

**IN THE DISTRICT COURT
AT MANUKAU**

CRI

NEW ZEALAND POLICE
Informant

v

FELAFOAI VILE
Defendant

Hearing: 23 August 2006

Appearances: Sergeant Charmley for Informant
Ms Sapolu for Defendant

Judgment: 23 August 2006

NOTES OF JUDGE D J HARVEY ON SENTENCING

[1] Mr Felafoai Vile appeared before this Court on 26 July 2006 having pleaded not guilty to five charges alleging breaches of s 131(1) of the Copyright Act 1994. After a defended hearing he was convicted on all charges.

[2] The charges were in brief:

- i) That he made for sale or hire certain sound recordings that were infringing copies of copyright works.
- ii) The second charge was that he possessed infringing copies other than pursuant to a copyright license, knowing that they were infringing copies.
- iii) Thirdly, that he offered or exposed for sale other than pursuant to a copyright licence infringing copies of certain works.
- iv) Fourthly that he actually sold sound recordings knowing that they were infringing copies of copyright works,
- v) and there was also another charge of offering or exposing for sale infringing copies of sound recordings.

[3] In brief, the prosecution case that I heard and found established was that the defendant operated a relatively sophisticated operation from his home. He was engaged in sound recording and I am satisfied that there were legitimate aspects to his operations in that regard but there was also a very sophisticated set-up whereby he was able to copy CDs, music CDs, and in some cases apply labels to them and also labels on the jewel cases that made them almost indistinguishable from a proper authorised copy. These CDs, having been copied, or burned as is the term, were then taken by the defendant and were distributed at certain flea markets and other forms of outlet and the evidence is that illicit copies and infringing copies of the CDs were being offered for sale and were being sold at these outlets.

[4] At his operation, it is quite clear that his CD burning business was significant. There was sophisticated computer equipment, some computers having three CD drives which clearly were used for burning purposes. Stacks of blank CDs which could be used for the purposes of burning were present. I am satisfied it was a relatively large scale operation.

[5] The defendant offered a defence that he in fact had been authorised to copy certain CDs as a settlement of some debt that was owing to him by another person in Samoa. That position is maintained in the pre-sentence report. That position was rejected by me at the defended hearing. I was satisfied that it was abundantly clear that the defendant was well aware of the fact that he had no authorisation whatsoever to make the copies that he did not did he have any authorisation to sell the copies that he did or possess them.

[6] The music that he sold was what could be generically described as Pacific Island music from groups and bands that have been around for some time. It is perhaps a tragic aspect of this particular case that the artists whose works he was infringing were artists from his own culture and I take that into account.

[7] It has been difficult to locate any guidance cases about sentencing under s 131 of the Copyright Act, that is because there are not many and it has been necessary to look at legislation itself, the policies behind the legislation, consider the provisions of the Sentencing Act and the way in which those provisions should be applied, together with attempting to distil a number of principles that could be applied to sentencing under s 131 of the Copyright Act.

[8] Section 131 of the Copyright Act is entitled “Criminal Liability for making or dealing with infringing objects”. It contains a number of sub sections but the important sub section for this defendant is subs (1), it sets out the various offences that a person may commit who does not hold a copyright license. Those are:

- a) Making for sale or hire, or,

- b) Importing into New Zealand for otherwise than private or domestic use, or,
- c) Possessing in the course of business with a view to committing any act infringing copyright, or,
- d) In the course of business:
 - i) Offering or exposing for sale or hire, or,
 - ii) Exhibiting in public, or,
 - iii) Distributing, or,
- e) In the course of a business or otherwise, selling or letting for hire, or,
- f) Distributing otherwise than in the course of business to such extent as to affect prejudicially copyright owner an object that is, and the person knows, an infringing copy of a copyright work.

[9] In essence s 131 (1) deals with commercially based infringement of copyright - people who are copying and infringing a copyright owner's copyright in works and then making them available for sale and thereby profiting from them, which of course must be to the detriment of the copyright owner.

[10] Subsection (2) deals with the mechanics or paraphernalia of infringement because it creates an offence of making an object specifically designed or adapted for making copies of the copyright work, or having such an object in possession knowing that the object is to be used for making infringing copies for sale or hire or for use in the course of a business.

