THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV2009-04722**

BETWEEN

COPYRIGHT MUSIC ORGANISATION OF TRINIDAD AND TOBAGO

(formerly Copyright Organisation of Trinidad and Tobago

Claimant

AND

COLUMBUS COMMUNICATION TRINIDAD LIMITED

TRADING AS "FLOW"

Defendant

Appearances:

Claimant: Elton Prescott SC instructed by Sarah Sinanan for the Claimant
Stephen Singh instructed by Tracy Rojas for the Defendant

Before The Honorable Mr. Justice Devindra Rampersad

Dated the 29th October 2015

JUDGMENT

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The Procedural History

1. On December 18th 2010 the claimant, the Copyright Music Organisation of Trinidad and Tobago (COTT) initiated a claim for copyright infringement against the defendant. COTT, a licensing body within the meaning of the Copyright Act Chapter 82:80, averred that the defendant broadcasted one or more musical works, the copyright of which was either owned or assigned to COTT (COTT's repertoire), without first obtaining COTT's permission. As a result of the alleged infringement COTT sought as against the defendant, inter alia, an inquiry as to damages (including statutory damages) for the infringement of its copyright, or, an account of profits. COTT also sought an order for the payment of all sums due upon taking such inquiries or account together with interest thereon pursuant to the Supreme Court of Judicature Act Chap 4:01.

2. The defendant filed its Defence on March 16th 2010 in which it admitted that it distributes and redistributes, in Trinidad and Tobago, various types of video and audio programming from various authors and composers but denied that COTT's repertoire constituted any material portion of its programming. Further, the defendant averred that the majority of its content was provided by third parties with the assumption that those parties had the right to make that content available and denied that it infringed COTT's copyright.

3. On July 15th 2010 COTT made an application for summary judgment pursuant to Part 15.2 of the CPR alleging that the defendant had no realistic prospect of success because of it admissions and further that its Defence did not disclose a defence in law and was not in compliance with the requirements of Part 10 of the CPR.

4. On June 14th 2011 this Court granted COTT's application and made the following orders:

   4.1. There is to be an inquiry as to the damages (including statutory damages) for infringement of copyright by the unauthorised transmission by the defendant of the musical works.

   4.2. An order for payment of all sums found due upon taking such inquiries or account, together with interest thereon pursuant to the Supreme Court of Judicature Act Chapter 4:01.

5. This Court was minded to give judgment in COTT's favor because the defendant had no realistic prospect of success in light of the resounding admissions by the defendant that it utilizes audio and video works which likely falls under the direct

aegis of COTT.[1] Further, the Defence as filed, ran afoul of the requirements of Rule 10.5 of the CPR in that the defendant failed to provide any reasons for its denials and failed to annex any documentation to support same.

6. By order dated July 14th 2011 the defendant was ordered to provide audited accounts for the years 2006 to that date together with its subscription base for the same period. On October 4th 2011 Brendan Paddick, Chief Executive Officer of the defendant, filed an affidavit which included audited accounts for the defendant for the years 2006-2011. Also included in that affidavit were details of the defendant's subscription base for that period.

7. COTT pursued its claim in damages. On November 30th, 2011 COTT filed Particulars of Claim and sought the following:

   7.1. Damages in the sum of $30,174,891.20 being outstanding royalties for the period 5th January 2006 to 31st August 2011;

   7.2. Damages for royalties for the period 1st September 2011 to such date as the court deems just as rate of 1.625% of annual revenue per year based on the subscriber base;

   7.3. Interest thereon pursuant to section 25 of the Supreme Court of Judicature Act at such rate as the court thinks fit from 5th January, 2006 when the cause of action arose and/or such other date or dates as the court may deem just to the date of judgment;

   7.4. Statutory interest pursuant to section 25A of the Supreme Court of Judicature Act at the rate of 12% per annum from the date of judgment until payment in full;

   7.5. Prescribed costs;

   7.6. Such further and other relief as the nature of the case may require and/or as the court deems just;

   7.7. Liberty to apply.

8. Damages were calculated as a percentage of the defendant's gross revenue as determined by the amount of subscribers and the basic subscription rate per year. The following was put forward by COTT as justification for the claim:

Year	Basic subscription rate	Subscribers	Annual revenue based on subscriber base and base rate	Copyright royalties owed to COTT

[1] See para 47 of that judgment – ***COTT v Columbus Communication Trinidad Limited t/a Flow*** CV 2009-04722 dated June 14th 2011

2006	197.6	118071	279,969,955.00	4,549,511.77
2007	197.6	123059	291,797,500.80	4,741,709.39
2008	197.6	123451	292,727,011.00	4,756,813.93
2009	210.00	125374	315,942,480.00	5,134,065.30
2010	260.00	127631	398,208,720.00	6,470,891.70
Jan 31st – Aug 2011	260.00	133784	278,270,720.00	4,521,899.20
Total to Aug 2011				**30,174,891.20**

9. COTT filed written submissions in relation to the assessment of damages on February 27th 2012 with the defendant filing written submissions in response on the April 2nd 2012. Thereafter COTT filed reply submissions on April 16th 2012, which was amended on April 30th 2012.

