

[2013] NZCOP 1

COP 03/12

UNDER

The Copyright Act 1994

BETWEEN

**RECORDING INDUSTRY
ASSOCIATION OF NEW
ZEALAND INC**

Applicant

AND

**ENFORCEMENT NUMBER:
TELECOM NZ 2592**

Respondent

BEFORE THE COPYRIGHT TRIBUNAL

Ms J Glover

HEARING ON THE PAPERS

DECISION

Introduction

[1] This is one of the first cases to come before the Copyright Tribunal in respect of alleged file sharing infringement under s.122 of the Copyright Act 1994. This section provides a process for copyright owners to use when they consider that an internet user has infringed their copyright via a file sharing network. An application may be made to the Tribunal for relief once three infringement notices (referred to as Detection, Warning and Enforcement Notices respectively) have been issued to an internet account holder on behalf of the rights owner.

[2] Because this is one of the first times the Tribunal has considered this legislation, this decision is slightly more detailed than perhaps will be necessary in future. (For the same reason, the Applicant filed comprehensive submissions in support of its application, which have been of assistance.) That said, however, the file sharing legislation is intended to provide a relatively quick, simple and inexpensive method of dealing with alleged infringement. The Tribunal has attempted, therefore, to strike an appropriate balance between addressing all of the issues comprehensively, and keeping its decision short and simple.

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 relevant copyright owners, Island Def Jam Music Group (Universal Music New Zealand Limited), and RCA Records (Sony Music Entertainment New Zealand Limited). The

Act clearly contemplates that applications to the Copyright Tribunal may be made by representatives of the copyright owners, and “rights owner” is defined as including a person acting as agent for one or more copyright owners.¹

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

Factual background and procedural history

[5] The initial Detection Notice was sent to the Respondent by Telecom’s copyright infringement team on 24 November 2011. The Notice alleged that the Respondent had infringed copyright in the song *Man Down* by communicating the work to the public. Copyright in that work is owned by Island Def Jam Music Group (Universal Music New Zealand Limited).

[6] The Warning Notice was sent to the Respondent on 19 June 2012 in respect of a further alleged infringement of the same work. Again, the Respondent was alleged to have infringed copyright by communicating the work to the public.

[7] The Enforcement Notice was sent to the Respondent on 30 July 2012 in respect of an alleged infringement of copyright in the song *Tonight Tonight*. Copyright in that work is owned by RCA Records (Sony Music Entertainment New Zealand Limited). Again, the Respondent was alleged to have infringed copyright by communicating the work to the public.

[8] The Application was filed with the Tribunal on 31 August 2012. The Applicant filed its submissions together with the Application, and the Tribunal therefore sent both the submissions and the Application to the Respondent.

[9] On 26 September 2012 the Respondent wrote to the Tribunal, giving her explanations for the alleged infringement. It is convenient to reproduce certain material excerpts at this point:

“The letter outlines three separate infringements recorded on an internet connection in my name. The first song downloaded was a song called man down by rihanna. I accept responsibility for this. I downloaded this song unaware that in doing so from this site was illegal. When this song was downloaded to my computer, a whole utorrent program downloaded onto my computer ... [W]hen I turned my computer on it said that the song was still downloading and maybe that caused the song to register twice as it being downloaded? I’m unsure if this is possible or not but I don’t know why it shows that I would try to download the same song twice.

I kept receiving a pop up notice saying it seems like utorrent is already running but not responding, please close all utorrent processes and try again ... I figured out how to delete the song that was still trying to download but still couldn’t figure out how to delete the whole program until just recently when I got someone to look at it as after I received the letter, I assumed having this program on my computer was causing the warning regarding downloading?

¹ Section 122A(1).

When I received the letter warning me of the download and consequences and that it was illegal, I didn't challenge the letter as I took responsibility for my actions and realised I was in the wrong and took it as a warning and didn't do it again.

I would never intentionally do anything illegal and you can see this from my criminal record as it is clean. I didn't realise that it was illegal and I apologise sincerely for this mistake and have removed it from my computer.

