

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE**

**CIV-2014-485-11220
[2017] NZHC 2603**

UNDER	The Copyright Act 1994
BETWEEN	EIGHT MILE STYLE, LLC First Plaintiff
	MARTIN AFFILIATED, LLC Second Plaintiff
AND	NEW ZEALAND NATIONAL PARTY First Defendant
	GREG HAMILTON Second Defendant
AND	STAN 3 LIMITED First Third Party
	SALE STREET STUDIOS LIMITED Second Third Party

Continued

Hearing: 1–8 May 2017 and 11–12 May 2017

Appearances: G C Williams, A M Simpson and C M Young for plaintiffs
G F Arthur, G M Richards and P T Kiely for defendants
A J Holmes for second third party
T P Mullins and C I Hadlee for third and fourth third parties
L M Kelly for fifth third party
R K P Stewart for fourth party
No appearance for fifth party

Judgment: 25 October 2017

JUDGMENT OF CULL J

AND

AMCOS NEW ZEALAND LIMITED
Third Third Party

AUSTRALASIAN MECHANICAL
COPYRIGHT OWNERS SOCIETY
LIMITED
Fourth Third Party

BEATBOX MUSIC PTY LIMITED
Fifth Third Party

AND

LABRADOR ENTERTAINMENT INC
Fourth Party

AND

MICHAEL ALAN COHEN
Fifth Party

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You better lose yourself in the music, the moment
You own it, you better never let it go ...¹

[1] So raps Eminem to the musical work *Lose Yourself*. The plaintiffs claim their copyright in *Lose Yourself* has been infringed by the New Zealand National Party, by its use of a “sound-alike” track called *Eminem Esque* in its 2014 election campaign advertising and promotion.

[2] This case concerns the use of production music, sourced from production music libraries, for synchronisation with television or media advertisements. Such use is subject to a synchronisation licence and fee, which is issued and collected by copyright collecting societies. Here, the production soundtrack used by the National Party is described as a “sound-alike” and is called *Eminem Esque*, which was composed by Mr Cohen, the fifth party who holds copyright in that work.

[3] The plaintiffs (whom I will refer to as Eight Mile Style) allege that in the lead up to the 2014 election, the National Party infringed Eight Mile Style’s copyright, by using *Lose Yourself* or a substantially similar version or adaptation of it, called *Eminem Esque*, in National Party campaign advertisements on television, the internet and a National Party video. Eight Mile Style seek damages for the National Party’s copyright infringement.

[4] The National Party and the Party Secretary (both of whom I will refer to as the National Party) deny there has been any copyright infringement because there was no reproduction or copying of *Lose Yourself*; that not every aspect of *Lose Yourself* was original; and the National Party had paid for a synchronisation licence to use the music sound-alike *Eminem Esque*.

[5] There are three separate copyrights in *Lose Yourself*, namely, the original sound recording, the lyrics and the music. Copyright is a property right that exists in original works. This case concerns the copyright in the music only. The references to *Lose*

¹ An excerpt from the lyrics to *Lose Yourself*. Marshall Mathers III (Eminem) *Lose Yourself* (composed by Jeffrey Bass, Luis Resto and Marshall Mathers III, ©Kobalt Music Publishing Ltd, 2002).

Yourself in this decision, therefore, are to the musical work of *Lose Yourself*, unless otherwise stated.

[6] This proceeding is being heard in two parts. The first is a hearing to determine the liability of the National Party and the quantum of damages, if any. The second concerns a separate hearing to determine third party liability, if any. This decision deals with the first hearing only, namely, the issues of liability and quantum against the National Party as the alleged publisher of the infringing work. The third party liability hearing awaits the outcome of this trial. However, three of the third parties adduced evidence and made submissions in this hearing. Beatbox Music, an Australian based production music library and the fifth third party, adduced evidence on the musical history of “borrowing”. AMCOS New Zealand and AMCOS,² the third and fourth third parties, which are the copyright collecting societies providing centralised copyright licensing services, adduced evidence and made submissions on the range of industry licence fees, in the event damages may be awarded.

[7] During the hearing, a number of witnesses gave evidence on confidential agreements and commercially sensitive information in relation to artist and industry practices and licence fees. To protect this confidential information, this decision will be delivered with the analysis of the confidential material being released to the parties only. This will form Appendix II to the decision.

The musical works

[8] The principle focus in this case is to determine whether *Lose Yourself* has been substantially copied or reproduced in *Eminem Esque*. Each of the respective musical works are described below. The relevant sound tracks to the works, the 30 second National Party advertisement and the comparative tracks have been made available by hyperlink, to enable public access to the sound tracks that were produced during the hearing.

² AMCOS is the Australasian Mechanical Copyright Owners Society Ltd.

Lose Yourself

[9] *Lose Yourself* was composed by Marshall Mathers III (Eminem), Jeffrey Bass and Luis Resto in 2002. The musical work, accompanied by lyrics, was recorded and released as a single in the United States of America in September 2002. Following an exclusive artist recording agreement and an operating agreement, Eight Mile Style ultimately became the owner of 50 per cent and exclusive licensee of the other 50 per cent of *Lose Yourself*. This arrangement was finalised on 9 January 2003.

[10] The original recording of *Lose Yourself*, which includes both the musical work and lyrics can be accessed at the following hyperlink: [Lose Yourself – original recording of music and lyrics](#).³

[11] The musical work only, being the original Interscope recording, is the focus of the determination in this decision. The musical work only is available at the following hyperlink: [Lose Yourself – musical work only](#).⁴

Eminem Esque

[12] Sometime prior to 8 March 2007, Michael Cohen (the fifth party) produced a track that he called *Eminem_abbrev*, which was later renamed *SQ mc Eminem Esque*. Mr Cohen holds copyright in this track. On 14 February 2008, Mr Cohen granted Labrador Entertainment Inc (Labrador), a Californian-based production music library and the fourth party, the rights to licence his work commercially. Labrador in turn licensed Beatbox Music to make the track available in Australia, New Zealand and Fiji. Mr Cohen's track is referred to in this judgment as *Eminem Esque*.

[13] The sound track of *Eminem Esque* can be accessed at the following hyperlink: [Eminem Esque sound track](#).⁵

³ The hyperlinks, when clicked, will play the identified track. Alternatively, the website addresses are available as follows. *Lose Yourself* original recording and lyrics: <<http://www2.justice.govt.nz/website-documents/judicial/lose-yourself-eminem-original-recording.mp3>>.

⁴ *Lose Yourself* musical work only: <<http://www2.justice.govt.nz/website-documents/judicial/lose-yourself-eminem-musical-work-only.mp3>>.

⁵ *Eminem Esque* sound track: <<http://www2.justice.govt.nz/website-documents/judicial/eminem-esque.mp3>>.

Audio comparison of both works

[14] Two further sound tracks were produced by the plaintiffs, to assist in comparing the two works. The first comparative track is a sequential playing of an excerpt of *Lose Yourself*, which has a duration of 56 seconds, followed by an excerpt of *Eminem Esque*. *Eminem Esque* then starts at 57 seconds. The tracks can then be compared, one following the other. The sequential track can be accessed at the following hyperlink: [Lose Yourself – Eminem Esque sequential track](#).⁶

[15] The second comparative track is called an overlay track.⁷ This track has *Lose Yourself* and *Eminem Esque* overlayed, allowing both tracks to be heard together. Each of those tracks can be heard separately by *Lose Yourself* being channelled through a left headphone or speaker and *Eminem Esque* played through the right headphone or speaker. This track can be accessed at the following hyperlink: [Lose Yourself – Eminem Esque overlay](#).⁸

[16] Finally, the 30 second National Party advertisement can also be accessed at the following hyperlink: [30 second National Party advertisement](#).⁹

What happened?¹⁰

[17] Prior to the 2014 New Zealand election, the National Party engaged three experienced advertising and media consultants to provide their expertise and services for the production of broadcast advertisements for the National Party's election campaign. They worked for Stan 3 Ltd (first third party), which was incorporated to develop and produce the National Party's 2014 election campaign advertisements.

⁶ *Lose Yourself – Eminem Esque* sequential track: <<http://www2.justice.govt.nz/website-documents/judicial/lose-yourself-eminem-esque-sequential1.mp3>>.

⁷ *Lose Yourself* has an orchestral introduction of 30 seconds, before the commencement of the main part of the song. *Eminem Esque* is alleged to be a copy of the main part of *Lose Yourself* and does not contain the orchestral introduction.

⁸ *Lose Yourself – Eminem Esque* overlay: <<http://www2.justice.govt.nz/website-documents/judiciallose-yourself-eminem-esque-overlay.mp3>>.

⁹ Thirty second National Party advertisement: <<http://www2.justice.govt.nz/website-documents/judicial/national-party-advertisement.mp4>>.

¹⁰ This section contains an abridged sequence of events, which are more fully detailed in the chronology in Appendix I to this decision.

[18] In February 2014, Mr Jameson of Stan 3 prepared animatics, which comprise still photographs to convey “the look and feel” of the advertisement, and incorporated an extract from the music of *Lose Yourself*. The attraction was the steady, syncopated beat and rhythm to *Lose Yourself*, giving a sense of momentum to accompany the rowing strokes in the advertisement. Mr Jameson sought other possible tracks that could be tested for use in the advertisement. Sale Street Studios Ltd (Sale Street Studios), a New Zealand audio production studio and the second third party, located two tracks of music according to Mr Jameson’s specification. The first was a classical track. The other was a modern track called *Eminem Esque*.

[19] In February and March 2014, Sale Street Studios synchronised the two tracks respectively with the animatics and tested them on focus groups. The preference was for the modern track, *Eminem Esque*. Between March 2014 and May 2014 election advertisements were produced.

[20] In late May 2014, when the proposed election advertisement was shown to the campaign manager and staff, a staff member told the campaign manager that the track sounded like Eminem and Eminem had been accused of using hate speech.

[21] The campaign manager asked Stan 3 for full details of the musical track, being concerned about the association with Eminem and any copyright issues.

[22] On or about 13 June 2014, the campaign committee listened to several music options and decided *Eminem Esque* suited the advertisement best, because the track fitted with the visuals of the advertisement. The committee however wanted reassurance that the National Party could safely use *Eminem Esque*.

[23] In late June 2014, Stan 3 sought reassurance about the track’s copyright and obtained it from Sale Street Studios, Beatbox Music, APRA AMCOS,¹¹ among others. Stan 3 organised through Beatbox Music that an APRA AMCOS licence was paid to use Mr Cohen’s track *Eminem Esque*. In particular, Stan 3 received a written assurance on 18 June 2014 from Mr Mackenzie of Beatbox that “[t]he agreement we have with

¹¹ APRA AMCOS is the Australian Performing Right Association / Australasian Mechanical Copyright Owners Society Ltd.

the publisher gives us assurance that the music does not infringe on copyright and is free to be used for production purposes.”

[24] On 28 June 2014, a campaign video with the *Eminem Esque* track synchronised to it was played to the National Party conference.

[25] On 20 August 2014, the first of the election advertisements was uploaded to YouTube and to the National Party’s Facebook page. Between 20 to 30 August, the advertisements, with the *Eminem Esque* track synchronised to them, were played 186 times on New Zealand television. *Eminem Esque* was also played eight times for a total period of seven minutes during a 15 minute opening broadcast on TV1, occurring on 23 August 2014.

[26] Following suggestions in the media that the music sounded like *Lose Yourself*, on 25 August 2014, Eight Mile Style’s lawyers wrote to the National Party complaining of the unlicensed use of *Lose Yourself*.

[27] On or about 27 August 2014, the National Party decided to replace the *Eminem Esque* track on its advertisements with alternative music, which were aired from 30 August 2014.

Issues

[28] The parties have agreed on the following issues for determination in this proceeding. I have summarised them into four principal issues as follows:

1. *Is there actionable copyright in Lose Yourself?*
 - 1.1 Can Eight Mile Style enforce the copyright of *Lose Yourself* in New Zealand?
 - 1.2 Does copyright subsist in the musical work known as *Lose Yourself*?
2. *Was there copying of Lose Yourself?*
 - 2.1 How original is *Lose Yourself*?
 - 2.2 Has *Eminem Esque* substantially copied or reproduced *Lose Yourself*?
 - 2.3 Does *Eminem Esque* sound objectively similar to *Lose Yourself*?
 - 2.4 Is there a causal connection between *Eminem Esque* and *Lose Yourself*?

3. *Was there copyright infringement?*
 - 3.1 Have any restricted acts taken place?
 - 3.2 Did the National Party infringe the copyright of *Lose Yourself*?

4. *What relief, if any, should be awarded?*
 - 4.1 If the National Party has infringed copyright, are Eight Mile Style entitled to relief and if so, what damages should be awarded?
 - 4.2 Are Eight Mile Style entitled to additional damages?

[29] In this judgment, I will deal with each of the issues in four sections. Under each of the principal issues, the legal principles, any sub-issues arising, the parties' positions in relation to those issues, and the relevant evidence will be analysed, with my conclusions recorded at the end of each sub-issue. A summary of conclusions appears at the end of the judgment.

FIRST ISSUE: IS THERE ACTIONABLE COPYRIGHT IN *LOSE YOURSELF*?

[30] Eight Mile Style claim they are eligible to enforce copyright in New Zealand under ss 18, 230 and 232 of the Copyright Act 1994 (the Act). The composers are United States' citizens.¹²

[31] Eight Mile Style say that the musical work *Lose Yourself* was an original work composed by Marshall Mathers III, Luis Resto and Jeffrey Bass. They are the exclusive licensee and co-owner of copyright in the musical work.

[32] The National Party does not substantively challenge determining the first issue in favour of Eight Mile Style. The National Party accepts that *Lose Yourself* is an original musical work in which copyright can subsist under the Act. It also accepts that at least Mr Bass was an author of the musical work and, because he is a United States' citizen, New Zealand copyright subsists in the musical work *Lose Yourself*. It further accepts that Eight Mile Style are exclusive licensees and can enforce copyright in New Zealand.

¹² Copyright Act 1994, s 18. Under s 18, a work qualifies for copyright if any of the authors satisfy the requirements in subsection (1) or (2). In this case, the authors are the composers of *Lose Yourself*, namely, Mr Mathers, Mr Bass and Mr Resto, as they created the work. See definition of "author" in s 5 of the Act.

1.1 Can Eight Mile Style enforce copyright in New Zealand?

[33] To enforce a copyright claim the requirements in either ss 18, 19 or 20 of the Act regarding qualification for copyright must be satisfied.¹³ Eight Mile Style satisfies s 18 of the Act, and in particular s 18(2), where a work qualifies for copyright if the author is, at the material time, a citizen or subject of a prescribed foreign country. A prescribed foreign country includes a convention country, to which s 230 applies.¹⁴ A convention country is defined as “an entity that is a party to an international agreement or arrangement relating to copyright.”¹⁵

[34] The composers of *Lose Yourself* are citizens of the United States. Both New Zealand and the United States are state parties to the Universal Copyright Convention.¹⁶ The United States is therefore a prescribed foreign country (and a convention country) pursuant to ss 18(2) and 230 of the Act.

[35] Eight Mile Style derive their status as a copyright owner by being the exclusive licensee. Under s 120 of the Act, copyright infringement is actionable by the copyright owner. Section 123 gives an exclusive licensee the same rights and remedies that a copyright owner has within s 120. Therefore, copyright infringement is actionable by both the copyright owner and the exclusive licensee, who own the copyright jointly.

Conclusion 1.1

[36] The findings are:

- (a) Eight Mile Style are the owners of 50 percent and are exclusive licensees of the other 50 per cent of the musical work *Lose Yourself*. They are therefore the exclusive licensees of copyright in the musical work *Lose Yourself*; and
- (b) Eight Mile Style are entitled to bring this action for copyright infringement in New Zealand as the authors of *Lose Yourself* are citizens of a prescribed foreign country under the Act.

¹³ Copyright Act 1994, s 17.

¹⁴ Section 2, definition of “prescribed foreign country”.

¹⁵ Section 2, definition of “convention country”.

¹⁶ Universal Copyright Convention 943 UNTS 178 (opened for signature 6 September 1952, entered into force 16 September 1955).

1.2 Does copyright subsist in the musical work *Lose Yourself*?

[37] To bring an action for copyright infringement, Eight Mile Style must accurately identify the copyright work in respect of which they are claiming infringement.

[38] Section 14 of the Act defines copyright as a property right that exists in original works. The original work in this case is a musical work.¹⁷

[39] Having identified the work for which it is claiming copyright, Eight Mile Style must establish that the work is an original work. The Act prescribes when a work is not original, under s 14(2), which provides:

- (2) A work is not original if—
 - (a) it is, or to the extent that it is, a copy of another work; or
 - (b) it infringes the copyright in, or to the extent that it infringes the copyright in, another work.

[40] However, the Act does not define originality or how the common law principles apply. The Supreme Court has identified the relevant elements of originality.¹⁸ First, originality must be carefully distinguished from novelty. The Court said there “need be nothing novel in a work to qualify it for copyright protection.”¹⁹

[41] Secondly, the Court emphasised that to be original for copyright purposes, the work must originate from its author. Section 21(1) of the Act stipulates “the person who is the author of a work is the first owner of any copyright in the work”. Eight Mile Style submit that the composers (and first owners) of any copyright in the work *Lose Yourself* are Marshall Mathers III, Luis Resto and Jeffrey Bass, who created the work through musical composition.²⁰

¹⁷ Copyright Act 1994, s 14(1)(a).

¹⁸ *Henkel KGaA v Holdfast New Zealand Ltd* [2006] NZSC 102, [2007] 1 NZLR 577 at [37]–[38].

¹⁹ At [37].

²⁰ This satisfies the meaning of “author” pursuant to the Copyright Act 1994, s 5.

[42] Thirdly, *Lose Yourself* must be “the product of more than minimal skill and labour.”²¹ Eight Mile Style adduced evidence about the composition of the work from Mr Jeffrey Bass, one of the composers, who emphasised that *Lose Yourself* was an original composition.

[43] The National Party accept that the total combination of the introduction, the guitar chord progression (known as the guitar riff), the drum track, bass, keyboard, piano and violin of *Lose Yourself* reflects sufficient skill and labour to meet the low threshold to be an original work under the Act and as identified by the Supreme Court.²²

[44] From the evidence of Mr Bass and his demonstration of the guitar riff in *Lose Yourself*, together with the combination of the other instruments and the distinctive rhythm and beat, I am satisfied that the low qualifying threshold under the Act of an “original work” has been met.

Conclusion 1.2

[45] Copyright subsists in the musical work *Lose Yourself* as it meets the definition and threshold of being an original musical work under s 14(1)(a) of the Act.

²¹ *Henkel KGaA*, above n 18, at [37].

²² At [38]. The threshold for originality is a low one and it can be material for other purposes how original the work is; that is, how much skill and labour has gone into its creation.

SECOND ISSUE: WAS THERE COPYING OF *LOSE YOURSELF*?

[46] In order to succeed in their action for breach of copyright, Eight Mile Style must establish two things:

- (a) that it is the owner of a copyright work; and
- (b) that the defendant has infringed the plaintiff's copyright in that work.²³

[47] Having established that they are the owners of the copyright in *Lose Yourself*, Eight Mile Style must then establish the second element, which requires:

- (a) proof of copying (which incorporates the common law test regarding how to determine if a work is a copy);²⁴ and
- (b) that a restricted act has taken place.²⁵

[48] This section focuses on whether there has been copying of *Lose Yourself*. I now turn to consider the legal principles applicable to proof of copying.

Legal principles on “copying”

[49] “Copying” is defined in the Act as “reproducing, recording, or storing the work in any material form”.²⁶ The common law has developed alongside the Act in respect of what qualifies as infringement by copying. Three elements must be proved:²⁷

- (a) The reproduction must be either of the entire work or of a **substantial part**.
- (b) There must be **sufficient objective similarity** between the infringing work and the copyright work, or a substantial part thereof.
- (c) There must be some **causal connection** between the copyright work and the infringing work. The copyright must be the source from which the infringing work is derived.

²³ *Henkel KGaA*, above n 18, at [34].

²⁴ At [42]–[44]; *Oraka Technologies Ltd v Geostel Vision Ltd* [2013] NZCA 111 at [83]–[88]; and *Fisher & Paykel Financial Services Ltd v Karum Group LLC (No 4)* [2012] NZHC 3314, [2013] 2 NZLR 266 at [145]–[147].

²⁵ Copyright Act 1994, s 29.

²⁶ Section 2(1).

²⁷ These elements were first set out by the Court of Appeal in *Wham-O MFG Co v Lincoln Industries Ltd* [1984] 1 NZLR 641 (CA) at 666 (emphasis added) and confirmed more recently by the Supreme Court in *Napier Tool & Die Ltd v Oraka Technologies Ltd* [2013] NZSC 86, which affirmed *Oraka Technologies*, above n 24.

Substantiality

[50] The first element, substantiality, does not require the work to be copied in its entirety. The Supreme Court has reinforced that it is not necessary for a plaintiff to show the defendant copied the whole of the copyright work or that the copying was exact.²⁸ It is enough if the plaintiff demonstrates that the defendant copied a substantial part of the copyright work. What amounts to a substantial part in an artistic work depends more on qualitative visual impression rather than on quantitative analysis.

[51] Once the act of copying has been established, the issue of substantiality should be decided “on the basis of what is actually found to have been copied rather than on what may be wider allegations of copying.”²⁹ The question of whether a substantial part has been copied must be decided by its quality rather than its quantity. The High Court has held that “[w]hat must have been copied is the essence of the copyright work. It is the cumulative effect of the copied features that is important.”³⁰

[52] The House of Lords in *Ladbroke (Football) Ltd v William Hill (Football) Ltd* focused on whether the original work, the bookmakers coupons, being compilations, were “original” for copyright purposes.³¹ In canvassing the principles of copyright infringement, their Lordships approached the issue of substantiality as follows:

- (a) the substantiality depends on quality, not quantity;³²
- (b) substantiality is a matter of fact and degree;³³
- (c) where there may be a question of originality, one looks at the “collocation” of elements taken;³⁴ and
- (d) the reproduction of a part which by itself has no originality will not normally be copying of a substantial part.³⁵

²⁸ *Henkel KGaA*, above n 18, at [44].

²⁹ *Oraka Technologies*, above n 24, at [87].

³⁰ *Fisher & Paykel*, above n 24, at [174] per Rodney Hansen J.

³¹ *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 (HL).

³² At 276, 279, 288 and 293 per Lord Reid, Lord Hodson and Lord Pearce.

³³ At 283 per Lord Evershed.

³⁴ At 293 per Lord Pearce.

³⁵ At 293 per Lord Pearce.

Objective similarity

[53] The second element, objective similarity, requires that the whole or substantial part taken of the original work looks objectively similar to the copy. Whether there is objective similarity is largely a matter of impression for the Court to determine.

[54] In *Designers Guild Ltd v Russell Williams (Textiles) Ltd*, the House of Lords reinforced the need to compare the two works through the following process:³⁶

- (a) identify the features of the infringing work which are alleged to have been copied from the copyright work;
- (b) undertake a comparison of the two works, noting the similarities and differences. Similarities may be disregarded if they are commonplace, unoriginal, or consist of general ideas; and
- (c) finally, determine whether the parts taken constitute a substantial part of the copyright work.

[55] Under step (b), the House of Lords confirmed the reason for the comparison:³⁷

The purpose of the examination is not to see whether the overall appearance of the two designs is similar, but to judge whether the particular similarities relied on are sufficiently close, numerous or extensive to be more likely to be the result of copying than of coincidence.

[56] In comparing the similarities, courts have cautioned that the focus in the inquiry into objective similarity is on the number and nature of the similarities, rather than the differences.³⁸ There must be a “sufficient degree of resemblance” between the similarities within the two works.³⁹

[57] In *Thornton Hall Manufacturing Ltd v Shanton Apparel (No 2)*, Hillyer J identified that the numerous coincidences between the two works were such that it could not be accidental that the infringing work was a copy of the original.⁴⁰

³⁶ *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416 (HL) at 2425–2426.

³⁷ At 2425.

³⁸ At 2425; and *Fisher & Paykel*, above n 24, at [173].

³⁹ *Fisher & Paykel*, above n 24, at [173].

⁴⁰ *Thornton Hall Manufacturing Ltd v Shanton Apparel Ltd (No 2)* [1989] 1 NZLR 239 (HC) at 246.

[58] The High Court considered the best test was whether the copy brought to mind the original.⁴¹ Hillyer J put it succinctly like this:⁴²

... a copy is a copy if it looks like a copy ...

[59] In a musical copyright case such as the present one, with the authorities reinforcing that the test is one of hearing and “ear recognition,”⁴³ the Hillyer J formulation can more appropriately be adapted to this test:

a copy is a copy if it sounds like a copy.

Causal connection

[60] The third element, causal connection, requires proof that the National Party has directly or indirectly made an unlawful use of Eight Mile Style’s copyright work.

[61] To establish causal connection between the original and copied works, the Supreme Court in *Henkel KGaA* focused on the close similarity between the two works and the ability of the alleged infringer to have access to and an opportunity to copy the original work.⁴⁴ The Supreme Court said:

[43] The ultimate issue in a breach of copyright case concerns derivation not similarity, albeit the degree of similarity between the copyright work and the allegedly infringing work has evidentiary significance. Proof of copying will seldom be direct; in most cases the Court will rely on inference. **The closer the similarity between the two works the stronger the inference is likely to be that the one was copied from the other.** If the alleged infringer has had access to, and therefore an opportunity to copy, the copyright work, and the similarity between the works supports an inference of copying, it may well be appropriate for the Court to conclude, on the balance of probabilities, that there was indeed copying ...

[62] The copying need not be direct copying but what must be shown is that the copier has appropriated the labours of the original creator, either directly or indirectly. The Court of Appeal formulated this approach in *Wham-O MFG Co v Lincoln Industries Ltd*:⁴⁵

⁴¹ *Fisher & Paykel*, above n 24, at [173].

⁴² *Thornton Hall*, above n 40, at 246.

⁴³ *D’Almaine v Boosey* (1835) 1 Y&C Ex 288 (KB) at 301, 160 ER 117 at 123.

⁴⁴ *Henkel KGaA*, above n 18, at [43].

⁴⁵ *Wham-O MFG Co*, above n 27, at 668.

The copying need not be direct copying. It may be indirect. What must be shown, however, is that either directly or indirectly the alleged defendant copier has in making his copies appropriated the labours of the plaintiff. That copying has taken place is for the plaintiff to establish and prove as a matter of fact. The beginning of the necessary proof normally lies in the establishment of similarity combined with proof of access to the plaintiff's productions ...

Musical copyright principles

[63] As this case concerns proof of copying in music, the following principles have been gleaned from the authorities where musical copyright infringement was in issue.⁴⁶ They are condensed from authorities collected primarily from the United Kingdom, Canada and Australia.⁴⁷ There is one reference to the California District Court's decision upholding the jury verdict in the challenge by Marvin Gaye's children to the Robin Thicke and Pharrell Williams song *Blurred Lines*.⁴⁸

The test is whether the substance of the work is taken, not a note for note comparison

[64] Infringement does not depend upon making a note-for-note comparison to determine whether the actual notes have been taken, but rather whether the substance of the work has been taken.⁴⁹

The sounds of the works are determinative

[65] Determining substantial reproduction does not involve a note-by-note textual comparison of scores, but involves listening to and comparing the sounds of the two works.⁵⁰

⁴⁶ A helpful summary can also be found in Emmett J's decision in *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* [2011] FCAFC 47, (2011) 191 FCR 444 at [45]–[57]; and *Francis Day & Hunter Ltd v Bron* [1963] Ch 587 (CA) at 609–610.

