[2013] NZCOP 10

COP 008/13

UNDER	The Copyright Act 1994
BETWEEN	**RECORDING INDUSTRY ASSOCIATION NEW ZEALAND**
	Applicant
AND	**Telecom NZ 4296**
	Respondent

BEFORE THE COPYRIGHT TRIBUNAL

Paul Sumpter

DECISION ON THE PAPERS

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 Group, Inc and Societe D'Invertissements Et De Gestion 104 SAS.

[3] The Respondent is an individual account holder.

[4] The case concerns the uploading of sound recorded songs by means of the BitTorrent (Azureus ver 4.7.1.2/4.8.0.0) software programme on three separate occasions. The songs were "Back to Black" (Amy Winehouse), "Turn up the Love" (Far East Movement) (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 3 May 2013 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 ($1,043.42) 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 name 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] No challenge notices under s 122G were lodged by the Respondent.

[9] Correspondence occurred between the Tribunal and the Respondent and in a letter dated 31 May 2013 the Tribunal asked the Respondent if he wished to be heard or would like the matter dealt with on the papers. A deadline of 7 June 2013 was given for response. By an email from the Respondent to the Tribunal dated 8 June the Respondent indicated that he did not have time to attend a hearing. Accordingly the Tribunal is deciding this matter on the papers.

[10] 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 3 May 2013; and

- letter from between the Tribunal to the Respondent dated 31 May 2013, two emails from the Respondent to the Tribunal dated 6 and 8 June 2013 and an email dated 6 June 2013 from the Tribunal to the Respondent.

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 RIANZ has alleged that the copyright in the songs was infringed by 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 has provided information about the sound recordings uploaded by the Respondent in this case setting out, amongst other things, the internet protocol address (IP), the exact times and dates of the uploading, 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 Respondent 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.

[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 are the emails dated 6 and 8 June 2013 from the Respondent to the Tribunal which indicate that the infringements were carried out by a person who was a resident at the Respondent's address and who was "willing to take responsibility for the downloads".

[18] Unfortunately the Act makes clear that the responsibility for illegal uploading or downloading lies with the account holder. The fact that another person at the account holder's address may have been responsible does not, in the Tribunal's view, in itself make it manifestly unjust to impose a penalty. It is a matter, nevertheless, that may be taken into account in assessing the penalty.

[19] As to the assessment of the penalties, s 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 subs (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;

[b] reimbursement of the application fee paid by the rights owner to the Tribunal.

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

[21] 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 subclauses (2)(a) to (d); and

[b] $15,000.

[22] 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.

[23] Accordingly, included in the amount that the account holder will be ordered to be pay is the sum of $7.17, the reasonable cost of obtaining the three sound recordings legally and is the sum sought by RIANZ in its submission. The cost is calculated by reference to a purchase in electronic form from "iTunes".

[24] 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

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

[26] As to the latter, 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.

[27] Under r 12(2)(b) the Tribunal is of the view that RIANZ is entitled to a "contribution" of its total fees of $86.25 In previous decisions the Tribunal has calculated the contribution, as noted by RIANZ in its submission, in accordance with a 'sliding scale of culpability' inherent in the notice requirement. In the present case the Tribunal calculates the contribution to be $50.00.

Deterrent

[28] 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".*

[29] Regulation 12(3) sets out some factors that the Tribunal must take into account:

[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.

[30] Regulation 12(2) provides that the Tribunal may also take into account any circumstances it considers relevant.

[31] Submissions were made by RIANZ on all these aspects. As to flagrancy, these included, in particular, reference to the Court of Appeal case *Skids Programme Management Limited v MacNeal* [2012] NZCA 314. It is correct that this case discusses the meaning of "flagrancy" under the Copyright Act 1994 but we are not convinced that guidance from the *Skids* case is altogether appropriate because it operates in a different context to the present one. In general terms the Court of Appeal noted that "flagrant" copyright infringement might involve scandalous, outrageous, or deceitful conduct of some sort. It would include *"deliberate and calculated"* copyright infringement.

[32] As outlined above, the Respondent indicated in two emails that another person resident at the address was responsible and that person was willing to take responsibility for the infringements. It was also stated that the account holder had *"made every reasonable precaution to ensure illegal acts weren't performed using the internet connection at his house"*. Unfortunately that is the only information which the Tribunal has as to the circumstances of the infringements. We do not know, for instance, whether any steps were taken to prevent further infringing after the initial notices were received by the account holder. In the absence of more detail it is difficult to conclude that this infringing, therefore, amounted to "flagrancy". There is no direct evidence that the Respondent's behaviour was "calculated and deliberate" as submitted by RIANZ. One might infer that it was possibly slack or negligent behaviour but that is not "fragrant".

[33] Before leaving this aspect we comment briefly on terminology. In the email dated 8 June the account holder referred to the concern he had about "a charge" in his name *"because of someone else's actions"*. It is important to understand that the Act creates no criminal offences and the Tribunal does not impose "fines". There may be some general misunderstanding about this aspect.

[34] As to the effect on the market, we take broadly into account the submissions of RIANZ as to the general effect on copyright owners of illegal downloading. We also agree with RIANZ in its submission that the reimbursement of fees would in itself be insufficient as a deterrent against further infringing (the third prescribed factor).

[35] The Tribunal may also consider any other circumstances among which is the maximum figure of $15,000 which can be ordered to be paid to the rights owner and another is the availability of legal downloading services in New Zealand.

[36] Looking at matters in the round, we believe that an appropriate amount for the Respondent to pay as a deterrent is $100.00 per infringement, i.e. a total of $300.00.

Orders

[37] In summary therefore, the Tribunal orders the Respondent to pay to the Applicant the sum of $557.17 comprised as follows:

[a] under r 12(2)(a)(i) – $7.17;

[b] under r 12(2)(b) –$50.00 contribution toward the IPAP fees paid by the Applicant;

[c] under r 12(2)(c) – reimbursement of the application fee of $200.00; and

[d] under r 12(2)(d) – a deterrent sum of $300.00.

Total: $557.17.

Decision of the Copyright Tribunal delivered by Paul Sumpter

DATED at WELLINGTON this 16th day of July 2013

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Paul Sumpter
Member
Copyright Tribunal