

[2013] NZCOP 5

COP 012/12

UNDER

The Copyright Act 1994

BETWEEN

**RECORDING INDUSTRY
ASSOCIATION OF NEW
ZEALAND**

Applicant

AND

CAL2012-E000609

Respondent

BEFORE THE COPYRIGHT TRIBUNAL

Jane Glover

HEARING ON THE PAPERS

DECISION

Introduction

[1] This case concerns alleged file sharing infringement under ss. 122A-U of the Copyright Act 1994 (“the Act”).¹ Sections 122A-U of the Act set out a process for copyright owners to use when they consider that an internet user has infringed their copyright via a file sharing network. File sharing is defined in s.122A of the Act as follows:

“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.”

[2] File sharing networks are not illegal in themselves, although much of the content on file sharing networks is music, film, television, books or software that is protected by the Copyright Act 1994. When a rights owner alleges that its copyright has been infringed via file sharing, the Act provides that the rights owner may require the relevant internet protocol address provider (IPAP) to issue infringement notices to the account holder concerned. The first infringement notice is a detection notice, the second is a warning notice, and the third is an enforcement notice. After an enforcement notice has been issued, the rights owner may apply to the Copyright Tribunal for an order under s.122O of the Act that the account holder pay to it a sum of money, calculated in accordance with the Copyright (Infringing File Sharing) Regulations 2011 (“the Regulations”).

¹ Sections 122A-U were inserted into the Copyright Act 1994 by virtue of the Copyright (Infringing File Sharing) Amendment Act 2011.

Parties

[3] The Applicant is the Recording Industry Association of New Zealand (RIANZ). RIANZ filed its application to the Tribunal in its capacity as agent for the relevant copyright owners, Island Def Jam Music Group (Universal Music New Zealand Limited), and RCA Records (Sony Music Entertainment New Zealand Limited). Applications to the Copyright Tribunal may be made by representatives of the copyright owners, and “rights owner” is defined as including a person acting as agent for one or more copyright owners.²

[4] The Respondent is an individual internet account holder.

Factual background and procedural history

[5] On 6 February 2012, Slingshot (the relevant IPAP) sent an initial detection notice to the Respondent. The detection notice alleged that on 25 January 2012 the Respondent had infringed copyright in the song *S&M* by uploading it and thereby communicating the work to the public in breach of s.16(1)(f) of the Act. Copyright in the work is owned by Island Def Jam Music Group (Universal Music New Zealand Limited).

[6] The warning notice was sent to the Respondent on 24 July 2012. The warning notice alleged that on 18 July 2012 the Respondent had infringed copyright in the song *I Like It Like That*. Again, the Respondent was alleged to have infringed copyright by “communicating the work to the public”. Copyright in the work is owned by RCA Records (Sony Music Entertainment New Zealand Limited).

[7] The enforcement notice was sent to the Respondent on 18 September 2012 in respect of a further alleged infringement of copyright in the song *I Like It Like That*, on 12 September 2012. Again, the Respondent was alleged to have infringed copyright by communicating the work to the public.

[8] The Application was filed with the Tribunal on 18 October 2012. The Applicant filed its submissions together with the Application, and the Tribunal therefore sent both the submissions and the Application to the Respondent.

[9] On 20 November 2012 the Respondent wrote to the Tribunal in respect of the alleged infringement, explaining as follows:

“I have just returned from deployment overseas [in] Afghanistan and was not aware of music being downloaded. It is very difficult to determine who in the household is responsible for downloading music as flatmates are currently deployed around NZ.

However I understand entirely that I am the person who is held liable for these actions. I have spoken to the pers [sic] who have access to my internet IP address, and between 8 pers, we cannot determine who is fully responsible.

I ask that this notice be a lesson to those in my household as they now understand how severe the consequences may be for committing such an act. I do not wish this situation to grow any more than it needs to be. I am currently

² Section 122A(1).

going through transitioning from military life in Afghanistan to life back home in NZ, and I'm not fit to tackle this allegation made against me.

However I take full responsibility for the acts committed under my IP address and wish for this to be resolved asap. I am willing to co-operate by any means required of me."

[10] The Applicant responded by way of a further letter of submissions dated 29 November 2012. In particular, the Applicant noted that it appreciated the responsible approach taken by the Respondent. It advised that, in the circumstances, it was confining its application to an order for payment under regs. 12(2)(a)-(c) of the Regulations, and was waiving its request for an additional deterrent sum to be awarded pursuant to r.12(2)(d).

[11] Neither party has requested a hearing, and the Tribunal does not consider it necessary to convene one. Accordingly, this matter is determined on the papers in accordance with s.122L of the Act.

