

[2013] NZCOP 9

COP 014/12

UNDER

The Copyright Act 1994

BETWEEN

**RECORDING INDUSTRY
ASSOCIATION OF
NEW ZEALAND
INCORPORATED**

Applicant (Rights Owner)

AND

CAL2012-E000627

Respondent (Account Holder)

BEFORE THE COPYRIGHT TRIBUNAL

WARWICK SMITH

HEARING ON THE PAPERS

DECISION

The Application

[1] This is an application by Recording Industry Association of New Zealand Incorporated (“**the Applicant**”) for an order under s.122O of the Copyright (Infringing File Sharing) Amendment Act 2011 (“**the Act**”). The Applicant seeks an order for payment of a sum of money in respect of infringing file sharing for which the Respondent is alleged to be liable.

[2] The Applicant has made the application as agent for:

- [a] Universal Music Group, Inc. of the United States, and Société d’Invertissements et de Gestion of France (collectively “the Universal Companies”); and
- [b] Sony Music Entertainment, a Delaware General Partnership, and Sony Music Entertainment BV of The Netherlands (collectively “Sony Music”).

[3] Those parties claim to be the respective owners of the copyrights in the two sound recordings which are alleged to have been the subject of infringing file sharing.

The General Scheme of the Act

[4] Section 122B provides an overview of the provisions of the Act that are relevant to this application. In short, the Act is intended to provide copyright owners (whether

acting alone or through agents) with a special regime for taking enforcement action against people who infringe their copyrights through “file sharing”.

[5] Paragraph 122A of the Act defines “file sharing” in the following terms:

“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.”*

[6] The Act provides that a rights owner may require an Internet Protocol Address Provider (“**IPAP**”) to issue infringement notices to Internet account holders, where the rights owner alleges that its copyright has been infringed by file sharing taking place at an Internet Protocol (“**IP**”) address used by that account holder.

[7] There are three kinds of infringement notice which an Internet account holder might receive from his or her IPAP. These are a detection notice, a warning notice and an enforcement notice.

[8] The Act makes provision for an account holder to challenge each infringement notice he or she receives, and for the rights owner to either accept or reject any such challenges.

[9] 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.

Factual Background

[10] In this case, the IPAP is CallPlus Limited, trading as Slingshot (“**Slingshot**”). Slingshot issued infringement notices to the Respondent as follows:

- [a] A detection notice was issued on 7 May 2012.
- [b] A warning notice was issued on 2 August 2012.
- [c] An enforcement notice was issued on 1 October 2012.

[11] In each case, the infringement notices alleged infringement of copyright in a single sound recording, by the communication of that sound recording to the public. The detection notice referred to the sound recording “With Ur Love” by Cher Lloyd. The warning and enforcement notices were each concerned with the sound recording “Who You Are” by Jesse J. In addition, the enforcement notice referred to alleged incidences of unlawful file sharing on 12 May 2012 (With Ur Love) and 15 August 2012 (Who You Are). In each case uTorrent was identified as the relevant file sharing application.

[12] Although they were not referred to in the enforcement notice, the Applicant alleged in its submissions that a further 15 tracks by Jesse J. were uploaded, on three separate occasions.

[13] There was no challenge to any of the infringement notices.

The Applicant's Application to the Copyright Tribunal

[14] The Applicant applied to the Copyright Tribunal for an order under s.122O of the Act, on 2 November 2012.

[15] Pursuant to s.122J(2)(c) of the Act, the Applicant identified the alleged infringements by the Respondent in respect of which it sought an order from the Tribunal, as the five instances of alleged infringing file sharing referred to in the enforcement notice.

[16] The Applicant claimed the sum of \$215.10 for each of the five alleged infringements. It also claimed an additional sum of \$3,000, together with the fees it had paid to Slingshot for the issue of the infringement notices (\$143.75), and the application fee it had paid to the Tribunal (\$200). The total amount claimed was \$4,419.25.

The Parties' Submissions

The Applicant

[17] The Applicant filed detailed written submissions. They are summarised below under the heading "Discussion and Findings".

