

[2013] NZCOP 17

COP 010/13

**UNDER**

The Copyright Act 1994

**BETWEEN**

**RECORDING INDUSTRY  
ASSOCIATION OF NEW  
ZEALAND**

Applicant

**AND**

**TCLE[A] T7364885**

Respondent

**BEFORE THE COPYRIGHT TRIBUNAL**

Mr. P C Dengate Thrush

**DECISION ON THE PAPERS**

*Background*

[1] This is an application brought by RIANZ (the Recording Industry Association of New Zealand) to the Copyright Tribunal (“the Tribunal”) under section 122I of the Copyright Act 1994, (“the Act”). This section is part of a comprehensive procedure directed at copyright infringement by peer-to-peer file sharing on the Internet. RIANZ is acting as agent for the rights owners: “rights owner” is defined as including an agent for one or more copyright owners.<sup>1</sup>

[2] A distinctive feature of the procedure, introduced by the Copyright (Infringing File Sharing) Amendment Act 2011, is that an applicant proceeds through three clearly defined steps before bringing its case before the Tribunal. In summary, the owner of copyright in a work alleged to be infringed can require the Internet Service Provider that provides Internet connectivity to the alleged infringer, provided there is no cessation or successful challenge, to send that person 3 infringement notices. After a third notice has been sent, the rights holder may bring a case before the Tribunal.

[3] A rights holder can, by observation techniques detect that a computer, connected to the Internet, is downloading or uploading copyright works. Computers connect to the Internet by means of Internet Protocol (“IP” herein) addresses. A rights holder can deduce the IP address of the computer engaged in the infringing act, but cannot identify the user. Internet Service Providers know the user’s identity, because they provide Internet connectivity to their clients by providing them with IP addresses. Their internal records will show which of their clients was using a specified IP address at any given time, and further, they know their client’s physical address and communication details. Because they provide IP addresses, they are called “IPAPs” in the Act – Internet Protocol Address Providers. Because he or she has an account

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<sup>1</sup> See s 122A(1)

with the IPAP, the computer user is called an “account holder”. The respondent in this case is an individual account holder.

[4] An outline of the steps of the procedure is contained in earlier Tribunal decision [2013] NZCOP 13<sup>2</sup>.

#### *The detection notice*

[5] A detection notice dated 30 January 2013 was sent by the IPAP to the account holder, under reference number TCLD[A] – T7364885. It identified the copyright work as the sound recording “Gangnam Style”, authored by the artist Psy, and the copyright owner as Universal Republic Records.(Universal Music New Zealand Limited). That copyright was alleged to have been infringed by “*communicating the work to the public (16(1)(f))*” at a stated date and time. The file sharing application “uTorrent” was identified, as was the file sharing protocol “BitTorrent”.

[6] No response by the account holder to the detection notice was received by the IPAP.

#### *The warning notice*

[7] A warning notice dated 12 March 2013 was sent to the respondent, under reference number TCLW(A)-T7364885. It identified the copyright work as a sound recording “Snow (Hey Oh)”, authored by The Red Hot Chili Peppers, and the copyright owner as Warner Brothers Records Incorporated.(Warner Music New Zealand Limited). The warning notice explained it was the second notice sent to the respondent, identified the detection notice referred to above, and contained the following warning of the consequence of a possible further notice:

*“If we reach the stage of sending the third notice (the Enforcement Notice) to you in relation to the same copyright owner (or their representative), then we are also obliged to notify them that an Enforcement Notice has been issued to you. If this happens they may choose to take a claim to the Copyright Tribunal”.*

The warning notice also listed 5 other alleged infringements occurring at the respondent’s IP address after the date of the detection notice, that did not trigger warning notices, as they occurred within 28 days of that detection notice. Copyright in four of the alleged infringements was owned by the copyright owners named above, the fifth was owned by The Island Def Jam Music Group. (Universal Music New Zealand Limited). All copyrights were alleged to have been infringed by “*communicating the work to the public (16(1)(f))*” at a stated date and time. The file sharing application “uTorrent” was identified, as was the file-sharing protocol “BitTorrent”.

