[2014] NZCOP 3

COP 010/14

UNDER The Copyright Act 1994

BETWEEN **RECORDED MUSIC NZ LIMITED**

Applicant

AND **VOD052014-D-R-9242889**

Respondent

BEFORE THE COPYRIGHT TRIBUNAL

Sarah-Jane Weir

HEARING ON THE PAPERS

DECISION

Introduction

[1] This is an application brought by Recorded Music NZ Limited ("RMNZL") to the Copyright Tribunal ("the Tribunal') in respect of alleged infringing file sharing under ss 122A-U of the Copyright Act 1994 ("the Act"). These sections establish a procedural regime for copyright owners to take enforcement action against internet users who infringe right owner's copyright via "file sharing". The Act allows copyright owners to act alone or through agents.

[2] RMNZL has made the application as agent for Universal Music Group, Inc. Universal Music Group, Inc through its New Zealand subsidiary Universal Music New Zealand Limited is stated to be the owner of the copyright in sound recording, the subject of this application for infringing file sharing. The respondent is an individual internet account holder.

[3] Section 122A of the Act defines file sharing 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."

[4] The regime provided for under the Act allows a right owner to require an Internet Protocol Address Provider ("IPAP") (an Internet Service Provider) to issue infringement notices to individual internet account holders where the right owner alleges that its copyright has been infringed by file sharing that has taken place at an Internet Protocol ("IP") address used by the individual internet account holder.

[5] The regime set out in the Act includes for the provision of three infringement notices – a detection notice, a warning notice and an enforcement notice.

[6] Once an enforcement notice has been issued, the rights owner may apply to the Copyright Tribunal for an order under s 1220 of the Act that the account holder pay it a monetary sum. The Copyright (Infringing File Sharing) Regulations 2011 ("the Regulations") set out how that sum is to be calculated.

Factual Background and Application to the Tribunal

[7] The IPAP involved in this case is Vodafone New Zealand ("Vodafone"). Vodafone issued infringement notices to the respondent in accordance with the regime set out in the Act as follows:

a. a detection notice on 5 February 2014;

b. a warning notice on 26 March 2014;

c. an enforcement notice on 22 May 2014.

[8] Each of the infringement notices alleged infringement of copyright by the account holder or a person using the account holder's IP address in the sound recording Berzerk. In each case, uTorrent was identified as the file sharing application used.

[9] The Respondent did not challenge any of the infringement notices. Neither has she communicated with the Tribunal in any way.

[10] The Tribunal received the Applicant's application on 25 June 2014. The application included:

- a copy of the enforcement notice;
- evidence that RMNZL is the agent of the copyright owner of the sound recording in which copyright is alleged to be infringed;
- the alleged infringements in respect of which the Applicant sought an order from the Tribunal (being the alleged infringing file sharing referred to in the infringement notices);
- a statement of the amount that RMNZL is seeking from the account holder.

[11] That applicant's claim is for a total of $1,043.42, comprising $7.17 for the three alleged infringements, $200 for the application fee it has paid to the Tribunal, and an additional sum of $750.

[12] The Tribunal notified the account holder on 7 July 2014 that a claim had been made against her and invited response by 21 July 2014. No response was received. Further correspondence was sent to the Applicant on 21 August 2014 inviting her to confirm if she wished to be heard or would like the matters to be dealt with on the papers. No response was received. It was made clear in that correspondence that if the Applicant chose not to respond, the case would be heard on the papers.

[13] Neither party has requested a hearing. This matter is therefore determined on the papers in accordance with s 122L of the Act.

Infringement

[14] File sharing networks allow material to be downloaded from, or uploaded by, the internet using an application or network which allows multiple users to simultaneously share files. Where that file sharing network involves, by way of example, sound recordings (music) that is protected by the Act, as the applicant alleges has happened in this case, the Act gives the Tribunal the jurisdiction to require the respondent to pay various sums of money to the applicant. Section 122N(1)(a) of the Act creates a presumption that the alleged file sharing set out in each infringement notice constitutes an infringement of the right owner's copyright in the copyright work (in this case a sound recording), although the account holder may submit evidence this presumption does not apply. No such evidence has been put forward.

