



FILE-SHARERS PUT ON NOTICE

Professor Louise Longdin and Senior Lecturer Pheh Hoon Lim examine the first two infringing file-sharing cases decided by the Copyright Tribunal.

The tension between supporters of internet freedom and copyright owners will be familiar to any New Zealander keeping abreast of the on-going Kim Dotcom extradition saga concerning the Megaupload file-sharing site. At the time it was shut down last year Megaupload had around 66 million users but it is not only large commercial concerns which have been targeted in attempts to limit the uploading and downloading of online files. The first two cases under ss 122A to

122U of the Copyright Act 1994 (inserted by the Copyright (Infringement File-sharing) Amendment Act 2011) decided by the Copyright Tribunal at the beginning of this year involved individual 'bit-users' of the internet.

The purpose of the provisions is to make internet account holders responsible for infringements via their accounts irrespective of knowledge or intent. Copyright owners or their agents are provided with a process for taking action

against internet users who infringe their copyright through file-sharing. This involves the relevant Internet Protocol Address Provider (IPAP), at the request of the rights owner, issuing three infringement notices to the infringing internet account holder. Once the third of these notices (the enforcement notice) is issued the rights owner can seek an order from the Copyright Tribunal (the Tribunal) for an award not exceeding \$15,000 (s 122O) or an order from the District Court requiring the IPAP to suspend the infringing account holders internet account for up to six months (s 122P).

The applicant in both cases was the Recording Industry Association of New Zealand Incorporated (RIANZ) seeking awards under s 122O. In each case the respondents claimed that their infringements were inadvertent and / or occurred without their knowledge.

In *Recording Industry Association of New Zealand Inc v Enforcement Number: Telecom NZ 2592 [2013] NZCOP 1* (Case 1), the account holder received the detection notice when she downloaded one song, the warning notice when she downloaded it for a second time and the enforcement notice when a different song was downloaded – the infringements taking place over a period of some eight months. The account holder claimed that she was unaware that her activities were illegal and that the downloading of the song which triggered the final notice had not been downloaded "by myself

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FROM THE DEAN

It is a pleasure to welcome you to this latest issue of AUTlaw. 2013 promises to be another busy but exciting year for the Law School. At the end of last year we had our first cohort of students completing the AUT law degree, with pleasing numbers finding employment in law firms – we know they will serve us proud. At the beginning of this year the School moved into its new premises at 120 Mayoral Drive

and we have included some photographs of our smart new space.

We value fostering collaborative connections with the profession and this newsletter gives us the opportunity to keep you abreast of the Law School's news and activities. I hope you find it an interesting read.



or anyone else in this household". The Tribunal was nevertheless satisfied that there had been downloading - and uploading - via her account. Similarly, in *Recording Industry Association of New Zealand Incorporated v TCLE[A]-T587710* [2013] NZCOP 2 (Case 2), the Tribunal considered that the infringements had taken place despite the respondent's contention that his young sons had inadvertently downloaded / uploaded the two songs.

Those who are concerned that the regime is unduly weighted in favour of the rights holder might gain some solace from the seemingly temperate and closely reasoned approach adopted by the Tribunal on the question of awards in contrast to the "wholly disproportionate" and "oppressive" awards made in several United States jury trials such as the *Capitol Records v Thomas* litigation (2008-2010). In that case the first jury required the defendant who had illegally downloaded 24 songs (the equivalent of three CDs costing less than US\$54) to pay US\$222,000, damages representing \$9,250 per song and more than five hundred times the cost of buying 24 separate CDs and more than four thousand times the cost of three CDs. On appeal, ironically, a second jury returned an even higher award of US\$1.92 million based on US\$80,000 per song. Fortunately for the defendant, the quantum was eventually reduced to US\$54,000 on yet another appeal, but this time by a judge acting alone.

Under s 1220 and the associated regulations the Tribunal can award the rights owner sums in respect of compensatory damages for infringement, a contribution to the fees paid by the rights owner to IPAP, reimbursement of the application fee to the Tribunal and an additional sum as a deterrent against further infringing. In determining the deterrent sum to be awarded the Tribunal may consider any circumstances it considers relevant but must take into account the flagrancy of the infringement, the possible effect of the infringement on the market for the work and whether the

sums awarded under the other heads are a sufficient deterrent – reg 12(2).

In terms of damages, the Regulations require the Tribunal to determine the reasonable cost of purchasing the works in electronic form. In both cases the Tribunal was only prepared to award the cost which the account holder would have paid to download the songs from a legal supplier – \$6.57 and \$7.17 respectively.

