

[2013] NZCOP 7

COP 001/13

UNDER

The Copyright Act 1994

BETWEEN

RIANZ

Applicant

AND

Telecom NZ 3663

Respondent

BEFORE THE COPYRIGHT TRIBUNAL

Graeme Austin

HEARING ON THE PAPERS

DECISION

The Application

[1] The applicant has applied under s 122J of the Copyright Act 1994 (the 1994 Act) for an award under s 122O of that Act. Sections 122A-122U of the 1994 Act were added by the Copyright (Infringing File Sharing) Amendment Act 2011 (the 2011 Act). These sections establish a “special regime for taking enforcement action against people who infringe copyright through file sharing” (s 122B(1)). The applicant seeks an award against the respondent (referred to in these reasons as the account holder) of \$1,519.55. The Tribunal makes an order for payment by the account holder of \$276.78. Its reasons follow.

[2] The papers received by the Tribunal in the context of this application include: a detection notice, relating to an alleged infringement on 17 September 2012; a warning notice, relating to an alleged infringement on 22 October 2012; and an enforcement notice, relating to an alleged infringement on 4 December 2012. Attached to the latter document is a schedule with the heading: “Other recent alleged infringements recorded.” This schedule provides details of the three notices on which the application to the Copyright Tribunal under s 122J is conditioned.

[3] In the schedule, the preceding warning and detection notices are not identified as such. The Tribunal is satisfied, however, that, in the terms of s 122F(2)(d), the enforcement notice sufficiently “identifies the most recent warning notice issued to the account holder in relation to the rights owner, and the preceding detection notice.” Section 122F(2)(d) does not require in terms that the labels “detection” and “warning” be used in the enforcement notice to describe the earlier notices. Moreover, nothing in the information received by the Tribunal suggests that the applicant was prejudiced by the applicant’s failure to use these specific terms. (Attached to warning notice is a similar schedule, which, of course, identifies only the infringements that triggered the warning and detection notices.) That said, the Tribunal considers that it would be preferable if the detection and warning notices were identified as such at all stages of the process. The problem, such as it is, is

exacerbated in this application because the letter accompanying the detection notice was headed “Infringement Notice”. Technically, this is an accurate description: Under the 2011 Act, that is the generic term for the three requisite notices (see s 122A, definition of “infringement notice”), and the term “detection notice” was, used in the text of the letter. In terms of s 122F(2)(d), it would also be useful for any document accompanying the enforcement notice that purports to identify the previous detection and warning notices to specify the dates of those *notices*, not merely the dates of the alleged infringements. Without this information, it might be objected that the recipients of these documents (the account holder *and*, where relevant, the Tribunal) are required to connect too many dots.

[4] The infringement notices were served by Telecom New Zealand Ltd, Internet Protocol Address Provider (IPAP). According to the applicant, the respondent was the account holder of the IP addresses at which the file sharing is alleged to have occurred.

[5] The account holder challenged the detection notice. In material part, the text of the challenge notice is as follows:

*I am at work at this time, that song is also not on any laptops in the household.
Are you able to provide the laptop serial number?*

[6] The account holder also appears to have provided a contact number (which number is appropriately redacted in the documents received by the Tribunal). In a letter dated 12 October 2012, the applicant sent a reply to the challenge notice. Following receipt of the enforcement notice, the account holder made a submission (email to copyright@justice.govt.nz, dated 24 January 2012), to which the applicant responded with a letter of 12 February 2013. That letter set out the applicant’s reply submissions. The latter document stipulates that, on the facts of this case, the applicant “does not contend that the infringement was ‘flagrant’.” The Tribunal will refer again to these documents later in its reasons.