The Respondent

[18] The Respondent filed a one-page response to the Application, in an email from a Hotmail address. In her response, the Respondent said that her daughter had previously downloaded "a few songs" from uTorrent, having been told by her friends, and informed by the site itself, that this was legal. She said that her daughter would never have done this if she had thought it was illegal, and that she could not understand how it *could* be illegal. The Respondent stated that the site "all looks very legitimate with regular notifications of being able to download the latest version".

[19] The Respondent also said: "We have never received any notices of warning from our Internet provider with regards to this. All I receive from them is my monthly bill."

[20] The Respondent concluded by asking the Tribunal to consider her "fully made aware and warned", and by saying that she would definitely not be using any site like this again.

Applicant's Reply

[21] In reply, the Applicant emphasised that the Respondent had been found to be *uploading* copyright material via uTorrent in each of the five alleged infringements. The Applicant also submitted that the Respondent's admission that her daughter has previously downloaded "a few songs from uTorrent" constituted an admission that there had been further unlawful file sharing undertaken, beyond the instances of uploading which had been detected. The Applicant submitted that the Respondent's statement was likely to be an underestimate.

[22] On the question of the sending of the infringement notices, the Applicant said that it had checked the position with Slingshot. It set out in its Reply the means by which Slingshot says that it forwarded the infringement notices to the Respondent.

The Applicant submitted that there had been proper notification of the three infringement notices.

No Hearing

[23] Neither party has requested a hearing, and the Tribunal sees no need to convene one. Accordingly, the application is being determined on the papers pursuant to s.122L of the Act.

Discussion and Findings

Presumptions

[24] Section 122N of the Act provides that, in proceedings before the Tribunal, a number of matters concerning infringement notices issued under the Act are presumed unless the account holder submits evidence that (or gives reasons why) one or more of the presumptions does *not* apply. If an account holder does submit such evidence or give such reasons, the rights owner must then satisfy the Tribunal that, in relation to the relevant infringement or notice, the particular presumption or presumptions is/are correct (s.122N(3)).

[25] The statutory presumptions are as follows:

- [a] That each incidence of file sharing identified in the notice constituted an infringement of the rights owner's copyright in the work identified; and
- [b] That the information recorded in the infringement notice is correct; and
- [c] That the infringement notice was issued in accordance with the Act.

[26] There is nothing to suggest that the first two presumptions should not be applied in this case. The Respondent has not submitted any evidence, or offered any reasons, why they should not be; indeed she has acknowledged that her daughter has downloaded songs from uTorrent. However there is an issue over the third presumption: the Respondent denies receiving any "notices of warning" from Slingshot with regard to the present allegations. She says that all she has received from Slingshot are her monthly bills.

[27] Whether the infringement notices were properly sent is an important issue, because the Tribunal cannot make any order requiring payment of any sum to the Applicant unless it is satisfied that each of the infringement notices was issued in accordance with this Act (s.122O(1)(b)).

[28] Under s.122C(5) of the Act, Slingshot was required to send the infringement notices to the Respondent "by whatever method [Slingshot] uses to communicate with [the Respondent] for billing purposes, unless [the Respondent] and [Slingshot] agree in writing to use a different method". The steps Slingshot took, as reported by the Applicant in its Reply, were as follows:

- [a] the Respondent having elected to receive Slingshot's monthly bills by ordinary mail, Slingshot sent the detection, warning, and enforcement notices to her by post, with Slingshot's address details;
- [b] an electronic copy of each notice was also sent by Slingshot by pdf. to an email address the Respondent had nominated.

If that information is correct, it appears that Slingshot did comply with its notification obligations under s.122C(5).

[29] In considering whether the infringement notices were issued in accordance with s.122C(5), the Tribunal notes first that the Respondent did receive the formal notice of the present proceedings which the Tribunal sent to her at the physical address provided to it by Slingshot under s.122J(iii) of the Act. That would have been the same address to which Slingshot had been sending monthly bills to the Respondent, and the Respondent acknowledges having received those bills.

