

[2013] NZCOP 2

COP 004/12

UNDER

The Copyright Act 1994

BETWEEN

RECORDING INDUSTRY
ASSOCIATION OF NEW
ZEALAND INCORPORATED

Applicant (Rights Owner)

AND

TCLE[A]-T5877102

Respondent (Account Holder)

BEFORE THE COPYRIGHT TRIBUNAL

HEARING ON THE PAPERS

DECISION

The Application

[1] This is an application by Recording Industry Association of New Zealand Incorporated (“the Applicant”) for an order under s.122O of the Copyright (Infringing File Sharing) Amendment Act 2011 (“the Act”). The Applicant seeks an order for payment of a sum of money in respect of infringing file sharing for which the Respondent is alleged to be liable.

[2] The Applicant has made the application as agent for:

[a] EMI Records Limited; and

[b] Sony Music Entertainment, a Delaware General Partnership, and Sony Music Entertainment BV of The Netherlands (collectively “Sony Music”).

[3] Those parties claim to be the respective owners of the copyrights in the two sound recordings which are alleged to have been the subject of infringing file sharing.

The General Scheme of the Act

[4] Section 122B provides an overview of the provisions of the Act that are relevant to this application. In short, the Act is intended to provide copyright owners (whether acting alone or through agents) with a special regime for taking enforcement action against people who infringe their copyrights through “file sharing”.

[5] Paragraph 122A of the Act defines “file sharing” in the following terms:

“Where –

(a) Material is uploaded via, or downloaded from, the Internet using an application or network that enables the simultaneous sharing of material between multiple users; and

(b) *Uploading and downloading may, but need not, occur at the same time.*"

[6] The Act provides that a rights owner may require an Internet Protocol Address Provider ("IPAP") to issue infringement notices to Internet account holders, where the rights owner alleges that its copyright has been infringed by file sharing taking place at an Internet Protocol ("IP") address used by that account holder.

[7] There are three kinds of infringement notice which an Internet account holder might receive from his or her IPAP. These are a detection notice, a warning notice and an enforcement notice.

[8] The Act makes provision for an account holder to challenge each infringement notice he or she receives, and for the rights owner to either accept or reject any such challenges.

[9] After an enforcement notice has been issued, the rights owner may apply to the Copyright Tribunal for an order under s.122O of the Act.

Factual Background

[10] In this case, the IPAP is TelstraClear Limited ("TelstraClear"). TelstraClear issued infringement notices to the Respondent as follows:

[a] A detection notice was issued on 15 November 2011.

[b] A warning notice was issued on 12 June 2012.

[c] An enforcement notice was issued on 2 August 2012.

[11] In each case, the infringement notices alleged infringement of copyright in a single sound recording, by the communication of that sound recording to the public. The detection and warning notices referred to the same sound recording – the track "We R Who We R" by Ke\$ha. The issue of the enforcement notice was triggered by alleged infringing file sharing of the song "Paradise", by Coldplay. In each case BitTorrent ("Mainline") was identified as the relevant file sharing application.

[12] The Respondent did not challenge any of the infringement notices.

The Applicant's Application to the Copyright Tribunal

[13] The Applicant applied to the Copyright Tribunal for an order under s.122O of the Act, on 5 September 2012.

[14] Pursuant to s.122J(2)(c) of the Act, the Applicant identified the alleged infringements by the Respondent in respect of which it sought an order from the Tribunal, as the three instances of alleged infringing file sharing referred to in the infringement notices described above.

[15] The Applicant claimed the sum of \$215.10 for each of the three alleged infringements. It also claimed an additional sum of \$750, together with the fees it had paid to TelstraClear for the issue of the infringement notices (\$86.25) and the application fee it had paid to the Tribunal (\$200). The total amount claimed was \$1,681.55.

The Parties' Submissions

The Applicant

[16] The Applicant filed detailed written submissions. They are summarised below under the heading "*Discussion and Findings*".

