

[2014] NZCOP 2

COP 001/14

UNDER

The Copyright Act 1994

BETWEEN

RECORDED MUSIC NZ

Applicant

AND

VOD02014-D-R-9488397

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 copyright owners, Interscope Records (Universal 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 *Mountain Sound* by Of Monsters and Men on 2 October 2013, and the alleged uploading of the sound recording *Radioactive* by Imagine Dragons on 15 November 2013, and again on 9 January 2014. These three alleged infringements triggered the following infringement notices:

- [a] an initial detection notice, issued on 7 October 2013;
- [b] a warning notice, issued on 26 November 2013; and
- [c] an enforcement notice, issued on 21 January 2014.

[7] There was also a further alleged uploading of *Radioactive* on 1 December 2013 which, because of the timing, did not trigger an infringement notice.²

[8] The Application, together with detailed submissions and an authorisation of agent form, was filed with the Tribunal on 24 February 2014. The Applicant seeks an award of \$1,323.96, including a deterrent sum of \$1,000.

[9] The Tribunal notes that the authorisation of agent form refers 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 5 March 2014, the Tribunal wrote to the Respondent, sending him 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 \$1,323.96 to the Applicant.*

You have 10 working days to respond. If you do not respond by 20th March 2014, the Tribunal may make its decision based only on the application.

[11] On 11 March 2014, the Respondent wrote as follows:

"To whom it may concern

² See s.122F(b).

These three songs that have apparently been downloaded we know nothing about and oppose any costs. If you would like to take this further we will be pleading not guilty as we have had travellers staying on top of our 6 new permanent flatmates all with different computers and if this goes to a tribunal we can confirm the amount of people (travellers) staying here and will be appealing this I [] brother is writing this, ring me.

Regards

ring to deal with this

please reply before 18 April

I also have medical evidence of a brain injury and need this correspondence portrayed via a house meeting as cannot read well."

[This letter was handwritten; there may be some slight inaccuracies where the handwriting was difficult to decipher.]

[12] On 27 March 2014, the Applicant wrote to the Tribunal in response to the letter from the account holder dated 11 March 2014. The Applicant disputed various statements made by the Respondent as follows:

- (a) Each of the notices was sent from Vodafone New Zealand to the customer via email, and the Applicant had received no information from Vodafone New Zealand that service of the infringement notices via email was ineffective.
- (b) The Applicant had verified with Vodafone New Zealand that the email address used by Vodafone New Zealand to deliver the three infringement notices was the same email address as was used to deliver the billing invoices.
- (c) It was highly unlikely that the account holder had received (and continues to receive) his monthly account statements and yet did not receive any of the preceding infringement notices.

[13] In respect of the reference to "these three songs that have apparently been downloaded", the Applicant said that it had presented evidence showing *uploading* of tracks on four occasions, and says that it is entitled to the benefit of the presumptions in s 122N that:

- (a) Each incidence of file sharing identified in the notice constituted an infringement of the rights owner's copyright in the work identified; and
- (b) The information recorded on the infringement notice is correct; and
- (c) The infringement notice was pursued in accordance with the Act.

[14] Neither party has requested a hearing, and the Tribunal does not consider it necessary to convene one. Accordingly, this matter is determined on the papers.

Infringement

[15] Infringement is defined as “an incidence of file sharing that involves the infringement of copyright in a work by a user”.³ The Applicant has provided evidence that on four separate occasions the account holder or a person using the account holder’s IP address uploaded copyright protected tracks, i.e. the sound recordings *Mountain Sound* and *Radioactive* (three times). Each of the infringements occurred at an IP address of the account holder as verified by the IPAP.

[16] 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.⁴ An account holder may submit evidence that this presumption does not apply, or give reasons why it should not apply.⁵ In this case, the Respondent has not provided any evidence that the presumption should not apply.

