

Liability of third parties for online infringement

A chance to discuss any issues with the way the Copyright Act treats parties who have indirect involvement with infringing copies, which are more prolific in an online environment. This includes providers of internet platforms and services, the safe harbour provisions, 'linking' and other behaviours that may constitute 'authorisation' to do a restricted act.

Conversation-starters:

- › When is providing a link to infringing content problematic and when is it acceptable?
- › Do you think our safe harbour provisions for ISPs continue to fulfil their intended purpose?
- › What are the costs or disadvantages of maintaining these provisions, who is affected and how?

Notes recorded by workshop groups

Sub-topic	Theme	Comments recorded
Acceptability of linking		<ul style="list-style-type: none"> › Storing versus linking versus framing – want to focus on the conduct rather than technical details. › What matters is the intention of the third party: <ul style="list-style-type: none"> › Individuals sharing links between themselves (impracticable to make liable). › Making money from infringement (should be liable), particularly if generating advertising revenue: <ul style="list-style-type: none"> › Targeted website blocking. › 42 countries have a procedure to apply to shut down / site blocking for infringing websites. › Search engines – safe harbours – protect innocent third parties. › If a site's core reason for being is to provide access to infringing works – problem. › As opposed to social media – eg Reddit -> will disable access to infringing content. › Search engines are a legitimate business. › When it is for research or education, users want the connection. › Providing a link or a pathway is 'always' problematic. <ul style="list-style-type: none"> › Does the user have permission? › Are rights granted by the publisher? › Offline framework should work in a similar way to online.



Sub-topic	Theme	Comments recorded
		<ul style="list-style-type: none">› Is the content paid for/subscribed?<ul style="list-style-type: none">› What is the intention behind the content producer positing or hosting on the website initially?› Some publishers allow their content to be used in a personal/private context, others don't.› Whether linking is okay depends on scale, market impact and whether you are profiting.› Due diligence required?› Google news links to a news article can increase views of the article.› Concern about links that promote piracy.› Who polices what links are okay?› Providing 'links' – how do we know what is infringing?› What are parameters? What is the sliding scale?› Notification?› Can we define what 'due diligence' or 'reasonable steps' are?› Fibre TV and My Box case held that the business were 'authorising'.<ul style="list-style-type: none">› Companies being sued. However, devices now being imported by individuals alone – don't want to sue potential clients.› It is illegal software that is the issue not necessarily the box, which can be used legitimately.› The boxes per se can't be stopped by Customs because the boxes themselves don't infringe.› Are there considerations other than copyright? For example, are there social benefit considerations? For example, Irving 'Holocaust' denier – posting something online becomes a public issue around what he might talk about? Does this infringe his copyright?› Personal recordings -> archive – check sources:<ul style="list-style-type: none">› Reuse – issues creator – permission.› New services?<ul style="list-style-type: none">› Website terms and conditions to protect. No responsibility to links o/s website.› Where does infringement happen?› Direction to link? Issues if posting.› User upload vs website upload vs link.



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Safe harbour provisions	Do they continue to serve their intended purpose?	<ul style="list-style-type: none">› Safe harbours developed for infancy of internet.› Business' service versus copyright breaches.› Responsibility is currently with rights holders, not hosts.› Safe harbours mean not liable till creator makes them aware.› Under safe harbour provisions the third party is protected, in the process [where] copyright material may have been distributed (copied).› Puts 'transaction costs' and 'respect for the law' objectives at issue.› Disadvantages to creators – are they getting enough? Is copyright being used to prop-up an industry?› We are in agreement safe harbours need reviewing viz around the hosting.› Need to protect content.› Natural justice for content creators.› Wellbeing – fairness – powerless to redress. Consumer rights verse creator rights.› Piracy piece overlays safe harbours and should be excluded.› ISPs exploit ambiguity in legislation to infringe.› Rights holders need to adjust their traditional rights distribution to incorporate online rights. Example: watching live sports.› Safe harbour provisions don't work well – discuss transmission.› ISPs as an industry need to agree:<ul style="list-style-type: none">› Easier to agree on some filters, but not all possible filters.› ISPs already take measures in other jurisdictions eg Singapore.› Safe harbours needed – can impact investment (Dippon study) and GDP if they don't exist.› Is it possible to get rid of it? Google would disagree?› Types of third party:<ul style="list-style-type: none">› Social media› Media sharing› ISPs (in NZ)› CDNs (in NZ)