The Respondent

[17] The Respondent filed a one-page submission on 30 September 2012, in which he acknowledged that he is the owner of the IP address at which the infringing file sharing is alleged to have occurred. The Respondent submitted that the infringements occurred inadvertently while his two sons, aged 12 and 8, had been playing on the Respondent's computer. He stated that, on questioning his sons, they replied that they did not know how this occurred, although the older boy said that it may have occurred when he plugged his phone into the computer to charge it up. The Respondent said that he is 50 years of age, and that he does not know either of the works which were the subject of the infringement notices. He stated that he and his household had very little computer literacy, and only really used the computer for email and online banking. The children were also said to use the computer for their school work.

[18] The Respondent went on to say that he has removed BitTorrent from his computer, and does not now have any file sharing application on it. He said that he now realised that he should have done that after either the first or second infringement notice had been received, and that he was sorry for not having done so.

[19] Generally, the Respondent requested leniency, saying that he did not believe that he was the type of offender that the new law was intended for. He said that the acts of alleged infringing file sharing were innocent acts, and that it was not intended to share the material with anyone else. He also referred to financial difficulties his family were going through, stating that health difficulties suffered by his wife had resulted in her being off work since July 12, 2012. The Respondent said that he had learned from his mistake, and would not let this occur again.

Applicant's Reply

[20] In reply, the Applicant expressed strong disagreement with the Respondent's claims that the infringements had occurred inadvertently, and that the Respondent had acted innocently and without any intention to share the copyright material with anyone else. The Applicant contended that the loading of BitTorrent onto the Respondent's computer enabled the downloading and uploading of sound recordings, and that that could not be regarded as "*inadvertent*". The Applicant also drew attention to the fact that the Respondent had had two opportunities to stop the alleged offending (following his receipt of the detection and warning notices), but had not done so.

[21] The Applicant emphasised that the Respondent had been found to be uploading copyright material via BitTorrent in each of the three infringements detected by MarkMonitor, and thus plainly did share the copyright material with others. The Applicant concluded by submitting that the activities of the Respondent and his family were precisely the type of offending that the Act was intended to cover.

No Hearing

[22] Neither party has requested a hearing, and the Tribunal sees no need to convene one. Accordingly, the application is being determined on the papers pursuant to s.122L of the Act.

Discussion and Findings

Presumptions

[23] Section 122N of the Act provides that, in proceedings before the Tribunal, a number of matters concerning infringement notices issued under the Act are presumed to be true unless the account holder submits evidence that (or gives reasons why) one or more of the presumptions does *not* apply. If an account holder does submit such evidence or give such reasons, the rights owner must then satisfy the Tribunal that, in relation to the relevant infringement or notice, the particular presumption or presumptions is/are correct (s.122N(3)).

[24] The statutory presumptions are as follows:

- [a] That each incidence of file sharing identified in the notice constituted an infringement of the rights owner's copyright in the work identified; and
- [b] That the information recorded in the infringement notice is correct; and
- [c] That the infringement notice was issued in accordance with the Act.

[25] In this case, the Respondent has not submitted any evidence, or given any reasons, which might suggest that the statutory presumptions in s.122N of the Act should not apply.

In what Circumstances is the Complainant entitled to an Order directing the Respondent to pay it a Sum of Money under Section 122O?

[26] Section 122O(1) of the Act provides that the Tribunal must order an account holder to pay a rights owner a sum of money if the Tribunal is satisfied that:

- "(a) Each of the 3 alleged infringements that triggered the infringement notices issued to the account holder –*
 - (i) was an infringement of the rights owner's copyright; and*
 - (ii) occurred at an IP address of the account holder; and*
- (b) The 3 notices were issued in accordance with this Act."*

[27] Those provisions are subject to a discretion given to the Tribunal under s.122O(5) of the Act, under which the Tribunal may decline to make an order under subs.(1) if, in the circumstances of the case, the Tribunal is satisfied that making the order "*would be manifestly unjust to the account holder*".