⁴⁷ Many of the United States' authorities are not included here, because there are jurisdictional differences in the availability of copyright defences, such as fair use, which is not available under the New Zealand legislation. Further, all first instance copyright cases are conducted by way of jury trial, so the Court's decisions are either pre-trial or post-verdict as in *Williams v Bridgeport Music Inc* USDC CD California LA CV13-6004 JAK (AGRx), 30 October 2014.

⁴⁸ *Williams*, above n 47. This judgment is under appeal to the Federal Courts of Appeals (9th circuit) and is the subject of considerable criticism by the legal and music communities. This case is discussed further at [128] of this judgment.

⁴⁹ *Austin v Colombia Graphophone Co Ltd* [1917–1923] Mac CC 398 (Ch) at 408 and 415; and *EMI*, above n 46, at [47].

⁵⁰ *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565, [2005] 1 WLR 3281 at [54].

[66] A comparison of musical works is a subjective test of hearing for a judge to determine similarity.⁵¹

[67] Copyright infringement is where the appropriated music, though adapted to a different purpose from the original, may still be “**recognised by the ear.**”⁵² Adding variations makes no difference to the principle.

[68] A sufficient test of definite or considerable degree of similarity is “such that an ordinary reasonably experienced listener might think that perhaps one had come from the other”.⁵³

[69] Merely changing an air to a dance, or transferring the tune from one instrument to another, does not alter the original subject because “[t]he ear tells you that it is the same.”⁵⁴

The copying must be substantial

[70] If the part that has been taken is so small a part of the original musical work, and it is not a substantial part of the musical copyrighted work it does not constitute an infringement.⁵⁵

A combination of non-copyright elements can amount to substantial similarity

[71] A “constellation” of extrinsic similarities between two works, for example in terms of bass lines, keyboard chords, and vocal contours and hooks, amounts to substantial similarity because of the combination of elements, even if those elements are not individually protected.⁵⁶

The hook of a musical work is protected

⁵¹ *Grignon v Roussel* (1991) 38 CPR (3d) 4 (FC) at 20–21.

⁵² *D’Almaine*, above n 43, at 123 (emphasis added).

⁵³ *Francis Day*, above n 46, at 596.

⁵⁴ *D’Almaine*, above n 43, at 123 (emphasis added).

⁵⁵ *EMI*, above n 46; and *G Ricordi & Co (London) Ltd v Clayton & Waller Ltd* [1928–1935] MCC 154 (Ch) at 162.

⁵⁶ *Williams*, above n 47, at 21.

[72] The “signature” or the “distinctive or important” or “vital and essential” part of an original work is protected.⁵⁷ There will be infringement where a new work is arrived at by way of imitation and appropriation.⁵⁸

The degree of similarity must be considerable

[73] To determine whether one musical work infringes another’s copyright, it is necessary to analyse the musical features and structure of each, noting points of similarity or difference. The question is whether **the degree of similarity** can be said to be **definite or considerable**.⁵⁹

There must be causal connection, not just coincidence

[74] Causal connection can be inferred where the degree of objective similarity between the works was sufficient, determined by examining factors such as the degree of familiarity, the original work, the character of the work, the probability of coincidence and the existence of other influences upon the defendant.⁶⁰

Coincidence is not infringement where there is no conscious copying

[75] Reproduction by subconscious copying may amount to infringement, provided it is shown the composer of the offending work was familiar with the original and there was a causal connection between the two pieces.⁶¹

Parties’ positions

[76] Before determining whether *Lose Yourself* was copied, I will consider the parties’ positions in relation to the claim for breach of copyright.

[77] Eight Mile Style submit that the elements of copyright infringement have been met. Specifically:

- (a) the objective similarity between the relevant parts of *Lose Yourself* and *Eminem Esque* is obvious;

⁵⁷ *EMI*, above n 46, at [48], [49] and [85].

⁵⁸ *Austin*, above n 49, at 421.

⁵⁹ *Francis Day*, above n 46, at 610.

⁶⁰ At 614–615.

⁶¹ At 614.

- (b) *Eminem Esque* and the music synchronised with the relevant campaign advertisements substantially reproduced *Lose Yourself*;
- (c) there is a causal connection between the two works, indicated by the names of the copied tracks (*Eminem Esque* and *Eminem_abbr*); and
- (d) restricted acts (including authorisation) have taken place without a licence. This allegation will be dealt with under the third issue of copyright infringement.⁶²

[78] The National Party submits that *Eminem Esque* does not reproduce any substantial part of *Lose Yourself*. It submits further that not every aspect of *Lose Yourself* is original and a number of the aspects of *Lose Yourself* are borrowed.

[79] The National Party says *Eminem Esque* is not an “adaptation” of *Lose Yourself* as an adaptation is an arrangement or transcription of the work. As *Eminem Esque* is in the same medium as *Lose Yourself*, there has been no adaptation.

[80] The National Party accepts that it did authorise the television broadcast of the advertisement and also authorised the synchronising of *Eminem Esque* to the advertisement. However, those acts of communicating to the public or publishing the election advertisements do not constitute copyright infringement if *Eminem Esque* does not reproduce a substantial part of *Lose Yourself*.

[81] I now turn to consider whether *Lose Yourself* was copied. The first part of that analysis requires a determination of originality. Although *Lose Yourself* has met the low threshold of an “original work” under s 14 of the Act, the Court is required to determine how original the work is and whether there are features in the work that are not original. To establish infringement, there must be substantial copying of the original parts of the work. Any copying of a part of the work, which by itself has no originality, will not normally be protected.

[82] Under the broad heading of “How original is *Lose Yourself*” I will analyse the following matters:

⁶² See [281]–[301] of this judgment.

- (1) Is there originality in popular music?
- (2) Are borrowed musical elements protected by copyright?
- (3) Does an alteration in melody avoid copying?
- (4) Is *Lose Yourself* original?

[83] I will deal with each in turn.

2.1 How original is *Lose Yourself*?

[84] The National Party relies on the observations and findings of the House of Lords in *Ladbroke* for the general proposition that there is no copyright in some unoriginal part of a whole that has copyright protection.⁶³ On that basis, the National Party submits that the correct approach is to determine whether the plaintiffs' work as a whole is original and protected by copyright, and then to enquire whether the part they used was substantial.

[85] The National Party also relies on the Supreme Court's decision in *Henkel KGaA*, where the Court emphasised that the greater the originality, the wider will be the scope of protection which copyright affords.⁶⁴ This differs from the low threshold test under the Act for an original work.⁶⁵ The Supreme Court said:⁶⁶

The threshold for originality is a low one and it can be material for other purposes how original the work is; that is, how much skill and labour has gone into its creation. In general terms the greater the originality, the wider will be the scope of the protection which copyright affords and vice versa.

[86] Both the *Henkel KGaA* and *Ladbroke* decisions involved a collocation or arrangement of features which were not original in themselves.⁶⁷ *Henkel KGaA* involved packaging for an adhesive and was a arrangement or collocation of packaging with graphic work. The *Ladbroke* decision concerned coupons on which were printed columns of squares for betting customers to complete. The primary focus of both

⁶³ *Ladbroke*, above n 31, at 293.

⁶⁴ *Henkel KGaA*, above n 18.

⁶⁵ Copyright Act 1994, s 14.

⁶⁶ *Henkel KGaA*, above n 18, at [38].

⁶⁷ At [40]; and *Ladbroke*, above n 31, at 293.

cases was whether or not the collocation or compilation was original for copyright purposes and whether they were protected by copyright at all.

[87] In *Henkel KGaA*, the appellant had to prove that the graphic work was original in the sense explained and that it owned the copyright in that work.⁶⁸ In dismissing the appeal, the Supreme Court found that:⁶⁹

The skill and labour which has given rise to the arrangement is what gives the work its originality, and if that skill and labour is not great, another arrangement of the same unoriginal underlying features may not have to depart greatly from the copyright arrangement in order to avoid infringement. **If the level of originality in the copyright arrangement is low, the amount of originality required to qualify another arrangement of the same elements as original is also likely to be low.**

[88] Of importance to the present case, the Supreme Court reinforced that:⁷⁰

Substantial reproduction of those aspects of the work in which the originality lies must be shown to establish infringement. This is consistent with the purpose of the law of copyright, which is to recognise and protect the skill and labour of the author of the copyright work.

[89] What the cases all reinforce is that the issue of originality in the context of copyright must be assessed by looking at all those elements together – the “collocation” of the elements, as Lord Pearce said in *Ladbroke*.⁷¹ In that case, the House of Lords emphasised that it is incorrect to approach originality by subdividing a work into component parts and asking whether copyright attached to the individual parts.

[90] The National Party called evidence to demonstrate that musical elements in popular music, alone or in combination, are too common place and too commonly combined to be original. The National Party argues that if the parts comprising *Lose Yourself* have a low level of originality, then *Eminem Esque* does not have to be too different to avoid copyright infringement. Reproduction of the non-original aspects of those parts, it submits, does not infringe copyright.

⁶⁸ *Henkel KGaA*, above n 18, at [38].

⁶⁹ At [41] (emphasis added).

⁷⁰ At [41].

⁷¹ *Ladbroke*, above n 31, at 293.

[91] To deal with this submission, I will analyse the evidence provided by the parties on originality in popular music and the originality of *Lose Yourself*.

Is there originality in popular music?

[92] Both expert musicologists who gave evidence at the hearing described and referred to various components of a song, which include timbre, texture, rhythm, metre, time signature, tempo, melody and feel. As the components are relevant to understanding the respective analyses, their definitions are summarised below.

Articulation refers to the manner in which a note or chord is played. For example, it might be very short, long or accentuated.

Duple metre is when the music is felt in groups of two (or multiples of two), as opposed to a triple metre.

Feel can be a combination of texture, timbre and rhythm. These elements are the recognisable characteristics of a genre such as reggae, samba or rock. There are particular sounds, instruments, textures and rhythm bases which make a song easily placed into its genre.

Figure is a sample of notes or a phrase of music. Here it refers to the recurring six note piano feature. It was also referred to in the evidence as a piano “doodle”.

A **hook** or **riff** is a musical phrase that is repeated and often intended to be memorable and catchy.

A **measure** or **bar** of music refers to the division of the music into segments of time, delineated on a sheet of music by bar lines usually in accord with the musical metre. Dr Ford describes an example where a bar of four beats would tend to have a strong beat followed by three weaker beats.

Melody refers to the notes a singer uses for the verse and chorus. Many backing instruments often play small melodic fragments (usually repeated often), but these are not often distinctive enough to detract from the primary song melody. Sometimes the backing instruments simple melody can be called the hook if it stands out.

Metre is the accent within a rhythmic bar. In a bar of four beats, the types of metre are very limited and most songs would use the same metre.

Sonic bed refers to a combination of chords, tempo, harmony, instrumentation, metre and articulation (for example staccato use of guitar).

Tempo is the speed with which one would count out a beat.

Timbre is the particular “sound” of an instrument and means tone colour or the quality of sound. It is more than instrumentation. When the same note is played on a number of instruments, the difference in the quality of sound is timbre.

[93] Dr Zemke, an expert musicologist,⁷² was called by Beatbox Music to give evidence on behalf of the National Party on the general concept of originality in

⁷² Dr Zemke is a Senior Lecturer in ethnomusicology in the Department of Anthropology, University of Auckland. Dr Zemke completed her PhD at the University of Auckland in sociology and ethnomusicology on the topic of rap music in New Zealand.

popular music. Her evidential thesis was that there is a history of borrowing in Western musical traditions, which has led to the development of musical genres throughout the ages.

[94] In particular, Dr Zemke described drum patterns, distinctive timbre and chord patterns as musical building blocks, which are too universal and simple to be subject to ownership. The borrowing, quoting and constant reworking throughout classical music and other western music traditions, has resulted in the genres of jazz, and rock and roll. She describes the development of genres based on universal musical building blocks as follows:

A constant amalgam of borrowing, quoting, and re-working is rife throughout classical music and other Western music traditions. For instance, the whole style of jazz is based on re-working musical “quotations”.

[95] Dr Zemke pointed to early rock and roll songs, which all used the same musical elements and were not “owned” by any one:

Another example would be early rock and roll songs, which all used similar beats, bass lines, chord progressions, guitar strums and collections of instruments. This is what created the sound of the genre itself. No one is considered to “own” or have solely invented the rock and roll basslines, piano chord styles, timbre collections, or drum patterns.

[96] The rock and roll musical elements were then adapted, as Dr Zemke described:

... rock and roll stylistic “backing” aspects were all in turn used by British rockers in the 60’s and 70’s, becoming the British Rock Tradition (The Beatles, The Rolling Stones, Led Zeppelin). These British bands fully acknowledge that they lifted their sounds and musical backing elements directly from the American Blues Tradition.

[97] Dr Zemke gave an example of musical integration and borrowing, where the Beatles’ album *Sergeant Pepper’s Lonely Hearts Club Band* used recognised quotes and borrowing from a number of genres:

That album “quoted” from numerous pop, folk and classical sources. Its eclectic mixing is a part of the work’s genius, and it is usually considered the greatest and most important rock album of all time. The album simply would not exist if the Beatles had to delete or legally reimburse every recognisable musical influence or pattern on the album.

[98] In summary, Dr Zemke highlighted:

- (a) numerous examples of tracks that sound like each other;⁷³
- (b) that many genres have stereotypical rhythms which characterise the genre;
- (c) the time signatures for pop songs and the metre for most rhythm and blues songs are typically the same for the genre;
- (d) harmonic progressions in pop music are not usually very complex and there are a limited number of patterns used by “a huge majority of the music we hear”;
- (e) backing instrumentals are not typically considered part of a song that is owned, namely the drum beats and guitar chord patterns could be recopied, without payment or composition credit; and
- (f) typically it is the melody, melodic components and/or lyrics, which can be considered original in a pop song.

[99] Dr Zemke explained that she understood only the lyrics and melody can be considered original and are subject to copyright and payment goes to the composer (not the singer or instrumentalists). If, for example, Dr Zemke wanted to record a new version of Bob Marley’s *I Love You*, she understood she would only have to pay the composer of the lyrics and melody. If her band musicians copy the base lines, drum patterns, backing vocals and the like, those original performers do not get paid. On that basis, that element of the song is not owned and nor would it be considered to be subject to copyright.

[100] Dr Zemke observed that Eminem has been inspired by, and has acknowledged, other musicians. Masta Ace for example, is a big influence. Dr Zemke described *Lose Yourself* as using similar elements to previous songs. In oral evidence, she gave an example of a similar guitar chord change and timbre to the song *Kashmir* by Led Zeppelin. Noting that it is simply a similar timbre and rhythm which are not considered owned and it is too small a musical fragment to be credited as composed,

⁷³ Some of the examples given by Dr Zemke included songs with the same melody: *Twinkle Twinkle Little Star* and *The ABC Song*; songs with a similar bass riff: *What Makes You Beautiful* (One Direction) and *Summer Nights* (Grease); songs with similar piano parts: *Clocks* (Coldplay) and *When Love Takes Over* (David Guetta featuring Kelly Rowland); and songs with the same harmonic structure: *Don’t Stop Believing* (Journey), *You’re Beautiful* (James Blunt), *Where is the Love* (Black Eyed Peas), *Forever Young* (Alphaville) and *I’m Yours* (Jason Marz) amongst others.

Dr Zemke stated these elements “are generally not considered as important or substantial or original as the song melody and lyrics.”

[101] Thus, Dr Zemke believed that if *Eminem Esque* mimics only some of the instrumental backing of the musical elements of *Lose Yourself*, these are not considered to have been copied, because they form part of the shared use of such features in all music.

[102] Dr Ford,⁷⁴ the musicologist called by Eight Mile Style, acknowledged that it is not impossible for pop songs to have similar tempo, metre, structure and chords. Examples were played to Dr Ford under cross-examination, including *La Bamba* (Los Lobos) and *Twist and Shout* (the Beatles). Dr Ford acknowledged that they had the same chords and the same progressions, but noted they did not have the same tempo and the sound of the instruments were not similar. Dr Ford disagreed that Led Zeppelin’s *Kashmir* had the same chords as *Lose Yourself* and they were not staccato equal quavers. He thought *Kashmir* was different to *Lose Yourself*. He acknowledged that every aspect of chords, beat, tempo and drum patterns have a common function, but when you put them together you get something very distinctive:

Everything, every aspect of this has a common function as I said and as Dr Zemke says, it’s only when you put them all together you get something very distinctive. If you take them separately then we’re back to my analogy of saying that somebody has got big ears which doesn’t really narrow it down very much. You need to put all of the information together before you get something distinctive.

[103] Mr Bass, one of the composers of *Lose Yourself* and the creator of the guitar riff, acknowledged the influence of other musicians that is reflected in their music. He also agreed under cross-examination that there is a history of borrowing musical building blocks when writing music, including drum patterns, chord patterns, guitar strum techniques and the sounds of an instrument. Mr Bass rejected, however, that when he was composing *Lose Yourself*, he considered other influences or referenced

⁷⁴ Dr Ford is a composer, writer and broadcaster. He studied musical composition at the University of Lancaster, United Kingdom and completed a doctorate at the University of Woolongong, Australia. He was a composer in residence with the Australian Chamber Orchestra and has received multiple fellowships as a resident and visiting composer in Australia and at Yale University. He appeared as an expert witness in *EMI*, above n 46.

any particular music. He also disagreed that Led Zeppelin's *Kashmir* was like his guitar riff in *Lose Yourself*.

[104] Before analysing the originality of *Lose Yourself* as a musical work, I consider it is important to address two general themes that underpinned the National Party's position during the hearing. The first is whether musical components that are borrowed from a genre or other musicians can qualify for ownership or engage copyright protection. The second is whether alterations to a melody in a musical work are sufficient to avoid copyright infringement. I deal with each in turn.

Are borrowed musical elements protected by copyright?

[105] The House of Lords cautioned that similarities may be disregarded because they are commonplace, unoriginal, or consist of general ideas.⁷⁵ Here, the National Party rely on Dr Zemke's evidence to show that the musical elements in *Lose Yourself* were unoriginal and commonplace because they were borrowed. Therefore, they say, those elements cannot be protected and nor can they be included in the assessment of what has been substantially copied.

[106] Eight Mile Style submit that the Court should disregard Dr Zemke's evidence about the practices of borrowing in the music industry and her opinion of what can and cannot be protected by copyright as they are matters outside her expertise (which she has admitted). Atomising the component parts of *Lose Yourself* into musical elements that were commonplace and not protectable by copyright, Eight Mile Style contend, was contrary to the proper legal test.

[107] In *Austin v Columbia Graphophone Co Ltd*, Astbury J in the English Court of Chancery said it is important to avoid an overly technical analysis and determining infringement is not a question of note for note comparison but whether the substance of the original copyright work has been taken.⁷⁶ The approach in *Austin* was confirmed in *Sawkins v Hyperion Records Ltd*, where the Court of Appeal of England and Wales said the test of substantial reproduction involves listening to and comparing

⁷⁵ *Designers Guild*, above n 36, at 2425.

⁷⁶ *Austin*, above n 49, at 415.

the sounds of the copyright work and of the infringing work.⁷⁷ It is therefore possible to infringe the copyright in a musical work without taking the actual notes.

[108] However, the issue of borrowing in the music tradition has permeated the evidence in this case, not just from Dr Zemke, but also from the other parties to this litigation who are involved in licensing musical works for reproduction and synchronisation for advertising or film purposes, as well as owning and managing music libraries. Musical borrowing has also been the subject of much legal and musical analysis. Far from disregarding the evidence or the issue, I consider this debate is relevant in defining the boundaries of copyright protection and brings the dichotomy of copying versus borrowing into sharp relief.

[109] The history of musical borrowing has been the subject of many academic treatises, books and articles by musical scholars, legal academics and copyright experts.⁷⁸ As early as 1739, Johan Mattheson wrote on the topics of imitation and borrowing in *The Perfect Chapel Master*.⁷⁹

Borrowing is permissible; but one must return the thing borrowed with interest, i.e., one must so construct and develop imitations that they are prettier and better than the pieces from which they are derived.

[110] Music historian J Peter Burkholder characterises musical borrowing, or the uses of existing music, as encompassing everything “from direct quotation to the use of an older work as a model without over reference”.⁸⁰ The latter form of borrowing, using older musical works as a model, is overtly seen in the recent work of Professors James Boyle and Jennifer Jenkins.⁸¹ The two copyright professors from Duke University presented their research and thesis in a music/comic, which graphically depicts the dichotomy between borrowing and copying. They capture the very issues

⁷⁷ *Sawkins*, above n 50, at [54].

⁷⁸ See for example Johann Mattheson *Der Vollkommene Capellmeister* (Ernest C Harriss (trans), UMI Research Press, Michigan, 1981); J Peter Burkholder *All Made of Tunes: Charles Ives and the Uses of Musical Borrowing* (Yale University Press, New Haven, 1995); and J Peter Burkholder, Donald Grout and Claude V Palisca *A History of Western Music* (9th ed, W W Norton, New York, 2014).

⁷⁹ Mattheson, above n 78, at 298.

⁸⁰ J Peter Burkholder “The Uses of Existing Music: Musical Borrowing as a Field” (1994) 50 *Second Series* 851 at 861.

⁸¹ James Boyle, Jennifer Jenkins and Keith Aoki *Theft: A History of Music* (Duke University Law School: Center for the Study of the Public Domain, Durham, NC, 2017).

raised by the parties in this hearing and illustrate the current tension in the music industry, namely, the copyright protections to preserve the integrity of an artist's work, as against the creative freedom for artists to develop musical works and genres.⁸²

[111] Most relevantly, one of the examples included by the Professors is an example also referred to by Dr Zemke in her evidence, of the British rock bands borrowing their sounds and musical backing elements directly from the American blues tradition. They portray Chuck Berry as the forefather of rock and roll, by mixing country, rhythm and blues and inventing a new guitar style, with two famous British musicians acknowledging their debt to Chuck Berry's innovation.⁸³

[112] Professor Boyle reinforces that the history of music is intertwined with borrowing and that history also involves regulation of musical borrowing. He says:⁸⁴

You can't tell the history of music without telling the history of musical borrowing. And you can't tell the history of music without telling the history of attempts to regulate musical borrowing.

[113] The copying of musical ideas and commonplace building blocks and motifs from a musical work, which are not themselves original, has been considered by the English and Australian courts in determining whether there has been copyright infringement of a musical work.⁸⁵ The use of commonplace elements or clichés has formed part of the determination of the originality of musical works, with an acknowledgement that many writers of great music have used clichés to produce masterpieces.⁸⁶

[114] In *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd*, Emmett J referred to copyright legislation as striking a balance of competing interests and competing policy considerations.⁸⁷ Significantly, his Honour noted that copyright is concerned with rewarding authors of original literary, artistic and musical works with

⁸² At 111.

⁸³ At 135.

⁸⁴ James Boyle as cited in Francis Presma "Remix or Robbery: two copyright scholars present the History of Music as an epic battle between creativity and control" (2017) 36(1) *Duke Law Magazine* 46 at 48.

⁸⁵ *EMI*, above n 46, at [11]; and *Francis Day*, above n 46, at 594.

⁸⁶ *Francis Day*, above n 46, at 594–595.

⁸⁷ *EMI*, above n 46.

commercial benefits, having regard to the fact that such works, in turn, benefit the public.⁸⁸ In *IceTV Pty Ltd v Nine Network Australia Pty Ltd*, the High Court of Australia observed similar purposes to copyright law, balancing the public interest in promoting the encouragement of musical and other works by providing a just reward for the creator, with the public interest in maintaining a robust public domain in which further works are produced.⁸⁹

[115] In the present case, the National Party essentially submitted that *Lose Yourself* is not an original work, or has a low level of originality, as it is substantially borrowed from other music and genres. It submits, therefore, *Eminem Esque* cannot have infringed Eight Mile Style's copyright as the parts copied are too general or non-original to be entitled to copyright protection.

[116] Unlike the examples involving the use of musical building blocks, or "reference" or "quotes" from other musical works, the present case concerns the sale of production music (sound-alike tracks) for commercial use in advertising. The tension between illegitimate copying versus permissive borrowing and the resulting copyright consequences, therefore, are at the forefront of this case.

[117] It is beyond dispute, that musicians are influenced by countless other songs and artists and borrow from them, as Dr Zemke described and the academic works confirm. It is correct that music history and "musical childhoods", as Dr Zemke described, create a platform for any artist to build upon to create his or her own works. Those works often are the legacies of others.

[118] However, the "borrowed" platforms, genres or chords must create distinctive musical works to obtain copyright protection. On behalf of the defendants, Beatbox Music played a number of tracks during the Court hearing, including *La Bamba* (Los Lobos), *Twist and Shout* (the Beatles), *Total Control* (the Motels) and *Kashmir* (Led Zeppelin), among many others. This served to illustrate that the similarities of sound,

⁸⁸ At [29], with reference to *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14, (2009) 239 CLR 458 at [24].

⁸⁹ *IceTV*, above n 88, at [71]. See also Ian Finch *James & Wells Intellectual Property Law in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2017) at [4.1] where it is observed that copyright protection provides "an incentive for authors to create more original works. It also provides them with recognition for their creative efforts."

when the songs were created from the influence of other artists and used the same chords, which are not in themselves original and are common among many such songs. The chords and musical elements were said to be similar to those used in *Lose Yourself*.

[119] The musicologists were not in agreement about the similarities of sound in the songs that were played. Dr Ford described the differences in sound and tempo between *La Bamba* and *Twist and Shout*; the different guitar chords and beat between Led Zeppelin's *Kashmir* and *Lose Yourself*; and the different guitar chords in *Total Control* to *Lose Yourself*, even though there was similar staccato articulation in both.

[120] I agree with Dr Ford's evidence. Although these songs use the same musical elements as each other, to my ear they are distinctly different songs. *La Bamba* and *Twist and Shout* are each original and recognisably distinctive musical works in their own right. They sound different to each other.

[121] The songs also provide a modern day demonstration of Johann Mattheson's thesis that permissive "borrowing" must return the object borrowed with "interest".⁹⁰ They have transformed the "borrowings", the same musical elements, to make something different with them.

[122] Consistent with the authorities, musical components that are borrowed from a music genre or from other musicians can engage copyright protection, where the compilation of those components produces a distinctive and recognisably different musical work. The evidence above demonstrates this.

Does an alteration in melody avoid copying?

[123] The second issue permeating Dr Zemke's evidence is whether a change in the "melodic line" alters the copied work sufficiently to avoid a finding of copying.

[124] In her evidence, Dr Zemke accepted that ordinary listeners who had heard both the National Party advertisement track and *Lose Yourself* more than once and had the resemblance pointed out would likely find resemblance between the two works. She

⁹⁰ Mattheson, above n 78, at 298.

acknowledged that the similarity seems intentional by the composer of *Eminem Esque*, as if to present an echo of *Lose Yourself*.

[125] However, Dr Zemke points to an intention to alter the “melodic” elements so as not to infringe copyright. It is on this basis that she describes the music industry creating derived works quickly for cheaply-made television shows or advertisements, with melodic changes to avoid infringement. Her evidence was:

... there has also been an intention to alter any melodic elements so as not to infringe upon what would general[ly] be considered to be the “owned” elements of the “composition”. This is done endlessly in the advertising and television sector. There is a segment of the music industry which is not about creating original works for sales and popularity, but instead creates simplistic often derived works to quickly fill time for cheaply made television shows, or to use in advertisements.