[30] Under s.122J(iii), Slingshot also provided to the Tribunal a "Slingshot" email address for the Respondent. Again, it is reasonable to suppose on the available evidence that that is the email address to which Slingshot says that it sent pdf copies of the infringement notices.

[31] The Respondent has not sought to challenge the advice provided by Slingshot via the Applicant's reply. If she thought that advice was wrong, one might have expected her to investigate the position with Slingshot and seek to put the correct position before the Tribunal. She has not done that. Nor has she offered any reason why documents sent to her by Slingshot at her billing address would not have reached her, or referred at all to the Slingshot email address to which Slingshot says the notices were also sent (the Respondent used a Hotmail address to submit her response to the Tribunal).

[32] Taking all of these circumstances into account, the Tribunal does not think it plausible that Slingshot could have failed in its notification duties under s.122C(5) of the Act on three separate occasions, and then provided misleading or incomplete information (separately) to the Tribunal and to the Applicant about what it had done. If the Respondent's bare denial of receipt of the notices may be regarded as "evidence", or "reasons", why the relevant presumption should not apply¹, the information provided by the Applicant in its reply provides a sufficient rebuttal. The Tribunal is therefore satisfied that the infringement notices were issued by Slingshot in accordance with the Act.

In what Circumstances is the Complainant entitled to an Order directing the Respondent to pay it a Sum of Money under Section 122O?

[33] Section 122O(1) of the Act provides that the Tribunal must order an account holder to pay a rights owner a sum of money if the Tribunal is satisfied that:

- “(a) Each of the 3 alleged infringements that triggered the infringement notices issued to the account holder –*
 - (i) was an infringement of the rights owner's copyright; and*

¹ A point which the Tribunal finds it unnecessary to decide.

- (ii) *occurred at an IP address of the account holder; and*
- (b) *The 3 notices were issued in accordance with this Act.”*

[34] Those provisions are subject to a discretion given to the Tribunal under s.122O(5) of the Act, under which the Tribunal may decline to make an order under subsection (1) if, in the circumstances of the case, the Tribunal is satisfied that making the order “would be manifestly unjust to the account holder”.

Application of Section 122O(1) and (5) in this Case

[35] Because of the application of the presumptions set out in subparagraphs 25(a) and (b) of this decision, and the Respondent’s acknowledgement that her daughter has downloaded a few songs from uTorrent, the Tribunal is satisfied that the Applicant has sufficiently proved each of the matters on which the Tribunal is required to be satisfied under s.122O(1)(a). For the reasons discussed at paragraphs 26 to 33 above, the Tribunal is also satisfied that the 3 notices were issued in accordance with the Act.

[36] Consequently, the Tribunal must order the Respondent to pay a sum under s.122O(1), unless the circumstances of the case are such as to satisfy the Tribunal that it would be “manifestly unjust” to the Respondent to do so.

[37] There is nothing in the evidence which would make it manifestly unjust for the Tribunal to make an order. The fact that the infringing file sharing might have been carried out by a member of the Respondent’s family is not enough, as the intention of the Act was clearly to make the account holder (in this case the Respondent) responsible for any infringing file sharing taking place on his or her Internet account. And the Respondent’s denial that she received any of the infringement notices, unsupported as it was by any evidence of circumstances which might have lent some credibility to the denial, is insufficient to satisfy the Tribunal that it would be manifestly unjust to make an order.

What Sum should be paid to the Applicant?

[38] Under s.122O of the Act, if the Tribunal orders payment of a sum under s.122O(1), the sum specified is to be determined in accordance with the Copyright (Infringing File Sharing) Regulations 2011 (“**the Regulations**”). Any sum awarded must include a sum in relation to every infringement identified in the enforcement notice that the Tribunal is satisfied was committed against the rights owner at an IP address of the account holder.

[39] In addition to any amount the Tribunal may award under s.122O(1), the Tribunal may also make an order requiring the account holder to pay to the rights owner either or both of the following:

- [a] A sum representing a contribution towards the fee or fees paid by the rights holder to the IPAP; and
- [b] Reimbursement of the application fee paid by the rights owner to the Tribunal (s.122O(3)).