[8] No response from the account holder was received to this second notice.

#### *The enforcement notice*

[9] An enforcement notice dated 17 April 2013 was sent to the respondent, numbered TCLE(A)- T7364885. It identified the copyright work as a sound recording

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<sup>2</sup> See <http://www.justice.govt.nz/tribunals/copyright-tribunal/decisions/2013-nzcop-13-rianz-v-telecom-nz-2688>

“Diamonds” authored by Rihanna, and the copyright owner as The Island Def Jam Group.(Universal Music New Zealand Limited) That copyright was alleged to have been infringed by *“communicating the work to the public (16(1)(f))”* at a stated date and time. “BitTorrent” and “uTorrent” were again identified as the file-sharing protocol and the file sharing application, respectively.

[10] The enforcement notice identified the most recent warning notice, and the preceding detection notice sent to the respondent. It explained that, unless the enforcement notice was cancelled, no further infringement notices may be issued in respect of infringements against the rights owner until the end of the quarantine period. It explained, as had previous notices, how the respondent might challenge the notice, and that the rights owner or their representative would now be notified that an enforcement notice had been issued. It listed four further allegations of infringement of copyright in relation to “Diamonds” (two occasions) and in relation to Snow (Hey Oh) (two occasions). Three of these alleged infringements had not triggered an enforcement notice, as they were dated within 28 days of the warning notice. The fourth alleged infringement, under reference number 146388/1 was dated 6 March 2013, and so was received before the date of the warning notice. Its inclusion in the enforcement notice is a clerical error of no account. No recovery was sought in relation to this alleged infringement.

[11] The respondent appears to have responded to the enforcement notice on 29 April 2013, saying (verbatim):

*“I was not aware 'u torrent' was illegal and was included in "bad downloading" as I am one of those people whom knows nothing about computers and stupidly thought it was ok... Once I received my 1st warning I deleted u torrent - Well so I thought, until the 2nd warning arrived and realised it was in my rubbish bin, my friend then dis-installed it and I trusted her judgement . Then on this 3rd warning I rung Vodafone and the lady talked me through disinstalling the programme so hopefully this NEVER happens again. I am truly sorry, If only I knew how to take U torrent away on the 1st warning I think it's gone permanently. I will only use my computer for google searches, email etc from now on... It scares me now.”*

[12] The Tribunal has not been provided with a copy of a challenge notice in the form prescribed by regulation 6. Section 122G(1) provides that the account holder may challenge an infringement notice by *“...sending a challenge, in the prescribed form, to the IPAP...”*. Section 122G(3) provides that an *“...IPAP that receives a valid challenge to an infringement notice must immediately forward it to the relevant rights owner.”* In this case, the IPAP appears to have extracted text received from the respondent and sent this in an email to the IPAP. It is not clear that the challenge was in the prescribed form. This contrasts with what the IPAP said it would do with a challenge notice, in each of its infringement notices, when providing a copy of a challenge notice form, namely:

*“Once received by us we will remove your personal details, and forward it on for consideration by the rights owner”*

[13] Section 122J(2)(d) requires the rights owner, when making an application to the Tribunal, to supply *“a copy of any challenges received by the rights owner...”* The Tribunal has been provided with a document with the text from the respondent quoted above, presumably as supplied by the IPAP to the rights owner. Although the

IPAP appears to have communicated the detail of the challenge immediately to the rights owner. It would be preferable if the prescribed form were to be used by the respondent, and sent to the rights owner by the IPAP as required by s 1223G(3), to allow the rights owner to include it with the materials provided to the Tribunal as it must do under s 122J(2)(d). That will allow the Tribunal to consider the challenge as required under s 122L(2)(c)

[14] On 7 May 2013 RIANZ responded to the respondent's challenge, rejecting the challenge on the ground that their evidence established that someone at the respondent's IP address had uploaded a copyright protected track at the date and time alleged in the enforcement notice.