The Statutory Obligation to Order Payment

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

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

[8] There is an exception in s 122O(5), under which the Tribunal may decline to make an order if “in the circumstances of the case, the Tribunal is satisfied that making the order would be manifestly unjust to the account holder.” In all other cases - that is, where s 122O(5) is not engaged - the legislation requires the Tribunal to order payment. In this case, the Tribunal does not consider that s 122O(5) applies. However, as is discussed below, matters arise in the context of this application that indicates that a relatively modest award is appropriate. These relate in particular to the adequacy of the information provided by the applicant, on receipt

of the account holder's challenge notice, as to how future infringements of the type involved in this case could have been avoided.

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

"122N Infringement notice as evidence of copyright infringement

- (1) *In proceedings before the Tribunal, in relation to an infringement notice, it is presumed—*
- (a) *that each incidence of file sharing identified in the notice constituted an infringement of the rights owner's copyright in the work identified; and*
 - (b) *that the information recorded in the infringement notice is correct; and*
 - (c) *that the infringement notice was issued in accordance with this Act.*
- (2) *An account holder may submit evidence that, or give reasons why, any 1 or more of the presumptions in subsection (1) do not apply with respect to any particular infringement identified in an infringement notice.*
- (3) *If an account holder submits evidence or gives reasons as referred to in subsection (2), the rights owner must satisfy the Tribunal that, in relation to the relevant infringement or notice, the particular presumption or presumptions are correct."*

[10] These presumptions provide the principal basis on which the Tribunal is to determine that it is "satisfied" of the matters to which s 122O(1) refers.

[11] In the enforcement notice, the following appears under the heading "Detail of alleged infringement that triggered this notice":

*"IP Address: 122.59.172.209
Date and time of alleged infringement(s): 04DEC2012:16:28:02
Name of the copyright owner: Warner Bros. Records Inc and WEA international Inc (Warner Music New Zealand Limited)
Name of the work: IT GIRL JASON DERULO
Type of work: Song
Alleged infringed Act: Copyright has been infringed by this account holder communicating the work to the public (16(1)(f))
File Sharing application or network used: uTorrent 2.2.1"*

[12] The applicant included similar information (referring to the same song) in the detection and warning notices.

[13] Section 122A of the 1994 Act defines "infringement" as "an incidence of file sharing that involves the infringement of copyright in a work by a user." For the purposes of ss 122A to 122U therefore "infringement" has two elements. There must be file sharing, and, the file sharing must involve the infringement of copyright. This definition of "infringement" was added by the 2011 Act and applies only to ss 122A to 122U of the 1994 Act.

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

“file sharing is where—

- (a) material is uploaded via, or downloaded from, the Internet using an application or network that enables the simultaneous sharing of material between multiple users; and*
- (b) uploading and downloading may, but need not, occur at the same time.”*

[15] The Tribunal accepts that in each of the three notices there is sufficient information to engage the relevant presumptions in s 122N. While the information in the IPAP notices might have been set forth in a clearer manner, the Tribunal accepts that the relevant instances of copyright infringement involving file sharing are identified sufficiently.

[16] The Tribunal has considered carefully the matters addressed in the account holder’s challenge notice and submissions in the email of 24 January 2013. The Tribunal does not consider these matters to preclude reliance on the statutory presumptions in s 122N. The account holder’s claim that the account holder was at work at the time of the alleged infringement that was stipulated in the detection notice is irrelevant to liability. The 2011 Act makes the *account holder* liable for copyright infringement involving file sharing. Liability is not conditioned on identifying the person who actually engaged in the infringing act or caused the infringement to occur. The matter to which the account holder refers in the challenge notice would, under the scheme introduced by this legislation, make no difference to the account holder’s responsibility. Accordingly, s 122N(2) is not engaged by the challenge notice.

[17] As to the account holder’s claim in the email—that the account holder has not located any files containing the song on any computer using the relevant IP address—the Tribunal concludes that the applicant remains entitled to the benefit of the presumptions. Reaching this conclusion, the Tribunal does not place much reliance on the matters to which the applicant refers in paragraphs [4]-[7] of its letter of 12 February 2013 (“Reply Submissions of Applicant”). The relevant paragraphs of the Reply Submissions note that the account holder did not provide evidence or independent verification that the Derulo song was not on the account holder’s computer or any other computer that the account holder referred to in the challenged notice or emailed submissions; nor did the account holder provide evidence “that the uTorrent software program, shown in the applicant’s evidence packs as having been used for the uploading, was not on the respondent’s computer or on any other computer in the household using the respondent’s IP address.”