10. A witness statement of Nicholas Lue Sue, Manager of COTT, was filed on May 31st 2012 with the defendant filing the witness statements of Margot Patterson, Certified Specialist: Intellectual Property (Copyright), and Brendan Paddick on June 8th 2012.

11. A consolidated list of agreed and un-agreed issues was filed February 6th 2013 and a trial was held on April 2nd 2014 to specifically address the issue of the assessment of damages.

12. COTT filed closing submissions on April 30th 2015, pursuant to an order of the Court dated March 11th 2015. The defendant filed submissions in response on June 10th 2015 with COTT filing a reply on June 17th 2015.

The Evidence in Chief of the Witnesses

13. Nicholas Lue Sue stated that:

13.1. He had been the Manager, Media Licensing of COTT for the past 5½ years;

13.2. He was responsible for issuing licenses to various organizations;

13.3. One of the principles adopted for copyright laws was that the financial benefit the author gains is proportional to the financial benefit a third party gains from the use of his musical works;

13.4. To the best of his knowledge, the defendant belonged to a group of broadcasters collectively referred to as subscription TV because their revenue is derived from subscriptions from their subscribers;

13.5. The two most common bases for calculating the amount to be paid are (1) a 'percentage of gross revenue' and (2) a set amount per subscriber;

13.6. The 'percentage of gross revenue basis' allows the composers/authors to gain financially in proportion as the broadcaster gains;

13.7. In Canada, the Society of Composers, Authors and Music Publishers of Canada (SOCAN) applies the 'percentage of gross revenue basis' to Cable retransmissions;

13.8. The 'percentage of gross revenue basis' has become settled practice in Trinidad and Tobago having been in use since 1958, for radio broadcasters, and 1966, for the then television broadcaster, TTT, and has been accepted by other Cable and Satellite Broadcasters;

13.9. The 'per subscriber basis' for determining amounts due provides a direct link to the number of subscribers paying but not the revenue earned in aggregate. It is based on the cost to the subscriber of the basic package but does not reflect the cost of additional packages which the subscribers may purchase;

13.10. The 'percentage of gross revenue basis' is fairer;

13.11. The rate proposed by COTT is the 'percentage of gross revenue basis' of 1.625% and has been accepted by all the other major Satellite and Cable Broadcasters;

13.12. In determining the amount claimed for damages COTT used the gross revenue figure and applied the established rate of 1.625%.

14. On behalf of the defendant, Ms. Margot Patterson put forward the following into evidence by her witness statement filed June 8th 2012:

14.1. Ms. Patterson had twelve years' experience dealing with copyright issues in the broadcasting sector in Canada;

14.2. Her evidence was intended to assist the Court in understanding the structure and functions of the collective administration of copyright in Canada;

14.3. The structure which existed in Canada was outlined, together with the specific legislative provisions which govern the imposition of a tariff for use of copyright work. It was noted that the legislative framework which exist in Trinidad and Tobago is not as developed as that which exist in Canada;

14.4. In Canada, a licensing body that proposes to implement a tariff for use of its repertoire must show the extent of its repertoire and may be requested to provide copies of agreements used to assign copyright from the owner to that body or lists of members;

14.5. Cable and satellite distributors of broadcasting content in Canada pay two tariffs set by the Copyright Board for the transmission of telephone services. The first was SOCAN Tariff 17 and applied to transmission by distribution undertakings to pay, specialty and other television services. The most recent certified SOCAN Tariff 17 rate was 1.9% of gross income. That rate was proposed to continue until 2012;

14.6. The second tariff applied to the retransmission by distribution undertakings of distant radio and television signals. The most recent certified rate falling into this category was $.85 per subscriber per month. The proposed general rates for 2009 through 2013 range from $.90 to $1.10 per subscriber.

15. Also giving evidence for the defendant was Brendan Paddick, Chief Executive Officer, who stated that:

15.1. From his experience, which he made specific reference to, he was familiar with most aspects and practices of the cable business in numerous countries, including Canada and the United States of America;

15.2. In Trinidad and Tobago, the defendant acts as a cable operator in that it receives cable programming which originate abroad, via satellite, and re-transmits same by cable to its subscribers;

15.3. Cable networks make payments for copyrighted material either directly to the owners or to one or more performing rights organisations (PRO's). In the United States, cable networks have 'through-to-the-viewer' licences covering the public performance on music in their channels. Cable operators in turn have agreements with the cable networks where they pay for the rights to use their programming. This avoids the need for cable operators to obtain separate licences from the PRO's for the use of music in connection with these channels and the distribution of those channels to cable operator's subscribers;

15.4. The defendant has agreements with various foreign networks and suppliers of programming;

15.5. In the Statement of Case the impression is given that Columbus is the originator of the cable broadcast; however, regard should be had to the fact that the original author or assignee would have been entitled to receive payments in the United States in Canada directly, or from a PRO;

15.6. It is not clear what (if any at all) rights COTT has vested in it nor is it clear as to the particular nature of the alleged infringement and whether some of their claims, if successful, would constitute double recovery and therefore be inequitable;

15.7. In determining the rate for equitable remuneration or compensation for unathorised use of copyright material in the United States and Canada the tribunal has regard to (1) identification of the copyright content used; (2) the duration of use; and (3)the percentage of overall programmes. It is only after a consideration of all these factors that an equitable remuneration may be arrived at.

