

[2013] NZCOP 13

COP 005/12

UNDER

The Copyright Act 1994

BETWEEN

**RECORDING INDUSTRY
ASSOCIATION OF NEW
ZEALAND INC**

Applicant

AND

TELECOM NZ 2688

Respondent

BEFORE THE COPYRIGHT TRIBUNAL

Mr. P C Dengate Thrush

HEARING ON THE PAPERS

DECISION

Background

[1] This is an application brought by RIANZ (the Recording Industry Association of New Zealand) to the Copyright Tribunal (“the Tribunal”) under s 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 owner: “rights owner” is defined as including an agent for one or more copyright owners.¹

[2] The procedure was intended to be, by comparison with traditional copyright infringement cases, expeditious and inexpensive. The Cabinet paper² calling for the establishment of the regime spoke of creating an “... *efficient, low cost and credible regime* ...” A distinctive feature of the procedure 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, if 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

¹ See s.122 A 1.

² See: <http://www.med.govt.nz/business/intellectual-property/pdf-docs-library/copyright/notice-process/cabinet-paper-illegal-peer-to-peer-file-sharing-pdf>.

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 with the IPAP, the computer user is called an "account holder".

[4] The first event in the process is detection by the rights holder of infringement. "Infringement"³ for these purposes means file sharing⁴, and file sharing means uploading or downloading material using systems that allow simultaneous sharing of material with others. A rights holder then sends to the IPAP a "rights notice", the contents of which are specified in r 4 of the Copyright (Infringing File Sharing) Regulations 2011 (the "Regulations"). Not surprisingly for a copyright proceeding, the rights owner needs to specify its own name and contact details, the name of the owner of the work, the name of the work including any unique identifiers, the type of work by reference to s 14 of the Act which characterises works as, for example "literary, dramatic, musical or artistic works" and as "sound recordings". The notice must also provide details about the alleged infringing, such as the IP address, and the date and time (to the hour, minute and second) of the infringement.

[5] An IPAP who receives a proper rights notice is required⁵ to match the IP address in the rights notice with an account holder from his own records (i.e. identify the alleged infringer) and generally⁶ obliged to send a "detection" notice. The contents of a detection notice are specified in s 122D(2). It must be dated, and include the name of the rights owner, identify the alleged infringement and its date, explain the consequences of further infringing and explain the challenge process. From the account holder's perspective, this is the first of the three steps referred to above.

[6] If a further infringement from the same IP address occurs within the specified timeframe (at least 28 days after the date of the detection but not more than nine months after it) and the rights holder sends a rights notice in proper form, the IPAP is required⁷ to send a "warning" notice. A warning notice must⁸, in addition to giving the same general naming and identifying materials of the detection notice, "identify the most recent detection notice issued to the account holder in relation to the rights owner (the **preceding detection notice**)"⁹ and also "identify any other alleged infringements by the account holder against that rights owner that have occurred since the date the preceding detection notice."¹⁰ Information about the consequences of further infringement and how to challenge the notice is also provided. Receipt of a warning notice is the second of the three steps.

[7] If infringement is detected on a 3rd occasion from the same IP address within the post-28 day, pre-9 month window, on receipt of a proper rights notice an "enforcement" notice is sent. The requirements of the enforcement notice include, in

³ See s.122A; "infringement means an incidence of file sharing that involves the infringement of copyright in a work by a user".

⁴ See s.122A; "file sharing is where- (a) the 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".

⁵ See s.122C (1).

⁶ "generally" because there are conditions- not relevant in this case – which exempt an IPAP from sending notice. See eg. S.122C (3) and (4).

⁷ See s.122E.

⁸ See s.122E(2).

⁹ See s.122E (2)(c).

¹⁰ See 122E (2)(d).

addition to the naming, dating and identifying material referred to in the previous notices that it “identify the most recent warning notice issued to the account holder in relation to the rights owner, and the preceding detection notice”¹¹. Further it must “identify any other alleged infringements against the rights owner that have occurred since the date of the preceding detection notice”¹². Receipt of the enforcement notice is the 3rd step.

[8] After each of the three notices the account holder may challenge aspects of the infringement notice¹³. If successful, a challenge brings an end to the procedure. If a rights holder sends an enforcement notice which is not successfully challenged, the rights holder may then bring proceedings before the Tribunal seeking orders that the account holder pay to it sums of money under various statutory headings. We shall deal with the notice and challenge procedure in greater detail below.

