

[2013] NZCOP 4

COP 009/12

UNDER

The Copyright Act 1994

BETWEEN

RIANZ

Applicant

AND

TCLE[A]-T6054929

Respondent

BEFORE THE COPYRIGHT TRIBUNAL

HEARING ON THE PAPERS

DECISION

The Application

[1] The applicant has applied for an order under s 122O of the Copyright Act 1994 (the 1994 Act). Sections 122A-122U of the 1994 Act were added by the Copyright (Infringing File Sharing) Amendment Act 2011 (the 2011 Act). These sections concern file sharing of copyright-protected works.

[2] The papers received by the Tribunal in the context of this application include the following: a detection notice, dated 18 January 2012; a warning notice dated 18 April 2012; and an enforcement notice, dated 4 September 2012. Under the 2011 Act, warning, and detection notices are referred to as “infringement notices.” The infringement notices were served by Telstra Clear Ltd, the relevant Internet Protocol Address Provider (IPAP). According to the applicant, the respondent was the account holder of the IP addresses at which the file sharing is alleged to have occurred. No challenge by the respondent to any of the infringement notices is on file.

The Statutory Obligation to Order Payment

[3] Section 122O(1) of the 1994 Act requires the Copyright Tribunal to order the account holder to pay a sum to the rights holder if the Tribunal is satisfied that:

- [a] Each of the three alleged infringements that triggered the infringement notices amounted to an infringement of the right owner’s copyright;
- [b] The infringements occurred at the IP address of the account holder; and
- [c] The three notices were issued in accordance with the Act.

[4] There is an exception in s 122O(5), under which the Tribunal may decline to make an order if “in the circumstances of the case, the Tribunal is satisfied that making the order would be manifestly unjust to the account holder.” In other cases,

the legislation requires the Tribunal to order payment. Because no challenge has been received, there is no basis for s 122O(5) to apply.

[5] In s 122N(1) of the Act there are a number of evidentiary presumptions that are relevant to the Tribunal's statutory obligation to order payment:

“122N Infringement notice as evidence of copyright infringement

- (1) *In proceedings before the Tribunal, in relation to an infringement notice, it is presumed—*
- (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 this Act.*
- (2) *An account holder may submit evidence that, or give reasons why, any 1 or more of the presumptions in subsection (1) do not apply with respect to any particular infringement identified in an infringement notice.*
- (3) *If an account holder submits evidence or gives reasons as referred to in subsection (2), the rights owner must satisfy the Tribunal that, in relation to the relevant infringement or notice, the particular presumption or presumptions are correct.”*

[6] These presumptions provide the principal basis on which the Tribunal is to determine that it is “satisfied” of the matters to which s 122O(1) refers. Because no evidence has been filed by the respondent, subss (2) and (3) are not engaged.

[7] In the enforcement notice, the following appears under the heading “Detail of alleged infringement that triggered this notice”:

*“Date and Time: 26/08/12 18:05:38
 IP Address: 121.74.161.222
 Protocol: BitTorrent
 File Sharing Application: uTorrent 2.2.1
 [...]
 Title: EVERY TEARDROP IS A WATERFALL
 Author: COLDPLAY
 File Name: Coldplay – Every Teardrop Is a Waterfall.mp3
 File Size: 9622194
 Copyright Owner: EMI Records Ltd (EMI Music New Zealand)
 Type of Work: Sound recording (14(1)(b))
 Restricted Act: Copyright has been infringed by this account holder communicating the work to the public (16(1)(f)).”*

[8] The applicant included similar information (referring to the song, “The Best Thing I Never Had”, by Beyonce) in the detection and warning notices.

[9] Section 122A of the 1994 Act defines “infringement” as “an incidence of file sharing that involves the infringement of copyright in a work by a user.” This

definition applies only to ss 122A to 122U of the 1994 Act. In ss 122A to 122U, therefore, “infringement” has two elements. There must be file sharing, and, the file sharing must involve the infringement of copyright by the user.