Issues

16. The issues identified in this matter are as follows:

16.1. Whether COTT is an exclusive or a non-exclusive licensee of the repertoire claimed?

16.2. What are the principles to be applied by the court when determining the measure of damages payable pursuant to section 38(1)(d) of the Copyright Act?

16.3. Whether the Court is empowered by the Copyright Act to set rates as between the owner of the copyright and the infringer and if so, how is that rate to be determined?

16.4. What factors, if any, should the Court take into account when determining the measure of damages in this particular case?

16.5. What is the appropriate time period against which damages should be assessed?

16.6. Whether any other section of the Copyright Act applies in these circumstances?

The Law

17. The court will, first of all, consider the principles of law which apply. The Copyright Act, Chapter 82:80 of the laws of Trinidad and Tobago forms the basis for the cause of action in these proceedings. That Act provides, at section 38, as follows:

> *38. (1) The Court shall have the authority—*
>
> *(a) to grant injunctions to prohibit the committing, or continuation of committing, of an infringement of any right protected under this Act;*
>
> *(b) to order the impounding of copies of works or sound recordings suspected of being made or imported without the authorisation of the owner of any right protected under this Act where the making or importation of copies is subject to such authorisation, as well as the impounding of the packaging of, the implements that could be used for the making of, and the documents, accounts or business papers referring to, such copies;*
>
> *(c) to order the forfeiture and seizure of all copies of works or sound recordings manufactured, reproduced, distributed, sold or otherwise used, intended for use or possessed with intent to use in contravention of section 8 or 22 and all plates, moulds, matrices, masters, tapes, film negatives, or other articles by means of which such copies of works or sound recordings may be reproduced, and all electronic, mechanical or other devices for manufacturing, reproducing, or assembling such copies of works or sound recordings;*
>
> *(d) to order that the owner of any right protected under this Act whose right has been infringed, be paid by the infringer, damages adequate to compensate for the injury suffered as a consequence of the act of infringement, as well as the payment of expenses caused by the infringement, including legal costs;*
>
> *(e) to fix the amount of damages taking into account the pecuniary and non-pecuniary loss suffered by the owner of the right;*
>
> *(f) to order an account of the infringer's profits attributable to the infringement;*
>
> *(g) where infringing copies exist, to order the destruction or other reasonable disposition of those copies and their packaging outside the channels of commerce in such a manner as to avoid harm to the right holder, unless the owner of the right requests otherwise.*
>
> *(2) Where the infringer did not know or had no reasonable reason to know that he was engaged in infringing activity, the Court may limit damages to the profits of the infringer attributable to the infringement.*

(3) Where there is a danger that implements may be used to commit or continue to commit acts of infringement, the Court shall have the authority, whenever and to the extent that it is reasonable, to order their destruction or other reasonable disposition outside the channels of commerce in such a manner as to minimise the risks of further infringements, including surrender to the owner of the right.

(4) The Court shall not, in respect of the same infringement, both award the owner of rights damages and order that he shall be given an account of profits.

(5) The provisions of subsection (1)(g) shall not be applicable to copies and their packaging which were acquired by a third party in good faith.

(6) Where there is a danger that acts of infringement may be continued, the Court shall have the authority to order that such acts not be committed and the Court shall fix a fine of five thousand dollars for each day on which the infringement is continued, which fine shall be paid if the order is not respected.

18. The relevant and applicable provisions COTT falls, therefore, under s. 38 (1) (d) and (e). In this case, COTT has not identified any pecuniary or non-pecuniary loss. Instead, it was common ground that the approach, therefore, would be under the common law principle espoused in ***General Tire and Rubber Company v Firestone Tyre and Rubber Company Ltd*** [1975] RPC 203.

19. In ***Irvine and others v TalkSport Ltd*** [2003] All ER (D) 05 (Apr) Lord Justice Jonathan Parker helpfully analysed the law in relation to copyright infringements. After referring to the landmark decision in this field of ***General Tire,*** he went on to quote extensively from it and, to my mind, his analysis is worth referencing *in extenso*:

> *"97. .... In General Tire, Lord Wilberforce refers to three groups of cases as exemplifying the approaches of the courts to typical situations arising in the context of infringement of a patent. The first group consists of cases where the infringer makes a profit from exploiting the invention, thereby diverting sales from the owner of the patent to the infringer. In such cases the measure of damages will normally be the profit which the owner of the patent would have made if the sales had been made by him The second group consists of cases where patents are exploited by through the granting of licences in consideration of royalty payments. In such cases, Lord Wilberforce says (at ibid. p.212 line 40):*
>
> > *"... if an infringer uses the invention without a licence, the measure of damages he must pay will be the sums which he would have paid by way of royalty if instead of acting illegally, he had acted legally."*
>
> *98. Lord Wilberforce continues:*
>
> > *"The problem .... is to establish the amount of such royalty. The solution to this problem is essentially and exclusively one of evidence, and as the facts capable of being adduced in evidence are necessarily individual, from case to case, the danger is obvious in referring to a particular case and transferring its conclusions to other situations."*

