can you describe the barriers that you face when enforcing copyright in the digital environment?
- › Can anyone describe any example of when they were on the receiving end of an allegation of copyright infringement?
- › What action, if any, did you take to defend yourself against such an allegation and what were the costs? Can you provide any information regarding the recovery of your costs to defend against an allegation of copyright infringement from the copyright owner?

Notes recorded by workshop groups

Theme/sub-topic	Comments recorded
Peer-to-peer (infringing file sharing regime)	<ul style="list-style-type: none"> › P2P regime does not work – only for some infringement, cost and delays and ineffective results. › P2P regime has chilled legitimate actors, eg libraries from using content, education because P2P regime does not apply › P2P file sharing regime doesn't work – cost, delay and lack of deterrent penalties
Notice and takedown	<ul style="list-style-type: none"> › Legitimate use for P2P? Technology itself is not the problem, but how it is used. › Notice and takedown – only works in limited way – should be notice and stay down – possible and reasonable using technology. › Notice and takedown is a whack-a-mole process due to the speed of piracy and content copying › Notice and takedown provisions burden copyright owners to notify infringement – delays in taking down – but no burden on person uploading the content. › Notice and takedown process is very fraught – either you cannot find who to contact or they ignore the notice or the domain changes (by one letter). › Where to send takedown notice? "Whack a mole" effect. › Big platforms have processes for enforcement. "YouTube are good" – good corporate citizenship with skin in the game.



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Identifying infringement	<ul style="list-style-type: none">› Customers powers: need more training to identify infringing material.› ID of copyright owners – metadata but up to copyright owner› Technological advancements can find and identify infringement more efficiently now. Although metadata stripping risks losing copyright ownership data, which is an infringement in itself.› Hard to find – is it there or just a scam?› How do we find the person copying?› Easy to hide behind a website. Can have multiple accounts. Platforms.› Searching for pirated content is sometimes the only way to find out if copyright is being infringed› YouTube – provide a content ID system.› Why can't platforms identify infringing material (i.e. YouTube filter)?› Internet service providers (ISPs) cannot check everything online anymore – lots of things are now encrypted for safety.<ul style="list-style-type: none">› Separate from the broader “should you or shouldn't you” debate.› There is a speed of encryption issue – in five years you may not be able to do it.
Copyright Tribunal	<ul style="list-style-type: none">› Copyright Tribunal? So few cases. Does deal with file-sharing cases.› Tribunal should be used more – brought in to deal with illegal music downloads, but the online space has changed with music and video streaming› Copyright Tribunal exists but is underused and limited in remit› Copyright Tribunal: usefulness is limited, it's ineffective, jurisdiction/remit limited, P2P is an overseas issue, availability – not permanent members› Copyright Tribunal – delays, lack of procedural rules – Collection management organisations (CMOs) have lost confidence in the process.
Educating/providing guidance	<ul style="list-style-type: none">› There is general lack of education provided to the public and, therefore, understanding of copyright and what is fair use of copyright.› People don't know copyright› Part of the issue is educating people on how to legally access content – people have the option to pay for or access content for free through various models› Ignorance – lack of education regarding copyright. Difficulty of contacting copyright holders.› Education – need to educate people that copyright laws exist to highlight the laws and minimise people from infringing them in the first place



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	<ul style="list-style-type: none">› Education – getting people to know the Act exists and is relevant to your profession before you strike problems› Enforcement measures not appropriate in some contexts, e.g. education may be better.› Every discussion is about the top of the pyramid – but we need to regulate for the majority and that may just take education about what people can do.› Lack of education› Educate kiwis about authors' rights.› Teach the value of intellectual property› People don't know about copyright – understanding is low.› Value in educating about copyright – encourage respect for the law› Awareness of impact of infringement on creators› Part of digital literacy and safety on the internet – copyright can be part of this bigger picture.› More guidance from the Government› Education› Balance between educating and enforcing – experience is that we need both.› Lack of understanding in schools, education sector.› Guidance is needed even with legislative change› It is hard for overseas creators to comply with the Act if they don't understand what the NZ law is and/or why it is the way it is.
Use of algorithms (bots) to identify infringing content	<ul style="list-style-type: none">› Bots troll the internet looking for any use of a work on behalf of copyright owners.› These bots work on the basis that any and all use of a copyright work is illicit. These bots do not distinguish between authorised and unauthorised use.› Once a bot flags any use of the work in question, punitive measure usually reserved for infringing content can be applied immediately, e.g. muting sound, take down of content. Sometimes it can take weeks for these measures to be reversed.› These automatic measures applied by bots damage the reputation of legitimate users, because they are effectively labelled as infringers.› Algorithms on YouTube are not reliable for video and music works› There is no way for a person to flag for these bots to identify that they have a written agreement/licence to use the work online and therefore is one of the "good guys".



