

[2013] NZCOP 11

COP 009/13

UNDER

The Copyright Act 1994

BETWEEN

**RECORDING INDUSTRY
ASSOCIATION NEW ZEALAND**

Applicant

AND

TELECOM NZ 4366

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. The Act makes provision for an account holder to challenge each infringement notice it receives, and for the rights owner to either accept or reject any such challenges.

[3] 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

[4] 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, WEA International Incorporated (Warner Music New Zealand Limited).

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

Factual background and procedural history

[6] This case involves the alleged uploading on 10 separate occasions of the sound recording *I Cry* by Flo Rida. 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.

[7] The initial detection notice was issued on 14 January 2013. During the ensuing on-notice period, the Applicant sent three further notices to the IPAP. 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.

[8] The warning notice was issued on 25 February 2014. During the ensuing on-notice period, the Applicant sent four further notices to the IPAP.

[9] The enforcement notice was issued on 8 April 2013. The enforcement notice listed all 10 alleged infringements by this account holder.

[10] The Application, together with detailed submissions and an authorisation of agent, was filed with the Tribunal on 10 May 2013. The Applicant sought an award of \$3,011.40, including a deterrent sum of \$2,500.

[11] On 30 May 2013, the Respondent filed a response with the Tribunal, admitting that there had been infringement but claiming that she had limited means to pay a financial penalty:

“I [] admit to downloading FLO RIDA, I CRY through UTorrent. After the first warning I did not go back onto U torrent again nor have I downloaded ANY other songs or movies. After the second warning I emailed a reply thinking I haven’t done anything wrong and that you had sent me another warning by accident. After the third one I un installed UTorrent altogether, after finding out that “seeding” meant file sharing.

As for a fine. [] is on a benefit, can hardly afford to pay rent yet alone put food on the table. I don’t see why I need a deterrent fine as my daughter has not downloaded anything since the first warning. My daughter doesn’t have a job either, and this household has no assets what so ever. \$390.59 would be nearly impossible to pay off and \$2500 after that IS impossible for us to pay.

This was done in error and ignorance and I hope you can take this into account.”

[12] On 19 June 2013, the Applicant filed submissions in reply, waiving its earlier request for a deterrent sum.

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

[13] The Applicant has not requested a hearing, and by email dated 26 June 2013 the Respondent confirmed that she wished to have the matter determined on the papers in accordance with s.122L of the Act.

Infringement

[14] 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 10 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 *I Cry*. Each of the infringements occurred at an IP address of the account holder as verified by the IPAP.

[15] 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, 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 and has acknowledged that infringement did in fact take place.

[16] 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

[17] 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

[18] 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

³ Section 122A(1).

⁴ Section 122N(1)(a).

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).

[d] regulation 12(2)(d), which provides that an additional sum may be awarded as a deterrent against further infringing.¹²

[19] Each of these is addressed in turn below.

Cost of purchasing work: r.12(2)(a)

[20] 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”*.

[21] According to the Applicant, at the time of the infringements the sound recording *I Cry* was available for purchase in electronic form from iTunes at a cost of \$2.39.

[22] Accordingly, the Tribunal orders the Respondent to pay to the rights owner 10 x \$2.39, totalling \$23.90.

IPAP fees: Regulation 12(2)(b)

[23] 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.

[24] In the present case, there are 10 *“infringements to which the application relates”*, i.e. 10 occasions on which infringement by way of uploading was detected from the Respondent’s IP address. The Applicant has paid 10 x \$25 plus GST to the IPAP (\$250 plus GST). As noted earlier, seven of the infringements did not trigger infringement notices, but the Applicant was still obliged to pay an IPAP fee as required by s.122U.

[25] The Tribunal accepts the Applicant’s submission that it should be entitled to the following contributions towards the fees that it has incurred:

- | | | |
|---|------------------------|--|
| - | Detection notice | \$8.33 (one third of IPAP fee) |
| - | 3 x additional notices | \$16.67 each (two thirds of IPAP fees) |
| - | Warning notice | \$16.67 (two thirds of IPAP fee) |
| - | 4 x additional notices | \$16.67 each (two thirds of IPAP fees) |
| - | Enforcement notice | \$25.00 (entire IPAP fee) |

[26] The Respondent is required to pay a contribution towards the IPAP fees incurred by the Applicant in accordance with the above calculations, totalling \$166.69.

¹² See also r.12(3).

Application fee: Regulation 12(2)(c)

[27] Section 122O(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.

[28] 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.

Deterrent sum: Regulation 12(2)(d)

[29] Regulation 12(2)(d) requires the Tribunal to determine “*an amount that the Tribunal considers appropriate as a deterrent against further infringing*”. In considering whether to award a deterrent sum and, if so, what that sum should be, the Tribunal may consider “*any circumstances it considers relevant*”, including the flagrancy of the infringement, the possible effect of the infringing activity on the market for the work, and whether the other sums awarded would already constitute a sufficient deterrent against infringement.¹³ In this case, a highly relevant circumstance is the fact that the Applicant itself does not consider a deterrent penalty to be appropriate and has not requested the Tribunal to make such an award.

[30] In addition, the Tribunal notes that the Respondent has accepted responsibility for her actions, and has engaged with the Tribunal process. Taking into account all of these factors, the Tribunal agrees that no deterrent sum should be awarded in this case.

Orders

[31] In summary, therefore, the Tribunal orders the Respondent to pay to the Applicant the sum of \$390.59, comprised as follows:

- [a] \$23.90 under r.12(2)(a), representing the cost of purchasing the work legally;
- [b] \$166.69 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.

Decision of the Copyright Tribunal delivered by Jane Glover

DATED at WELLINGTON this 19th day of July 2013

Jane Glover

¹³ Regulation 12(3).