[40] Clause 12(1) of the Regulations provides that the total amount the Tribunal may award, is the lesser of –

- [a] the sum of the amounts referred to in subclause (2)(a) to (d) of Regulation 12; and
- [b] \$15,000.

Determinations under Regulation 12(2) of the Regulations

[41] Subclause (2) of Regulation 12 requires the Tribunal to make certain determinations if it orders an account holder to pay a rights owner a sum of money under s.122O of the Act.

Regulation 12(2)(a)(i)

[42] If the relevant work was legally available for purchase in electronic form at the time of the infringement, the Tribunal is required to determine under this subclause “*the reasonable cost of purchasing the work in electronic form at that time*”.

[43] In this case, the works *were* legally available for purchase in electronic form at the times of the infringements. The Applicant says, and the Respondent does not dispute, that each of the tracks was available for purchase in electronic form from iTunes, at NZ\$2.39.

[44] The Applicant accepts that, on a literal reading of Regulation 12(2)(a), “the reasonable cost of purchasing the work” would be calculated at \$2.39 per track, or a total of \$11.95 for the five infringements referred to in the enforcement notice. However, the Applicant submits that such a sum would not be appropriate to compensate it for the act of making a copyright work available to a potentially very large audience via a P2P network. The Applicant submitted:

“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 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 \$2.39 each. This consideration was reflected in the MED Discussion Paper² where the MED noted that ‘the upload of works is more damaging to a rights owner than the download’.”

² A Discussion Paper published by the Ministry of Economic Development in 2011, in which public submissions were sought on certain matters which the Act (then the Copyright (Infringing File Sharing) Bill) provided should be the subject of regulations made under the Act. One of the matters addressed in the Discussion Paper was the form of regulations to be made “prescribing the sum, or a method or methods of calculating the sum, that the Tribunal may order an account holder to pay”.

[45] The Applicant noted in its submissions that the definition of “file sharing” in s.122A(1) specifically includes uploading, and that uploading of sound recordings is a serious concern for the Applicant and the copyright owners it represents. It drew attention to the ease with which uploaded tracks can be disseminated widely to downloaders using specialised P2P software.

[46] In this particular case, the specialised P2P software used by the Respondent was a BitTorrent “client” known as “uTorrent”. In *Roadshow Films Pty Ltd v iiNet Ltd* [2012] H.C.A. 16, three judges of the High Court of Australia³ noted that a user of the BitTorrent system who downloads a work (in that case it was a film) will automatically make the work available online on the user’s computer for downloading by other BitTorrent users in the group, until the relevant “.torrent file” is removed from the BitTorrent software installed on the user’s computer.

[47] The Applicant submitted that Regulation 12(2)(a) is directed at compensating the rights owner for its losses, and that limiting the amount determined under Regulation 12(2)(a)(i) to the market cost of one copy of the work in electronic form (in this case, \$2.39 for each work), would manifestly not compensate the Applicant for its losses caused by the Respondent’s activities in *uploading* the works. It submitted that the proper approach is for the Tribunal to read Regulation 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.

[48] Following that approach, the Applicant argued that the Tribunal should determine a sum with reference to the actual or estimated number of downloads occurring in respect of each infringing upload. As the Applicant put it, “if a file uploaded is then downloaded [by other users participating in a BitTorrent “swarm”] 100 times, the starting point for compensation could be the reasonable cost of purchasing a copy of the work multiplied by 100”. The Applicant acknowledged that it might then be appropriate to discount the resulting figure to take into account the fact that not every illegal download would represent an actual lost sale to the rights holder.

[49] The principal difficulty with that approach is that there can be no clear proof how many downloads of a given work have been made by users within a BitTorrent swarm.

[50] The Applicant attempted to deal with that difficulty by producing a report dated May 2008 commissioned by the International Federation of the Phonographic Industry, entitled “Analysis of User Demand on the BitTorrent Peer-to-Peer Network for Music”. The report was prepared by a company called Envisional Limited, an “internet intelligence agency” in the United Kingdom (“**Envisional**”). The purpose of Envisional’s report was to determine the level of demand on the BitTorrent peer to peer network for a range of music albums being offered by a typical user over a four week period. The key objective of the research was said to be to determine the number of copies of each album actually downloaded from a single locally-installed “client” on the BitTorrent network, to other persons on the same network during the research period.

