

[2013] NZCOP 15

COP 012/13

UNDER

The Copyright Act 1994

BETWEEN

**RECORDING INDUSTRY
ASSOCIATION OF NEW
ZEALAND**

Applicant (Rights Owner)

AND

TELECOM NZ 4451

Respondents

BEFORE THE COPYRIGHT TRIBUNAL

WARWICK SMITH

HEARING ON THE PAPERS

DECISION

Introduction

[1] This is an application by Recording Industry Association of New Zealand Incorporated (“**the Applicant**”) for an order under s.122O of the Copyright (Infringing File Sharing) Amendment Act 2011 (“**the Act**”). The Applicant seeks an order for payment of a sum of money in respect of infringing file sharing for which the Respondents are alleged to be liable.

[2] The Applicant has made the application as agent for Sony Music Entertainment Incorporated (“**Sony Music**”). Sony Music claims to be owner of the copyright in the sound recording which is alleged to have been the subject of infringing file sharing.

The General Scheme of the Act

[3] Section 122B provides an overview of the provisions of the Act that are relevant to this application. In short, the Act is intended to provide copyright owners (whether acting alone or through agents) with a special regime for taking enforcement action against people who infringe their copyrights through “file sharing”.

[4] Paragraph 122A of the Act defines “file sharing” in the following terms:

“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.”*

[5] The Act provides that a rights owner may require an Internet Protocol Address Provider (“**IPAP**”) to issue infringement notices to Internet account holders, where the rights owner alleges that its copyright has been infringed by file sharing taking place at an Internet Protocol (“**IP**”) address used by that account holder.

[6] There are three kinds of infringement notice which an Internet account holder might receive from his or her IPAP. These are a detection notice, a warning notice and an enforcement notice.

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

[8] 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.

Factual Background

[9] In this case, the IPAP is Telecom New Zealand Limited (“**Telecom**”). Telecom issued infringement notices to the Respondents as follows:

[a] A detection notice was issued on 3 January 2013;

[b] A warning notice was issued on 13 March 2013;

[c] An enforcement notice was issued on 17 April 2013.

[10] In each case, the infringement notices alleged infringement of copyright in the sound recording, “International Love”, by Pitbull, by the communication of that sound recording to the public. In each case uTorrent, version 2.2.1, was identified as the relevant file sharing application.

[11] There was no challenge to any of the infringement notices.

The Applicant’s Application to the Copyright Tribunal

[12] The Applicant applied to the Copyright Tribunal for an order under s.122O of the Act, on 31 May 2013.

[13] Pursuant to s.122J(2)(c) of the Act, the Applicant identified the alleged infringements by the Respondents in respect of which it sought an order from the

Tribunal, as the three instances of alleged infringing file sharing referred to in the infringement notices.

[14] The Applicant claimed the sum of \$7.17 for the three alleged infringements. It also claimed an additional sum of \$750, together with the fees it had paid to Telecom for the issue of the infringement notices (\$86.25 including GST), and the application fee it had paid to the Tribunal (\$200). The total amount claimed was \$1,043.42.

The Parties' Submissions

The Applicant

[15] The Applicant filed detailed written submissions. They are summarised below under the heading "Discussion and Findings".

The Respondents

[16] The Respondents filed a one-page Response to the Application. The Response included the following:

"I have spoken to my teenage sons; both have deleted the song off their iTunes account last year, and deleted uTorrent application; I also had a friend look at our computer and confirm same had happened. When the letters came through this year I thought it was a mistake as we had rectified.

I have checked again today and we cannot locate that application or that song; where are we supposed to go from here when we can't locate the song or application you are referring?

Why would the kids continue to download the same song??? How do we fix something we can't see??

This seems very unfair; we are not computer experts but know enough to know both are not on our computer."

[17] On 4 July 2013, in response to a request from the Tribunal for advice as to whether the Respondents wished to be heard by the Tribunal or would be content to have the application dealt with on the papers, the Respondents sent the following email:

"Please deal with on papers; what choice do we have; pretty difficult to argue with the legal resources they have. Thanks ..."

Applicant's Reply

[18] In reply, the Applicant emphasised that the Respondents had been found to be uploading copyright material via uTorrent in each of the three alleged infringements.