The detection notice

[9] RIANZ procured the sending of a detection notice under s 122D by the relevant IPAP, Telecom New Zealand Limited (“Telecom”), dated 24 November 2011. As required, the notice identified the rights owner, the alleged infringement triggering the notice (communicating the work (a named song) to the public in breach of s 16(1)(f) of the Copyright Act 1994, via file sharing using uTorrent, named as the file sharing application), gave the date of the alleged infringement, and was itself dated. It also explained the consequences to the account holder of further infringing, and how the account holder might challenge the notice. It was numbered, under Telecom’s numbering system, as “infringement notice number: 369”. There was no response by the Respondent; in particular, there was no challenge to the infringement notice.

The warning notice

[10] On 28 May 2012 RIANZ procured the sending of a warning notice under s 122E. It was numbered 2183 by Telecom. As required¹⁴, it identified the rights owner, identified the alleged infringement (a named song, shared by uTorrent, in breach of s 16(1)(f) again) identified the date of the alleged infringement, identified the preceding detection notice, and listed a further alleged infringement by the same account holder occurring since the date of that detection notice and prior to its expiry, gave the date of the warning notice, explained the consequences of further infringing, and explained how the account holder might challenge the notice. To comply with its identifying and disclosure requirements, the IPAP produced a table, in which details of the individual infringement notices sent to the respondent are set out. A copy of that table, in its entirety, is show below.

¹¹ See 122F (2)(d).

¹² See 122F (2)(e).

¹³ See S122G.

¹⁴ 122E (2).

Other recent alleged infringements recorded

Telecom Notice ID	Status	Rights Owner	Infringement Notification Number	IP Address	Infringement Date and Time	Material Downloaded	Name of the Work	Description of the Work	Description of the violated Act	File sharing Application or Network used	Name of Cop Right Owner
369	DETECT	Recording Industry Association of New Zealand	1585	222.152.164.201	12/11/2011 19:19	Song	DYNAMITE TAI0 CRUZ	Sound recording (14 (1)(b))	Copyright has been infringed by this account holder communicating the work to the public (16 (1)(f))	ÅTorrent for Mac 1.0.2	UNIVERSAL ISLAND RECORDS LIMITED (UNIVERSAL MUSIC NEW ZEALAND LIMITED)
668		Recording Industry Association of New Zealand	2725	222.152.160.143	28/11/2011 13:24	Song	DYNAMITE TAI0 CRUZ	Sound recording (14 (1)(b))	Copyright has been infringed by this account holder communicating the work to the public (16 (1)(f))	ÅTorrent for Mac 1.0.2	UNIVERSAL ISLAND RECORDS LIMITED (UNIVERSAL MUSIC NEW ZEALAND LIMITED)
2183	WARNING	Recording Industry Association of New Zealand	31632	222.152.161.199	18/05/2012 21:53	Song	DYNAMITE TAI0 CRUZ	Sound recording (14 (1)(b))	Copyright has been infringed by this account holder communicating the work to the public (16 (1)(f))	uTorrent for Mac 1.0.2	UNIVERSAL ISLAND RECORDS LIMITED (UNIVERSAL MUSIC NEW ZEALAND LIMITED)

[11] Pursuant to s 122E(2)(d)– the most recent detection notice (numbered 369) was identified as “DETECT” in the “Status” column. It is neither completely described as the “**preceding detection notice**”, nor as the “most recent detection notice” but it has been identified as a Detection notice. Notice 2183 is identified as a Warning notice in the Status column.

[12] Similarly, s 122E (2)(e) has been complied with: under Telecom’s ID no. 668 a further alleged infringement is listed as occurring after the date of the (assumed preceding) detection notice.

The Enforcement notice

[13] On 6 August 2012 RIANZ procured the issuing of an Enforcement Notice under s 122F. It was numbered 2688.

[14] Under s 122F(2)(d) the Enforcement notice should identify the **most recent warning notice**, and **the preceding detection notice**. Section 122F(2)(h) requires that the notice explain that, **unless the enforcement notice is cancelled, no further infringement notices may be issued in respect of infringements against the rights owner until the end of the quarantine period**. The status column referred to in paragraph 11 above indicating which were Detection and which were Warning notices has not been included in the Enforcement notice.