³ French C.J., and Crennan and Kiefel JJ, at paragraph 21 of their judgment.

[51] Using the Envisional results, the Applicant submitted that a rational and conservative basis for a damages calculation for each infringement identified in the enforcement notice, would be to apply a “baseline” figure of 90 downloads to the single download cost of \$2.39, giving a compensation figure of \$215.10 for each of the five infringements identified in the enforcement notice. The Applicant accordingly argued that the total figure the Tribunal should determine under Regulation 12(2)(a)(i) of the Regulations, is \$1075.50.

[52] The Tribunal does not accept the Applicant’s submission on the interpretation of clause 12(2)(a)(i) 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.

[53] The plain language of clause 12(2)(a)(i) 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 five identified infringements.

[54] In the Tribunal’s view, the consequences of downloading by other participants in a BitTorrent swarm are to be considered under subclause (2)(d) of Regulation 12, which is concerned with deterrence, and not under the (compensation) provisions of subclause 12(2)(a).

[55] Taking all those factors into account, the Tribunal determines under clause 12(2)(a)(i) that the reasonable cost of purchasing the work “With Ur Love” in electronic form on 28 April 2012 and on 12 May 2012, was \$2.39 on each of those dates. The reasonable cost of purchasing the work “Who You Are” in electronic form on 20 July 2012, 15 August 2012, and 26 September 2012, was also \$2.39 on each of those occasions. The total amount to be awarded to the Applicant under Regulation 12(2)(a)(i) will therefore be \$11.95.

Regulation 12(2)(b)

[56] Under this subclause, the Tribunal is required 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”.

[57] Section 122O of the Act is also relevant. It provides at subsection (3) that the Tribunal “may also make an order requiring the account holder to pay to the rights owner ... (a) a sum representing a contribution towards the fee or fees paid by the rights owner to the IPAP ...”

[58] The Applicant claims the total sum of \$125 plus GST under this head, being the total amount charged by Slingshot in respect of the five infringements referred to in the application.

[59] The Applicant argued for full reimbursement of the fees paid by it to Slingshot. In the alternative, it argued that it should be entitled to a 95% “contribution” to the fees it has paid to Slingshot.

[60] The Tribunal sees no reason to depart from the “sliding scale” approach it has so far adopted in fixing respondents’ fees contributions under Regulation 12(2)(b).⁴ Under this approach the educative role of the first two notices is reflected in contribution “discounts” of two thirds and one third respectively, while the respondent is normally required to reimburse the Applicant fully for fees paid by the Applicant in respect of subsequent notices given by the Applicant in respect of infringements covered by its application. The result in this case, is that the Respondent is to pay the Applicant the sum of \$8.33 in respect of the infringement which resulted in the issue of the detection notice, \$16.67 for each of the two further infringements which occurred after the issue of the detection notice and before the issue of the warning notice, and \$25 for each of the two further infringements which occurred between the date of the warning notice and the date of the enforcement notice. The total of those sums is \$91.67.

Regulation 12(2)(c)

[61] Under this subclause, the Tribunal is required to determine “the cost of the application fee paid by the rights owner to the Tribunal”.

[62] Section 122O(3)(b) of the Act expressly contemplates that the Tribunal may include in its award a sum representing full reimbursement of the amount paid by the rights owner. The fee itself is fixed in the Regulations (Regulation 8), at \$200.

[63] In this case, the Applicant has succeeded in its application, and has paid a \$200 filing fee which it would not have had to pay if it were not for the continued infringing file sharing which occurred after the detection and warning notices were issued. In those circumstances, the Tribunal considers that an order for full reimbursement is appropriate.

[64] The Tribunal accordingly determines that the cost of the application fee paid by the Applicant to the Tribunal is the sum of \$200.