[11] Subsection (2) deals with what may be broadly described as the performance right that is contained in the Copyright Act and relates to literary, dramatic or musical works which are performed or causing sound recordings or films to be played in public or shown in public where there is infringement.

[12] Subsection (4) sets out a saving clause in that nothing in subs (3) applies to infringement by reception of a broadcast or a cable programme.

[13] Subsection (5) sets out the penalties, and they are extremely severe. Any person who commits an offence against s 131(1) is liable for a fine not exceeding \$10,000 for every infringing copy to which the offence relates but not exceeding \$150,000 in respect of the same transaction or to imprisonment for a term not exceeding five years. Under subs (2) and (3) of s 131 a maximum fine is \$150,000 or a term of imprisonment not exceeding five years and where under subs (6) a person is convicted of an offence and that offence involves the making of profit or gain the offence is deemed to have caused a loss of property for the purposes of the Sentencing Act and the provisions of that Act relating to reparation must apply. It may be seen that the penalties are very high for commercial copyright infringement.

[14] It is important to note just exactly what we are dealing with. Section 131 is a specific section that dealt with criminal liability for dealing in infringing copies. It is a specific offence because theft cannot apply to this type of activity. Notwithstanding media comment to the contrary, copyright infringement is not theft, copyright infringement is copyright infringement under s 131 of the Copyright Act. If it was theft there would be a specific copyright infringement types of offences contained in the theft sections of the Crimes Act 1961, but of course there are not.

[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.

[17] I have had the opportunity of reading the pre-sentence report and the reparation report that have been prepared by Community Corrections. I have also had the opportunity of reading Ms Sapolu's submissions and she bases her submissions primarily upon the provisions of the Sentencing Act.

[18] As far as the pre-sentence report is concerned, it sets out that the defendant is a 45 year old Samoan, father of three children, the oldest of whom is 15. Their financial situation has not been the best but he has advised me through his counsel that he is able to make reparation in the sum of \$85 per week. He maintains his position that he had at the defended hearing, and which I rejected, regarding the reason why it was that he embarked upon what he was doing. It is also of note that he has previous convictions in the District Court since 1989. Most of those relate to driving offences, although there are two offences involving violence.

[19] He says that he has stopped selling unauthorised compact disks, he wants to stop his offending and put it all behind him, and that is confirmed by Ms Sapolu. He has support from his wife and family. He wants a community based sentence so that he can obtain full time employment, increase reparation, and look after his family. Ms Sapolu argues pursuant to the provisions of the Sentencing Act that that particular outcome, especially having regard to the provisions of s 16 of the Act with the presumption against imprisonment that that consequence should flow.

[20] There is also the question of reparation. I called for a reparation report because it was abundantly clear that in fact much of the work involving this particular set of prosecutions had been done by copyright owners or organisations representing copyright owners' interests.

[21] As far as reparation is concerned, the total amount of \$105,633 is sought and that probably gives us an indication of the extent to which copyright infringement can interfere with copyright owners' interests. Of that some \$7,000 odd dollars involves investigation costs, \$4,500 for the Recording Industry Association of New Zealand, and \$2,670 being investigation costs for other recording companies. Loss of revenue is then set out in the sum of \$10,470 to Kiwi Pacific Records who own the copyright in respect of some of the artists and \$3,493 for Ode Records. There is indirect impact of \$18,500 for Kiwi Pacific and \$5,000 for Ode Records along with a loss of estimated sales since 2003 in a total of \$61,000. I shall turn to the issue of reparation shortly.

[22] Application is also made by Mr McCall, who is the person in charge of anti piracy activities with Phonographic Performances New Zealand Ltd who carried out some of the investigative work in this matter. He is seeking an order for destruction of duplicated and counterfeit CDs but seeks two examples of each to be retained by Phonographic Performances New Zealand Ltd for catalogue and training purposes. Furthermore, he seeks that the means for making infringing copies such as computer equipment be forfeited to Phonographic Performances New Zealand Ltd for use in their anti piracy internet investigation or disposal. Also application is made for forfeiture of the vehicle from which sales were made.

