

## SUBMISSIONS TO COPYRIGHT TRIBUNAL

### (1) Introduction

1. Since this is one of the first occasions that the Tribunal has had the opportunity to consider the issue of penalties under s112O of the Copyright Act and the Copyright (Infringing File Sharing) Regulations 2011. For this reason, the rights owner is providing more detailed submissions (as part of its application) than might ordinarily be anticipated. It is hoped that these will be of assistance to the Tribunal in addressing the various statutory considerations.

### (2) The statutory framework: Relevant considerations

2. At the outset, it is important to record that a person who shares or makes available copyright-protected material, such as sound recordings, without authorisation by means of P2P software and a P2P file sharing network, infringes a copyright owner's exclusive rights of *copying* and *communication* to the public<sup>1</sup>.
3. The issue of penalty in respect of the separate file sharing provisions is covered by s122O of the Copyright Act and by Regulation 12 of the Copyright (Infringing File Sharing) Regulations 2011.

### (A) The relevant provisions in s122O Copyright Act

4. Section 122O(1) states that the Tribunal:
 

"must order an account holder to pay a rights owner a sum if the Tribunal is satisfied that:

  - (a) each of the 3 alleged infringements that triggered the infringement notices issued to the account holder:
    - (i) was an infringement of the rights owner's copyright; and
    - (ii) occurred at an IP address of the account holder; and
  - (b) the 3 notices were issued in accordance with this Act."
5. RIANZ submits that each of the *three requirements* in subsection (1) has been satisfied on the facts of this case for the following reasons:
  - There has been an infringement of the rights owner's copyright. The evidence packs submitted by RIANZ show that on each of three separate occasions, the account holder uploaded 1 copyright protected track being a

<sup>1</sup> Sections 16(1)(a) and (f), 30 and 33 Copyright Act 1994 and definition of "communicate" in s2. This has been confirmed by decisions in both the UK (on virtually identical legislation) and in Australia. In *Dramatico Entertainment Limited & Ors v British Sky Broadcasting Limited & Ors* [2012] EWHC 268 (Ch) (*Dramatico*) the High Court gave detailed consideration to the activities engaged in by users of "the Pirate Bay" (a website which facilitates access to torrent files) and concluded ([41] – [43]) that these resulted in both unauthorised copying, and communication to the public of the applicant's films. Specifically with regard to communication, the Court held that users infringed by "mak[ing] the recordings available by electronic transmission in such a way that members of the public may access the recordings from a place and at a time individually chosen by them".

Similarly, in a recent High Court of Australia decision, *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 (*iiNet*), French CJ, Crennan and Kiefel JJ noted at [21] that "a user of the BitTorrent system who downloads a film, the subject of copyright, will infringe not only s 86(a) of the Copyright Act, but also s 86(c), because the BitTorrent system will automatically make that film available online on the user's computer until the .torrent file is removed from the BitTorrent client."

sound recording. The Enforcement Notice also lists a further two infringements by this account holder that, because of their timing did not trigger notices. At the time of the five infringement detections, the account holder used had BitTorrent protocol (uTorrent ver 2.0.0) software installed on their computer to enable the upload.

- Each of the three infringements occurred at an IP address<sup>2</sup> of the account holder as verified by the IPAP.
  - The three notices were issued in accordance with this Act. There have been no Challenge Notices received in respect of the Detection, Warning or Enforcement Notices.
6. Section 122N(1) creates certain presumptions as to the infringement notices:
- “In proceedings before the Tribunal in relation to an infringement notice, it is presumed:
- (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 this Act.”
7. Sections 122N(2) and (3) provide that an account holder may submit evidence that, or give reasons why, any one or more of these presumptions do not apply with respect to any particular infringement identified in an infringement notice. If the account holder submits evidence of his reasons, then the rights owner must satisfy the Tribunal that the particular presumption or presumptions are correct.
8. The rights owner is not aware of any such evidence from the account holder. Nevertheless since this is the first case under these provisions, in order to assist the Tribunal the rights owner has provided additional explanation of file sharing via the BitTorrent protocol throughout this submission and in footnotes, and has included in **Schedule 1** a description of the method used by Dtechnet (now renamed Mark Monitor) to gather evidence in this case.
9. Where (as here) each of the three s122O(1) requirements has been satisfied, the section requires that the Tribunal order the account holder to pay a sum to the rights owner. The extent of that sum and how it is calculated is determined as follows.
10. Section 122O(2) requires that the sum specified in the Tribunal order:

“... must be determined in accordance with regulations made under this Act and *must include* a sum in relation to every infringement identified in the enforcement notice that the Tribunal is satisfied was committed against the Rights Holder at an IP address of the account holder.” [emphasis added]

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<sup>2</sup>

Whenever a computer is connected to the internet, the device used to establish the connection (such as the computer itself, or a “router” in the case of a network of computers that access the internet via that router) is assigned with a unique numerical “IP address” which enables it be identified (eg. “127.86.207.71”).

These IP addresses are allocated by internet service providers (IPAPs) on either a “dynamic” basis (which means the address may change each time the computer is connected) or “static” basis (which means the address for that computer is always the same). Regardless, the IP address enables a computer or router connected to the internet at any particular time to be identified, by consulting the records maintained by IPAPs of the IP addresses that have been assigned to its customers.