[15] A copy of the table (two pages) attached to the Enforcement notice is pasted below.

Other recent alleged infringements recorded

Telecom Notice ID	Rights Owner	Infringement Notification Number	IP Address	Infringement Date and Time	Material Downloaded	Name of the Work	Description of the Work	Description of the violated Act	File sharing Application or Network used	Name of Copy Right Owner
369	Recording Industry Association of New Zealand	1585	222.152.164.201	12/11/2011 19:19	Song	DYNAMITE TAIO CRUZ	Sound recording (14 (1)(b))	Copyright has been infringed by this account holder communicating the work to the public (16 (1)(f))	µTorrent for Mac 1.0.2	UNIVERSAL ISLAND RECORDS LIMITED (UNIVERSAL MUSIC NEW ZEALAND LIMITED)
668	Recording Industry Association of New Zealand	2725	222.152.160.143	28/11/2011 13:24	Song	DYNAMITE TAIO CRUZ	Sound recording (14 (1)(b))	Copyright has been infringed by this account holder communicating the work to the public (16 (1)(f))	µTorrent for Mac 1.0.2	UNIVERSAL ISLAND RECORDS LIMITED (UNIVERSAL MUSIC NEW ZEALAND LIMITED)
2183	Recording Industry Association of New Zealand	31632	222.152.161.199	18/05/2012 21:53	Song	DYNAMITE TAIO CRUZ	Sound recording (14 (1)(b))	Copyright has been infringed by this account holder communicating the work to the public (16 (1)(f))	uTorrent for Mac 1.0.2	UNIVERSAL ISLAND RECORDS LIMITED (UNIVERSAL MUSIC NEW ZEALAND LIMITED)

Other recent alleged infringements recorded

Telecom Notice ID	Rights Owner	Infringement Notification Number	IP Address	Infringement Date and Time	Material Downloaded	Name of the Work	Description of the Work	Description of the violated Act	File sharing Application or Network used	Name of Copy Right Owner
2249	Recording Industry Association of New Zealand	32549	222.152.163.147	28/05/2012 15:34	Song	DYNAMITE TAIO CRUZ	Sound recording (14 (1)(b))	Copyright has been infringed by this account holder communicating the work to the public (16 (1)(f))	uTorrent for Mac 1.0.2	UNIVERSAL ISLAND RECORDS LIMITED (UNIVERSAL MUSIC NEW ZEALAND LIMITED)
2688	Recording Industry Association of New Zealand	46644	222.152.162.161	27/07/2012 21:01	Song	DIRTY PICTURE TAIO CRUZ	Sound recording (14 (1)(b))	Copyright has been infringed by this account holder communicating the work to the public (16 (1)(f))	uTorrent for Mac 1.0.2	Universal Island Records Limited (Universal Music New Zealand Limited)

The Regulations

[16] Infringement notices are also required to comply with the Regulations.¹⁵

[17] Regulation 5(2) requires that:

“every infringement notice number must comprise a series of number, letters or both that-

- (a) is unique to that notice, and*
- (b) indicates whether the notice is a detection notice, a warning notice, or an enforcement notice ...”*

[18] Telecom has created and used an infringement notice number system, comprised of numbers only, used in the “Telecom Notice ID” column above, used in both Warning and Enforcement notices shown above. These numbers do not, on their own, indicate whether a notice is a Detection notice, Warning notice or Enforcement notice. The absence of the “status” column is not helpful.

¹⁵ Copyright (Infringing File Sharing) Regulations 2011.

[19] This decision sets out in detail the procedure involved because of the two statutory requirements of Enforcement notices that they (1) give a warning that no further notices will issue (unless the Enforcement notice is challenged) until the end of the quarantine period, and (2) identify the most recent warning and preceding detection notices, and the regulatory requirement for a unique number that conveys that same information.

[20] The tribunal notes that the absence of these requirements had no discernible effect on the way the account holder responded in this case, and which appears not to have been prejudiced by their omission. Further, the applicant submitted no evidence or reasons which challenged the presumption in s 122N(1)(b) that the “information recorded in the infringement notice is correct” nor that in s 122N(1)(c) that the “infringement notice was issued in accordance with the Act”. Accordingly for present purposes the Tribunal finds the applicant entitled to the presumptions, and the Enforcement notice to be valid as a result.