[126] In the same way, when Dr Zemke reviewed the piano figure in *Eminem Esque*, she agreed there was a similar use of a high pitched “melodic” line. In her view, however, it was “altered enough so the melody is not a direct copy.” Dr Zemke said further:

The pianist on “*Lose Yourself*” did not invent the use of a single piano line running along the top of other instruments. And “*Eminem Esque*” is not playing the same exact melody.

[127] The American cases appear to have placed the focus on the melody of the original work as attracting copyright. In a recent article, an American academic, Joseph Fishman begins by citing French philosopher Jean-Jacques Rousseau:⁹¹

Any disinterested judge will have to admit that melody is, after all, the soul of music.

[128] In his article, Fishman follows a series of cases from as early as 1765 and focuses on the verdict and decision in relation to the song *Blurred Lines* in *Williams v Bridgeport Music*.⁹² He notes that a trend in recent United States District Court cases has emerged, where copyright protection has been extended beyond the melody of a

⁹¹ Joseph Fishman “Music as a Matter of Law” (2018) 131 Harv L Rev (forthcoming) at 3, citing Alfred Richard Oliver *The Encyclopedists as Critics of Music* (Columbia University Press, New York, 1947) at 43.

⁹² *Williams*, above n 47.

song.⁹³ From those recent District Court decisions, he writes that copyright protection in the American courts could extend to a piece's rhythm, percussion, or instrumental riffs,⁹⁴ as well as permutations of chord progression, key, tempo and genre.⁹⁵ Of the *Williams* decision, he says *Blurred Lines* is a symptom, not a cause, of confusion over what copyright covers. He concludes that in the United States "[t]he notion that melody today is the primary locus of music's value, however defined, is a fiction" and that the primacy of melody in infringement cases is weakening.⁹⁶

[129] As discussed above,⁹⁷ the authorities on musical copyright, since at least 1835, have focused on what the ear tells the listener about the similarity of the original song.⁹⁸ The decisions, which have been followed in the United Kingdom and Australia, have applied the principle of aural recognition and upheld that variations or alterations to the original air or tune will not avoid infringement if the two works sound the same. These decisions have also noted that it is wrong in principle to single out the notes as uniquely significant for copyright purposes.⁹⁹

[130] However, the distinctive hook of a song or musical riff appearing in the context of another song, as in *EMI v Larrikin*, has attracted copyright protection, because the sound is distinctive and the ear can recognise it from the original. The opening two bars copied in the *EMI* case, which were held to be the signature of the original *Kookaburra* work, "sticks in your head."¹⁰⁰

[131] As the musical copyright authorities reinforce, it is not sufficient, therefore, to simply alter a melody line, to show that notes have been changed, when the sound remains the same or similar to the original.

⁹³ Fishman, above n 91, at 9.

⁹⁴ See *New Old Music Group Entertainment Inc v Gottwald* 122 F Supp 3d 78 (SD NY 2015) (drumbeat); *BMS v Bridges* 2005 WL 1593013 at 3–5 (SD NY July 7, 2005) (combination of rhythmic elements); and *ZZ Top v Chrysler Corp* 54 F Supp 2d 983 (WD Wash 1999) (guitar riff).

⁹⁵ *Swirsky v Carey* 376 F 3d 841 (9th Cir 2004) at 848–850.

⁹⁶ Fishman, above n 91, at 46.

⁹⁷ See [65]–[69] of this judgment.

⁹⁸ *D'Almaine*, above n 43.

⁹⁹ *Sawkins*, above n 50, at [56]; *EMI*, above n 46.

¹⁰⁰ *EMI*, above n 46, at [216].

Is Lose Yourself original?

[132] Eight Mile Style rejects the National Party's submission that *Lose Yourself* has a low level of originality and adduced evidence from Mr Bass about the composition of *Lose Yourself*.

[133] Mr Bass gave evidence on how the composition of *Lose Yourself* took place over a year and a half. His evidence described the opening guitar riff of *Lose Yourself* and the steps taken by the composers to finalise the work. He told the Court that he was one of the people who composed the original musical composition entitled *Lose Yourself*, which was incorporated in a sound recording that was first released as a single in the United States sometime in or around September 2002. This was the original Interscope recording of *Lose Yourself*.

[134] He described the beginnings of composing *Lose Yourself*:

The first step was that I composed the opening guitar riff of the composition. This was around the time that Eminem and I were working on his album *The Eminem Show* and we had been working on a track called *Rock City* with Royce da 5'9" for that artist's forthcoming album.

We were in a studio with Royce da 5'9" and I picked up a guitar and started playing that opening guitar chord progression. At the time, I didn't know if it was a song or not. A lot of the tunes for *The Eminem Show* started out like that.

[135] He then provided a description of how the composition was completed, with the gradual development of the backing elements and the writing of the lyrics:

The composition came together slowly over the following months. Marshall built the drum track using a MPC2000 drum machine. I composed the bass line, more guitar and some keyboard parts for the composition.

It developed incrementally. We kept working at it on and off and felt we really ought to finish it but we got stuck.

We were stuck because it took a long time for Marshall to write the lyrics for *Lose Yourself* and this delayed the completion of the musical composition. It took him a number of months to author the perfect lyrics that were just right for the beat. As I recall, Marshall completed the lyrics at around the time he was working on the movie *8 Mile* and we then began working on the musical composition again between his scenes during the movie shoot. It really developed in a little studio we had set up in his trailer.

It was around this time that we approached Luis Resto (who is a Detroit-based musician, producer and keyboardist) to play and develop the composition's piano parts. Luis's keyboard work replaced some of my rock guitar elements initially composed in the hooks.

[136] After a year and a half, the song was recorded. Mr Bass described the process as follows:

After Marshall and I recorded the core elements of the song, we brought Luis in to overdub his piano parts. We felt he would be the one to help us remove some of the rock feel without losing the “hip-hop” tone.

The composition ended up being multi-layered and the recorded musical parts were all captured in a master sound recording, which I understand is in the possession of Interscope Records.

Overall, I estimate that it took about a year and a half to finalise the sound recording which incorporated the musical composition known as *Lose Yourself* and the lyrics for that song that Marshall wrote.

[137] Mr Bass brought his guitar to Court to demonstrate the guitar riff that he had described and he played it to the Court.

[138] In response to questions about the strum of the guitar and its purpose, Mr Bass told the Court that he intended to create a tense, hypnotic feeling with the guitar riff. Mr Bass described it as follows:

Q. That strum that you did, is that common?

A. No, I'd never heard it before, your Honour, I've never heard anybody play that line. I've heard chords before played but not in that rhythm.

...

A. When I sat down to write that song and put my fingers on the guitar fret board, the intention was to create a tense hypnotic feeling where it starts playing and never goes away and along with that drum beat actually will hypnotise you where you're feeling that something is going to happen as in a movie chase scene and that's what the power of playing it that way does to the psyche.

Q. And the particular strum that you demonstrated?

A. Yes, I actually play the guitar part as if I'm playing guitar and drums at the same time because I accent on a third beat. So if I, if you're counting one, two, three, four, one, two, three four, I accent on the three.

[139] Eight Mile Style, through its witnesses, Mr Bass and Mr Martin emphasised that *Lose Yourself* won the 2003 Academy Award for Best Original Song.¹⁰¹ *Lose Yourself* also won two Grammy Awards in 2004 for Best Rap Song and Best Rap Solo

¹⁰¹ This being the sound recording, including the lyrics and musical work.

Performance. *Lose Yourself* was a commercial and critical success, reaching number one on the Billboard Hot 100 (United States charts) and in a number of other countries.

[140] Eight Mile Style says further that *Lose Yourself* is the jewel in the crown of Eminem's catalogue, topping the music charts in numerous countries around the world, including New Zealand and receiving much critical acclaim. In 2004, it was included in *Rolling Stone* magazine's list of the "500 Greatest Songs of All Time."

[141] I turn then to consider the way in which *Lose Yourself* was created. I found the evidence of Mr Bass, in describing the creation of the music of *Lose Yourself*, compelling. His intention to create a tense hypnotic feeling by the guitar strum, chords and drum beat succeeded, through the insistent rhythm and guitar strum. The effect of this was amply demonstrated by Mr Bass's playing the guitar riff in Court. Under cross-examination, Mr Bass accepted that he was quoted as describing the guitar piece in *Lose Yourself* as "[i]t's not so difficult, it's just two or three chords", but added the proviso "[f]or a guitar player that's played for 45 years."

[142] Although there may be two or three well-known chords used in the guitar riff, I consider the experience of the musician is demonstrated in how those chords are employed. Despite the commonality of the chords used by Mr Bass (as both musicologists agreed) and despite the common use of progression from the fifth to the sixth chord as "common," the guitar riff is striking in its intensity. The accompanying instruments, drums, violin and piano are arranged in such a way that the arrangement gives the music of *Lose Yourself* its own individual and, I consider, distinctive sound.

[143] The comparisons with the many other songs, which use the same repeated playing of the fifths and sixths of the guitar chord missing the middle note and only playing the "tonic" – the first note of the scale and the fifth note above it – reinforces the unique sound of *Lose Yourself*.

[144] As noted earlier,¹⁰² the song *Kashmir* may contain a similar chord/interval repeated pattern as *Lose Yourself*, but the sound of each of *Lose Yourself* and *Kashmir* are different. Similarly, with *La Bamba* and *Twist and Shout*, Dr Ford was unable to

¹⁰² See the evidence on musical borrowing, at [118]–[120] of this judgment.

accept that the sound was the same, despite the songs having the same chords and the same progressions. I respectfully agree.

[145] Both musicologists agreed that the individual component parts of *Lose Yourself*, such as duple metre (or 4/4 metre), the chords of D minor or G minor, the steady beat, the staccato articulation and the sound of an electric guitar, may be borrowed, common or unremarkable, but they disagree about the use of those elements in *Lose Yourself*.

[146] Dr Ford agreed with Dr Zemke that there was nothing remarkable about the component parts in themselves, except that in his view, Dr Zemke had not joined the dots. If the elements are put together, the end result, in his view, makes the work distinctive.

[147] Dr Ford drew a useful analogy with an identikit picture of a person's face. The individual component parts, such as large ears, are not distinctive in themselves, but once large ears, blue eyes, red hair, freckles and a cap are combined, you have a picture that is more distinctive than its individual parts.

[148] The issue in this case is whether the combination of the individual elements makes *Lose Yourself* distinctive or original, qualifying for the protection of copyright.

[149] I am unable to accept the National Party's submission that when the low level of originality of the guitar section, the piano "doodle" and the string line are considered even in combination the originality only lies in the detail of those parts. I am also unable to accept the National Party's submission or Dr Zemke's evidence that the instrumental backing and musical elements, other than melodic aspects, cannot be considered original or capable of copyright protection.

[150] From listening to the tracks of songs using duple metre and the accented rock and roll pattern in the back beat, it is inescapable that numerous songs are played in the chords of D minor or G minor, that a rock and roll beat is common, that the sound of the electric guitar is commonplace and the staccato articulation is not remarkable or unusual. In that sense, those musical building blocks are the very things upon which

the history of music has been built and is clearly demonstrated in the discussion of musical borrowing set out above and as Dr Zemke describes in her evidence.¹⁰³ The individual component parts may be borrowed from other artists or songs and, individually, may be unremarkable. However, it is the result of the elements being combined to create a new sound or work, which is at issue here.

[151] I accept Dr Ford's view, that the end result of putting the musical blocks or elements together, whether they are unremarkable or borrowed, is what makes the work distinctive. His analogy with an identikit picture is appropriate here. It is the combination of sounds, for instance, the way the staccato guitar and drum beat is combined with the other elements of the song, that makes it distinctive. I respectively agree with Dr Ford that the musical elements give *Lose Yourself* its distinctive sound.

[152] I turn then to consider Dr Zemke's evidence that it is only the "melodic" aspects of the guitar part that can be original, but even the top line in *Lose Yourself* which could "possibly be called a 'melody'" was "plain" and had a low level of originality.

[153] In *Lose Yourself*, the traditional view of a melody line is an awkward description of the staccato guitar chords and string line when the violin, drums, keyboard and piano figure contribute to the song's effect. I am unable to accept the melody in this work is the dominant feature. In *Lose Yourself*, as Dr Ford described, the focus is the hypnotic guitar strum, the beat and the sonic bed, with the piano figure and the guitar line giving the work its distinctive sound. The work is more of an integrated sound of musical elements rather than having a distinctive melody. A change in melody will not suffice if the overall sound in both works is the same. I consider this further in the next section.

[154] The distinctive sound of *Lose Yourself* is not limited by a "melodic" line, but is a combination of the other instruments, particularly the guitar riff, the timbre, the strong hypnotic rhythm and the recurring violin instrumentation and the piano figure.

¹⁰³ See [94]–[101] and [108]–[117] of this judgment.

It is no coincidence that *Lose Yourself* received the 2003 Academy Award for Best Original Song. I find that *Lose Yourself* is a highly original work.

Conclusion 2.1

[155] The findings are:

- (a) *Lose Yourself* is an original musical composition, with a distinctive guitar strum and drum beat, which creates an insistent tense hypnotic rhythm, with a heightened sense of anticipation, as originally created and intended;
- (b) *Lose Yourself* is a highly original musical work; and
- (c) the melody in *Lose Yourself* is not the dominant feature.

[156] Having determined *Lose Yourself* is a highly original musical work, I now turn to consider if copying has occurred. Three elements must be satisfied:

- (a) Has *Eminem Esque* substantially copied or reproduced *Lose Yourself*?
- (b) Does *Eminem Esque* sound objectively similar to *Lose Yourself*?
- (c) Is there a causal connection between *Lose Yourself* and *Eminem Esque*?

[157] I now address each of these issues in turn.

2.2 Has *Eminem Esque* substantially copied *Lose Yourself*?

[158] As canvassed in the principles on copying,¹⁰⁴ it is not necessary for Eight Mile Style to show that *Eminem Esque* copied the whole of *Lose Yourself* or that the copying was exact.¹⁰⁵ It is enough if Eight Mile Style demonstrates *Eminem Esque* copied a substantial part of *Lose Yourself* or what has been copied contains the essence of the copyright work.¹⁰⁶

¹⁰⁴ See [51] of this judgment.

¹⁰⁵ *Henkel KGaA*, above n 18, at [44].

¹⁰⁶ At [44]; and *Bleiman v News Media (Auckland) Ltd* [1994] 2 NZLR 673 (CA) at 678 per Gault J.

[159] Both musicologist experts broke down the musical works into their constituent components and compared the similarities and differences between the two works.

Dr Ford's analysis of Lose Yourself

[160] Dr Ford analysed the music in *Lose Yourself*, then contrasted his analysis with the music in *Eminem Esque*, recording the similarities between the works. In referring to the time points within the musical works, which can be followed in the soundtracks, Dr Ford uses:

- (a) 0.30 means 30 seconds into the track;
- (b) 1.20 means 1 minute and 20 seconds into the track.

[161] It is important to note that the music of the main part of *Lose Yourself* begins at 30 seconds into the soundtrack of *Lose Yourself*, whereas in *Eminem Esque* there is no such piano introduction. I set out Dr Ford's succinct analysis of *Lose Yourself* as follows, under the relevant headings.

Instrumental introduction

The introduction to *Lose Yourself* is in D minor and consists of simple drifting chords and descending piano arpeggios morphing into a melodic phrase that will return in the main body of the song. There is also the hiss and crackle of what is, presumably, intended to be an old record. The introduction comes to rest on the dominant chord (chord V) of A major.

The sonic bed of Lose Yourself

As the A major chord fades, a strongly rhythmic figure in D minor begins (the tonic D clashing strikingly with the C sharp mediant of the fading A major). I consider this section to be the sonic bed of *Lose Yourself*. It is the striking feature of *Lose Yourself* against which all of the other musical elements of the song are set.

[162] Dr Ford transcribed the sonic bed into musical note form, which is shown in Example A, and described as follows:

Example A – the sonic bed of *Lose Yourself*



- (1) An electric guitar plays staccato (short, precisely articulated) chords.
- (2) It plays at a moderate tempo of approximately 84 quarter notes (crotchets) to the minute.
- (3) There is a steady duple metre.
- (4) A four-measure (four-bar) harmonic template is established that runs unchangingly throughout the song. This template consists of two measures of D minor, followed by two measures of G minor (first inversion). The precise notes in the chords vary slightly, but the chords themselves do not – they are always D minor and G minor – and the note D appears in every chord, functioning as a sort of pedal point or drone, a constant bass to the music.
- (5) At the end of each round of four measures, there is a thirty-second note (demisemiquaver) chord of A7 (in fact D/E/G, the A is not sounded), a flick of an upbeat propelling the music back to the tonic D minor.

[163] The other musical aspects of the song are:

(i) *The violin tone in D*

After eight measures (two rounds of the template), a long, high violin tone (the tonic D) emerges to hang over this sonic bed.

(ii) *The harmonic template*

At around 0.54 the violin tone morphs into background chords of D minor (two measures) and G minor (two measures), reinforcing the existing harmonic template.

(iii) *Drum beat*

From around 1.16, the drums have a 4/4 pattern with a distinctive backbeat (emphasising beats 2 and 4).

(iv) *Piano figure*

At around 1:43 into the song, a six-note piano figure (which operates as a subsidiary hook to the sonic bed) appears for the first time. This is a sped-up version of the melodic line heard in the slow introduction.

[164] Dr Ford transcribed the piano figure in *Lose Yourself* into musical note form, as Example B, below:

Example B – piano figure in *Lose Yourself*



Lyric/vocal quality

At the beginning of the song (at 0:32, as the regular pulse of the ‘bed’ commences):

- (1) Eminem speaks with a measured delivery and a few rhetorical pauses.
- (2) He employs a natural, reasonable voice.
- (3) Addressing us directly he proposes a choice:

“Look, if you had one shot or one opportunity to seize everything you wanted in one moment, would you capture it or just let it slip?”

After this, the reasonable tone of voice gives way to Eminem rapping with rhythmic urgency and a more strident tone that sometimes employs *sprechgesang* or ‘speech-song’, the spoken word becoming strongly pitched (in this case on the notes D and F) but without ever turning into actual song.

[165] Dr Ford then addressed the similarities of *Lose Yourself* to *Eminem Esque*. These are also dealt with under the relevant headings below.

Similar piano hook

In *Eminem Esque*, there is no slow introduction, so the first 30 seconds of *Lose Yourself* are only relevant in relation to the melodic riff that will develop into the piano hook of the main part of the song (as shown in Example B). A very similar, though not identical, hook appears in *Eminem Esque*, as further explained below.

Similar sonic beds

Both these pieces of music rely heavily on the use of their sonic bed, indeed there is little else in *Eminem Esque*. The sonic beds are closely similar in terms of tempo, harmony, instrumentation, articulation and timbre. The musical effect and the manner of its creation are very similar in all essential features, being:

- (1) The same staccato use of electric guitar.

- (3) Its dotted rhythm is identical.
- (4) It is played in the same part of the keyboard.
- (5) Whilst the notes in *Eminem Esque* are never all identical to the notes in *Lose Yourself*, in at least two instances (for example at 1.20 and 1.43) five of the six notes are identical.

[169] To demonstrate the close similarity in the piano phrases or figures, Dr Ford transcribed the piano figure from *Eminem Esque*, as Example C below, which indicates the one note difference when compared to Example B, the piano figure from *Lose Yourself*.

Example C – Piano figure in *Eminem Esque*



Example B – Piano figure in *Lose Yourself*



[170] Dr Ford said:

It should be noted that in *Eminem Esque* the piano part is sometimes extended and joined by a few notes to another version of the piano part, but it remains recognisably the same.

[171] The other close similarities, which Dr Ford drew between *Eminem Esque* and *Lose Yourself* are the drum patterns, the background chords and the high violin tone. He describes them as follows:

- (1) The 4/4 drum patterns in both pieces of music are identical in emphasising the backbeats 2 and 4.
- (2) The background chords at 0.22 in *Eminem Esque* are very similar to the chords in *Lose Yourself* from 2.00.
- (3) The drum pattern in *Eminem Esque* mirrors the upbeat figure found at the end of every fourth bar of *Lose Yourself*.
- (4) The high violin tone in *Eminem Esque* has the same function as that in *Lose Yourself*.

[172] Dr Ford also analysed the music that was synchronised with the National Party advertisement. He describes this as a 30 second cut-down version of *Eminem Esque*, comprising 24 measures of music, or six of the four-measure harmonic templates. In referring to a cut-down version of music, Dr Ford meant that it has been edited from its original form. The analysis of the parts of *Eminem Esque* which feature in the National Party advertisement is further discussed in the next section.¹⁰⁷

[173] In his cross-examination Dr Ford clarified the following matters:

- (a) The back beat used in *Lose Yourself* is a standard common rock and roll pattern, stressing the second and fourth beat. In that sense it is a common element with other musical works. The harmonic effect in *Lose Yourself* is distinctive and the drum pattern in *Eminem Esque* mirrors the upbeat figure found in the fourth bar of *Lose Yourself*.
- (b) The staccato guitar is one of the most distinctive features of *Lose Yourself*. It is a different use to the guitar chords and articulation in *Kashmir* by Led Zeppelin.
- (c) The harmonic device in *Lose Yourself* at the end of each round of four measures, the 30 second note (the demisemiquaver) is mirrored in the drum pattern of *Eminem Esque*, making it the same rhythmic device.
- (d) *Eminem Esque* sounds to Dr Ford like a synthesised version of *Lose Yourself*, in that there is no distortion in the sound, no 30 second note inflections and the drum pattern does not have the accented strums of *Lose Yourself*.

¹⁰⁷ See section 2.3 of this judgment at [219]–[229].

- (e) *Eminem Esque* sounds as though it is produced by a machine, which gives a more standardised sound of the chords. They are slightly more standardised in *Eminem Esque*, but it is a small difference, as they are the same chords and are staccato.
- (f) The string lines in the two works are not identical. They have the same function, but they do not use the same notes.
- (g) Dr Ford accepted that the piano part in *Eminem Esque* is used only against the guitar part, whereas in *Lose Yourself* the piano high part is added to the string chords, bass and a drum beat.
- (h) The creators of *Eminem Esque* have gone out of their way to introduce subtle differences so that the two pieces of music are not identical, but Dr Ford concludes that *Eminem Esque* is a “slightly pale imitation. It’s close but pale.” *Eminem Esque* has all of the striking features of *Lose Yourself*, “not just quite as well-achieved.”

[174] Dr Ford concludes that *Eminem Esque* substantially reproduces the essence of *Lose Yourself*. He found the key elements of *Lose Yourself* that are reproduced in *Eminem Esque* were also present in the National Party advertisement.

Dr Zemke’s evidence

[175] The following five factors underlie and summarise Dr Zemke’s evidence on whether there was an objective similarity between *Lose Yourself* and *Eminem Esque* (including the portion used in the National Party advertisement) and whether the advertisement was a substantial reproduction of *Lose Yourself*. They are:¹⁰⁸

- (a) The musical elements which are generally considered to be distinctive, and therefore a “substantial part of the original work,” are the melody and lyrics. Other musical backing elements are not considered to be “owned” by anyone as they are common or not the core part of the composition of a pop song.

¹⁰⁸ The concepts of borrowing ubiquitous musical building blocks and the focus on altering the melody line of *Lose Yourself* have been canvassed in the previous section on whether *Lose Yourself* was original. See [92]–[154] of this judgment.

- (b) *Lose Yourself* as a song does not have a sung melody as it is a rap song. Only some of the backing elements, namely the baseline, string line, piano line, top line of the guitar strum, are “melodic” in nature.
- (c) The creator of *Eminem Esque* “appears to have subtly altered the string line, piano line and top line of the guitar strum so that the track does not copy any “melodic” aspects of *Lose Yourself*.”
- (d) The musical elements of *Eminem Esque* “which are overtly similar to *Lose Yourself*”, including the timbre collection, beat and rhythmic elements, “are not generally perceived in music to be things anyone can ‘own’.”
- (e) *Eminem Esque* “is only a vague approximation of the backing music of *Lose Yourself*, created by a music programmer who purposely altered melodic elements to avoid it being a substantial reproduction.”

[176] Dr Zemke also analysed the similarities and differences between *Eminem Esque* and *Lose Yourself*. Her analysis is set out below.

[177] Dr Zemke analyses *Eminem Esque* from bars 1–24, being the elements that are used in the National Party advertisement, and compares the elements from *Eminem Esque* with *Lose Yourself*. After analysing bars 1–24, Dr Zemke then analysed the music track used in the National Party advertisement focusing on the musical elements apparent in each bar.

Eminem Esque

Bars 1–4

Guitar – similar to the guitar part in “*Lose Yourself*” but with an altered top line in bars 2 and 4. The guitar strum itself is not distinctive, but there is a melodic line which stands out at the top of the chords which could possibly be called “a melody”. “*Eminem Esque*” provides a new melody for this part.

Bars 5–8 [12 seconds in]

Guitar, String line – one line doing a simple ascending phrase.

Bars 9–16

Guitar, String line, String chords, Drum Beat, Bass – simple repeated notes.

Bars 17–24 [1 minute 7 seconds in]

Guitars, Drums, Bass, String Chords, Piano line – simple homophonic line, high pitched.

[178] Dr Zemke observes that the full *Eminem Esque* track goes on much longer, but the elements that are used in the National Party advertisement are from these earlier segments.

[179] Dr Zemke observed that the music track in the National Party advertisement uses three sets of eight bars from *Eminem Esque*. She describes them as follows:

Bars 1–4 (from bars 1–4 in *Eminem Esque*)
Guitar.

Bars 5–8 (a segment from bars 9–12 in *Eminem Esque*)
Guitar, Drums, Strings, Bass.

Bars 9–12 (a segment from bars 17–24 in *Eminem Esque*)
Guitar, Drums, Bass, Piano.

[180] Dr Zemke compared the musical elements used in *Eminem Esque* with those used in *Lose Yourself*. The following is her analysis:

“*Lose Yourself*” starts with a piano and string intro[duction].

At 32 [seconds] of “*Lose Yourself*” the guitar part starts.¹⁰⁹ In the first bar the top part of the strum is a repetition of one note, in second bar the melodic line goes one note up, repeating on each beat. Then this is repeated in bars 3–4 making up a 4 bar repeated riff.

“*Eminem Esque*” uses a similar guitar element. The guitar strum and top line melody similarly uses a repeated note for bar 1 and 3, but in bars 2 the notes go down for 4 beats, then up. In bar 3 there is the same repeated note, then in bar 4 the notes go down, and then further down.

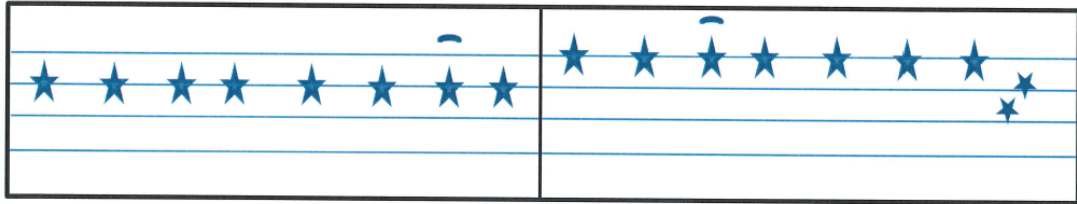
“*Eminem Esque*” uses a similar strumming pattern and sound to the “*Lose Yourself*” guitar part but timbrally there are differences – in “*Eminem Esque*” there is no distortion, no small inflections like “*Lose Yourself*” has and “*Eminem Esque*” does not have the accented strums that “*Lose Yourself*” has.

