



# COURT OF APPEAL OF NEW ZEALAND

## TE KŌTI PĪRA O AOTEAROA

18 December 2018

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*THE NEW ZEALAND NATIONAL PARTY v EIGHT MILE STYLE, LLC*

PRESS SUMMARY

**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.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz).**

1. The Court of Appeal today released judgment determining the appropriate level of damages for copyright infringement in *The New Zealand National Party v Eight Mile Style, LLC*.
2. The Court allowed the National Party’s appeal. The award of damages of \$600,000 made by the High Court was quashed and substituted with an award of \$225,000.
3. The Court dismissed the cross-appeal of the first and second respondents (“Eight Mile”) against the High Court’s decision not to award additional damages.

### **Background**

4. In the lead up to the 2014 General Election, the National Party broadcast on television and the internet, and played by video at a National Party conference, a 30 second advertisement which incorporated a sound track called *Eminem Esque*. In proceedings brought by Eight Mile for copyright infringement, the High Court found *Eminem Esque* infringed copyright in *Lose Yourself*, a well-known musical work composed by Marshall Mathers III

(Eminem), Jeffrey Bass and Luis Resto in 2002. That finding was not challenged. The appeal concerned only the level of the damages award.

5. It was common ground damages were to be assessed by applying the user principle, which involves determining the licence fee for the infringed work that would have been agreed in a hypothetical negotiation between a willing licensor and a willing licensee. The High Court accepted evidence from Eight Mile's expert witness Ms Zamoyska as to a minimum baseline fee for *Lose Yourself*. The Court also adopted her suggested uplift reflecting the use for political advertising, significant risk to the future commercial value of the song and the lack of creative control and opportunity to re-record. After allowing a discount for the short duration of use, the Judge assessed a reasonable licence fee to be NZ \$600,000.

## **The Judgment**

### *The appeal*

6. Given the evidence of the expert witnesses for both sides, it was not open to the High Court to adopt the baseline figure that it did. The advertising message was only relevant to a relatively small population, and the minimum baseline concept negated proper consideration of a territory-related licence.
7. The Court held it is reasonable to expect a higher fee would be payable for a political use of the work. Use in divisive or polarising contexts has an increased potential to affect future commercial use of a work. However the acceptance of political use as a factor warranting an increased licence fee is confined to a licensor's objective reluctance, namely concern about the nature of the use per se. In the artificial construct of the user principle, a licensor's subjective reluctance to agree to a licence because the licensor does not personally endorse the message the subject of the advertisement does not justify an increased licence fee.
8. Although the High Court did not intend the licence fee should reflect such subjective reluctance on Eight Mile's part, that intention was thwarted by the adoption of Ms Zamoyska's analysis, which made no distinction between objective and subjective reluctance. The damages award was also inflated by taking into account the perceived subjective willingness of the National Party in determining the starting point for the fee. Similarly the award was inflated on account of the assumed omission of a quality control

provision in the hypothetical licence and the absence of consideration of non-infringing alternative options for the National Party.

9. It was necessary for the Court to undertake its own assessment of damages. The licence fee for *Lose Yourself* would have been close to the top of the range for New Zealand licences. Once adjustments to the expert witnesses' evidence were made to reflect the Court's view on the factors discussed above, the evidence on both sides of the case supported a finding of a reasonable licence fee for the use of *Lose Yourself* of \$225,000.

*The cross-appeal*

10. The Court agreed with the reasoning and conclusion of the Judge that this was not a case that warranted an award of additional damages. On the evidence, the proposition the National Party turned a blind eye to the risk of copyright infringement or saw a risk and embarked on a reckless course of conduct with respect to that risk was not sustainable.

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