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Overseas/jurisdiction issues	<ul style="list-style-type: none">› Copied overseas› Large hosting sites like YouTube are not based in New Zealand and therefore beyond the jurisdiction of New Zealand’s copyright law.› Use of geoblocking measures to prevent users accessing content from New Zealand are out-of-date› A solution/change may be to make the Act enforceable internationally (eg China)?› Need to tackle this because of jurisdiction – less distribution of content (concept of copying is becoming redundant).› Actively in NZ, e.g. Viagogo from Switzerland, submit to the jurisdiction› Need ability (somehow) to reach overseas infringement. There are international private law issues› Writers: things on Amazon - Someone claims a piece of writing as theirs – Amazon has no choice but to act on it under US law. How do they prove it?› Infringement based overseas is a big challenge, e.g. hosts, sites, intermediaries all overseas.› A major enforcement challenge is that the infringers or platforms are mostly located outside of New Zealand. How can you keep control of your own work when it crosses borders through digital means?› Challenge of offshore infringement› Possible to check online services to find who is behind a website, but problems when they are based overseas and privacy protected.› Identifying and enforcing infringement internationally is challenging
Platforms	<ul style="list-style-type: none">› Have to do takedowns› Can be very proactive<ul style="list-style-type: none">› Expensive› Good› Time consuming› Noticing problems automatically› Immediate liability<ul style="list-style-type: none">› Could not work› Does the platform know – do they know the content?



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Accessibility of content	<ul style="list-style-type: none">› Creative industry in NZ has done a lot to get content available online. Needs to be widely available. E.g. time delay in getting content online. Building content. But consumers have more choice now, e.g. Netflix.› One way to decrease piracy is to make more content legally available, but creators need ways to keep up with consumers and tackle infringement› Streaming› Buying online› YouTube scanning<ul style="list-style-type: none">› Have to pay› Have to be at scale› EU view – Not practical – work is soul› More content services available now at a reasonable price, which is curbing piracy. Legitimate use of copyright should be modelled and supported by legislation to protect consumers
Technological protection measures (TPMs)	<ul style="list-style-type: none">› TPMs – used by big business<ul style="list-style-type: none">› Can lock in bad privacy and competition effects› Per-person pricing› Security research<ul style="list-style-type: none">› TPM software has problems› Copyright mechanisms are used to stop security researchers (“white hat” hackers)› Are TPMs now obsolete? People are not using them very often any more – they use other mechanisms of digital rights management (DRM).› DRM is a much better topic than TPMs.
Site blocking	<ul style="list-style-type: none">› There are rolling site blocking orders in the UK that can deal with changing URLs.› Because cannot control overseas jurisdictions, look to ISPs for site blocking. While not 100% effective, it is proving a good deterrent overseas.› Lack of specialist IP judges in NZ may create uncertainty, hence site blocking litigation has not been tested here because of the cost and uncertainty (compare with UK and Australia).› In music the issue is unlicensed small scale use versus cost.› Site blocking is needed at an ISP level. Australian example: culture of looking for infringing has curbed because of site blocking:<ul style="list-style-type: none">› Cost to ISPs not too much› Even though whack-a-mole culture has changed and people are less likely to search for infringing pirated sites, appeal is reduced› Site blocking is an option to get content removed - though it is a task for the telcos (but they can do this in Australia).› Site blocking in Australia. Great evidence-led reforms. Could see that the policy change had already been effective.