[23] I will turn back to reparation shortly but it is important that we have some idea of the amount of money that is involved as a result of these infringing activities. If anybody were to think that copyright infringing was something at the bottom of the scale, it is only when one looks at those figures that one realises that this type of infringement, this type of activity in general has the potential to be as high level in terms of losses and profits as methamphetamine making and selling and in some respects although the societal consequences of methamphetamine are far more damaging than copyright infringement, copyright infringement has the effect of

damaging not only copyright owners and those associated with them but also the cultural heart of the community.

[24] Under the Sentencing Act I have to hold the accused accountable for the harm that he has caused both to the victim and to the community and from what I have already said it is probably apparent that there is a significant community interest in copyright infringement as well as victim interest, as I have also said, the victim is not just the copyright owner, it is everybody associated with the exploitation of the copyright owner's monopoly.

[25] The accused must be held responsible for his actions. I must provide for victims' interests in reparation, which I shall deal with shortly. Importantly I must denounce the offender's conduct and deter others from offending likewise. As I have said this is one of the first of the prosecutions under s 131 of the Copyright Act that has come before the Court and it is probably important that the clear reasons for the sentence that I am about to impose be articulated, and furthermore that a clear message be sent to the community that this type of offence, which is as far as anecdotal evidence is concerned reasonably widespread, is going to be dealt with harshly. I have to protect the community and in this respect what I am talking about, what I am thinking about, is the protection of the community's cultural interests. I also have to take into account the rehabilitation and reintegration of the offender.

[26] As far as principles of sentencing are concerned, I have to take into account the gravity of the offending, the seriousness of the offence. Where there are serious cases the imposition of the maximum penalty. I have to take into account consistency of sentencing, although that is somewhat difficult in this particular case. The effect upon the victim. As Ms Sapolu said of course the least restrictive outcome and the offender's circumstances, and his cultural background and issues of Restorative Justice which do not occur in this particular case.

[27] I shall deal with what I consider to be the aggravating circumstances of this offending in a moment in the context of s 131 of the Copyright Act but I do record

the aggravating circumstance of loss, damage or harm, which has been quantified in the reparation report and which I have already observed is significant.

[28] As far as mitigating circumstances are concerned, regrettably there are very few in this case, if any. I cannot give credit for a guilty plea, nor can I really give credit for expressions of remorse, especially when the defendant has maintained the position before the Probation Officer that he maintained before me by way of defence. So I record that I have taken all of those particular factors into account.

[29] I believe it is important also to consider certain aspects of offending under s 131 of the Copyright Act and I believe that there are ten principles that can be considered and I do not consider this list to be exclusive. The first must be the extent of the commercial infringement, for example, how many copies of each title were being made and how many copies were being sold.

[30] The second is the manner of the infringement. Is the infringement amateurish or is there a getup, and by getup I mean are there CD labels being printed and dual cases with art work and matters of that nature? If so, at what level of sophistication of getup is there?

[31] Thirdly if the getup is of a sophisticated nature is it likely to confuse a consumer, and in that respect there is an element of fraud that underlies this. Fourthly the amount of gains that may be made from the infringement. Fifth, the nature and scale of the distribution system, if any. Sixth, whether the internet with its apparent anonymity was involved in the course of distribution. Seventh, the time over which the activities took place.

[32] Eighth the number of victims, such as authors, producers, those involved in the making or marketing of movies or CDs, distribution networks, all the way down to the storefront retailer who are going to be affected and in that respect the public confidence in purchasing a product must be taken into account. The public is entitled to know into whose pocket the dollars they are spending is going to go.

[33] Ninthly, there is the nature of the offending itself and copyright infringement in some respects has certain analogies, and I emphasise the word “analogy”, to theft, coupled with receiving. Not only is somebody interfering with a copyright owner’s rights by making illicit copies, they are also profiting from the making of those illicit copies by distributing and selling them.

[34] And then tenth, and this is a matter which must be taken into account and is part and parcel of the aggravating circumstances under the Sentencing Act in any event, the very high level of premeditation that must underlie any offending of this nature. From the reparation figures that I have referred to it is quite clear that there is a significantly large extent of commercial infringement. The manner of the infringement was not amateurish there was getup, and it was at a certain level of sophistication which meant that some of the art work on the covers was indistinguishable from the originals and in that respect the getup was sophisticated and like to confuse a consumer.