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99. Lord Wilberforce goes on to cite a passage from the judgment of Sargent J in A.G [etc] v. London Aluminium Co Ltd (No 2) (1923) 40 RPC 107, where Sargent J said:

> *"... what has to be ascertained is that which the infringer would have had to pay if, instead of infringing the patent, he had come to be licensed under the patent. I do not mean by that that the successful patentee can ascribe any fancy sum which he says he might have charged, but in those cases where he has dealt with his property merely by way of licence, and there have been licences at certain definite rates, there prima facie, apart from any reason to the contrary, the price or royalty which has been arrived at by means of a free bargain between the patentee and the person desiring to use the patented article has been taken as being the price or royalty that presumably would have had to be paid by the infringer. In doing that, it seems to me that the court is certainly not treating the infringer unduly harshly; he should at least, in my judgment, have to pay as much as he would in all probability have had to pay had he to deal with the patentee by way of free bargain in the way in which the other persons who took licences did in fact pay."*

100. Lord Wilberforce continues:

> *"These are very useful guidelines, but the principle of them must not be misapplied. Before a 'going rate' of royalty can be taken as the basis on which an infringer should be held liable, it must be shown that the circumstances in which the going rate was paid are the sane or at least comparable with those in which the patentee and the infringer are assumed to strike their bargain."*

101. The third group of cases to which Lord Wilberforce refers in General Tire consists of cases where it is not possible to prove either the amount of profit which the owner of the patent has lost by reason of the infringement (with the consequence that the case does not fall within the first group), or that there is a 'going rate' of royalty (with the consequence that the case does not fall within the second group). As to this third group, Lord Wilberforce says (at ibid. p. 213 line 49):

> ***"In such cases it is for the plaintiff to adduce evidence which will guide the court. The evidence may consist of the practice, as regards royalty, in the relevant trade or analogous trades; perhaps of expert opinion expressed in publications or in the witness box; possibly of the profitability of the invention; and any other factor on which the judge can decide the measure of loss. Since evidence of this kind is in its nature general and also probably hypothetical, it is unlikely to be of relevance, or if relevant, of weight, in the face of the more concrete and direct type of evidence referred to [in connection with the second group of cases]. But there is no rule of law which prevents the court, even where it has evidence of licensing practice, from taking these more general considerations into account. The ultimate process is one of Judicial estimation of the available indications."***
>
> *[Emphasis added]*

1928

102. Lord Wilberforce goes on to cite the well-known passage from the judgment of Fletcher Moulton LJ in Meters Ltd v. Metropolitan Gas Meters Ltd (1911) 28 RPC 157 at 164-5 as expressing "the true principle" governing cases within the third group. In that passage, Fletcher Moulton LJ said this:

> *'There is one case in which I think the manner of assessing damages in the case of sales of infringing articles has almost become a rule of law, and that is where the patentee grants permission to make the infringing article at a fixed price - in other words, where he grants a licence at a certain figure. Every one of the infringing articles might then have been rendered a non-infringing article by applying for and getting that permission. The court then takes the number of infringing articles, and multiplies that by the sum that would have had to be paid in order to make the manufacture of that article lawful, and that is the measure of the damage that has been done by the infringement. The existence of such a rule shows that the courts consider that every single one of the infringements was a wrong, and that it is fair - where the facts of the case allow the court to get at the damages in that way - to allow pecuniary damages in respect of every one of them. I am inclined to think that the court might in some cases, where there did not exist a quoted figure for a licence, estimate the damages in a way closely analogous to this. It is the duty of the defendant to respect the monopoly rights of the plaintiff. The reward to a patentee for his invention is that he shall have the exclusive right to use the invention, and if you want to use it your duty is to obtain his permission. I am inclined to think that it would be right for the court to consider what would have been the price which - although no price was actually quoted - could reasonably have been charged for that permission, and estimate the damage in that way. Indeed, I think that in many cases that would be the safest and best way to arrive at a sound conclusion as to the proper figure. But I am not going to say a word which will tie down future judges and prevent them from exercising their judgment, as best they can in all the circumstances of the case, so as to arrive at that which the plaintiff has lost by reason of the defendant doing certain acts wrongfully instead of either abstaining from doing them, or getting permission to do them rightfully."*

103. Lord Wilberforce continues:

> *"A proper application of this passage, taken in its entirety, requires the judge assessing damages to take into account any licences actually granted and the rates of royalty fixed by them to estimate their relevance and comparability, to apply them so far as he can to the bargain hypothetically to be made between the patentee and the infringer, and to the extent to which they do not provide a figure on which the damage can be measured, to consider any other evidence, according to its relevance and weight, upon which he can fix a rate of royalty which would have been agreed."*

104. .....

105. The assessment of damage in a case such this is very much a matter for the judge, requiring as it does a 'Judicial estimation of the available indications" (see Lord Wilberforce in General Tire at p.213, quoted in paragraph 101 above). ...."