11. This means that the sum ordered by the Tribunal *must* include a sum in relation to every infringement identified in the third notice i.e. the enforcement notice. The enforcement notice, in turn, must identify the preceding detection and warning notices (in respect of infringements) (s122F(2)(d)) and “any other alleged infringements against the rights owner that have occurred since the date of the precedent detection notice” (s122F(2)(e)). This means in this case that **all** three infringements that have triggered notices are covered.
  12. Section 122O(3) states that if the Tribunal makes an order under subsection (1) it:
 

*“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 owner to the IPAP under section 122U;
    - (b) reimbursement of the application fee paid by the rights owner to the Tribunal.”
  13. The total amount ordered by the Tribunal must not exceed \$15,000: s122O(4).
  14. Despite s122O(1), the Tribunal may decline to make the order required by that subsection if, in the circumstances of the case, the Tribunal is satisfied that making the order would be manifestly unjust to the account holder: s122O(5). In this regard, the rights owner submits that “manifestly unjust” is a high threshold and there is no evidence in this case which meets that standard.
- (B) The relevant provisions in Regulation 12 of the Regulations**
15. The Regulations impose a further layer of statutory considerations in respect of the sum that the Tribunal may order under s122O. The relevant provisions can be summarised as follows:
    - (1) *Maximum sum permissible: Regulation 12(1)*
  16. The sum that the Tribunal may order an account holder to pay under s122O is the lesser of:
    - (a) The sum of the amounts referred to in sub-clauses (2)(a) – (d); and
    - (b) \$15,000.
    - (2) *Individual items: Regulation 12(2)*
  17. Where, under s122O the Tribunal orders an account holder to pay a sum, the Tribunal “*must determine* the following”:
    - (a) For each work in which the Tribunal is satisfied that copyright has been infringed at the IP address of the account holder, the Tribunal must determine:
      - (i) if the work was legally available for purchase in electronic form at the time of the infringement, the reasonable cost of purchasing the work in electronic form at that time; or
      - (ii) if the work was not legally available for purchase in electronic form at the time of the infringement but was available in some other form, the

reasonable cost of purchasing that work in another form at that time;  
or

- (iii) if neither subparagraph (i) nor subparagraph (ii) applies, the amount claimed by the applicant in respect of the work, or any other reasonable amount determined by the Tribunal."

This issue is addressed in more detail shortly.

- (b) The Tribunal must 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 relates".

In this regard, the fees paid by RIANZ to Telecom NZ were \$25.00 + GST per notice i.e. a total across five notices of \$125.00 + GST. (Note that the IPAP set the maximum fee allowable by the Regulations.)

- (c) The Tribunal must determine "the cost of the application fee paid by the rights owner to the Tribunal".

This sum is \$200 + GST.

- (d) The Tribunal must determine "an amount that the Tribunal considers appropriate as a deterrent against further infringing".

This is dealt with in more detail in the rest of these submissions.

(3) *Relevant factors for awarding a deterrent sum: Regulation 12(3)*

- 18. Regulation 12(3) requires that, in considering whether to award a deterrent sum under Regulation 12(2)(d) and, if so, what that amount should be, the Tribunal may consider "any circumstances it considers relevant" but:

"must also consider:

- (a) the flagrancy of the infringement;
- (b) the possible effect of the infringing activity on the market for the work; and
- (c) whether the sum of the amounts referred to in sub-clause 2(a) to (c) would already constitute a sufficient deterrent against further infringing."

**(3) Specific submissions in this case as to the sum that should be ordered**

- 19. In addressing these provisions for the first time, it is relevant to consider the policy underlying them. In this regard, the Discussion Paper<sup>3</sup> issued by MED in 2011 prior to promulgation of the Regulations, but *after* the Select Committee had reported back on the Copyright (Infringing File Sharing) Amendment Bill, contains some helpful observations.
- 20. The Discussion Paper noted<sup>4</sup>:

"It is likely that the usual civil remedy of damages would frustrate the efficient working of the Tribunal for file sharing claims as damages are often difficult to calculate and require

<sup>3</sup> Copyright (Infringing File Sharing) Regulations 2011 – Discussion Paper.  
<sup>4</sup> Para 45.



complex legal argument. The intention of the Tribunal process is that it should be simpler for both rights owner and internet account holder to use (reflecting the scale of the infringing activity). We also note the recommendation of the Commerce Select Committee that a punitive element should be included in the award, and agree with this recommendation. This will mean that an award under the Bill will have a deterrent effect to future infringing, which is a key policy driver for the regime."

21. The Ministry noted that its objectives for the Regulations relating to calculation of Copyright Tribunal awards were:
    - (a) To "provide further certainty" to the Tribunal surrounding the method by which they calculate awards<sup>5</sup>;
    - (b) To "ensure the deterrent objective of the regime is maintained. This was a key policy driver for the Bill itself"<sup>6</sup>;
    - (c) To "facilitate the efficient working of the Tribunal"<sup>7</sup>.
  22. The Ministry's preferred option<sup>8</sup> was to "require the Tribunal to make a compensation based award, and provide discretion to award an additional amount as a deterrent. This was the option which was adopted in Regulation 12 and is reflected in the language in Regulation 12(2) (i.e. "must determine") and the discretion given in respect of a deterrent sum<sup>9</sup>.
- Specific sums specified in Regulation 12(2)(a) – (c)*
23. Before turning to the issue of a deterrent sum, RIANZ deals first with the sums specified in Regulation 12(2)(a) - (c).
  24. ***Under Regulation 12(2)(a)***, the Tribunal is required to determine for each work one of three alternatives. In the present case the sound recording tracks were legally available for purchase in electronic form from iTunes at NZ\$2.39 per track. On this basis "the reasonable cost of purchasing the work"<sup>10</sup> was \$2.39.
  25. But it is necessary to make some further comment. A literal reading of Regulation 12(2)(a) might suggest that the Tribunal should award the rights owner, in respect of each work infringed, an amount being the reasonable cost of purchasing *one copy* of the work. If that were the case, then that sum would be \$2.39 x 5 i.e. \$11.95.
  26. However such a sum is not appropriate to compensate the rights owner for the act of making a copyright work available to a potentially very large audience via a P2P network. 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.
  27. 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

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<sup>5</sup> Para 46.  
<sup>6</sup> Para 47.  
<sup>7</sup> Para 48.  
<sup>8</sup> Paras 49 and 54.  
<sup>9</sup> Regulation 12(2)(d) and (3).  
<sup>10</sup> Regulation 12(2)(a)(i).

reflected in the MED Discussion Paper<sup>11</sup> where the MED noted that “the upload of works is more damaging to a rights owner than the download”. This point is also made in *Atlantic v Anderson*, a US judgment referred to later in these submissions.