Application of Section 122O(1) and (5) in this Case

[28] Because of the application of the presumptions set out in paragraph 21 of this decision, the Tribunal is satisfied that the Applicant has sufficiently proved each of the matters on which the Tribunal is required to be satisfied under s.122O(1).

[29] Consequently, the Tribunal must order the Respondent to pay a sum under s.122O(1), unless the circumstances of the case are such as to satisfy the Tribunal that it would be "manifestly unjust" to the Respondent to do so.

[30] There is nothing in the evidence which would make it manifestly unjust for the Tribunal to make an order. The Respondent acknowledged receiving the detection and warning notices, and he acknowledged that he did not then take any steps to stop the infringing file sharing. He submitted that the infringements may have occurred "inadvertently" while his 12 year old and 8 year old sons were playing on the computer, but even if that were the case it would not be sufficient to render the making of an order manifestly unjust: there would be nothing particularly unusual about such a situation, and the intention of the Act was clearly to make the account holder (in this case the Respondent) responsible for infringing file sharing taking place on his or her Internet account. Nor can the Tribunal place any weight on the Respondent's statement that his household has "*very little computer literacy*". It appears that there was at least enough computer literacy in the household to locate and install the BitTorrent application, even if its later use was inadvertent, as the Respondent contends.

[31] The fact that there may not have been many proved instances of infringing file sharing by downloading, is not a reason for the Tribunal to decline to make an order under s.122O(1). If the infringing file sharing has not been extensive or sophisticated, that may be a matter going to the *amount* of any payment the Tribunal may order as a deterrent against further infringing, but on its own it will not normally provide a basis for the Tribunal to decline to make any order under s.122O.

[32] The Respondent referred to his wife having been off work with health difficulties since 12 July 2012, and he stated that the family was struggling financially to meet its mortgage payments while she was off work. However, no details of the family's financial position were provided, and the Respondent did not provide a medical certificate or other evidence showing how long his wife was expected to be off work.

[33] Having regard to those considerations, the Tribunal concludes that there is nothing in the evidence that would make it "*manifestly unjust*" for it to make an order under s.122O.

What Sum should be paid to the Applicant?

[34] Under s.122O of the Act, if the Tribunal orders payment of a sum under s.122O(1), the sum specified is to be determined in accordance with the Copyright (Infringing Filing Sharing) Regulations 2011 ("**the Regulations**"). Any sum awarded must include a sum in relation to every infringement identified in the enforcement notice that the Tribunal is satisfied was committed against the rights owner at an IP address of the account holder.

[35] In addition to any amount the Tribunal may award under s.122O(1), the Tribunal may also make an order requiring the account holder to pay to the rights owner either or both of the following:

- [a] A sum representing a contribution towards the fee or fees paid by the rights holder to the IPAP; and
- [b] Reimbursement of the application fee paid by the rights owner to the Tribunal (s.122O(3)).

[36] Clause 12(1) of the Regulations provides that the total amount the Tribunal may award, is the lesser of –

- [a] The sum of the amounts referred to in subcl.(2)(a) to (d) of r.12; and
- [b] \$15,000.

Determinations under Regulation 12(2) of the Regulations

[37] Subclause (2) of r.12 requires the Tribunal to make certain determinations if it orders an account holder to pay a rights owner a sum of money under s.122O of the Act.

Regulation 12(2)(a)(i)

[38] If the relevant work was legally available for purchase in electronic form at the time of the infringement, the Tribunal is required to determine under this subclause “*the reasonable cost of purchasing the work in electronic form at that time*”.

[39] In this case, the works *were* legally available for purchase in electronic form at the times of the infringements. The Applicant says, and the Respondent does not dispute, that each of the two tracks was available for purchase in electronic form from iTunes, at NZ\$2.39.