[17] In the circumstances, the Tribunal is satisfied that:

- [a] each of the alleged infringements that triggered the notices amounted to an infringement of the right owner’s copyright;⁶ and
- [b] the infringements occurred at the IP address of the account holder.⁷

[18] Further, in the absence of any evidence to the contrary, the Tribunal accepts that the three infringement notices were issued in accordance with the Act.⁸ In this regard, the Tribunal notes s.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.

Penalties

[19] The Tribunal has jurisdiction to require the Respondent to pay various sums to the Applicant under four different heads of relief:

- [a] regulation 12(2)(a), which deals with the cost of purchasing the works legally;⁹
- [b] regulation 12(2)(b), which provides for a contribution towards the fees paid by the rights owner to the IPAP;¹⁰
- [c] regulation 12(2)(c), which provides for reimbursement of the application fee paid by the rights owner to the Tribunal;¹¹ and
- [d] regulation 12(2)(d), which provides that an additional sum may be awarded as a deterrent against further infringing.¹²

³ Section 122A(1).

⁴ Section 122N(1)(a).

⁵ See s. 122N(2).

⁶ See s.122O(1)(a)(i).

⁷ See s.122O(1)(a)(ii).

⁸ Section 122O(1)(b).

⁹ See also s.122O(1) and (2).

¹⁰ See also s.122O(1)(3)(a).

¹¹ See also s.122O(3)(b).

¹² See also r.12(3).

Regulation 12(2)(a)

[20] Regulation 12(2)(a) provides that in calculating the appropriate relief, the Tribunal must determine the reasonable cost of purchasing each of the works in which the Tribunal is satisfied that copyright has been infringed. Similarly, s.122O(2) provides that *“the sum specified in the Tribunal order ... 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”*.

[21] According to the Applicant, at the time of the infringements the sound recording *Mountain Sound* was available for purchase in electronic form from iTunes at a cost of \$1.79 and *Radioactive* was available for purchase at a cost of \$2.39.

[22] Accordingly, the Tribunal orders the Respondent to pay to the rights owner 1 x \$1.79 and 3 x \$2.39, totalling \$8.96.

Regulation 12(2)(b)

[23] 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.120(3)(a) 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.¹³

[24] In the present case, there are four *“infringements to which the application relates”*, i.e. four occasions on which infringement by way of uploading was detected from the Respondent’s IP address. The Applicant has paid 4 x \$25 plus GST to the IPAP (\$100 plus GST). One of the infringements did not trigger an infringement notice, but the Applicant was still obliged to pay an IPAP fee as required by s.122U of the Act.

[25] The Tribunal accepts the Applicant’s submission that it should be entitled to the following contributions towards the fees that it has incurred:

- Detection notice (7 Oct 2013) \$8.33 (one third of IPAP fee)
- Warning notice (26 Nov 2013) \$16.67 (two thirds of IPAP fee)
- Additional notice (9 Dec 2013) \$16.67 (two thirds of IPAP fee)
- Enforcement notice (21 Jan 2014) \$25.00 (entire IPAP fee)

[26] The Respondent is required to pay a contribution towards the IPAP fees incurred by the Applicant in accordance with the above calculations, totalling \$66.67.

¹³ Section 122O(3)(a).

Regulation 12(2)(c)

[27] Section 122O(3)(b) provides that the Tribunal may make an order requiring the account holder to reimburse the rights owner for the application fee paid by the rights owner to the Tribunal, and r.12(2)(c) requires the Tribunal to determine the cost of that application fee.

[28] The Tribunal accepts that the Respondent should reimburse the Applicant for the cost of application fee paid to the Tribunal, i.e. the sum of \$200.

Regulation 12(2)(d)

[29] Regulation 12(2)(d) 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 amount should be, the Tribunal may consider “any circumstances it considers relevant”, but also:

- [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.

[30] On four occasions, the account holder or a person using the account holder’s IP address has made available copyright protected tracks using P2P software. By making these tracks available, the account holder or a person using the account holder’s IP address has enabled multiple other parties to download these tracks every time the account holder or a person using the account holder’s IP address used the BitTorrent Protocol software. The Applicant submits that in this case, a deterrent sum of \$250 per infringement is warranted, i.e. \$1000.