28. The Act specifically defines “file sharing” (s122A(1)) as including uploading and as occurring:

“... where material is uploaded via ... the Internet using an application or network that enables the simultaneous sharing of material between multiple users;”

29. The uploading of sound recordings to a file sharing network is a serious concern and has been made part of the definition of “file sharing” because of the ease with which uploaded tracks can be disseminated widely to downloaders using the specialised P2P software (in this case BitTorrent) which the account holder has downloaded and is using. A track can be downloaded from a P2P file sharing network in about 1 minute (or slightly less depending on broadband speeds). The longer a person is online and is making tracks available, the larger the number of potential downloads of that track by other P2P users<sup>12</sup>. All such downloads cause loss to the rights owner.
30. Given the matters just outlined, the rights owner submits that it is not likely that the Legislature intended that the compensation for uploading under Regulation 12(2)(a) be limited to the cost of purchasing one work. Plainly, that would not compensate the rights owner for the losses caused. Rather it is submitted the proper approach is for the Tribunal to read Regulation 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.
31. On this approach, the Tribunal should determine a sum with reference to the actual or estimated number of downloads occurring in respect of each infringing upload. For example, if a file uploaded is then downloaded 100 times, the starting point for compensation could be the reasonable cost of purchasing a copy of the work multiplied by 100. If the objective is to compensate the rights owner for actual loss (which is clearly affirmed by the MED Discussion document<sup>13</sup>), the Tribunal may then find it 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.

<sup>11</sup> Para 50.

<sup>12</sup> BitTorrent is one of a number of file sharing protocols that enable internet users (known as “peers”) to share files across the internet on a “peer-to-peer” basis. Peers use BitTorrent software such as uTorrent (known as a “client”) to acquire files (such as sound recordings) from the group (known as a “swarm”) of other BitTorrent users who are sharing that file, while also making their own files available for sharing. In this way, BitTorrent enables both upload and download of files across the internet.

A key element of the BitTorrent system is the division of shared files into small pieces, such that each piece making up a particular shared file can be acquired from any BitTorrent user in the swarm. This makes the BitTorrent system a highly efficient means of distributing files amongst a large group of users, and means that in the course of downloading a single file, a BitTorrent user may connect with hundreds of other users, in order to obtain each of the pieces comprising that file.

The BitTorrent system facilitates this method of file sharing by means of small “torrent files” which do not contain the actual file that the user wishes to acquire, but rather contain a set of instructions that enable the user to connect and participate in the swarm of users who are sharing that file. The system also relies on “trackers” which monitor the computers that are making particular files available at any one time. The tracker makes this information available to a user’s BitTorrent client when it commences the download process.

A further significant element of the BitTorrent system is the use of “hash values”. These serve as a means of identifying the files that are being shared using BitTorrent. Each file containing a sound recording which is being shared amongst a swarm, and each piece of that file, will have its own unique hash value that is recognisable by the BitTorrent client. This enables the BitTorrent client to ensure that it has acquired the correct file, including each of the individual pieces comprising that file at the conclusion of the download process.

<sup>13</sup>

Para 50(a):

“The compensation element of the award would be calculated with reference to the market value of the work.”

32. The difficulty in applying this method in this case is that it is not known how many downloads were made from the sound recordings uploaded by the account holder. The rights owner is not able to obtain via current Internet detection services, details of the number of persons who downloaded the tracks in issue.
33. In the present case the account holder has infringed on five separate occasions in respect of four different tracks i.e. *Only Girl (In the World)* by Rihanna (twice), *Dynamite* and *Break Your Heart* by Taio Cruz and *Resistance* by Muse. All of these are very popular hit tracks. These infringements occurred over a two month period commencing on 08 May 2012 and concluding on 17 July 2012. It defies common sense to think that the only occasions during this period when this account holder was online and making the tracks available through its use of the P2P software, happened to be the five occasions on which it was detected (leading to the infringement notices).
34. Based on empirical data it is possible to estimate the number of downloads that will have resulted from the account holder's activities with some precision. The evidence is that the number of downloads is likely to be substantial. In late 2007 the International Federation of the Phonographic Industry (IFPI) commissioned a report from a UK Internet intelligence agency, Envisional Limited, to determine the number of copies of an album and tracks from an album from a single installed client on the BitTorrent network to other persons on the same network during a research period of one month<sup>14</sup>. A total of 17 albums were chosen to model the folder of a typical uploader and were balanced between recent releases, current and classic albums<sup>15</sup>.
35. The Envisional research showed that:
- On average, each album was downloaded from the client itself the equivalent of 90 times in a month or 3.2 times per day.
  - The maximum number of individual album downloads from the client itself was the equivalent of 159.7 times in a month or 5.7 times a day on average.
  - The minimum number of individual album downloads from the client itself was the equivalent of 39.4 times in a month or 1.4 times per day on average.
36. The Envisional research was designed to ensure that the monitored experience was as close as possible to that of a typical user of a P2P network and steps were taken by the research setup to have the account holder act conservatively and in a manner which would mimic the typical installation<sup>16</sup>. The report states that the results of the research can be interpreted as "*the minimum amount of upload possible over the monitoring period*"<sup>17</sup>. One of the reasons for this was because the study created *unique torrent swarms* for each album monitored. This meant that the monitored demand for and actual data transfer for each album might be lower than had the client joined an already established and popular swarm for each album. Most BitTorrent users will in fact choose an established swarm.
37. The rights owner submits that the Envisional data provides a rational and conservative basis for a damages calculation for each infringement identified in the

<sup>14</sup> The study is filed with this application as a **separate document**.

<sup>15</sup> Appendix A para 4.1.

<sup>16</sup> Envisional Report para 2.3.

<sup>17</sup> Ibid para 2.3.1.

enforcement notice<sup>18</sup> – namely to apply a baseline figure of 90 downloads x \$2.39<sup>19</sup> for each such infringement. It is both rational and conservative because:

- (a) The average figure uploaded of 90 downloads per month (or 3.2 downloads a day) identified by Envisional was across a range of albums from recent to classic status. Given that all the tracks in issue here are very popular, current hit tracks, this figure *understates* the amount of downloading that will have occurred as a result of the account holder's infringement. As outlined earlier, the maximum average monthly downloads in the Envisional for the most popular album was 159.7 downloads a month or 5.7 per day;
- (b) The Envisional study also showed<sup>20</sup> that, if downloads from a BitTorrent swarm were taken into account (i.e. as a direct result from the uploading of the 17 albums) each album was downloaded an average of *130 times per day*. Taking a baseline figure of 90 downloads (for each detected infringing uploaded) is therefore reasonable and much less than this daily figure;
- (c) Given that the activities of this account holder were detected over successive monthly periods, it is reasonable for the Tribunal to adopt a baseline figure of 90 downloads *for each infringement identified* i.e. each uploaded track. The evidence demonstrates a *pattern of activity* by the account holder that has continued undeterred by the earlier notices sent by the IPAP. This is confirmed by the fact that the account holder has been detected uploading the same track on successive occasions.

