

[2014] NZCOP 4

COP 018/14

**UNDER**

The Copyright Act 1994

**BETWEEN**

**RECORDED MUSIC NZ  
LIMITED**

Applicant

**AND**

**Telecom NZ 6806**

Respondent

**BEFORE THE COPYRIGHT TRIBUNAL**

Sarah Bacon

**HEARING ON THE PAPERS**

**Introduction**

[1] This is an application brought by Recorded Music NZ Limited ("RMNZL") to the Copyright Tribunal. The Applicant, Recorded Music NZ<sup>1</sup>, seeks an order under s122O of the Copyright Act 1994 ("the Act") for payment of a sum calculated in accordance with the Copyright (Infringing File Sharing) Regulations 2011 ("the Regulations") by the Respondent, an individual Internet account holder.

[2] The Applicant alleges that the Respondent has infringed copyright by uploading copyright protected sound recordings using uTorrent 2.0.2, a BitTorrent Protocol or in other words through file sharing.

[3] File sharing is where material is uploaded via, or downloaded from, the Internet using an application or network that enables the simultaneous sharing of material between multiple users.<sup>2</sup>

---

<sup>1</sup> Recorded Music NZ, formally known as the Recording Industry Association of New Zealand, is the authorised agent for copyright owners Universal Music Group Inc and Societe D'Investissements et de Gestion 104 SS.

<sup>2</sup> Section 122A of the Act.

## **The Scheme of the Act**

[4] File sharing networks are not illegal in themselves although the Copyright Act 1994 protects much of the content of file sharing networks.

[5] Sections 122A-122U of the Act provide rights owners<sup>3</sup> with a regime for taking enforcement action against people who infringe copyright through file sharing.<sup>4</sup> Infringement means an incident of file sharing that involves the infringement of copyright in a work by a user.<sup>5</sup>

[6] The regime requires an IPAP (as defined in s.122A of the Act) upon instigation of rights owners to issue infringement notices to alleged infringers.

[7] There are three types of infringement notice: a detection notice, a warning notice and an enforcement notice.

[8] The notices must be sent to the allegedly infringing account holder by whatever method the IPAP uses to communicate with the account holder for billing purposes, unless the account holder and IPAP agree in writing to use a different method.<sup>6</sup>

[9] If the alleged infringer does not cease the alleged infringing or successfully challenge the notices, the rights owner may take enforcement action including seeking an order from the Tribunal for a sum of up to \$15,000.<sup>7</sup>

[10] The scheme of the Act is considered in further detail in a number of the Tribunal's decision. See for example [2013] NZCOP 1, [2013] NZCOP 2 and [2013] NZCOP 13.

## **Procedural history**

[11] In this case the IPAP, Telecom New Zealand, issued infringement notices to the Respondent in accordance with the Act as follows:

- (a) A detection notice was issued on 28 January 2014.
- (b) A warning notice was issued on 11 March 2014.
- (c) An enforcement notice was issued on 17 June 2014.

---

<sup>3</sup> Section 122A of the Act, a rights owner means a copyright owner or a person acting for one or more copyright owner.

<sup>4</sup> Section 122B of the Act.

<sup>5</sup> Section 122A of the Act.

<sup>6</sup> Section 122C(5) of the Act.

<sup>7</sup> Section 122B of the Act.

[12] In each case the infringement notices allege that the Respondent infringed the rights owner's copyright by communicating a single sound recording to the public.

[13] Both the detection notice and the warning notice refer to the same sound recording, Reflektor by Arcade Fire. The enforcement notice pertains to the alleged file sharing of the song Gangsta by Schoolboy Q.

[14] Neither the Applicant nor the Tribunal has received a response of any kind (including any formal "challenge" under s 122G) from the Respondent.

[15] The Applicant filed an application pursuant to s122J of the Act with the Tribunal on 18 July 2014 claiming a total sum of \$1043.42 as follows:

(a)	Fees paid to the IPAP:	\$86.25
(b)	Application fee:	\$200.00
(c)	Claim for infringements:	\$7.17
(d)	Any other amount claimed:	\$750.00

[16] The Tribunal issued a notice of proceeding on 22 July 2014 giving the Respondent 10 working days (until 5 August 2014) to respond. No response was received.

[17] Neither party has requested a hearing and the Tribunal does not consider one should be held. The application is therefore being determined on the papers pursuant to s122L of the Act.

### **The enforcement notice**

[18] The Applicant notes that in decisions [2013] NZCOP 7, [2013] NZCOP 13 and [2013] NZCOP 14, the Tribunal indicated that the identification of the preceding detection & warning notices in the triggering enforcement notices were not correctly indicated by the relevant IPAP. The Applicant says it has engaged with Telecom New Zealand and there has been some adjustment. The Applicant does not identify the adjustment it has made.