[18] These submissions appear to assume that it is for the account holder to establish that the file sharing did not occur. While this is not the occasion to resolve the issue, that assumption seems to be belied by the wording of subs 122N(3). It provides: “If account holder submits evidence or gives reasons as referred to in subsection (2), *the rights owner* must satisfy the Tribunal that, in relation to the relevant infringement or notice, the particular presumption or presumptions are correct” (added emphasis). In this application, however, the Tribunal is prepared to rely on the information provided by the applicant in Schedule 1 of its submissions to the Tribunal as to the evidence gathering method. That information is, it must be observed, somewhat thin. In the light of the wording of s 122N(3), in particular, its stipulation that the applicant has the task of satisfying the Tribunal that it continues to

have the benefit of the evidential presumptions in s 122N(1), a fuller explanation of the technological processes leading to detection would be preferable. Of course, the facts of other cases might provoke a more testing exposition of these issues—and prompt consideration of the interplay of subss 122N(2) and (3), and whether those subsections require the account holder’s “evidence” or “reasons” to pass any kind of threshold before s 122N(3) is engaged.

[19] Because the applicant is entitled to the benefit of the presumptions in 122N, the Tribunal is satisfied of the relevant matters in s 122O(1), and is accordingly required to order the account holder to pay a sum to the rights holder.

Quantifying the Sum

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

“The sum specified in the Tribunal order must be determined in accordance with regulations made under this Act and must include a sum in relation to every infringement identified in the enforcement notice that the Tribunal is satisfied was committed against the rights owner at an IP address of the account holder.”

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

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

- (1) *The sum that the Tribunal may order an account holder to pay under section 122O of the Act is the lesser of—*
 - (a) *the sum of the amounts referred to in subclause (2)(a) to (d); and*
 - (b) *\$15,000.*
- (2) *If the Tribunal orders an account holder, under section 122O of the Act, to pay a rights owner a sum, the Tribunal must determine the following:*
 - (a) *for each work in which the Tribunal is satisfied that copyright has been infringed at the IP address of the account holder,—*
 - (i) *if the work was legally available for purchase in electronic form at the time of the infringement, the reasonable cost of purchasing the work in electronic form at that time; or*
 - (ii) *if the work was not legally available for purchase in electronic form at the time of the infringement but was available in some other form, the reasonable cost of purchasing that work in another form at that time; or*
 - (iii) *if neither subparagraph (i) nor subparagraph (ii) applies, the amount claimed by the applicant in respect of the work, or any other reasonable amount determined by the Tribunal:*
 - (b) *the cost of any fee or fees paid by the rights owner to the IPAP in respect of the infringements to which the application relate; and*
 - (c) *the cost of the application fee paid by the rights owner to the Tribunal; and*
 - (d) *an amount that the Tribunal considers appropriate as a deterrent against further infringing.*

- (3) *In considering whether an amount is appropriate under subclause (2)(d) and, if so, what that amount should be, the Tribunal may consider any circumstances it considers relevant, but must also consider—*
- (a) *the flagrancy of the infringement; and*
 - (b) *the possible effect of the infringing activity on the market for the work; and*
 - (c) *whether the sum of the amounts referred to in subclause (2)(a) to (c) would already constitute a sufficient deterrent against further infringing.”*

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

[23] Under s 122O(2), the Tribunal is instructed to determine the sum “in accordance with the regulations made under this Act” and to include a sum “in relation to every infringement identified in the *enforcement* notice” (added emphasis). In this application, the enforcement notice refers to only one work, the Jason Derulo song; no other work is identified as being infringed at the account holder’s IP address. The Tribunal is directed to take account of the number of infringed *works*, not the number of copies of a work (or works).