In regards to the song 'tonight tonight' by Hot Chelle Rae being downloaded, I can't claim responsibility for this as it wasn't done by myself or anyone in this household but if I find the person responsible for downloading this through my internet then I will definitely enforce the consequences behind doing so."

[10] The Applicant responded by way of a further letter of submissions dated 15 October 2012. In particular, the Applicant noted that the evidence showed that the songs in question had been uploaded from the Respondent's account, whereas the Respondent's correspondence referred only to downloading. In addition, three separate notices had been sent to the Respondent, and therefore she had in fact "done it again" after receiving the first two notices.

Infringement

[11] File sharing networks involve material being uploaded via, or downloaded from, the internet using an application or network that enables the simultaneous sharing of material between multiple users.² Such 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. In this case, the Applicant alleged that copyright in the works was infringed by way of 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.

[12] 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.³ An account holder may submit evidence that this presumption does not apply, or give reasons why it should not apply.⁴ In this case, the Respondent has not provided any evidence that the presumption should not apply. In fact, she acknowledges that at least some manner of infringement has taken place and has apologised for this.

[13] Although the Respondent's correspondence does not refer to any uploading of the works, the Tribunal accepts the Applicant's evidence that uploading did in fact take place, whether or not this was with the Respondent's knowledge. Uploading and downloading may, but need not, occur at the same time, and it is possible that the Respondent intended only to download the works. In her letter dated 26 September 2012 the Respondent also implied that a third party may have had access to her internet account, saying in respect of the song *Tonight Tonight* that "it

² See definition of file sharing in section 122A(1).

³ Section 122N(1)(a).

⁴ Section 122N(2).

wasn't done by myself or anyone else in this household but if I find the person responsible for downloading this through my internet then I will definitely enforce the consequences behind doing so".

[14] There is insufficient evidence before the Tribunal for it to make detailed findings on these factual issues. That is the nature of a decision being made on the papers. On the basis of the information available to it, however, together with the statutory presumption that each incidence of file sharing identified in an infringement notice constitutes an infringement of the right owner's copyright in the work, the Tribunal is satisfied that file sharing took place via the Respondent's internet account as alleged.

Penalties

[15] The Tribunal has jurisdiction to require the Respondent to pay various sums to the Applicant under different heads of relief. Very broadly speaking, those heads of relief may be divided into compensatory damages for infringement;⁵ a contribution towards the fees paid by the rights owner to the relevant internet protocol address provider (IPAP);⁶ reimbursement of the application fee paid by the rights owner to the Tribunal;⁷ and an additional sum awarded as a deterrent against further infringing.⁸

[16] The total amount to be paid by the account holder must not exceed \$15,000.⁹ The Tribunal also has a discretion to decline to make orders if to do so would be manifestly unjust to the account holder.¹⁰ The Tribunal may only award costs against a party if that party has engaged in conduct intended to impede the prompt determination of the proceedings.¹¹

Damages for infringement

[17] Unless it would be manifestly unjust to do so,¹² the Tribunal *must* order an account holder to pay a rights owner a sum 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.¹³

[18] As discussed above, and bearing in mind the effect of subs.122N(1)(b) and (c), 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, the Tribunal is satisfied that each of the three requirements has been met.

⁵ Sections 122O(1) and (2) and Regulation 12(2)(a).

⁶ Section 122O(1)(3)(a) and Regulation 12(2)(b).

⁷ Section 122O(3)(b) and Regulation 12(2)(c).

⁸ Regulation 12(2)(d) and Regulation 12(3).

⁹ Section 122O(4).

¹⁰ Section 122O(5).

¹¹ Section 122O(7).

¹² Sections 122O(2) and (5).

¹³ Section 122O(1).

[19] According to the Regulations, the next step the Tribunal must take is to determine the reasonable cost of purchasing the works in electronic form (if they were legally available for purchase at that time).¹⁴ According to the Applicant, the works were available for purchase from iTunes at a cost of \$2.39 for *Man Down* and \$1.79 for *Tonight Tonight*.

