

[2013] NZCOP 6

COP 017/12

UNDER

The Copyright Act 1994

BETWEEN

RIANZ

Applicant

AND

TELECOM NZ 3553

Respondent

BEFORE THE COPYRIGHT TRIBUNAL

Paul Sumpter

DECISION ON THE PAPERS

DECISION

Introduction

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

[2] The Applicant here is the Recording Industry Association of New Zealand (RIANZ) which filed the application to the Tribunal as agent for copyright owners Universal Music, Inc, Societe D'Invertissements Et De Gestion 104 SAS and WMG Acquisition Corp.

[3] The Respondents are an individual account holder.

[4] The case concerns the uploading of sound recorded songs by means of the BitTorrent Protocol (Azureus) software programme on three separate occasions. The songs were "Lonely Boy" by the Black Keys and "Good Time" by Owl City (twice).

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

[6] The application was received by the Tribunal on 22 December 2012 and included:

- a copy of the enforcement notice;
- evidence that RIANZ acts as the agent of the owners of the material in which copyright is alleged to be infringed;
- a statement of which of the alleged infringements identified in the enforcement notice RIANZ seeks to enforce;

- a statement of the amount (\$1,627.55) that RIANZ is seeking from the account holder; and
- the prescribed fee.

[7] Following receipt of that information the Tribunal ordered Telecom New Zealand, the relevant internet protocol address provider (IPAP) to produce to the Tribunal the names and contact details of the account holder and copies of the detection warning notices sent to that account holder. The Tribunal was satisfied that these details and notices were provided to it as soon as practicable and the Tribunal gave notice of the proceedings to the account holder.

[8] Correspondence has been entered into between the Tribunal and the Respondents and in a letter dated 31 January 2013 from the Tribunal to the Respondents they were invited to confirm if they wished to be heard or if they would like matters to be dealt with on the papers. No response was received from that letter and further letters were sent by the Tribunal to the Respondents dated 25 February and 5 March 2013 informing them that the Tribunal would hear the matter on the papers.

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

- RIANZ's application to the Tribunal;
- copies of the infringement notices sent to the account holder;
- submission provided by RIANZ dated 20 December 2012;
- a letter dated 14 January 2013 from the account holder; and
- a response to that letter from RIANZ on 31 January 2013.

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

Infringement

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

- that each incidence of file sharing identified in the notice constituted an infringement of the copyright in the work identified; and
- that the information recorded in the notice is correct; and
- that the notice was issued in accordance with this Act.

[12] File sharing networks involve material being uploaded by, or downloaded from, the internet using an application or network that enables the simultaneous sharing of material between multiple users. Such networks are not illegal in themselves, although much of the content of the file sharing networks is music, film, television,

books or software that is protected by the Copyright Act 1994. In this case the Applicant alleged the copyright in the songs was infringed by way of the account holder uploading the works, i.e. communicating the works to the public in contravention of s 16(1)(f) of the Copyright Act 1994.

[13] RIANZ provided considerable detail in its submission including a description of the method used by RIANZ employing a methodology known as “Mark Monitor” (formerly called “Detecnet”) to gather evidence. Although this description was of a general nature, it should be read in conjunction with information about the sound recordings downloaded by the Respondents in this particular case. The information set out, amongst other things, the internet protocol address (IP), the exact times and dates of the downloading, the identity of the sound recordings, the copyright owners’ names and the file sharing application or network used.

[14] There has been no evidence provided by the Respondents under s 122N(2) as to why any one or more of the presumptions set out above do not apply with respect to any particular infringement identified in this case. Furthermore, the Respondents by their letter dated 14 January 2013 accepted that three songs were “downloaded”.

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

Penalties

[16] There is a preliminary step. The Tribunal may decline to make an order under s 122O(1) if, in the circumstances of the case, it is satisfied that making the order “*would be manifestly unjust to the account holder*”: s 122O(5). Would it be manifestly unjust in the present case?