#### *Application to the Tribunal*

[15] By application dated 17 May 2013, RIANZ applied under regulation 9 of the Copyright (Infringing File Sharing) Regulations ("the regulations") for an order under s 122O of the Act. RIANZ supplied evidence of its authority to act for the rights owners named above, filed submissions to the Tribunal and listed the 11 infringements for which it sought relief. I shall deal with those submissions below.

[16] RIANZ sought financial recovery of \$3292.54, comprised as follows:

|   |           |
|---|-----------|
| (1) compensation for lost sales (11 x \$2.39) | \$26.29   |
| (2) Fees paid to the IPAP (11 x \$28.75)      | \$316.25  |
| (3) Fees paid to the Tribunal                 | \$200.00  |
| (4) A deterrent sum (11 x \$250)              | \$2750.00 |

#### *Proceedings issued*

[17] On 24 May 2013 the Tribunal issued notice of the proceedings against the respondent, providing the details of the claim, and informing the respondent it had 10 working days to respond. The accompanying letter pointed out that if no response was received by 7 June, the Tribunal "*may make its decision based only on the application*".

#### *Respondent's Response*

[18] By email to the Registrar dated 6 June 2013, the respondent, in summary:

- (1) Acknowledged receipt of the detection notice of 30 January 2013;
- (2) Accepted that downloading was illegal, and wrong;
- (3) Claimed that the downloading was unintentional;
- (4) Declared that she had not downloaded anything since then, wanted to avoid this situation, has a young family, and wanted to avoid a fine or imprisonment;
- (5) Acknowledged receipt of the warning notice of 12 March;
- (6) Asked a friend to help with the computer, resulting in them deleting "*the utorrent to avoid further file sharing communication.*"
- (7) Acknowledged receipt of the enforcement notice of 17 April, whereupon rang the ISP and was talked through an uninstall of utorrent, as not done correctly previously, the file remaining in the recycle bin;

- (8) Explained: *“I was completely unaware that my computer was still file sharing the songs I had downloaded prior to the 30<sup>th</sup> Jan through “seeding”.*

[19] A copy of the respondent’s submission was given to RIANZ, who replied on 20 June 2013 with a supplementary submission. The matter came before the Tribunal, which has determined the matter on the papers mentioned.

*Infringement presumptions; not displaced*

[20] “Infringement” is defined for the purposes of these proceedings as *“an incidence of file sharing that involves the infringement of copyright in a work by a user”*, and “file sharing” is defined as occurring where *“material is uploaded via, or downloaded from, the Internet...”*<sup>3</sup>

[21] The Act<sup>4</sup> creates a presumption in proceedings before the Tribunal that each incidence of file sharing contained in an infringement notice constitutes an infringement of the rights owner’s copyright in the work identified. In each infringement notice in this case (detection, warning and enforcement) file sharing of identified work is made out, and infringement of the rights owners’ rights are presumed to have occurred.

[22] The Act<sup>5</sup> also creates presumptions that information in the notices is correct, including that the infringement occurred at the IP address of the account holder, and that the notices were issued in accordance with the Act.

[23] An account holder may submit evidence or give reasons why any of the presumptions should not apply, in which case the onus falls on the rights holder to satisfy the Tribunal that the matter challenged is correct.<sup>6</sup> In this case the account holder did not challenge the incidence of file sharing, acknowledged that downloading had occurred, and had taken steps to remove the file sharing software. That submission does not amount to evidence or reasons why the presumptions do not apply, and, therefore, the onus does not shift to the rights holder under s 122N(3) to sustain the presumptions. The presumptions, accordingly, remain in place.

