



High Court of New Zealand

25 October 2017

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EIGHT MILE STYLE V NATIONAL PARTY

[2017] NZHC 2603

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsfnz.govt.nz

What the case is about

The key issue for determination by the Court was whether a “sound-alike” production track, called *Eminem Esque*, used by the National Party in its 2014 election campaign advertising, is sufficiently similar to the 2002 music of Eminem’s hit song, *Lose Yourself*, so as to constitute a breach of copyright.

Lose Yourself was composed by Marshall Mathers III (Eminem), Jeffrey Bass and Luis Resto (all called Eight Mile Style) in 2002. The composition is regarded by Eight Mile Style as the most valuable work in their catalogue and has only rarely been licensed for use, and never as part of a political campaign.

Eight Mile Style,¹ who own the copyright in *Lose Yourself*, sought damages against the National Party after *Eminem Esque* featured in Party advertisements played on television, the internet and at a Party conference in the lead up to the 2014 election. Between 20 to 30

¹ Eight Mile Style are the owners of 50 percent and exclusive licensees of the other 50 per cent of the musical work *Lose Yourself*.

August 2014, the advertisements, with *Eminem Esque* synchronised to them, were played 186 times on New Zealand television. *Eminem Esque* was also played eight times during a 15 minute opening broadcast on TV1, occurring on 23 August 2014.

This proceeding is being heard in two parts. The first, a hearing to determine the liability of the National Party and the quantum of damages, if any, was held in the High Court at Wellington over eight days between 1 May and 12 May 2017. The second part concerns a separate hearing to determine third party liability, if any.

This decision deals with the first hearing only, namely, the issues of liability and quantum against the National Party as the alleged publishers of the infringing work. The third-party liability hearing awaits the outcome of this trial.

Background and legal issues

The tensions between illegitimate copying versus permissive borrowing and the resulting copyright consequences are at the forefront of this case.

To attract copyright protection under the Copyright Act 1994 (the Act) a work must be “original.” There are three separate copyrights in *Lose Yourself*, namely, the original sound recording, the lyrics and the music. Copyright is a property right that exists in original works. This case concerns the copyright in the music only. The references made to *Lose Yourself*, therefore, are to the musical work of *Lose Yourself*.

The National Party deny there has been any copyright infringement because there was no reproduction or copying of *Lose Yourself*.

In response to the alleged infringement, the National Party challenged the inherent originality of *Lose Yourself*. The National Party submitted that *Lose Yourself* is not an original work, or has a low level of originality, as it is substantially borrowed from other music and genres. On that basis, they argued *Eminem Esque* cannot have infringed Eight Mile Style’s copyright as those parts it copied were too generic, or non-original, to be entitled to copyright protection. Two central issues raised in evidence before the Court were whether borrowed musical elements are protected by copyright and whether an alteration in melody can avoid copying.

The use of sound-alike tracks sourced from production music libraries for synchronisation with television, film or media advertisements are sold regularly on a commercial basis.

The National Party sought and received assurances from *Eminem Esque*'s licensors that no copyright issues arose from their use of the production track and paid for a synchronisation licence to use the music sound-alike *Eminem Esque*.

The Court's approach

The National Party's challenge to the originality of *Lose Yourself*, meant before addressing Eight Mile Style's copyright allegations, it was necessary for the Court to assess the expert evidence and argument from the parties on the fundamental question of originality and whether *Lose Yourself* met the threshold established in case law.

This analysis required consideration of the originality not just of the composition but also the various elements of the composition as not every **part** of an original work will necessarily be protected by copyright.

After reaching a conclusion on this issue the Court worked through a series of questions to determine whether the three elements necessary to establish copying had taken place:

- (a) Has *Eminem Esque* substantially copied or reproduced *Lose Yourself*?
- (b) Does *Eminem Esque* sound objectively similar to *Lose Yourself*?
- (c) Is there a causal connection between *Lose Yourself* and *Eminem Esque*?

After considering those issues the Court had to determine whether the publications by the National Party met the legal definition of "restricted acts" under the Act and therefore amounted to an infringement of copyright of *Lose Yourself*.