[19] The Applicant submitted that the Respondents' claims in the Response were not accurate, for the following reasons:

- [a] The detection notice was not sent to the Respondents until January 2013, and there would have been no reason for the Respondents' sons to delete either the "International Love" track or the uTorrent application, before that notice was received. The Respondents claim that both were deleted "last year" cannot be accurate;
- [b] It is clear that uTorrent was not deleted because each of the three infringement notices shows that uTorrent was used for uploading;
- [c] The Respondents failed to challenge any of the infringement notices (which they acknowledge receiving), and took no other steps. Any prudent account holder would not have just left the matter, as occurred here;

[20] The Applicant submitted that it is entitled to rely on the presumptions set out in s.122N of the Act, as the Respondents did not put forward any evidence or reasons why those presumptions should not apply. The Applicant further submitted that the Respondents did not provide any independent verification of their claims that "International Love" was not on their computer (or on any other computer which may have been used at the Respondents' IP address), and that a friend had looked at their computer and confirmed that uTorrent had been deleted.

No Hearing

[21] Neither party has requested a hearing, and the Tribunal sees no need to convene one. Accordingly, the application is being determined on the papers pursuant to s.122L of the Act.

Discussion and Findings

In what Circumstances is the Applicant entitled to an Order directing the Respondents to pay it a Sum of Money under Section 122O?

[22] Section 122O(1) of the Act provides that the Tribunal must order an account holder to pay a rights owner a sum of money if the Tribunal is satisfied that:

- “(a) Each of the 3 alleged infringements that triggered the infringement notices issued to the account holder –*
 - (i) was an infringement of the rights owner's copyright; and*
 - (ii) occurred at an IP address of the account holder; and*
- (b) The 3 notices were issued in accordance with this Act.”*

[23] Those provisions are subject to a discretion given to the Tribunal under s.122O(5) of the Act, under which the Tribunal may decline to make an order

under subsection (1) if, in the circumstances of the case, the Tribunal is satisfied that making the order “would be manifestly unjust to the account holder”.

Presumptions

[24] Section 122N of the Act provides that, in proceedings before the Tribunal, a number of matters concerning infringement notices issued under the Act are presumed unless the account holder submits evidence that (or gives reasons why) one or more of the presumptions does *not* apply. If an account holder does submit such evidence or give such reasons, the rights owner must then satisfy the Tribunal that, in relation to the relevant infringement or notice, the particular presumption or presumptions is/are correct (s.122N(3)).

[25] The statutory presumptions are as follows:

- [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 the Act.

Application of Section 122O(1) and (5) in this Case

[26] In this case, there is nothing to suggest that the first and third of the three presumptions do not apply. The Respondents have acknowledged receipt of the three infringement notices, and have not suggested that the notices did not conform to the requirements of the Act. They have not suggested that, if the instances of file sharing did occur as alleged, the file sharing would not have constituted infringements of Sony Music’s copyright in “International Love”.

[27] The application of the first and third presumptions is sufficient to satisfy the Tribunal on the matters set out in s.122O(1)(a)(i) and 122O(1)(b) of the Act.

[28] The remaining issue under s.122O(1) is whether the alleged infringements referred to in the infringement notices occurred at an IP address of the Respondents (s.122O(1)(a)(ii)).

[29] On the available evidence, the Tribunal is satisfied that the three alleged infringements did occur at an IP address of the Respondents. On three separate occasions, Telecom identified the Respondents’ IP address as the location of the alleged infringing file sharing, and the Respondents did not challenge any of the three infringement notices which were sent to them. Furthermore, the Respondents’ statement in their Response that the uTorrent application and the song were deleted “last year”, called for some explanation, given that the detection notice was only issued in early January 2013. The Respondents did not provide any explanation for the deletions they say were made.

[30] Nor have the Respondents provided sufficient information for the Tribunal to give any weight to their statement that they “had a friend look at our computer

and confirm [the deletions] had happened.” When did the friend look at the computer? What information technology qualifications or experience does the friend have? The Respondents did not say.

[31] If the Respondents did have a friend confirm that the deletions had been made from their computer as they have said, the subsequent receipt by them of infringement notices squarely raised the issue of whether the advice received from the friend was correct. In the Tribunal’s view, when the Respondents continued to receive infringement notices, it was not reasonable for them to simply do nothing, and assume that the infringement notices had been issued in error.

[32] Having regard to the circumstances just described, the Tribunal is satisfied that each of the infringements described in the infringement notices issued to the Respondents did occur at an IP address of the Respondents. Each of the elements of s.122O(1) of the Act has therefore been proved.

[33] The consequence of that finding is that the Tribunal must order the Respondents to pay a sum under s.122O(1), unless the circumstances of the case are such as to satisfy the Tribunal that it would be “manifestly unjust” to the Respondents to do so.

[34] There is nothing in the evidence which would make it manifestly unjust for the Tribunal to make an order. The fact that the infringing file sharing might have been carried out by members of the Respondents’ family is not enough, as the intention of the Act was clearly to make the account holder (in this case the Respondents) responsible for any infringing file sharing taking place on their Internet account. The Respondents were given ample opportunity to investigate and rectify the infringing file sharing referred to in the infringement notices, but they did not do so.

What Sum should be paid to the Applicant?

[35] Under s.122O of the Act, if the Tribunal orders payment of a sum under s.122O(1), the sum specified is to be determined in accordance with the Copyright (Infringing Filing Sharing) Regulations 2011 (“**the Regulations**”). Any sum awarded 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.

[36] In addition to any amount the Tribunal may award under s.122O(1), the Tribunal 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 holder to the IPAP; and
- [b] Reimbursement of the application fee paid by the rights owner to the Tribunal (s.122O(3)).

[37] Clause 12(1) of the Regulations provides that the total amount the Tribunal may award, is the lesser of –

[a] the sum of the amounts referred to in subclause (2)(a) to (d) of Regulation 12; and

[b] \$15,000.

Determinations under Regulation 12(2) of the Regulations

[38] Subclause (2) of Regulation 12 requires the Tribunal to make certain determinations if it orders an account holder to pay a rights owner a sum of money under s.122O of the Act.

Regulation 12(2)(a)(i)

[39] If the relevant work was legally available for purchase in electronic form at the time of the infringement, the Tribunal is required to determine under this subclause “the reasonable cost of purchasing the work in electronic form at that time”.

[40] In this case, the work was legally available for purchase in electronic form at the times of the infringements. The Applicant says, and the Respondents do not dispute, that “International Love” was available for purchase in electronic form from iTunes, at NZ\$2.39.

[41] The Tribunal accepts the Applicant’s submission that that figure represents the “reasonable cost of purchasing the work” for the purposes of Regulation 12(2)(a)(i). As there were three proved instances of infringing file sharing, the amount to be awarded to the Applicant under this heading will therefore be \$7.17 (\$2.39 x 3).

Regulation 12(2)(b)

[42] Under this subclause, the Tribunal is required 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”.

[43] Section 122O of the Act is also relevant to the Regulation 12(2)(b) determination. It provides at subsection (3) that the Tribunal “may also make an order requiring the account holder to pay to the rights owner ... (a) a sum representing a contribution towards the fee or fees paid by the rights owner to the IPAP ...”

[44] In its formal Application to the Tribunal, the Applicant claimed the total sum of \$75 plus GST under this head, being the total amount charged by Telecom in respect of the three infringements referred to in the Application. However, that claim was adjusted down to \$50 by the Applicant in its submissions, reflecting the Applicant’s acknowledgement of the approach the Tribunal has so far taken to awards under Regulation 12(2)(b).

[45] The Tribunal sees no reason to depart from the “sliding scale” approach adopted in its early decisions. Under this approach, the educative role of the first two notices is reflected in contribution “discounts” of two thirds and one third respectively, while the respondent is normally required to reimburse the Applicant fully for fees paid by the Applicant in respect of subsequent notices given by the Applicant in respect of infringements covered by its application. The result in this case, is that the Respondents are to pay the Applicant the sum of \$8.33 in respect of the infringement which resulted in the issue of the detection notice, \$16.67 for the infringement which resulted in the issue of the warning notice, and \$25 for the infringement which resulted in the issue of the enforcement notice. The total of those sums is \$50.

Regulation 12(2)(c)

[46] Under this subclause, the Tribunal is required to determine “the cost of the application fee paid by the rights owner to the Tribunal”.

[47] Section 122O(3)(b) of the Act expressly contemplates that the Tribunal may include in its award a sum representing full reimbursement of the amount paid by the rights owner. The fee itself is fixed in the Regulations (Regulation 8), at \$200.