Regulation 12(2)(d)

[65] Under this subclause, the Tribunal must determine “an amount the Tribunal considers appropriate as a deterrent against further infringing”.

[66] Regulation 12(3) of the Regulations provides that the Tribunal may consider any relevant circumstances under subclause (2)(d), and that it *must* consider the three matters listed at subclause (3)(a) – (c) of the Regulation. The Tribunal now turns to consider each of those matters.

⁴ See for example, [2013] NZCOP 2 at para 64.

Regulation 12(3)(a) – the flagrancy of the Infringement

[67] The New Zealand Court of Appeal has addressed the meaning of “flagrancy” of copyright infringement, in the context of the making of “additional damages” awards under s.121(2) of the Copyright Act 1994.⁵ Those cases show that “flagrant” copyright infringement may involve scandalous, outrageous, or deceitful conduct of some sort. It will include “deliberate and calculated” copyright infringement.

[68] The Applicant submitted that the locating, downloading, installing and configuring of BitTorrent software in this case was a deliberate act. It further submitted that it would defy common sense to believe that the only occasions during the (almost) five month period when the Respondent (or person using the Respondent’s IP address) was online and making tracks available through use of the P2/P software happened to be the occasions detected and referred to in the infringement notices. The Applicant emphasised the Respondent’s failure to stop the illegal activity following the issue of the first two infringement notices, and the wide publicity which had been given to the Act in New Zealand news media. The Application also referred to the 15 other tracks made available for uploading from the Respondent’s IP address, on three separate occasions.

[69] In the Respondent’s favour on the issue of “flagrancy”, the Tribunal accepts that it may have been the Respondent’s daughter who was engaging in the infringing file sharing. Also, the Respondent does not appear to have derived any financial or other benefit from the infringing file sharing – it appears to be a fairly typical family situation, where one of the Respondent’s family members has been engaging in the infringing file sharing.

[70] In considering the “flagrancy of the infringement” under Regulation 12(3)(a) the Tribunal does not consider it appropriate to take into account the alleged 15 additional tracks which were said to have been uploaded on 3 separate occasions. They were not referred to in the enforcement notice, and the Applicant did not seek any order in respect of them in its Application to the Tribunal. Nor have they been sufficiently proved. The Applicant has not identified the IP address or addresses at which the additional tracks are said to have been uploaded, and it has not explained how it linked that IP address (or those IP addresses) to the Respondent. Nor has it provided any evidence of when these alleged additional instances of infringing file sharing occurred. The presumptions in s 122N of the Act cannot fill these gaps – they only apply to alleged instances of infringing file sharing which have been identified in an infringement notice.

[71] On the very limited evidence which is available, the Tribunal cannot say that the proved infringements have been “outrageous”, “scandalous”, “deceitful”, or “calculated”.

⁵ See *Wellington Dealers Limited v Dealers Guide Limited* [1984] 2 NZLR 66, referring to *Ravenscroft v Herbert* [1980] RPC 193, 208, and *SKIDS Programme Management Limited and Others v McNeill and Others* [2012] NZCA 314.

Regulation 12(3)(b) – the Possible Effect of the Infringing Activity on the Market for the Work

[72] The Applicant emphasised the market damage caused by P2P file sharing generally. It described the cumulative effect of multiple instances of illegal downloading as “devastating”, and contended that such activity has contributed to a halving of recorded music sales in New Zealand since 2002.⁶

[73] Consistent with its decisions under the Act to date, the Tribunal accepts that, as a general proposition, infringing activity by way of uploading sound recordings to the Internet in the course of the use of BitTorrent software may have some damaging effect on the market for those sound recordings. It also accepts that it is probable that some proportion of those free downloads will represent lost revenue to the copyright owner. The “possible effect” of the uploading on the market for the two sound recordings, may therefore be regarded as adverse.