20. The ***General Tire*** case was a decision in a patent infringement case but its principles are equally applicable to copyright cases as is clear from the decision of the English Court of Appeal in ***Blayney v Clogau St. David's Goldmines Ltd*** [2003] FSR 361.

21. There is no doubt that the assessment of damages in this case falls to be considered under the third group in which the court must make a "judicial estimation of the available indications". Clearly, as per Lord Wilberforce's formulation, it is not possible to prove either the amount of profit which COTT has lost by reason of the infringement (with the consequence that the case does not fall within the first group), or that there is a 'going rate' of royalty (with the consequence that the case does not fall within the second group).

22. The application of the third group has been described in authorities as the determination of a notional licence.

23. In ***32RED PLC v WHG (International) Limited & Ors*** [2013] EWHC 815, Mr. Justice Newey went on to describe certain principles applicable in an assessment of damages as in the case of this third group:

> *22. As already mentioned, 32Red's claim is based on what has been termed the "user principle". Nicholls LJ coined the term in Stoke-on-Trent City Council v W & J Wass Ltd [1988] 1 WLR 1406 (at 1416) to refer to the principle that a person who has wrongfully used another's property can be liable to pay, as damages, a reasonable sum for such use.*
>
> *23. This principle is well-established in relation to patent infringement. In General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd [1975] 1 WLR 819, Lord Wilberforce explained (at 824-825) that damages for patent infringement are assessed in three main ways. In the first place, if COTT exploits the invention by manufacturing and selling goods at a profit, and the effect of the infringement has been to divert sales to the defendant, the "measure of damages will ... normally be the profit which would have been realised by the owner of the patent if the sales had been made by him". Secondly, if COTT exploits his patent by granting licences in return for royalty payments, "the measure of damages [the defendant] must pay will be the sums which he would have paid by way of royalty if, instead of acting illegally, he had acted legally". Thirdly, where it is not possible to prove either that there is a normal rate of profit or a normal royalty, damages fall to be assessed by considering what price could reasonably have been charged for permission to carry out the infringing acts. This last method of assessing damages can be seen as an application of the user principle (see Stoke-on-Trent City Council v W & J Wass Ltd, at 1416-1417, and Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd [2012] EWHC 616 (Ch), [2012] RPC 29, at paragraph 376).*
>
> *24. On occasions, the Courts adopt essentially the same approach when assessing contractual damages. As Lord Nicholls of Birkenhead explained in Attorney-General v Blake [2001] 1 AC 268 (at 283-284), in contract as well as tort damages will in a suitable case:*

"be measured by the benefit gained by the wrongdoer from the breach. The defendant must make a reasonable payment in respect of the benefit he has gained".

25. In Force India, Arnold J extracted from the authorities the following principles for the assessment of such damages (see paragraph 386):

"(i) The overriding principle is that the damages are compensatory: see Attorney-General v Blake at 298 (Lord Hobbouse of Woodborough, dissenting but not on this point), Hendrix v PPX at [26] (Mance L.J., as he then was) and WWF v World Wrestling at [56] (Chadwick L.J.).

(ii) The primary basis for the assessment is to consider what sum would have [been] arrived at in negotiations between the parties, had each been making reasonable use of their respective bargaining positions, bearing in mind the information available to the parties and the commercial context at the time that notional negotiation should have taken place: see PPX v Hendrix at [45], WWF v World Wrestling at [55], Lunn v Liverpool at [25] and Pell v Bow at [48]-[49], [51] (Lord Walker of Gestingthorpe).

(iii) The fact that one or both parties would not in practice have agreed to make a deal is irrelevant: see Pell v Bow at [49].

(iv) As a general rule, the assessment is to be made as at the date of the breach: see Lunn Poly at [29] and Pell v Bow at [50].

(v) Where there has been nothing like an actual negotiation between the parties, it is reasonable for the court to look at the eventual outcome and to consider whether or not that is a useful guide to what the parties would have thought at the time of their hypothetical bargain: see Pell v Bow at [51].

(vi) The court can take into account other relevant factors, and in particular delay on the part of COTT in asserting its rights: see Pell v Bow at [54]".

26. With regard to point (v), the authority cited is Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd [2009] UKPC 45, [2011] 1 WLR 2370. In that case, the Privy Council endorsed (in paragraph 50) a passage from Neuberger LJ's judgment in Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd [2006] EWCA Civ 430, [2006] 2 EGLR 29 reading as follows:

> *"Given that negotiating damages under [Lord Cairns'] Act are meant to be compensatory, and are normally to be assessed or valued at the date of breach, principle and consistency indicate that post-valuation events are normally irrelevant; but, given the quasi-equitable nature of such damages, the judge may, where there are good reasons, direct a departure from the norm either by selecting a different valuation date or by directing that a specific post-valuation date event be taken into account"."*

Discussion

24. Having established the relevant legal principles, it is now necessary to analyze the information before the court.

25. COTT, upon whom the burden of proof lies, based its evidence on the witness statement of Nicholas Lue Sue alone with no other information, documentation or evidence. Notably, Mr Lue Sue did not provide any real evidence in a cogent and proper evidential manner.