[21] The position in relation to the Enforcement notice schedules has been noted by the Tribunal in a previous decision¹⁶ that suggested it would be helpful if the various notices also specified the dates of previous notices. Similarly, it would be helpful to both account holders and the Tribunal if the requirements of s 122F(2)(d) and (h) and r 5(2) were clearly part of the notices used.

A challenge

[22] Sometime after 6 August 2012, and before 20 August 2012, (that is, within the 14 days for challenging a notice provided by s 122G), the account holder challenged the Enforcement notice. It denied that the IP address stated was that of the account holder, and went on to give its IP address, which was different to the IP address referred to in the Enforcement notice. It was also different from the two IP addresses given respectively in the Detection and Warning notices.

[23] On 20 August 2012 the rights holder responded, explaining that the IP address referred to by the account holder was an IP address installed in its computer, and that the IPAP had confirmed that that computer was connected to the Internet via the IP addresses provided in the notices. Further advice and information about IP addresses and online security including password protection was also provided. The rights holder did not accept the challenge.

Proceedings issued

[24] On 7 September, 2012 the rights holder applied to the Tribunal, as stated above. The application was made before the end of the quarantine period (35 days from the Enforcement Notice) and after the closing of the 14-day challenge period (s 122G). Orders were sought under s 122O(2) in relation to the five infringements noted in the Enforcement notice. The sum of \$215.10 compensation was sought in relation to each, as were IPAP fees of \$143.75, the application fee to the Tribunal of \$200.00, and \$1250.00 to act as a deterrent, for a total of \$2669.25

[25] The Tribunal Case Manager acting as registrar sent notice of the application to the Account Holder on 20 September 2012, giving the account holder until 3 October

¹⁶ See Tribunal Decision [2013] NZCOP 7, paragraph [3].

to submit any response. By 15 October 2012, no response from the account holder having been received, RIANZ wrote asking that the matter proceed. On 17 October 2012, the Tribunal Case Manager wrote to the account holder, pointing out that a response had been due to be filed by 3 October and informing the Account Holder the Tribunal “... will now deal with this matter on the papers which means a formal hearing does not take place and the Tribunal will issue a decision without any of the parties being present. A formal decision of the Tribunal will be issued to you in due course.”

[26] On 23 October, 2012 there was an exchange between the Tribunal Case Manager and the account holder including an e-mail from the account holder to the registrar referring to infringement notices 1585, 2725, 31632, and asserting that “... I state again this file was not downloaded by any member of our family, 2 of the times stated there was nobody at home? As also previously stated we had no password in place so internet could have been accessed by anyone in this area.”

[27] This email was acknowledged and forwarded to the rights holder, who responded on 31 October 2012 noting, in summary, that the infringements related to uploading not downloading, that the evidence showed the respondent's account was used for uploading and there was no proof of the lack of password.

[28] The matter came on for consideration by the Tribunal on the papers. RIANZ has made submissions in writing, attaching evidence of its authorisation as the agent of the rights holder, and an industry analysis from 2008. Nothing further has been received from the Account Holder.

Infringements

[29] “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...”¹⁷

[30] The Act¹⁸ 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 owners copyright in the work identified. In each infringement notice in this case (Detection, Warning and Enforcement) file sharing of identified work is made out.

[31] As noted above (paragraph 20) the Act also creates presumptions that information in the notices is correct, and that the notices were issued in accordance with the Act.

[32] An account holder may submit evidence or give reasons why the presumption should not apply; in this case the account holder did not challenge the incidence of file sharing, but sought to claim that it was not responsible. That claim, even if true, would be of no effect, as liability does not require identification of the person responsible for the file sharing, nor any knowledge or intention to infringe, but is the liability of the account holder. Accordingly that claim by the account holder does not

¹⁷ S 122A(1).

¹⁸ S 122N (1)(a).

amount to evidence or reasons why the presumptions do not apply, and the onus does not shift to the rights holder under s 122N(3) to sustain the presumptions.

Payments to Rights owner

[33] 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.

[34] That requirement is subject to s 122O(5) which grants the Tribunal discretion not to make a payment when it is satisfied that to do so would be "manifestly unjust" to the account holder.