The applicant argued that by uploading the songs the respondent had made them available to hundreds of users within the file-sharing swarm who might otherwise have legally purchased the songs. It therefore sought recompense for the "devastating losses" which could potentially arise. The Tribunal, however, was disinclined to award sums to award compensation for the mere spectre of losses, considering that they could be more appropriately dealt with under the deterrent head. In Case 2 the Tribunal considered that the "plain language" in the Regulation made it clear that Parliament intended to compensate only for "the reasonable cost of purchasing the work . . . at that time" and not for a speculative number of potential lost sales.

With respect to the contribution to fees, in both cases the Tribunal awarded \$50.00 of the \$75.00 paid to the IPAP, applying a formula which took into account the educative role which the first two notices would have in the process – effectively placing the responsibility for that cost on the rights owner. The full application fee of \$200 was also reimbursed.

It is the Tribunal's approach to the deterrent sum which is of particular interest especially in the light of the wildly vacillating jury sums awarded in the United States. The Tribunal awarded \$120 and \$100 per infringement respectively as a deterrent against further infringing. In Case 1 it found, for the most part, that the account holder's behaviour – installing file-sharing software, taking no heed of the first two notices issued and likely infringing well beyond the detected incidents – was likely to be typical of the

respondents who would come before it and that it would be difficult to view such behaviour as flagrant. In Case 2 the Tribunal in weighing up the flagrancy factor of the infringement found it relevant that the respondent derived no financial or other benefit from the infringement. Indeed he appeared not to have fully understood the nature of file-sharing. (This defence had also resonated for one United States judge when the Recording Industry Association of America (RIAA) sought to make an example of a mother of five children aged between 16 and 20 who had six songs owned by five different record companies downloaded and distributed from her IP address. In dismissing the RIAA's claim, the judge found she was a truly "internet illiterate" parent who didn't know Kazaa from Kazoo.)

In relation to the possible effect of the infringement on the market for the work (reg12(2)(d)) the Tribunal accepted that it was likely that at least some potential third party downloaders would have purchased the uploaded songs legally thus having a detrimental effect on the market. However, in Case 2 the Tribunal emphasised that the regulation was not concerned with quantifying the rights owner's losses but rather with determining an amount "appropriate to deter the respondent from further infringing".

These are the first of many cases which are likely to come before the Tribunal. RIANZ has signalled its intent to rigorously pursue alleged infringers and claims to have issued over 6,000 notices since the law came into force. The organisation has spent around \$250,000 in pursuing those alleged infringers and recognises that ensuring compliance will come at a cost. The extent to which the file-sharing provisions will be instrumental in changing attitudes and behaviour in relation to downloading and uploading material from the internet remains to be seen.



CRYPTIC CORNER – BE INTO WIN

A bottle of bubbles

What do you think Buffy is thinking? Buffy owns one of our colleagues and she has some quite insightful and humorous ideas on the law. There's a bottle bubbles for the person who, in the opinion of the judges, can provide Buffy with their most original thought yet.

Email Buffy's thought to
mike.french@aut.ac.nz
by 4 pm on 24 April.

LAST ISSUE'S WINNER

The answers to the quiz in the last issue of AUTlaw were:

1. Sir Alfred North
2. The Accident Compensation Act 1972
3. *Bognuda v Upton & Shearer Limited* [1972] NZLR 741
4. Mr Hamlin's house
5. The Paper Chase



The winner of the bottle of champagne was
Jonathan Wood from Rainey Law



NEW BUILDING FOR AUT LAW SCHOOL

The Law School is delighted to have moved into its new premises at 120 Mayoral Drive and our students and staff are certainly impressed with the new teaching and learning facilities in the recently opened Sir Paul Reeves Building (WG).



THOROUGHBREDS: A QUESTION OF BREEDING?

Senior Lecturer, Shirley Quo, considers a recent Australian decision which will be of interest to New Zealand thoroughbred breeders.

Late last year the Australian Federal Court in *McHugh v Australian Jockey Club Ltd (No 13)* [2012] FCA 1441 ruled that artificial insemination (AI) could not be introduced into breeding programmes for thoroughbred horses. About 70 countries worldwide, including New Zealand, are signatories to racing agreements which state that a horse is only a 'thoroughbred' if it is conceived using the standard "covering" method of breeding. Consistent with those agreements, the Australian Stud Book (ASB) provides that a foal is only eligible for inclusion in the ASB register if it is the product of a "natural service" which is the physical mounting of a mare by a stallion and where a natural gestation takes place in, and delivery is

from, the body of the mare in which the foal is conceived. The Australian Rules of Racing (ARR) similarly provide that only thoroughbred horses registered in the ASB register may be entered in a thoroughbred horse race in Australia.