26. No expert or real evidence was provided to show that the "percentage of gross revenue" rate of 1.625% suggested was a generally accepted rate in the industry.

27. No analysis of the economic benefit to either party was presented.

28. No details were provided of the works which COTT had exclusive rights over at the material time or the proportion of the defendant's programming which incorporated these works. To my mind, COTT has to provide the evidence of the extent of its protected repertoire. The fact of the summary judgment does not obviate the need to properly prove damages at the assessment stage. To use an obvious example, default judgment taken in a running down case does not automatically mean an acceptance by the court of the pleaded damages. They still have to be proven at the assessment stage[2]. To my mind, if, as COTT alleges, it has the rights to some or all of the programming carried by the defendant, then, notwithstanding the judgment on liability, the extent of that liability **must** be established by evidence. This would have meant identifying the offending programs being broadcast by the defendant and establishing the rights to the same. From there, a mathematical exercise would be necessary to determine the proportion of the defendant's revenue/subscriptions that these offending programs comprise and then ascribe an established comparable market rate to it.

29. To me, it is trite that COTT has to identify the copyright material which is being used without permission before seeking damages on that material. Does it cover the content on, for example, channels such as The Discovery Channel, National Geographic Channel, HGTV, ESPN, Sportsmax, Fox Sports, etc. – all channels which are carried by the defendant but which have minimal musical content?

30. The witness for COTT acknowledged in cross examination that not all of the subscriber service provided by the defendant involved musical content. In fact, the cross examination in that regard was as follows:

> *Q* *In the case of TV the main component is visual?*

[2] Civ App 146 of 2003 ***Mario's Pizzeria Limited v Hardeo Ramjit*** per Kangaloo JA

A One part is visual. Another is spoken word. A 3rd element may or may not be music.

Q The 3rd element, music, can vary in proportion depending on the nature of the show?

A Yes. e.g. ABC may have low music content and MTV purely musical content.

Q So it can range from zero to 100%?

A Yes

Q So it does not mean that every program has musical content?

A That's correct

Q And even in musical content, the use can vary?

A Yes

Q So the use of the Copyrighted material can vary from program to program and channel to channel?

A Yes

Q Going back to para 7 of the witness statement, we have highlighted a fundamental difference between radio broadcasters and FLOW in regards of musical content.

A Yes

Q Did you analyze FLOWS operations and services they provide?

A Yes

Q Part of FLOW provides watched services – ie the TV channels - but also provides other services such as broadband?

A Yes

Q Business solutions, where you can get internet data and telephone?

A Yes

Q Did you see it fit to inquire what proportion of profit was derived from watched services?

A I expect that would be forthcoming in this process

Q So you don't know?

A No

Q Knowing there is watched and non- watched services, you nonetheless attached percentage on all?

A Yes

Put In the case of watched services, that is only 45% of gross revenue

A I don't know. I have no basis to disagree with that figure. I only looked at the gross revenue from all services.

31. Obviously, the court would have to reach a finding as to how much of the content provided by the defendant amounts to watched services as opposed to non-watched services such as internet data and telephone, and how much of the former comprises musical content in respect of which COTT has exclusive rights which do not fall within any rights which the defendant may have had bundled in its arrangements with its providers. Only then can the court, fairly and reasonably, award damages against the defendant in relation to the claim made by COTT i.e. for on authorized use of copyrighted material. Obviously, no royalties would accrue in relation to services which do not fall within COTT's repertoire. To this court, therefore, it is essential that the percentage of the services which include (though not solely) copyrighted material by the defendant which is covered by COTT's copyright repertoire has to be ascertained. COTT cannot, for example, seek to recover copyright damages on internet data service. If that forms a part of the revenue of the defendant, then quite clearly, this has to be excluded from the approach of painting all of the defendant's revenue with the same paintbrush i.e. the 1.625% demand.

32. Interestingly, the basis of the requested percentage of 1.625% was not set out by COTT. In his witness statement, Nicholas Lue Sue said:

> *"The rate proposed by COTT is "the percentage of gross revenue" basis of 1.625%. This rate has been in use for Television Broadcasters since 1978 and has been agreed to through license agreements with all the other major Satellite and Cable broadcasters."*

Comment

32.1. It is difficult to justify a rate which has been in use since 1978 with respect to Television Broadcasters when the television content and experience would have been vastly different from that which is available now in 2015 – there was no internet and the telephone traffic would have been different.

32.2. Further, his statement that the rate has been agreed to through license agreements with all the other major Satellite and Cable broadcasters is a bare statement as he did not produce any of these license agreements nor did he identify who these other broadcasters were or if they, like the defendant, provided a variety of services which included non-watched services and whether that rate applied to all of its gross annual earnings or just that which represented watched services.

32.3. The latter identification process would have necessarily been quite important to see whether their revenue sources were comparable to the defendant's. Do they provide internet data service and/or telephone service and/or other business solutions in the same comparable proportions as the defendant?

33. Mr. Lue Sue went on in his witness statement:

"Collective Management Societies like COTT have an onus to apply rates equally to all licensees in the Cable industry in order to be fair; to do otherwise would risk making some competitors in the satellite/cable industry uncompetitive and to make COTT the course of their uncompetitiveness. All Collective Management Societies must avoid being the cause of on competitiveness in any industry by consistent application of established rates."