[40] The Applicant accepts that, on a literal reading of r.12(2)(a), “*the reasonable cost of purchasing the work*” would be calculated at \$2.39 per track, or a total of \$7.17 for the three proved infringements. However, the Applicant submits that such a sum would not be appropriate to compensate it for the act of making a copyright work available to a potentially very large audience via a P2P network. The Applicant submitted:

“The sum referred to in Regulation 12(2)(a)(i) appears to be more appropriate as compensation in a case where a sound recording has been downloaded once by the account holder. This is because the reasonable cost of purchasing the work is what the account holder would have paid if he or she had purchased the work legally.

The act of uploading, on the other hand, is more harmful as it enables multiple potential unauthorised downloads by third parties, each of which could have been paid for by those third parties at a cost of \$2.39 each.

This consideration was reflected in the MED Discussion Paper¹ where the MED noted that 'the upload of works is more damaging to a rights owner than the download'.

[41] The Applicant noted in its submissions that the definition of "file sharing" in s.122A(1) specifically includes uploading, and that uploading of sound recordings is a serious concern for the Applicant and the copyright owners it represents. It drew attention to the ease with which uploaded tracks can be disseminated widely to downloaders using specialised P2P software.

[42] In this particular case, the specialised P2P software used by the Respondent was BitTorrent. In *Roadshow Films Pty Ltd v iiNet Ltd* [2012] H.C.A. 16, three judges of the High Court of Australia² noted that a user of the BitTorrent system who downloads a work (in that case it was a film) will automatically make the work available online on the user's computer for downloading by other BitTorrent users in the group, until the relevant ".torrent file" is removed from the BitTorrent software installed on the user's computer.

[43] The Applicant submitted that r.12(2)(a) is directed at compensating the rights owner for its losses, and that limiting the amount determined under r.12(2)(a)(i) to the market cost of one copy of the work in electronic form (in this case, \$2.39 for each work), would manifestly not compensate the Applicant for its losses caused by the Respondent's activities in *uploading* the works. That is because uploading the works made them available to possibly hundreds of other BitTorrent users within the swarm.

[44] The Applicant further submitted that it is not likely that the Legislature intended that the compensation for uploading under r.12(2)(a) was to be limited to the cost of purchasing one copy of the work. It submitted that the proper approach is for the Tribunal to read r.12(2)(a) as giving it a mandate to "*determine a sum*" with reference to the reasonable cost of purchasing a copy of the work.

[45] Following that approach, the Applicant argued that the Tribunal should determine a sum with reference to the actual or estimated number of downloads occurring in respect of each infringing upload. As the Applicant put it, "*if a file uploaded is then downloaded [by other users participating in a BitTorrent "swarm"] 100 times, the starting point for compensation could be the reasonable cost of purchasing a copy of the work multiplied by 100*". The Applicant acknowledged that it might then be appropriate to discount the resulting figure to take into account the fact that not every illegal download would represent an actual lost sale to the rights holder.

[46] The principal difficulty with that approach is that there can be no clear proof how many downloads of a given work have been made by users within a BitTorrent swarm.

¹ A Discussion Paper published by the Ministry of Economic Development in 2011, in which public submissions were sought on certain matters which the Act (then the Copyright (Infringing File Sharing) Bill) provided should be the subject of regulations made under the Act. One of the matters addressed in the Discussion Paper was the form of regulations to be made "prescribing the sum, or a method or methods of calculating the sum, that the Tribunal may order an account holder to pay".

² French C.J., and Crennan and Kiefel JJ, at paragraph 21 of their judgment.

[47] The Applicant attempted to deal with that difficulty by producing a report dated May 2008 commissioned by the International Federation of the Phonographic Industry, entitled "*Analysis of User Demand on the BitTorrent Peer-to-Peer Network for Music*". The report was prepared by a company called Envisional Limited, an "*internet intelligence agency*" in the United Kingdom ("Envisional"). The purpose of Envisional's report was to determine the level of demand on the BitTorrent peer to peer network for a range of music albums being offered by a typical user over a four week period. The key objective of the research was said to be to determine the number of copies of each album actually downloaded from a single locally-installed "*client*" on the BitTorrent network, to other persons on the same network during the research period.