For all these reasons, it is submitted that the baseline figure of 90 downloads per infringing upload allows a very substantial margin in favour of the account holder and can rightly be seen as a conservative approach.

38. Taking this approach, the sum to be determined would be:

- *Only Girl (In the World)* x 2 infringements:  
 2 infringements x 90 downloads = 180 downloads  
 180 downloads x \$2.39 per track = \$430.20
- *Dynamite* x 1 infringement:  
 1 infringement x 90 downloads = 90 downloads  
 90 downloads x \$2.39 per track = \$215.10
- *Break Your Heart* x 1 infringement:  
 1 infringement x 90 downloads = 90 downloads  
 90 downloads x \$2.39 per track = \$215.10

<sup>18</sup> S122O(2).

<sup>19</sup> The cost of purchasing the track from iTunes.

<sup>20</sup> Results on pages 3-4.

- *Resistance* x 1 infringement:  
     1 infringement x 90 downloads = 90 downloads  
     90 downloads x \$2.39 per track = \$215.10
- Total = \$1075.50

39. Based on this approach and methodology, the rights owner seeks compensation of \$1075.50 for the five infringements.

40. ***Under Regulation 12(2)(b)***, the Tribunal is obliged to determine any fee paid by the rights owner to the IPAP in respect of the infringement to which the application relates. That sum in the present case is \$25 x 5 notices i.e. \$125 + GST (\$143.75).

41. As noted earlier, s122O(2) states that the Tribunal "may order" a sum representing a contribution towards this fee. Yet Regulation 12(3)(c) seems to anticipate that the whole of the fee is being paid to the rights owner. This is because it states:

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

42. The MED Discussion Paper certainly contemplated full reimbursement of IPAP fees<sup>21</sup>:

"The fact that the Tribunal can require an internet account holder to reimburse the rights owner for the fees they have had to pay to an ISP to send notices under the regime, and the fee to take a claim to the Tribunal, would be taken into account."

43. RIANZ submits that in fact s122O is not binding because it only uses the permissive terminology "may". RIANZ submits that in line with Regulation 12(3), it should be reimbursed the whole of the \$25 fee x 5 notices (\$125 + GST) which it has had to pay to the IPAP in respect of the infringements. Otherwise RIANZ is left out-of-pocket.

44. In the alternative, if the Tribunal believes it is bound by s122O(3)(a) to order only a contribution, then RIANZ seeks a 95% contribution towards the fee i.e. \$118.75 + GST (\$136.56). The fee is a disbursement which it has been obliged to pay in order to trigger action against the infringer in the first place and, in circumstances where it is found that there has been infringing activity by the account holder, it is only fair to the rights owner that this should be reimbursed. A 95% 'contribution' is warranted i.e. \$136.56 (inc GST).

45. ***Under Regulation 12(2)(c)***, the Tribunal is obliged to determine the cost of the application fee paid by the rights owner to the Tribunal i.e. \$200 + GST (\$230). Again Regulation 12(3)(c) contemplates an order being made that this be paid to the rights owner. This is confirmed by s122O(3)(b) which provides that the Tribunal:

"May also make an order requiring the account holder to pay to the rights owner:

(b) Reimbursement of the application fee paid by the rights owner to the Tribunal."

46. Therefore RIANZ seeks reimbursement of the \$200 + GST (\$230) which it has already been obliged to pay to the Tribunal.

<sup>21</sup> Discussion Paper para 50(d).

47. The total sum sought is therefore:

Regulation 12(2)(a)	\$1075.50
Regulation 12(2)(b)	\$143.75 (inc GST)
Regulation 12(2)(c)	\$230.00 (inc GST)
Total:	\$1449.25

If the Tribunal is not prepared to award a full reimbursement of the IPAP fees, then on a 95% reimbursement (\$136.56), the total figure would adjust to \$1442.06.

*A deterrent sum: Regulation 12(2)(d) and 12(3)*

48. RIANZ now turns to address the relevant considerations in Regulation 12(3) as to whether the award of a deterrent amount in favour the rights owner is appropriate and, if so, what that amount should be. Again it is relevant to take into account the policy objectives of the legislation. The Select Committee in its report on the Bill recommended a punitive amount be included in the Tribunal's award – something that the MED Discussion Paper regarded as a "key policy driver for the regime"<sup>22</sup>.
49. The Discussion Paper also stated in relation to a deterrent amount<sup>23</sup> that the Tribunal could also consider "whether the work was uploaded or downloaded, and the possible effect of the infringing activity on the market. *It is likely that the upload of works is more damaging to a rights owner than a download*".
50. As to *flagrancy of the infringement*<sup>24</sup>, the rights owner submits as follows:
- (1) At the time of the infringement detections, the account holder had BitTorrent protocol (uTorrent ver 2.0.0) software installed on his/her computer.
  - (2) The locating, downloading, installing and configuring of BitTorrent software to enable the uploading or downloading from P2P websites is a deliberate act. It does not occur without direct action on behalf of a computer user.
  - (3) On at least five occasions over a 2 month period, the account holder<sup>25</sup> engaged in the file sharing as defined in s122(A)(1) of the tracks; *Only Girl (In the World)*, *Dynamite*, *Break Your Heart* and *Resistance*. As noted earlier, it defies common sense to accept that the only occasions during the 2 month period when this account holder was on line and making tracks available through use of the P2P software happened to be the five occasions detected and causing the three infringement notices.
  - (4) The account holder took no action to alter his/her behaviour following the first two notices. This is so, even though wide publicity has been given by the New Zealand media to the file sharing legislation and its operation.