Comment

33.1. In this sequence of evidence, the witness is quite clearly seeking to establish a certain level of expertise in relation to the duties of Collective Management Societies such as COTT. Mr. Lue Sue did not demonstrate any academic professional qualifications enabling him to claim this expertise. His entire statement in his witness statement with respect to his expertise or qualifications was that he had been employed as the Manager, Media Licensing at COTT for 5 ½ years. Even in that regard, if even he was relying on job experience to give him this expertise, he did not describe that experience.

33.2. In cross examination, Mr. Lue Sue described himself as *"a consultant in Intellectual Property Management"*, again, without providing any basis or corroborating evidence to support this qualification.

33.3. Consequently, this court cannot accept that he is in a position to make the statements that he has made which were set out above. Even though the statements seem logical, the court is of the respectful view that a more serious analysis of the duties of COTT in the arena of collective management societies ought to have been presented on behalf of COTT.

34. Therefore, it is my respectful view that the grounds for the requested 1.625% ***has not*** been established on a balance of probabilities, whether as an industry standard or under any of the considerations referred to in the case law above[3].

35. As far as the court is aware, there is no standard rate applicable to this industry in Trinidad and Tobago. Further, the impression that the court got from conversations had with the parties was that whatever order this court made may seem to be a signal as to what the standard rate ought to be. If even that were not so, then the court has to be extremely careful in its approach since it would be the first judicial exercise in relation to the breach of copyright in relation to television broadcasting in this jurisdiction and it would be setting a precedent of sorts in that regard.

[3] After the close of evidence, the court drew to the attention of attorney-at-law for COTT that it had grave doubts about the evidence given by Mr. Lue Sue. The matter was then adjourned for discussions between the parties and, after it became obvious that no resolution could have been reached, COTT made an application to reopen its case to adduce fresh evidence and this was refused.

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36. The court has looked at the information available online in relation to the state of the industry and has noted that, in 2007, for example, the authorized television broadcasters were as follows:

> *"6.1. **<u>Free-to-Air TV Broadcasting Market</u>***
>
> *In 2007, the market for free-to-air TV broadcasting service comprised six (6) operators. They were: • Advance Community Television Network Limited (ACTN),*
>
> *• Caribbean Communications Network Limited (TV6),*
>
> *• Gayelle Limited,*
>
> *• Caribbean New Media Group (CNMG),*
>
> *• World Indian Network Television Limited (WINTV), and*
>
> *• Government of the Republic of Trinidad and Tobago (GRoTT).*
>
> *6.3. **<u>Subscription Television Broadcasting (Cable TV) Market</u>***
>
> *In 2007, the subscription broadcasting sector comprised of six (6) concessionaires. Although a concession was granted to TSTT for the provision of subscription television services in 2005, TSTT has delayed the launch of this service and has requested more time from the Authority to start its operations. The six (6) subscription television broadcasting services providers that were in operation in 2007 were:*
>
> *• Columbus Communications Trinidad Limited (CCTL) (National),*
>
> *• DirecTV Trinidad Limited (National),*
>
> *• TRICO Industries Limited (Tobago only),*
>
> *• RVR International Limited (RIO Claro/ Princess Town/New Grant only),*
>
> *• Computer Technologies and Services Limited (Mayaro/Guayagauare only), and*
>
> *• Independent Cable Network of Trinidad and Tobago ICNTT (National)."*[4]

37. Any information from any of the above may have assisted this court in ascertain what a notional license agreement may have yielded.

38. On top of all of that is the similarly unsubstantiated statement of Mr. Brendan Paddick for the defendant that the defendant has already paid fees to its cable content providers such as Fox Cable Network Services, MTV Networks, Black Entertainment Television Inc. and Scripps Network and has also noted that cable networks in the United States, as far as he is aware, have "*through to the viewer*" licenses covering the public performance of music in their channels. [5] As

[4] Source: ***"Annual Market Report Telecommunications and Broadcasting Sectors January – December 2007"*** issued by the Telecommunications Authority of Trinidad and Tobago
[5] See paragraphs 10 and 11 of his witness statement

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an aside, and bearing in mind the reasoning for the court's grant of summary judgment to COTT in light of the unsubstantiated statements made in the defence by the defendant in relation to this very same issue, it was very surprising that these statements made in his witness statement were not corroborated by supporting documents.

39. It is obvious that all of these issues along with the other matters discussed above have to be thoroughly articulated and analyzed before the court can come to a fair judicial estimation of the damages which ought to be awarded.

40. To meet the obvious requirements of the industry, and this particular market, the court had suggested that these proceedings be stayed to allow the exercise of the court's special jurisdiction under part IX of the Copyright Act. In particular, section 50 thereof provides:

> *"50. Subject to this Act, the Court shall have jurisdiction—*
>
> *(a) to determine any dispute which may be referred to it pursuant to section 52; and*
>
> *(b) to fix the amount of equitable remuneration or compensation which by any provision of this Act is required to be fixed by the Court in any case where there has been no agreement between a person and the owner of copyright or neighbouring rights as to the amount of remuneration or compensation payable in respect of the use of the work, sound recording, broadcast or performance. "*

41. This special jurisdiction, to my mind, would have allowed the parties to properly address all of the issues which are necessary to determine a fair rate taking all of the necessary ingredients in mind. This is especially so since there is no established market rate produced to this court on cogent evidence.