[48] Using the Envisional results, the Applicant submitted that a rational and conservative basis for a damages calculation for each infringement identified in the enforcement notice, would be to apply a "*baseline*" figure of 90 downloads to the single download cost of \$2.39, giving a compensation figure of \$215.10 for each of the three infringements identified in the enforcement notice. The applicant accordingly argued that the total figure the Tribunal should determine under r.12(2)(a)(i) of the Regulations, is \$645.30.

[49] The Tribunal does not accept the Applicant's submission on the interpretation of cl.12(2)(a)(i) of the Regulations. That clause requires the Tribunal to determine "*the reasonable cost of purchasing the work in electronic form at that time*", and the words "*at that time*" can refer only to the time of the particular infringement identified in the enforcement notice. Also, the words "*the reasonable cost of purchasing the work*" cannot reasonably describe the total amount an unknown number of hypothetical purchasers of the work would have paid if each of them had legally purchased an electronic copy of the work.

[50] The plain language of cl.12(2)(a)(i) refers only to the amount it would have cost the account holder to purchase one copy of the relevant work in electronic form at the time of the infringement identified in the enforcement notice. In this case, that is the sum of \$2.39 for each of the three identified infringements.

[51] The Applicant's submissions referred to a number of extracts from the Ministry of Economic Development's discussion paper. But as a principle of statutory interpretation it is inappropriate to look at that material if, as is the situation here, the meaning of the Regulation is plain. In any event, the discussion paper does not clearly suggest that any different meaning was intended.

[52] In the Tribunal's view, the consequences of downloading by other participants in a BitTorrent swarm are to be considered under subcl.(2)(d) of r.12, which is concerned with deterrence, and not under the provisions of subcl.12(2)(a).

[53] Taking all those factors into account, the Tribunal determines under cl.12(2)(a)(i) that the reasonable cost of purchasing the work "We R Who We R" in electronic form on 5 November 2011 and on 4 June 2012, was \$2.39 on each of those dates. The reasonable cost of purchasing the work "Paradise" in electronic form on 22 July 2012, was also \$2.39. The total amount to be awarded to the Applicant under r.12(2)(a)(i) will therefore be \$7.17.

Regulation 12(2)(b)

[54] Under this subclause, the Tribunal is required to determine *"the cost of any fee or fees paid by the rights owner to the IPAP in respect of the infringements to which the application relate"*.

[55] Section 122O of the Act is also relevant. It provides at subs.(3) that the Tribunal *"may also make an order requiring the account holder to pay to the rights owner ... (a) a sum representing a contribution towards the fee or fees paid by the rights owner to the IPAP ..."*

[56] The Applicant claims the total sum of \$86.25 under this head, being the total amount charged by TelstraClear in respect of the three infringements at \$25 plus GST per notice.

[57] The claim for \$86.25 has not been challenged by the Respondent, and the question under this heading is whether the apparently discretionary nature of this part of the award (*"may also make an order"*, and *"a sum representing a contribution ..."*, to quote the language used in s.122)(3)) means that the Tribunal might award a successful applicant something less than complete reimbursement of the sums paid by the rights owner to the IPAP. The use of the expression *"contribution"* in s.122)(3)(a) of the Act, contrasted with the choice of the word *"reimbursement"* in s.122O(3)(b) (which is concerned with the fee paid by the rights owner to the Tribunal on filing an application), supports that interpretation.

[58] The Applicant argued for full reimbursement of the fees paid by it to TelstraClear. It based that argument on its interpretation of certain provisions in r.12. First, it referred to subcl.(3)(c) of r.12, which provides that one of the factors which the Tribunal must consider in deciding whether or not it is appropriate to order an amount as a deterrent against further infringing (under r.12(2)(d)), is:

"(c) whether the sum of the amounts referred to in subclause (2)(a) to (c) would already constitute a sufficient deterrent against further infringing."