Finally, if the National Party had infringed copyright, the Court had to determine whether Eight Mile Style is entitled to relief and if so, what damages should be awarded?

Throughout the hearing several witnesses gave evidence on confidential agreements and commercially sensitive information in relation to artist and industry practices and licence fees

throughout the hearing. To protect this confidential information, this decision is delivered with the analysis of the confidential material being released to the parties only.

The Court's key rulings

Is *Lose Yourself* an original work capable of protection under the Act and were the elements of *Lose Yourself* referenced in *Eminem Esque* also original?

The Court found that copyright does subsist in the musical work *Lose Yourself* as it meets the definition and low threshold of being an original work under the Act.

Although *Lose Yourself* met the low threshold of an original work under the Act, the Court was also required to determine how original the work is and whether there are features in the work that are not original. To establish infringement, there must be substantial copying of the original parts of the work. Any copying of a part of the work, which by itself has no originality, will not normally be protected.

Cull J found *Lose Yourself* also met the higher threshold of an original work in the case law. Her Honour concluded:

[154] The distinctive sound of *Lose Yourself* is not limited by a “melodic” line, but is a combination of the other instruments, particularly the guitar riff, the timbre, the strong hypnotic rhythm and the recurring violin instrumentation and the piano figure. It is no coincidence that *Lose Yourself* received the 2003 Academy Award for Best Original Song. I find that *Lose Yourself* is a highly original work.

Was there copying of *Lose Yourself*?

The Court found *Eminem Esque* was a copy of *Lose Yourself* for three reasons.

First, Cull J determined *Eminem Esque* has substantially copied *Lose Yourself*. The differences between the two works are minimal; the close similarities and the indiscernible differences in drum beat, the “melodic line” and the piano figures, make *Eminem Esque* strikingly similar to *Lose Yourself*. *Eminem Esque* substantially reproduces the essence of *Lose Yourself*. The parts of *Eminem Esque* used in the National Party's campaign advertisements also substantially reproduce *Lose Yourself*.

Second, *Eminem Esque* is objectively similar to *Lose Yourself* as there are minimal discernible differences. The inquiry into objective similarity is a test of hearing and ear recognition; *Eminem Esque* sounds like a copy and is a copy of *Lose Yourself*. *Eminem Esque* was designed to “sound like” Eminem and *Lose Yourself* as production music and a sound-alike track.

Finally, there is a causal connection between *Lose Yourself* and *Eminem Esque*. It was no coincidence that the works sounded the same and the undeniable inference to be drawn from the evidence is that the composer of *Eminem Esque* had *Lose Yourself* in front of him at the time of composition. The similarities between the works overwhelmingly support a finding of copying. The original title *Eminem_abbr*; the title of *Eminem Esque*; and the fact that *Eminem Esque* is a sound-alike track, reinforces the finding that there is a causal connection between the two works, supporting a finding of copying.

Did the copying constitute a breach of the Act?

The Court found the National Party committed three restricted acts amounting to copyright infringement.

The National Party communicated a copy of *Lose Yourself* to the public without licence; authorised the copying of *Lose Yourself*; and authorised the use and/or deployment of the relevant advertisements and opening broadcast.

Was Eight Mile Style entitled to damages?

The Court found Eight Mile Style is entitled to damages on a “user principle” basis in the sum of NZ\$600,000, with interest, from 28 June 2014.

This sum was determined under the user principle, being the hypothetical licence fee that would reasonably have been charged for permission to use a copy of *Lose Yourself* in the National Party’s campaign advertising.

The relevant factors considered in assessing this hypothetical licence fee included that Eight Mile Style have retained exclusive control of licensing and rarely grant permission to use *Lose Yourself* in advertising; the purpose for use in the present case was political use in an

unassociated country, which is not what Eminem or Eight Mile Style would endorse; the use was confined over 11 days, with 186 television viewings, as well as being uploaded to the internet; and the National Party wanted the sound of *Lose Yourself* or an equivalent.

Although copyright infringement did occur, the National Party's actions were taken after receiving professional, commercial and media advice and were not reckless or contumelious of the rights of the copyright owner. No additional damages are awarded.

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