[19] The enforcement notice is to contain the explanation set out in s122F(h). The enforcement notice in this case did not. This deficiency was also noted in [2013] NZCOP 13. The Tribunal noted at paragraph 21 that it would be helpful to both account holders and the Tribunal if the requirements of s 122F(2)(d) and (h) and r 5(2) were clearly part of the notices used.

[20] However given that this omission does not appear to have prejudiced the Respondent, the Tribunal confirms that the schedules annexed to the relevant infringement notices identify the preceding warning and detection notices sufficiently for the purposes of ss 122E(2)(d) and 122F(2)(d) of the Act.

## **Infringement presumptions**

[21] S122O (1) of the Act provides that the Tribunal must order an account holder (in this case the Respondent) 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) the 3 notices were issued in accordance with this Act.”*

[22] Despite s122O (1) of the Act, the Tribunal may decline to make the order required by that subsection if it is satisfied that doing so would be manifestly unjust to the account holder.<sup>8</sup>

[23] By operation of s122N of the Act it is presumed, in relation to an infringement notice, that:

- (a) each incidence of file sharing identified in the infringement notices constituted an infringement of the rights owner's copyright the work;
- (b) that the information recorded in the infringement notice is correct; and
- (c) that the infringement notice was issued in accordance with the Act<sup>9</sup>.

[24] The account holder may submit evidence or give reasons why the presumptions do not apply to a particular infringement.<sup>10</sup>

[25] As the Respondent has neither challenged the infringement notices nor responded to the Notice of Proceeding, the presumptions remain in place and there is no basis for s122O (5) to apply.

[26] Accordingly, the Tribunal is satisfied of the matters contained in s122O (1) and is required to order the Respondent to pay a sum to the Applicant.

---

<sup>8</sup> Section 122O(5) of the Act.

<sup>9</sup> Section 122N(1) of the Act.

<sup>10</sup> Section 122N(2) of the Act.

## **Quantifying the sum**

[27] The sum the Tribunal is required to order pursuant to s122O(1) must include a sum for each infringement. The Tribunal may also make an order requiring the account holder to pay the rights owner either or both of a sum representing a contribution towards the fees paid by the rights holder and reimbursement of the application fee paid by the rights owner to the Tribunal.<sup>11</sup>

[28] The sum must not exceed \$15,000<sup>12</sup> and must be calculated in accordance with the Regulations.<sup>13</sup>

### ***Regulation 12(2)(a)***

[29] Regulation 12(2)(a) provides that in calculating the appropriate relief, the Tribunal must determine the reasonable cost of purchasing the work that the Tribunal accepts has been infringed.

[30] In this case the evidence shows that the Respondent has infringed on three separate occasions.

[31] The Applicant states that at the relevant time the song Reflektor (two infringements) could be purchased from iTunes for \$2.39 and the song Gangasta (one infringement) for \$2.39.

[32] Accordingly, The Tribunal orders the Respondent to pay the Applicant for the three infringements, 3 x \$2.39 totalling \$7.17.

### ***Regulation 12(2)(b)***

[33] The Tribunal is required, pursuant to Regulation 12(2)(b), to determine any fees paid by the Applicant to the IPAP in respect of the infringements to which the application relates. S.122O(3) provides that the Tribunal may order the account holder to pay the rights holder a sum representing a contribution towards those fees.

[34] According to the Applicant it has paid fees of \$75 plus GST to the IPAP (being a total of \$86.25) and pursuant to the Tribunals decisions [2013] NZCOP 1 and 2 seeks the following amounts using a “sliding scale of culpability”:

- (a) \$8.33 for the detection notice;

---

<sup>11</sup> Sections 122O(2) and (3) of the Act.

<sup>12</sup> Section 122O(4) of the Act.

<sup>13</sup> Section 122O(2) of the Act

(b) \$16.67 for the warning notice; and

(c) \$25.00 for the enforcement notice.

[35] The Tribunal accepts that the Applicant is entitled to the contributions it seeks and orders the Respondent to pay a contribution towards the IPAP fees of \$50.00.

***Regulation 12(2)(c)***

[36] Regulation 12(2)(c) requires the Tribunal to determine the cost of the application fee while s.122O(3)(b) states that the Tribunal may make an order requiring the account holder to reimburse the rights owner for the application fee paid to the Tribunal.

[37] The Applicant seeks reimbursement of the \$200 (inc GST), which it says it was obliged to pay the Tribunal.

[38] The Tribunal accepts that the Respondent should reimburse the Applicant for the fee paid by it to the Tribunal and therefore orders the Respondent to pay the applicant \$200.00.

***Regulation 12(2)(d)***

[39] Regulation 12(2)(d) provides that the Tribunal must determine an amount that it consider appropriate as a deterrent against further infringing.