*Payments to rights owners*

[24] Under s 122O(1) the Tribunal must order a payment to the rights owner if it is satisfied that each of the alleged infringements in the notices was an infringement, occurred at the account holder’s IP address and the notices were issued in accordance with the Act. By operation of the presumptions mentioned above, each of those matters is deemed to have occurred in this case.

[25] The obligation to order a payment, however, is subject to s 122O(5) which grants the Tribunal discretion not to order a payment when it is satisfied that to do so would be “manifestly unjust” to the account holder.

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<sup>3</sup> s 122A(1)

<sup>4</sup> s 122N(1)(a)

<sup>5</sup> s 122 N (1) (b) and (c)

<sup>6</sup> s 122 N (3)

[26] In this case, the respondent appears to have reacted in response to the notices in the manner intended by the legislature. On receipt of the first notice, the decision was made not to further download copyright material; on receipt of the second, the peer-to-peer file sharing software was deleted, or so it was thought, to prevent further infringing: after the third notice, expert help was requested via the ISP to ensure the software was deleted. Faced with cooperative and remedial action of this kind, there is an element of unjustness in seeking payment from this respondent.

[27] It appears to the Tribunal that the respondent has misunderstood the allegation of infringement being made. While the defendant has referred to ‘downloading’ the actual infringement complained of in every case was ‘uploading’. To some extent, the arcane description of the nature of the infringing act by the IPAP in its notices must take some responsibility for this. Each infringement notice “...*must identify the infringement that has triggered the issue of the (relevant) notice*”<sup>7</sup>. In every case the phrase “*Copyright has been infringed by communicating the work to the public (16(1)(f))*” has been used. It is not clear that this would be taken by a lay person as a reference to the (unstated) Copyright Act. If it did, it is not clear that a lay person would appreciate that the term “communicating” would include “uploading to the Internet” within its meaning. The Tribunal has noted this potential interpretation issue previously.<sup>8</sup>

[28] The Tribunal notes that this misconception has appeared in a number of other cases brought before it under this legislation. Respondents in some cases only realised that the infringement was occurring as a result of uploading after the enforcement notices issued, with proceedings following soon after.

- (1) In [2013] NZCOP 1<sup>9</sup>, at para [4] the case is reported to be a complaint about uploading. Respondent replied (para [10]) as if the matter were about downloading.
- (2) In [2013] NZCOP 5<sup>10</sup> all allegations were of infringement by uploading. At para [9] the respondent talks about ‘downloading’.
- (3) In [2013] NZCOP 6<sup>11</sup> see paras [4] and [17].
- (4) In [2013] NZCOP 9<sup>12</sup> see paras [11] and [18].
- (5) In [2013] NZCOP 10<sup>13</sup> see paras [4] and [17].
- (6) In [2013] NZCOP 11<sup>14</sup> see paras [6] and [11].
- (7) In [2013] NZCOP 12<sup>15</sup> see paras [6] and [10].
- (8) In [2013] NZCOP 13<sup>16</sup> see paras [15] and [26].

[29] Given that every infringement notice (detection, warning and enforcement) issued so far in all reported decisions under the Act has been about uploading, not

<sup>7</sup> See ss 122D (2)(b), 122E (2)(b) and 122F (2)(b)

<sup>8</sup> [2013] NZCOP 7, at [31] and [32].

<sup>9</sup> <http://www.justice.govt.nz/tribunals/copyright-tribunal/decisions/2013-nzcop-1-rianz-v-telecom-nz.pdf>

<sup>10</sup> <http://www.justice.govt.nz/tribunals/copyright-tribunal/decisions/2013-nzcop-5-rianz-v-cal012-e000609.pdf>

<sup>11</sup> <http://www.justice.govt.nz/tribunals/copyright-tribunal/decisions/2013-%20NZCOP%206%20-%20RIANZ%20v%20Telecom%20NZ%203553.pdf>

<sup>12</sup> <http://www.justice.govt.nz/tribunals/copyright-tribunal/decisions/2013-nzcop-9-rianz-v-cal2012-e000627>