[181] Dr Zemke set out chart versions of the comparative guitar lines in *Lose Yourself* and *Eminem Esque* for bars 1–2 and then bars 3–4. They are produced below:

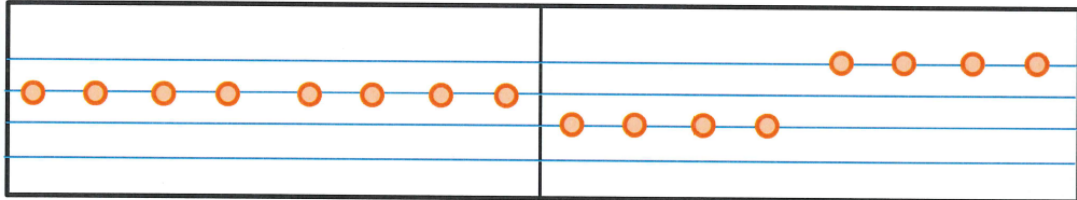
¹⁰⁹ 32” in Dr Zemke’s evidence is described in this judgment as 32 seconds and 1. 7” is described as 1 minute seven seconds.

Guitar lines

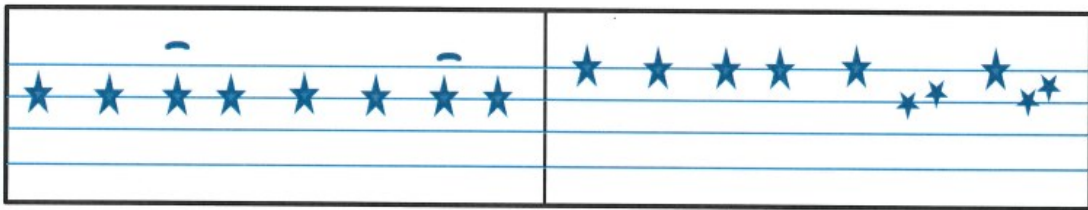
"Lose Yourself" guitar part bars 1-2



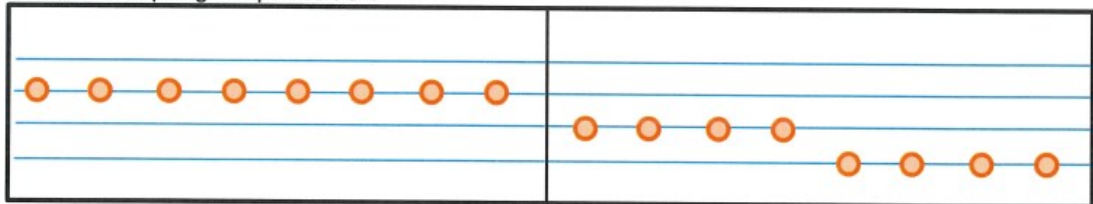
"Eminem Esque" guitar part bars 1-2



"Lose Yourself" guitar part bars 3-4



"Eminem Esque" guitar part bars 3-4



[182] Dr Zemke made further comparisons:

At 44 [seconds] of "*Lose Yourself*" a string line (meaning one note played, not a chord, which is why I am using the word line) joins the guitar strum. "*Eminem Esque*" has a segment with the same texture (two layers, guitar strum and string line). However the string line in "*Lose Yourself*" stays on one note (with an octave note at the end of the 8 bar phrase) while the string line in "*Eminem Esque*" is ascending upwards (so same texture and timbres, but different melodic shape).

At 55 [seconds] of "*Lose Yourself*" the texture thickens. Eminem stops talking and starts rapping. There is a simple drum part (not the full beat), mostly bass drum. Soft synth chords.

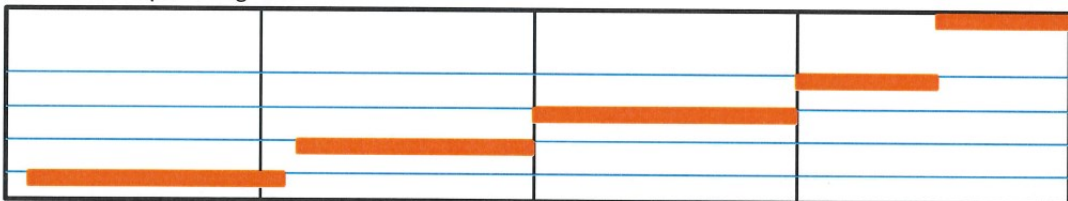
[183] To illustrate the string lines, Dr Zemke produced chart versions of the string lines of both *Lose Yourself* and *Eminem Esque*.

String lines

“Lose Yourself” String Line



“Eminem Esque” String Line



[184] Dr Zemke further stated:

“*Eminem Esque*” also uses similar synth chords and with the guitar strum in its bars 9–16, but combines this with the full beat and the string line. After four bars the synth chords get louder and a bass line is added.

At 1 [minute] 38 [seconds] of “*Lose Yourself*” the beat “drops” after tension and anticipation. “*Eminem Esque*” has no such drop.

In “*Lose Yourself*”, the synth chords are full and played rhythmically. “*Eminem Esque*” does not have this.

In “*Lose Yourself*” a piano high part is added to everything else going on (string chords, bass, drum beat) playing a single melodic line. “*Eminem Esque*” uses a similar piano sound and range, but it is playing different notes and is used against only the guitar part.

Later in “*Lose Yourself*” full piano chords are added for further texture, “*Eminem Esque*” does not have these.

“*Eminem Esque*” uses the same general idea of having a guitar strum, joined by a string line, then joined by a beat, and bass. While this is a similar gathering of textures and timbre, they are playing different notes.

“*Eminem Esque*” also incorporates the use of a high single piano line added to these elements, but this piano is playing a variation of the “*Lose Yourself*” piano tune (not the same notes in the same order) and combines it with a different selection of the elements.

[185] Dr Zemke disagreed with Dr Ford on the use of the relevant musical elements and his conclusions. Dr Zemke expanded on her view that musical elements are common and cannot be the subject of copyright. Under each of the musical elements respective headings, she said as follows:

- (a) Harmonic structure – it is very common in popular music to reuse chord patterns (also known as harmonic structure) in countless songs. The majority of popular music songs would only use a handful of harmonic progressions. While this may make the two versions sound similar, this is not considered to be something “owned” by the *Lose Yourself* composers. Otherwise perhaps 90 [per cent] of pop songs would be guilty;
- (a) Tempo – no one can “own” a tempo. Hundreds of songs would use the same tempo. Tempo is just a number on a spectrum. DJ-ing as an art is built around linking songs with the same tempo together in a mix;
- (b) Metre – only a few permutations are used throughout Western music history so thousands of songs would use any given metre. Similar to the situation in poetry;
- (c) Back beats – most rock derived music produced from the 1950’s onwards uses a back beat – so this is irrelevant; and
- (d) Drum Beat – no one can claim ownership of a “beat”. Especially within any given genre drum beats are purposefully mimicked in order to be recognisable as the same genre.

[186] Dr Zemke accepted that the musical elements identified directly above were “strikingly similar” in the two musical works and that the composer of *Eminem Esque* has purposely echoed some aspects of *Lose Yourself*, such as repeated chords and comparable beat. But she did not accept that *Eminem Esque* had substantially reproduced *Lose Yourself*, because the composer had created a newly composed music bed that sounded like some of the backing elements of *Lose Yourself*.

[187] Dr Zemke also accepted that *Eminem Esque* uses a similar staccato “ostinato” guitar pattern to *Lose Yourself* and has a similar use of a high pitched “melodic” piano line, but the guitar and piano “melodic” lines were altered enough so the melody was not a direct copy. She said further that the pianist in *Lose Yourself* did not invent the use of a single piano line running along the top of other instruments and *Eminem Esque* is not playing the same exact melody. Equally, the guitar pattern cannot be owned or even composed in music terms as it is ubiquitous. This sort of pattern was not an

invention. Similarly, the string line to which Dr Ford referred, is used in thousands of songs.

[188] Dr Zemke accepted that the combination of these elements in *Eminem Esque* and the National Party advertisement music sound like *Lose Yourself*, but the melodic aspects of *Lose Yourself* have not been reproduced and the balance of musical elements “would otherwise be considered by the music community to be ‘fair-game’ for re-versioning.” Although those elements may create a similar “vibe” to *Lose Yourself*, vibe “is something that no one can own” as these elements are used widely, particularly in songs of a similar genre.¹¹⁰

[189] Dr Zemke disagreed with Dr Ford’s final conclusion that *Eminem Esque* reproduces the essence of *Lose Yourself*. Dr Zemke described “essence” as indicating a primary core and that the primary “composed” and “owned” aspects of a pop song are typically the melody and the lyrics. She disagreed that a music bed could be considered the essence of the piece.

[190] Dr Zemke emphasised that there is no musical meaning for the term essence. If there was something that could be called an essence in the hip hop genre, in her view it would refer to the flow, lyrics, life, history, imagery, videos, engagement with the hip hop community, fierceness, anger, vulnerability and timbre of Eminem, none of which, she says, is captured or even broached in *Eminem Esque*.

[191] If Dr Ford, in using the term “essence”, meant elements of the backing track, Dr Zemke agrees that this is definitely “imitated to an extent” in *Eminem Esque*. Dr Zemke’s evidence was that these are background elements in a pop song and the backing track is not the essence of *Lose Yourself*, but is rather the scenery in front of which the “play” is acted. Those backing elements or feel, in her view, were shared in the music industry and cannot be owned. If that were the case, it would disrupt the whole functioning of the music industry.

[192] Dr Zemke also stressed that any instrumental element reproduced in the National Party advertisement such as the guitar strum, string line and piano

¹¹⁰ This is discussed in more detail at [223] of this judgment.

“doodlings” are slightly altered. She said this is “most likely intentionally, and enough for the work not to copy anything that would qualify as ‘melodic’.” Dr Zemke also said of the *Eminem Esque* composer, Mr Cohen, that he would have been aware of the need to alter anything that would qualify as “melodic”, because such composers have done this countless times in their experience of writing for advertisements or television backing music.

[193] Dr Zemke concluded that *Eminem Esque* and the National Party advertisement music track do not represent a substantial reproduction, nor the essence, of *Lose Yourself*, because:

- (a) the tracks are different;
- (b) *Eminem Esque* only mimics some of the instrumental backing musical elements of *Lose Yourself* and even those are altered in small ways;
- (c) similar collections of timbre and/or rhythmic patterns as are found in the two tracks may give some familiarity for listeners, but the shared use of such features is how “the musical world usually operates within a general understanding”; and
- (d) the composer of *Eminem Esque* seems to have purposely altered anything which could be construed as having “melodic” aspects, to ensure they were not copied.

Points of difference between the musicologists

[194] The points of difference between the two experts focus on the use of the sonic beds in both tracks, the high pitched “melodic” line and the essence of the work.

[195] The differences are:

- (a) whether the sonic beds are closely similar;
- (b) whether the composer of *Emimen Esque* had substantially reproduced *Lose Yourself*;
- (c) whether the high pitched “melodic” line, namely, the piano figure and chords, are similar or altered enough to avoid being a copy; and

(d) whether *Eminem Esque* substantially reproduces the essence of *Lose Yourself*.

[196] For the National Party, Mr Arthur reinforced the differences between the two tracks and relied on Dr Zemke's differences in timbre (where there is no distortion and no small inflections as in *Lose Yourself*.) He also points to the evidence of Mr Bass, where under cross-examination Mr Bass said "the feeling of what this gentleman [Mr Cohen] did does not feel, in my opinion, like me" and acknowledged the rhythms in *Eminem Esque* were not the same.

[197] Highlighting the difference in the string lines, the piano figure and the absence of the piano figure in the National Party advertisement, Mr Arthur submits that *Eminem Esque* does not reproduce a substantial part of *Lose Yourself*. He submits the similarities are due to a partially successful attempt to create the same sort of "energies" without using that which is actually original and distinctive of *Lose Yourself*.

Analysis

[198] It is an important start to any analysis of the musicologists' evidence to define what is a musical work. A musical work means "a work consisting of music, exclusive of any words, intended to be sung or spoken with the music or any actions intended to be performed with the music."¹¹¹

[199] The English and Welsh authorities have stressed that for copyright purposes, "music" does not mean simply a tune or harmony. It is the effect on the ear of the listener, of the combination of sounds:¹¹²

The performance of the editions [the printed musical scores] creates a **combination of sounds** available for hearing and appreciation through the ears of the listeners.

[200] And further:¹¹³

¹¹¹ Copyright Act 1994, s 2(1), definition of "musical work".

¹¹² *Sawkins*, above n 50, at [18] (emphasis added).

¹¹³ At [56] (emphasis added).

It is wrong in principle to single out the notes as uniquely significant for copyright purposes and to proceed to deny copyright to the other elements that make some contribution to the sound of the music when performed, such as performing indications, tempo and performance practice indicators, if they are the product of a person's effort, skill and time ...

[201] Expert musicologists, as Drs Ford and Zemke demonstrated, analyse music by breaking down the music into constituent pieces to assess similarities and differences. However, as the authorities emphasise, it is not a note-for-note comparison that is needed to assess copyright infringement.¹¹⁴ It is important to ensure that the collocation or compilation of the whole is not overlooked, in assessing whether a work has a high or low degree of originality. The whole must be considered.¹¹⁵

[202] In assessing whether *Lose Yourself* was an original work, I have already canvassed the submissions and evidence on the use of borrowed musical blocks and whether those elements in *Lose Yourself* detracted from its originality.¹¹⁶ I have concluded that *Lose Yourself* is a highly original musical work and the shared elements comprising the backing elements or sonic bed were not to be considered separately, but in combination, consistent with the authorities already cited.

[203] In this section, I will analyse the similarities and differences of the two works and determine whether the similarities are substantial. In relation to the evidence from Dr Zemke that an alteration in the melody line can avoid copying, I have already determined that a change in melody will not suffice if the overall sound in both works is the same.¹¹⁷ I have also found that the melody in this work is not the dominant feature, because the work is more of an integrated sound of musical elements rather than having a distinctive melody. The focus therefore is whether the two works sound the same.

[204] From the analysis of the musicologists' evidence, Dr Zemke agrees with Dr Ford that the features of harmonic structure, tempo, metre, back beats and drum beats are strikingly similar between the two works. After Mr Bass gave evidence that *Lose Yourself* was played in D minor, the G Minor reference in the notation to *Lose*

¹¹⁴ *Austin*, above n 49, at 408 and 415; *EMI*, above n 46, at [47]; and *Sawkins*, above n 50, at [54].

¹¹⁵ *Henkel KGaA*, above n 18, at [44]; and *Ladbroke*, above n 31, at 293.

¹¹⁶ See [132]–[155] of this judgment.

¹¹⁷ See [131] and [153] of this judgment.

Yourself was explained, because Mr Bass told the Court he used his little finger on B flat, when playing the chord of D minor in the guitar line. Dr Zemke agreed that there is very little difference between G minor and D minor, because G minor sounds like D minor when B flat is played and the fifth and sixth notes of the D chord are not.

[205] As described above, the real point of difference between the experts is Dr Zemke's evidence about the piano figure and the "melodic" line which were used in *Eminem Esque*. Dr Zemke contends they were altered enough so the melody was not a direct copy. Further, Dr Zemke stressed throughout her evidence that the elements of the sonic bed and harmonic structure referred to by Dr Ford are things which cannot be owned by the *Lose Yourself* composers, because those features are common in popular music and cannot be the subject of copying.

[206] In undertaking my analysis of the similarities and differences, I will focus first on the similarities between the two works. I find *Eminem Esque* uses:

- (a) the same staccato use of electric guitar, that is, a similar strumming pattern and sound;
- (b) identical tempo (84 beats to the minute);
- (c) identical duple metre;
- (d) identical harmonic structure;
- (e) the piano figure is always a six note figure, it appears at the same beat (on the second beat of the fourth measure) and it is played in the same part of the keyboard;
- (f) the piano's dotted rhythm is identical;
- (g) the piano figure is recognisably the same as the piano figure in *Lose Yourself*, even though there is one different note in the six note piano figure of *Eminem Esque*;
- (h) the 4/4 drum patterns are identical emphasising the back beats two and four;
- (i) the background chords are similar (at 22 seconds in *Eminem Esque* to the chords in *Lose Yourself* from 2.00 minutes onwards);

- (j) the drum pattern mirrors the upbeat figure found at the end of every fourth bar of *Lose Yourself*; and
- (k) the high violin tone in *Eminem Esque* has the same function as that in *Lose Yourself*, although the notes are different.

[207] In focusing on the differences in *Eminem Esque*, I have already taken into account that *Eminem Esque* does not have the first 30-second piano and orchestral introduction of *Lose Yourself*. The further differences between the works are:

- (a) the string line differs in *Eminem Esque* as it ascends upwards, whereas in *Lose Yourself* it stays on one note with an octave note at the end of the eight bar phrase;¹¹⁸
- (b) there is a more mechanical drum beat in *Eminem Esque* because it is synthesised sound, whereas *Lose Yourself* has a more human quality about it and the strums are not as equal as they are in *Eminem Esque*;
- (c) there is a difference in the timbre of the chords between *Lose Yourself* and *Eminem Esque*, with *Eminem Esque* sounding more standardised;
- (d) *Eminem Esque* has different guitar lines, as set out by Dr Zemke, to that in *Lose Yourself*;¹¹⁹
- (e) *Eminem Esque* uses similar synth chords and the guitar strum in its bars 9–16, but there are differences in combining with the full beat and string line and the synth chords get louder and a base line is added after four bars;
- (f) *Eminem Esque* uses a similar piano sound and range to *Lose Yourself*, but plays different notes and is used against only the guitar part;
- (g) *Eminem Esque* does not use the full piano chords which were added in for further texture in *Lose Yourself*; and
- (h) *Eminem Esque* does not use the distortion, small inflections or the accented strum of *Lose Yourself* which differentiates the timbre changes in the two tracks.

¹¹⁸ See string line diagrams at [183] of this judgment.

¹¹⁹ See guitar line diagrams at [181] of this judgment.

[208] Having listened to all the evidence and compared the similarities and differences, I find that when broken into their musical components, the two tracks appear strikingly similar. Further, the similarities between the two works are substantial. In reaching this conclusion, I agree with Dr Ford and Dr Zemke's respective analyses, when they described:

- (a) the elements of *Eminem Esque* and the National Party advertisement are "overtly similar to *Lose Yourself*";
- (b) an ordinary listener who had heard the National Party advertisement track and *Lose Yourself* more than once and had the resemblance pointed out, would likely find resemblance between the two works;
- (c) the similarity seems intentional by the composer of *Eminem Esque*, as if to present an echo of *Lose Yourself*; and
- (d) the features of harmonic structure, tempo, metre, back beats and drum beats are strikingly similar.

[209] I have carefully considered the differences as set out above and in particular the "melodic" line of *Eminem Esque* with its alteration to the notes, both in the music figure and in the string line, but I can discern no real aural difference. The string line has the differences demonstrated by Dr Zemke, but they appear minimal, compared to the close similarities of the use of instruments and the musical elements as described. I bear in mind the warning that it is wrong to single out the notes as uniquely significant and deny the other elements that make some contribution to the sound of the music when performed, if they are the product of effort, skill and time.¹²⁰

[210] In *Lose Yourself*, it is the musical elements that contribute to the sound, not just the "melodic" line, which is normally the defining sound in traditional or most musical works. The elements of *Lose Yourself* were the produce of effort, skill and time over 18 months as Mr Bass described, with the composers working to achieve a particular, and distinctive, sound and effect.

[211] I agree with Dr Ford's view that the main feature of *Lose Yourself* is the sonic bed. The "melodic" line is but one part of the composition. The defining sound to my

¹²⁰ *Sawkins*, above n 50, at [56].

ear is the guitar riff in *Lose Yourself*, which forms part of the sonic bed and is the main hook of the work. Its distinctive and dominating rhythm almost subsumes the sound of the string line, such that any differences between the string lines of *Eminem Esque* and *Lose Yourself* are barely discernible. The subsidiary hook, the repeating piano figure, which is also distinctive in *Lose Yourself*, occurs at the same intervals in *Eminem Esque* as in *Lose Yourself*. The one different note in the *Eminem Esque* piano piece is imperceptible to my ear.

[212] There is a more human quality about *Lose Yourself*, as Dr Ford described, in that the guitar strums are not as equal as they are in *Eminem Esque*. The drum beats are more standardised in *Eminem Esque* and to my ear sound more mechanical, but those differences are barely discernible when considering the track of *Eminem Esque* as a whole. *Eminem Esque*'s mechanical beat and sound make it a "slightly pale imitation" of *Lose Yourself*, as Dr Ford described it, but an imitation nonetheless.

[213] Having listened to all the evidence, examined the notation examples and replayed the advertisements and track exhibits, with the close similarities and the indiscernible differences between *Lose Yourself* and *Eminem Esque*, I am in agreement with Dr Ford's conclusion when he said: "Put simply, *Eminem Esque* is strikingly similar to *Lose Yourself* in all of its major features."

[214] When the two tracks are deconstructed into their musical elements, including tempo, duple metre, harmonic structure, piano parts, drum patterns and background chords, it is clear that *Eminem Esque* incorporates the essential features of *Lose Yourself*.

[215] For copyright purposes, I do not accept the submission that production music and hits like *Lose Yourself* are in totally different worlds. If production music infringes the copyright of any song, whether it be a popular or famous hit or otherwise, the principles of music copyright still apply.

[216] The very title suggests *Eminem Esque* is a copy of *Lose Yourself* and a sound-alike track in this context, means what it says. *Eminem Esque* sounds like *Lose*

Yourself. The sound-alike copy of *Lose Yourself* mimics the musical elements of *Lose Yourself*, as set out above, producing a copy of *Lose Yourself*.

[217] I find the number of close similarities between the two tracks leads inevitably to the same conclusion reached by Dr Ford. I accept Dr Ford's evidence that *Eminem Esque* substantially reproduces the essence of *Lose Yourself* and I find that *Eminem Esque* is a substantial copy of *Lose Yourself*.

Conclusion 2.2

[218] The findings are:

- (a) the differences between *Eminem Esque* and *Lose Yourself* are minimal;
- (b) the close similarities and the indiscernible differences in drum beat, the "melodic" line and the piano figures between *Lose Yourself* and *Eminem Esque* make *Eminem Esque* strikingly similar to *Lose Yourself*;
- (c) *Eminem Esque* substantially reproduces the essence of *Lose Yourself*, and
- (d) *Eminem Esque* has substantially copied *Lose Yourself* and is a substantial copy of *Lose Yourself*.

2.3 Do the parts of *Eminem Esque* used in the National Party's election advertisements and conference video reproduce the whole or a substantial part of *Lose Yourself*?

[219] Having found that *Eminem Esque* substantially reproduces *Lose Yourself*, the next question is whether the parts of *Eminem Esque* used in the National Party's election advertisements and conference video also reproduce the whole or a substantial part of *Lose Yourself*.

[220] To consider this issue, I have taken the points of comparison from the relevant parts of *Lose Yourself* in the audio files described at [9]–[16].

[221] The track of *Eminem Esque* can then be compared with copies of the National Party advertisements, which, in the absence of discovering a copy of the conference video, are as follows:

- (a) the 30 second advertisement; and
- (b) the opening broadcast advertisement of 15 minutes.

National Party advertisements

[222] In addition to having the relevant tracks available for listening, I also heard evidence from Dr Ford on the synchronised version of *Eminem Esque* with the National Party advertisements. Dr Ford, in reaching his view that the music synchronised with the National Party advertisements reproduces *Lose Yourself*, describes the parts of *Eminem Esque* which feature in the advertisements. They are:

- (a) the sonic bed, which features in the first two four-measure templates of the advertisement;
- (b) the 4/4 drum pattern and the chords, which feature in the third and fourth four-measure templates;
- (c) the sixth note piano figure, which features in the fifth template for the advertisement;
- (d) the background chords, the high violin tone and two instances of the upbeat drum pattern at the end of the fourth bar; and
- (e) the sound and use of the voice over resemble Eminem's delivery from *Lose Yourself* (at 32 seconds) and the measured rhetorical pauses, the tone of the voice and the choice proposed in the advertisement, reproduces the essence of *Lose Yourself*.

[223] Dr Zemke contested Dr Ford's observations about the sound and use of the voice over in the National Party advertisements, as reproducing the essence of *Lose Yourself*. She contends there is no mistaking that this is not Eminem speaking; there is no similar delivery and there is no copyright on the use of rhetorical pauses or a tone of reasonableness. The use of those elements may create a similar vibe to *Lose Yourself*, but vibe cannot be owned by anyone. The lyrics of *Lose Yourself* and their delivery are not in contention here, because the issue is whether the musical work has

been copied. Nevertheless, in their analysis, the musicologists have considered the components of both tracks and given their views on the differences and similarities.

[224] I have listened carefully to the sound track and videos of the advertisements, both the 30 second advertisement and the 15 minute National Party opening broadcast. *Eminem Esque* has been synchronised with the advertisements, using three sets of the eight bars from *Eminem Esque*, which are respectively described by the musicologists.

[225] In the 15 minute advertisement, there are eight edits of *Eminem Esque* being synchronised to parts of the advertisement throughout the 15 minutes. These include the piano figure being played at least five times in the 15 minute track.

[226] The 30 second advertisement is an edited version of *Eminem Esque*, being 24 measures of music or six of the four-measure harmonic templates, which Dr Ford provided in Example C,¹²¹ or three sets of eight bars as Dr Zemke describes it. The 30 second advertisement also contains the six note piano figure, which features in the fifth template and is heard in the final template of the advertisement before it fades out. It appears on listening to both advertisements that the 30 second advertisement is an edit of the last part of the 15 minute National Party opening broadcast.

[227] The National Party did not contest that the relevant parts of *Eminem Esque* were used in the National Party's election advertisements. It was submitted that the six note piano figure is not included in the National Party advertisements, but that does not appear to be correct, as the piano figure is clearly heard as I have described above. Not only do I hear it in playing the advertisements, but I also accept Dr Ford's evidence as correct.

[228] There is little contest in the evidence (apart from the alleged omission of the piano figure in the advertisements) that the key elements of *Lose Yourself* that are reproduced in *Eminem Esque* are also present in the National Party advertisements.

¹²¹ See [169] of this judgment.

Conclusion 2.3

[229] I find that the parts of *Eminem Esque* used in the National Party’s election advertisements substantially reproduce *Lose Yourself*.

2.4 Does *Eminem Esque* sound objectively similar to *Lose Yourself*?

[230] The inquiry into objective similarity requires that the whole or substantial part taken of the original is objectively similar to the copy and it is largely a matter of impression for the Court to determine. This is a test of hearing and ear recognition.¹²²

[231] Although stated to be an objective test, the importance of the aural impression is ultimately with the Judge. The trial Judge in *Grignon v Roussel* found that the defendant’s work had such a striking resemblance that one could only be a copy of the other, even with minor differences resulting from arrangements or substitution of chords.¹²³ His approach was to listen to the works several times during the trial and in his deliberation he said:¹²⁴

This was a test of hearing. Certainly it is a subjective test, but it is the one that must ultimately be used in such a matter, just as and still more in “trade mark” cases, to determine the similarity of works after expert evidence has established an objective resemblance. Writing imposes natural limits on the reproduction of what is perceived on hearing a musical work; it is not possible to accurately reproduce by words the impression made on the ear by hearing alternately the first measures of the refrain of these two works: it is striking.

[232] Of relevance to this case, the trial Judge in *Grignon* considered that the resemblance between the two works applied to a significant part of the work, not in quantitative but in qualitative terms, in that it concerned the first measures of the refrain, which is the “hook” that the ear retains for the purpose of identifying a piece.