[17] The only relevant information before the Tribunal is the letter from the Respondents dated 14 January 2013. In that letter the Respondents said that the songs were “downloaded” (although RIANZ maintains that uploading occurred) by their children. After receiving the first warning notice they explained to their three young children the rules about downloading music and that it was not to be done. However, one child subsequently downloaded another song after which they received a further notice. That child was warned about the behaviour but a third notice subsequently arrived for the same song. The Respondents provided an explanation how this may have happened by mistake, though RIANZ, in its response of 31 January 2013, does not accept that explanation.

[18] The Respondents accept responsibility for the actions of their children and state that they believe that they have now done enough to ensure that future illegal downloading of songs will not occur again. They have asked for any penalties to be waived or alternatively that they would be willing to contribute to the disbursements incurred. Steps taken by the Respondents to ensure that illegal copying will not occur in future include that they will arrange for a friend to update all the passwords on the computer to ensure that their children no longer have internet access without their supervision.

[19] RIANZ, however, doubts that changing passwords will be effective to stop ongoing infringement by illegal file sharing through uploading. RIANZ states that the Azureus file sharing software on the Respondents' computer had not been removed and that the uploading of tracks would still be happening whenever that computer connects to the internet. Furthermore, RIANZ says that the Azureus software has been on the Respondents' computer from the first notice until the third notice and has been continually upgraded whenever that computer connected to the internet. RIANZ maintains that the Respondents should delete the Azureus software entirely from their computer.

[20] The infringing, therefore, arises from a family situation where blame has been cast upon the Respondents' children in the context of a degree of 'computer illiteracy' on the part of the Respondents. However we do not consider that (nor the offer of reimbursement) to be enough to bring the situation within the "manifestly unjust" category.

[21] These matters may, nevertheless, be relevant in the context of the sum to be ordered to be paid by the account holder under s 122O(2) discussed below.

[22] We turn therefore to the assessment of that sum.

[23] Section 122O(2) stipulates that the sum to be ordered must be determined in accordance with the regulations and must include a sum in relation to every infringement identified in the enforcement notice that the Tribunal is satisfied was committed against the rights owner at the IP address of the account holder. Section 122O(3) states that if the Tribunal makes an order under subs (1) it may also make an order requiring the account holder to pay to the rights owner either or both of the following:

[24] A sum representing a contribution towards the fee or fees paid by the rights owner to the IPAP:

[a] Reimbursement of the application fee paid by the rights owner to the Tribunal.

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

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

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

[b] \$15,000.

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

[28] In addition under r 12(2)(b), the Tribunal must determine:

"The cost of any fee or fees paid by the rights owner to the IPAP in respect of the infringements to which the application relate"; and

[29] Under r 12(2)(c), *“the cost of the application fee paid by the rights owner to the Tribunal.”*

[30] Dealing first, therefore, with r 12(2)(a), the Tribunal must determine *“for each work”* that copyright has been infringed at the IP address of the account holder. The regulation is parsimonious with words. There is a reference simply to *“each work”* which *“has been infringed”*. In the present case the account holder has infringed on three separate occasions. According to the RIANZ submission each sound recording track was legally available for purchase at the time in electronic form from iTunes as an individual track. So, all other things being equal, *“the reasonable cost”* amounts to, in total, \$6.57. However, in its submission RIANZ has suggested that the object of the regulations and the Act is to compensate the rights owner *“for the act of making a copyright work available to a potentially very large audience via a P2P network”*. RIANZ refers to the Discussion Paper of the (then called) Ministry of Economic Development in 2011 in support of its argument that the *“proper approach”* is to determine a sum *“with reference to the reasonable cost of purchasing a copy of the work”* and therefore the Tribunal should include in this sum an amount taking account of *“the actual or estimated number of downloads occurring in respect of each infringing upload”*. Based upon overseas literature and guesswork, RIANZ submits that the Tribunal should use a *“baseline figure of 90 downloads per infringing upload”* (taking, it was submitted, a conservative approach) to determine the *“compensation”* at \$591.30.