[59] The Applicant then submitted that the amounts determined pursuant to subcl.(2)(a) to (c) will necessarily include a determination (under subcl.(2)(b)) of the amounts *actually paid* by the rights owner to the IPAP (i.e. not merely some contribution to those amounts). It argued that there would be little point in considering whether the amounts determined under subcls.(2)(a) to (c) of r.12 would or would not constitute a sufficient deterrent, if the account holder was not going to be required to pay them in full.

[60] In the alternative, the Applicant argued that it should be entitled to a 95% *"contribution"* to the fees it has paid to TelstraClear.

[61] The Tribunal is of the view that the wording of s.122O(3) of the Act means that there will be some cases of infringing file sharing where the Tribunal award will include only a contribution to the IPAP fees, and not full reimbursement. The Legislature's choice of the word *"contribution"* in s.122O(3)(a), which is to be contrasted with its use of the word *"reimbursement"* in s.122O(3)(b), must be given some meaning.

[62] Subclause 3(c) of r.12 should not be read in a way that would have the effect of defeating the intention of s.122O(3)(a) of the Act. In the Tribunal's view the expression "*the cost of any fee or fees [paid by the rights owner to the IPAP]*" used in r.12(2)(b) is broad enough to cover the amount of any contribution to those fees which the Tribunal may order under s.122O(3)(a) of the Act.

[63] The Tribunal accordingly finds that it might, in appropriate circumstances, order a respondent to pay a contribution which is not necessarily the full amount, under r.12(3)(c).

[64] In this case, the infringing appears to be at the lower end of the scale of seriousness, and the Tribunal takes into account the educative role of the first two infringement notices. The detection notice and the warning notice both provide the account holder with an opportunity to cease the infringing file sharing, and bring the procedures under the Act to a stop. The enforcement notice has less of an educative role. It is the final step before an application is made to the Tribunal, and it is issued only after the account holder has failed to heed the advice and warnings given in the first two notices. Given the "*sliding scale*" of culpability which is inherent in the infringement notice regime, the Tribunal determines that the cost of the fees paid to TelstraClear in respect of the infringement notices will be as follows: \$25 (being the full GST-exclusive amount paid by the Applicant to TelstraClear) in respect of the enforcement notice, \$16.67 in respect of the warning notice (representing two thirds of the costs in respect of that notice), and \$8.33 in respect of the detection notice (representing one-third of the costs in respect of that notice). The total contribution will therefore be \$50.

Regulation 12(2)(c)

[65] Under this subclause, the Tribunal is required to determine "*the cost of the application fee paid by the rights owner to the Tribunal*".

[66] Section 122O(3)(b) of the Act expressly contemplates that the Tribunal may include in its award a sum representing full reimbursement of the amount paid by the rights owner. The fee itself is fixed in the Regulations (Regulation 8), at \$200.

[67] In this case, the Respondent had received three separate infringement notices by the time the application to the Tribunal was filed, and he has offered no satisfactory explanation for the continued infringing. The Applicant has succeeded in its application, and has paid a \$200 filing fee which it would not have had to pay if it were not for the continued infringing file sharing which occurred after the detection notice was sent to the Respondent. In those circumstances, the Tribunal considers that an order for full reimbursement is appropriate.

[68] The Tribunal accordingly determines that the cost of the application fee paid by the Applicant to the Tribunal is the sum of \$200.

Regulation 12(2)(d)

[69] Under this subclause, the Tribunal must determine "*an amount the Tribunal considers appropriate as a deterrent against further infringing*".

[70] Regulation 12(3) of the Regulations provides that the Tribunal may consider any relevant circumstances under subcl.(2)(d), and that it *must* consider the three matters listed at subcl.(3)(a) – (c) of the Regulation. The Tribunal now turns to consider each of those matters.

Regulation 12(3)(a) – the flagrancy of the Infringement

[71] The New Zealand Court of Appeal has addressed the meaning of “*flagrancy*” of copyright infringement, in the context of the making of “additional damages” awards under s.121(2) of the Copyright Act 1994.³ Those cases show that “*flagrant*” copyright infringement may involve scandalous, outrageous, or deceitful conduct of some sort. It will include “*deliberate and calculated*” copyright infringement.