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	<ul style="list-style-type: none">› Take down and keep down. Whack-a-mole. Key for live sports. Take down: make the host responsible, e.g. content ID. Need technical solutions. Google hosted outside of NZ. Site blocking still workable. But take down and stay down not so much. Also, don't want to block legitimate material.› Website blocking – effective deterrent leading to increase in legal use<ul style="list-style-type: none">› Court order on the basis of criteria to block infringing sites› Difficulty with differentiating legitimate and illegitimate content dissemination.› Enforce site-blocking at an ISP level for all ISPs (i.e. generic).› Websites are unresponsive:<ul style="list-style-type: none">› Website blocking an option› Jurisdictional issues regarding the location of websites.› Site blocking introduced into 30-40 countries and has been effective in UK and Australia.› Website blocking – pros and cons? Shown to be effective in other countries and risks can be managed – discussion about costs.› Need to be able to get court injunctions to require NZ ISPs to block access to overseas sites› Issue with pirate sites overseas – limited options to take action from NZ. Need ability to seek orders requiring ISPs to block access to sites – effective overseas.› Blocking orders – who pays for implementing?
Enforcement costs/lack of resources	<ul style="list-style-type: none">› Problem for small organisations that don't have resources to deal with groundless cease and desist letters.› Problem for small organisations and resources to deal with enforcement issues.› Almost impossible for individuals with limited resources – individuals feel powerless.› Cost of enforcement is massive.› Expensive and impossible to pursue actions against non-New Zealand located websites. Need a quick and easy way to pursue them.› Often the value of an individual work negates litigation investment.› Value of loss – erodes licensable value/exclusivity commitments› Litigation too uncertain and costly (easier to settle). The issue of uncertain can impact settlement value.› Because of litigation costs, there are not many precedents in NZ. Therefore we need to rely on UK and others.› Litigation costly – lots of work required to enforce<ul style="list-style-type: none">› Not many can do it especially independent creators› What is the remedy for them?



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	<ul style="list-style-type: none">› Both lack of a clear process and inability to afford› Provision in the Act not used – why? Consequences lower than the cost of enforcement› Specialist judiciary would significantly reduce cost.› Legal costs of court action too high for many copyright owners to prosecute infringers.› Cost a significant issue› 3-strikes [infringing file-sharing] scheme cumbersome and costly for film, TV and games industry, especially for small creators focussed on creation.› Difficulty enforcing – costs – schools also using material online.
Possible solutions (other than explicitly site blocking)	<ul style="list-style-type: none">› Consider providing a small copyright claims tribunal to assist with prosecuting infringers. Concern expressed that the costs of such a tribunal are likely to outweigh benefits for copyright owners.› Have specialist IP court and judges to maintain integrity of the law. Seems to be lots of IP specialist lawyers, so why not judges? But a lot of infringement is done offshore, so how useful would this be?› MBIE could have an infringement investigative body with the tools they have. It would give companies somewhere to go. A point of contact› MBIE one check search for copyright content?› How to prevent manipulation of metadata on digital material to prove who is the real creator? Block-chain could be a way to tackle and log when the digital material was created and edited› Voluntary registration managed by MBIE – block-chain could be useful technology to track copyright› Register like US› Lower the burden for right holders to prove copyright ownership› Could MBIE provide template letters for example? Need less formal route. Some dispute system. Extension of IPONZ, good track record. But note, IPONZ does not deal with infringement.› Solution:<ul style="list-style-type: none">› meta data› education› licensing› Have a copyright tribunal for small claims?› Smaller claims – small claims tribunal.› Voluntary register for copyright to assist with proving authorship – to be public, accessible and reduce transaction costs› Voluntary registration would make sure initial stages of copyright are worked through towards the start of the work/projects like in public space› MBIE could have an infringement investigative body with the tools they have. It would give companies somewhere to go. A point of contact



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Other enforcement issues	<ul style="list-style-type: none">› Challenges for the law:<ul style="list-style-type: none">› No borders.› Perceptions.› Need effective remedies› Consumer piracy – B2C [business-to-consumer] – big problem› Law more effective in B2B [business-to-business] context.› Willingness to take down/licence uptake.› Public perceptions of infringement.› Are right holders asking for policing of the internet?› Ministry of Education does not compel schools to take a licence, so 30% schools are not licensed – authors, music affected by this.› Difficulty enforcing in New Zealand courts – expensive and difficult to prove chain of title – should lower the barrier for right holders.› Problems with standing for some bodies – exclusive licensees have standing, but not non-exclusive licensees and collective bodies do not.› Concern about over-reach by some right holders to get paid for things that are not in copyright – cease and desist letters are common in some countries – not sure about NZ.› If people receive a cease and desist letter – if less well resourced – content may just come down – others would investigate.› Need to encourage sustainable careers in the creative sector› Corresponding issue for orphan works and GLAM trying to find who owns copyright – should be able to stop searching after completing a reasonable search.› Term of protection only 50 years, others mostly have 70 or 90 years.› Impact of fair use, e.g. Google books – impact on authors’ income.› Protection for data structure in software programs – not sure this is protected in New Zealand.› Music industry suffering from:<ul style="list-style-type: none">› Piracy› Consumer behaviour changes› 3 strikes not effective.› Auckland council – want material acknowledged.› Auckland Uni – challenges as ISP/IPAP where students use infringing file sharing behaviour.› PCMA [?] – nature of sharing: is it personal or more wide spread?› Cultural side to copyright.