<sup>22</sup> Discussion Paper para 45.

<sup>23</sup> Discussion Paper paras 50(b) and (c).

<sup>24</sup> Regulation 12(3)(a).

<sup>25</sup> Or a user at this account holder's IP address.



51. As to the *possible effect of the infringing activity on the market for the work*<sup>26</sup>, the rights owner submits that the account holder has clearly made available on three occasions, a copyright protected track using P2P software. By making available this track, the account holder will have enabled multiple other parties to download these tracks every time the account holder used the BitTorrent software. In this regard, the rights owner refers again to the Envisional study outlined earlier and its statistics as to average downloads arising from making albums available through P2P software.
52. The cumulative effect of multiple instances of illegal downloading is devastating. Accordingly to figures available from the monitoring company comScore<sup>27</sup>, each month there are around 700,000 people in New Zealand accessing unlicensed P2P services.
53. Music piracy and predominantly the making available of sound recordings via P2P file sharing networks has contributed to a halving of recorded music sales in New Zealand since 2002. Whereas sales of recorded music in New Zealand were \$124 million in 2002, by 2011 these sales (both physical and digital) had dropped to just \$59 million.
54. The effect on the market caused by infringement of copyright in sound recordings was well summarised by Judge David Harvey in *New Zealand Police v Vile*<sup>28</sup> - a case involving the illegal burning of music CDs:
- "[15] What is important to remember as far as copyright infringement is concerned is that losses are caused as a result of that activity. The losses may be direct or they may be indirect. Most of them of course are indirect, they involve losses of royalties that would otherwise be received from the sale of copyright works by artists and of course the whole theory that underlies copyright is that a monopoly is given to a copyright owner to control the copying of works so that that copyright owner firstly will be able to exploit and derive an income from the sale of the copyright work and thereby, secondly, be encouraged to continue to produce creative works for the benefit of the community and of course there are, in addition to that, a whole lot of permitted uses that allow people to begin to develop upon existing copyright works to improve and enhance some of the cultural benefits that copyright provides.
- It is all part of a carefully designed statutorily created social contract for the benefit of artists and for the benefit of the wider community.
- [16] The important thing to remember, however, is that it is not only the artists who suffer. It is not only the creators, the writers of the songs, or the actors in the movie. It is also everybody else who is associated with that, the record producers, the session musicians in the cases of music, and on it goes through to the people who occupy the CD stores in the malls who sell the product. These are all people who are affected by, detrimentally, copyright infringement and particularly commercially based copyright infringement."
55. As to "*whether the sum of the amounts in sub-clause 2(a) – (c) would already constitute a sufficient deterrent* against further infringing<sup>29</sup>", the rights owner strongly submits that the sum of these amounts would not be a sufficient deterrent.
56. As seen already, the sums that would be available under sub-clause 2(a) – (c) would be \$1449.25 if full reimbursement is allowed of the IPAP fee or \$1442.06 if 95%

<sup>26</sup> Regulation 12(3)(b).

<sup>27</sup> RIANZ research is based on comScore data. comScore relies on software that installs on to users' PC's, providing a passive measurement of all PC activity of those users (with their full knowledge and permission).

<sup>28</sup> 23 August 2006. The defendant was sentenced to 9 months imprisonment and ordered to pay \$8,500 in reparations.

<sup>29</sup> Regulations 12(3)(c).

reimbursement were to be allowed and if the Tribunal accepts the rights owner's methodology for determining a sum under Regulation 12(2)(a).

57. The rights owner submits that whichever figure is allowed, this is a modest sum which, in the context of this account holder's use of P2P file sharing software to make tracks available, will not likely operate on its own as a deterrent. It only reimburses the rights owner's out-of-pocket costs and (because of the conservative calculation) part only of its actual losses. The intention of the Legislature in providing for a deterrent sum is to act not just as a deterrent for this account holder but to speak to others – i.e. the 700,000 people per month in New Zealand accessing unlicensed P2P services<sup>30</sup>. For there to be a deterrent effect, there should be an extra sum which deters the infringer as well as others in the market from engaging in similar activity. In the first penalty case under the Fair Trading Act, *Commerce Commission v L D Nathan*<sup>31</sup>, Greig J referred with approval to Australian authority and the need to impose deterrent penalties and in particular a comment by French J<sup>32</sup>:

"The need to impose deterrent penalties is accepted and it is also accepted that they must not be so high as to be oppressive."

58. In determining whether to impose an amount appropriate as a deterrent against further infringing, the Tribunal is required to consider each of the three factors in Regulation 12(3) that have just been addressed. However the Regulation makes it clear that in addition the Tribunal may take into account "*any other circumstances it considers relevant*".

59. The rights owner submits that the following further factors are relevant to the imposition of a deterrent against further infringing:

(a) *All three infringements must be considered*

60. The Act and Regulations make it clear that each separate act of file sharing amounts to an infringement. See Regulation 5 which refers to the requirements in relation to *each* infringement notice and the fact that there can be a challenge to each individual infringement notice<sup>33</sup>.

61. So even though the Act and Regulations provide that action can be taken only after the third infringement notice has been sent, in fact all three infringements have to be taken into account when determining what might amount to an appropriate deterrent<sup>34</sup>. When Regulation 12(3) refers to "the flagrancy of the infringement", it is referring to all three individual infringements cumulatively. Similarly Regulation 12(3)(b) and its requirement to consider "the possible effect of the infringing activity" encompasses all three.

(b) *The Legislature has set a maximum figure of \$15,000*

62. Secondly, the Legislature has set a maximum figure of \$15,000 for the total amount that can be ordered to be paid to the rights owner i.e. inclusive of the contribution to IPAP fees and the Tribunal's fee (a maximum of \$275)<sup>35</sup>. Further, Regulation 12(1) mandates the lesser of the sums in 12(2)(a) – (d) i.e. *cumulatively* or \$15,000. But

<sup>30</sup> See para 56 above and Footnote 34.

<sup>31</sup> [1990] 2 NZLR 160.

<sup>32</sup> *Gardam v Splendid Enterprises Pty Limited* (1987) 9 ATPR 48,495 at [48,503].