[20] What is not made explicit in the Regulations, however, is whether the sum payable by the Respondent under this head must be only the cost to the Respondent of purchasing the works legally, or whether this is just the starting point for the Tribunal's calculations. The Applicant argues strongly that the legislation should not be interpreted as requiring the Tribunal to award only the cost of purchasing the works, especially where the copyright works have been uploaded by the rights owner rather than downloaded. The Applicant submitted:

“However such a sum is not appropriate to compensate the rights owner for the act of making a copyright work available to a potentially very large audience via a P2P network. The sum referred to in Regulation 12(2)(a)(i) appears to be more appropriate as compensation in a case where a sound recording has been downloaded once by the account holder. This is because the reasonable cost of purchasing the work is what the account holder would have paid if he or she had purchased the work legally.

The act of uploading, on the other hand, is more harmful as it enables multiple potential unauthorised downloads by third parties, each of which could have been paid for by those third parties at a cost of \$1.79/\$2.39 each.”

[21] The Applicant submits that the proper approach is for the Tribunal to read r.12(2)(a)(i) as giving it a mandate to “*determine a sum*” with reference to the reasonable cost of purchasing a copy of the work. After careful consideration of this issue, the Tribunal is unable to accept the Applicant's submission. The Tribunal considers that the number of downloads flowing from a work being uploaded is not relevant to the Tribunal's determination under r.12(2)(a)(i). It may be relevant, however, to the provisions relating to deterrence¹⁵ and, in particular, to the potential effect on the market for the work.¹⁶

[22] In any event, as the Applicant rightly acknowledges, a difficulty in this case is that it is not known how many downloads, if any, were made from the sound recordings uploaded by the account holder. Using current internet detection services the rights owners were not able to obtain details of the number of persons who downloaded the tracks in issue.

[23] Accordingly, under this particular head of relief the Tribunal orders the Respondent to pay to the rights owner 2 x \$2.39 in respect of the work *Man Down* and 1 x \$1.79 in respect of the work *Tonight Tonight*, totalling \$6.57.

¹⁴ Regulation 12(2)(a)(i).

¹⁵ Regulation 12(2)(d).

¹⁶ Regulation 12(3)(b).

Contribution towards IPAP fees

[24] Section 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,¹⁷ which in this case was Telecom. The Applicant submits that, notwithstanding the use of the word “*contribution*” in the legislation, the Tribunal can and should order the account holder to pay *all* of the fees paid by the rights owner to Telecom. It submits that the fact that the legislation is framed in permissive terms, i.e. that the Tribunal “*may order*” a sum representing a contribution towards this fee indicates that the Tribunal can in fact require a Respondent to pay the entire fee. However, the use of the term “*may*” in this context appears to refer to the fact that the Tribunal may or may not require the Respondent to pay a contribution towards the relevant fees. That contribution may or may not be 100 per cent of the fee.

[25] Regulation 12(2)(b) is also relevant. This regulation 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*”. Reading r.12(2)(b) in light of s.120(3)(a) of the Act, it seems clear that the Applicant is entitled to a sum representing “*a contribution*” to the fee(s) paid to the IPAP.

[26] For the purposes of this application, the Tribunal calculates that contribution as follows. The fees paid to the IPAP were \$75 (\$25 per notice). The Tribunal notes the importance of the educative role of the first two notices, especially the Detection Notice. When an account holder receives a Detection Notice, he or she has an opportunity to cease any infringing activity and thereby avoid further escalation. The Enforcement Notice is, however, less educative. It is the final step before an application is made to this Tribunal, by which time the Respondent has ignored two opportunities to modify the infringing behaviour. Given this “*sliding scale*” of culpability, the Tribunal finds that the entire cost of the fee for the Enforcement Notice is payable to the Applicant (\$25); two-thirds of the Warning Notice (\$16.67) and one-third of the fee for the Detection Notice is payable (\$8.33). The total contribution to be paid, therefore, is \$50.

Cost of application fee

[27] The Tribunal accepts the Applicant’s submission 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

[28] Regulation 12(2) 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*”, but also:

¹⁷ Section 1220(3)(a).

- [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.