Infringement

[12] The Act creates a presumption that each incidence of file sharing identified in an infringement notice constitutes an infringement of the right owner's copyright in the work identified.³ An account holder may submit evidence that this presumption does not apply, or give reasons why it should not apply.⁴ In this case, the Respondent has not provided any evidence that the presumption should not apply. In fact, the Respondent acknowledges that infringement has taken place. Although the Respondent states that the infringing activities were undertaken by third parties, as the holder of the relevant internet account the Respondent accepts ultimate responsibility for those activities.

[13] In the circumstances, the Tribunal is satisfied that:

- [a] Each of the three alleged infringements that triggered the notices amounted to an infringement of the right owner's copyright;⁵ and
- [b] The infringements occurred at the IP address of the account holder.⁶

[14] Further, in the absence of any evidence to the contrary, the Tribunal accepts that the three infringement notices were issued in accordance with the Act.⁷ In this regard, the Tribunal notes ss. 122N(1)(b) and (c) of the Act, which create statutory presumptions that the information recorded in an infringement notice is correct and that the notice was issued in accordance with the Act.

Penalties

[15] The Tribunal has jurisdiction to require the Respondent to pay various sums to the Applicant under four different heads of relief:

³ Section 122N(1)(a).

⁴ Section 122N(2).

⁵ Section 122O(1)(a)(i).

⁶ Section 122O(1)(a)(ii).

⁷ Section 122O(1)(b).

- [a] Regulation 12(2)(a), which deals with the cost of purchasing the works legally;⁸
- [b] Regulation 12(2)(b), which provides for a contribution towards the fees paid by the rights owner to the IPAP;⁹
- [c] Regulation 12(2)(c), which provides for reimbursement of the application fee paid by the rights owner to the Tribunal;¹⁰ and
- [d] Regulation 12(2)(d), which provides that an additional sum may be awarded as a deterrent against further infringing (not sought in this case).¹¹

[16] The total amount ordered by the Tribunal to be paid by the account holder must not exceed \$15,000.¹² The Tribunal also has a discretion to decline to make orders if to do so would be manifestly unjust to the account holder.¹³ It may only award costs against a party if that party has engaged in conduct intended to impede the prompt determination of the proceedings.¹⁴

Regulation 12(2)(a)

[17] In calculating the appropriate relief, the Tribunal must begin by determining the reasonable cost of purchasing each of the works in electronic form (if they were legally available for purchase at that time).¹⁵ In this case, the works were available for purchase in electronic form at the time of the infringements. According to the Applicant, the works were available for purchase from iTunes at a cost of \$2.39 for *S&M* and \$1.79 for *I Like It Like That*.

[18] On a literal reading of r.12(2)(a), therefore, the reasonable cost of purchasing the work would be a total of \$5.97 for the three infringements. However, the Applicant argues that the legislation should not be interpreted as requiring the Tribunal to award only the cost of purchasing the works, especially where the copyright works have been uploaded by the rights owner rather than downloaded.

“However such a sum is not appropriate to compensate the rights owner for the act of making a copyright work available to a potentially very large audience via a P2P network. The sum referred to in Regulation 12(2)(a)(i) appears to be more appropriate as compensation in a case where a sound recording has been downloaded once by a person using the account holder’s IP address. This is because the reasonable cost of purchasing the work is what the account holder or the person using the account holder’s IP address would have paid if he or she had purchased the work legally.

The act of uploading, on the other hand, is more harmful as it enables multiple potential unauthorised downloads by third parties, each of which could have been paid for by those third parties at a cost of \$1.79/\$2.39 each.”

⁸ See also sections 1220(1) and (2).

⁹ See also section 1220(1)(3)(a).

¹⁰ See also section 1220(3)(b).

¹¹ See also regulation 12(3).

¹² Section 1220(4).

¹³ Section 1220(5).

¹⁴ Section 1220(7).

¹⁵ Regulation 12(2)(a)(i).

(emphasis in original)

[19] The Applicant submits that r.12(2)(a) is directed at compensating the rights owner for its losses, and that limiting the amount determined under r.12(2)(a) to the market cost of one copy of the work in electronic form would be inadequate because uploading the works makes them available to any number of other BitTorrent users within the swarm.

[20] The Applicant submits that the proper approach is for the Tribunal to read r.12(2)(a) as giving it a mandate to determine a sum *with reference to* the reasonable cost of purchasing a copy of the work. As has been outlined in earlier decisions,¹⁶ the Tribunal does not accept this submission. See, for example, *RIANZ v TCLE[A]* [2013] NZCOP 2 at paragraphs 49 and 50:

“The Tribunal does not accept the Applicant’s submission on the interpretation of cl. 12(2)(a) of the Regulations. That clause requires the Tribunal to determine “the reasonable cost of purchasing the work in electronic form at that time”, and the words “at that time” can refer only to the time of the particular infringement identified in the enforcement notice. Also, the words “the reasonable cost of purchasing the work” cannot reasonably describe the total amount an unknown number of hypothetical purchasers of the work would have paid if each of them had legally purchased an electronic copy of the work.