<sup>33</sup> Regulation 6.

<sup>34</sup> See section 122O(2) "... and 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".

<sup>35</sup> S122O(4).

the figure of \$15,000 produces a guideline as to the top limit for all sums in a worst case. The figure equally provides an indication that a deterrent sum needs to be more than a small or trivial amount when compared to the maximum penalty.

(c) *Principles governing additional damages under s121(2) Copyright Act 1994*

63. In a conventional copyright infringement action, the Court under s121(2):

“... may having regard to all the circumstances and in particular to –

- (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.”

64. This provision earlier in the same statute shares with Regulation 12(3) the criteria of “the flagrancy of the infringement” and the ability to have regard to all the relevant circumstances<sup>36</sup>. The criterion in s121(2) of “any benefit accruing to the defendant” is replaced in Regulation 12(3) by:

- “(b) The possible effect of the infringing activity on the market for the work; and
- (c) Whether the sum of the amounts referred to in sub-clause 2(a) to (c) would already constitute a sufficient deterrent against further infringing.”

65. In a very recent decision (the *Skids* case), the New Zealand Court of Appeal noted<sup>37</sup> that under s121(2), flagrancy includes deliberate and calculated copyright infringement<sup>38</sup> citing the Court of Appeal decision in *Wellington Newspapers Limited v Dealers Guide Limited*<sup>39</sup>. The Court of Appeal noted that “flagrancy includes deliberate and calculated copyright infringement and that a previous Court of Appeal had considered that damages were at large and could include elements of compensation for aggravation and of punishment”<sup>40</sup>. The Court held<sup>41</sup> that the provision gave it “the power to award damages that are not linked to a compensation award, and which is to be exercised applying principles that correspond to those which govern awards of exemplary damages at common law”.

66. In that case, the Court awarded additional damages in the sum of \$20,000 for deliberate line-by-line copying of 50 pages of a manual in circumstances where compensatory damages were \$2,000. The factors considered by the Court were<sup>42</sup>:

- The nature of the infringement.
- The means of the parties.
- The conduct of the parties up to the date of judgment.
- The availability of other penalties and the fact that the only penalty that the defendant would suffer for her flagrant copying and aggravating actions would be this award of additional damages.

<sup>36</sup> Regulation 12(3) “may consider any circumstances it considers relevant”; s121(2) “having regard to all the circumstances and in particular to ...”.

<sup>37</sup> *Skids Programme Management Limited & Ors v McNeill & Ors* [2012] NZCA 314, 23 July 2012.

<sup>38</sup> At [102] and [103].

<sup>39</sup> [1984] 2 NZLR 66.

<sup>40</sup> *Wellington Dealers Limited v Dealers Guide Limited* supra at 76 and 78.

<sup>41</sup> Supra at [105].

<sup>42</sup> Ibid at [118].

- The amount of other awards for exemplary damages in previous cases.
67. The rights owner submits that this decision provides three points of guidance in the present case.
- First, that “flagrancy” clearly encompasses deliberate and calculated actions by the infringer. The present case can be regarded as deliberate and calculated because the account holder was given two warnings and yet persisted with the infringing file sharing.
  - Secondly, the Court’s recognition that even though compensation damages had been awarded in that case, this did not provide any penalty for the flagrant infringement. In the present case, (as already seen) the Tribunal is obliged by Regulation 12(3)(c) to decide whether the compensation/reimbursement awarded would constitute a sufficient deterrent. It is submitted that the Court of Appeal approach lends weight to the account holder’s submission<sup>43</sup> that an extra sum is required as the only penalty for deliberate and calculated conduct and (in this case) to deter others from ongoing file sharing. After all the Legislature has provided this statutory regime so that file sharing can be curbed and deterred;
  - Thirdly, the Court’s robust assessment of penalty at a figure of \$20,000 shows that deterrent sums where flagrancy is involved should be more than a minimal trifling sum. The sum of additional damages substantially exceeded the compensatory damages.

(d) *Assessments in other jurisdictions*

68. The rights owner submits that, when assessing an appropriate sum under Regulation 12(2)(d) in relation to the sums fixed under Regulation 12(a) – (c), it is relevant for the Tribunal to have regard to determinations in overseas Courts as to appropriate sums payable. There have been a number of decisions from overseas Courts in this area and some examples are included in **Schedule 2**.
69. One particularly useful decision is the US decision of *Atlantic Record Corp et al v Anderson*<sup>44</sup>. In the US there are legislative statutory minimum damages of US\$750 per infringement. The defendant, who had made available sound recordings on the KaZaA P2P network argued<sup>45</sup> that the plaintiff’s damages were just 99¢ per track because the song could be purchased for that amount. District Judge Vanessa Gilmore rejected this<sup>46</sup>.

“Yet, the true cost of Defendant’s harm in distributing Plaintiffs’ Copyrighted Recordings for download by other users on KaZaA is incalculable. That is, there is no way to ascertain the precise amount of damages caused by Defendant’s actions in not only improperly downloading Plaintiffs’ Copyrighted Recordings himself but also subsequently distributing some or all of the Plaintiffs’ Copyrighted Recordings to a vast community of other persons on KazaA. Clearly, under such circumstances, Plaintiffs’ actual damages exceed 99¢ per Copyrighted Recording.

Furthermore, Defendant concedes that he placed the subject Copyrighted Recordings, along with other sound recordings, into a shared folder on his computer while being

<sup>43</sup> In para 58.

<sup>44</sup> US District Court for the Southern District of Texas, Houston Division, Civil Action H-06-3578, District Judge Vanessa D Gilmore, 12 March 2008.

<sup>45</sup> Decision page 16.

<sup>46</sup> Ibid line 6.

connected to the media distribution system or peer-to-peer network, KaZaA. Defendant also concedes that he knowingly did so without the consent or authorisation of Plaintiffs. Thus, even though the Court acknowledges the possibility that the Defendant did not appreciate the gravity of his actions in the context of copyright law, that nevertheless does not amount to a wholesale lack of willfulness."