<sup>13</sup> <http://www.justice.govt.nz/tribunals/copyright-tribunal/decisions/2013-nzcop-10-rianz-v-telecom-nz4296>

<sup>14</sup> <http://www.justice.govt.nz/tribunals/copyright-tribunal/decisions/2013-nzcop-11-rianz-v-telecom-nz-4366>

<sup>15</sup> <http://www.justice.govt.nz/tribunals/copyright-tribunal/decisions/2013-nzcop-12-rianz-v-tclea-t6518151>

<sup>16</sup> <http://www.justice.govt.nz/tribunals/copyright-tribunal/decisions/2013-nzcop-13-rianz-v-telecom-nz-2688>

copying by downloading, the tribunal suggests that IPAPs may consider addressing the clarity of their notices. This respondent may have been misled by the notice, and may have acted sooner to remove the software if she had appreciated earlier that uploading, not downloading, was the issue.

[30] The respondent's lack of technical knowledge of the operation of the file sharing programme on her computer may also be partly or wholly responsible for the file sharing incidents after the detection notice. The respondent says that after that notice, she undertook to download no further material. That is not challenged by the rights owner. However, downloading was not the cause of the infringement. As the Tribunal has noted before, the software in question can operate independently of the account holder, sending uploads automatically when the computer is logged on. (See [2013] NZCOP 8<sup>17</sup>, para [27]). After the second notice the respondent asked for help from a friend. They thought they had deleted the software, but hadn't, and infringing by uploading continued. After the third notice they took the advice of the ISP and were able to remove it - but by then the rights owners were entitled to commence this proceeding. The Tribunal takes notice of the difficulties some users have had with the software, noting by way of example, tutorials provided online such as; "How to Automatically Stop Seeding in uTorrent"<sup>18</sup> and the How-To Geek seminar; "Stop uTorrent 2.0 from Automatically Starting in Windows".<sup>19</sup>

[31] RIANZ says that by uploading 3 different tracks, the respondent has shown that the uploading was not inadvertent. The Tribunal does not find that necessarily so, and is not sufficient to rebut the respondent's evidence that she was unaware of the uploading and when told, attempted to prevent it.

[32] There are elements of unjustness in ordering payment when the respondent appears to have been willing to cease infringing, and took steps to ensure compliance, but did not understand the complaint, and could not properly configure the software. However, the threshold of s 122O(5) is high – ordinary unjustness will not suffice to prevent a payment. She is responsible for installing the software and the consequences of it performing in the way that it did. The conditions she created appear to have facilitated unauthorised copying of copyright works, may have caused the rights owners financial losses, and caused the rights owners to send multiple notices and to issue proceedings. She was clearly warned in the warning notice of the consequences of further infringing.

[33] The Tribunal does not find it manifestly unjust to order a payment in these circumstances. A payment will be ordered.

[34] The Tribunal turns to assessment of the appropriate sum for payment. This is the area addressed by the RIANZ submissions mentioned above.

#### *Quantifying the sum to be paid*

[35] Section 122O(2) provides that the sum must be calculated according to the Regulations, and must include a sum in relation to every infringement identified in the Enforcement notice that the Tribunal is (1) satisfied was committed against the rights

<sup>17</sup> <http://www.justice.govt.nz/tribunals/copyright-tribunal/decisions/2013-nzcop-8-rianz-v-telecom-nz-3728>

<sup>18</sup> [http://www.ehow.com/how\\_5719894\\_automatically-stop-seeding-utorrent.html](http://www.ehow.com/how_5719894_automatically-stop-seeding-utorrent.html)

<sup>19</sup> <http://www.howtogeek.com/howto/10413/stop-utorrent-2.0-from-automatically-starting-in-windows/>

owner, and (2) occurred at an IP address of the account holder. As noted above (see para [21]), the s 122N presumptions deemed these 2 criteria satisfied. The Tribunal finds that infringement has been established in relation to the two works named in the enforcement notice in paragraph 10 above, on two occasions each.