The plain language of cl. 12(2)(a) refers only to the amount it would have cost the account holder to purchase one copy of the relevant work in electronic form at the time of the infringement identified in the enforcement notice. In this case, that is the sum of \$2.39 for each of the three identified infringements.”

[21] The Tribunal considers that the number of downloads flowing from a work being uploaded is not relevant to the determination under r.12(2)(a). It may be relevant, however, to the provision relating to deterrence (r. 12(2)(d)) and, in particular, to the potential effect on the market for the work (r. 12(3)(b)).

[22] Accordingly, under this particular head of relief, the Tribunal orders the Respondent to pay to the rights owner 1 x \$2.39 in respect of the work *S&M* and 2 x \$1.79 in respect of the work *I Like It Like That*, totalling \$5.97.

Regulation 12(2)(b)

[23] Regulation 12(2)(b) requires the Tribunal to determine the cost of any fee or fees paid by the rights owner to the IPAP in respect of the infringements to which the application relate, and s.120(3)(a) of the Act provides that the Tribunal may order the account holder to pay to the rights owner a contribution towards the fees paid to the relevant IPAP.¹⁷

[24] It is clear that, depending on the circumstances of the case, the contribution paid by the account holder may be less than 100 per cent of the total IPAP fees. The use of the word “contribution” in subs. 120(3)(a) stands in direct contrast to the use of the word “reimbursement” in subs. 120(3)(b), which provides that the Tribunal may

¹⁶ To be fair to the Applicant, it should be noted that none of these decisions were issued prior to the Applicant’s submissions being filed, so it could not have known of these.

¹⁷ Section 122O(3)(a).

make an order requiring the account holder to reimburse the application fee paid by the rights owner to the Tribunal.

[25] For the purposes of this application, which is not at the serious end of the scale in terms of levels of infringement, the Tribunal calculates the appropriate contribution as follows. The fees paid to the IPAP were \$75 plus GST (\$25 per notice). The Tribunal notes the importance of the educative role of the first two notices, especially the detection notice. When an account holder receives a detection notice, he or she has an opportunity to cease any infringing activity and thereby avoid further escalation. The enforcement notice is, however, less educative in its function. It is the final step before an application is made to this Tribunal, by which time the Respondent has ignored two opportunities to stop the infringing behaviour. Given this “sliding scale” of culpability, the Tribunal finds that the entire cost of the fee for the enforcement notice is payable to the Applicant (\$25); one-third of the fee for the detection notice is payable (\$8.33); and two-thirds of the warning notice (\$16.67). The total contribution to be paid, therefore, is \$50.

Regulation 12(2)(c)

[26] Section 122O(3)(b) of the Act provides that the Tribunal may make an order requiring the account holder to reimburse the rights owner for the application fee paid by the rights owner to the Tribunal, and r.12(2)(c) requires the Tribunal to determine the cost of that application fee.

[27] The Tribunal accepts that the Respondent should reimburse the Applicant for the cost of application fee paid to the Tribunal, i.e. the sum of \$200.

Regulation 12(2)(d)

[28] Regulation 12(2)(d) requires the Tribunal to determine “an amount that the Tribunal considers appropriate as a deterrent against further infringing”. In considering whether to award a deterrent sum and, if so, what that sum should be, the Tribunal may consider “any circumstances it considers relevant”, including the flagrancy of the infringement, the possible effect of the infringing activity on the market for the work, and whether the other sums awarded would already constitute a sufficient deterrent against infringement.¹⁸ In this case, a highly relevant circumstance is the fact that the Applicant itself does not consider a deterrent penalty to be appropriate and has not requested the Tribunal to make such an award. The Tribunal agrees that no deterrent sum should be awarded in this case.

Orders

[29] In summary, therefore, the Tribunal orders the Respondent to pay to the Applicant the sum of \$255.97, comprised as follows:

- [a] \$5.97 under r.12(2)(a), which is made up of 1 x \$2.39 in respect of the work *S&M* and 2 x \$1.79 in respect of the work *I Like It Like That*,
- [b] \$50.00 under r.12(2)(b), representing a contribution towards the IPAP fees paid by the Applicant; and

¹⁸ Regulation 12(3).

[c] \$200 under r.12(2)(c), being reimbursement of the application fee paid by the rights owner to the Tribunal.

Decision of the Copyright Tribunal delivered by Jane Glover

DATED at WELLINGTON this 7th day of March 2013

Jane Glover
Member
Copyright Tribunal