Although there is no prohibition on the production of thoroughbreds by means of AI, the practical and commercial effect of the combination of the two sets of rules under the ASB and the ARR is that breeders are effectively prevented from using AI to produce thoroughbreds to race or to sell, because the progeny of any such process are not eligible to be entered in any of the thoroughbred races conducted in Australia and abroad.

Bruce McHugh, a former chairman of a Sydney racing club, brought the case against the ASB and other parties including Thoroughbred Breeders Australia and the Australian Jockey Club. He argued that the rule requiring horses to have physical sex made breeding expensive and dangerous and was preventing him from getting into the sport; this he asserted resulted in an unreasonable "restraint of trade" and breached s 45 of the Competition and Consumer Act 2010.

The rule against breeding thoroughbreds by AI was originally introduced in Australia in the 1940s to prevent fraud and reduce errors in the registration of thoroughbreds thereby enhancing the integrity of the

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pedigree records of the ASB register. McHugh argued that this was no longer a valid reason for maintaining the rule as horses were now electronically tagged and identified by their DNA. It was only the method of conception that distinguished a particular horse bred by AI from a particular horse bred by natural service; there was no difference in appearance, genetic make-up, physical attributes or performance. Therefore the only reason that a horse bred by AI was not a 'thoroughbred' was the prohibition itself. Federal Court Justice Alan Robertson noted however that the law required that the plaintiff must show that any trade restraint was unreasonable when it was established in order for it to be illegal and that the rule in this case was reasonable when it was introduced.

Justice Robertson agreed with the respondents' submission that the provisions quintessentially defined the rules of a sport, namely a contest to determine the best naturally bred horse with specified bloodlines and indicated that he would not examine rules or standards imposed by sporting bodies where those rules or standards were related to the nature of the sport even if they had anticompetitive effects. He considered that the issue was whether the provisions dealt only with an irrelevant mode of conception (not performance affecting) or whether the method of conception was an attribute of the sport of thoroughbred racing. While acknowledging the original reasons for introducing the rules, the Judge said that did not prevent them from having become an attribute of the sport. He saw "a crucial distinction between direct cover as a method of manufacture (such as handmade tennis racquets) as opposed to a brand of manufacture (such as Slazenger tennis racquets) in respect of which one person enjoys a monopoly". The sport of thoroughbred racing was defined by reference to breeding and so the mode of conception or manufacture was closer to the heart of the sport than the mode of manufacture of a tennis

racquet; the notion of what qualified as a 'thoroughbred' horse was conventional, defined by the norms of regulatory bodies which governed the breeding, supply and racing of horses. He concluded that, as a matter of pedigree, international classification and practice, a horse of thoroughbred lineage bred by AI would not be classified as a 'thoroughbred'. He was also cognisant of the ramifications which a contrary decision would have on Australian racing internationally.

Not only had the rules contributed to the nature and quality of the sport but, the Judge opined, they also probably had pro-competitive effects by contributing to the interest of those who participated in the sport whether as breeders, owners, punters or spectators.

In finding against McHugh, Justice Robertson noted that there was nothing to stop the plaintiff setting up a separate register for horses bred artificially. He emphasised that the application failed "on the legal grounds on which it was brought" and that "whether thoroughbreds bred by artificial insemination should or should not be permitted to race" was not the question. The decision will be of interest to breeders in New Zealand which has one of the most successful thoroughbred industries in the world; the latest figures produced by the New Zealand Thoroughbred Breeders' Association indicate that, in 2011-12, the industry produced around 3,800 foals and exported 1,600 horses at an estimated value of \$135 million.

Artificial insemination is permitted in the standardbred horse industry and it is interesting to compare the approach adopted by the New Zealand Kennel Club (NZKC) which maintains a register of pedigree dogs in New Zealand. Under the register, pure-bred dogs of breeds recognised by the NZKC are accepted for full registration and only dogs registered under the NZKC regulations may be entered at breed shows – Best of Breed, Group Competition and Best in Show. There is no distinction between a pure-bred dog conceived by natural mating

and one conceived by AI as long as the sire and dam are also registered with the NZKC. However, while there may be arguments for allowing thoroughbreds to be bred through AI, it is doubtful whether the international rules will change any time soon. As Justice Robertson intimated, there are economic reasons for maintaining the present rules. There are a limited number of mares which can be serviced by one stallion through direct cover compared with the couple of thousand which it would be possible to produce with AI. Thus the practice prevents an oversupply of thoroughbreds and preserves the high prices paid for horses of the finest or most popular lineages. Where is the anti-competitiveness in that?



