

[2013] NZCOP 8

COP 002/13

UNDER

The Copyright Act 1994

BETWEEN

**RECORDING INDUSTRY
ASSOCIATION NEW ZEALAND**

Applicant

AND

TELECOM NZ 3728

Respondent

BEFORE THE COPYRIGHT TRIBUNAL

Jane Glover

DECISION ON THE PAPERS

Introduction

[1] This case concerns alleged file sharing infringement under s.122A-U of the Copyright Act 1994 (“the Act”).¹ Sections 122A-U of the Act set out a process for copyright owners to use when they consider that an internet user has infringed their copyright via a file sharing network. File sharing is defined in s.122A of the Act as follows:

“File sharing is where -

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

[2] File sharing networks are not illegal in themselves, although much of the content on file sharing networks is music, film, television, books or software that is protected by the Copyright Act 1994. When a rights owner alleges that its copyright has been infringed via file sharing, the Act provides that the rights owner may require the relevant internet protocol address provider (IPAP) to issue infringement notices to the account holder concerned. The first infringement notice is a detection notice, the second is a warning notice, and the third is an enforcement notice. After an enforcement notice has been issued, the rights owner may apply to the Copyright Tribunal for an order under s.122O of the Act that the account holder pay to it a sum of money, calculated in accordance with the Copyright (Infringing File Sharing) Regulations 2011 (“the Regulations”).

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

Parties

[3] The Applicant is the Recording Industry Association of New Zealand (RIANZ). RIANZ filed its application to the Tribunal in its capacity as agent for the copyright owner, Warner Brothers Records Inc and WEA International Inc (Warner Music New Zealand Limited).

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

Factual background and procedural history

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

[6] The initial detection notice was issued on 30 October 2012 in respect of an alleged infringement that took place on 23 October 2012. During the ensuing on-notice period, the Applicant sent three further notices to the IPAP regarding infringements alleged to have taken place on 17 November, 21 November and 25 November respectively. (Because only the IPAP holds the information matching IP addresses and account holders, the Applicant did not know the identity of the account holder or that the further alleged infringing was taking place within an on-notice period.)

[7] The warning notice was issued on 10 December 2012, and the enforcement notice was issued on 14 January 2013. The Application was filed with the Tribunal on 17 February 2013. The Respondent has not filed any submissions, nor has she communicated with the Tribunal in any way.

[8] Neither party has requested a hearing, and the Tribunal does not consider it necessary to convene one. Accordingly, this matter is determined on the papers in accordance with s.122L of the Act.

Infringement

[9] Infringement is defined as “an incidence of file sharing that involves the infringement of copyright in a work by a user”.³ The Applicant has provided evidence that on six separate occasions the account holder or a person using the account holder’s IP address uploaded one copyright protected track, i.e. the sound recording *It Girl*. The account holder or a person using the account holder’s IP address evidently used BitTorrent Protocol (uTorrent ver 3.0.0/3.2.2) software to enable each of the uploads. Each of the infringements occurred at an IP address of the account holder as verified by the IPAP.

[10] The Act creates a presumption that each incidence of file sharing identified in an infringement notice constitutes an infringement of the right owner’s copyright in the work identified.⁴ An account holder may submit evidence that this presumption does not apply,

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

³ Section 122A(1).

⁴ Section 122N(1)(a).

or give reasons why it should not apply.⁵ In this case, the Respondent has not provided any evidence that the presumption should not apply.

[11] In the circumstances, the Tribunal is satisfied that:

- [a] each of the alleged infringements that triggered the notices amounted to an infringement of the right owner's copyright;⁶ and
- [b] the infringements occurred at the IP address of the account holder.⁷

[12] Further, in the absence of any evidence to the contrary, the Tribunal accepts that the three infringement notices were issued in accordance with the Act.⁸ In this regard, the Tribunal notes s.122N(1)(b) and (c) of the Act, which create statutory presumptions that the information recorded in an infringement notice is correct and that the notice was issued in accordance with the Act.

Penalties

[13] The Tribunal has jurisdiction to require the Respondent to pay various sums to the Applicant under four different heads of relief:

- [a] regulation 12(2)(a), which deals with the cost of purchasing the works legally;⁹
- [b] regulation 12(2)(b), which provides for a contribution towards the fees paid by the rights owner to the IPAP;¹⁰
- [c] regulation 12(2)(c), which provides for reimbursement of the application fee paid by the rights owner to the Tribunal;¹¹ and
- [d] regulation 12(2)(d), which provides that an additional sum may be awarded as a deterrent against further infringing.¹²

[14] In this case, the Applicant seeks a total sum of \$1,886.64, the majority of which comprises a claim for \$1,500 under r.12(2)(d).