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		<ul style="list-style-type: none">› Who operates here / uses third parties?<ul style="list-style-type: none">› Writers› Education providers› Musicians› Funders› Government› Civil society› Licensing.
	Definition of an ISP	<ul style="list-style-type: none">› What is an ISP?<ul style="list-style-type: none">› “Pipes” versus “Hosts”.› Pipes shouldn’t have to police traffic.› IPAP.› Is definition of safe harbour too broad?› Where in the internet [stock?] is the place to address this?› Definition of ISP required – passive versus active use.› Should we distinguish between commercial/active (curate, make money) and passive (just host)?<ul style="list-style-type: none">› Uptake of technology may blur this distinction.› Limit definition to company who provides infrastructure. Not Youtube = point of tension.› Is Youtube (and hosts of user uploaded content) a content creator or ISP?› Power of platforms has grown. They should be responsible.› Recognise that different business models have developed and it applies to different types of businesses.› Late 90s – no Facebooks etc. Mature – should have responsibility.› Redefine ISP? Exclude Facebook etc, but blow back:<ul style="list-style-type: none">› NZ on screen› NZ taonga archive.› Distribution has changed live/delayed.› Can carve safe harbours by activity, i.e. safe harbours for connectivity versus legal responsibilities.› Transmission must remain open.› Exempt infrastructure providers:<ul style="list-style-type: none">› Broad unintended consequences: social media / search engines?



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	Who is responsible for user-uploaded content?	<ul style="list-style-type: none">› ISPs moving into content space.› Issue around YouTube providing copyright material. By the way their AI works, they appear to 'authorise' the copy.› Clearance of rights/liability for the copyright works.› Spotify and Netflix etc, normalize access to legitimate content.› ISPs should be part of the conversation about piracy.› How do we identify where the liability lies?<ul style="list-style-type: none">› What are the criteria?› Does the 3rd party benefit from the infringements?› Knowledge/notice (eg megaload) – levels of responsibility.› Content providers e.g. Google may become risk averse.› ISPs have the ability to stop infringements even though not deliberate – should take positive steps.› How should websites be blocked?› DMCA safe harbour = Youtube = US law:<ul style="list-style-type: none">› Therefore hard for NZ to make a difference.› Difficulty of distinguishing between artists sharing their own legitimate/legal content as opposed to upload of illegitimate content.› More engagement from TV/Movie sector than individual artists.› Need to balance freedom of openness with infringing concerns.› Consider efficiency of who bears liability and who can pursue infringement (NZ government (eg Customs, overseas))?› Video games -> infringement occurs through websites:<ul style="list-style-type: none">› Not a priority for video games industry.› More options/tools for dealing with piracy.› "modding" [?] communities modifying games:<ul style="list-style-type: none">› Some developers happy with this.› Others not – e.g. where modified games displace original game.› Can be promotional benefits.



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	Potential obligations of content hosts	<ul style="list-style-type: none">› Site blocking – want court orders to require ISPs to block access to pirate sites.› Any website / link blocking (simple and efficient – whereas three strikes is awkward and clumsy) shouldn't be technology specific. Via court process.› Should ISPs be responsible for blocking websites? Or punished for failing to do so?<ul style="list-style-type: none">› Failure to shut down these infringing websites is normalizing it to the public.› ISPs as “innocent intermediary”.› 750,000 people per month getting things for free online. No incentive to pay, stifling the possibility of legitimate business and content creation.› Complexity costs with complex layers of rights.› Cost of site blocking? Commercial cost? Pass on consumers?› Blocking vs. power to “cease and desist”, cut off/prevent further infringement.› More efficient to have take-down notices, rather than seek permissions first.› Notices and takedowns to be enacted, not ignored and stay down.› Compliance costs to:<ul style="list-style-type: none">› big companies› start-ups› content creators.› Safe harbours create barriers to competition – but do legal obligations risk locking in platform incumbents?› Industry codes and agreements around infringements (as no case law available).› Find mechanisms to control and manage accountability of ISP's in the legislation› Geoblocking(?)› Content id – surely possible.› Will Google restrict uploading?› Are filters desirable? Possible?› Automation: automated infringement detection (e.g. via amazon and print on demand).› Intention of upload?› ISPs should be treated as responsible:<ul style="list-style-type: none">› Have control so -> no safe harbour.



