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# New Zealand's "three strikes" graduated response law: How it operates and is it working?

Associate Professor Alexandra Sims

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# Outline of presentation

- Background
- What does it cover?
- Who is liable?
- How does it work?
- Fairness of strict liability?
- Is it working?

# Background

- NZ's first attempt to combat infringing file sharing was via s92A of the Copyright Act 1994 – but was so controversial that it was repealed before it came into force
- NZ's graduated response law is contained in the Copyright Act 1994 (via the Copyright (Infringing File Sharing) Amendment Act 2011)
- NZ's attempt to create a low-cost alternative for copyright owners so they don't need to take the traditional expensive path of copyright litigation through the courts – ie designed to be handled on the papers (although the parties can request to be present at a hearing)

# What does it cover?

- “file sharing is where—
  - “(a) material is uploaded via, or downloaded from, the Internet using an application or network that enables the simultaneous sharing of material between multiple users; and
  - “(b) uploading and downloading may, but need not, occur at the same time”

## Who is liable?

- Regardless of who engages in file sharing the “account holder” (person who has the account with an internet protocol address provider – “IPAP”) is liable = strict liability
- Definition of IPAP “is intended to exclude universities, libraries, and businesses that provide Internet access to their members or employees but are not in the nature of a traditional ISP” (Explanatory Memorandum)

## How does it work?

- When a copyright owner or its agent (“rights owner”) find an internet users is engaging in file sharing, the rights owner can contact the account holder’s IPAP about the file sharing
- The IPAP then sends a “detection” notice (first notice) which must (see next slide):

## How does it work?

- (a) identify the rights owner; and
- (b) identify the alleged infringement that has triggered the issue of the notice; and
- (c) identify the date of that alleged infringement; and
- (d) state the date of the detection notice; and
- (e) explain the consequences to the account holder if further infringing occurs; and
- (f) explain how the account holder may challenge the notice; and
- (g) comply with any other requirements that may be prescribed in regulations.

## How does it work?

- If another infringement of the rights owner's work occurs after 28 days of the detection notice, but before 9 months of the detection notice, the IPAP must issue a "warning" notice (second notice)
- If a further infringement occurs after 28 days of the warning notice, but before 9 months of the warning notice – IPAP must issue an "enforcement" notice (third notice)
- The rights owner must pay the IPAP \$25 per notice that the IPAP sends

## How does it work?

- Once an enforcement notice has been issued, the rights owner has 35 days before the notice expires
- The rights owner can apply to the Copyright Tribunal for an order before the enforcement notice applies. This application costs \$200
- The Copyright (Infringing File Sharing) Regulations 2011 sets out what the rights owner can ask for (see next slide):

## How does it work?

- (a) if work legally available for purchase in electronic form (or if not electronic then in another form) at the time of the infringement, the reasonable cost of purchasing that work; or  
if not legally available for purchase any other reasonable amount determined by the Tribunal:
- (b) the cost of any fee or fees paid by the rights owner to the IPAP; and
- (c) the cost of the application fee paid by the rights owner to the Tribunal; and
- (d) an amount that the Tribunal considers appropriate as a deterrent against further infringing.

# How does it work?

- Plus:
  - Tribunal cannot award more than \$15,000
  - Costs against a party to the proceedings only be awarded if the Tribunal is satisfied that the party has engaged in conduct intended to impede the prompt determination of the proceedings
  - the Tribunal may decline to make the order if it is satisfied that making the order would be “manifestly unjust” to the account holder
  - Currently an account holder’s internet account cannot be suspended

# Fairness of strict liability?

- Account holder liable regardless of who engaged in the infringing activity
- This strict liability makes life much easier for the account holder = more efficient
- One way of mitigating the strictness is that the Tribunal can refuse to make an award if it is “manifestly unjust to the account holder” – so far this discretion has not be used
- In practice the Tribunal simply not made an order for a “deterrent” sum in situations where it would be “unfair” to the account holder, but order made covering the other heads

# Is it working?

- “The worst case scenario with NZ's new internet file sharing law was that a few chumps would get punished, while hardcore downloaders would simply change their tactics.” (“File sharing law - NZ downloaders simply shift tactics”, NBR, 19 March, 2012)  
<http://www.nbr.co.nz/article/file-sharing-law-nz-downloaders-simply-shift-tactics-ck-113345>
- The worst case looks to have come to pass (see next slide):

# Is it working?

- Although straight after the law came into force measured peer-to-peer traffic fell, secure tunneling and remote-access protocol traffic volumes more than doubled = “Hardcore” downloaders/uploaders using other means of accessing content, ie secure tunnelling, VPNs etc
- Since coming into force just over 2 years ago, only 17 cases before the tribunal
- All cases are for music – no movies (does this mean that no movies are being shared?)
- Biggest “offender” downloaded/uploaded 11 music tracks
- Nearly all account holders had little or no computer knowledge
- Largest order \$914.35, smallest \$255.97

## Is it working

- Prior to the law, the probability of being sued for copyright infringement for private copying was zero - moral pressure and lack of technical skill were the only barriers to copyright infringement
- The law has undoubtedly changed the habits of some – the designers of the law would say the law has been a success if viewed from that angle
- Would be naive to expect the law to catch sophisticated computer users intent on infringing copyright

the end