TWO AUT LAW SCHOOL PROJECTS RECEIVE NEW ZEALAND LAW FOUNDATION FUNDING

New Zealand's Supreme Court: One Decade On.

July 2014 will mark the end of the first decade of New Zealand's Supreme Court hearing cases as our final court of appeal. An Advisory Report, produced for the then Attorney-General by Crown Law in 2002, concluded that the establishment of the Supreme Court would:

- Improve accessibility to New Zealand's highest court
- Increase the range of matters considered by New Zealand's highest court
- Improve the understanding of local conditions by judges on New Zealand's highest court
- Hear between 40 and 50 appeals per year, excluding applications for leave
- Continue to treat as highly persuasive the decisions of other final appellate courts from relevant jurisdictions, such as the High Court of Australia, the House of Lords (now the Supreme Court) and the Supreme Court of Canada.

The Report also considered that a second tier of appeal was necessary for development of the law, to consider the larger and wider legal questions of public interest, and keep the law in step with applicable international developments. It was envisaged that overseas perspectives would be available to the Court by counsel introducing relevant material from comparable overseas jurisdictions in proceedings.

[A project, led by Mary-Rose Russell, Senior Lecturer, has received New Zealand Law Foundation funding to document the contribution of the Supreme Court to New Zealand's jurisprudence over the past 10 years.](#)

The project will examine whether the predictions contained in the Crown Law report have been borne out and consider the extent to which this significant constitutional change in New Zealand's legal system has met the expectations set for it.



The principal objectives of the project are to:

1. Ascertain any trends in the types of cases selected by the Court for hearing
2. Identify the extent to which the Court refers to New Zealand academic writing in its judgments
3. Identify any discernible trends in the use of persuasive authority
4. Examine the development of New Zealand's jurisprudence in specific areas of the law.

Senior Lecturers Dr Matthew Barber, Marnie Prasad, and Helen Dervan from AUT Law School make up the rest of the team and some additional invited academics and legal jurists will also contribute to parts of the project.

Fossil fuel subsidy reform: A New Zealand perspective

In December 2012, the New Zealand Law Foundation approved a legal research grant to Senior Lecturer Vernon Rive to assist with a project examining the contribution of the New Zealand Government towards reform of the international legal and policy regime for fossil fuel subsidies.

As explained by Vernon, "The process of development and implementation of policy and law relating to domestic subsidies (in particular, in the agricultural sector) in New Zealand has been well documented. However to date there has been no in-depth independent review of what might be regarded as a second phase of New Zealand-driven subsidy reform: the application of principles, practices and legal frameworks for domestic subsidy reform to international

fossil fuels subsidies. The project will fill that gap on an issue that the New Zealand Government has identified as a priority in terms of current international environmental policy and law."

The Law Foundation grant will assist with development of a project website (www.subsidyreform.com), research and interviews with government officials, diplomats, academics and commentators in New Zealand. It will also enable Vernon to continue his research, investigations and interviews with northern hemisphere legal experts and officials from a base at the Faculty of Law, University of Cambridge in the second half of this year.





ALESCO: A KING-HIT FOR THE IRD?



Professor Julie Cassidy comments on a recent Court of Appeal decision on tax avoidance.

The Court of Appeal in *Alesco New Zealand Ltd v CIR* [2013] NZCA 40 has upheld the decision of the High Court in finding that the finance arrangements which Alesco NZ used when it purchased two other New Zealand companies in 2003 amounted to tax avoidance.

The appellant's Australian parent company, Alesco Corporation, provided the funding for the purchases through what was effectively an interest free loan. In return for the advance of \$78 m, Alesco NZ issued a series of 10 year 'optional convertible notes' (OCN) to its parent company. No interest was payable on the OCN during this fixed period. When the OCN matured Alesco Corporation had the option of converting any/all of the OCN to shares in Alesco NZ or redeeming them for cash. The OCN were used solely for the tax benefits that stemmed from the asymmetrical tax treatment in Australia and New Zealand. The OCN were treated as 100% equity interests in Australia and thus any interest received by Alesco Corporation would not be assessable income. By contrast, Alesco NZ treated it as debt interest and between 2003 and 2008 progressively amortised the value of the debt, claiming deductions for the so-called accrued interest payable over the 10 year life of the OCN. The reality was that no interest was paid. Moreover, as Alesco NZ was already a wholly owned subsidiary, the option of converting the OCN to shares had no true economic benefit to Alesco Corporation and no economic cost to Alesco NZ.