[35] The threshold of s 122O(5) is high – ordinary unjustness will not suffice to prevent a payment. In this case, the information provided by the account holder is very limited. In August a brief note said that the IP address cited was wrong. That was met by a reasonably detailed letter by the rights owner explaining the practice of dynamic IP addressing, and that the IP address information was accurate. It also invited the account holder to check its computer for copies of the infringing material, to check for and delete common file sharing programs (including uTorrent, said to be used in these instances of infringement) to educate family members about their responsibilities under copyright law, and to install strong password protection.

[36] After receipt of two further warnings and the issuing of proceedings, and after two letters from the Tribunal, the account holder emailed the short claim noted above. In essence it said there was no one home at the time, and it then had no password, but did now. No real attempt was made to substantiate the claim that there was no one home at the time of the alleged infringements, which had occurred at 10.06 am, 12.44 pm, and 9.43 am on their respective dates. Information about the usual inhabitants of the house and their usual hours could reasonably have been adduced in support of such an argument. No explanation of why a password was not installed earlier, or whether the searches and education recommended had taken place was given. In the circumstances, the Tribunal finds that making a payment order has not been shown to be manifestly unjust.

[37] The tribunal finds that the requirements of s 122O(1) have been made out on the basis of the presumptions, and turns to assessment of the appropriate sum for payment.

[38] Section 122O(2) provides that the sum must be calculated according to the Regulations, and must include a sum in relation to every identified infringement in the Enforcement notice. Regulation 12(2) provides that if the Tribunal determines to make a payment order, it has to calculate amounts under a number of heads. The first is the "reasonable cost of purchasing the work in electronic form " at the time of infringement (assuming it to be so available) for each work which the Tribunal finds to have been infringed. The Tribunal finds that infringement has been established in relation to two works, named in the schedule in paragraph 15 above. The Applicant has submitted that each work was so available, and at a cost of 2.39 each, or a total (under s 122O(2)) of \$11.95.

[39] RIANZ made submissions on this point to the effect that the intent of this section was compensatory, and that it was inappropriate to limit compensation for what may well have been many uploads and downloads of these works to the price of one sale for each infringement. A UK study dated 2008 of patterns in the UK in 2007 was tendered to show that popular works were uploaded many hundreds of times per day, with an “average” of 90 downloads per month. The Tribunal rejects this approach. The plain words of r 12(2)(a)(i) require the tribunal to “determine the reasonable cost of purchasing the work”. Regulation 12(1)(a) requires that amount *simpliciter* to be included in the “sum of the amounts” referred to. There is no authority for multiplying that sum by 90 per month, or augmenting it in any other way. Section 122O(2) is also plain – infringement sums are payable in respect of “every infringement identified in the enforcement notice...”. Five infringements have been identified in the enforcement notice. It is simply not permissible to engage in speculation about what other infringements may have occurred and to order compensation based on that speculation.

[40] The second head is the cost of fees paid to the IPAP; the Applicant has identified these as those due and paid on five notices as set out in the enforcement notice (under Telecom ID numbers 369, 668, 2183,2249, and 2688.) At \$25 per notice this comes to \$125¹⁹.

[41] The third head is the amount of fees paid to the Tribunal, which is \$200.

[42] The fourth item is an amount considered appropriate by the Tribunal as a deterrent.

[43] While r 12(2) sets out the items to be considered, there are constraints: s 122O(3) provides that the Tribunal may order payment of a “sum representing a contribution” to the fees paid to the IPAP, and a ‘reimbursement’ for the fees paid to the Tribunal. The regulation must be interpreted in the light of the Act.

[44] In relation to IPAP fees, the Tribunal adopts the approach taken in several other cases before it²⁰, and regards the cost of the detection and warning notices to be in part educative, and awards one third of the cost of the detection Notice, two thirds of the cost of the Warning notice and three thirds of the cost of the enforcement notice. In addition, the rights owner applied for two other notices, which did not result in the sending of an infringement notice, but which were notified to the applicant under s 122E(2)(e) and s 122F(2)(e). The rights owner has succeeded overall on its application, and has been put to the cost of filing notices to restrain the account holder, who appears to have taken no action in response to the first two notices. In the circumstances full recovery of these additional notices seems appropriate, making a total under this head of \$99.98.