42. The suggestion did not find favour with COTT and so the court has proceeded as requested under s. 38.

43. As it stands, this court is not satisfied with the evidence that it has before it. Consequently, it cannot accept the unilateral imposition of a rate of 1.625% of gross revenue suggested by COTT. But that is not the end of the matter.

44. It is trite law that in cases of copyright breach, the claimant ought not to go away empty-handed.[6]

45. This court has considered the paucity of information and evidence before it on both sides. COTT, on the one hand, has suggested that the rate ought to be 1.625% of gross revenue. It was suggested to Mr. Lue Sue in cross-examination, although not referred to anywhere else, that the defendant's watched TV

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[6] ***Performing Rights Organization of Canada Ltd. v. Glenn Greening,*** op. cit., at 213; ***Robert D. Sullivan Architects Ltd. v. Montykola Investments Inc. et al.*** (1995) 61 C.P.R. (3d) 447 at 462-463; ***Weiss v. Prentice Hall Canada Inc. et al.*** (1995) 66 C.P.R. (3d) 417 at 429-430

services comprise 45% of their gross revenue. Consequently, the court proposes to impose the damages only on that portion of the gross revenue which attaches to watched TV services i.e. 45% of the gross revenue. Applying that formula in a fairly simplistic manner, and taking into account the reasonable possibility[7] that the defendant would already have paid copyright fees built into the fees that it would paid to these foreign television network providers, the court is minded to award to COTT, solely in the circumstances of this case and without the intention of creating a market standard whatsoever, a rate of 1.5% of gross revenue calculated on 50% of the defendant's watched TV services gross revenue as the notional license fee in this matter. To my mind, this percentage of gross revenue is most apt in the circumstances before this court with the information that it has available to it to make a judicial estimation since not all of the watched TV services carry musical content and, to my mind, it is not possible at this stage of the proceedings to identify what percentage of the watched TV services comprise his musical content. Doing the best that it can, this court's judicial estimation is 50% hence the use of that percentage for the purposes of these proceedings.

The Order

46. Consequently, the court will make the following order:

46.1. The defendant will provide to the court audited accounts for its watched TV services for the years 2006 to date in respect of subscribers together with its subscription base for the same period by the 11th of January 2016 verified by affidavit.

46.2. COTT shall within 21 days thereafter i.e. by 1 February 2016, file a complete schedule of the defendant's yearly watched TV services revenue for the period 2006 to date in the same tabular form as set out in the Particulars of Claim filed by COTT on 30 November 2011, inserting columns for "100% of the watched TV services" and "50% of the watched TV services" and substituting the rate of 1.5% for the claimed rate of 1.625%;

46.3. The defendant shall then pay to COTT 1.5% of its gross revenue calculated on 50% of its gross revenue for watched TV services for the period 2006 to date as damages for infringement of copyright by the unauthorised transmission by the defendant of the musical works claimed by COTT;

[7] It seems **highly unlikely** that cable networks in the USA or the UK or Canada would provide content to the defendant without some sort of royalty built into its fees.

46.4. The defendant shall also pay to COTT interest thereon i.e. on the said damages, at the rate of 3% per annum, such interest to be calculated on the amount for each year separately. By that I mean that the damages for each year will be calculated separately and the damages for each year will carry interest thereon at the rate of 3% per annum from the end of that particular year. So that, the interest for the damages for 2006 shall carry interest at the rate of 3% per annum from 31 December 2006, the damages for 2007 shall carry interest at the rate of 3% per annum from 31 December 2007 and so on.

46.5. The defendant shall pay to COTT the prescribed costs of this action calculated on the total damages and interest – such sum to be officially quantified by the court by 5 February 2016 upon receipt of a schedule of the tabulation of the total damages for the said period and interest thereon – such schedule to be filed and served by COTT by the 1 February 2016 and a digital copy forwarded to the court by email copied to the other side.

Post script

47. It is patently obvious that a proper rate fixing exercise has to be conducted to establish the appropriate market rates which apply in 2015 to the range of services which are now being offered by service providers such as the defendant in these proceedings.

48. Respectfully, the cut and paste approach suggested in these proceedings at the assessment stage, without actually analyzing the facts as they are and the various permutations of license arrangements, cannot be deemed to be a fair process. It is unquestionable that royalties ought to be paid for rights held in COTT's repertoire which have not already been paid at some level. The challenge is identifying those unpaid rights which are due and agreeing or fixing, through the court process under section 50 of the Act, an appropriate and fair rate taking all of the circumstances into account. With the proper information and copies of the relevant agreements, this ought not to be a difficult task.

49. This court would encourage such an approach at the earliest possible time to ensure that the parties move forward with a fair and justifiable procedure for calculating the market rate.

/s/ Devindra Rampersad

Devindra Rampersad
Judge