



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2014 HCV 05341

BETWEEN

**JAMAICA ASSOCIATION OF
COMPOSERS AUTHORS &
PUBLISHERS LIMITED**

CLAIMANT

AND

KLAS SPORTS RADIO LIMITED

DEFENDANT

IN CHAMBERS

**Ms Yana Samuels and Mr Joerio Scott instructed by Messrs. Samuda & Johnson
for the Claimant**

Mr Neco Pagon instructed by Messrs. Vaccianna & Whittingham for the Defendant

Heard: 14 October 2020 and 16 December 2025

Copyright – Copyright Infringement – Assessment of Damages

A. NEMBHARD J

INTRODUCTION

[1] This matter concerns the calculation of an award of Damages in circumstances where there was an infringement of copyright. Particularly, the Claimant, the Jamaica Association of Composers Authors and Publishers Limited, ("JACAP")

seeks statutory damages pursuant to the Copyright Act for the Defendant's purported continuing infringement of the copyright of musical works from on or around September 2009. JACAP also seeks damages for the breach of their licence and the Defendant's purported unjust enrichment.

BACKGROUND

- [2] JACAP is a copyright licensing body,¹ acting as agent and/or licensee pursuant to various reciprocal collection and agency agreements with both local and international performance rights societies, including but not limited to the Performing Rights Society, the American Society of Composers Authors and Publishers, Broadcast Music Incorporated and the Association of Caribbean Copyright Societies. By virtue of these reciprocal collection agreements, these institutions are entitled to just about every musical work broadcast transmitted via radio, television or cable throughout the world, including the jurisdiction of Jamaica.²
- [3] JACAP also maintains agreements with music publishers who have assigned to them the sole and/or exclusive right in Jamaica to broadcast or license the broadcast of and to transmit or authorize the transmission of their musical works within their repertoire by radio, television or otherwise. JACAP asserts that it is the owner and/or assignee and/or licensee of copyright and/or as the authorized collection agent in Jamaica of the musical works within their repertoire. Consequently, JACAP maintains that it has the exclusive right to authorize or prohibit the broadcasting and/or transmission of any musical works in its repertoire. JACAP further maintains that it has the exclusive and/or non-exclusive

¹ Under the Copyright Act, the term "licence", means any licence that is issued or offered by a licensing body authorizing, in relation to works in which copyright subsists, the doing of any of the acts restricted by copyright. Section 87(1) of the Copyright Act defines a licensing body as being "a society or other organization which has as its main object or one of its main objects, the negotiation or granting, either as owner or prospective owner of copyright or as agent for him, of licences, and whose objects include the granting of licences covering works of more than one author."

² See – Paragraphs 1 and 2 of the Particulars of Claim, which was filed on 6 November 2014

licence and/or issues licences by means of which all broadcasters are authorized by JACAP to transmit and/or retransmit musical works from time to time in JACAP's said repertoire in consideration of a fee or fees determined from time to time by JACAP.³

- [4] The Defendant, KLAS, is a company responsible for the operation of the national radio broadcast station, KLAS-ESPN Sports FM 89. KLAS asserts that it is a broadcasting station, that is primarily a Talk Radio station, carrying current affairs and sports programming for most of its airtime.⁴ For its part, KLAS contends that the allegations levied by JACAP are unfounded as they contend that music is hardly, if ever, played during their set programmes. In fact, KLAS states that the station does not air any sponsored music show, which would facilitate revenue generation and has very few commercial schedules for air during a short music segment.⁵
- [5] It is alleged that KLAS-ESPN Sports FM 89 first went on air on or around 1 September 2009. JACAP further alleges that since then, music has been an integral part of the Defendant's programming until the commencement of these proceedings. Specifically, JACAP contends that KLAS has, on a daily basis, broadcast and/or transmitted and/or authorized the transmission and/or retransmission via its radio programmes either discreetly or embedded in the programming, one or more of the musical works in JACAP's repertoire without first obtaining JACAP's permission and/or paying the requisite licence fees. To date, JACAP asserts, KLAS has failed to pay all licence fees due to JACAP since it commenced broadcasting on or around 1 September 2009, despite multiple attempts to broker an amicable agreement.⁶
- [6] JACAP alleges that the flagrant disregard of its copyright has deprived it of substantial benefit of the copyright. The Claimant asserts that it is therefore entitled to restitution from the Defendant for unjust enrichment as well as

³ See – Paragraphs 10 and 11 of the Particulars of Claim, which was filed on 6 November 2014

⁴ See – Paragraph 4 of the Witness Statement of Alston Stewart, which was filed on 17 January 2019

⁵ See – Paragraphs 5 – 9 inclusive of the Witness Statement of Alston Stewart, which was filed on 17 January 2019

⁶ See – Paragraphs 13 to 24 inclusive of the Particulars of Claim, which was filed on 6 November 2014

statutory Damages for copyright infringement for the period commencing 1 September 2009 to 31 December 2014 and continuing.⁷

Chronology of Events

- [7] On 19 September 2018, Palmer J entered Judgment in Default of Defence in favour of JACAP against KLAS, on the basis that KLAS failed to file a Defence within the period specified by rule 10.3(1) of the Civil Procedure Rules, 2002, as amended ("the CPR").⁸ On the basis of that Interlocutory Judgment in Default of Defence, the matter proceeded to a hearing of the Assessment of Damages on 14 October 2020, before this Court. This Court was met with an application for specific disclosure made on behalf of JACAP, requesting disclosure of KLAS' Audited Financial Statements for the period of 2015-2020, as JACAP contended that these financial statements are directly relevant to the matters in dispute between the parties and further, that these statements were necessary in order to dispose fairly of the claim. This Court granted the application for specific disclosure.
- [8] KLAS appealed this decision. The Court of Appeal allowed the appeal, refused the application for specific disclosure and directed the continuation of the hearing of the Assessment of Damages.

