

[2013] NZCOP 3

COP 013/12

UNDER

The Copyright Act 1994

BETWEEN

**RECORDING INDUSTRY
ASSOCIATION OF NEW
ZEALAND**

Applicant (Rights Holder)

AND

CAL2012-E000614

Respondent (Account Holder)

BEFORE THE COPYRIGHT TRIBUNAL

Mr Paul Sumpter

HEARING ON THE PAPERS

DECISION

Introduction

[1] Under the Copyright (Infringing File Sharing) Amendment Act 2011 (Act) the Copyright Tribunal (Tribunal) has been given jurisdiction to decide whether to order payment to the copyright owner by persons found to have down/uploaded copyright works from the Internet without permission.

[2] The applicant here is the Recording Industry Association of New Zealand (RIANZ) which filed the application to the Tribunal as agent for the copyright owners Universal Music Group, Inc, Societe D'Invertissements et de Gestion and EMI Records Limited. The respondent is an individual internet account holder.

[3] The case concerns the uploading of sound recorded songs by means of the BitTorrent Protocol (Azureus) software program on three separate occasions. The songs were "Daniel" by Elton John (twice) and "Mylo Xyloto" by Coldplay. According to the evidence submitted by RIANZ on two of the three occasions the account holder or a person using the account holder's internet address uploaded 43 copyright protected tracks, one of which is specifically referred to in the Detection and Warning Notices issued to the account holder. On another occasion 14 copyright protected tracks were uploaded one of which was referenced in the Enforcement Notice issued to the account holder.

[4] No response of any type (including any formal "*challenge*" under s 122G) has been received from the account holder either by RIANZ or the Copyright Tribunal.

[5] Complying with the relevant time periods and procedures RIANZ has applied to the Tribunal under s 122J for an order requiring payment by the account holder in accordance with s 122O.

[6] The application was received by the Tribunal on 30 October 2012 and included:

- a copy of the Enforcement notice;
- evidence that RIANZ acts as the agent of the copyright owners;
- a statement of which of the alleged infringements identified in the Enforcement notice RIANZ seeks to enforce;
- a statement of the amount (\$3,931.55) that RIANZ is seeking from the account holder; and
- the prescribed fee.

[7] Following receipt of that information the Tribunal ordered CallPlus Limited (Slingshot), the relevant internet protocol address provider (IPAP) to produce to the Tribunal the name and contact details of the account holder and copies of the Detection and Warning notices sent to that account holder. The Tribunal was satisfied that these details and notices were provided to it as soon as practicable and the Tribunal gave notice of the proceedings to the account holder.

[8] No party has requested to be heard in this matter and accordingly, the Tribunal is issuing this decision on the papers pursuant to s 122L.

[9] To be clear, the papers on which this decision is determined are the following:

- RIANZ's application to the Tribunal;
- copies of the infringement notices sent to the account holder;
- submissions provided by RIANZ dated 26 October 2012.

[10] Under s 122L the Tribunal may determine its own procedure for deciding an application that is dealt with on the papers, subject to the Copyright (Infringing File Sharing) Regulations 2011 (Regulations). Under s 122L(4) the Tribunal must make all reasonable efforts to ensure that, unless it orders otherwise or an order is made against the account holder, the identity and contact details of the account holder are not disclosed to the rights owner. No such disclosure has been made in the present case.

[11] The critical issues for the Tribunal concern the evidence of copyright infringement and, if satisfied on that score, an assessment, by taking into account all the relevant and prescribed factors, of the amount to be paid by the account holder for the infringements.

Infringement

[12] Section 122N sets out, in relation to an infringement notice, certain presumptions:

- that each incidence of file sharing identified in the notice constituted an infringement of the copyright in the work identified; and

- that the information recorded in the notice is correct; and
- that the notice was issued in accordance with this Act.

[13] File sharing networks involve material being uploaded via, or downloaded from, the internet using an application or network that enables the simultaneous sharing of material between multiple users. Such networks are not illegal in themselves, although much of the content of file sharing networks is music, film, television, books or software that is protected by the Copyright Act 1994. In this case, the applicant alleged that copyright in the songs was infringed by way of the account holder uploading the works, i.e. communicating the works to the public in contravention of s 16(1)(f) of the Copyright Act 1994.

[14] RIANZ provided considerable detail in its submission including a description of the method it used employing a methodology known as “MarkMonitor” (formerly called “DetecNet”) to gather evidence of the infringing. Reference was also made to Australian Federal Court and English High Court cases in which this methodology had been accepted. Although the description of the method was of a general nature, it should be read in conjunction with the specific information about the sound recordings uploaded in this particular case. The information set out, amongst other things, the internet protocol address (IP), the exact times and dates of the uploading, the identity of the sound recordings, the copyright owners’ names and the file sharing application or network used.