[36] Regulation 12(2)(a)(i) establishes the amount to be paid; if the work was “legally available for purchase at the time of the infringement, (it is) the reasonable cost of purchasing the work in electronic form at that time.” The applicant has submitted that each work was so available, and at a cost of \$2.39 each. Accordingly the sum payable under s 122O(2) is (4 x \$2.39) or \$9.56.

[37] In addition to the compensation specified in s 122O for those infringements identified in the enforcement notice, the regulations prescribe recovery under four different heads of relief, dealing with recovery of lost sales, fees paid to the IPAP, fees paid to the Tribunal, and a possible sum to act as a deterrent.

#### *Lost Sales*

[38] Regulation 12(2)(a) requires that the Tribunal determine the reasonable cost of purchasing the work for “*each work in which the Tribunal is satisfied that copyright has been infringed at the IP address of the account holder*” at the time of the infringement. That covers each infringement contained in all of the notices cumulatively, including the 4 specifically covered by s 122O. Regulation 12(1) specifies the total amount that may be paid under s 122O, and works to preclude double counting of the infringements identified in the enforcement notice.

[39] The Tribunal is satisfied that all the infringements identified in the infringement notices were infringements at the IP address of the account holder, and were of works electronically available for purchase at the time of their respective infringements. Although there are only 3 copyright works in issue, the sum to be determined is the purchase price at the time of infringement. As there are 11 “times of infringement”, there are 11 purchase prices that need to be determined. Accordingly the sum payable under regulation 12(2)(a)(1) is (11 x \$2.39) or \$26.29. Note that this amount includes the sum required under s 122O(2). This is the sum sought by RIANZ.

[40] RIANZ was concerned that only 4 of the infringements were recorded in the enforcement notice, as s 122O(2) orders specific compensation for those there. RIANZ sought to argue that, as the enforcement notice mentioned both the detection notice and the warning notice, and as they both expressly identified infringements, the enforcement notice could be interpreted as naming all of the infringements. The Tribunal disagrees. The wording of s 122O is clear. Section 122O(2) refers to infringements named in the enforcement notice, not to references in other documents to further infringements. However, the point is moot; regulation 12(2) provides for recovery in relation to each infringement.

#### *IPAP fees*

[41] The second head is the recovery of fees paid to the IPAP; the applicant has identified these as those due and paid on eleven rights owner notices, the contents of



which are set out in the infringement notices. At \$25 per notice<sup>20</sup> this comes to \$316.25 once GST is included, and is the amount originally claimed by RIANZ. In submissions, however RIANZ adopted the “sliding scale” approach the Tribunal has developed in recent cases, and sought one third of the cost of the detection notice, two thirds in relation to warning notices, and full recovery in relation to the enforcement notice.

[42] On this basis, RIANZ sought \$8.33 in relation to the detection notice, \$16.67 for the warning notice and \$25.00 for the enforcement notice. The Tribunal agrees. More significantly, RIANZ submitted that it was entitled to a contribution to its fees for the remaining 8 infringement notices it had filed. RIANZ submits, correctly, that it has to pay a full fee on each notice, and has to file each notice in respect of infringements detected without knowing the identity of the alleged infringer, as only the IPAP can identify parties from their IP addresses. It is entitled to a contribution<sup>21</sup>. RIANZ submits that all 8 notices sent after the detection notice and before the enforcement notice should be treated at the same rate as the warning notice, or a 2/3 contribution. It seems more logical to apportion costs for those notices at the same rate as the infringement notice in which they appeared; the discount for notices attached to a warning notice is because they may have some educative effect, but that effect is not present in relation to notices accompanying the enforcement notice. On that basis, 5 of the infringements accompanied the warning notice, and will be compensated at \$16.67, while 3 accompanied the enforcement notice and will be compensated at \$25.00. Accordingly the sum determined under this head is  $(1 \times 8.33) + (6 \times \$16.67) + (4 \times \$25)$  or \$208.35.