“Regulation 12(2)(a)

Regulation 12(2)(a) provides that in calculating the appropriate relief, the Tribunal must determine the reasonable cost of purchasing each of the works in which the Tribunal is satisfied that copyright has been infringed. Similarly, s.122O(2) provides that “the sum specified in the Tribunal order ... must include a sum in relation to every infringement identified in the enforcement notice that the Tribunal is satisfied was committed against the rights owner at an IP address of the account holder”.

⁵ See s. 122N(2).

⁶ See s.122O(1)(a)(i).

⁷ See s.122O(1)(a)(ii).

⁸ Section 122O(1)(b).

⁹ See also s.122O(1) and (2).

¹⁰ See also s.122O(1)(3)(a).

¹¹ See also s.122O(3)(b).

¹² See also r.12(3).

[15] According to the Applicant, at the time of the infringements the sound recording *It Girl* by Jason Derulo was available for purchase in electronic form from iTunes at a cost of \$2.39.

[16] Regulation 12(2)(a) and s.122O(2) sit more comfortably with proceedings involving downloading rather than uploading. Where a song has been downloaded illegally, it makes perfect sense for the user to be required to pay the market price for the work. In this case, however, the only evidence of infringement is in relation to uploading – the Respondent has uploaded the same work on six different occasions. Presumably, the Respondent would not have otherwise purchased the same work six times, and so there is some artificiality in requiring her to pay the reasonable cost of purchasing the work six times over. What the Respondent *has* done is make the work available illegally for any number of third parties to obtain copies of it, although there is no evidence of actual downloading by third parties. Given the wording of the legislation - which does not differentiate between uploading and downloading - it seems reasonable that the Respondent be required to pay the market price for the work in respect of each act of infringement.

[17] Accordingly, the Tribunal orders the Respondent to pay to the rights owner 6 x \$2.39, totalling \$14.34.

“Regulation 12(2)(b)

Regulation 12(2)(b) requires the Tribunal to determine the cost of any fee or fees paid by the rights owner to the IPAP in respect of the infringements to which the application relate, and s.120(3)(a) of the Act provides that the Tribunal may order the account holder to pay to the rights owner a contribution towards the fees paid to the relevant IPAP.¹³”

[18] In the present case, there are six “infringements to which the application relates”, i.e. six occasions on which infringement by way of uploading was detected from the Respondent’s IP address. The Applicant and has paid 6 x \$25 plus GST to the IPAP, being a total of \$172.50. As noted earlier, three of the infringements did not trigger notices, but the Applicant was still obliged to pay an IPAP fee as required by s.122U. (At the time it sends information to the IPAP under s.122C, the Applicant does not know whether the information is occurring shortly after a detection or warning notice and therefore within an on-notice period.)

[19] The Applicant’s submissions refer to the Tribunal’s decisions [2013] NZCOP 1 and 2, where the Tribunal referred to a “sliding scale of culpability” inherent in the notice requirement. The Applicant submits that in the circumstances of this case, where three further IPAP fees were incurred after the detection notice was issued, the Applicant should be entitled to the following contributions:

- | | |
|----------------------|----------------------------------------|
| - Detection notice | \$8.33 (one third of IPAP fee) |
| - Additional notices | \$16.67 each (two thirds of IPAP fees) |
| - Warning notice | \$16.67 (two thirds of IPAP fee) |
| - Enforcement notice | \$25.00 (entire IPAP fee) |

¹³ Section 122O(3)(a).

[20] It is debatable whether the additional notices should be recoverable at the two thirds rate (as submitted by the Applicant) or the one third rate. On the one hand, the notices were issued during an on-notice period, which is designed to provide users with a safe harbour period during which they can cease their illegal activities without any further repercussions or escalation. On the other hand, the Respondent has not, in fact, responded to the infringement notice by ceasing file sharing, as evidenced by the fact that the warning and enforcement notices were issued and the case has proceeded to the Tribunal. Furthermore, the Applicant is out-of-pocket in respect of those fees through no fault of its own.

[21] On balance, the Tribunal accepts the Applicant's submission that the additional notice issued during the on-notice period should be recoverable at the two thirds rate. Accordingly, the Respondent is required to pay a contribution towards the IPAP fees incurred by the Applicant in accordance with the above calculations, totalling \$100.01.

“Regulation 12(2)(c)

Section 1220(3)(b) of the Act provides that the Tribunal may make an order requiring the account holder to reimburse the rights owner for the application fee paid by the rights owner to the Tribunal, and r.12(2)(c) requires the Tribunal to determine the cost of that application fee.”

[22] The Tribunal accepts that the Respondent should reimburse the Applicant for the cost of application fee paid to the Tribunal, i.e. the sum of \$200.