[233] Counsel for the National Party accepted that if I determine that *Eminem Esque* reproduces a substantial part of *Lose Yourself*, then the National Party concedes there is objective similarity between *Eminem Esque* and *Lose Yourself*.

¹²² *D’Almaine*, above n 43, at 123.

¹²³ *Grignon*, above n 51.

¹²⁴ At 20–21.

[234] In addition to my finding that *Eminem Esque* reproduces a substantial part of *Lose Yourself*, there are five reasons for my finding that *Eminem Esque* sounds objectively similar to *Lose Yourself*. They are:

- (a) my assessment from listening to the tracks of the works;
- (b) Drs Ford and Zemke agree that the sonic bed is strikingly similar;
- (c) the beat of *Lose Yourself* was intended to be replicated;
- (d) others recognised *Eminem Esque* as sounding like *Lose Yourself*; and
- (e) *Eminem Esque* was synchronised as a sound-alike track.

Subjective assessment

[235] I have watched the National Party’s advertisements and all of the music tracks produced. I have compared the tracks of *Eminem Esque* and *Lose Yourself* separately, sequentially and listened to the tracks overlaid one on the other.

[236] The guitar riff of *Lose Yourself* is the hook that identifies *Lose Yourself* to my ear. This is reproduced in *Eminem Esque*, in such a way that it sounds like a copy of the guitar riff in *Lose Yourself*. However, the drum beat sounds more mechanised and pedestrian in *Eminem Esque* and, when overlaid with *Lose Yourself*, is fractionally later in timing. However, as discussed previously,¹²⁵ the tracks sound so strikingly similar, they are almost indistinguishable.

Evidence of Drs Ford and Zemke

[237] I have canvassed fully the evidence of the experts. Both experts are in agreement that the sonic beds of *Lose Yourself* and *Eminem Esque* are strikingly similar. Dr Zemke said it “appears that the composer of *Eminem Esque* has purposefully echoed some aspects of *Lose Yourself* – such as repeated chords, comparable beat and the like.”

[238] Further, Dr Zemke describes *Eminem Esque* as using a:

... similar strumming pattern and sound to the *Lose Yourself* guitar part but timbrally there are differences – in *Eminem Esque* there is no distortion, no

¹²⁵ See [208][206]–[217] of this judgment.

small inflections, like *Lose Yourself* has and *Eminem Esque* does not have the accented strums that *Lose Yourself* has.

[239] In Dr Zemke’s evidence she accepts that the musical elements are “overtly similar” and the listener would likely find resemblance between *Lose Yourself* and the National Party advertisements when heard more than once and with the resemblance pointed out.

[240] Dr Ford, whose evidence I accept, concluded that *Eminem Esque* is strikingly similar to *Lose Yourself* in all of its major features. Specifically, he gave evidence that “[n]ot only do the two tracks sound very similar, when they are deconstructed into their musical elements ... it is clear that *Eminem Esque* incorporates the essential features of *Lose Yourself*.”

Replication of the beat in Lose Yourself

[241] Mr Jameson worked for the company Stan 3 Ltd, which was engaged by the National Party to provide creative services for their 2014 election campaign. Mr Jameson, on behalf of Stan 3, obtained approval from the Electoral Committee of the National Party to source a modern track which sounded like the clippings of *Lose Yourself* in the animatics that Mr Jameson created for the National Party’s approval.

[242] Mr Jameson approached Mr Foster at Sale Street Studios to provide the sound production for the National Party’s advertisements. This will be dealt with in greater detail under the third issue of copyright infringement.¹²⁶ For present purposes however, Mr Jameson described why he used *Lose Yourself* in the animatics and why he wanted tracks with the same type of beat as *Lose Yourself* for the contemporary track for his animatic. Mr Jameson explained:

The reason I used this track was because the opening rhythm to “Lose Yourself” had the steady, syncopated beat, which would give a sense of momentum, and would be a good beat to create a dynamic edit. It was something I considered a famous beat that I recognised from a number of tracks, for example, the Motels used it on “Total Control” and Led Zeppelin used it for “Kashmir”. “Lose Yourself” was an example that came to mind as something I could use as a prompt to [Mr Foster] to find me tracks with this type of beat to test as the contemporary track for the animatic.

¹²⁶ See [291]–[296] of this judgment.

[243] The ultimate sourcing and use of *Eminem Esque* achieved his aim: to provide the same opening rhythm to *Lose Yourself* with the steady syncopated beat. On an objective assessment, there is little doubt that the final sound track used in the National Party advertisements was used to sound like the beat and rhythm in *Lose Yourself*. The result was a sound so similar to *Lose Yourself* that *Eminem Esque* sounds like a copy.

Recognition of Lose Yourself

[244] There are three items of evidence from people who recognised the sound of *Lose Yourself* in the National Party election campaign advertisements.

[245] In late May 2014, Mr Jameson showed the National Party's campaign office a version of the proposed election advertisement. Ms de Joux was the campaign manager for the National Party's 2014 general election campaign. She gave evidence that a staff member, employed by the National Party at the time, heard the *Eminem Esque* track and said it sounded like Eminem. This was an obvious reference to *Lose Yourself*.

[246] I acknowledge the National Party's submission that no-one including the media present, recognised it at the National Party's conference opening when the video was first played. Nevertheless, it was recognised by a staff member, who obviously had a familiarity with Eminem's music. He then raised the issue of the appropriateness of the association of the National Party with Eminem.

[247] The second item of relevant evidence is a post dated 20 August 2014 on the TVNZ OneNews website which reads:

The music on the National Party's new ad has been compared to a track by Eminem.

The National Party released the ad on You-Tube and on its Facebook page today sparking reaction on social media.

Journalist Russell Brown tweeted "Yup. You can pretty much play Eminem's *Lose Yourself* right over National's campaign ad".

Sarah McMullan posted "Because nothing speaks to the National Party more than an 8 Mile Detroit vibe #TeamKey."

Tina Ng said the party was "totally ripping off Eminem."

Others posted on the National Party Facebook page saying that it was an “excellent” and “impressive” ad.

[248] The third item of evidence is an email exchange on 20 August 2014 between a staff member at Parliament to Ms de Joux drawing her attention to Mr Rutherford’s online feed called “Rutherford Beehive Live: Has National been inspired by Eminem?” Mr Rutherford, a parliamentary journalist, signalled that “[w]e have a story coming soon, but if you’re interested, you decide?” Mr Rutherford then asked whether two tracks on YouTube comparing the National Party advertisement with Eminem’s *Lose Yourself* sound alike. He further said “[a]t least one former Beehive staffer thought so, as has a music critic.”

[249] In closing, the National Party submitted that the music identifier cell-phone application called “Shazam” did not detect that *Eminem Esque* sounded like *Lose Yourself*. Neither of the expert musicologists were questioned about the reliability of Shazam and nor was there any evidence adduced about the accuracy or otherwise of the cell-phone application. I am unable to give any weight to the submission, not only because of the lack of evidence surrounding Shazam and its aural reliability, but also the weight of evidence and my own aural impression, that *Eminem Esque* sounds like *Lose Yourself*.

[250] Leaving aside the submissions about Shazam, the three pieces of evidence, whilst not conclusive in themselves, indicate that others had recognised the close similarity and the same sound of the two works.

Eminem Esque was synchronised as a sound-alike track

[251] Where an artist holds copyright in a musical work, that musical work can be used for commercial purposes, provided that the consent of the artist is obtained. In the music industry, this is achieved by way of a music synchronisation licence. A music synchronisation licence is a type of licence that may be granted by the holder of copyright in a particular composition that allows the licensee to synchronise music with visual media (for example, film, television shows, advertisements or video games). In this case Mr Cohen, as the copyright holder of *Eminem Esque*, would have been paid a fee.

[252] As Ms Zamoyska, an expert in commercial licensing of music, told the Court, the higher the value of the musical work and the greater the success of the artist and performers, generally the higher the value is of the licence fees and more control over the use of the music that is exercised by the copyright holder or controller.

[253] As an alternative to acquiring a higher value work, some companies offer production music for licensing. Ms Zamoyska described production music as referring to music which can be obtained off the shelf for use in synchronisation, including advertisements. Ms Zamoyska also described production music as tending to be music by unknown performers and artists. It is often music that is generic in nature or of a particular style of genre of music, but is not known by the public and is rarely particularly original or memorable.

[254] On 14 February 2008, it appears Mr Cohen entered into an agreement with Labrador Entertainment for it to use his work for recording, licensing, publishing or performing worldwide in exchange for an agreed percentage of payments.

[255] These rights were then licensed to Beatbox Music which in turn licensed to AMCOS, which ultimately licensed to the National Party. It should be noted that AMCOS receives licences from third parties for over 2.5 million songs, but does not assess songs for potential copyright infringement. Therefore, the fact that *Eminem Esque* was the subject of a synchronisation licence did not mean that it had been assessed for copyright infringement, as that is not a function of AMCOS.

[256] The National Party rely on the AMCOS licence that was obtained for their use of *Eminem Esque* in their election campaign advertising. They point to the National Party campaign committee's meeting with Stan 3, where the National Party specifically sought assurances that it was safe to use *Eminem Esque* and that there were no legal complications. Stan 3 then sought assurances from Sale Street Studios, Mr Collins, former head of production of a number of large international advertising agencies, Mike Chunn, former head of APRA, Ms Benoit at APRA/AMCOS and Mr Mackenzie at Beatbox Music. Mr Mackenzie specifically advised Stan 3 in writing:

The agreement we have with the publisher gives us assurance that the music does not infringe on copyright and is free to be used for production purposes.

[257] The issues around licensing are likely to be issues that arise in the next stage of the hearing and are not ones I can presently determine. However, in terms of copyright infringement, the licensing arrangement is relevant to assessing the purpose for which *Eminem Esque* was intended, namely, as a sound-alike track to be synchronised to an advertisement.

[258] Eight Mile Style submits that sound-alike tracks are in a different or sub-category to production music, because they are tracks that are made and sold to sound like a particular song. It further submits that sound-alikes intentionally seek to appropriate skill, effort and time of the original artists and seek to sound sufficiently similar to the original track so that it comes to mind.

[259] Mr Martin, the manager of Eight Mile Style, said in his experience it was not common to have sound-alikes that refer to the original artist that are essentially the same as the original track. He accepted that while it was common to have production music that evokes the feel or type of genre, *Eminem Esque* was just a poor attempt to disguise the actual nature of the true authors.

[260] *Eminem Esque* was produced before 8 March 2007 by Michael Cohen. The initial track was called *Eminem_abbrev*. Eight Mile Style submit that this name indicates the intention of Mr Cohen to substantially reproduce *Lose Yourself* by abbreviating or shortening it. The track was renamed *Eminem Esque*, in which Mr Cohen has copyright.

[261] Mr Cohen did not participate in the hearing, following legal advice, so no evidence has been provided by him as to how he produced *Eminem Esque*. In the absence of any explanation for the original title of *Eminem_abbrev* and its subsequent renaming, I accept Eight Mile Style's submission that the naming revealed that the composition was an abbreviated reproduction of *Lose Yourself* and the change of name was an attempt to disguise the nature of the reproduction.

[262] Having explained to the Court that he was introduced to the concept of sound-alikes by a music coordinator at NBC/Universal Studios in 2006, Mr Webb of Labrador Entertainment explained that a film or television show director uses a "temp

track” to give a composer a specific directional sound that the director wants in each section of his or her production.

[263] Mr Webb gave evidence explaining the concept of sound-alikes, being tracks that are designed to sound like other artists. Mr Webb told the Court that:

The music composer composes a music piece that has a similar feel, groove, and/or similar sound to the well-known music. This new composition is called a sound-a-like. I[t] is expected to be composed such that it does not infringe the well-known composition. The sound-a-like is used in the published version of the film or TV show.

[264] Mr Webb explained how the tracks were named after the well-known music.

With constant requests by music supervisors and production companies for sound-a-likes Labrador would purposely title the cue with the name of the famous artist the music “sounded like”. This was done to make the end user (and all parties in the chain towards the end user) aware of the composer’s objective of having a similar feel, groove or sound without infringing the well-known composition.

[265] Mr Webb told the Court that to his knowledge, no sound-alike in the music library industry had ever been successfully identified as infringing copyright.

[266] In an assessment of originality and substantial copying, the “sound-alike” is almost self explanatory. The name of the track alone suggests that it is a copy of Eminem. In the same way, the Court heard that music libraries contain works of famous artists as sound-alikes, with the artist’s name appearing in the title. For example, *Beatles Esque* in the same way as *Eminem Esque* was named.

[267] Further, in the absence of evidence from Mr Cohen, there is an obvious inference that Mr Cohen, when he was writing *Eminem Esque*, had *Lose Yourself* in front of him. This proposition was put to both the musicologists. Dr Zemke agreed that the inference could be drawn. She acknowledged that *Eminem Esque* has been subtly and purposely altered as it shows an intent to “present an echo of *Lose Yourself*.”

[268] Dr Ford, when asked whether he believed Mr Cohen put his own effort into composing something that sounded like *Lose Yourself*, concluded that he could not

conceive of any way in which *Eminem Esque* was created “without close recourse to *Lose Yourself*.”

[269] The point of difference in this case, from Dr Zemke’s evidence about musical building blocks and a lack of originality generally, is that *Eminem Esque* was intended to sound like and is a copy of *Lose Yourself*.

[270] Applying all the principles from the musical copyright cases, alteration of an original work constitutes infringement if “[t]he ear tells you that it is the same”.¹²⁷ Equally “an ordinary reasonably experienced listener might think that perhaps one had come from the other”, such that the threshold of objective similarity has been reached.¹²⁸

[271] In addition to my aural assessment, in combination with the evidence outlined above, I am satisfied that on an objective assessment, *Eminem Esque* sounds like a copy of *Lose Yourself*. The ear tells you *Eminem Esque* sounds the same and the listener is left thinking one has come from the other. I also find it telling that Dr Zemke accepts that an ordinary listener who had heard *Lose Yourself* and the National Party advertisement more than once would likely find resemblance between the two works. She considered it was intentional that *Eminem Esque* sounded like an echo of *Lose Yourself*.

[272] *Eminem Esque* is strikingly similar to *Lose Yourself* with minimal discernible differences and objectively, it was designed to “sound like” *Eminem* and *Lose Yourself* as it was production music and a sound-alike track. Adapting Hillyer J’s formulation, *Eminem Esque* sounds like a copy of *Lose Yourself* and I find it is a copy of *Lose Yourself*.¹²⁹

¹²⁷ *D’Almaine*, above n 43, at 123.

¹²⁸ *Francis Day*, above n 46, at 610.

¹²⁹ *Thornton Hall*, above n 40, at 246.

Conclusion 2.4

[273] The findings are:

- (a) *Eminem Esque* is objectively similar to *Lose Yourself*, with minimal discernible differences;
- (b) *Eminem Esque* sounds like a copy; and I find it is a copy of *Lose Yourself*; and
- (c) *Eminem Esque* was designed to “sound like” *Lose Yourself* as production music and a sound-alike track.

2.5 Is there a causal connection between *Lose Yourself* and *Eminem Esque*?

[274] There is no contest in this case that Mr Cohen, the composer of *Eminem Esque*, had access to *Lose Yourself*. As Dr Zemke acknowledged, it was an obvious inference to be drawn that Mr Cohen had a copy of *Lose Yourself* before him when creating *Eminem Esque*. She admitted that *Eminem Esque* was “subtly” and “purposely” altered. Tellingly, Dr Zemke said:

The similarity seems intentional by the composer of *Eminem Esque*, as if to present an echo of *Lose Yourself*. But then there has also been an intention to alter any melodic elements so as not to infringe upon what would general[ly] be considered to be the “owned” elements of the “composition”.

[275] Similarly, Dr Ford said that he could not conceive of any way in which *Eminem Esque* was created “without close recourse to *Lose Yourself*.” Although there is no direct evidence from Mr Cohen that he copied *Lose Yourself*, it is clearly evident, as Lord Scott said in *Designers Guild*, that the copier has produced his “copy” with the original at his elbow.¹³⁰

[276] The National Party accepts there is a causal connection between *Lose Yourself* and *Eminem Esque*, as *Eminem Esque* was not coincidentally similar to *Lose Yourself*. This distinguishes these facts from those in *Francis Day*, where there had been no

¹³⁰ *Designers Guild*, above n 36, at 2432.

conscious or subconscious copying and therefore no infringement, even though the works in question were objectively similar.¹³¹

[277] The similarities between the two works are extensive. The initial title of *Eminem Esque* named it as *Eminem_abbrev. Eminem Esque* was created as a sound-alike track and is called *Eminem Esque*. It is clearly evident that *Lose Yourself* was copied in the production of *Eminem Esque*. Overwhelmingly, the causal connection between *Lose Yourself* and *Eminem Esque* was not coincidental and the threshold is met.

[278] The lyrics to *Lose Yourself* have a heightened irony in the context of these proceedings. The words of Peterson J in *University of London Press Ltd v University Tutorial Press Ltd* are apt:¹³²

... what is worth copying is prima facie worth protecting.

And prophetically so rapped Eminem:

You better lose yourself in the music, the moment
You own it, you better never let it go ...

¹³¹ *Francis Day*, above n 46, at 614.

¹³² *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 (Ch) at 610.

Conclusion 2.5

[279] The findings are:

- (a) there is a causal connection between *Lose Yourself* and *Eminem Esque*, as it was no coincidence that the works sounded the same;
- (b) the undeniable inference to be drawn from the evidence is that the composer of *Eminem Esque* had *Lose Yourself* in front of him at the time of composition; and
- (c) the original title *Eminem_abbr*, the title of *Eminem Esque*, and the fact that *Eminem Esque* is a sound-alike track reinforces the finding that there is a causal connection between the two works, supporting a finding of copying.

Summary of findings on issue two

[280] In summary, there was copying of *Lose Yourself* and the findings for issue two are:

- (a) *Lose Yourself* is a highly original musical work;
- (b) *Eminem Esque* has substantially copied *Lose Yourself* and is a substantial copy of *Lose Yourself*;
- (c) the parts of *Eminem Esque* used in the National Party's election advertisements also substantially reproduce *Lose Yourself*;
- (d) *Eminem Esque* is objectively similar to *Lose Yourself*; and
- (e) there is a causal connection between *Lose Yourself* and *Eminem Esque*, as it was no coincidence that the works sounded the same.

THIRD ISSUE: WAS THERE COPYRIGHT INFRINGEMENT

3.1 Have any restricted acts taken place?

[281] Eight Mile Style allege that the National Party infringed copyright in *Lose Yourself*, without licence, by:

- (a) communicating *Lose Yourself*, or a reproduction of a substantial part of it, to the public; and/or
- (b) communicating to the public an adaptation of *Lose Yourself*; and/or
- (c) authorising (a) and (b) above; and/or
- (d) authorising the copying of *Lose Yourself*, or a substantial part of *Lose Yourself*, by authorising the synchronisation of *Eminem Esque* (or parts of *Eminem Esque*) with election campaign advertisements and the deployment of those advertisements to television broadcasters, YouTube and other social media outlets.

[282] Copyright in a work is infringed if a person does any restricted act. Section 29 sets out what constitutes copyright infringement. It provides:

29 Infringement of copyright

- (1) Copyright in a work is infringed by a person who, other than pursuant to a copyright licence, does any restricted act.
- (2) References in this Act to the doing of a restricted act are to the doing of that act—
 - (a) in relation to the work as a whole or any substantial part of it; and
 - (b) either directly or indirectly;—and it is immaterial whether any intervening acts themselves infringe copyright.
- (3) This Part is subject to Parts 3 and 8.

[283] A “restricted act” is defined as any of the acts listed in s 16 of the Act, which the owner of the copyright in a work has the exclusive right to do.¹³³ Of relevance to this proceeding, a “restricted act” includes:¹³⁴

- (a) issuing copies of the work to the public, whether by sale or otherwise;¹³⁵
- (b) communicating the work to the public;¹³⁶
- (c) making an adaptation of the work;¹³⁷ and
- (d) authorising another person to do any of these acts.

[284] The Court must determine as a matter of fact, whether the National Party has undertaken any of the restricted acts either directly or indirectly, and in relation to the work either as a whole or a substantial part of it.

[285] The requirements of the restricted acts are relatively self-explanatory from the wording of s 16 above. The terms “adaptation” and “authorise” do warrant some further discussion, however.

[286] “Adaptation” in relation to a musical work is defined in s 2(1) of the Act as follows:

- (1) In this Act, unless the context otherwise requires,—
adaptation,—
...
 - (c) in relation to a musical work, means an arrangement or transcription of the work.

[287] The act of authorising another person to do a restricted act is not defined in the Act. However, the meaning of “authorised” was discussed by the House of Lords in *CBS Songs Ltd v Amstrad Consumer Electronics Plc*, where the Court stated:¹³⁸

... an authorisation means a grant or purported grant, which may be express or implied, of the right to do the act complained of.

¹³³ Copyright Act 1994, ss 2(1) and 16(1).

¹³⁴ Section 16(1).

¹³⁵ Also constitutes primary infringement of copyright under s 31.

¹³⁶ Also constitutes primary infringement of copyright under s 33.

¹³⁷ Also constitutes primary infringement of copyright under s 34.

¹³⁸ *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013 (HL) at 1054.

[288] An equivalent expression to the word “authorise”, which has been used in the authorities is “sanction, approve and countenance”.¹³⁹

[289] As the authors of *Copinger and Skone James on Copyright* note, clearly a person will have authorised an act if he or she formally grants the right to do the act in contemplation that it will in fact be done, or simply gives permission for it to be done.¹⁴⁰

[290] In this proceeding, the Court is also required to determine whether the National Party authorised infringement. If copyright infringement was found, it was accepted by the National Party:

- (a) the National Party authorised the television broadcast of the National Party advertisement;
- (b) the National Party authorised the synchronising of *Eminem Esque* to the advertisement; and
- (c) Mr Hamilton, the second defendant, authorised the publication of the National Party advertisement, pursuant to s 204H of the Electoral Act 1993, because it is unlawful to publish a party advertisement without the authority of the Party secretary.

Relevant facts

[291] The facts surrounding the engagement of Stan 3 Ltd to provide the National Party with creative services to produce election campaign advertising and the sequence of events which followed, are hardly in contention.

[292] As already traversed in this judgment,¹⁴¹ Stan 3 proposed an advertising concept of a rowing crew and developed this idea into a concept for election advertisements. Stan 3 produced animatics for testing with focus groups in early March 2014 and one animatic had music named “modern” which included the music

¹³⁹ At 1054, citing *Falcon v Famous Players Film Co* [1926] 2 KB 474 (CA) at 491.

¹⁴⁰ Gillian Davies, Nicholas Caddick and Gwilym Harbottle *Copinger and Skone James on Copyright: Volume 1* (17th ed, Thomson Reuters, London, 2016) at [7-248], citing *Evans v E Huton & Co Ltd* (1924) 131 LT 534 (Ch); and *ABKCO Music & Records Inc v Music Collection International Ltd* [1995] RPC 657 (CA).

¹⁴¹ See [17]–[27] of this judgment.

of *Lose Yourself*. The results of the focus group showed a preference for the modern track.

[293] It was not until late May 2014 that the National Party first became aware that the music track it knew as “modern” sounded like Eminem, after a staff member heard the music and commented on this. The National Party was informed it was called *Eminem Esque*. The steps the National Party took following this revelation are canvassed more fully in the next section, in relation to the fourth issue of relief. For present purposes, following the Party’s enquiries as to the use of *Eminem Esque*, the Party sought assurances that it was safe to use *Eminem Esque*, without fear of a challenge over its use.

[294] Having received reassurances, the National Party used *Eminem Esque* in its conference video, authorised the synchronising of *Eminem Esque* to the advertisements and authorised the television broadcast of the advertisements.

[295] The following were the times and dates the video and advertisements were authorised and played:

28 June 2014 Conference video played at the National Party conference.

5 August 2014 Ms Worthington on behalf of Stan 3 emailed Sale Street Studios, setting out the following uses to which the *Eminem Esque* track was to be put:

- (a) synchronising with the video shown at the National Party conference;
- (b) the broadcasting opening address and closing address;
- (c) 30 second television advertisements;
- (d) 15 second cut-down advertisements;
- (e) radio advertisements; and
- (f) various other cuts of footage to go online.

The requested advertisements had the track *Eminem Esque* synchronised to them and copies were provided to T-Cab and the broadcasters so they could be aired.

20 August 2014 National Party advertisement with *Eminem Esque* synchronised to it was uploaded to YouTube and the National Party's Facebook page and was viewed by members of the public.

The 15 minute long opening broadcast was also uploaded to YouTube and social media.

20 August–30 August 2014 National Party advertisements with the *Eminem Esque* track were played at least 186 times on New Zealand television.

23 August 2014 The 15 minute opening broadcast was aired on TV1.

[296] Between 26 and 27 August, after Eight Mile Style's United States attorneys had written to the National Party, the National Party decided to replace the *Eminem Esque* track on its advertisements with alternative music.

Analysis

[297] On the issue of whether any restricted acts have taken place, I find that the National Party infringed the copyright in *Lose Yourself* by:

- (a) communicating a copy, or a reproduction of a substantial part, of *Lose Yourself* to the public without licence;
- (b) authorising the copying of *Lose Yourself* by authorising the synchronisation of *Eminem Esque* with the National Party election campaign advertisements; and
- (c) authorising the use and/or deploying of the relevant advertisements, the opening conference video and broadcast.

[298] Eight Mile Style also pleaded that *Eminem Esque* was an adaptation of *Lose Yourself*. The authorities consider adaptation to be the act of producing a different

version of the work, not just copying or reproducing a substantial part.¹⁴² For musical works, this includes adapting the musical work for a different instrument or an arrangement of a piano work for a full orchestra. In *Mitre 10 (New Zealand) Ltd v Benchmark Building Supplies Ltd*, the Court of Appeal, referring to previous authorities, said that making an adaptation of a work involves producing a different version of the work incorporating the same product, but expressing it in a manner which cannot be characterised as copying or reproduction.¹⁴³

[299] In this case, *Eminem Esque* copies and/or reproduces a substantial part of *Lose Yourself*. It is not an adaptation of *Lose Yourself* as they are still in the same musical form. There has been no adaptation for use from one medium to another.

¹⁴² See, for example, how adaptation is considered in *EMI*, above n 46, at [46]; and *D'Almaine*, above n 43, at 123.

¹⁴³ *Mitre 10 (New Zealand) Ltd v Benchmark Building Supplies Ltd* [2004] 1 NZLR 26 (CA) at [38]–[40].

Conclusion 3.1

[300] The findings are:

- (a) the National Party has carried out the following restricted acts which amount to copyright infringement:
 - (i) communicating a copy, or a reproduction of a substantial part, of *Lose Yourself* to the public without licence;
 - (ii) authorising the copying of *Lose Yourself* by authorising the synchronisation of *Eminem Esque* with the National Party election campaign advertisements; and
 - (iii) authorising the use and/or deployment of the relevant advertisements, the conference video and opening broadcast.
- (b) *Eminem Esque* is not an adaptation of *Lose Yourself*, as there has been no adaptation for use from one medium to another.

Positive defence of innocent infringement

[301] Although the National Party pleaded the positive defence of innocent infringement under s 121(1) of the Act, at the close of trial the National Party did not pursue or rely on that defence.

FOURTH ISSUE: WHAT RELIEF, IF ANY, SHOULD BE AWARDED?

4.1 If the National Party has infringed copyright, are Eight Mile Style entitled to relief and if so, what are the damages?