[45] In relation to the Tribunal fees, there seems no reason not to reimburse all of this fee. The Tribunal adopts that approach and reimburses the \$200 fee.

[46] Regulation 12(3) applies when considering any sum payable under the fourth head, namely deterrent effect. The Tribunal must consider, in addition to “any circumstances it considers relevant” also the flagrancy of the infringement, the possible effect of the infringements on the market, and whether the amounts under

¹⁹ It is not clear why the Application to the Tribunal lists this sum as \$143.75.

²⁰ See, for example, [2013] COP 1 and [2013] COP 6.

the other heads would be sufficiently deterring. The rights owner has made extensive submissions on this point.

[47] It notes that the account holder had installed peer-to-peer file sharing software on its computer, which was a deliberate and conscious act. Although RIANZ does not say so, it is implicit in that submission that the intention in installing the software is to download and upload material via the Internet, some of which, at least, can be expected to be protected by copyright. On five occasions the account was detected uploading such material. We are invited to accept that such file sharing, which is an infringement under this part of the Act, happened on other occasions. The rights owner also points to the non-response after two notice, and a laconic response after the enforcement notice suggesting that the IP address in the notices was wrong – a point quickly and comprehensively responded to by the Rights owner.

[48] The rights owner then argues that the infringing activity will have had a deleterious affect on the market, noting such factors as the number of people alleged to be involved in file sharing, the decline in music sales since 2002 and the strong comments by the District Court on the cost of music piracy in *NZ Police v Vile*. The Tribunal has insufficient information on the direct impact on the market that the respondent's infringing might have.

[49] The rights holder says that infringements in all three notices need be considered. The Tribunal agrees and says all five instances of infringement will be considered.

[50] The rights holder says the deterrence needs go beyond the account holder; a deterrent sum should also deter others in the market from infringing. The Tribunal does not accept that. Regulation 12(2)(d) talks of a “deterrent against **further** infringing” (emphasis added) which strongly implies there has been a finding of infringement, against which future infringement by the infringer would be “further” infringing. If the legislature had intended to cover infringement by others, including by those who had not previously infringed, it would have used a word such as “other”. The Tribunal interprets deterrence in this provision as applying only to the account holder, not the general public.

[51] The rights holder observed the similarity between this provision and s 121(2) dealing with flagrancy and similar considerations in assessing additional damages in other copyright cases. It referred to the Court of Appeal's decision in *Skids*²¹ but the Tribunal does not find that of much assistance. In that case the court was able to consider factors such as the intention of the parties, their means, their conduct – none of which are available to the Tribunal on a hearing on the papers. It is not clear, for example, whether the infringement arose from the deliberate and calculated actions such as those present in the *Skids* case, or were simply the result of ignorance of the law, apathy about the result, vagueness about the technology, or the newness of this procedure.

[52] Reference to US cases involving statutory damages of identified sums are of no assistance in resolving this provision, which involves the setting of a figure. Nor, with respect, are the schedules prepared by the rights holder showing the tariffs in offences under other statutes involving increasing penalties for up to three offences.

21 *Skids Programme Management Limited & Ors. v McNeill & Ors.* [2012] NZCA 314, 23 July 2012.

[53] The Tribunal accepts that deterrent sums could substantially exceed the compensatory damages awarded and that a limit of \$15,000 (the total sum under all heads) is the maximum to be awarded²². Other factors which seem relevant are that the account holder's computer may well be a domestic or family one, and cases involving copyright fights between businesses may well not be applicable, especially as to quantum, and that a Tribunal order, which has the same effect as a judgment for a sum of money made by a District Court, may of itself have a deterrent impact on a lay party.

[54] Taking all such matters into account, the Tribunal finds that in this case, a sum of \$50 for each of the five infringements identified will be an appropriate deterrent against further infringing, or a total under this head of \$250.00.

Orders

[55] The Tribunal orders the account holder to pay to the rights holder the sum of \$561.93, made up as follows:

- [a] under r 12 (2)(a)(i) and s 122O(2) the amount of \$11.95 for compensation;
- [b] under r 12 (2)(b) the amount of \$99.98 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 \$250 as a deterrent.

Decision of the Copyright Tribunal delivered by PC Dengate Thrush

DATED at WELLINGTON this 1st day of August 2013

PC Dengate Thrush
Member

²² r.15 (1) (b).