[24] The Tribunal accepts the applicant’s submission that, in the terms of subclause 12(2)(a)(i), the price for an electronic copy of the work infringed is \$1.79.

[25] However, the Tribunal does not accept the applicant’s submission that the “sum” should be augmented because the file sharing involved communication of the work to the public, one of the exclusive rights of the copyright owner enumerated in s 16 of the 1994 Act (s 16(1)(f)). The legislation trains the Tribunal’s focus on the particular kind of “infringement” (infringement by file sharing) with which the 2011 Act is concerned. This application does not present an opportunity for any wider consideration of the implications of the kind of infringement of the copyright owner’s exclusive rights (ie, as stipulated in s 16 of the 1994 Act) that occurred in conjunction with the file sharing, even in the context of the deterrence factor.

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

- “(b) the cost of any fee or fees paid by the rights owner to the IPAP in respect of the infringements to which the application relate; and*
- (c) the cost of the application fee paid by the rights owner to the Tribunal.”*

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

“If the Tribunal makes an order under subsection (1), it may also make an order requiring the account holder to pay to the rights owner either or both of the following:

- (a) a sum representing a contribution towards the fee or fees paid by the rights owner to the IPAP under section 122U:*
- (b) reimbursement of the application fee paid by the rights owner to the Tribunal.”*

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

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

[30] The Tribunal calculates those sums as follows. As to the fee paid to the IPAP, this application to the Tribunal was triggered, as is required by the legislation, by the three requisite notices: detection, warning, and enforcement. The total of the fees paid to the IPAP was \$75.00 (\$25.00 each). In other cases, the Tribunal has referred to the educative role of the first two notices, especially the detection notice. It has reasoned that the educative role of an enforcement notice is less than that of the other notices, noting that the enforcement notice is the final step in the statutory process on which an application to the Tribunal is conditioned.

[31] In this application, however, the Tribunal does *not* consider that any more than a third of each fee (i.e. \$8.33) should be paid. The Tribunal considers that the applicant could readily and cheaply have done more to enhance the educative value of the information accompanying the notices that was provided in response to the challenge notice. From the applicant’s letter of 12 February 2013, it is reasonably clear that the applicant had developed a theory of how the “infringements” occurred. That is, the applicant had reached the conclusion that the infringements resulted from the uploading of the file by other parties from one of the computers that used the account holder’s IPAP account. That theory is not, to say the least, made entirely clear in the notices served by the IPAP. These notices refer simply say: “Copyright has been infringed by this account holder communicating the work to the public (16(1)(f)).” Those familiar with the wording of the Copyright Act 1994 will know that “to communicate” is defined to mean “to transmit or make available by means of a

communication technology, including by means of a telecommunications system or electronic retrieval system, and communication has a corresponding meaning.” For a lay recipient, however, this point is likely to be somewhat opaque, if it be discerned at all.

[32] In the light of the account holder’s denial of knowledge of the infringement, and the information provided in the challenge notice that the account holder was at work at the time of the infringement, the possibility arises that the relevant infringing act, for the purposes of s 16(1)(f), involved making the work available. That can occur through an automated process. It should not be readily assumed that the account holder would know that this is a type of infringement that is provided for in the Copyright Act 1994. The applicant had an opportunity to clarify matters with its letter of 12 October 2012: “Reply to Challenge Notice for Infringement Notice Number 75752”. However, that letter did not clearly enough set forth the applicant’s theory about how the infringements occurred. The letter did not, for example, clearly explain how the infringement might have occurred even though the account holder was not present (being at work); nor did explain for instance how the *specific* file sharing program (which, as the detection notice detailed, the account holder knew to be “uTorrent”) might cause an infringement to occur (which in the context of this program is often described as “seeding”) without the active participation of the account holder (or anyone else connecting to the Internet from the same account). The letter’s admonition simply to remove any file sharing program does not reach the point.