#### *Tribunal fees*

[43] The third head is the recovery of fees paid to the Tribunal. The Tribunal accepts the applicant’s submission that the respondent should reimburse the applicant the \$200.00 fee the applicant paid to the Tribunal, and so orders.

#### *Deterrent amount*

[44] The fourth head is an amount considered appropriate by the Tribunal as a “*deterrent against further infringing*”<sup>22</sup>. Regulation 12(3) applies when considering any sum payable under the fourth head. The Tribunal must consider, in addition to “any circumstances it considers relevant”, the flagrancy of the infringement, the possible effect of the infringing activity on the market, and whether the amount awarded under the other heads would be sufficiently deterring. The rights owner has made extensive submissions on this point.

[45] RIANZ submitted that the Tribunal should be considering the deterrence of others from further infringing. The Tribunal disagrees, and considers that the use of the word “further” in regulation 12(2)(d) means further infringing by the respondent. “Further infringing” by others, who may not have infringed yet, makes poor sense. If the legislature had intended to cover infringement by others, including those who had not previously infringed, it would have used a word such as “other”. The Tribunal

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<sup>20</sup> See r. 7

<sup>21</sup> S 1220(3)(a)

<sup>22</sup> r.12 (2)(d)

interprets deterrence in this provision as applying only to the account holder, not the general public.

### *Flagrancy*

[46] RIANZ noted that “flagrancy” is to be considered by a Court as a factor in awarding additional damages in cases of copyright infringement, and pointed to the recent Court of Appeal discussion in the Skids<sup>23</sup> case to the effect that “flagrant” meant “deliberate and calculated conduct”. The Tribunal adopts that, but notes that those words form only a portion of a much stronger definition used by the Court of Appeal. In Skids, the Court of Appeal repeated the definition it used in the Wellington Newspapers case.<sup>24</sup>

*“The ordinary dictionary meaning of flagrant is “glaring, scandalous, or outrageous”. Flagrancy was described by Brightman J. in Ravenscroft v Herbert [1980] RPC 193, 208 as:*

*“Flagrancy, in my view implies the existence of scandalous conduct, deceit and such like; it includes deliberate and calculated copyright infringements.”*

[47] RIANZ argues that loading and using the BitTorrent software was “deliberate”. That is true, but loading and using BitTorrent is not the issue: legitimate uses can be made of such software. Twitter and Facebook, for example, make large use of BitTorrent. The Court of Appeal [107] is quite clear – it is the flagrancy of the infringement that is the issue. The wording in regulation 12 is the same as that analysed by the Court of Appeal in Skids, and the same approach is required in this case. The respondent’s evidence is that the copying (by uploading) the songs involved in this case was not designed or intended by her, happened without her knowledge, and that steps had been taken to prevent it.

[48] RIANZ points to the number of infringements (11) and the fact that they continued after the infringement notices were received. That is consistent with the respondent’s evidence that the uploading was unknowing. The Tribunal finds that the uploading was not deliberate or calculated, and falls short of deceit and outrageous or scandalous conduct. There is no element of flagrancy.

### *Effect on the market*

[49] RIANZ submitted that the respondent had made copyright works available to others for illegal downloading, a phenomenon that had had a “devastating” effect on the market for recorded music. Sales of recorded music in 2002 were worth \$124 million; by 2012 this sum had been reduced to \$59 million. RIANZ also noted the strong comments by the District Court in its sentencing notes on the cost of music piracy in NZ Police v Vile<sup>25</sup>.