[72] The Applicant submitted that the locating, downloading, installing and configuring of BitTorrent software in this case was a deliberate act by the Respondent. It further submitted that it would defy common sense to believe that the only occasions during the eight month period when the Respondent was online and making the sound recordings available to others through the BitTorrent software were the three occasions which were detected, and which resulted in the infringement notices. The Applicant emphasised the Respondent’s failure to alter his behaviour, despite the wide publicity which had been given to the Act in New Zealand news media, and despite his receipt of the first two infringement notices.

[73] In the Respondent’s favour on the issue of “*flagrancy*”, the Tribunal accepts that it may have been the Respondent’s children who were engaging in the infringing file sharing. Also, the Respondent does not appear to have derived any financial or other benefit from the infringing file sharing: he says that he does not know either of the two songs. Nor is it clear that he understood that using BitTorrent would involve not only the downloading of the particular songs his children wanted to hear, but the online communication of those songs to others participating in the P2P networks.

[74] In those circumstances the evidence does not support a finding that the infringements have been “*outrageous*”, “*scandalous*”, “*deceitful*”, or “*calculated*”.

Regulation 12(3)(b) – the Possible Effect of the Infringing Activity on the Market for the Work

[75] The Applicant made detailed submissions under this head, in which it emphasised the market damage caused by P2P file sharing generally. It described the cumulative effect of multiple instances of illegal downloading as “*devastating*”, and contended that such activity has contributed to a halving of recorded music sales in New Zealand since 2002.⁴

[76] The Tribunal accepts that, as a general proposition, infringing activity by way of uploading sound recordings to the Internet in the course of the use of BitTorrent software may have some damaging effect on the market for those sound recordings. It also accepts that it is probable that some proportion of those free downloads will

³ See *Wellington Dealers Limited v Dealers Guide Limited* [1984] 2 NZLR 66, referring to *Ravenscroft v Herbert* [1980] RPC 193, 208, and *SKIDS Programme Management Limited and Others v McNeill and Others* [2012] NZCA 314.

⁴ According to the Applicant’s submission, sales of recorded music in New Zealand were \$124 million in 2002. By 2011 that figure (covering both physical and digital sales) had dropped to \$59 million.

represent lost revenue to the copyright owner. The “possible effect” of the uploading on the market for the two sound recordings, may therefore be regarded as adverse.

[77] Beyond that, it is neither necessary nor appropriate for the Tribunal to engage in a complex attempt to quantify the effect of the infringing activity on the market for the two sound recordings. There would be too many unknowns in any such exercise, including the length of the period or periods when the two sound recordings were accessible to participants in the P2P networks, and how many downloads took place during those periods. There is no evidence about such matters, and the Tribunal does not think it appropriate to adopt the Applicant’s hypothesis of 90 downloads for each song. The number of downloads monitored in the Envisional report ranged from 39.4 for the least popular album, to 159.7 for the most popular one. Furthermore, it is now 5 years since the Envisional research (which related to albums rather than individual tracks) was carried out in the United Kingdom. The extent to which the findings in the Envisional report may or may not be relevant in the present case is not clear.

[78] It must also be kept in mind that what the Tribunal is ultimately concerned with under r.12(2)(d) is not the quantification of the rights owner’s losses, but the determination of a figure which will be appropriate to deter the Respondent from further infringing. Determination of that figure will rarely, if ever, require a detailed calculation of a rights owner’s losses.

Regulation 12(3)(c) - whether the sum of the amounts referred to in subclause 2(a) to (c) would already constitute a sufficient deterrent against further infringement

[79] The Tribunal is satisfied that the determinations it has made under subcl.2(a) – (c) would not constitute a sufficient deterrent against further infringing.

[80] The total sum to be awarded to the Applicant under those subclauses is \$257.17, which is less than the total of the amounts paid by the Applicant to TelstraClear and to the Tribunal. The Respondent has offered no explanation or excuse for his failure to take appropriate steps on receipt of the detection and warning notices, and it is likely that the infringements will have had some adverse effect on the markets for the two sound recordings. In those circumstances the Tribunal considers that a stronger deterrent is required than an order for payment of the sum of \$279.04.