[15] There has been no evidence provided by the account holder under s 122N(2) as to why any one or more of the presumptions set out above do not apply with respect to any particular infringement identified in this case.

[16] The Tribunal is satisfied that, in accordance with s 122O(1), to the standard required under the Act, each of the three infringements alleged by RIANZ, on behalf of the rights owners, were infringements of copyright, occurred at the IP address of the account holder and that the three prescribed notices were issued in accordance with the Act. Therefore the Tribunal must order the account holder to pay RIANZ a sum calculated as required in s 122O.

Penalties

[17] Section 122O(2) stipulates that the sum to be ordered must be determined in accordance with the regulations and 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. Section 122O(3) states that if the Tribunal makes an order under subs (1) it 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 owner to the IPAP;
- [b] Reimbursement of the application fee paid by the rights owner to the Tribunal.

[18] By subs (4), the total amount ordered by the Tribunal to be paid by the account holder must not exceed \$15,000.

[19] Regulation 12 sets out the calculation of sums payable under s 122O. Subclause (1) states that the sum that the Tribunal may order an account holder to pay under s 122O is the lesser of:

[a] The sum of the amounts referred to in subcl (2)(a) to (d); and

[b] \$15,000.

[20] Regulation 12 goes on to say that if the Tribunal orders an account holder, under s 122O, to pay a rights owner a sum, the Tribunal must determine under r 12(2)(a) *“the reasonable cost of purchasing the work in electronic form”* if each of the works were so available at the relevant time.

[21] In addition, under r 12(2)(b), the Tribunal must 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

[22] Under regulation 12(2)(c),

“The cost of the application fee paid by the rights owner to the Tribunal”.

[23] Dealing first, therefore, with regulation 12(2)(a), the Tribunal must determine *“for each work”* that copyright has been infringed at the IP address of the account holder. The regulation is parsimonious with words. There is a reference simply to *“each work”* which *“has been infringed”*. In the present case the account holder has infringed on three separate occasions. According to the RIANZ submission each sound recording track was legally available for purchase at the time in electronic form from iTunes at a cost of NZ\$2.39 as an individual track. So that is, all other things being equal, *“the reasonable cost”* and amounted to, in total, \$7.17. However, RIANZ submitted that the object of the regulations and the Act is to compensate the rights owner *“for the act of making a copyright work available to a potentially very large audience via a P2P network”* (para 27 of the submission). RIANZ refers to the Discussion Paper of the (then called) Ministry of Economic Development in 2011 in support of its argument that the *“proper approach”* is to determine a sum *“with reference to the reasonable cost of purchasing a copy of the work”* and therefore the Tribunal should include in this sum an amount taking account of *“the actual or estimated number of downloads occurring in respect of each infringing upload”* (paras 31 and 32). Based upon overseas literature and guesswork, RIANZ submits that the Tribunal should use a *“baseline figure of 90 downloads per infringing upload”* (taking, it was submitted, a conservative approach) to determine the *“compensation”* at \$645.50 (paras 38 and 39).

[24] However, the wording of s 122O is quite specific and refers to the particular, identified infringements. Further, there is no reference in r 12(2)(a) to any other matters which might be taken into account. In our view, if the legislature had wished to incorporate such a compensatory approach, it would have said so. Another problem for RIANZ is that there is no specific evidence of what downloading has occurred in the present case.

[25] Accordingly, included in the sum that the account holder will be ordered to be pay is \$7.17, the reasonable cost of obtaining the three sound recordings legally.

[26] Under r 12(2)(b), the Tribunal must then determine the cost of any fee or fees paid by the rights owner to the IPAP. Section 122O(3), however, provides that the Tribunal may make an order requiring the account holder to pay a sum representing a contribution towards the fees and/or reimbursement of the application fee paid by the rights owner to the Tribunal.

[27] There is something of a lacuna between the wording of r 12(2)(b) when compared with s 122O(3)(a). The former seems to suggest that the rights owner should be reimbursed for all fees, the latter talks of a “*contribution*”. The Tribunal takes the view that in some cases full reimbursement may be warranted and in others a “*contribution*”.

[28] In the circumstances the applicant here is entitled to a “*contribution*” and for present purposes the Tribunal calculates that as follows. The fees paid to the IPAP were \$75 (\$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. It is the final step before an application is made to this Tribunal, by which time the account holder has ignored two opportunities to modify 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, RIANZ, (\$25); two-thirds of the Warning Notice (\$16.65) and one-third of the fee for the Detection Notice is payable (\$8.33). The total contribution to be paid, therefore, is \$50.