[74] Beyond that, it is neither necessary nor appropriate for the Tribunal to engage in a complex attempt to quantify the effect of the infringing activity on the market for the two sound recordings. There would be too many unknowns in any such exercise, and the Envisional report does not help the Applicant overcome that difficulty.⁷ In any event what the Tribunal is ultimately concerned with under Regulation 12(2)(d) is not the quantification of the rights owner’s losses, but the determination of a figure which will be appropriate to deter the Respondent from further infringing. Determination of that figure will rarely, if ever, require a detailed calculation of a rights owner’s losses.

Regulation 12(3)(c) - whether the sum of the amounts referred to in subclause 2(a) to (c) would already constitute a sufficient deterrent against further infringement

[75] The Tribunal is satisfied that the determinations it has made under subclause 2(a) – (c) would not constitute a sufficient deterrent against further infringing.

[76] The total sum to be awarded to the Applicant under those subclauses is \$303.62, which is less than the total of the amounts paid by the Applicant to Slingshot and to the Tribunal. The Tribunal does not regard the Respondent’s denial that she received any of the enforcement notices as plausible, and she has been vague about the extent of the infringing file sharing which has taken place. It is likely that the infringements will have had some adverse effect on the markets for the two sound recordings. In those circumstances the Tribunal considers that a stronger deterrent is required than an order for payment of the sum of \$303.62.

Determination under Regulation 12(2)(d)

[77] The Applicant made detailed submissions under this heading. Its submissions included reference to decisions in other jurisdictions, and (for “reality check” purposes) penalties fixed under the Land Transport (Offences and Penalties)

⁶ According to the Applicant’s submission, sales of recorded music in New Zealand were \$124 million in 2002. By 2011 that figure (covering both physical and digital sales) had dropped to \$59 million.

⁷ The same view was taken by the Tribunal in Cases COP 003/12, COP 004/12, where the Applicant referred to the Envisional report in support of submissions which were similar to those which have been made in this case – see Case 003/12 at para 34, and Case 004/12 at para 77.

Regulations 1999. As in other decisions under the Act which the Tribunal has given to date, the Tribunal has not found submissions of that sort helpful. A decision on an appropriate amount to be ordered as a deterrent must be made in the specific context of the Act, and with regard to the specific nature of the Respondent's infringing file sharing.

[78] In this case the Applicant has proved five separate infringements, and the Respondent has acknowledged that her daughter has previously "downloaded a few songs" from uTorrent. The Respondent has not indicated how often that occurred, nor acknowledged that the particular tracks listed in the infringement notices were among those "downloaded" by her daughter. She did not mention the additional fifteen tracks which the Applicant alleges were made available for downloading at the Respondent's IP address on three separate occasions, and it is not clear whether the "few songs" which were acknowledged to have been downloaded may have included the additional tracks.⁸ The proved infringing file sharing extended over a period of almost five months.

[79] In the circumstances, the Tribunal considers that the appropriate amount for it to determine under Regulation 12(2)(d) as a deterrent against further infringing, is the sum of NZ\$100 for each of the five proved instances of infringing file sharing. There will be an order accordingly.

DECISION

[80] The Tribunal orders the Respondent to pay the sum of \$803.62 to the Applicant.

[81] That sum is made up as follows:

[a]	Regulation 12(2)(a)(i) –	For the two proved infringements relating to the work "With Ur Love", the sum of \$4.78. For the three proved infringements of the work "Who You Are", the sum of \$7.17.
[b]	Regulation 12(2)(b) -	cost of fees paid to IPAP, \$91.67.
[c]	Regulation 12(2)(c) -	cost of application fee paid to the Tribunal, \$200.
[d]	Regulation 12(2)(d) –	deterrent against further infringing, \$500 (being \$100 for each of the five infringements referred to in the enforcement notice).
	Total	\$803.62

⁸ While the allegations relating to these additional tracks have not been taken into account in considering the flagrancy of the proved infringements, the Tribunal considers that the vague nature of the Respondent's answer on the extent of the infringing file sharing which is alleged to have occurred, is something it may properly take into account in assessing the amount of any deterrent order under Regulation 12(2)(d).

Decision of the Copyright Tribunal delivered by Warwick Smith

DATED the 1st day of July 2013

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Warwick Smith
Member
Copyright Tribunal