[10] File sharing is defined in s 122A:

“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.”*

[11] The Tribunal accepts that in each of the three notices there is sufficient information to engage the relevant presumptions in s 122N. Each notice identifies the name of the file sharing application, as well as the relevant protocol. While the information might have been set forth in a clearer manner, the Tribunal accepts that the notices sufficiently describe copyright infringement effected by file sharing. The Tribunal is therefore satisfied of the relevant matters in s 122O(1). Accordingly, it is required to order the account holder to pay a sum to the rights holder.

Quantifying the Sum

[12] Section 122O(2) prescribes the bases on which the sum is to be calculated:

“The sum specified in the Tribunal order must be determined in accordance with regulations made under this Act 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.”

[13] The relevant clause in the Copyright (Infringing File Sharing) Regulations 2011 is as follows:

“12 Calculation of sums payable under section 122O of the Act

- (1) The sum that the Tribunal may order an account holder to pay under section 122O of the Act is the lesser of—*
 - (a) the sum of the amounts referred to in subclause (2)(a) to (d); and*
 - (b) \$15,000.*
- (2) If the Tribunal orders an account holder, under section 122O of the Act, to pay a rights owner a sum, the Tribunal must determine the following:*
 - (a) for each work in which the Tribunal is satisfied that copyright has been infringed at the IP address of the account holder,—*
 - (i) if the work was legally available for purchase in electronic form at the time of the infringement, the reasonable cost of purchasing the work in electronic form at that time; or*
 - (ii) if the work was not legally available for purchase in electronic form at the time of the infringement but was available in some other form, the reasonable cost of purchasing that work in another form at that time; or*

- (iii) *if neither subparagraph (i) nor subparagraph (ii) applies, the amount claimed by the applicant in respect of the work, or any other reasonable amount determined by the Tribunal:*
 - (b) *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*
 - (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.*
- (3) *In considering whether an amount is appropriate under subclause (2)(d) and, if so, what that amount should be, the Tribunal may 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.”*

[14] For the purposes of s 122O of the 1994 Act, the term “infringement” is accorded the specific meaning set forth in s 122A. In terms of s 122O(2), the phrase “infringement identified in the enforcement notice” for which a sum must be specified means the incidence(s) of “file sharing” identified in the enforcement notice. In this context, “infringement” does not mean other acts of infringement of the copyright owners’ exclusive rights (e.g. as set forth in s 16) that might have been facilitated by the file sharing.

[15] In this application, the Tribunal does not accept the applicant’s submission that the “sum” should be augmented because the file sharing involved communication of the work to the public, one of the exclusive rights of the copyright owner enumerated in s 16 of the 1994 Act. As is noted above, s122O(3) is not engaged. The Tribunal does not in this application look beyond the statutory presumptions in s 122N. That the infringement involved unlicensed communication may, however, be relevant to deterrence, which the Tribunal discusses below.

[16] Under s 122O(2), the Tribunal is instructed to determine the sum “in accordance with the regulations made under this Act” and to include a sum “in relation to every infringement identified in the *enforcement notice*” (added emphasis). In this application, the enforcement notice refers to one work – the Coldplay song. However, the regulations require the Tribunal to determine the relevant sum “for each *work* in which the Tribunal is satisfied that copyright has been *infringed at the IP address of the account holder*” (added emphasis). It is not clear why s 122O makes specific reference to the enforcement notice, while the regulations refer to every infringement that the Tribunal is satisfied was committed at an IP address of the account holder. The number of works infringed at the IP address of the account holder (as identified in the three requisite infringement notices) might be greater than the number of works identified in the enforcement notice. In this application, *two* works are identified in the infringement notices that form the basis of this application: the Beyonce song (in the detection and warning notices) and the Coldplay song (in the enforcement notice).

[17] Given the two requirements in s 122O – that the sum must be determined in accordance with the regulations *and* that the Tribunal must include a sum in relation to every infringement that the Tribunal is satisfied occurred at the respondent’s IP address (or addresses) – the Tribunal is of the view that it should include in the sum a separate amount for each work whose infringement is appropriately identified in the three infringement notices that form the basis of an application. Here, it seems relevant that the evidentiary presumptions in s 122N apply to infringement notices, not only the enforcement notice. In the light of those presumptions, the Tribunal is satisfied that two works were infringed at the respondent’s IP address: the Coldplay and Beyonce songs. Under subclause 12(2)(a)(i), the price for an electronic copy of each work is, according to the applicant’s submissions, \$2.39. For two works infringed, the total is \$4.78.

[18] In this application, the Tribunal is not required to consider any additional infringements specified in the infringement notices. The additional infringements all relate to the same work: the Beyonce song. The Tribunal is directed to take account of infringed *works*, not the number of copies of a work (or works). Furthermore, the total number of works infringed at the respondent’s IP address would not appear to be relevant to the other matters to which subclause 12(2) refers. For example, the number of works infringed does not affect the application fees paid by the applicant.

[19] Determining the contribution to the total sum to be ordered under reg 12(2)(b) and (c) is more difficult. As is noted above, Regulation 12(2) requires the Tribunal to determine a number of “sums”, including those set forth in (b) and (c):

- “(b) 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*
- (c) the cost of the application fee paid by the rights owner to the Tribunal.”*

[20] According to reg 12(1)(a) the sum that the Tribunal may order an account holder to pay under section 122O of the Act is the sum of the amounts referred to in reg 12(2)(a) to (d), including, of course, those set forth immediately above. However, s 122O(3) of the 1994 Act provides:

“If the Tribunal makes an order under subsection (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 under section 122U:*
- (b) reimbursement of the application fee paid by the rights owner to the Tribunal.”*

[21] The fees to which this subsection refers appear to be in respect of the same amounts to which reg 12(2)(b) and (c) refer, which, as the Tribunal notes above, reg 12(1)(a) prescribes must be included in the *total* sum to be ordered to be paid. The regulations require the fees paid to the IPAP and the Tribunal to be calculated as part of the total sum payable to the applicant, whereas the Act provides that if the Tribunal makes such an order “it may also” make an order requiring the account holder to pay to the rights holder “a sum representing a contribution toward the fee or fees paid to the IPAP” and “reimbursement of the application fee paid by the rights holder.”

[22] As is noted above, the Act directs that the sum must be determined in accordance with the regulations. The regulations must of course be read as giving effect to the Act. Assuming that double payment was not intended, the Tribunal considers that the sums to which regs 12(2)(b) and (c) refer are those stipulated by s 122O(3). In other words, under reg 12(2)(b), read in the light of s 12O(3)(a) of the Act, the applicant is entitled to a sum representing “a contribution” to the fee(s) paid to the IPAP; under reg 12(2)(c), read in the light of s 122O(3)(b) of the Act, the applicant is entitled to “reimbursement of the application fee paid by the rights holder.” Those sums are then to be included in the total sum awarded. The Tribunal considers this approach to reconcile both the regulations and the Act, given the priority that must be accorded to the latter.

[23] The Tribunal calculates those sums as follows. As to the fee paid to the IPAP, this application to the Tribunal was triggered, as is required by the legislation, by the three requisite notices: detection, warning, enforcement. The total of the fees paid to the IPAP was \$75.00 (\$25.00 each). The Tribunal notes the educative role of the first two notices, especially the detection notice. The educative role of an enforcement notice is, however, significantly less: it is the final step in the statutory process on which an application to the Tribunal is conditioned. In the light of this distinction, the Tribunal considers that the entire cost of the fee for the enforcement notice should be included in the “sum” to be paid the applicant (\$25.00); however, only one-third of the fee for the first (detection) notice is payable (\$8.33) and two-thirds of the second (warning) notice (\$16.66). Accordingly, the total amount in fees paid by the applicant was \$75.00, but the sum representing the “contribution” to be included in the total sum payable is \$49.99 (taking into account reg 12(2)(b) read in the light of s 122O(3)(a)).

[24] The position under reg 12(2)(c) and s 122O(3)(b) is simpler. Unlike in s 122O(3)(a), there is no reference in reg 12(2)(c) to a “contribution” of the amount to be paid. Therefore, the sum determined by the Tribunal for the purposes of reg 12(2)(c) is the full application fee: \$200.

[25] The final matter to be considered is, in terms of reg 12(2)(d), “an amount that the Tribunal considers appropriate as a deterrent against further infringing.” Subclause 12(3) provides:

“In considering whether an amount is appropriate under subclause (2)(d) and, if so, what that amount should be, the Tribunal may 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.”*

[26] The regulations do not stipulate whether the reference to deterrence is directed to an individual respondent in a particular case or whether the Tribunal is entitled to consider the deterrence effect of the award on file sharing activity more generally. The reference in 12(3)(a) to “the flagrancy of the infringement” appears to focus on the infringement by the individual respondent. However, phrase “the possible effect of the infringing activity on the market for the work” in 12(3)(b) could have a broader focus, albeit one trained only on the specific works to which the infringement notices refer, not file sharing of copyright-protected works more generally. (The

terminological distinction between “the infringement” and “infringing activity” presumably signals some relevant difference.) Of course, to segregate individual and general deterrence may be unrealistic. The Tribunal’s decisions will be published, and an order made against a specific respondent might itself serve as a more general deterrent to others.

[27] Those points made, the Tribunal turns to the three factors it must consider under subclause 12(3):

(a) *The flagrancy of the infringement;*

[28] The Tribunal does not consider the infringements that are the subject of this application to be “flagrant.” The Tribunal takes account of the applicant’s references to the Court of Appeal’s recent decision in *Skids Programme Management Limited v McNeill* [2013] 1 NZLR 1 and the analysis of “flagrancy” that case sets forth. In the present application, however, only the minimum conditions for an application under the 2011 Act to be filed have been satisfied. If this infringement were characterized as “flagrant”, the infringements stipulated in most, if not all, applications would be similarly characterized.

(b) *The possible effect of the infringing activity on the market for the work*

[29] The Tribunal acknowledges the possibility that the market for the relevant works has been deleteriously affected. As the applicant explains in its submissions, making a work available through the relevant protocol would likely lead to unlicensed downloads by others, including some who might have otherwise purchased copies of the work.

(c) *Whether the sum of the amounts referred to in subclause (2)(a) to (c) would already constitute a sufficient deterrent against further infringing*

[30] The Tribunal does not consider that the sum of the amounts calculated under subclause (2)(a) to (c) would constitute a sufficient deterrent against further infringing. The circumstances taken into account by the Tribunal include the making available of unlicensed copies of the copyright-protected works to others and the retail costs of files containing these works.

[31] The Tribunal also takes account of the number of infringements that the Tribunal is satisfied occurred at the respondent’s IP address and notes that the respondent has provided no explanation of or excuse for these infringements. In the light of these relevant circumstances, the Tribunal considers that an addition of \$200 to the sum of the amounts in subclause (2)(a) to (c) would serve as an appropriate deterrent against further infringing.

[32] The total sum to be paid by the respondent is as follows:

Under reg 12(2)(a):	\$7.17
Under reg 12(2)(b):	\$49.99
Under reg 12(2)(c):	\$200.00
Under reg 12(3):	\$200.00.

The total sum awarded is therefore: \$457.16.

Decision of the Copyright Tribunal delivered by Graeme Austin.

DATED at WELLINGTON this 21st day of February 2013

Graeme Austin
Member
Copyright Tribunal