[48] In this case, the Applicant has succeeded in its application, and has paid a \$200 filing fee which it would not have had to pay if it were not for the continued infringing file sharing which occurred after the detection and warning notices were issued. In those circumstances, the Tribunal considers that an order for full reimbursement is appropriate.

[49] The Tribunal accordingly determines that the cost of the application fee paid by the Applicant to the Tribunal is the sum of \$200.

Regulation 12(2)(d)

[50] Under this subclause, the Tribunal must determine “an amount the Tribunal considers appropriate as a deterrent against further infringing”.

[51] Regulation 12(3) of the Regulations provides that the Tribunal may consider any relevant circumstances under subclause (2)(d), and that it *must* consider the three matters listed at subclause (3)(a) – (c) of the Regulation. The Tribunal now turns to consider each of those matters.

Regulation 12(3)(a) – the flagrancy of the Infringement

[52] The New Zealand Court of Appeal has addressed the meaning of “flagrancy” of copyright infringement, in the context of the making of “additional damages” awards under s.121(2) of the Copyright Act 1994.¹ Those cases show that “flagrant” copyright infringement may involve scandalous, outrageous, or

¹ See *Wellington Dealers Limited v Dealers Guide Limited* [1984] 2 NZLR 66, referring to *Ravenscroft v Herbert* [1980] RPC 193, 208, and *SKIDS Programme Management Limited and Others v McNeill and Others* [2012] NZCA 314.

deceitful conduct of some sort. It will include “deliberate and calculated” copyright infringement.

[53] The Applicant submitted that the locating, downloading, installing and configuring of the uTorrent application was a deliberate act. It further submitted that it would defy common sense to believe that the three instances of infringing file sharing referred to in the infringement notices were the only occasions when the Respondents were uploading sound recordings. It referred to the Respondents’ failure to modify their actions following their receipt of the detection and warning notices, and to the wide publicity which has been given to the Act in New Zealand news media. It contended that the Respondents’ behaviour has been both deliberate and calculated.

[54] The Applicant cited an Australian case, *Universal Music Australia Pty Limited v Hendy Petroleum Pty Ltd*,² in support of its submissions on flagrancy. In that case, ten infringing copies of three different compilation CDs were sold in the service station/convenience store operated by the first respondent. The respondents knew that the CDs included infringing material, and they intended to make a commercial profit from the sales.

[55] The Court in the *Universal Music* case regarded the respondents’ conduct as “towards the lower end of the range of flagrancy”, having regard to the relatively small number of CDs involved and the fact that the respondents did not burn the discs themselves.

[56] In this case, the Tribunal accepts that it may have been the Respondents’ teenage children who were engaging in the infringing file sharing. And, unlike the position in the *Universal Music* case, the Respondents do not appear to have derived any financial or other benefit from the infringing file sharing – it appears to have been a fairly typical family situation, where the infringing activities have arisen out of the activities of the Respondents’ children. Only one song was referred to in the infringement notices.

[57] Having regard to those considerations, the Tribunal is not prepared to categorise the proved infringements as “outrageous”, “scandalous”, “deceitful”, or “calculated”. This is therefore not a case where the infringing file sharing has been proved to be flagrant.

Regulation 12(3)(b) – the Possible Effect of the Infringing Activity on the Market for the Work

[58] The Applicant emphasised the market damage caused by P2P file sharing generally. It described the cumulative effect of multiple instances of illegal downloading as “devastating”, and contended that such activity has contributed to a halving of recorded music sales in New Zealand since 2002.³

[59] Consistent with its decisions under the Act to date, the Tribunal accepts that, as a general proposition, infringing activity by way of uploading sound

² (2003) 59 IPR 204.

³ According to the Applicant’s submission, sales of recorded music in New Zealand were \$124 million in 2002. By 2011 that figure (covering both physical and digital sales) had dropped to \$59 million.

recordings to the Internet in the course of the use of uTorrent software may have some damaging effect on the market for those sound recordings. It also accepts that it is probable that some proportion of the free downloads which will have resulted from the unlawful uploading will represent lost revenue to the copyright owner. The “possible effect” of the uploading on the market for the two sound recordings, may therefore be regarded as adverse.