[15] The Tribunal therefore finds that given the presumptions under s 122N, each of the three infringements alleged by RMNZL were infringements of copyright through the account holder uploading works - that is, communicating the works to the public in contravention of s 16(1)(f) of the Act- occurred at the account holder's (the respondent) IP address, and that the three infringement notices were issued in accordance with the Act.

[16] That being the case, under s 122O(1) the Tribunal must order the account holder to RNZML a sum unless it declines to do so because in the circumstances it will be "manifestly unjust" to the Respondent to do so (s 122O(5)).

[17] Given the lack of evidence from the Respondent, the Tribunal does not need to exercise that discretion.

Penalties

[18] Section 122O(2) of the Act provides that the sum specified by the Tribunal is to be determined in accordance with the Copyright (Infringing File Sharing) Regulations 2011 ("the Regulations"). It is a requirement of the Regulations that the sum ordered must include a sum in relation to every infringement identified in the enforcement notice that the Tribunal is satisfied was committed against the right owners at the address of the account holder.

[19] In addition to this, the Tribunal, if the Tribunal makes such an order, it may also make an order requiring the account holder to pay either or both of:

[a] a sum representing a contribution toward the fee or fees paid by the right holders to the IPAP; and

[b] reimbursement of the application fee paid by the right owner to the Tribunal (s 122O(3).

[20] The total amount the Tribunal orders the account holder to pay must not exceed $15,000: s 122O(4).

[21] Regulation 12 sets out the basis of how the sums payable under s 122O should be calculated, summarised as follows:

[a] Regulation 12(2)(a) - the cost of dealing with the works legally;

[b] Regulation 12(2)(b) - a contribution towards the fees paid by the rights owner to the IPAP;

[c] Regulation 12(2)(c) – reimbursement of the application fee paid by the rights owner to the Tribunal;

[d] Regulation 12(2)(d) – provision for an additional sum which may be awarded as a deterrent against further infringing.

[22] The Tribunal considers each of those below.

Regulation 12(2)(a) – The cost of dealing with the works legally

[23] If the work is legally available to purchase in electronic form at the time of infringement, the Tribunal must determine the *reasonable cost of purchasing the work in electronic form at that time.* The copyright work in question is the recording *Berzerk* by Eminem. The applicant submits the work was legally available to be purchased in electronic format from iTunes for NZD $2.39.

[24] Section 120O(2) provides the sum specified in the order is "*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*".

[25] The enforcement notice dated 22 May 2014 refers to 3 occasions on which the alleged uploading occurred. Accordingly, the Tribunal orders the Respondent to pay to the applicant 3 x $2.39, a total of $7.17.

Regulation 12(2)(b) – A contribution towards the fees paid by the rights owner to the IPAP

[26] 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 122O(3) provides the Tribunal "*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".*

[27] Consistent with the above, the Tribunal notes the 3 occasions of infringement are referred to in the enforcement notice.

[28] The applicant has paid 3 x $25 plus GST ($86.25) in relation to each of the occasions on which uploading was detected to Vodafone, the IPAP in question. Of this sum, it claims NZD $50.00 on the basis of a "sliding scale of culpability" consistent with the Tribunals decisions [2013] NZ COP 1 and 2. For completeness, the Tribunal notes this calculation is as follows:

- Detection notice 5 February 2014 $8.33 (one third of IPAP fee of $25)
- Warning notice 26 March 2014 $16.67 (two thirds of IPAP fee of $25)
- Enforcement notice 22 May 2014 $25.00 (entire IPAP fee of $25.00)

[29] The Tribunal determines the contribution towards the IPAP incurred by the Applicant to be $50.00.

Regulation 12(2)(c) – A contribution towards the application fee paid the rights owner to the Tribunal

[30] Section 1220(3)(b) provides the Tribunal may include in its orders a sum reimbursing the rights owner in full the application fee paid to the Tribunal. Regulation 12(2)(c) requires the Tribunal to determine the cost of that application fee.