[40] Regulation 12(3) states that in determining whether an amount is appropriate as a deterrent against further infringing, the Tribunal may consider any circumstances it considers relevant and must consider the following:

- (a) the flagrancy of the infringement;
- (b) the possible effect of the infringing activity on the market for the work;
- (c) whether the other sums referred to above would already constitute a sufficient deterrent against further infringing.

***Flagrancy of the infringement***

[41] The Applicant contends, in relation to the issue of flagrancy that the Respondent's behaviour has been both deliberate and calculated in that:

- (a) the installation of the BitTorrent Protocol (uTorrent 2.0.2) software was a deliberate act by the Respondent or a person using the Respondent's IP address;

- (b) it would defy common sense to believe that the three occasions detected by the Applicant were the only occasions when the Respondent was uploading sound recordings;
- (c) the Respondent did not modify his/her actions following receipt of the detection and warning notices but continued to infringe by uploading. This is despite wide publicity having been given to the file sharing legislation and its operation

[42] As noted in a number of the Tribunal's decisions,<sup>14</sup> the factors identified by the Applicant may well be common to most the matters before it. As such the conduct does not meet the ordinary definition of "flagrancy" identified by the Court of Appeal in *Skids Programme Management Limited & Ors. v McNeill & Ors*<sup>15</sup> namely conduct that implies the existence of scandalous conduct or deceit; something beyond the common case.

[43] Moreover, given BitTorrent Protocol software can be used legitimately and as there is no evidence before the Tribunal as to the deliberateness of the Respondents actions<sup>16</sup> it is not possible to conclude with certainty that the Respondents actions are either deliberate or calculated.

[44] Similarly, there is no evidence to support the Applicant's inference that the exercise of common sense demands a conclusion that the Respondent uploaded sound recordings on occasions other than those detected.

*Possible effect of the infringing activity on the market for the work*

[45] The Applicant suggests that in using P2P software the Respondent will have enabled multiple other parties to download the songs and that the cumulative effect of multiple instances of illegal downloading is devastating.

[46] The Tribunal acknowledges that the Respondent's activities may have had a detrimental effect on the market for the copyright works, although it is noted that no evidence has been proffered that speaks to the direct impact the infringing may have had.

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

[47] The Applicant states that:

- (a) the sums the Tribunal is entitled to award pursuant to s122O (a)-(c) of the Act are modest and are not a sufficient deterrent;

---

<sup>14</sup> See: [2013] NZCOP1, [2013] NZCOP 4 and [2013] NZCOP 8.

<sup>15</sup> [2012] NZCA 314, 23 July 2012.

<sup>16</sup> This software can operate independently of the account holder, sending uploads automatically when the computer is logged on. See [2013] NZCOP 817 and [2013] NZCOP 17

- (b) these sums do not entirely reimburse the rights owner for out-of-pocket expenses;
- (c) the intention of the Legislature in providing a deterrent sum is to speak to the wider public.

[48] The Tribunal rejects the Applicant's third submission. The Tribunal's view is that the words "deterrent against further infringing" contained in regulation 12(2)(d) are directed at further offending by the Respondent, not the wider public. However, the Tribunal agrees that the sums awarded would not necessarily constitute a sufficient deterrent against further infringing, and that a further deterrent sum is appropriate.

#### *Other relevant circumstances*

[49] The Applicant suggests that the following circumstances are relevant to the Tribunal's determination:

- (a) the maximum figure that can be ordered is \$15,000 which indicates that the deterrent sum must be more than a small or trivial amount;
- (b) that there are now many readily available legal digital music services; and
- (c) that a deterrent sum should be ordered that serves to change peoples behaviour inducing them to use legal rather than illegal channels of music distribution.

[50] The Tribunal views these circumstances as having limited relevance. Further, with reference to paragraph 48 above, 49 (c) is only relevant so far as it pertains to inducing a change in the Respondent's behaviour.

[51] The Tribunal considers the following circumstances to be relevant to its determination:

- (a) That the Respondent failed to comply with the infringement notices.
- (b) That the Respondent has not provided an explanation for these infringements.

[52] Bearing in mind all of these matters, the Tribunal considers an additional \$120 per infringement to be an appropriate deterrent against further infringing.

#### **Orders**

[53] The Tribunal therefore orders the Respondent to pay to the Applicant the sum of \$617.12, comprised as follows:

- (a) \$7.12 under r.12 (2)(a), representing the cost of purchasing the works legally;
- (b) \$50.00 under r.12 (2)(b), representing a contribution towards the IPAP fees paid by the Applicant;
- (c) \$200.00 under r.12 (2)(c), being reimbursement of the application fee paid by the Applicant to the Tribunal; and
- (d) \$360.00 under r.12 (2)(d), being an additional deterrent sum.

Decision of the Copyright Tribunal delivered by Sarah Bacon

**DATED** the 24th day of December 2014

---

Sarah Bacon  
Member  
Copyright Tribunal