70. The Court therefore awarded statutory damages of US\$750 (NZ\$910.30) x the 31 copyrighted sound recordings in issue.
71. Plainly that case involved a statutory minimum damages figure which does not apply in New Zealand. But the significance and value of the decision is:
- First the recognition that the damage to the copyright owner caused by uploads well exceeds the price of a single download.
  - Second, that it was appropriate to apply a statutory minimum damages figure (US\$750) to do justice. Where there is no statutory minimum but the context involves the awarding of an additional sum *to the rights owner* as a deterrent<sup>47</sup>, then the Tribunal will similarly be forced to adopt a rounded figure.

(e) *Legal downloading services available in New Zealand*

72. A fourth relevant factor in relation to deterrent penalty is that legal services for the digital downloading or streaming of sound recordings are now readily and inexpensively available in New Zealand. So it is not a case where the uploading (or downloading) of sound recordings by account holders is made necessary by the unavailability of services or other barriers.
73. RIANZ has been successful in encouraging a wide range of legal digital services to establish businesses in New Zealand. New Zealand consumers now have 9 digital download stores, 8 streaming services and 2 Internet radio stations to choose from including global leaders iTunes, Spotify and Pandora:

*Download stores:*

7digital	<a href="http://nz.7digital.com">nz.7digital.com</a>
Amplifier	<a href="http://amplifier.co.nz">amplifier.co.nz</a>
Bandit	<a href="http://bandit.fm">bandit.fm</a>
Fishpond	<a href="http://fishpond.co.nz/music">fishpond.co.nz/music</a>
iTunes	<a href="http://apple.com/itunes">apple.com/itunes</a>
Marbecks Digital	<a href="http://marbecksdigital.co.nz">marbecksdigital.co.nz</a>
The In Song	<a href="http://www.theinsong.co.nz">www.theinsong.co.nz</a>
telecom music store	<a href="http://telecom.co.nz/music">telecom.co.nz/music</a>
Vodafone	<a href="http://play.vodafone.co.nz/music">play.vodafone.co.nz/music</a>

*Streaming Services:*

theaudience	<a href="http://theaudience.co.nz">theaudience.co.nz</a>
DEEZER	<a href="http://deezer.com">deezer.com</a>
Myspace Music	<a href="http://myspace.com/music">myspace.com/music</a>
Music Unlimited	<a href="http://music.sonyentertainmentnetwork.com">music.sonyentertainmentnetwork.com</a>
rara	<a href="http://rara.com">rara.com</a>

<sup>47</sup>

Regulation 12(2)(d).



rdio	rdio.com
Spotify	spotify.com
VEVO	vevo.com

*Internet Radio:*

Pandora	pandora.com
Mixtape	mixtape.co.nz

74. Unlike P2P services, these services ensure that songwriters, musicians and those who invest in them are paid. Consistent with the Select Committee's recommendation that a punitive amount should be included in an award<sup>48</sup>, the rights owner requests a deterrent sum to serve the purpose of changing people's behaviour to using legal instead of illegal channels of music distribution.

*(f) Fixed penalties in other cases*

75. Finally, the rights owner submits that, as a "reality check" when determining an appropriate deterrent sum, it is relevant for the Tribunal to consider penalties set by the Legislature in other spheres involving a very large section of the population. Under the Land Transport (Offences & Penalties) Regulations 1999, a tariff fee is spelt out (without discretion) that individuals must pay<sup>49</sup>. Set out below are some examples of the infringement fee for an individual on a single occasion and then the figure if there were three offences (as here):

Offence	Infringement fee for individual	Total if three offences
Driving without appropriate <i>current</i> driver licence	\$400	\$1,200
Driving contrary to conditions of driver licence	\$400	\$1,200
Making a false or misleading statutory declaration	\$750	\$2,250
Failing to report damage to other vehicles or property	\$370	\$1,110
Parking in a parking area reserved for disabled persons	\$150	\$450

76. In the present case, the maximum discretionary sum provided by the Act and Regulations is of course the much larger figure of \$15,000. But the examples demonstrate the use of a fixed penalty of a deterrent nature i.e. non-discretionary. Such 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<sup>50</sup>.

### Conclusion

77. Based on all of these factors, the rights owner submits that the additional sum of \$1250 over and above compensation of \$1449.25 should be awarded. This sum has been calculated by reference to each of factors (a)-(f) in this section of the submissions. It is designed to be a sum that will jolt the account holder into a change of behaviour. It represents \$250 per infringement (which if the Tribunal accepts

<sup>48</sup> See Discussion Paper para 45 – accepted by the MED "This will mean that an award under the Bill will have a deterrent effect to future infringing, which is a key policy driver for the regime".

<sup>49</sup> Regulation 4(1) and (2) and Schedule 1.

<sup>50</sup> Discussion Paper para 53.



RIANZ's submissions and methodology), would likely be a consistent sum for all infringers.

78. If the Tribunal were to discount the sum sought by way of compensation under Regulation 12(2)(a), then the rights owner would seek a proportionally higher deterrent sum.

**Summary**

79. In summary the rights owner seeks:
- (a) Under Regulation 12(2)(a) - (c) - \$1449.25;
  - (b) Under Regulation 12(2)(d) - \$1250 or, in the alternative, if the sum awarded under Regulation 12(2)(a) is discounted, a proportionally higher deterrent sum.

**DATED** at Auckland this 31st day of August 2012



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For and on behalf of the rights owner  
Chris Caddick, Managing Director RIANZ