“Regulation 12(2)(d)

Regulation 12(2)(d) requires the Tribunal to determine “an amount that the Tribunal considers appropriate as a deterrent against further infringing”. In this case, the Applicant submits that the actions of the Respondent were calculated and deliberate, as evidenced by the six instances of uploading over a period of two and a half months, and that a sum of \$250 per infringement is warranted, i.e. \$1,500.”

[23] In considering whether to award a deterrent sum and, if so, what that amount should be, the Tribunal may consider “any circumstances it considers relevant”, but also:

- [a] the flagrancy of the infringement;
- [b] the possible effect of the infringing activity on the market for the work; and
- [c] whether the other sums awarded by the Tribunal would already constitute a sufficient deterrent against further infringing.

[24] Each of these three factors is considered in turn below.

(a) Flagrancy of the infringement

[25] The Applicant submits that the following factors demonstrate flagrancy on the part of the Respondent:

- The locating, downloading, installing and configuring of the BitTorrent software was a deliberate act by the Respondent.
- The Respondent uploaded tracks on six occasions over a period of nearly three months. The Applicant submits that it “defies common sense” to accept that the

only occasions during that period when she was uploading sound recordings were the six occasions detected.

- The account holder took no action to alter her behaviour following the first two notices, despite widespread publicity regarding the file sharing legislation and its operation.

[26] The Tribunal does not consider, however, that it has been established that the infringement was flagrant, and it notes that the factors identified by the Applicant will in fact be common to most proceedings. For example, all of the file sharing cases that come before the Tribunal will involve both the use of file sharing software and account holders who have failed to change their behaviour following the first two infringement notices. Also, because of the time frames in the legislation all of the file sharing cases that come before the Tribunal involve infringements occurring over a lengthy period - and in this case the total period of less than three months is very much at the shorter end of the scale.

[27] Also, the evidence has established that the Respondent uploaded only one song. The nature of file sharing software, which often runs in the background, means that these uploads may well have taken place automatically when the Respondent connected to the internet.

(b) Possible effect of the infringing activity on the market for the work

[28] The Applicant submits that by uploading a copyright protected track using P2P software, the account holder or a person using the account holder's IP address has enabled multiple other parties to download these tracks. It submits that according to figures available from the monitoring company comScore, each month there are around 779,000 people in New Zealand accessing unlicensed P2P services, and that cumulative effect of illegal downloading is devastating.

[29] The Tribunal accepts that the Respondent's actions are likely to have had a detrimental effect on the market for the work.

(c) Whether the other sums awarded by the Tribunal would already constitute a sufficient deterrent against further infringing

[30] The rights owner strongly submits that the sums available under sub-clauses 2(a) – (c) would not be a sufficient deterrent, and would not even fully reimburse the right owner's out-of-pocket costs.

[31] The Tribunal agrees that those other sums would not necessarily constitute a sufficient deterrent against further infringing, and that a further deterrent sum is appropriate.

Any other circumstances the Tribunal considers relevant

[32] The Applicant submits that the Tribunal should also consider the following points:

- The Legislature set a maximum figure of \$15,000 for the total amount that can be ordered to be paid to the rights owner,¹⁴ and this produces a guideline as to

¹⁴ Section 1220(4).

the top limit for all sums in a worst case. The Applicant submits that the figure equally provides an indication that a deterrent sum needs to be more than a small or trivial amount when compared to the maximum penalty.

- Legal services for the digital downloading or streaming of sound recordings are readily and inexpensively available in New Zealand. The Applicant has been successful in encouraging a wide range of legal digital services to establish businesses in New Zealand. New Zealand consumers have nine digital download stores, eight streaming services and two internet radio stations to choose from, including global leaders iTunes, Spotify and Pandora. Unlike P2P services, these services ensure that songwriters, musicians and those who invest in them are paid. A deterrent sum should serve the purpose of changing people's behaviour to using legal instead of illegal channels of music distribution.

[33] In addition, the Tribunal notes that the Respondent has not accepted any responsibility for her actions, has not provided any assurances regarding her future conduct, and has not filed any submissions or otherwise engaged with the Tribunal process at all. She has chosen simply to ignore it.

[34] Taking into account all of these factors, the Tribunal considers that a deterrent sum of \$600, or \$100 per infringement, is appropriate.

Orders

[35] In summary, therefore, the Tribunal orders the Respondent to pay to the Applicant the sum of \$914.35, comprised as follows:

- [a] \$14.34 under r.12(2)(a), representing the cost of purchasing the work legally;
- [b] \$100.01 under r.12(2)(b), representing a contribution towards the IPAP fees paid by the Applicant; and
- [c] \$200.00 under r.12(2)(c), being reimbursement of the application fee paid by the rights owner to the Tribunal; and
- [d] \$600.00 under r.12(2)(d), being an additional deterrent sum.

Decision of the Copyright Tribunal delivered by Jane Glover

DATED at WELLINGTON this 27th day of June 2013

Jane Glover