[2015] NZCOP 1

COP 022/14

UNDER	The Copyright Act 1994
BETWEEN	**RECORDED MUSIC NZ LIMITED**
	Applicant
AND	**TELECOM NZ 7011**
	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 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").

[3] This case concerns an application for an order for payment under s.122O.

[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 Recorded Music NZ (RMNZ). RMNZ filed its application to the Tribunal in its capacity as agent for the relevant copyright owners, Universal Island Records Limited (Universal Music New Zealand Limited) and Warner Music (UK) Limited (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 of the sound recording *Body and Soul* by Amy Winehouse on 20 February 2014, *Rather Be* by Clean Bandit on 21 May 2014, and *West Coast* by Lana Del Ray on 10 July 2014. These three alleged infringements triggered the following infringement notices:

[a] an initial detection notice, issued on 4 March 2014;

[b] a warning notice (although it is described as an enforcement notice), issued on 27 May 2014; and

[c] an enforcement notice, issued on 15 July 2014.

[7] There was also a further alleged uploading of *West Coast* on 8 June 2014 and again on 20 June 2014 which, because of the timing, did not trigger infringement notices.[2]

[8] The Application was filed with the Tribunal on 18 August 2014, together with submissions from the Applicant. The Applicant seeks an award of $1,605.70, including a deterrent sum of $1,250 ($250 per infringement).

[9] The Tribunal notes that the authorisation of agent forms refer to the agent's former name, the Recording Industry Association of New Zealand Inc (RIANZ). Although the Tribunal has accepted the authorisation in this form, it would have been preferable for the applicant to have updated it to reflect its new name. Section 122J(2)(b) of the Act provides that the application must include or be accompanied by evidence that the rights owner is the owner, or acts as agent for the owner, of the material in which copyright is alleged to be infringed.

[10] On 29 August 2014, the Tribunal wrote to the Respondent, sending her a copy of the Application and Notice of Proceedings. The Notice of Proceedings included the following:

> *Under section 122K(2) of the Act, the Applicant alleges that the Respondent has committed the file sharing infringements, as set out in* ***Attachment A****, and now applies to the Copyright Tribunal to award the amount of $1,605.70 to the Applicant.*
>
> *You have 10 working days to respond. If you do not respond by 12 September 2014, the Tribunal may make its decision based only on the application.*

[11] On 12 September 201, the Applicant filed "reply submissions", although no submissions had been received from the Respondent.

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[2] See s.122F(1)(b).

[12] The Applicant advised the Tribunal that the Respondent had contacted RMNZ directly and admitted that the infringing was committed by a family member. (There is not, of course, any direct evidence before the Tribunal that this was the case).

[13] The Applicant indicated that it would consider withdrawing its case if the account holder agreed to:

[a] reimburse RMNZ's direct costs incurred in submitting an application to the Copyright Tribunal ($355.70); and

[b] undertake an audit of all personal computers and devices that use the respondent's internet connection, removing any file-sharing software and illegally downloaded music located therein.

Effect of misdescribed "warning notice"

[14] As noted above, a warning notice was purportedly issued on 27 May 2014. However, the notice begins with the heading "*Copyright Act – Enforcement Notice*". The body of the notice includes the following:

> *"This infringement notice is an Enforcement Notice and is sent in accordance with the Copyright Act. Please find more information on the Copyright Act and these notifications at med.govt.nz.*
>
> ***What happens from here?***
>
> *As this is an Enforcement Notice, the rights owners may now decide to make an application to the Copyright Tribunal."*

[15] Section 122O(1) provides:

> The Tribunal must order an account holder to pay a rights owner a sum 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) <u>the 3 notices were issued in accordance with this Act</u>.
>
> (emphasis added)

[16] The Act does not provide any explicit guidance regarding the Tribunal's obligations in circumstances where the notices have <u>not</u> been issued in accordance with the Act, and whether the Tribunal has jurisdiction to order an account holder to pay a rights owner a sum if a notice deviates at all from the prescribed form, no matter how minor that deviation.

[17] For current purposes, however, I am not required to decide that issue. In my view, the non-conformity in this case is more than minor. From the point of view of an account holder, it is highly material to know whether a notice is a warning notice (in which case

there is still an opportunity to avoid proceedings by ensuring that no further infringing activities take place), or an enforcement notice (by which time the rights owner has the right to make an application to the Tribunal.)

[18] The Act places a great deal of emphasis on ensuring that accurate, detailed information is provided to the account holder as the process unfolds. For example, s122E of the Act provides that a warning notice must include certain specified information,[3] must explain to the account holder the consequences of further infringing,[4] must explain how the account holder may challenge the notice,[5] and must comply with any other requirements that may be prescribed in regulations.[6]

[19] Regulation 5(1)(e) provides that every infringement notice sent to an account holder concerning an alleged infringement must, in addition to complying with the requirements of sections 122C to 122F of the Act, include a link to, or a description of how to access, information on an Internet site of the Ministry of Economic Development that sets out information about the infringing file sharing regime, account holders' rights and obligations, and any other matters that the Ministry of Economic Development considers useful to account holders.

[20] In this case, if the account holder had sought further information about the file sharing regime after receiving the notice issued on 27 May 2014, she would probably have assumed that she was at the final stage of the "warning" process and that there were few options available to her.

[21] As has been outlined in previous decisions, one reason the three-step process is important is to give the account holders concerned an opportunity to educate themselves about their rights and obligations, as well as about the relevant technology itself. Often, the software that is used for downloading continues to operate independently of the account holder once it is installed, sending uploads automatically whenever the computer is connected to the internet without the account holder being aware that this is happening. This can give rise to confusion. Some account holders also experience difficulty deleting the software.

[22] The statutory regime is intended to balance the rights of rights owners and account holders respectively. It is not appropriate for the Tribunal to make an order for payment under s.122O in circumstances where the account holder has not had the full opportunity to rectify the position vis a vis ongoing infringement.

[23] The Tribunal appreciates the difficulty that this may cause for rights owners, who of course are not responsible for sending infringement notices, yet who bear the consequences of any errors in those notices that cause them to be invalidated.

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[3] It must identify the following: the rights owner; the infringement that has triggers the issue of the warning notice; the date of the alleged infringement; the most recent detection notice; any other alleged infringements by the account holder against that rights owner that have occurred since the date of the preceding detection notice; and the date of the warning notice.

[4] Section 122E(2)(g). By contrast, s 122F(2)(g) provides that an enforcement notice must explain that enforcement action may now be taken against the account holder.

[5] Section 122E(2)(h).

[6] Section 122E(2)(i).

[24] In its submissions, the Applicant did not refer to the errors in the way in which the warning notice was issued. It did, however, make the following submission, which may have been intended as an oblique reference to the issue:

> *"Due to the respondent not engaging with the rights owner using the process as afforded by s 122G, the Copyright Act 1994, the applicant did not have the opportunity to assist the respondent in mitigating the series of infringements."*

[25] The Tribunal accepts that the account holder did not challenge the warning notice, as she could have done pursuant to s 122G. Nonetheless, in this case, it is apparent from the face of the document that the warning notice was not issued in accordance with the Act.

Orders

[26] The Tribunal makes no order for payment under s.122O of the Act.

Decision of the Copyright Tribunal delivered by Jane Glover

DATED at WELLINGTON this 20th day of February 2015

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Jane Glover