[302] Eight Mile Style seek damages of two kinds:

- (1) substantial compensatory damages for the National Party's infringements, to be assessed under the user principle; and
- (2) additional damages under s 121(2) of the Act, because the National Party acted in flagrant disregard of Eight Mile Style's rights.

[303] Eight Mile Style also seek interest on these damages.

[304] Having found copyright infringement occurred, both parties agreed that damages should be assessed on the basis of the user principle, namely the license fee that *would have* been negotiated between a willing licensor and a willing licensee.

[305] In this case, the National Party paid a licence fee in respect of the synchronisation licence of *Eminem Esque* to its advertisement. If, despite the licensing fee, an infringement is found, the National Party says additional damages should not be awarded because its conduct falls well short of what is required for such an award.

[306] The Act provides for a range of remedies for copyright infringement. Section 120 specifies:

- (1) An infringement of copyright is actionable by the copyright owner.
- (2) In proceedings for infringement of copyright, all such relief by way of damages, injunctions, accounts, or otherwise is available to the plaintiff as is available in respect of the infringement of any other property right.

...

[307] An exclusive licensee has the same rights and remedies for infringement as the copyright owner.¹⁴⁴ This is relevant as Eight Mile Style is the exclusive licensee of *Lose Yourself*.

¹⁴⁴ Copyright Act 1994, s 123(1).

Legal principles of damages

[308] In general, damages for copyright infringement are compensatory in nature and are intended to put the plaintiff in the position he or she would have been in “but for” the infringement of his or her rights. Thus, the focus is on the plaintiff’s loss and not the defendant’s gain.

[309] This was confirmed in the leading New Zealand case on assessing the quantum of compensatory damages for copyright infringement, *Electroquip Ltd v Craigco Ltd (No 2)*.¹⁴⁵ That case assessed the recovery of profits lost on sales of their own products, as a result of the defendant’s infringement. There, Rodney Hansen J stated:¹⁴⁶

The object of damages is to compensate the plaintiffs for their loss. They are entitled to be put in the position they would have been in had the infringements not occurred.

[310] However, the Judge imposed a notional royalty fee for each infringing article, based on what has been referred to as the “user principle”. The rationale for this approach is not to compensate for loss, but to recognise that the infringement invaded the rights of the copyright owner:¹⁴⁷

Although damages for infringement of copyright in New Zealand have previously been determined by reference to the loss suffered, I see no reason to confine an award to the straitjacket of compensatory damages. An award which includes royalties on the additional infringing articles sold will ensure that the plaintiffs are fairly compensated for the use of their property as well as for the losses they have incurred.

[311] In *Napier Tool & Die Ltd v Oraka Technologies Ltd*, the Court of Appeal described the user principle as a “notional licence fee or royalty”, where the copyright owner:¹⁴⁸

... is entitled to receive from the infringers the price that would reasonably have been charged for permission or authorisation to carry out each infringing act. This approach, called the “user principle”, is used when it is not possible to establish a normal royalty fee because the claimant is not in the practice of licensing their property.

¹⁴⁵ *Electroquip Ltd v Craigco Ltd (No 2)* HC Auckland CIV-2006-404-6719, 29 April 2010.

¹⁴⁶ At [4].

¹⁴⁷ At [28]–[29] (footnote omitted). See also *Attorney-General v Blake* [2001] 1 AC 268 (HL).

¹⁴⁸ *Napier Tool & Die v Oraka Technologies Ltd* [2016] NZCA 544, [2017] 2 NZLR 611 at [74].

[312] The user principle has been applied in other jurisdictions, particularly the United Kingdom and Australia. The relevant principles that have emerged in these cases are discussed below.

United Kingdom

[313] The user principle has been used in patent cases in the United Kingdom since the early twentieth century. The cases provide background as to the purpose of the user principle and the type of remedy it is trying to provide.

[314] The principle has its origins in the judgment of Fletcher Moulton LJ in *Meters Ltd v Metropolitan Gas Meters Ltd*.¹⁴⁹ The Court of Appeal of England and Wales considered a patent infringement in relation to improvements in prepayment gas meters. The Court held that as well as recovery for lost profits, a plaintiff could also be granted damages on the basis of a licence fee, by multiplying each infringing article by the sum that would have been paid in order to make the manufacture lawful. In recognising this method of damages, Fletcher Moulton LJ commented:¹⁵⁰

The existence of such a rule shows that the Courts consider that every single one of the infringements was a wrong, and that it is fair – where the facts of the case allow the Court to get at the damages in that way – to allow pecuniary damages in respect of every one of them. I am inclined to think that the Court might in some cases, where there did not exist a quoted figure for a licence, estimate the damages in a way closely analogous to this. **It is the duty of the defendant to respect the monopoly rights of the plaintiff.** The reward to a patentee for his invention is that he shall have the exclusive right to use the invention, and if you want to use it your duty is to obtain his permission ... it would be right for the Court to consider what would have been the price which – although no price was actually quoted – could have reasonably been charged for that permission, and estimate the damage in that way.

[315] In *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd*, the House of Lords assessed damages for patent infringement in relation to synthetic rubber compounds suitable for tyre treads.¹⁵¹ Lord Wilberforce, with whom the majority agreed, reviewed the authorities and identified three main categories of reported patent infringement cases which exemplify the approaches of courts:¹⁵²

¹⁴⁹ *Meters Ltd v Metropolitan Gas Meters Ltd* (1911) 28 RPC 157 (CA).

¹⁵⁰ At 164–165.

¹⁵¹ *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd* [1975] 1 WLR 819 (HL).

¹⁵² At 824–826.

- (a) manufacturers who exploit an invention to make articles or products which they sell at a profit: the effect of infringement will be to divert sales from the patent owner and, therefore, the remedy is the profit that would have been realised by the patent owner if the sales had been made by them;
- (b) patents that are exploited through the granting of licences for royalty payments: if an infringer uses the invention without a licence, the measure of damages to be paid will be the sum the infringer would have paid by way of royalty if they had acted legally; and
- (c) where it is not possible to prove a normal rate of profit, or a normal or established licence royalty (through comparable cases), yet infringement has still occurred.

[316] The third type of case is most applicable to the present case, as there is no normal rate of profit and no established licence royalty. In relation to this third group, Lord Wilberforce provided assistance on the type of evidence, which should be adduced, on relevant royalty practices, for the guidance of the Court. Ultimately, his Lordship cautioned, the relevant analysis is one of judicial estimation of the available indicators. His Lordship said:¹⁵³

In such cases it is for the plaintiff to adduce evidence which will guide the court. This evidence may consist of the practice, as regards royalty, in the relevant trade or in analogous trades; perhaps of expert opinion expressed in publications or in the witness box; possibly of the profitability of the invention; and of any other factor on which the judge can decide the measure of loss. **Since evidence of this kind is in its nature general and also probably hypothetical, it is unlikely to be of relevance, or if relevant of weight ... But there is no rule of law which prevents the court, even when it has evidence of licensing practice, from taking these more general considerations into account. The ultimate process is one of judicial estimation of the available indications.**

[317] His Lordship identified relevant factors to be taken into account by a judge assessing damages in this situation:¹⁵⁴

- (a) any licences actually granted;

¹⁵³ At 826 (emphasis added).

¹⁵⁴ At 827.

- (b) the rates of royalty fixed by them;
- (c) estimates of their **relevance** and **comparability**, to apply them so far as one can to the bargain hypothetically made between the patentee and the infringer; and
- (d) where a figure is not provided on which the damage can be measured, to consider any other evidence, according to its relevance and weight, upon which a judge can fix a rate of royalty which would have been agreed.

[318] Lump sum settlement agreements with other companies who had infringed the patent and paid money sums to prevent litigation with the owner are to be approached with caution. The figures paid in settlement agreements were recognised by the Court as distinct from valid patent agreements fixing a royalty rate.¹⁵⁵ Settlement agreements could not be used to fix the measure of damages.¹⁵⁶

[319] His Lordship also discussed whether the bargaining positions of the parties and their willingness to licence could be taken into account when assessing damages:¹⁵⁷

The “willing licensor” and “willing licensee” to which reference is often made ... is always the actual licensor and the actual licensee who, one assumes, are each willing to negotiate with the other – they bargain as they are, with their strengths and weaknesses, in the market as it exists. It is one thing (and legitimate) to say of a particular bargain that it was not comparable or made in comparable circumstances with the bargain which the court is endeavouring to assume, so as, for example, to reject as comparable a bargain made in settlement of litigation. It is quite another thing to reject matters (other than any doubt as to the validity of the patent itself) of which either side, or both sides, would necessarily and relevantly take account when seeking agreement.

[320] More recently, the High Court of England and Wales applied the user principle in a copyright infringement claim for a musical work. In *Ludlow Music Inc v Williams*, the claimant owned the copyright in lyrics from the song *I am the way (New York Town)* by Loudon Wainwright III that were infringed by the artist Robbie Williams in

¹⁵⁵ At 831.

¹⁵⁶ At 832.

¹⁵⁷ At 833 (emphasis added).

the lyrics of his song *Jesus in a Camper Van*.¹⁵⁸ The issue was what quantum of damages should be awarded for a derivative musical work, that is, a work which is itself entitled to copyright but which infringes another.¹⁵⁹

[321] As there was no going rate for the original work, Pumfrey J determined that the case would be decided on relevant evidence of the type of rates that appear in other similar transactions and the approach which is taken to the negotiation of such agreements.¹⁶⁰ Importantly, the Judge held that the **degree of borrowing** from the original work was material to the royalty rate to be charged and that while a substantial part of the original work was borrowed, the message of both works was different.¹⁶¹ The Judge assessed damages for infringement as a percentage of the royalty share.

[322] Pumfrey J further stated that “precision is not attainable” and one should err on the side of generosity to the claimant.¹⁶² However, five months later, without referring to this proposition in *Ludlow Music*, the Court of Appeal of England and Wales decided the reverse proposition, that one should err on the side of under-compensation.¹⁶³

[323] In *Blayney v Clogau St David’s Gold Mines Ltd*, the Court of Appeal of England and Wales applied the notional royalty approach to award damages for infringement of copyright in a jewellery design. The Court applied the above patent infringement cases to copyright infringement, confirming that the same rules applied in this context.¹⁶⁴ The Court outlined that damages are recoverable for all copyright infringements, whether the infringement has resulted in lost sales or not, and noted:¹⁶⁵

The fact that the claimant may not be able to prove the application of one measure of damages, namely lost sales, does not mean that he has suffered no damage at all, rather some other measure by which to assess the compensation for that interference must be sought.

¹⁵⁸ *Ludlow Music Inc v Williams* [2002] EWHC 638 (Ch).

¹⁵⁹ At [39].

¹⁶⁰ At [48].

¹⁶¹ At [51].

¹⁶² At [48].

¹⁶³ *Blayney v Clogau St David’s Gold Mines Ltd* [2002] EWCA Civ 1007, [2003] FSR 19 (CA).

¹⁶⁴ At [13]–[20].

¹⁶⁵ At [20].

[324] The Court also found that it would be a denial of justice to refuse any compensation at all simply because there was no evidence as to what the notional royalty rate should be.¹⁶⁶ The Court should assess compensation by reference to a notional royalty rate payable under a notional licence agreement. Yet, in the absence of evidence enabling it to make a precise calculation, a court should err on the side of under-compensation.¹⁶⁷

[325] *Blayney* was decided by the Court of Appeal, as noted above, five months after *Ludlow Music* was decided in the High Court and the latter was not considered by the Court of Appeal.¹⁶⁸ Both cases concerned a notional royalty rate payable under a notional licence agreement and in *Ludlow Music*, the case was decided on the type of rates that appear in other similar agreements and the approach which is taken to the negotiation of them. *Blayney*, however, is the authoritative English approach to the application of the user principle in damages on this point.

[326] More recently, the High Court of England and Wales has considered the applicability of the user principle in two relevant intellectual property cases. The first, *Force India Formula One Team Ltd v 1 Malaysia Racing Team SDN BHD*, concerned Malaysia's misuse of confidential information and copyright infringement in relation to the design of a half-size wind tunnel model of a Formula One race car.¹⁶⁹ Arnold J confirmed that the invasion of a proprietary right may not cause the owner financial loss, but that damages could still be claimed in accordance with the user principle.¹⁷⁰ The Judge applied the principles established in *General Tire* and *Blake* in the context of damages for breach of a contractual obligation of confidentiality.¹⁷¹ The Judge outlined the relevant principles to take into account when assessing damages under the user principle:¹⁷²

- (a) the overriding principle is that the damages are compensatory;

¹⁶⁶ At [32].

¹⁶⁷ At [33]–[34] and [55].

¹⁶⁸ See [322] of this judgment.

¹⁶⁹ *Force India Formula One Team Ltd v 1 Malaysia Racing Team SDN BHD* [2012] EWHC 616, [2012] RPC 757 (Ch). On appeal, the Court of Appeal did not dissent from Arnold J's analysis. See *Force India Formula One Team Ltd v Aerolab SRL* [2013] EWCA Civ 780, [2013] RPC 947.

¹⁷⁰ At [375].

¹⁷¹ At [379]–[386]; *General Tire*, above n 151; and *Blake*, above n 147.

¹⁷² *Force India*, above n 169, at [386].

- (b) the primary basis for assessing damages is to consider what sum would have been arrived at in negotiations between the parties, had each been making reasonable use of their respective bargaining positions, bearing in mind the information available and the commercial context at the time negotiation should have taken place;
- (c) the fact that one or both parties would not in practice have agreed to make a deal is irrelevant;
- (d) the assessment is to be made as at the date of the breach;
- (e) where there has not been an actual negotiation between the parties, it is reasonable to look at the eventual outcome and consider whether or not that is a useful guide to what the parties would have thought at the time of their hypothetical bargain; and
- (f) the court can take into account other relevant factors, and any delay on the part of the claimant in asserting its rights.

[327] Arnold J determined that, in this case, a willing licensor and licensee acting reasonably would have negotiated a licence fee of €25,000. The Judge identified that this was at the top end of the range calculated by the defendant's expert witness and reflected that a modest premium would have been negotiated to reflect the fact that the plaintiff would not want to assist a potential new competitor in the market.

[328] In the second case, *32Red Plc v WHG (International) Ltd*, Newey J assessed damages for trade mark infringement of the brand "32Red".¹⁷³ Damages were calculated in accordance with the user principle and the Judge endorsed the aforementioned authorities.¹⁷⁴ For the purpose of assessing damages, the parties are presumed to act reasonably and be willing to make a deal, even if one or both of them would not in reality have been prepared to do so.¹⁷⁵ The Judge also concluded that the Court could take into account any alternative course of action that was available to the parties at the time of the hypothetical negotiation.¹⁷⁶

¹⁷³ *32Red Plc v WHG (International) Ltd* [2013] EWHC 815, [2013] CN 544 (Ch).

¹⁷⁴ At [23]–[25].

¹⁷⁵ At [29].

¹⁷⁶ At [42].

[329] Newey J held that the “hypothetical licence should, so far as possible, be assumed to accord with the reality.”¹⁷⁷ While the hypothetical licence could be determined by reference to comparable licences granted, Newey J demonstrated caution when examining these to ensure that evidence of comparable licences was relevant and similar so that meaningful comparisons were made.¹⁷⁸

[330] In awarding damages under the user principle for £150,000, the Judge took into account the following factors:¹⁷⁹

- (a) the subject matter of the hypothetical licence will be what the infringer actually used;
- (b) the hypothetical licence must reflect what was done and must be for the period of infringement;
- (c) the exclusivity of the licence and the exclusive practice of the trade mark owner; and
- (d) the hypothetical licence will reflect the terms and conditions in fact used, therefore, the royalty might be more expensive to compensate for the greater risk to the licensor in licensing without quality control provisions commonly found in actual licences.

Australia

[331] In *Winnebago Industries Inc v Knott Investments Pty Ltd (No 4)* the Federal Court of Australia recently addressed the user principle and its origins in detail, in the context of damages for a trade mark claim.¹⁸⁰ Yates J highlighted the purpose of this type of damages by saying of the user principle, that:¹⁸¹

... a plaintiff is entitled to recover, by way of damages, a reasonable sum from a defendant who has wrongfully used the plaintiff’s property.

¹⁷⁷ At [54].

¹⁷⁸ At [64], [68], [72] and [82]–[83].

¹⁷⁹ At [49]–[58].

¹⁸⁰ *Winnebago Industries Inc v Knott Investments Pty Ltd (No 4)* [2015] FCA 1327.

¹⁸¹ At [13].

[332] His Honour cautioned that the plaintiff may not have suffered actual loss from the use, and the wrongdoer may not have derived actual benefit. Nevertheless, under the principle:¹⁸²

the defendant is obliged to pay a reasonable sum for the wrongful use. The reasonable sum is sometimes described as a reasonable ... licence fee or royalty (amongst other expressions), depending on the property involved and the nature of the wrongful use.

[333] The Judge observed that damages under the user principle have a restitutionary aspect to them, in the sense that they can be seen to reverse the “use value” of the property in question, as well as a compensatory nature and endorsed the principles in the United Kingdom cases.¹⁸³

[334] The user principle had been previously endorsed by the Federal Court of Australia in the case of *Larrikin Music*.¹⁸⁴ Damages were assessed by Jacobson J in accordance with the user principle and he awarded five per cent of the APRA/AMCOS licence income to *Larrikin* during the relevant period of the *Down Under* use.¹⁸⁵

[335] Relevantly, in that case, Jacobsen J held that the following factors informed the hypothetical bargain and its outcome:¹⁸⁶

- (a) the musical significance of the bars of the original work *Kookaburra* that were reproduced played an important and essential function in the flute riff of the infringing work, but not in the song as a whole;
- (b) the thematic significance of the works and their link with Australian culture, although the two bars only had a low significance to the theme of the infringing work;
- (c) comparable arrangements negotiated in the music industry for the sampling of works, where a part of a copyright work is “sampled” in a later work; and

¹⁸² At [13].

¹⁸³ At [14].

¹⁸⁴ *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd (No 2)* [2010] FCA 698, [2010] 188 FCR 321. Jacobson J’s decision as to damages was not disturbed on appeal to a full court of the Federal Court of Australia in *EMI*, above n 46.

¹⁸⁵ At [222].

¹⁸⁶ At [10]–[22].

- (d) the time at which the bargain was taken to have been reached, when the first misleading representations were made and Men at Work, the artists of the infringing song, was a relatively unknown band.

Summary of user principle factors

[336] From the relevant New Zealand and international authorities, the following nine principles have emerged in relation to the user principle.

The hypothetical bargain

[337] Where the copyright owner cannot establish lost profit or a normal royalty fee, damages are assessed under the user principle. This principle proceeds on the basis of a **hypothetical bargain** where damages are assessed on the basis of what would have reasonably been charged at the time of infringement had the defendant acted lawfully and obtained permission.

Compensatory and restitutionary damages

[338] The user principle is not strictly compensatory in nature as it is not remedying the plaintiff's financial loss. Rather, the user principle recognises the infringement that has invaded the monopoly a plaintiff has on their intellectual property rights and the defendant's gain in this infringement. It is therefore **both compensatory and restitutionary in nature**.

Willing parties

[339] The exercise of determining the hypothetical bargain assumes that the parties are a **willing licensor and licensee**, with their respective strengths and weaknesses within the commercial context that existed at the time. It is irrelevant in assessing quantum that the parties would not have in fact agreed to make a deal.

Extent of copying

[340] The subject matter of the hypothetical licence will be what the defendant actually used, including the **extent of copying** and its relationship with the copyrighted work.

Lack of quality control

[341] The bargain can take into account that the licensor did not have the opportunity to include terms related to **quality control**, if those are commonly included provisions.

Evidence is a guide only

[342] It is for the plaintiff to adduce evidence which will guide the Court on a **reasonable** charge or licence. That evidence may include the practice in the relevant trade, expert opinion, the profitability of the invention, licence competition in the market, the exclusivity of the licence of practice of the plaintiff, and any other factor which assists the Judge. However, **evidence is a guide only** and the ultimate process in determining quantum is one of judicial estimation.

Caution with comparable licences

[343] Comparable licences and the rates of royalty can assist in the assessment of quantum. However, **comparable licences must be approached with caution** and be relevant to the hypothetical bargain in question.

Settlement agreements are irrelevant

[344] **Settlement agreements are irrelevant** when making comparisons, as they are designed to prevent litigation rather than fixing a royalty rate.

Level of compensation

[345] The English and Welsh authorities show a divergence of views between erring on the side of generosity to the claimant (*Ludlow Music*),¹⁸⁷ or erring on the side of under-compensation (*Blayney*), the latter of which is the authoritative approach in England and Wales.¹⁸⁸

[346] Having considered the user principle factors, I am of the view that the focus on under or over-compensation in the authorities from England and Wales is unhelpful.

¹⁸⁷ *Ludlow*, above n 158.

¹⁸⁸ *Blayney*, above n 163.

If the factors are applied to an assessment of a hypothetical licence fee, the determination should be based on the application of these principles, not on whether the court should favour under or over-compensation to a claimant. I do not propose to factor in those concepts, because such an assessment is vague and uncertain. The focus must be on striking a reasonable fee for the hypothetical licence. That must be based on the relevant factors employed in a hypothetical licence fee negotiation, without subjectively favouring either side.

[347] In terms of calculating appropriate compensatory damages, damages are usually assessed as at the date of the wrong, when the damage was caused or the property was interfered with.¹⁸⁹ Inflation and delay in payment must be adjusted for, usually in the form of interest.¹⁹⁰

Relevant fact chronology

[348] The sequence of events leading to the making and release of the National Party advertisements is relevant in the consideration of the relief sought by Eight Mile Style. In summary form, the sequence of events are:

Late February 2014	Mr Jameson of Stan 3 Ltd prepared animatics that were synchronised with two musical tracks: the classical track and the modern track (<i>Eminem Esque</i>), provided by Sale Street Studios Ltd.
March 2014	The animatics were tested by the focus group for the National Party campaign committee. The group showed a preference for the modern track, being the animatic with <i>Eminem Esque</i> synchronised to it.
March 2014–late May 2014	The National Party election advertisements were produced by Stan 3 and its sub-contractors.
Late May 2014	Mr Jameson showed the proposed election advertisement to Ms de Joux, campaign manager for the National Party. The proposed election advertisement used <i>Eminem Esque</i> and a staff member of the National Party heard the track and said it sounded like Eminem. He also said Eminem is perceived to be into hate speech. Mr Jameson advised Ms de Joux that the music was production music named something like <i>Eminem Esque</i> .

¹⁸⁹ Peter Blanchard *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) at [2.9.1].

¹⁹⁰ At [2.9.3].

- 27 May 2014** Ms Worthington of Stan 3 emailed Mr Foster of Sale Street Studios asking him for a copy of the *Eminem Esque* track and forwarded the file to Ms de Joux.
- Ms de Joux asked for full details of the musical track, which were supplied by Stan 3. She was concerned about the National Party being associated with Eminem and copyright issues so asked Stan 3 to locate other music for consideration.
- Late May 2014** Mr Jameson was instructed to find alternative music choices and he contacted Mr Foster to do so.
- 2 June 2014** Mr Foster provided alternative tracks by WeTransfer.
- 3 June 2014** Mr Foster emailed Extreme Music indicating they had wanted to use Eminem's *Lose Yourself* because it was something harder and more edgy. Mr Foster provided an alternative track to Mr Jameson.
- 13 June 2014** The National Party campaign committee listened to several music options and decided that the advertisement with *Eminem Esque* synchronised to it was the best option because the track clearly fitted best with the visuals of the advertisement, particularly the rowing strokes. However, the committee wanted detailed reassurance that the National Party could safely use *Eminem Esque*.
- 13–18 June 2014** Stan 3 was asked to obtain reassurances that *Eminem Esque* could be used in the National Party's advertisement. Stan 3 obtained reassurance from:
- (a) Mr Collins, a freelance experienced television advertising producer;
 - (b) Mr Foster at Sale Street Studios;
 - (c) Mr Mackenzie of Beatbox Music;
 - (d) Mr Chunn, former head of APRA; and
 - (e) Ms Benoit at APRA/AMCOS.
- 18 June 2014** Stan 3 reassured the National Party that *Eminem Esque* could be used. A written assurance from Mr Mackenzie of Beatbox Music was obtained, stating that the "agreement we have with the publisher gives us assurance that the music does not infringe on copyright and is free to be used for production purposes."
- 18–23 June 2014** The National Party confirmed that it would proceed to use the *Eminem Esque* track, as the use of *Eminem Esque* in its campaign advertisements and other materials had been cleared "by the Party or members of its Campaign Committee."

23 June–5 August 2014 Stan 3 confirmed to Mr Foster of Sale Street Studios that *Eminem Esque* was to be synchronised with the National Party election materials, including the opening broadcast, a video that was to be shown at the National Party’s conference and television advertisements.

Evidence on licensing fees

[349] The parties called four experts, who gave evidence as to the range of licence fees to use music in advertising in New Zealand, Australia and worldwide. In addition, Eight Mile Style called Mr Martin, the person who is responsible for the approval of the use of *Lose Yourself* in any production advertising.

[350] In this section I am going to:

- (a) canvass the evidence of Mr Martin on licensing agreements by Eight Mile Style for *Lose Yourself*;
- (b) canvass the four experts’ evidence on negotiating licence fees for the use of music in advertising and film; and
- (c) apply the user principle factors to the assessment of a hypothetical licence fee for the use of *Lose Yourself*.

Licensing of Lose Yourself

[351] Mr Martin gave evidence of the few licence agreements for the use of *Lose Yourself*. Mr Martin emphasised that Eight Mile Style and the composers value *Lose Yourself* very highly, because it is the most valuable work in Eminem’s catalogue. He described *Lose Yourself* as being synonymous with Eminem and his “story”. It epitomises “victory”, which is why it is a sought-after song. To maintain its high commercial value and its integrity, Eight Mile Style are very cautious in any licensing activities.

[352] After detailing the successes of *Lose Yourself* and Eminem’s Award as Artist of the Decade by *Billboard Magazine* in 2009, Mr Martin emphasised that Eight Mile Style have rarely granted permission to use *Lose Yourself* in advertising. He explained that they are extremely selective and deliberate in the way that they have licensed *Lose Yourself* and gave the reasons for the plaintiffs being selective and deliberate when

considering whether or not to licence *Lose Yourself*. Those reasons were that *Lose Yourself* is an iconic song, performed by an iconic artist. Selective and infrequent licensing of iconic songs enhances the value that can be demanded for their use.

[353] Since the release of *Lose Yourself* in 2002, Eight Mile Style has licensed it for use only three times voluntarily and once as part of a settlement for copyright infringement.

[354] The first licence was for a Chrysler advertising campaign, which Eight Mile Style believed was consistent with the messaging of *Lose Yourself*, and would not damage its reputation or commercial value. It was something that they wanted to support. Mr Martin describes how he and Eminem were particularly drawn to the Chrysler campaign, which was run under the slogan “Imported from Detroit”, because it would show the viewer the real city of Detroit, where Eminem grew up. In addition, Eight Mile Style wanted to publicly support Chrysler, which would in turn support the city of Detroit, as Chrysler was and still is a major employer in that city.

[355] Eminem specifically agreed to appear in the Chrysler advertisement. The overall concept of the advertisement focused on Detroit, rather than a particular car within Chrysler’s range, which “sat well with *Lose Yourself*”. In addition, Eight Mile Style had a right of approval over the final edit. They insisted on creating a new recording of the music of *Lose Yourself*, because they wanted to ensure that the music was synchronised appropriately with the images. The advertisement, which was played during the hearing, showed how *Lose Yourself* had been changed, to fit in with the closing scenes of a gospel choir.