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	<ul style="list-style-type: none">› Ease of online infringement e.g. online behaviours, open source community and ownership around sharing and commercial versus non-commercial use.› Compilations and data – better managed with contract or non-disclosure agreements?› Difficulty with enforcement process – establishing elements, not a lot of case law around it.› Other enforcement methods?› Some organisations not proceeding with claims because of enforcement difficulties.› Risk analysis – who will sue? Influencing decision to publish. Equally, concern by many institutions for best practice behaviour› Whether or not there is a commercial impact – industry drivers versus creative drivers.› Is there a forum for people to go indirectly without engaging a lawyer?› Once the genie is out of the bottle , there isn't much more you can do when content is taken/infringes copyright› Copyright isn't a useful concept for the younger generation who are used to widespread sharing› Under the Act the only avenue is litigation to enforce copyright› Creator can allege that a work is infringing their copyright and they might be able to get an injunction preventing it from being released/published<ul style="list-style-type: none">› It may be easy to resolve by sharing further details› But complying with an injunction may be very burdensome.› People should be able to find out in one place (maybe the Copyright Act) whether their copyright is being infringed› If individuals can't be confident in their copyright being protected then big companies/producers wanting to benefit from their voices and creativity also lose out› Sending a letter is definitely the easiest (not the most successful necessarily) way of enforcing› International online index – registering for copyright as evidence is recommended. What is the standard procedure for digital materials?› Tools for tackling issues like the Amazon issue needed› Success rate of enforcement is high from a lawyers perspective› Websites don't always have contact info› Privacy – 'who is' registries are not as useful anymore. Can't look up domain name to get hold of website owners especially in Europe, but is becoming an international trend because of privacy protection› Copyright infringement of written works translated into another language is difficult. Writers are interested in how their copyright can be protected on the international stage› Claiming copyright can be abused as a way to take down competitors – unjustified threats› Threats provision for patents is not effective› Is anyone going to fund private copyright grievances? Government?



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	<ul style="list-style-type: none">› The Act is a nightmare – old fashioned and hodge-podged after many amendments – how can you enforce it when it’s so difficult to understand in the first place? Hard to boil down. Why isn’t it, e.g. if you commission something, you own it?› Biggest issue is being able to prove you are the owner› Better wording needed in the Act› Powerful digital communication Act 2017 – good example of a document that is easy to understand using modern drafting› Standing to sue. Owners and exclusive licensees can sue, not non-exclusive licensees. Publishers would like ability to sue without going back to owner.› Licencing bodies – can’t get exclusive licences. Competition issue.› UK example: contract needs to say OK for non-exclusive to sue.› Infringement litigation is very difficult: finding evidence and structural impediments› Insurance proceedings = subrogation. Taking prosecution on owner’s behalf. Where does the windfall go.› Complex to rights management organisations. Versus where copyright has been assigned. Book owners don’t ever assign full copyright in NZ, just individual rights. Whereas it is normal for screen copyright to be assigned.› Patent rights. Important they retain their copyright as the author.› Online infringement: MBIE aware of lots of piracy online.› Not focusing on solutions yet.› Very little case law. People willing to breach until there is a case that tells them not to. Not enough deterrence. Fair use bad for NZ for this reason, too uncertain, NZ not litigious.› Limited options for IP rights holders. Big difference between cease and assist letter and litigation.› Different business models<ul style="list-style-type: none">› Fine art – royalty› Music – listen repeatedly, touring.› Film – watch once or twice› Government seems to like industries to self-regulate.› Commissioning rule sucks.› Social media (overseas entities) policies/enforcement re: copyright infringement› Communication works don’t expressly include streaming› Tech neutral/agnostic to allow for change› Copyright territoriality is an issue› Fair use (US style) not a great ideal. Contained file sharing.