[29] Under r 12(2)(c), the Tribunal must determine the cost of the application fee paid by the rights owner and therefore the sum to be included in the amount to be paid by the account holder will be \$200, being reimbursement of what RIANZ has paid to the Tribunal as the application fee.

Deterrent

[30] This brings us to r 12(2)(d), under which the Tribunal must determine an amount which it considers “*appropriate as a deterrent against further infringing*”. Extensive submissions were made by RIANZ on this point. These included references to the Discussion Paper issued by MED regarding the background to the Act, the Select Committee’s report on the Bill, general information including sales losses from “*music piracy*” in New Zealand, an extract from the judgment of Harvey DJ in *NZ Police v Vile* (23 August 2006, District Court, Auckland), a decision under the Fair Trading Act in *Commerce Commission v LD Nathan* [1990] 2 NZLR 160 and comments on regulation 12(3).

[31] First we note that there is a possible ambiguity in r 12 because 12(2)(d) seems to suggest that the Tribunal *must* determine on appropriate amount as a deterrent but 12(3) asks *whether “an amount is appropriate, and if so, what that amount should be ...”*. We will be guided by r 12(3). It states that in considering whether an amount is appropriate as a deterrent and, if so, what that amount should be, the Tribunal is directed to “*consider any circumstances it considers relevant, but must also consider –*

- (a) *the flagrancy of the infringement; and*
- (b) *the possible effect of the infringing activity on the market for the work; and*
- (c) *whether the sum of the amounts referred to in subclause (2)(a) to (c) would already constitute a sufficient deterrent against further infringing.*

[32] The RIANZ submission, rightly we think, states that all three infringements must be considered in this case. We consider that in the present case some amount should be awarded as a deterrent. There is nothing before us that would require us to consider whether or not making an order would be “*manifestly unjust*” in accordance with S122O(5).

[33] We note that the account holder has chosen to provide no information or explanation.

[34] Looking at the factors mentioned in r 12(3), the word “*flagrancy*” also appears in s 121(2) of the Copyright Act 1994, in relation to the calculation of damages for infringement under other parts of the Act. RIANZ referred to the New Zealand Court of Appeal decision in *Wellington Newspapers Ltd v Dealers Guide Ltd* [1994] 2 NZLR 66 as an indication of the approach that the Tribunal might take. However, we think that s 121(2) operates in an entirely different context to the present one. That provision, for example, is considered in light of detailed and sworn evidence of what has occurred. RIANZ also referred to assessments in others jurisdictions. But we do not regard these as relevant as the laws are not equivalent. Nor do we regard the penalties fixed under other statutes, such as the Land Transport (Offences & Penalties) Regulations 1999 referred to by RIANZ, as being of any relevance.

[35] The difficulty faced by the Tribunal is that almost all the infringing acts likely to come before it under this legislation will be “*deliberate*” and possibly “*calculated*” (to employ words that have been used in relation to the meaning of “*flagrancy*”). Taking the word at its face value, there is a hint in the evidence in the present case of a degree of “*flagrancy*” particularly given the overall number of uploads and the six month time period over which the infringing occurred. But there is insufficient information before us to make this factor of clear significance.

[36] As to the effect on the market, we take into account the submission of RIANZ the likely fact that the account holder will have enabled other parties to download the sound recordings identified as infringements every time that the account holder used the BitTorrent software (see paras 51-52 of the RIANZ submission). We note, too, that a total of 97 tracks were made available for uploading at the internet address of this account holder. We take into account the information about legal downloading services available in New Zealand set out in the RIANZ submissions.

[37] Finally we note that the sums to be included in the order and made under r (2)(a), (b) and (c) are relatively modest and do not in our view constitute in themselves a sufficient deterrent.

[38] Looking at matters in the round, and taking into account all of the factors set out above, we believe that an appropriate amount to be paid as a deterrent to be \$180 per infringement, i.e. a total of \$540.

Orders

[39] In summary, therefore, the Tribunal orders the respondent to pay to the applicant the sum of \$797.17 comprised as follows:

- [a] Under regulation 12(2)(a)(i) - \$7.17;
- [b] Under regulation 12(2)(b) – a \$50 contribution towards the IPAP fees paid by the applicant;
- [c] Under regulation 12(2)(c) – reimbursement of the application fee of \$200; and
- [d] Under regulation 12(2)(d) – a deterrent sum of \$540.

Total: \$797.17

Decision of the Copyright Tribunal delivered by Mr Paul Sumpter

DATED the 19th day of February 2013

Paul Sumpter
Member
Copyright Tribunal