[31] It alleges that the actions of the Respondent were calculated and deliberate, and that the locating, downloading, installing of the BitTorrent Protocol (uTorrent 3.2.3 and Azureus 4.5.0.4) software was a deliberate act by the Respondent or a person using the account holder’s IP address.

[32] The period during which the four infringements occurred was only three months. The Applicant says that it would defy common sense to believe that the four occasions detected by the Applicant were the only occasions when the Respondent was uploading sound recordings.

[33] Following the detection and warning notices, the Respondent did not modify his actions, but continued to infringe by uploading. The infringement notices issued by Vodafone New Zealand set out the position very clearly. The notices included advice about the legal process, including a diagram showing precisely which stage of the process applied when each infringement notice was sent. The notices also included the following statement:

It is important to understand that the alleged offence is making the work publicly available, not necessarily downloading the copyrighted work (although that is also an

offence under the Copyright Act 1994). We have found that some customers have received a notice because they were not aware that just having the file sharing software active on their computer with an Internet connection actually allows others to pick up the files on it. We suggest that if you do not require the file sharing software, you consider removing it. If it is legitimately required, we suggest you ensure it is configured so no copyright material is available for sharing to the public.

Remember, as the account holder of the above fixed line internet account, you are responsible for all activity on the account and liable under the Copyright (Infringement File Sharing) Amendment Act 2011 for this activity, and any alleged copyright breaches could result in an award of up to \$15,000.

[34] Accordingly, despite the Respondent's submission that his household included both travellers and flatmates, he was clearly on notice that, as the account holder, he was responsible for all activity on his internet account. He was also on notice that even just having file sharing software on a computer with an internet connection allows others to pick up the files on it, even if no further downloading occurs.

[35] The Applicant submits that the cumulative effect of multiple instances of illegal downloading is devastating. It says that music piracy has contributed to a halving of recorded music sales in New Zealand since 2002.

[36] The Applicant submits that the sums available under sub-clauses 2(a) – (c) are modest and would not be a sufficient deterrent. Those sums do not even fully reimburse the rights owner's out-of-pocket expenses. For there to be a deterrent effect, there should be an extra sum which deters the infringer as well as others in the market from engaging in similar activity.

[37] It notes that the Legislature has set a maximum figure of \$15,000 of the total amount that can be ordered to be paid to the rights owner. It says that the figure of \$15,000 produces a guideline as to the top limit for all sums in a worst case, and that the figure equally provides an indication that a deterrent sum needs to be more than a small or trivial amount when compared to the maximum penalty.

[38] The Applicant submits that another relevant factor is that legal services for the digital downloading or streaming of sound recordings are readily and inexpensively available in New Zealand. The Applicant has been successful in encouraging a wide range of legal digital services to establish businesses in New Zealand. Unlike P2P services, these services ensure that song writers, musicians and those who invest in them are paid.

[39] The Applicant also notes that wide spread publicity has been given to the file sharing legislation and its operation by the New Zealand media.

[40] The Tribunal accepts that the activities of the Respondent are likely to have had a detrimental effect on the market for the copyright works. It also accepts that the sums awarded under sub-clauses (a) - (c) would not constitute a sufficient deterrent, and that a further deterrent sum is appropriate, particularly as the file sharing legislation has been in place for some time now.

[41] Taking into account all of these factors, the Tribunal orders the Respondent to pay to the Applicant a deterrent sum of \$120 per infringement, i.e. \$480.

Orders

[42] In summary, therefore, the Tribunal orders the Respondent to pay to the Applicant the sum of \$738.96, comprised as follows:

- [a] \$8.96 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; and
- [c] \$200.00 under r.12(2)(c), being reimbursement of the application fee paid by the rights owner to the Tribunal; and
- [d] \$480.00 under r.12(2)(d), being an additional deterrent sum.

Decision of the Copyright Tribunal delivered by Jane Glover

DATED at WELLINGTON this 4th day of August 2014

Jane Glover