The Court of Appeal's conclusion that this constituted tax avoidance involved a very straight forward application of the Supreme Court's previously articulated

approach to the general anti-avoidance provisions (GAAR) in *Ben Nevis Forestry Ventures Ltd & Ors v CIR* (2009) 24 NZTC 23,188. In that case the Supreme Court applied a 'Parliamentary contemplation test' which, in essence, held that the use of a provision which was contrary to those usages contemplated by Parliament will be proscribed by the GAAR. Applying this test to the Alesco arrangement, the Court of Appeal considered that Parliament would not have intended that Alesco NZ could claim a deduction for interest payments which it never made (nor intended to make); Parliament would not have intended the taxpayer to be able to claim a deduction when there was no corresponding economic cost. The Supreme Court in *Ben Nevis* asserted that a "classic indicator of a use that is outside Parliamentary contemplation is the structuring of an arrangement so that the taxpayer gains the benefit of the specific provision in an artificial or contrived way." Similarly, the Court of Appeal in the *Alesco* case noted that "[a]rtifice or contrivance can be hallmarks of tax avoidance" and that, in this case, the Alesco arrangement could be described as such. It was designed to secure a tax advantage without any real economic cost and the OCN were "a fiction adopted solely for income tax purposes".

The amount at issue in the *Alesco* case was \$8.6m of which around \$2.5m constituted shortfall penalties. The decision is a significant one and, as most tax avoidance cases do, it has attracted a range of comment across the spectrum from tax lawyers, the business community and academics. *Alesco* was an unofficial test case and the decision has potentially far-reaching fiscal consequences. Reports suggest that there are a further 15 or so foreign companies that have adopted similar funding arrangements. The Court of Appeal noted that the Commissioner estimates that more than \$300m in tax, penalties and use of money interest is at issue in these cases.

Professor Julie Cassidy will be delivering her Professorial Address, 'Capital Gains Tax: Lessons from Across the Ditch', on Tuesday 9 April 2013

CONFERENCE – CALL FOR PAPERS

"Regulating for Decent Work?"

The New Zealand Labour Law Society (NZLLS) in conjunction with the Employment Law Forum of the New Zealand Work Research Institute is convening a conference on "Regulating for Decent Work?" to be held at AUT University on Friday 22 November 2013.

The conference theme will be, first, to consider how the role of labour law is seen in a jurisdiction with uncertain employment protection and where work is increasingly performed in precarious or non-standard conditions and, secondly, to examine attempts at regulating decent work.

The NZLLS is inviting submission of papers for presentation at the conference. Your paper should address some aspect of the conference theme – or other related contemporary labour or employment law issue. Please submit a 100 word abstract of your paper for consideration to the NZLLS Secretary, Pam Nuttall, at pam.nuttall@aut.ac.nz. The deadline for the submission of abstracts is 30 April 2013.

Confirmed speakers include:

Keith Ewing
Professor of Law, Kings College London

Margaret Wilson
D CNZM, Professor of Law and Public Policy, University of Waikato

Andrew Stewart
John Bray Professor of Law, University of Adelaide Law School



NEWS AND EVENTS

- 1 Lord Phillips of Worth Matravers, New Zealand Law Foundation's 2013 Distinguished Visiting Fellow, and Lex Henry Pro-Chancellor of AUT and partner at Sanderson Weir.
- 2 Andrew Stewart, John Bray Professor of Law, University of Adelaide and Judge Coral Shaw of the Employment Court.
- 3 Nina Zyp-Vanderlaan Law Clerk at Buddle Findlay (left) and Jess Sewak (centre) receiving awards at Prize giving 2013.
- 4 Students making good use of the post graduate space in the new Law School premises.
- 5 AUT Law Students Society Executive 2013.
- 6 Criminal Law Moot finalists with Marnie Prasad, Paul Shenkin and Dr John Edgar of the Public Defence Service.
- 7 Students and staff and Judge Layne Harvey enjoying some Cook Islands entertainment at the Maori and Pacific Law Students Association inaugural annual dinner.



STAYING IN TOUCH

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