[33] This is of course not to suggest that liability for copyright infringement requires an intention to infringe. And the Copyright Act 1994, including the 2011 file sharing amendments, impose important responsibilities on account holders. However, in this application, where the applicant had formed the view that the infringement involved uploading by others rather than active participation in the infringement by the account holder, the educative value of the information provided to the account holder would have been significantly enhanced by the provision of more specific guidance, appropriate for a lay recipient, as to how that kind of infringement (i.e., file sharing by making a work available) might occur, and the specific steps that could be taken to avoid that occurrence in the future. Accordingly, the total amount in fees paid by the applicant was \$75.00, but the sum representing the “contribution” to be included in the total sum payable is \$8.33 for each application (a total of \$24.99) (taking into account reg 12(2)(b) read in the light of s 122O(3)(a)).

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

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

“In considering whether an amount is appropriate under subclause (2)(d) and, if so, what that amount should be, the Tribunal may consider any circumstances it considers relevant, but must also consider—

- (a) the flagrancy of the infringement; and*
- (b) the possible effect of the infringing activity on the market for the work; and*

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

[36] The regulations do not stipulate whether the reference to deterrence is directed to an individual respondent in a particular case or whether the Tribunal is entitled to consider the deterrence effect of the award on file sharing activity more generally. The reference in 12(3)(a) to "the flagrancy of the infringement" appears to focus on the infringement by the individual respondent. However, phrase "the possible effect of the infringing activity on the market for the work" in 12(3)(b) could have a broader focus, albeit one trained only on the specific works to which the infringement notices refer, not file sharing of copyright-protected works more generally. (The terminological distinction between "the infringement" and "infringing activity" presumably signals some relevant difference.) Of course, to segregate individual and general deterrence may be unrealistic. The Tribunal's decisions will be published, and an order made against a specific respondent might itself serve as a more general deterrent to others.

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

(a) *The flagrancy of the infringement;*

[38] The applicant does not consider the infringement to have been "flagrant" (Reply Submissions of Applicant, para. [12].) This is an appropriate concession. The Tribunal sees no reason to look beyond it.

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

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

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

[40] In this application, the Tribunal does not consider that the sum of the amounts calculated under subclause (2)(a) to (c) would constitute a sufficient deterrent against further infringing. The circumstances taken into account by the Tribunal include the respondent's making available of unlicensed copies of the copyright-protected work and the retail cost of licensed copies of the work. That said, any increase in the sum should be modest. It is apparent that the applicant had reached the view that the infringement through file sharing that occurred was making the work available for upload by others—yet, as is explained above, the applicant did not take the opportunity to explain in sufficiently specific terms how that might have happened and how to avoid its future occurrence.

[41] The 2011 Act also makes it clear, however, that account holders also have important responsibilities to prevent the use of their accounts for infringement of copyright through file sharing. In the account holder's email of 24 January 2013, the account holder wrote that the account holder "simply forgot" about the matter until the December notice was received. This is not consistent with the appropriate discharge

of those responsibilities in the light of the receipt of a detection notice under s 122D of the 2011 Act. Accordingly, the Tribunal believes that to make *no* award under this head would provide an insufficient deterrence against further infringing.

[42] In the light of all the relevant circumstances of this case, the Tribunal considers that an addition of \$50 to the sum of the amounts in subclause (2)(a) to (c) would serve as an appropriate deterrent against further infringing.

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

Under reg 12(2)(a):	\$1.79
Under reg 12(2)(b):	\$24.99
Under reg 12(2)(c):	\$200.00
Under reg 12(3):	\$50.00.

The total sum awarded is therefore: \$276.78.

While this is lower than awards made in other cases, the Tribunal considers this to be appropriate, given the circumstances detailed above.

Decision of the Copyright Tribunal delivered by Graeme Austin.

DATED at WELLINGTON this 22 day of April 2013.

Graeme Austin
Member
Copyright Tribunal