[356] The licence fees Chrysler paid are confidential but were substantial.

[357] The second licence to use *Lose Yourself* was granted in respect of a Castle Lager promotion in South Africa. The promotion was to provide Castle Lager sponsorship of a soccer development programme, to encourage South African football stars of the future, by setting up an academy to mentor and train young men to hopefully play for the South African national team. Eminem, the other composers and Mr Martin considered that there was a synergy between *Lose Yourself* and the

resilience and determination needed for young men to get into the programme and ultimately the national soccer team.

[358] Mr Martin told the Court that had this been an advertisement for beer only, they would not have licensed *Lose Yourself*. It was a collective desire to support the cause, along with the “creative fit” between the music and the programme that led them to agree to the licence. Again, they retained complete creative control, as a new recording was created for the advertisement and Eight Mile Style had right of approval over the final edit. Mr Martin emphasised that the concept behind the promotion was consistent with the messaging of the song and would not damage the song’s reputation or commercial value. It was also something they wanted to support.

[359] Because Eight Mile Style loved the concept of the soccer academy and of supporting the Bafana Bafana team in South Africa, they reduced the licensing fee to reflect the fact that they felt a moral alignment with the aim of the promotion.

[360] The third licence was for the use of *Lose Yourself* in the *8 Mile* film. This was part of a wider commercial arrangement, which involved Eminem starring in the film. There was a close personal connection between Eminem and the film. The trailer synchronisation licence with Universal Pictures was not considered to be indicative of the value of *Lose Yourself*, given that the use of *Lose Yourself* was to advertise the motion picture.

[361] The fourth licence occurred as part of a settlement of copyright infringement by a company, which had unlawfully used *Lose Yourself* in its advertising. An initial request by that company had been rejected by Eight Mile Style and as part of a wider settlement, a reduced licence fee was negotiated. However, the reduced fee did not reflect the true value of the settlement for the use of *Lose Yourself* as there were substantial commercial benefits to Eight Mile Style secured as part of the settlement.

[362] Mr Martin then detailed the requests for the use of *Lose Yourself* that had been declined. On one particular occasion, despite being offered a significant sum for the use of the musical work of *Lose Yourself* and an even more significant sum for the use of the music and vocals of *Lose Yourself*, by a large corporate for advertising purposes,

this was declined. Mr Martin, the composers, and Eminem in particular felt that the proposed advertisement, when it was shown to them, did not tell any story that aligned with their interests or with the focus of *Lose Yourself*. It focused on a product which had no synergy with the ideology of *Lose Yourself*. Notwithstanding the significant sums offered, Eight Mile Style declined to licence *Lose Yourself* for that purpose.

[363] Over the years, Mr Martin described being approached on numerous occasions for permission to use *Lose Yourself* in advertising. Eight Mile Style had also been approached by a presidential candidate in the United States to use *Lose Yourself* as part of his political campaign. On each occasion, the request was turned down. Mr Martin explained the reason for not licensing *Lose Yourself* for any political advertising. Political advertising falls in a special category of its own, because political advertisements often contain divisive messages or ideological messaging that have the potential to alienate future licensees. There is the additional risk of a perception that the artists are endorsing the political party.

[364] In the event that Eight Mile Style had licensed *Lose Yourself* for this political campaign, Mr Martin said a significant premium would have been justified for the licence, because the messages of the relevant political advertisements were not ones with which the creators of the work would have wanted to be associated. In his view, the importance of political advertising itself justifies a significant premium. Mr Martin described the reason for declining the use of *Lose Yourself* for the United States presidential campaign was because “we did not consider it to be an acceptable use”.

[365] Mr Martin is the person responsible on behalf of Eight Mile Style for retaining the control of the use of *Lose Yourself* and its approval for licensing. He explained that licence fees for synchronisation with advertising are almost always significantly higher than those charged for synchronisation with other uses such as background music in a television show. The difference is that music as incidental background to the dialogue and drama of a television song may be used very briefly and constitutes a minor part of a 30 minute, 60 minute or two hour television show and/or theatrical motion picture. However, advertisements generally involve “spots which are themselves no more than 30 seconds long”, where the music is featured much more

prominently and there is a direct association with a product, service or ideology and the implied endorsement. His view was that such advertising synchronisation warrants licence fees of a much higher order.

[366] Mr Martin detailed the factors he takes into account in considering whether to approve the grant of a synchronisation licence.¹⁹¹ Those factors included the message that the licensee is seeking to convey and whether it is consistent with the music and lyrics of the song sought; the control Eight Mile Style would have over the production, quality and message of the advertisement; the risk of a synchronisation licence affecting future licensing activities or sending an adverse message about the endorsement by or direct association with Eight Mile Style; and the proposed end use of the licence.

[367] Mr Martin emphasised that before Eight Mile Style agrees to grant any licence to use *Lose Yourself*, it assures itself that there is a right creative fit between the advertisement and *Lose Yourself*. He was adamant that neither the 30 second or 15 minute National Party advertisements would have been approved by Eight Mile Style.

¹⁹¹ The full list of factors considered by Mr Martin is:

- (a) the message that the prospective licensee is seeking to convey, and whether it is consistent with the music and lyrics and the likely views of the writers;
- (b) the quality and integrity of the particular product, service or production;
- (c) the identity, reputation and financial condition of the prospective licensee;
- (d) the media on which the copyright work is to be used – such as television, film, radio and/or the internet;
- (e) how long the work is to be used for;
- (f) the extent to which, if a synchronisation licence were to be granted, that might affect future licensing activities;
- (g) the control Eight Mile Style will have over the production, quality and message of the advertisement;
- (h) the importance of the music to the advertisement or purpose (including the role that the music or writers'/performers' reputation plays in supplementing the advertising);
- (i) the prominence and duration of the proposed use within the audio/visual production;
- (j) whether it would or might risk setting a bad precedent for other requests of a similar nature in the future;
- (k) whether the proposed use reflects or might imply a direct association with or endorsement by the relevant artist or artists; and
- (l) the relative importance the prospective user attaches to the selection of the particular song, so much so that they would likely pay a premium for the particular song.

[368] He considered that the 30 second advertisement was bland and perfunctory, it was not inspiring, and employs scare tactics to persuade voters to stick with what they know, rather than take a chance on another party. In his view, the advertisement messaging did not fit creatively with the message of *Lose Yourself*, which exudes the concepts of backing yourself and resilience. *Eminem Esque*, in his view, was a weak and bland copy of *Lose Yourself* and Eight Mile Style would not have licensed such a re-recording of *Lose Yourself*.

[369] In relation to the 15 minute National Party campaign advertisement video, also featuring *Eminem Esque*, he observed that *Eminem Esque* is played “ad nauseam” through the video and Eight Mile Style would never have licensed an advertisement to play *Lose Yourself* on repeat for such a long period.

[370] For the above reasons, Mr Martin said the licence fee for use by the National Party, assuming that it would have been granted, would be a figure representing the “absolute minimum license fee for *Lose Yourself* anywhere in the world for this type of use” and gave a range of fees for potential negotiation. For larger markets, such as the United States, the minimum fee would be considerably higher.

Licensing experts’ evidence

[371] Eight Mile Style called two expert witnesses, Ms Zamoyska and Mr Donlevy. Ms Zamoyska is an international, independent music consultant, with an extensive background in music entertainment, film, television and advertising since 1987.¹⁹² Mr Donlevy has had over 30 years of music licensing experience in Australia, New Zealand, and South-East Asia.¹⁹³

¹⁹² Ms Zamoyska has held various roles within MCA Music Entertainment Group, Polygram Music (both now part of Universal Music) and Universal Music, including as Head of Film, Television and Media for 16 years. In this role Ms Zamoyska was responsible for large licensing negotiations for international artists and overseeing global commercial licensing for all writers, artists and catalogues signed to Universal Music in the United Kingdom. She now has her own business as an independent music consultant for use of music in advertising, film, television and media.

¹⁹³ Mr Donlevy has held numerous roles with Peermusic Pty Ltd, including General Manager, Managing Director and Regional Director (Australia, New Zealand and South-East Asia). For 14 years he was a director of AMCOS and has had involvement in a number of other music related companies, now holding the position of Managing Director of Cooking Vinyl Publishing Australia Pty Ltd.

[372] The third parties, AMCOS New Zealand and AMCOS also called two experts: Mr Gough and Ms Hellriegel. AMCOS took no position on the infringement claims by Eight Mile Style, because AMCOS is a not-for-profit collecting society for arrangements reached in respect of licensing agreements. AMCOS issued the licence to use Mr Cohen's *Eminem Esque* to the National Party.

[373] Mr Gough is a director, founder and chairman of the New Zealand company Native Tongue Music Publishing Ltd and its Australian counterpart. He undertakes negotiation for all synchronisation licences for the companies of local New Zealand and Australian writers, composers and a number of overseas catalogues, through which his company represents a wide variety of international songwriters.¹⁹⁴

[374] Ms Hellriegel is a singer, songwriter, director of Aeroplane Music Services (a music licensing publicity and project management company) and Songbroker (a music publishing company) with 33 years of experience and involvement in the New Zealand music industry.¹⁹⁵

[375] All four licensing experts broadly agreed on the factors that are relevant to the commercial negotiation of a licence to use music in advertising and synchronisation deals. Those factors include:

- (a) the value of the music;
- (b) the purpose for which the music is to be used for and who wants to use it;
- (c) the views/sensibilities of the artists and controllers of the copyright;
- (d) the media in which the advertising would be used;

¹⁹⁴ Mr Gough has had an extensive career in the music industry as a music supervisor and negotiator for publishing and master rights with the major record companies and independent rights holders. He has worked with Mana Music (both the Australian and New Zealand companies), Mana Music Publishing and Native Tongue. Throughout his career, Mr Gough has supervised the music for approximately 90 feature films, 20 television series and a large number of commercials across Australia and New Zealand.

¹⁹⁵ Ms Hellriegel has written, registered and released more than 150 songs and continues to produce music on a regular basis as well as negotiating synchronisation licenses for commercial clients. Ms Hellriegel was also involved in Native Tongue Music Publishing as General Manager. She has also sat on the board of Independent Music New Zealand and been a director of Recorded Music New Zealand, which is an association of recording artists and record labels who own or control the rights to sound recordings of musical works in New Zealand.

- (e) size of the territory;
- (f) the creative control or right of approval over the proposed use;
- (g) the terms and duration of use as well as which part of the music is used (that is, the hook, the chorus or a less prominent part of the music); and
- (h) the territory of use.

[376] All four experts agreed that *Lose Yourself* was an iconic high value legacy artist work, that Eminem is a highly respected artist in New Zealand and that hip hop is a popular genre in New Zealand.

[377] However, the experts were not in agreement about the likely hypothetical licence fee for the use of *Lose Yourself* in the election advertising material for the National Party. The experts gave their ranges of fees for synchronisation licenses of songs for both high value and lesser known artists, in international territories, New Zealand and Australia. The details of those licensing fees are subject to confidential agreements, which are unavailable for publication. Nevertheless, there is a differential between the licence fees negotiated for use in Australia and New Zealand compared to licence fees negotiated for larger territories such as the United States, United Kingdom and/or European countries.

[378] The range of estimates is considered in detail in a confidential appendix, which can be released only to the parties because it contains confidential licence fee information concerning other artists.¹⁹⁶ However, the general basis of the experts' respective approaches to the factors to be applied is considered below and under the factors which I analyse.

Analysis

[379] It is plain from the authorities and the parties' positions that the user principle is the approach to be adopted in determining relief when it is not possible to establish a normal synchronisation licence fee.¹⁹⁷ The threshold has been met for the user principle to apply, because Eight Mile Style would not have licensed *Lose Yourself* for

¹⁹⁶ Appendix II.

¹⁹⁷ See [304]–[345] of this judgment

use in the National Party’s election advertising and the National Party was unlikely to have negotiated a licence with Eight Mile Style.

[380] The Court must therefore assess the hypothetical bargain that would have been reached between a willing Eight Mile Style as licensor and a willing National Party as licensee.

[381] As Pumfrey J stated in *Ludlow Music*,¹⁹⁸ “precision is not attainable” and while evidence of practice in the industry may “guide the Court”, the ultimate process “is one of judicial estimation of the available indications.”¹⁹⁹

[382] On the available indications from the evidence in the present case, the factors which I consider are relevant to a notional licence fee specific to *Lose Yourself* are set out below, under each of the relevant headings, with my assessment of the evidence adduced in relation to them.

Value of Lose Yourself in New Zealand

[383] The experts did not agree on the value of *Lose Yourself* in the New Zealand market. Mr Martin reminded the Court that Eminem had a successful sell out concert in New Zealand in 2014, where the last song he played was *Lose Yourself*. This concert took place, just a few months before the 2014 election campaign advertising in August 2014. Eminem was the headline act for Rapture, New Zealand’s largest outdoor hip-hop concert, which was held in Auckland. In Mr Martin’s view, the National Party wanted to capitalise on the popularity of Eminem and the recency and success of his tour.

[384] Mr Gough and Ms Hellriegel differ in their views from Mr Martin and Eight Mile Style’s experts about the appeal of *Lose Yourself*. They believe advertisers in New Zealand want to appeal to the widest possible audience and consequently will only pay the highest licensing fees for a safe option. *Lose Yourself* does not fit into those categories, in their view.

¹⁹⁸ *Ludlow Music*, above n 158, at [48].

¹⁹⁹ *General Tire*, above n 151, at 826.

[385] Although Mr Gough agreed that *Lose Yourself* was an iconic work, he did not rate it as high value because it did not have the broad appeal to all ages that works with other songs. If priced as a high value work, he said, it would need to be wanted by a comparable high value client, as a brand or service which is aimed at a younger demographic and the client must be prepared to pay the kind of fee such an iconic work would attract.

[386] Ms Hellriegel, in agreeing that Eminem is a highly respected artist in New Zealand and that hip hop is indeed a popular genre in New Zealand, questioned whether a political party, which is considered “centre right”, would have hinged their election campaign on the music of an American hip hop artist, just because he had recently performed in New Zealand. She raised the question as to whether Eminem, as an artist who can be polarising, would have negated any gains that having a well-known legacy song in a political campaign might have had.

[387] Mr Donlevy considered *Lose Yourself* was a very well-known and popular piece of music and he would place *Lose Yourself* in the same category as the most valuable works of certain famous and popular artists.

[388] I am unable to accept the misgivings of Mr Gough or Ms Hellriegel. *Lose Yourself* is highly successful, recognised professionally and commercially as original and iconic. This is demonstrated by its awards and Eminem’s popular following, including his recent tour in New Zealand just prior to the 2014 election. The work was acquired for the National Party’s election advertisements, despite any polarising effect such association with Eminem may have had and despite the other options available to the National Party to choose alternative music. As the National Party submits, the people creating the National Party’s advertisements “wanted the feel of *Lose Yourself*”. They had already settled on the rowing metaphor. Mr Jameson of Stan 3 said they particularly wanted a steady syncopated beat that could accompany the rowing strokes.

[389] In my view, the high licensing value placed on *Lose Yourself* by Eight Mile Style for their “jewel in the crown” justifies a willing licensor to demand a high fee

for its use. The National Party was also a very willing licensee, because they specifically wanted the *Lose Yourself* sound.

Use in a political election campaign

[390] The next significant factor in which there was disagreement among the experts was the proposed use for a national election campaign. There was general agreement that the chances of a major international artist agreeing to their work being used in a local political campaign, anywhere outside their home territory, were very remote. It was much more risky than product or service advertising.

[391] Where the experts differ is the effect on a synchronisation licence fee if the use was for an election campaign. Mr Donlevy and Ms Zamoyska both said that if the artist or copyright controller does not agree with “the message” that their music is to be used for, the artist’s reluctance can generally be overcome by an appropriate uplift to the synchronisation fee. Ms Zamoyska also observed that there is often a very fast social media sharing through Twitter or Facebook with political campaigns and advertising. Ms Hellriegel acknowledged a substantial fee would be justified for a political use, particularly where the artist had no affiliation with the political party and there was no control over the re-record.

[392] Mr Gough confirmed that the chances of a major international artist agreeing to a work being used in a local political campaign outside their home territory were very remote. In his experience, the artist will either refuse completely or if they are willing to agree, their representative will quote a fee based on the value of the work in the territory, the term, the media and the extent of rights to be licensed. Mr Gough then said that whether the relevant client would be willing to pay the sum quoted would depend on their budget and whether it was worth it to the client when compared with its other licensing alternatives.

[393] Where he differed from the other experts is that he did not think that licensing songs for a political campaign would affect the fee. He gave two examples of an artist agreeing to a song being licensed for a political campaign. The first involved the use of an artist’s song in a mayoral campaign, where the artist supported that particular candidate. The second was an approach from a political party who wanted to use one

of the company's artist's songs and because the artist was a party supporter, a nominal fee was agreed for what was an internet campaign. Mr Gough referred to a long history of artists supporting political candidates or parties by making appearances at concerts but artists would have opinions and preferences in relation to political use.

[394] Mr Donlevy considered the key factor in the licence negotiations was the proposed use by the licensee in a national election campaign. He agreed, as Mr Martin had told the Court, that political advertising can be divisive and copyright controllers and artists would generally be reluctant to associate themselves with a political party or candidate. He had examples of several artists complaining publicly about the use of their music during the recent United States presidential election campaign.

[395] None of the experts had experience of negotiating a licence for political use where the artist was not endorsing the political party or the issue.

[396] Mr Martin was adamant that *Lose Yourself* would not be licensed for a political use and gave examples of previous requests which had been declined, including a request from a presidential candidate. On a hypothetical licence, Mr Martin said the fee would be higher. Both Mr Gough and Mr Donlevy agreed that artists would not want their music associated with a political party, because it can be divisive and there would be a reluctance to associate with a particular political party or candidate.

[397] In the context of a hypothetical licence fee I do not find Mr Gough's evidence particularly helpful. I prefer the evidence of Ms Zamoyska, who factored into her assessment of a hypothetical licensing fee, the particular nature of political advertising and the significant risk to the future commercial value of this high value song. I consider the political use to which the song was used significantly increases any minimum licence fee.

Rare use

[398] From the evidence of Mr Martin, which I accept, Eight Mile Style retain control over the licensing of *Lose Yourself*, to preserve the integrity of the work and its use. *Lose Yourself* has been used three times only voluntarily. It was accepted by all experts that the less a work is used, the greater the value it retains. Mr Martin's

evidence that numerous and valuable requests for *Lose Yourself* have been declined, also points to a licensor being able to command a higher fee.

[399] By way of comparison, there was one example given of a song, which was released 32 years previously and had not been licensed, but was licensed for the first time in Australia 15 years ago. The fee commanded was comparatively high at the time because of the rarity of its use.

Degree of reproduction

[400] The degree of copying in *Eminem Esque* from *Lose Yourself* was almost entire. The orchestral introduction of the first 30 seconds is absent as previously described.²⁰⁰ In comparison with *Larrikin*, the entire copying of *Lose Yourself* (absent the first 30 seconds) was highly significant, as the works were strikingly similar and the advertisements contain substantial reproductions of *Lose Yourself*, including the recognisable hooks of the sonic bed and piano figure in *Lose Yourself*.²⁰¹ This adds to the high value of the hypothetical licence.

Duration

[401] Although I have heard expert evidence on duration of licenses, being for six weeks, six months, one year or more, I cannot overlook the intensity of a political election campaign advertisement, which is focused for a prescribed and short period of time. In New Zealand, that period is one month, prior to the election.²⁰² Further, the advertisement was available widely on the internet, without restriction.²⁰³

[402] Within the prescribed statutory time, the National Party's 30 second advertisement was played 186 times on television over a period of 11 days, consistent with obtaining maximum use of advertising and resources pre-election. Further, the

²⁰⁰ See [207] of this judgment.

²⁰¹ *EMI*, above n 46.

²⁰² Broadcasting Act 1989, ss 69 and 70 enables political parties to advertise four weeks from writ day to the close of the day before election day.

²⁰³ Some experts briefly referred to the non-use of Geonet, which is designed to restrict internet access from other than the licensed territory. Its effectiveness however was uncertain and the matter was not pursued by either party.

15 minute advertisement was aired on TV1 as an opening broadcast for the National Party campaign.

[403] The duration of 11 days viewing, on balance, justifies a reduction to the hypothetical licence fee despite the intensity of coverage, both in New Zealand media and on the internet.

New Zealand territory

[404] The size of the territory has been the subject of disagreement amongst the experts.

[405] Both Mr Gough and Ms Hellriegel gave evidence that the smaller the territory, such as licensed use for New Zealand only, the lower the fee. If it is unlikely that a commercial will be seen or have any interest elsewhere than in New Zealand territory, Ms Hellriegel said an artist is usually prepared to negotiate a competitive fee in this country.

[406] Mr Gough explained that the lower fees for Australia and New Zealand relate to the size of the markets. A larger market makes higher fees viable, although New Zealand fees on a per capita basis are high compared with other more populated countries in the same markets. Mr Gough also noted that advertisers in New Zealand and to some extent Australia, who can afford a high value song are few and far between and less likely to take risks than their European or American counterparts.

[407] Ms Zamoyska disagreed. Even though New Zealand is a relatively small market, compared to other markets such as the United States and the United Kingdom, the availability of the advertisement over the internet meant that it would be seen by audiences outside of New Zealand. She considered the “extra-territorial leakage is a risk to the global commercial value of the music”. In her experience, the copyright controllers would have been unlikely to endanger a high value work like *Lose Yourself* in return for a low figure, even if the use had been targeted at New Zealand audiences. She considered it would not have been worthwhile to do so, given the significant potential commercial risks in licensing it.

[408] It is obvious that New Zealand is a small territory, compared to Australia, the United States or United Kingdom. However, the advertisements were not viewed just in New Zealand. They were distributed on the internet for wider viewing. The 30 second advertisement and 15 minute video were uploaded to YouTube and placed on the National Party's Facebook page. On New Zealand television, over a period of 11 days, the 30 second advertisement was shown at least 186 times. Both advertisements had *Eminem Esque* synchronised to them.

[409] With the YouTube and website access, the relevance of New Zealand being a small territory and therefore lower in value, is diminished. While a licence for New Zealand territory only would normally attract a lesser fee, that factor must be balanced with the wide territorial internet access to the advertisements and their purpose. Further, Ms Zamoyska highlighted that an advertisement with synchronised music which is published online can go "viral ... simply because fans of certain performers consume and share anything and everything that relates to that performer."

Willing licensee

[410] As noted above, the National Party campaign committee sought the *Lose Yourself* sound specifically for its syncopated and hypnotic beat, which was an ideal accompaniment to the rowing strokes in the National Party advertisement. The willingness of the National Party to acquire the sound of *Lose Yourself* is a relevant factor in my assessment of a notional licence fee, justifying a higher starting point for the fee.

Quality of product

[411] Eight Mile Style's restrictive approach to licensing *Lose Yourself* reinforces the protection Eight Mile Style placed on the value of *Lose Yourself*. Despite valuable potential advertising fees, Eight Mile Style declined such use because the proposed advertising did not fit with the music or what *Lose Yourself* and Eminem stood for.

[412] The control and exercise of choice accompanies the monopoly that Eight Mile Style holds and is entitled to exercise as a result of its copyright over *Lose Yourself*.

[413] Ms Zamoyska and Mr Donlevy in their evidence considered that the fact the Eight Mile Style artists were given no opportunity to re-record or ensure good quality of the advertisement should be a factor which increases the fee. I accept this evidence in that regard. Eight Mile Style, having retained tight control over the work, have no opportunity to ensure its quality. Indeed, Mr Martin for Eight Mile Style highlighted that *Eminem Esque* “is a weak and bland copy of *Lose Yourself*” which they would not have licensed.

Settlement figures

[414] As the authorities reinforce, any evidence on settlement figures that were reached in respect of copyright infringement are not relevant for the purposes of identifying a notional licence fee where they are not comparable.²⁰⁴ The evidence on settlement agreements therefore do not form part of my assessment.

Target audience

[415] The evidence on the use of *Lose Yourself* reaching a smaller audience as it does not have wider audience appeal has been raised in the context of a notional licence fee. The target audience is irrelevant to the copyright holder. I consider there is a distinction to be drawn between the sound of *Lose Yourself* and whether Eminem had a wide audience appeal. It was the musical work of *Lose Yourself* which made the election advertising so compelling, in my view. The musical work was specifically sought for its arresting sound, to accompany the rowing strokes of the election advertisement.

[416] Despite the caution from its staff member of potential adverse association with Eminem, the National Party sought the sound of *Lose Yourself*. I accept Mr Donlevy’s evidence that whether an advertisement was trying to appeal to a wide or “narrow” audience does not define a licence or the licence fee. Ms Zamoyska also confirmed that the target audience was a consideration for the advertiser, but is not relevant to the copyright owner in relation to a fee. In the context of these National Party

²⁰⁴ *General Tire*, above n 151, at 831–832.

advertisements, the likely target audience for an Eminem hit is not the relevant consideration.

Analysis

[417] Taking into account the above factors, I consider that *Lose Yourself* is a high value work, which has been licensed rarely to preserve and increase its rarity and value. Eight Mile Style has imposed strict creative controls on any licence to maintain the integrity of the work and the personal interests of the authors.

[418] I accept the evidence given by Ms Zamoyska that *Lose Yourself* was a unique track and Eminem was a unique artist and that a substantial starting fee is in the discretion of the copyright holder. I also accept that the copyright controller would be seeking to maximise the licence fee and that it would have been reasonable for the licensor, Eight Mile Style, to seek a considerably higher figure in the circumstances. Of her range of estimates for that fee, Ms Zamoyska started at a minimum baseline for a song of the calibre of *Lose Yourself*, to which she then factored in the following matters:

- (a) the use for political advertising;
- (b) the significant risk to the future commercial value of the song; and
- (c) the lack of creative control and opportunity to re-record, along with the other factors outlined in her evidence.

[419] I found Ms Zamoyska's evidence compelling and of considerable assistance to reaching a reasonable fee because of her direct negotiating experience with international high value musical works and iconic artists. Although Ms Zamoyska accepted she had limited experience negotiating high value songs in New Zealand, she did have some past experience of doing so. I am persuaded by her evidence that, for a song like *Lose Yourself*, her starting point for the licence of *Lose Yourself* was appropriate. Ms Zamoyska's evidence was compatible with the credible and persuasive evidence from Mr Martin about Eight Mile Style's practice and concern to preserve the integrity and value of *Lose Yourself*.

[420] Although Mr Donlevy gave a lower licensing fee, he concluded by saying there can be a significant variation in the fees negotiated for different works and different uses. In relation to *Lose Yourself*, the high profile nature of the work, the political nature of the advertisement and the views of the owner artists are significant variables in trying to determine a licence fee. He said “it would not surprise [him] for a work of this calib[re] if the fees required by the head publisher were significantly higher.”

[421] From the starting point therefore of a high value work, I consider that it is appropriate to apply an uplift to the starting point for a licence fee to reflect the above factors outlined by Ms Zamoyska.