Determination under Regulation 12(2)(d)

[81] The Applicant did generally acknowledge that determining a deterrent sum under r.12(2)(d) may require the application of fairly broad brush strokes.⁵ After referring to a decision of the US District Court for the Southern District of Texas, in which the Court awarded damages on the basis of a statutory minimum figure of US\$750 per infringement⁶, and noting that no such minimum damages figure applies in New Zealand, the Applicant submitted that:

⁵ Its principal argument was that a sum to compensate it for the infringing downloads by others participating with the Respondent in the P2P networks, should be included within the Tribunal’s determination under subclause (2)(a)(i) of Regulation 12; not under subclause 2(d).

⁶ *Atlantic Record Corp et al v Anderson*, United States District Court for the Southern District of Texas, Houston Division, Civil Action M-06-3578; judgment 12 March 2008.

“...where there is no statutory minimum but the context involves the awarding of an additional sum to the rights owner, as a deterrent, then the Tribunal will similarly be forced to adopt a rounded figure.”

[82] The Applicant submitted that a fixed penalty approach would match the wish expressed in the MED discussion paper, which was to avoid the Tribunal being required to consider a substantial amount of evidence as part of a fast track approach. However recourse to the discussion paper is not appropriate here, where the meaning of the legislation is plain.

[83] The Applicant produced examples of a number of penalties set by the legislature for offending in various other spheres which could affect large numbers of the public. For example, the Land Transport (Offences and Penalties) Regulations 1999 prescribe a tariff of fees which offenders must pay for particular offences (e.g. \$400 for one offence of driving without an appropriate current driver's license, \$150 for parking in a parking area reserved for disabled persons, and so on). And in a schedule to its written submissions, the Applicant produced details of decisions made by several Courts in Germany within the last two years in cases taken against individual P2P end users.⁷ The Applicant submitted that the range of damages awards in Germany has generally been between €150 and €300 per uploaded file. However the Tribunal was not provided with copies of any of the German decisions, or with any evidence of the statutory and social frameworks within which those decisions were made. It has not derived any assistance from the references to those decisions.

[84] The Tribunal is also unable to accept the Applicant's submissions based on the penalties under the land transport legislation. First, it is not clear whether deterrence is the sole purpose of the fixed penalties under that legislation, or whether the amounts fixed may also include an element of partial recovery of the costs of enforcement. Under r.12(2)(d), the Tribunal is concerned only with deterrence. Secondly, the Tribunal is required to determine the amount which will be appropriate to deter the particular account holder against whom the application has been made. That amount will necessarily be different depending upon the circumstances of the account holder, and the number and nature of the infringements.

[85] On balance, the Tribunal considers that the appropriate amount for it to determine under r.12(2)(d) as a deterrent against further infringing, is the sum of NZ\$100 for each of the three proved incidents of infringing file sharing.

DECISION

[86] The Tribunal orders the Respondent to pay the sum of \$557.17 to the Applicant.

[87] That sum is made up as follows:

- [a] Regulation 12(2)(a)(i) - for the two proved infringements relating to work "We R Who We R", the sum of \$4.78.
- for the single proved infringement of the work "Paradise", the sum of \$2.39

⁷

The Applicant noted that several thousand such cases have now been taken in that country.

- [b] Regulation 12(2)(b) - cost of fees paid to IPAP, \$50.
- [c] Regulation 12(2)(c) - cost of application fee paid to the Tribunal, \$200.
- [d] Regulation 12(2)(d) - deterrent against further infringing, \$300 (being \$100 for each of the three infringements referred to in the enforcement notice).

Total

\$557.17

Decision of the Copyright Tribunal delivered by Warwick Smith

DATED the 5th day of February 2013

Warwick Smith
Warwick Smith
Member
Copyright Tribunal