## SCHEDULE 1

## MARKMONITOR EVIDENCE GATHERING METHOD

80. MarkMonitor uses a software tool (known as an “agent”) which connects to the BitTorrent network in the same way as other BitTorrent clients. This enables the agent to view and download files that the BitTorrent user has chosen to make available for sharing from his or her computer.
81. The process used by MarkMonitor firstly involves searching for torrent files that have the same name as the copyright protected content, such as particular sound recordings. Once MarkMonitor has identified what appears to be a torrent file relating to that content, it proceeds to download a full copy of the content from the swarm<sup>51</sup> and confirms its identity. MarkMonitor then downloads pieces of that same file from other users in the swarm, and matches it by means of the hash value. MarkMonitor’s agent logs each step of the process, and records information such as the IP address (i.e. the account holder) from where the file was obtained.
82. In this case, MarkMonitor partially downloaded the relevant track on the three occasions that resulted in each of the infringement notices, to verify that the track contained a copy of the original sound recording. At the time of the three infringement detections, the account holder had BitTorrent Protocol (uTorrent ver 2.2.0) software installed on their computer. (The uTorrent software is available from URL <http://www.utorrent.com>.)
83. Evidence prepared by MarkMonitor has been relied on to establish online infringements in the context of judicial and administrative proceedings in a number of other jurisdictions. We are not aware of any instance in which it has been successfully challenged. Reported judgments which have considered MarkMonitor evidence include the following:
- (a) In the Australian case, *Roadshow Films Pty Ltd v iiNet Limited*<sup>52</sup> the Federal Court of Australia examined MarkMonitor’s evidence thoroughly in the context of an adversarial trial concerning an ISP’s liability for its customers unauthorised sharing of the applicants’ films using BitTorrent. The judgment at first instance sets out both the relevance of the file hash process in identifying particular files<sup>53</sup>, and the operation of the MarkMonitor agent noting that “this [file hash] process established beyond doubt that a particular file hash corresponded with a film of the applicants”<sup>54</sup>. The case proceeded to the High Court of Australia, where the Court noted that following filing of expert reports which explained the MarkMonitor methodology, iiNet had not disputed the primary infringements by its customers<sup>55</sup>.
- (b) In the UK case, *Dramatico Entertainment Limited & Ors v British Sky Broadcasting Limited & Ors*<sup>56</sup>, the British Phonographic Industry relied on

<sup>51</sup> An explanation of some of the technical terms is given later in these submissions and in footnote [21].

<sup>52</sup> Federal Court of Australia [2010] FCA 24

<sup>53</sup> The Court notes at [67] that “the file hash is used by the applicants to show that a particular swarm is sharing one of their films, because they can watch a copy of the film with that file hash, identify it as their own, and then know that any copy with that file hash would be the same, because if the underlying file were different it would have a different file hash.”

<sup>54</sup> At [113].

<sup>55</sup> See *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 at [39]

<sup>56</sup> [2012] EWHC 268 (Ch) (UK).

evidence provided by MarkMonitor to successfully obtain an injunction requiring British ISPs to block access to the Pirate Bay file sharing website. Arnold J reviewed that evidence at [41]-[43] of his judgment, and concluded that "UK users of the TPB who have accounts with the Defendants have infringed, and are continuing to infringe, the Claimants' copyrights by copying the Claimants' sound recordings on a large scale".

- (c) In the Irish case, *EMI Records (Ireland) Limited & Ors v UPC Communications Ireland Ltd*<sup>57</sup>, MarkMonitor evidence was relied upon by Irish record companies in support of an application for an injunction requiring the defendant (an ISP) to implement a "graduated response programme" for its customers, to and block access to an infringing website. Charleton J reviewed the evidence as to the process employed by MarkMonitor and found (at [33]) "I am satisfied that from the evidence that the process is highly accurate."

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<sup>57</sup>

[2010] IEHC 377.

## SCHEDULE 2

### OVERSEAS JUDGMENTS

- (1) *English High Court in Polydor Limited & Anor v Brown & Ors*<sup>58</sup>.

This was a summary judgment against one of the defendants, Michael Bowles. The defendant had admitted to using P2P software (Limewire) and making over 400 audio files available on a P2P network for uploading. Collins J found that connecting a computer to the Internet which is running P2P software and in which music files (containing the playing of sound recording copyright works) were placed in a shared directory amounted to the infringing act of "communicating the work"<sup>59</sup>.

Further, the mere fact that the files were present or made available to the public was sufficient for the infringement. The Court further found that ignorance was not a defence to the infringement. Collins J held that there was no prospect of a successful defence and made an order for an *interim* payment of £1,500 (NZ \$2,845) by Mr Bowles with the hope that payment could be by instalments. This payment was only an interim payment and compensatory only.

- (1) *Germany*

In Germany, several thousand cases have been taken against individual P2P end users. In general, courts in Germany award damages of between €150 and €300 per uploaded file.<sup>60</sup> The amount of damages is usually calculated with reference to royalties/fees which would have been due if the infringer had requested authorisation to use the rights in question. Usually, courts make reference to the tariffs established by the authors' collecting society. In a recent judgment of the Regional Court of Dusseldorf<sup>61</sup>, the court referred to the tariff for the streaming of music which is €100 per title for 10,000 streams and added to this amount 50% per cent given the higher value of a download. The court then doubled the amount as an acknowledgement of the rapid distribution of material in file sharing networks. The Higher Regional Court of Cologne<sup>62</sup> based the amount of damages on a different calculation: the court started from the assumption that record labels charge between €0.50 and €0.92 per download when granting a license to download stores such as iTunes and takes the lowest amount of €0.50 per download. In order to estimate the number of downloads the court took into account the number of users signed in to the service on the time of the infringement (680,274 users); the period the titles were available (6 months); and additional evidence submitted by the plaintiffs. The plaintiffs had conducted a study with Red Hot Chili Pepper album "Stadium Arcadium". A not working file had been made available in the illegal file sharing network edonkey for a period of 3 weeks and evidence showed that users tried to download the album 29,603 times. The court finally concluded that €200 per title would be an appropriate amount of compensation.

<sup>58</sup> A copy of the judgment is attached as Attachment B.

<sup>59</sup> This is an infringing act under ss 16(1)(f) and 33 of the New Zealand Copyright Act 1994.

<sup>60</sup> E.g. Regional Court Dusseldorf, 24.08.2011 (12 O 177/10): **EUR 300.00 per title**; Higher Regional Court Cologne, 23.02.2012 (6 U 67/11): **EUR 200.00 per title**; Higher Regional Court Frankfurt, 13.01.2011 (2-03 O 340/10): **EUR 150.00 per title**; District Court Frankfurt, 29.1.2010 (31 C 1078/09): **EUR 150.00 per title**.

<sup>61</sup> Regional Court Dusseldorf, 24.08.2011 (12 O 177/10).

<sup>62</sup> Higher Regional Court Cologne, 23.02.2012 (6 U 67/11)