[422] There was no example given of an artist being persuaded to allow their works to be used for a political purpose which they did not either endorse or support. Apart from Mr Gough, the other experts agreed that there would be a higher licence fee. Two of the experts referred to a “heavy reluctance” to grant a licence in this case, justifying a higher fee. The authorities caution that a hypothetical licensor cannot be heard to say that he would have refused to grant a licence at all.²⁰⁵ If one increases the licence fee on the grounds that the licensor would be reluctant to grant a licence, that appears to be reintroducing the element of unwillingness by the back door.²⁰⁶

[423] I consider there is a distinction to be drawn between an increase in the fee because of a licensor’s reluctance, compared to a higher fee for the type of use to which the licence is to be put. Here, the licensor is saying that if *Lose Yourself* were to be licensed for a political campaign, the price must be higher, which is a position that I consider to be reasonable in a hypothetical licence negotiation. It reflects the rare occasions in which the artist would agree to have their work associated with politics and the high fees that need to be paid to have a recognisable song in a political campaign.

[424] The second matter which I consider properly increases a licence fee is the lack of control by the artist to either re-record or oversee the use of their high value songs in an advertisement. The clear example was given by Mr Martin of Eight Mile Style’s

²⁰⁵ 32Red, above n 173, at [29].

²⁰⁶ *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2014] EWHC 3159 (Ch) at [94].

exercise of control over the re-record of *Lose Yourself* for the Chrysler advertisement. The type of control exercised by Eight Mile Style shows what Ms Zamoyska described as ensuring the artistic integrity of the music: that the value of the composition would not be compromised by the use of a low quality recording; the advertisement is produced to a high standard; and the “messaging” in the advertisement is acceptable. This would normally mean a right of final approval over the advertisement. This was of course absent in the National Party advertisement and I accept from Ms Zamoyska’s and Mr Donlevy’s evidence that absence of control justifies a higher fee.

[425] A further factor which I consider relevant to this hypothetical bargain is the willing licensee. The National Party campaign committee approved the use of *Lose Yourself* and, despite the options of other musical works available to them, sought to have the sound of *Lose Yourself* accompany its election advertising and video provided it had no legal impediment. At the time of the hypothetical negotiation, Mr Foster from Sale Street Studios sent an email to Extreme Music on 3 June 2014, saying “They wanted to use Eminem’s *Lose Yourself*.”

[426] Mr Jameson described the “steady beat” of the music, which was the preferred accompaniment to the rowing advertisement. The evidence demonstrates that the National Party was a willing licensee and the wish to procure the *Lose Yourself* sound is a factor that would lead the parties to have agreed on a higher figure for the hypothetical fee.

[427] Against the factors that support a higher fee is the evidence on duration and the territory of use. It is plain that in a larger territory such as the United States, a licensing fee for *Lose Yourself* would be higher. I consider that Mr Martin’s view of a starting point, which is reflected in United States currency, would apply to the use in the United States. Generally, the experts were in agreement that the larger the territory, the higher the fee, but both Mr Donlevy and Ms Zamoyska were of the view that the territory does not matter where a song like *Lose Yourself*, being a high value but rarely used work, is licensed. Further, it is being licensed for an election campaign in a territory unassociated with the artist and is available on the internet through a website and YouTube.

[428] As Ms Zamoyska accepted, the media on which the song will be used, the duration of use and the territory of use are normally relevant factors to the negotiation of the fee. In this case, however, she considered those details would have limited impact because of the availability of the advertisement over the internet. It would be seen by audiences outside of New Zealand and such extra-territorial leakage is a risk to the global commercial value of the music. There is also a fast social media sharing on political campaigns, through Twitter and Facebook for example, and this emphasises the significant potential commercial risks in licensing a high value work like *Lose Yourself* in return for a low figure. I consider the evidence of Eminem's following, the reaction of an artist's fan base and the wide reach of the internet distribution. I accept Ms Zamoyska's evidence on this issue.

[429] The duration or period of use was 11 days, although it was an intensive use. The 30 second National Party advertisement was screened 186 times and in the opening broadcast *Eminem Esque* was played eight times. That is less than the duration of other licence fees adduced in evidence before the Court. The advertisements were also widely available on the internet. The experts agreed that the longer the period of use of a song in an advertisement, the higher the licence fee. However, I acknowledge Ms Zamoyska's evidence that it is not a linear relationship and that most of the value of using a song is in the first short period of use. Although I accept her evidence that territory and duration would have a limited impact on the fee, in my view there must be some discount for the duration in this case.

[430] I have taken into account that Australian and New Zealand licences have included some legacy artists, for licensing in Australia and/or New Zealand but prefer Ms Zamoyska's expert evidence. Although each of the other experts had legacy artists and high value works in their repertoire, Ms Zamoyska considered the factors relevant to Eight Mile Style, Eminem's reputation and works. She acknowledges the significance of *Lose Yourself* as a high value work, its rarity of use, and the fact that Eight Mile Style retains control directly over licensing and any re-recording of the song.

[431] A number of the New Zealand/Australian licences given were not comparable for a number of factors. In some instances, artists were licensing their songs for

products which they endorsed. In others, songs which had been rarely used were licensed some considerable years before. No evidence was adduced that the songs in the instances given were “the jewel in the crown” of an artist’s repertoire (apart from one artist’s song, which was used to advertise products the artists endorsed). Finally, none of the licence fees for New Zealand, Australia or international use had involved a licence for political use.

[432] As the authorities warn, caution should be exercised in looking at other comparable rates or licence fees, because they must be relevant.²⁰⁷ For reasons set out above,²⁰⁸ I do not take into account the evidence on settlement agreements for infringement, as they are different in character and have different considerations to the determination of a hypothetical licence.

[433] Fletcher Moulton LJ in *Meters Ltd* said it “is the duty of the defendant to respect the monopoly rights of the plaintiff” and believed it was right for the Court to consider “what would have been the price which – although no price was actually quoted – could have reasonably been charged for that permission, and estimate the damage in that way.”²⁰⁹ This is consistent with Pumfrey J in *Ludlow Music*, who said the true measure of damages “is either a rate that represents the going rate or a rate that it would be reasonable to demand in all the circumstances.”²¹⁰

[434] In summary, the factors which I consider relevant to this case, therefore are:

- (a) Eight Mile Style have retained exclusive control of licensing, with Mr Martin responsible for negotiating the use of *Lose Yourself*;
- (b) *Lose Yourself* has been rarely licenced: three times willingly and many requests have been denied;
- (c) the purpose for the use was a political use in an unassociated country to Eminem;
- (d) the nature of the use is not what Eminem or Eight Mile Style would endorse;

²⁰⁷ 32 *Red*, above n 173, at [64], [68], [72] and [82]–[83].

²⁰⁸ At [318], [344] and [361] of this judgment.

²⁰⁹ *Meters*, above n 149, at 164–165.

²¹⁰ *Ludlow*, above n 158, at [53].

- (e) the use was political advertising over 11 days and the advertisements were placed on YouTube, the National Party website and Facebook page;
- (f) despite the availability of other music, and the potential association with Eminem, the National Party wanted the sound of *Lose Yourself* or an equivalent;
- (g) if an artist wishes to retain control and rarely entertains licenses, the price for a hypothetical licence fee is higher rather than lower, despite the territory or the duration; and
- (h) the musical significance of copying the musical work was significant.

[435] In my view, balancing all of the factors, I consider that, of the range of potential licence fees adduced in evidence and submitted to the Court, I am guided most by the suggested licence fee proposed by Ms Zamoyska.

[436] I consider that Ms Zamoyska's minimum baseline fee for a high value work such as *Lose Yourself* is appropriate. I also consider her uplift reasonable for the factors she identifies, particularly political use, no opportunity to re-record and loss of control for a high value work.

[437] However, I have discounted this fee for the duration of use in the circumstances. I accept Ms Zamoyska's view that uplifting political advertisements onto websites and YouTube takes the publication beyond the territory of New Zealand and makes the factor of "territory" of limited impact on the fee. The political campaign with all its attendant publicity and high focus, particularly in the lead up to an election, is also relevant to "duration." I have given a discount for the 11 day use nevertheless.

[438] In doing so, I have adjusted Ms Zamoyska's proposed figure, which was given in another currency, by discounting for the short duration of use. It is less than the minimum fee proposed by Mr Martin and more than the fee range suggested by the other experts, although Mr Donlevy considered that a significantly higher figure here would likely be required. There has been no premium given for unwillingness or reluctance by either party.

[439] I find that a reasonable licence fee for the use of *Lose Yourself* by the National Party in its election campaign is NZ\$600,000.

[440] This licence fee is an award of damages against the National Party for copyright infringement. The ultimate liability for damages, however, is to be determined among the third parties, who have been joined to this proceeding. This will be the subject of a further hearing.

[441] The award of NZ\$600,000 is dated from the first copyright breach on 28 June 2014. To that figure, I award three years interest at five per cent to the date of payment, under s 87 of the Judicature Act 1908.²¹¹

Conclusion 4.1

[442] The findings are:

- (a) Eight Mile Style is entitled to damages on a user principle basis in the sum of NZ\$600,000 for copyright infringement; and
- (b) interest is payable at the Judicature Act rate of five per cent from 28 June 2014 to date of payment.

4.2 Are Eight Mile Style entitled to additional damages?

[443] Section 121 of the Act makes provision for additional damages in infringement proceedings and, of relevance, states:

- (1) Where, in proceedings for infringement of copyright, it is proved or admitted that at the time of the infringement the defendant did not know, and had no reason to believe, that copyright existed in the work to which the proceedings relate, the plaintiff is not entitled to damages but, without prejudice to the award of any other remedy, is entitled to an account of profits.
- (2) In proceedings for infringement of copyright, the court may, having regard to all the circumstances and in particular to—

²¹¹ From 1 January 2018, the Interest on Money Claims Act 2016 will enter into force. However, until that time s 87(3) of the Judicature Act 1908 and cl 4 of the Judicature (Prescribed Rate of Interest) Order 2011 continue to apply here. See Interest on Money Claims Act, s 2 and sch 1, cl 1.

- (a) the flagrancy of the infringement; and
- (b) any benefit accruing to the defendant by reason of the infringement,—

award such additional damages as the justice of the case may require.

[444] In relation to the predecessor of s 121, s 24 of the Copyright Act 1962, the Court of Appeal in *Wellington Newspapers Ltd v Dealers Guide Ltd* observed:²¹²

The ordinary dictionary meaning of flagrant is “glaring, scandalous, or outrageous”. Flagrancy was described by Brightman J in *Ravenscroft v Herbert* [1980] RPC 193, 208 as:

Flagrancy in my view implies the existence of scandalous conduct, deceit and such like; it includes deliberate and calculated copyright infringements.

...

The additional damages referred to in s 24(3) are to be awarded where the Court is satisfied that the remedies otherwise provided by the section for an action brought under it do not provide effective relief. This would suggest that there may be some damage or loss suffered by a plaintiff which compensatory damages, injunction, the taking of accounts or other remedy would not assuage. It is difficult to see what is contemplated by the additional damages unless it is something in the nature of punishment to the defendant for the hurt done to the plaintiff which the conventional remedies would not provide.

[445] In that case an additional sum of \$7,500 damages was upheld to reflect that the infringement was deliberate, calculated, done for commercial advantage, and accompanied by attempts at concealment.²¹³

[446] The Court of Appeal in *Feltex Furnishings of New Zealand Ltd v Brintons Ltd* further noted that damages for flagrancy are in the nature of aggravated or punitive damages to be fixed, if at all, after compensatory damages have been determined.²¹⁴

[447] Endorsing the approach in *Feltex*, Rodney Hansen J in *Electroquip Ltd* highlighted that:²¹⁵

²¹² *Wellington Newspapers Ltd v Dealers Guide Ltd* [1984] 2 NZLR 66 (CA) at 69–70.

²¹³ At 76 per Somers J.

²¹⁴ *Feltex Furnishings of New Zealand Ltd v Brintons Ltd* (1992) 4 NZBLC 102,913 at 102,921.

²¹⁵ *Electroquip*, above n 145, at [56].

Flagrancy, accordingly, goes beyond mere awareness. It is not to be found simply because the defendants have been unable to prove that they did not know or had no reason to believe that copyright existed in the works.

[448] The Court of Appeal recently confirmed the high standard required for an award of additional damages to be made in the case of *Skids Programme Management Ltd v McNeill*.²¹⁶ The Court endorsed the discussion in *Wellington Newspapers* and confirmed the following principles apply in relation to additional damages:²¹⁷

- (a) section 121(2) gives the Court the power to award additional damages, not linked to compensation damages, which is exercised by applying principles that govern exemplary damages at common law;
- (b) there is no temporal limitation as to what is relevant in making this assessment and all of the parties' conduct at the time of judgment can be considered;
- (c) it must be shown that the claimant was the victim of punishable behaviour;
- (d) there should be moderation in additional damage awards given, taking into account the nature of the claimant's business; and
- (e) the means of the parties should be considered.

[449] In that case, the Court awarded additional damages of \$20,000 for the copyright infringement to reflect "outrageous behaviour".²¹⁸ The Court considered that the defendant was involved in extensive and deliberate copying, had repeatedly denied her conduct, that the only penalty available was an award of additional damages, and the claimant's business was modest.²¹⁹

[450] As the Court of Appeal confirmed in *Skids Programme*, common law principles that govern exemplary damages generally are relevant here.²²⁰

[451] The Supreme Court in *Couch v Attorney-General* held that the primary purpose of exemplary damages is to punish a defendant for wrongful conduct and there must

²¹⁶ *Skids Programme Management Ltd v McNeill* [2012] NZCA 314, [2013] 1 NZLR 1.

²¹⁷ At [102]–[110].

²¹⁸ At [119].

²¹⁹ At [118].

²²⁰ At [102]–[110].

be conscious wrongdoing and not merely inadvertence.²²¹ The majority of the Court reaffirmed that the test for whether an award of exemplary damages should be granted is whether the defendant acted outrageously, either intentionally or with subjective recklessness.²²² This test applies across all causes of action for which exemplary damages are sought. Tipping J also confirmed that the consequences of the defendant's actions are not the primary assessment of blameworthiness. Rather, the defendant's state of mind is the focus.

[452] In *Jeans West Corp (New Zealand) Ltd v G-Star Raw CV*, the Court of Appeal awarded additional damages of \$50,000, which is understood to be the highest award in New Zealand.²²³ The relevant factors included flagrant infringement by blatant copying by the infringer, significant but unquantified financial benefit to the infringer, the actions of the infringer were very damaging to the business of the copyright owner, and the infringement was to test the market with a view to further importation of infringing material for sale. The conduct of Jeans West, in defending the claim, by late discovery of a critical document and failure to call evidence from relevant witnesses, was also relevant.

Analysis

[453] The above authorities clearly indicate that there is a high threshold for the award of additional damages for copyright infringement. Here, the National Party sought the copyright work, *Eminem Esque*, from a professional company specialising in production music for sale. The National Party obtained advice from experienced professionals within the advertising and music licensing industries, in relation to the use of the track.

[454] Eight Mile Style allege that the National Party should have sought legal advice to determine whether there was a risk of copyright infringement.

[455] I do not accept Eight Mile Style's submission. The National Party took appropriate steps in seeking professional and industry advice from experienced music

²²¹ *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149 at [117] and [238].

²²² At [178]–[179], per Tipping J.

²²³ *Jeans West Corp (New Zealand) Ltd v G-Star Raw CV* [2015] NZCA 14, (2015) 13 TCLR 787.

licensing companies and obtained a synchronisation licence to use *Eminem Esque* in their advertising. The extent to which the National Party was entitled to rely on that advice and the liability of the third parties for the award of damages is a matter for the second hearing.

[456] While copyright infringement of *Lose Yourself* did occur, the National Party's actions do not demonstrate:

- (a) flagrant or intentional infringement;
- (b) contumelious or total disregard for the plaintiffs' rights; or
- (c) conduct that is so bad that it should be punished.

[457] The compensatory and restitutionary damages awarded are appropriate in this case.

[458] Although the National Party, in communicating and/or reproducing a copy of *Lose Yourself*, is responsible for the actual copyright infringement, in doing so, the National Party was acting on industry advice and was not acting in flagrant disregard of Eight Mile Style's rights nor, as the authorities describe, acting in an outrageous manner. An award of additional damages against the National Party is not justified in these circumstances.

Conclusion 4.2

[459] The findings are:

- (a) although copyright infringement did occur, the National Party's actions were taken after receiving professional, commercial and media advice and were not reckless or contumelious of the rights of the copyright owner; and
- (b) no additional damages are awarded.

SUMMARY OF CONCLUSIONS

[460] There is actionable copyright in *Lose Yourself* because:

- (a) Eight Mile Style are the owners of 50 percent and are exclusive licensees of the other 50 per cent of the musical work *Lose Yourself*. They are therefore the exclusive licensees of copyright in the musical work *Lose Yourself*;
- (b) Eight Mile Style are entitled to bring this action for copyright infringement in New Zealand as the authors of *Lose Yourself* are citizens of a prescribed foreign country; and
- (c) copyright subsists in the musical work *Lose Yourself* as it meets the definition and threshold of being an original musical work under s 14(1)(a) of the Act.

[461] *Lose Yourself* is a highly original musical work, for the following reasons:

- (a) *Lose Yourself* is an original musical composition, with a distinctive guitar strum and drum beat, which creates an insistent tense hypnotic rhythm, with a heightened sense of anticipation, as originally created and intended;
- (b) *Lose Yourself* is a highly original musical work; and
- (c) the melody in *Lose Yourself* is not the dominant feature.

[462] *Eminem Esque* has substantially copied *Lose Yourself* and is a substantial copy of *Lose Yourself* because:

- (a) the differences between *Eminem Esque* and *Lose Yourself* are minimal;
- (b) the close similarities and the indiscernible differences in drum beat, the “melodic” line and the piano figures between *Lose Yourself* and *Eminem Esque* make *Eminem Esque* strikingly similar to *Lose Yourself*; and
- (c) *Eminem Esque* substantially reproduces the essence of *Lose Yourself*.

[463] The parts of *Eminem Esque* used in the National Party's election advertisements also substantially reproduce *Lose Yourself*.

[464] *Eminem Esque* is objectively similar to *Lose Yourself* because:

- (a) *Eminem Esque* is objectively similar to *Lose Yourself*, with minimal discernible differences;
- (b) *Eminem Esque* sounds like a copy and I find it is a copy of *Lose Yourself*; and
- (c) *Eminem Esque* was designed to "sound like" *Lose Yourself* as production music and a sound-alike track.

[465] There is a causal connection between *Lose Yourself* and *Eminem Esque*:

- (a) it was no coincidence that the works sounded the same;
- (b) the undeniable inference to be drawn from the evidence is that the composer of *Eminem Esque* had *Lose Yourself* in front of him at the time of composition; and
- (c) the original title *Eminem_abbr*; the title of *Eminem Esque*, and the fact that *Eminem Esque* is a sound-alike track reinforces the finding that there is a causal connection between the two works, supporting a finding of copying.

[466] In terms of copyright infringement:

- (a) The National Party carried out the following restricted acts which amount to copyright infringement:
 - (i) communicating a copy, or a reproduction of a substantial part, of *Lose Yourself* to the public without licence;

- (ii) authorising the copying of *Lose Yourself* by authorising the synchronisation of *Eminem Esque* with the National Party election campaign advertisements; and
 - (iii) authorising the use and/or deployment of the relevant advertisements, the conference video and opening broadcast.
- (b) *Eminem Esque* is not an adaptation of *Lose Yourself*, as there has been no adaptation for use from one medium to another.

[467] Eight Mile Style is entitled to damages on a “user principle” basis in the sum of NZ\$600,000, from 28 June 2014. Interest is payable at the Judicature Act rate of five per cent from 28 June 2014 to date of payment.

[468] Although copyright infringement did occur, the National Party’s actions were taken after receiving professional, commercial and media advice and were not reckless or contumelious of the rights of the copyright owner. No additional damages are awarded.

Costs

[469] Counsel are to file memoranda on costs.

Cull J

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APPENDIX I

Chronology of events

- November 1995** FBT Productions and Marshall Mathers III entered into an Exclusive Artist Recording Agreement (the Recording Agreement).
- 22 February 1999** The Recording Agreement was subsequently amended by an Amendment Agreement.
- 19 April 2000** The Bass brothers entered into the Eight Mile Style Operating Agreement (the Operating Agreement)
- 18 July 2001** Mr Jeffrey Bass entered into a Writer Co-Publisher Agreement with Eight Mile Style.
- 2001–2002** The musical work *Lose Yourself* was composed.
- September 2002** A sound recording featuring the musical work was first released as a single in the United States of America.
- 9 January 2003** Mr Resto assigned to Eight Mile Style an undivided 50 per cent interest in his share of the copyright and all other rights, title and interest, in and to a number of compositions, including the musical work known as *Lose Yourself*.
- 9 January 2003** Mr Resto entered into a Writer-Co-publisher Agreement with Eight Mile Style.
- Eight Mile Style and Martin Affiliated entered into a copyright assignment by which Eight Mile Style assigned to Martin Affiliated an undivided 33 per cent interest in Eight Mile Style’s share of the copyright and all other rights, title and interest, in and to the musical compositions acquired, owned, controlled or administered by Eight Mile Style. The assignment expressly recorded that the musical work *Lose Yourself* was one of the compositions covered by it.
- Prior to 8 March 2007** Mr Cohen produced a track that he called *Eminem_abbrev*. The work was renamed *SQ mc Eminem Esque* at around this time.
- 14 February 2008** Mr Cohen entered into an arrangement whereby he purported to grant Labrador Entertainment Inc the rights listed in cl 1.1 of the Composer’s Agreement bearing that date.
- Late 2013** Stan 3 Ltd pitched to the National Party and its campaign committee members the idea of using a rowing crew as a visual representation of the National Party and its record as a governing party. Stan 3 Ltd was directed to develop this idea into a fully thought through concept for advertisements.

- Late February 2014** Mr Jameson of Stan 3 Ltd prepared animatics that were synchronised with two musical tracks: the classical track and the modern track (*Eminem Esque*), provided by Sale Street Studios Ltd.
- 28 February 2014** These animatics were sent to Ms Worthington. They were then forwarded to Mr Foster at Sale Street Studios Ltd.
- Mr Foster located the track called *Eminem Esque* after conducting a search of production music libraries.
- The *Eminem Esque* track was then synchronised with certain animatics that were to be tested with a focus group.
- March 2014** The animatics were tested by the focus group for the National Party campaign committee. The group showed a preference for the modern track, being the animatic with *Eminem Esque* synchronised to it.
- 27 March 2014** Mr Jameson needed to make another animatic, and requests *Lose Yourself* sound-alike from Mr Foster.
- Mr Foster provides Mr Jameson the relevant music file.
- March 2014–May 2014** The National Party election advertisements were produced by Stan 3 and its sub-contractors.
- Late May 2014** Mr Jameson showed the proposed election advertisement to Ms de Joux, campaign manager for the National Party. The proposed election advertisement used *Eminem Esque* and a staff member of the National Party heard the track and said it sounded like Eminem. He also said Eminem is perceived to be into hate speech. Mr Jameson advised Ms de Joux that the music was production music named something like *Eminem Esque*.
- 27 May 2014** Ms Worthington of Stan 3 emailed Mr Foster of Sale Street Studios asking him for a copy of the *Eminem Esque* track and forwarded the file to Ms de Joux.
- Ms de Joux asked for full details of the musical track, which were supplied by Stan 3. She was concerned about the National Party being associated with Eminem and copyright issues so asked Stan 3 to locate other music for consideration.
- Ms Worthington sends correcting email indicating “Eminem” not “eminent”.
- Mr Foster provides the file.
- Ms Worthington forwards the file to Ms de Joux.

- 29 May 2014** Mr Jameson was instructed to find alternative music choices and contacted Mr Foster to do so.
- 2 June 2014** Mr Foster provided alternative tracks by WeTransfer.
- 3 June** Mr Foster emailed Extreme Music indicating they had wanted to use Eminem's *Lose Yourself* because it was something harder and more edgy. Mr Foster provided an alternative track to Mr Jameson.
- 13 June 2014** The National Party campaign committee listened to several music options and decided that the advertisement with *Eminem Esque* synchronised to it was the best option because the track clearly fitted best with the visuals of the advertisement, particularly the rowing strokes. However, the committee wanted detailed reassurance that the National Party could safely use *Eminem Esque*.
- 13–18 June 2014** Stan 3 was asked to obtain reassurances that *Eminem Esque* could be used in the National Party's advertisement. Stan 3 obtained reassurance from:
- (a) Mr Collins, a freelance experienced television advertising producer;
 - (b) Mr Foster at Sale Street Studios;
 - (c) Mr Mackenzie of Beatbox Music;
 - (d) Mr Chunn, former head of APRA; and
 - (e) Ms Benoit at APRA/AMCOS.
- 18 June 2014** Stan 3 reassured the National Party that *Eminem Esque* could be used. A written assurance from Mr Mackenzie of Beatbox Music was obtained, stating that the "agreement we have with the publisher gives us assurance that the music does not infringe on copyright and is free to be used for production purposes."
- 18–23 June 2014** The National Party confirmed that it would proceed to use the *Eminem Esque* track, as the use of *Eminem Esque* in its campaign advertisements and other materials had been cleared "by the Party or members of its Campaign Committee."
- 23 June 2014** That the use of *Eminem Esque* in its campaign advertisements and other materials had been cleared by the National Party or members of its campaign committee was communicated to Sale Street Studios Ltd by Ms Worthington by email. That email outlined the uses to which the track would be put.
- Ms Worthington confirmed to Mr Foster by email that the *Eminem Esque* track was to be synchronised with the National Party's broadcast opening address – a 15 minute political party advertisement.

Ms Worthington confirmed that the *Eminem Esque* track was to be synchronised with a 2.5 minute video that was to be shown at the National Party's conference that was taking place that weekend.

- 25 June 2014** Ms Worthington emailed Sale Street Studios Ltd asking whether they had done the final mix and purchased the *Eminem Esque* track for use with the video that was to be shown at that weekend's conference.
- 28 June 2014** The video that had been produced which had the *Eminem Esque* track synchronised to it was played to those in attendance at the National Party conference.
- 5 August 2014** Ms Worthington sent another email to Mr Foster which set out details on the use to which the *Eminem Esque* track was to be put. Those uses included synchronisation with the video shown at the National Party conference, the broadcasting opening address, six 30 second TVC's (including the framing TVC), and three 15 second cutdown TVCs.
- The requested advertisements had the track *Eminem Esque* (or parts of it) synchronised to them, were finalised and copies of them were provided to T-Cab and then the broadcasters so that they could be aired.
- 20 August 2014** The first of the advertisements that had *Eminem Esque* synchronised to it (the Framing Advertisement) was uploaded to YouTube and the National Party's Facebook page. The 15 minute long opening address advertisement was also uploaded to YouTube and social media.
- 20–30 August 2014** Advertisements which had the *Eminem Esque* track synchronised to them were played at least 186 times on New Zealand television.
- 23 August 2014** The 15 minute opening broadcast aired on TV1.
- The media in New Zealand began to run stories suggesting that the music used in the relevant advertisements sounded like the musical work.
- 25 August 2014** Eight Mile Style's United States attorneys formally wrote to the National Party complaining of the unlicensed use of the musical work.
- 26–27 August 2014** The National Party seeks to replace the *Eminem Esque* track on its advertisements with alternative music.
- 27–30 August 2014** The National Party, Stan 3 Ltd and subcontractors commission and approve alternative music, apply the alternative music to the advertisement and submit the advertisement to broadcasters for approval.

30 August 2014

The National Party ceased airing or otherwise publicising advertisements with the *Eminem Esque* track

**17 September
2014**

Mr Baker of Beatbox Music sent an email to APRA saying:

“Please note that today we have emailed our clients requesting them to delete the Spider Cues album SPID039 which contains the work *Eminem Esque* by Mr Cohen from their hard drive storage devices and that the music can no longer be licensed.”