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	<ul style="list-style-type: none">› Australia drafting is not necessarily a good example› Enforcement mechanisms need to be fast› Tools:<ul style="list-style-type: none">› Using TPMs› Watermarks› Login access› DNC [Domain Name Commission] withdrawal of names/details a significant issue› Section 21(3) commissioning rule excluded a set group from being commissioner even though don't 'own' copyright, length is connected to author› Exclusive licensees/non-exclusive licensees. UK exceptions let more non-exclusive licensees enforce provided right from owner permits that (i.e. contractually)› Makes sense to have same right here given volume of non-exclusive licensing in NZ from overseas› Safe harbour protection for ISPs. Definition of ISPs needs rethinking given we consider YouTube examples are different to ISPs in the real world. Needs to be flexible/future-proofed how 'ISP' is defined, so clearly applies as intended.› Unjustified threats vs proceedings. Threats exception in Australia was terrible, better to leave as proceedings.› Live events – very quick› Damages after the fact often of no use› Need an efficient and effective form of enforcement› WIPO arbitrators? Good given New York convention reach.› Reciprocal enforcement of judgements an issue› Look at penalties – ACCC with ACC – taken seriously› People assume that “free” on the internet means a work is available for anyone to “rip”.› Cease and desist letters have limited success in stopping infringement. Letters from lawyers more likely to be taken notice of.› Should signing exclusive copyright away in perpetuity be allowed?› The Copyright Act is relatively toothless for most people. To write an Act for the modern world we need to have a tiered penalty approach ending with a serious 6 figure penalty for people like Amazon.› One of the biggest issues is being able to track infringement and then figuring out who to pursue.› Don't want NZ to regulate platforms to a point where they are too big to fail. However, if we don't find a balance we would also have small infringers that could just fold up without fear of consequences.› Big companies can afford to put algorithms in place to search through all their content, but small platforms would be pushed out of the market. Have different “all practicable steps” requirements to scale with size of the company.› No recognition that New Zealand has a “uniqueness” that needs to be protected.



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	<ul style="list-style-type: none">› Broaden exceptions to GLAM, education and fair dealing.› Lack of clarity on fair use.› How long does something remain “news” for the purpose of the exceptions?› Continues to be prevalent.› Hard to see the scope of piracy activity.› Impacts on screen production and distribution.› Technical measure being used in games.› Reputational impact of enforcing copyright (e.g. in games).› Recent focus on putting a “fact” to creators being impacted.› Should distributors be able to enforce IP better?› Few examples/experience of groundless threats of legal action.› Difficult to measure economic impact/damages.› Important not to lose ground on ability to enforce copyright, with revenue streams collapsing.› Platforms operate overseas.› Possible for online platforms to do due diligence and they make money off it.› Is an issue with the safe harbour provisions.› Problem with platforms taking down content when not infringing.› US platforms can’t be contacted to deal with rights issues.› Alternatives – notice to users of platforms eg YouTube, approach services and offer a licence.› Problems proving ownership of copyright when there is no question that the defendant has any rights – burden is too high.› Possible online disputes mechanism – easier than going to court and more efficient.› Problem valuing the impact of piracy.› Groundless threats. Problem with overseas video aggregators sending an invoice and problem getting clear rights from content providers – content providers then pass rights to third parties.› Obstacles caused by privacy issues – site administrators don’t need to make details available – changes to who-is.› Piracy context – no problem proving infringement, but issues where claims are made about fair dealing.› Fair dealing – interpretations often align.› Organisations that are users and creators – don’t want exceptions expanded too far because it cuts both ways.› Fair dealing is not perfect but works better than alternatives› Sometimes there are commercial disputes around fair dealing, but this does not mean it is not working.



Theme/sub-topic	Comments recorded
	<ul style="list-style-type: none">› Is the law we are enforcing online fair? People won't obey the law if they think it is stupid or unreasonable.› The law does not differentiate between an individual infringing and the operator of a cyberlocker.› New Zealand is a tiny market, so we need to regulate specifically and also to protect New Zealand creators.› What is best done by copyright law and outside of copyright law?› Leaks of physical copies (Sione's Wedding, by Oscars screeners).› Enforcement versus privacy – is snooping on student connections OK?› Control – moral rights› Usable enforcement – jurisdiction? "Whack a mole"› Harmful Digital Communications Act – the law, but can't get it taken down. Is online there forever?› Illicit streaming devices› Too easy to copy from YouTube› Public are embracing streaming› Public will report breaches› Police 10/7 is regularly taken down from Youtube.› Youtube has the ability to take stuff down.› "If it were illegal, it wouldn't be easy"› Schools using devices, students using digital› Rights reversion to creator› People are using copyright to make more money – you become a tenant of your own data and have inadvertently surrendered your own personal IP.› Our copyright regime needs to be based upon principles and not technologies.› Whack-a-mole. Fake news articles, shut it down, pops up again.› Because copyright is not a registrable right (not necessarily a bad thing) makes enforcement harder.› Perspectives:<ul style="list-style-type: none">› Government› Lawyers› Civil society› Funder› Platform› Authors› Production



Theme/sub-topic	Comments recorded
	<ul style="list-style-type: none">› Screen› People are making money using works without copyright owner's permission› How is it measured?› Hard to know the impact› Undermines licensees in NZ and overseas.