[50] The Tribunal accepts that the respondent’s actions will have had some effect on the market, and are the kind of conduct at which the legislation is directed. However, the Tribunal has insufficient information on the direct impact on the market that the

<sup>23</sup> Skids Programme Management Limited & Ors. v McNeill & Ors. [2012] NZCA 314, 23 July 2012

<sup>24</sup> Wellington Newspapers Ltd v Dealers Guide Ltd, [1984] 2 NZLR 66 CA at 69

<sup>25</sup> <http://www.iplawyer.co.nz/wp-content/uploads/2013/03/Police-v-Vile.pdf>

respondent's infringing might have. A proceeding of this nature does not allow sufficient exploration of the many economic factors that go into a market. Simply pointing to declining sales revenue is insufficient, and ignores factors such as the increased market size that the Internet makes available, the ease and lack of costs of digital distribution, competition, and substitutability. RIANZ to some extent accepts that declining sales may have been caused by the unavailability of services, when it points to its own efforts to increase legal download facilities through the introduction of services such as Spotify and Pandora. It said:

*"So it is not a case where the uploading (or downloading) is made necessary by the unavailability of services or other barriers"*

[51] The test the Tribunal must apply is the effect of the respondent's infringement "on the market for the work". RIANZ has supplied no information on the markets for any of the works in question. Merely pointing to the overall market for recorded music in New Zealand, and to general data relating to a period commencing 11 years before the infringing activity in question is not helpful to resolving that issue.

[52] The Tribunal accepts the general comments in Vile about the potential damage infringement does, but finds this factor does not assist in considering whether any amount is appropriate as a deterrent.

#### *Sufficiency of other penalties*

[53] The sum payable under r.12(2)(a) to (c) is \$26.29 + \$208.35 + \$200.00 = \$434.64. The Tribunal considers that to be a sufficient deterrent against further infringing by the respondent

#### *Other factors*

[54] RIANZ submitted there were two further circumstances that the Tribunal should take into account when considering deterrence. The first is that the maximum penalty the Tribunal can award is \$15,000.00. RIANZ appears to suggest that penalties in cases such as this should be for an appreciable proportion of that maximum. Such a suggestion potentially raises many issues which have not been fully argued or put in submissions to the Tribunal. The issue here is the appropriateness of an award in relation to deterrence. The mere availability of a remedy is not an indication as to how it should be used.

[55] The second circumstance was the availability recently of legal methods of downloading and uploading digital music online that returned rewards to "songwriters, musicians and those who invest in them." RIANZ argues that deterrent sums will "serve the purpose of changing people's behaviour to using legal instead of illegal channels." As noted above, however, the purpose of the deterrent sum is directed against further infringing by the respondent, not the general public. The respondent has acknowledged fault, declared that she has not downloaded since the detection notice, removed the software that facilitates the infringement and will pay compensation. It is not clear that further deterrence is necessary. It is also not clear how, if at all, an increased fine would encourage this respondent to use the new facilities.

[56] A further factor for the Tribunal is the apparent lack of any benefit accruing to the respondent as a result of the infringements alleged. There is no record of her doing any downloading in the period since the detection notice; the rights holders would presumably have filed evidence of that were there any. When uploading occurs simultaneously with downloading, one can argue that the file sharing confers a benefit on both parties. In the present case, it appears that the unintended uploading brought no benefit to the respondent, and in the end, resulted in the penalties of this action.

[57] Taking all these matters into account, the Tribunal finds that, in this case, it would be inappropriate to award any sum as a deterrent against further infringing by the respondent.

*Orders*

[58] The Tribunal orders the account holder to pay to the rights holder the sum of \$434.64, made up as follows:

- [a] under r.12(2)(a)(i) and s.122O(2) the amount of \$26.29 for compensation;
- [b] under r.12(2)(b) the amount of \$208.35 for IPAP fees;
- [c] under r.12(2)(c) and s.122O(3)(b) the amount of \$200.00 for Tribunal fees;
- [d] under r.12(2)(d) the amount of \$0.00 as a deterrent.

Decision of the Copyright Tribunal delivered by PC Dengate Thrush

**DATED** at WELLINGTON this 4th day of September 2013

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PC Dengate Thrush  
Member