[31] However, the wording of s122O is quite specific and refers to the particular, identified infringements. Further there is no reference in r 12(2)(a) to any other matters which might be taken into account. In our view, if the legislature had wished to incorporate such a compensatory approach, it would have said so. Another problem for RIANZ is that there is no specific evidence of what downloading occurred in the present case.

[32] Accordingly, included in the sum that the account holder will be ordered to be pay is \$6.57, the reasonable cost of obtaining the three sound recordings legally.

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

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

[35] In the circumstances the applicant here is entitled to a *“contribution”* and for present purposes the Tribunal calculates that as follows. The fees paid to the IPAP were \$86.25. The Tribunal notes the importance of the educative role of the first two notices, especially the detection notice. When an account holder receives a detection notice, he or she has an opportunity to cease any infringing activity and thereby avoid further escalation. The enforcement notices however less educative. It is the final step before an application is made to this Tribunal, by which time the account holder has ignored two opportunities to modify the infringing behaviour. Given this *“sliding scale”* of culpability the Tribunal finds that the entire cost of the fee

for the enforcement notices is payable to the Applicant, RIANZ, (\$25.00); two thirds of the warning notice (\$16.65) and one third of the fee for the detection notices is payable (\$8.33). The total contribution to be paid, therefore is \$50.00.

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

Deterrent

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

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

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

[39] The RIANZ submission, rightly we think, states that all three infringements must be considered in this case. We are also mindful that the maximum figure for a sum ordered to be paid by the account holder is \$15,000.

[40] Looking at the factors mentioned in r12(3), the word “*flagrancy*” also appears in s 121(2) of the Copyright Act 1994, in relation to the calculation of damages for infringement under other parts of the Act. RIANZ pointed to the New Zealand Court of Appeal decision in *Wellington Newspapers Ltd v. Dealers Guide Ltd* 1994 2 NZLR 666 as an indication of the approach that the Tribunal might take. However we think that s 121(2) operates in an entirely different context to the present one. That provision, for example, is considered in light of detailed and sworn evidence in what has occurred.

[41] RIANZ referred to assessments in others jurisdictions. But we do not regard these as relevant. Nor do we regard the penalties fixed under other statutes, such as the Land Transport (Offences & Penalties) Regulations 1999 referred to by RIANZ, as being of any relevance.

[42] As outlined above, the Respondents provided a letter dated 14 January 2013 setting out an explanation of the infringing said to have been carried out by their three children and details of how this occurred. Some of this evidence, in particular in relation to the third infringing copy, is at odds with the response made by RIANZ in its *“Reply Submissions”* of 31 January 2013. Without the benefit of hearing the parties we are not able to resolve this conflict in the evidence. We do note, however, the implied admission of the Respondents that they are not *“IT computer savvy”* and, on the other hand, the fact that RIANZ used sophisticated tracking technology in assembling its evidence. The Respondents did, however, set out the steps that they were taking to prevent infringing in the future, offered to pay costs and apologised for what occurred. In all the circumstances we do not consider that this infringing amounted to *“flagrancy”*.

[43] As to the effect on the market, we take very broadly into account the submission of RIANZ about legal downloading services in New Zealand, as we do of the third prescribed factor being the reimbursement of fees to be paid.

[44] Looking at matters in the round, and taking into account all the circumstances in this case, we believe that an appropriate amount for the Respondents to pay as a deterrent is \$20.00 per infringement, i.e. a total of \$60.00.

Orders

[45] In summary therefore, the Tribunal orders the Respondent to pay to the Applicant the sum of \$316.97 comprised as follows:

[46] under r 12(2)(a)(i) – \$6.57:

- [a] under r 12(2)(b) – a \$50.00 contribution toward the IPAP fees paid by the Applicant;
- [b] under r 12(2)(c) – reimbursement of the application fee of \$200.00; and
- [c] under r 12(2)(d) – a deterrent sum of \$60.00.

Total: \$316.97

Decision of the Copyright Tribunal delivered by Paul Sumpter

DATED at WELLINGTON this 16th day of April 2013

Paul Sumpter