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		<ul style="list-style-type: none">› Global enforcement is hard.› How much is in NZ?<ul style="list-style-type: none">› Platforms not in NZ . . .› But some users are (audience).› Unclear whose responsibility:<ul style="list-style-type: none">› Need clarity/certainty on who's liable.› Where owners of copyright can enforce.› Role of legislation v market: requirements.› Not ISP that turns off but supplier.› Unregulated – re rentals – government decision whether to regulate.› Protection: sell product vs responsibility:<ul style="list-style-type: none">› Would be stopped at border if physical.› Is current focus on suing users and chasing ISPs right?<ul style="list-style-type: none">› Focus on parties with knowledge and control.› Reserve enforcement for top of the pyramid with guidance for the users.
	Other comments on safe harbours	<ul style="list-style-type: none">› Museums are taking measures to invite the owners to make contact and provide the provenance of orphan works – and provide the rights or negotiate the rights.› Safe harbour for archive sites.› Archives should be covered for:<ul style="list-style-type: none">› collection and conservation› making available, as sometimes serves public good (with orphan works problem)? Forest & Bird example› exceptions analysis: who are you and what for?› Library – non-commercial world, sub commercial world – still vital.› Do protections apply to libraries?<ul style="list-style-type: none">› Too complex. Libraries risk adverse.› Libraries? Yes, but. Not acting upon exception.› Library and Google in the same bucket? Is the bucket too big? Not similar purpose.› Public interest and defence? UGC? Exception?› Domain harvesting infringes copyright:



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		<ul style="list-style-type: none">› Needs exception to deal with this.› Law needs to draw distinction between pirate sites and archiving sites for preserving eg NZ's cultural heritage.› Empowering cultural institutions:<ul style="list-style-type: none">› Risk assessment (is it legal? 100%).› Business (will we get sued)?› Are they substituting when they reach an audience?› NZ creativity is global.› Issues with on-line services and overseas platforms.› Extension of safe harbours legislation to incorporate copyright responsibilities.› In the EU piracy has been addressed.› Research – online providers/tools/resource materials.› International platforms verse local sites and businesses.› Regulate / enforce – damage done (even interim publication).› Copyright – harder to define infringement [by copyright owner] enquiry.› Cost of infringement outweigh extent of infringement: eg film before opening.› Impact -3 – operate “good practice” best endeavours› Authentication:<ul style="list-style-type: none">› Organisational training systems.› Internal, hard to get evidence.› Providing training, writing blogs. Am I liable?› Standards for due diligence?<ul style="list-style-type: none">› Can you rely on what people say?› No effective time limit of liability.› Clearance in film – E&O insurance.› Limit benefits of archival charities to not for profit.› Disseminating cultural archives.› Untended consequences?› Platforms let users share. Creator choice. Is sharing giving away control?› What are the connections between [incomplete].



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	Video games	<ul style="list-style-type: none">› Involve live streams of games:<ul style="list-style-type: none">› Challenges for platforms.› Don't want to discourage innovation.› Safe harbour model is flexible enough to accommodate different approaches to content distribution.› Games not same as film and music.› Revised act – serve NZ as a whole.› Industry re-releasing old titles to re-monetise them.› Games cost money to keep going.› Games maybe abandoned if cash flow dries up but still may be valuable IP.› Players may pay money to keep game going.› Have not used notice and take down – no need.› Continuing to see piracy.› Trend – subscription model, gives access to a library of games:<ul style="list-style-type: none">› Changing business models.› Makes piracy unattractive.