

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2019-404-000900
[2019] NZHC 2508**

UNDER the Copyright Act 1994

BETWEEN AUSTRALASIAN PERFORMING RIGHT
ASSOCIATION LIMITED
Plaintiff

AND JT HI FI LIMITED
First Defendant

JOHN TOM
Second Defendant

Hearing: 2 October 2019

Appearances: C I Hadlee and S D Wakefield for the Plaintiff
No appearance by, or on behalf of the First or Second Defendants

Judgment: 3 October 2019

JUDGMENT OF EDWARDS J

*This judgment was delivered by me on 3 October 2019 at 2.00 pm
pursuant to r 11.5 of the High Court Rules.*

Deputy Registrar

Solicitors: Lee Salmon Long, Auckland

[1] The plaintiff, Australasian Performing Right Association Ltd (APRA), is a not-for-profit association of composers, authors and publishers of music for the purpose of licensing the public performance and broadcast of musical and literary works in Australia and New Zealand.

[2] APRA says that the defendants (JT Hi Fi Ltd and Mr Tom) have infringed APRA's copyright. Specifically, it says that the defendants have breached copyright in five songs: "Reckless", "People", "Takin' Care of Business", "Avalon" and "She Got a Wiggle" (together, the "Works"). APRA says those songs (and likely others within its repertoire of copyright works) were played in the defendants' shop, the Paul Money Hi Fi premises in Mount Eden when they did not have a licence to do so.

[3] The defendants have not taken any steps in the proceeding and did not appear at the hearing before me. The defendants have been served, and an affidavit of service has been filed. The application is supported by seven affidavits establishing the cause of action and providing sufficient information to enable me to calculate and fix damages. Accordingly, APRA is entitled to seek judgment by formal proof and the hearing proceeded on that basis.

Copyright infringement

[4] APRA says that JT Hi Fi has infringed its copyright through a public performance of its work, or alternatively it has authorised those performances. The claim against Mr Tom, who is the sole shareholder and director of JT Hi Fi, proceeds on the basis that he has authorised the infringing performances.

[5] I am satisfied on the evidence filed that APRA held copyright in the relevant music in New Zealand at the relevant time. Those rights arise out of assignment to APRA by its members, and by members of affiliated societies. Copies of the relevant agreements have been produced in evidence.

[6] Affidavit evidence also confirms that these songs were being played at the Paul Money Hi Fi retail shop. The music was being used to demonstrate the sound quality of JT Hi Fi's products, specifically the home audio and stereo systems sold at

that store. This amounts to a public performance under the Copyright Act 1994 because it is neither a domestic nor private performance. I am satisfied that both JT Hi Fi and/or Mr Tom have authorised those public performances.

[7] JT Hi Fi previously held a licence for the public performance of APRA's copyright works, but that licence was terminated on 30 June 2014. JT Hi Fi has been told on numerous occasions, both in writing, and in discussions with Mr Tom, that a licence is required to play the music. Those communications establish that JT Hi Fi and Mr Tom have been aware of the need to obtain a licence for the public performance of music in their store from at least 1 July 2014. They have known from at least that date that continuing to play those songs (and others) without a licence infringes APRA's copyright.

[8] APRA seeks compensatory damages in the sum of \$2,123.20. That is calculated according to the licence fees that would have been payable by JT Hi Fi under a retail licence for the years commencing 1 July 2014 to 1 July 2019. I award compensatory damages in that sum.

[9] APRA also seeks additional damages under s 121(2) of the Copyright Act 1994. A sum of between \$15,000–\$25,000 is sought. Counsel for APRA helpfully set out in her comprehensive submissions the relevant authorities addressing the question of additional damages.

[10] I am satisfied that an award under s 121(2) is appropriate in this case. The evidence establishes that the copyright infringement is flagrant in this case. JT Hi Fi and Mr Tom have been aware of the need to obtain a licence for some time and have been afforded several reasonable opportunities to obtain one. They have deliberately flouted that requirement and continued to play copyright music without authorisation.

[11] It is also clear that they are using the music for financial gain and have likely profited from the copyright breaches over the last five years. Additional damages will punish the calculated infringements of APRA's copyright and deter further breaches.

With reference to the awards made in the cases cited to me,¹ I award the sum of \$15,000 against the defendants jointly and severally.

[12] Finally, I am satisfied that an injunction should also issue to prevent JT Hi Fi and Mr Tom from performing or authorising the performance of both the Works and any of APRA's copyrighted music without a licence. APRA owns the copyright in millions of musical and literary works ("Repertoire"). The defendants' conduct suggests there is a real risk that APRA's copyright in this Repertoire will be infringed unless restrained and limiting the injunction to the performance of the Works will not be an effective remedy.

Result

[13] APRA's claim is allowed. The first and second defendants are declared to have infringed APRA's copyright in the Works.

[14] I award compensatory damages of \$2,123.20 and additional damages of \$15,000 against the defendants jointly and severally. I award interest on these sums.

[15] The first and second defendants are restrained from performing or authorising the performance of the Works and any works in APRA's Repertoire in public without a licence.

[16] I award costs and reasonable disbursements to APRA on a schedule 2B basis.

Edwards J

¹ In particular *Jeanswest Corporation (New Zealand) Ltd v G-Star Raw* [2015] NZCA 14; *Skids Programme Managements Ltd v McNeill* [2012] NZCA 314, [2012] 1 NZLR 1; and *Australasian Performing Right Association Limited v 3228 Business Ltd* [2018] NZHC 3088.