[35] The gains that could be made from the infringement of course cannot be equated in terms of the figure of reparation but I am satisfied, having regard to the extent of the operation and the account book that was kept by the defendant that this was a fairly sophisticated system and the gains were quite significant. The distribution system of course took place through flea markets, the sort of distribution system that is one that is on the move, difficult to detect, somewhat informal in nature and opportunistic as far as consumers are concerned, but most importantly one that does not have any fixed place of abode, unlike of course the copying operations with which the defendant was involved in. Of course there is no evidence in this case that the Internet was involved but it is quite clear that this type of activity was taking place over a period of time. Some of the offences took place in November 2005, others in July of 2005 and also in January of 2005. So the offending took place over a period of time.

[36] I have already made observations on the people who are going to suffer as a result of this copyright infringement and once again of course public confidence in the purchase of the product is going to be affected. Quite clearly having regard to

the set-up, there was a very high level of premeditation behind this particular offending.

[37] I have considered whether or not a fine or a community based sentence can meet the relative seriousness of this type of offending. I am of the view that it cannot. I do not believe that the correct message about deterrence and denunciation would be sent by the imposition of a fine and I believe that a community based sentence, notwithstanding that there is a community interest in ensuring that our cultural heritage is properly maintained would be proper in an infringement offence of this nature and of this extent.

[38] It is my view that fines and community based sentences should be available for the very low level offenders but not for serious, sophisticated commercial offenders in the nature of this type of offending. I am therefore of the view that imprisonment is the only outcome. I take into account the lack of authority that there is in this particular case, that the maximum penalty is five years' imprisonment and that that can only be reserved for the very worst case that can be imagined. I do not believe that this falls into the category of "worst case" but I do believe that it is offending which would justify a starting point of one year's imprisonment.

[39] I take into account the fact that the defendant is prepared to make reparation, and I am prepared to give him credit for that and I will factor that into the equation which allows me to arrive at a finishing point of nine months' imprisonment and in respect of each charge he will be convicted and sentenced to imprisonment for a period of nine months.

[40] I am prepared under the circumstances to grant him leave to apply for Home Detention.

[41] I now turn to the question of reparation. In making any order for reparation of course it is important that the accused not be overburdened with reparation. That the figure of reparation under the circumstances be reasonable and there are authorities which justify that particular point of view. From the point of view of the victim of course that gives little comfort. I think in this particular case reparation

orders should be made of a sufficient amount to make it plain to the defendant that he will make compensation for loss that has been suffered by the various parties and will also make it clear that any people who are going to get involved in similar type of activity can expect that reparation orders will be made as well.

[42] As far as Kiwi Pacific is concerned, I am prepared to make a reparation order of \$5,000, Ode Records \$1,500, and also \$2,000 to the Recording Industry Association of New Zealand. That reparation in total will be paid off at \$85 a week, first payment fourteen days following the defendant's release from imprisonment.

[43] Pursuant to s 134 of the Copyright Act I make an order for disposal in respect of all duplicated and counterfeit CDs except for two samples each to be retained by Phonographic Performances New Zealand Ltd for cataloguing and for training. Furthermore the means of making infringing copies, computer equipment, blank CDs, printers, scanners, or other copiers are forfeited and will be made available for the Phonographic Performances New Zealand Ltd.

[44] I note Ms Sapolu's submission regarding the need by the family for computer equipment. It is my respectful view that that cannot be justified in this particular case. This computer equipment is very, very sophisticated indeed. It has been used for the purposes of piracy. If there is to be any computer equipment in the defendant's household it should be of a low level of sophistication and certainly not of any level of sophistication that allows any sort of copying to be made other than the copying that takes place incidental to the utilisation of the computer. No CD burners for example, or DVD burners should be part and parcel of that computer set up.

[45] It should be made perfectly clear to those who are going to be engaged in commercial copyright infringement that if they are going to embark on this type of activity there will be consequences, that they will be severe, and that if there are going to be downstream consequences for their families then so be it. That this type of activity cannot be allowed to continue and the message must be sent. I trust it has been in this particular case. You may stand down.

D J Harvey
District Court Judge

Solicitors: