

[2013] NZCOP 12

COP 015/12

UNDER

The Copyright Act 1994

BETWEEN

**RECORDING INDUSTRY
ASSOCIATION NEW ZEALAND**

Applicant

AND

TCLE[A]-T6518151

Respondent

BEFORE THE COPYRIGHT TRIBUNAL

Jane Glover

DECISION ON THE PAPERS

Introduction

[1] This case concerns alleged file sharing infringement under s.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. The Act makes provision for an account holder to challenge each infringement notice it receives, and for the rights owner to either accept or reject any such challenges.

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

[3] 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”).

Parties

[4] 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 copyright owner, JIVE Records (Sony Music Entertainment New Zealand Limited).

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

Factual background and procedural history

[6] This case involves the alleged uploading on four separate occasions of the sound recording *Beautiful People* by Chris Brown. Only three of these occasions triggered infringement notices, however, due to the timing provisions in the legislation which provide for two 28-day “on-notice periods” after each of the first two infringement notices are issued.² No further infringement notices can be issued during those periods.

[7] The initial detection notice was issued on 24 May 2012.

[8] The warning notice was issued on 14 August 2012. During the ensuing on-notice period, the Applicant sent one further notice to the IPAP. Because only the IPAP holds the information matching IP addresses and account holders, the Applicant did not know the identity of the account holder or that the further alleged infringing was taking place within an on-notice period.

[9] The enforcement notice was issued on 23 October 2012.

[10] On 1 November 2012, the Respondent challenged the enforcement notice, saying as follows:

“As far as I was aware (after checking both our computers) we had never downloaded this song and the IP addresses quoted didn’t match our computers. After advice from your staff we investigated Utorrent ourselves but my son found that it was on his girlfriend’s computer from at least 2 years ago. It appears that when they accidentally opened that file it has “seeded”. We were totally unaware of this and now we know have deleted Utorrent so [it] should never happen again. We would have done this earlier if we had understood how this was happening as we thought it just was a mistake as we know we hadn’t downloaded this song ever, not just dates quoted.”

[11] On 14 November 2012, the Applicant rejected the challenge to the infringement notice. It explained that the relevant IP address was assigned to the Respondent’s internet connection in a dynamic capacity, which means that it could be changed periodically, without notice. It stated that the Applicant’s evidence pack proved unequivocally that someone with access to the Respondent’s internet connection uploaded copyright protected music for downloading by third parties. It suggested

² See s.122E, s.122F and the definition of “on-notice period” in s.122A(1).

that the Respondent examine all personal computers for file-sharing software and any infringing sound recordings, and it also provided advice from Netsafe (an independent, non-profit organisation) regarding ways to reduce the risk of copyright infringement.

[12] This Application, together with detailed submissions and an authorisation of agent form, was filed with the Tribunal on 23 November 2012. The Applicant sought an award of \$2,175.40, including a deterrent sum of \$1,000.

[13] On 13 December 2012, a Response was filed with the Tribunal. The following excerpts demonstrate the Respondent's position:

"On receipt of the Detection Notice we thoroughly checked all personal computers in our house...for the file in question. As the file in question wasn't on any of our computers we took the Detection Notice to be either an error or to have occurred while we had a friend of the family staying, and assuming there would be no further infringement action we took no more action. At this point we had no idea what Bittorrent/uTorrent/a "file sharing application" was and failed to recognise the significance.

On receipt of the Warning Notice we realised that the file sharing was ongoing, and took additional steps to remedy the situation. We contacted out IPAP Telstra Clear...requesting help and support to resolve the issue swiftly... We called the IPAP more than once receiving conflicting responses from different employees. In the end we were left with the impression that we would receive a mail outlining detailed steps we could take.

On receipt of the Enforcement Notice, we still hadn't received a response from TelstraClear. We contacted them again and eventually managed to speak with someone who could offer help over the phone. They gave us information regarding what exactly a file sharing application is, and with this information we searched our computers and found that our son's girlfriend's computer, which she very occasionally brought to our house, had uTorrent installed and that on turning on her computer it was automatically running and she was unknowingly uploading the file in question over the uTorrent network. Once this was discovered, she not only removed the file but also the uTorrent software, which she hadn't knowingly used since the revision of the Copyright Law.

Though the above provides an admission of guilt in the respect that the file was indeed being uploaded through our account, it also shows that we were actively working to resolve the issue from the first notice and that the file sharing was neither knowingly nor willingly actioned.

...

...had we received quick support from our IPAP the problem would have been dealt with in the first instance.

We have contacted TelstraClear requesting a copy of the communications with support, and though they have promised this we won't receive it in time to meet the deadline of 17 December. It states in your letter that we will have a further opportunity to provide additional documentation for the case, at which point we can provide the record of communication with TelstraClear support."

[14] On 8 January 2013, the Applicant filed submissions in reply, waiving its earlier request for a deterrent sum.

[15] No further information was filed by the Respondent.

Discussion and findings

[16] In this case, all of the alleged acts of infringement are acknowledged, so the key issue is the appropriate sum to be awarded to the Applicant, if any. The Tribunal has jurisdiction to require the Respondent to pay sums to the Applicant under four different heads:

- [a] regulation 12(2)(a), which deals with the cost of purchasing the works legally;³
- [b] regulation 12(2)(b), which provides for a contribution towards the fees paid by the rights owner to the IPAP;⁴
- [c] regulation 12(2)(c), which provides for reimbursement of the application fee paid by the rights owner to the Tribunal;⁵ and
- [d] regulation 12(2)(d), which provides that an additional sum may be awarded as a deterrent against further infringing.⁶

[17] The Tribunal also has a discretion to decline to make orders if to do so would be manifestly unjust to the account holder.

Would the making of orders be manifestly unjust?

[18] The Tribunal has some sympathy with the Respondent's position, and has given careful consideration to whether it would be manifestly unjust to make orders against him in this case. It notes the following:

- The file sharing was undertaken by a visitor to the household (the Respondent's son's girlfriend), without the Respondent's knowledge or permission.
- The sound recording was downloaded more than two years ago, and nobody realised that it was still being uploaded when the son's girlfriend's computer connected to the internet at the Respondent's address.
- The Respondent took steps to try and resolve the issue, but was struggling to come to grips with the unfamiliar terminology and technology. He examined all of the household computers for evidence of the alleged file sharing, to no avail. He also sought assistance from his IPAP, but experienced difficulties when dealing with them. He received conflicting verbal advice, and the written advice that was promised never materialised.

³ See also s.1220(1) and (2).

⁴ See also s.1220(1)(3)(a).

⁵ See also s.1220(3)(b).

⁶ See also r.12(3).

[19] On the other hand, the Tribunal considers there are other steps the Respondent could perhaps have taken. Even assuming that he believed the first infringement notice was sent in error, he had more than two months between the second and third notices in which to resolve the issue. There is no evidence that he sought advice from individuals or organisations other than the IPAP who could have explained how file sharing operates and how it might have occurred via the Respondent's internet account.

[20] Also, there is no evidence as to how closely – or when – the Respondent questioned his son and his son's girlfriend. It appears that the Respondent was aware that his son's girlfriend was bringing her computer into their home from time to time over the relevant five-month period, which should have raised a red flag – especially if the Respondent had taken additional steps to educate himself about file sharing after receipt of the first two infringement notices.

[21] The Tribunal also notes that the Respondent did not challenge either of the first two infringement notices sent by the IPAP. When the Respondent challenged the final notice, the Applicant provided information that no doubt the Respondent would have found very valuable earlier in the process (such as the names of the common file sharing programmes uTorrent, Vuze, Bit Torrent, DC++, Shareaza, Ares, and eMule, advice about wireless security, and advice about talking to all household members regarding their responsibilities), but by then it was too late.

[22] Overall, the Tribunal considers that it would not be manifestly unjust to make orders against this Respondent. The file sharing occurred via a computer used with his knowledge at his address. The copyright owner has had its rights infringed, and the Applicant has been put to time and expense in filing this application.

[23] However, the Tribunal agrees with the Applicant that it would not be appropriate to award a deterrent sum under r.12(2)(d). Regulations 12(a)-(c) are discussed below.

Cost of purchasing work: r.12(2)(a)

[24] Regulation 12(2)(a) provides that in calculating the appropriate relief, the Tribunal must determine the reasonable cost of purchasing each of the works in which the Tribunal is satisfied that copyright has been infringed. Similarly, s.122O(2) provides that *"the sum specified in the Tribunal order ... 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"*.

[25] According to the Applicant, at the time of the infringements the sound recording *Beautiful People* was available for purchase in electronic form from iTunes at a cost of \$2.39. The enforcement notice identifies four infringements,⁷ and the Tribunal is satisfied that these were committed against the rights owner at an IP address of the account holder. The Respondent is required to pay to the rights owner 4 x \$2.39, totalling \$9.56.

⁷ The schedule attached to the enforcement notice lists only the final two infringements, i.e. the infringement that triggered the enforcement notice and the infringement notified to the IPAP between the warning notice and the enforcement notice. However, the body of the enforcement notice refers also to the infringements that triggered the detection and warning notices respectively.

IPAP fees: r.12(2)(b)

[26] 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.

[27] In the present case, there are four *"infringements to which the application relates"*, i.e. four occasions on which infringement by way of uploading was detected from the Respondent's IP address. The Applicant has paid 4 x \$25 plus GST to the IPAP (\$100 plus GST).

[28] The Tribunal considers that the Applicant should be entitled to the following contributions towards the IPAP fees that it has incurred:

- | | | |
|---|-----------------------|-----------------------------------|
| - | Detection notice | \$8.33 (one third of IPAP fee) |
| - | Warning notice | \$16.67 (two thirds of IPAP fee) |
| - | 1 x additional notice | \$16.67 (two thirds of IPAP fees) |
| - | Enforcement notice | \$25.00 (entire IPAP fee) |

[29] The Respondent is required to pay a contribution towards the IPAP fees incurred by the Applicant in accordance with the above calculations, totalling \$66.67.

Application fee: r.12(2)(c)

[30] 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.

[31] 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.

Orders

[32] In summary, therefore, the Tribunal orders the Respondent to pay to the Applicant the sum of \$276.63, comprised as follows:

- [a] \$9.56 under r.12(2)(a), representing the cost of purchasing the work legally;
- [b] \$66.67 under r.12(2)(b), representing a contribution towards the IPAP fees paid by the Applicant; and
- [c] \$200.00 under r.12(2)(c), reimbursing the application fee paid by the rights owner to the Tribunal.

Decision of the Copyright Tribunal delivered by Jane Glover

DATED at WELLINGTON this 23rd day of July 2013

Jane Glover