[31] The Applicant seeks reimbursement of the fee of $200 which it has paid to the Tribunal. The Tribunal accepts that submission and determines the sum of $200 is paid by the applicant as a contribution towards the application fee paid to the Tribunal.

Regulation 12(2)(d) – A deterrent against further infringing

[32] The Tribunal is obliged to determine '*an amount that the Tribunal considers appropriate as a deterrent against further infringing" (r 12(2)(d)).* In doing so, the Tribunal must consider the three matters in r 12(3)(a)-(c) as follows:

- The flagrancy of the infringement (r 12(3)(a));
- The possible effect of the infringing activity on the market for the work (r 12(3)(b);

- Whether the other sums awarded by the Tribunal would already constitute a sufficient deterrent against further infringing (r 12(3)(c)).

although it may consider "*any circumstances it considers relevant*" (r 12(3)).

Flagrancy (Regulation 12(3)(a))

[33] The applicant submits that locating, downloading, installing and configuring BitTorrent Protocol (uTorrent 3.3.2) was a deliberate act by the respondent or a person using the account holder's IP address. The Tribunal notes that while this act may have been deliberate, it is not necessarily illegal, as the application may be used for legitimate purposes.

[34] The applicant states that it would defy common sense to believe that the occasions referred to in the enforcement notice were the only occasions when the respondent was uploading. The Tribunal is not prepared to reach that conclusion merely on assertion by the applicant. The applicant notes that the three occasions the subject of the enforcement notice took place over three and a half months, and that the respondent failed to modify their behaviour over that timeframe. The Tribunal notes however that this will likely be common in all file sharing cases before the Tribunal because of the nature of the regime and the timeframes it provides for.

[35] The evidence does not support the Tribunal finding *flagrancy.*

The possible effect of the infringing activity on the market for the work (regulation 12(3)(b))

[36] The applicant submits the cumulative effect of multiple instances of illegal downloading is devastating and has contributed to a halving of recorded music sales in New Zealand over the period 2002 to 2013.

[37] The Tribunal notes the submissions of the applicant, but given their general nature, does not consider them of direct relevance to this particular case so it has insufficient evidence of effect on the market in this case.

Whether the sum of the amounts referred to in subcl 2(a) to (c) would already constitute a sufficient deterrent against further infringing (r 12(3)(c)

[38] The applicant submits that the sum of $257.17 would not be a sufficient deterrent. Broadly, the Tribunal concurs, but does not consider it necessary to comment in more detail given its general findings under r 12(2)(d) below.

Any other circumstances the Tribunal considers relevant (regulation 12(3))

[39] The infringement notices issued by the IPAP Vodafone set out the position in respect of illegal uploading and downloading very clearly and accessibly. They include advice about the process, and diagrams showing what occurred at each step. They draw the respondent's attention to the fact that infringement can occur through uploading of files without knowledge as well as downloading, and to the

consequences. Nevertheless, the respondent has chosen not to engage in the process at all.

[40] There are, as the applicant submits, a number of inexpensive and legal services for legal download and streaming of sound recordings.

[41] Taking into account the combination of the circumstances the Tribunal considers relevant and its finding under r 12(3)(c), under r 12(2)(d) the Tribunal orders the respondent to pay to the applicant a deterrent sum of $120 per infringement, giving a total amount of $360.

Orders

[42] In summary therefore, the Tribunal orders the respondent to pay to the applicant the sum of $617.17 comprised as follows:

[a] $7.17 under r 12(2)(a) representing the cost of purchasing the works legally;

[b] $50 under r 12(2)(b) representing a contribution towards the IPAP fees paid by the applicant;

[c] $200 under r 12(2)(c) representing reimbursement of the applicant fee of $200;

[d] $360 under r 12(2)(d) representing a deterrent sum.

Total $617.17

Decision of the Copyright Tribunal delivered by Sarah-Jane Weir

DATED the 18th day of November 2014

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Sarah-Jane Weir
Member
Copyright Tribunal