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

(a) *Flagrancy of the infringement*

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

- The fact that the account holder had BitTorrent protocol (uTorrent version 2.2.0) software installed on her computer. It notes that the locating, downloading, installing and configuring of such software is a deliberate act and does not occur without direct action on behalf of a computer user.
- The account holder engaged in file sharing on at least three occasions over an eight-month period. The Applicant submits that it “*defies common sense*” to accept that the only occasions during that period when she was online and making tracks available via P2P software happened to be the three 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.

[31] The Tribunal observes that these factors may be common to most of the cases that come before it, and that it is difficult, therefore, to view them as establishing particularly “*flagrant*” behaviour. The Tribunal does accept, however, that the infringing acts took place over a lengthy period.

[32] For her part, Respondent submits that she “*would never intentionally do anything illegal and you can see this from my criminal record as it is clean*”. She has accepted some measure of responsibility, and also apologises for her actions, saying “*I didn’t realise that it was illegal and I apologise sincerely for this mistake and have removed it from my computer.*” She has also engaged with the Tribunal process rather than simply ignoring it.

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

[33] The Applicant submits that the act of uploading works has a potentially damaging effect on the market for those works, as it enables multiple potential unauthorised downloads by third parties, each of which could have been paid for by those third parties at a cost of \$1.79/\$2.39 each. On a larger scale, it submits that the cumulative effect of illegal downloading is “*devastating*”. It refers to data indicating that each month there are around 700,000 people in New Zealand accessing unlicensed P2P services.

[34] As mentioned above, it is not known how many downloads, if any, were made from the sound recordings uploaded by the account holder. In the absence of any concrete evidence, the Applicant invited the Tribunal to estimate the number of downloads that may have taken place based on a 2008 UK report commissioned by the International Federation of the Phonographic Industry. The Tribunal has felt unable to accord much weight to this UK report, however, it related to a different BitTorrent client (Azureus as opposed to uTorrent); related to different works (albeit a range of different types of works intended to be representative); related to entire albums rather than to individual tracks (and also included the statement that *“for each full download of an album, there is usually one full download of each track on that album because users do not often pick and choose tracks from an album on the BitTorrent network and download the entire album”*); and is nearly five years out of date.

[35] Nonetheless, the Tribunal accepts the general principle that the uploading of works and the subsequent downloading of those works by third parties is a matter which has a detrimental effect on the relevant market. Generally speaking, it is likely that at least some potential third party downloaders would otherwise have purchased the works legally.

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

[36] As discussed above, the Respondent is required to pay \$6.57 under regulation 12(2)(a)(i) for the infringing acts, reflecting the cost to the Respondent of purchasing the works legally. On top of this, the Tribunal requires the Respondent to pay a contribution of \$50 towards the IPAP fees paid by the Applicant, and the sum of \$200 as reimbursement for the cost of the application fee paid by the Applicant.

[37] It is notable that the sums to be paid in respect of the Applicant’s direct out-of-pocket administrative disbursements in filing this application represent a large proportion of the total relief awarded, and that the *“reasonable cost of purchasing the work”* element of the relief in this case is far outweighed by the *“disbursements”* element. Whilst this is unusual in most other types of proceedings, it is likely to be a feature of many file sharing cases which come before the Tribunal.

[38] In light of all of the factors the Tribunal is required to consider in relation to deterrence, and in particular the fact that the sums awarded by the Tribunal under the other heads of relief are modest, it considers that in this case a deterrent sum of \$120 per infringement (i.e. a total of \$360) is appropriate.

Orders

[39] In summary, therefore, the Tribunal orders the Respondent to pay to the Applicant the sum of \$616.57, comprised as follows:

- [a] Under regulation 12(2)(a)(i) - \$6.57;
- [b] Under regulation 12(2)(b) - A \$50.00 contribution towards the IPAP fees paid by the Applicant;

[c] Under regulation12(2)(c) - Reimbursement of the application fee of \$200;
and

[d] Under regulation12(2)(d) - A deterrent sum of \$360.00.

TOTAL \$ 616.57

Decision of the Copyright Tribunal delivered by Jane Glover

DATED at WELLINGTON this 29th day of January 2013

Jane Glover
Member