Regulation 12(3)(c) - whether the sum of the amounts referred to in subclause 2(a) to (c) would already constitute a sufficient deterrent against further infringement

[60] The Applicant referred to its out-of-pocket expenses (total paid to Telecom (excluding GST) and the Tribunal \$275), and pointed out that if no deterrent sum is awarded, its recovery in the proceeding will be less than the expenses it has incurred. It submitted that such an award would not operate as a sufficient deterrent, particularly in circumstances where the Respondents’ infringing activities are the cause of the Applicant being out-of-pocket.

[61] In addition, the Applicant argued that the legislative purpose in providing for the award of a deterrent sum was not just to deter the respondent in a particular case, but also to deter others who might contemplate similar infringing activity.

[62] On the latter point, the Tribunal has previously held that the provisions in Regulations 12(2)(d) and 12(3)(c) relating to awards of sums as a deterrent against further infringing are directed to the deterrent effect on the account holder, not on the public generally.⁴ The Tribunal sees no reason to alter that view.

[63] The Tribunal is satisfied that the determinations it has made under subclauses 2(a) – (c) of Regulation 12 would not constitute a sufficient deterrent against further infringing. The Respondents’ election to ignore the infringement notices, their apparent unwillingness to investigate the position thoroughly and take responsibility to ensure that it was rectified, and their continuing denial of responsibility, do not suggest that there has been a sufficient deterrent. It is likely too, that the infringements will have had some adverse effect on the markets for the sound recording in question. In those circumstances the Tribunal considers that a stronger deterrent is required than an order for payment of \$257.17 (the sum of the amounts awarded under Regulation 12(2)(a) – (c)).

Other Relevant Circumstances

Under this head, the Applicant made two submissions. First, it submitted that the maximum amount which the Tribunal has power to award under the Act, which is \$15,000,⁵ operates not merely as an upper limit for the worst cases, but also as an indicator that a deterrent sum needs to be more than a small or trivial amount when compared to the \$15,000 maximum figure. That is not necessarily so. However whether the \$15,000 maximum award figure has any such indicative function is an issue best left for full argument in an appropriate case. Here, there

⁴ See, for example, Case No. 005/12; [2013] NZCOP 13, and Case No. 014/12; [2013] NZCOP 9.

⁵ Act, s.1220(4), and Regulation 12(1).

have been only three instances of file sharing, apparently carried out by teenage children, and the award will obviously fall far short of that maximum figure. Also, the Applicant did not address in its submissions some questions which might be relevant to that issue (including the significance or otherwise of the fact that Regulation 12(1) appears to contemplate that the total of the Tribunal's Regulation 12(2) determinations might in some cases exceed \$15,000).

The Applicant's second submission under this head, was that this is not a case where the uploading and/or downloading by the Respondents was made necessary by any unavailability of the track in question from legal sources. There are a number of (legal) online stores available to New Zealand consumers, where "International Love" might have been legally purchased. The Tribunal accepts that submission.

Determination under Regulation 12(2)(d)

[64] In this case, the Applicant has proved three separate infringements, and the Respondents have chosen to ignore infringement notices which clearly put them on notice that there was an on-going infringing file sharing problem. Their Response denied responsibility, but did not describe any serious attempt by them to get to the bottom of the problem. The claim that "International Love" and uTorrent had been deleted from the family computer in 2012 was not correct, and the proved infringing file sharing continued over a period of approximately three months.

In those circumstances, the Tribunal considers that the appropriate amount to be awarded as a deterrent against further infringing is \$100 per infringement.

DECISION

[65] The Tribunal orders the Respondents to pay the sum of \$557.17 to the Applicant.

[66] That sum is made up as follows:

[a] Regulation 12(2)(a)(i) –	For the three proved infringements relating to the work "International Love", the sum of \$7.17.
[b] Regulation 12(2)(b) -	cost of fees paid to IPAP, \$50.00.
[c] Regulation 12(2)(c) -	cost of application fee paid to the Tribunal, \$200.
[d] Regulation 12(2)(d) –	deterrent against further infringing, \$300 (being \$100 for each of the three infringements referred to in the enforcement notice).
Total	\$557.17

Decision of the Copyright Tribunal delivered by Warwick Smith

DATED the 2nd day of September 2013

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Warwick Smith
Member
Copyright Tribunal