
Scott Johnston-Submission on the draft copyright Code of Practice for S92A

Thank you for the opportunity to comment on the draft code.

I will attempt to limit my comments specifically to points in the code as I recognise the purpose here is not to argue the legislative provisions that have made it necessary. My apologies if I stray too far from this.

It will be reasonably obvious from some of my points that I am familiar with torrents and downloading. My current downloading activity is restricted to what I believe to be either creative commons and/or out-of-copyright materials. The problem here is if a website states something has no copyright then I have to believe them. There is no simple way to determine if such assertions are indeed correct.

Comments:

The proposed code seems to be a good and pragmatic attempt at following the letter of the law while keeping the administrative overheads low.

- using education notices is a simple low-key first approach as it provides an initial warning without over-reaction.

- I also like the monthly summary approach. This helps reduce the draconian "three strikes before disconnect" to a more reasonable "three months". This gives people plenty of time to change their behaviour.

- a fee must be imposed on complaining parties. It is normal in legally imposed situations to charge fees on at least a cost recovery basis.

- charging a fee will also stop large numbers of spurious complaints, and will hopefully ensure complaints are only made on the basis of good quality, proven evidence.

- the pre-approval for some categories of rights holders is also a very good means of trying to keep processes simple.

- I like the list of details that must be provided to support each complaint. I would add one extra piece here. The copyright holder must also certify the material is freely available for purchase (or is currently screening) in New Zealand / Region 4 (as appropriate) at the time of the complaint. If this is not the case then the copyright holder arguably has no reason to be making a complaint.

- "month" needs to be defined more clearly. This is just a simple point of clarification. Does "month" refer to calendar month, or does it refer to a user's monthly charging period? From the end-user's perspective the latter would be preferable, although I suspect calendar month is simpler and provides greater consistency.

- there needs to be tighter provisions around timeframes and deadlines. Complaints must be received and the end-user notified within clear time windows. It is unreasonable to have a notice arrive even 2 or 3 weeks after alleged infringing activity.

- the pre-approval list should be publicly available. Legislation in New Zealand aims for transparency and so this point is critical. The number of complaints made by each party should also be made publically available.

- there must be a mechanism for removing entities from pre-approval status if there are a large number of disputes over their complaints.

- the responsibility for overall monitoring of the code, and recording / reporting of statistics needs to be spelled out. This sort of approach is also a key component of New

Zealand's transparent and open legal system.

Problems:

If I ever receive any education notices I will be automatically disputing them.

- it is well known some trackers fake IP addresses. Simply seeing an IP downloading material is not sufficient proof of a copyright violation.

- there are also numerous mislabeled and fake files. There is never any guarantee that the name reflects the actual content.

- many torrents are made up of material from more than one copyright holder, and support files are added which have no copyright. Unless it a single file torrent it is impossible to determine what material is actually being downloaded.

- broadcast / theatre copyright holders are usually different to DVD and CD copyright holders. If a complaint is received from a DVD copyright owner over a "TVRip" download, this complaint must be bounced (unless there is proof the same entity owns both rights).

- there is also an issue with incomplete downloads. If I have only 80% of a movie then I have not violated copyright. Under normal circumstances partial files are not viewable and all I have is a corrupt file. There is no way to determine when a file has completed. This is less of an issue with music CDs as the files are smaller, and the copyright persists in the entire CD work as well as the individual tracks.

- and lastly, a quote from coverage of the current PirateBay legal case... "... the defense asked why the Prosecution did not try to track down the actual infringers/seeders of the works mentioned in the trial. Roswall notes that this was impossible since their identities were protected under Swedish law."

There is an implication here that if I download a PirateBay tracked torrent, then I can claim even my ISP is not allowed to know who I am.

Once again thank you.

Scott Johnston