THE ISSUES

- [9] The issues which are determinative of the Claim may be distilled as follows: -
 - I. How should the Court calculate the licencing fees/outstanding royalties owed to JACAP for the copyright infringement committed by KLAS during the period of 1 September 2009 to 31 December 2014 and continuing?

⁷ See – Paragraph 25 of the Witness Statement of Lydia Rose, which was filed on 6 February 2019

⁸ See – Formal Order, which was filed on 19 November 2018

II. Whether JACAP is entitled to any award of Damages as a result of KLAS' copyright infringement of its licence.

To determine this salient issue, the following sub-issues must also be resolved: -

- a) Whether JACAP has demonstrated that it is entitled to an award of statutory Damages under the Copyright Act;
- b) Whether JACAP has demonstrated that it is entitled to an award of special Damages; and
- c) The quantum of Damages to be awarded to JACAP for KLAS's copyright infringement.

THE LAW

Assessment of Damages after Default Judgment

[10] Part 16 of the Civil Procedure Rules, 2002 as amended, details the procedure concerning the assessment of Damages. In particular, rules 16.2 and 16.4 state:

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"16.2 (1) An application for default judgment to be entered under rule 12.10(1)(b), must state –

(a) whether or not the claimant is in a position to prove the amount of the damages; and, if so

(b) the claimant's estimate of the time required to deal with the assessment.

(2) Unless the application states that the claimant is not in a position to prove the amount of damages, the registry must fix a date for the assessment of damages and give the claimant not less than 14 days' notice of the date, time and place fixed for the hearing.

(3) A claimant who is not in a position to prove damages must state the period of time that will elapse before this can be done.

(4) The registry must then fix:

- (a) *the date for the hearing of the assessment;*
- (b) *A date by which standard disclosure and inspection must take place;*
- (c) *A date by which witness statements must be filed and exchanged; and*
- (d) *A date by which a listing questionnaire must be filed.*

...

16.4 (1) *This rule applies where the court makes a direction for the trial of an issue of quantum.*

(2) *The direction may be given at –*

- (a) *a case management conference;*
- (b) *the hearing of an application for summary judgment; or*
- (c) *the trial of the claim or of an issue, including the issue of liability.*

(3) *On making such a direction the court must exercise the powers of a case management conference and in particular may give directions about*

–

- (a) *disclosure under Part 28;*
- (b) *service of witness statements under Part 29; and*
- (c) *service of expert reports under Part 32.*

(4) *The court must also fix –*

- (a) *a date by which the claimant is to file the listing questionnaire at the registry; and*
- (b) *a period within which the assessment of damages is to commence.”*

The Statutory Framework

The relevant sections of the Copyright Act

[11] Section 31 of the Copyright Act provides that a copyright in a work is infringed by any person who, without the licence of the copyright owner, does, in relation to that work, any of the acts which the copyright owner has the exclusive right to do. Section 32 of the Copyright Act details the actions that an owner of copyright can use to avail themselves in circumstances where they allege their copyright has been infringed.

[12] The Copyright Act provides for the establishment of licensing schemes.⁹ Section 88 stipulates: -

"88. The provisions of sections 89 to 94 apply to licensing schemes of the following descriptions –

- (a) *licensing schemes operated by licensing bodies in relation to the copyright in literary, dramatic, musical or artistic works or films (or film soundtracks when accompanying a film) which cover works of more than one author, so far as they relate to licenses for –*
 - (i) *copying the work;*
 - (ii) *performing, playing or showing the work in public; or*
 - (iii) *broadcasting the work or including it in a cable programme service;*
- (b) *all licensing schemes in relation to the copyright in sound recordings (other than film soundtracks when accompanying a film), broadcasts or cable programmes or the typographical arrangement of published editions; and*

⁹ A licensing scheme is defined in section 87(1) of the Copyright Act as being a scheme setting out – (a) **the classes of case in which the operator of the scheme, or the person on whose behalf he acts, is willing to grant licences;** and (b) **the terms on which licences would be granted in those classes of case, and for this purpose a “scheme” includes anything in the nature of a scheme, whether described as a scheme or as a tariff or by any other name.”**

(c) all licensing schemes in relation to the copyright in sound recordings, films or computer programs so far as they relate to licences for the rental of copies to the public."

Remedies for Exclusive Licenses for Works protected by Copyright

[13] Sections 34 and 35 of the Copyright Act outline the available remedies open to exclusive licensees¹⁰ of works protected by copyright. These sections provide as follows: -

"34. An exclusive licensee has, except against the copyright owner, the same rights and remedies in respect of matters occurring after the grant of the licence as if the licence had been an assignment.

35.- (1) The rights and remedies of an exclusive licensee are concurrent with those of the copyright owner and references in the relevant provisions of this Act to the copyright owner shall be construed accordingly.

(2) In an action brought by an exclusive licence by virtue of this section, a defendant may avail himself of any defence which would have been available to him if the action had been brought by the copyright owner.

(3) Where an action for infringement of copyright is brought by the copyright owner or by an exclusive licensee, and the action relates (wholly or partly) to a infringement in respect of which they have concurrent rights of action, the copyright owner or the exclusive licensee, as the case may be, shall not be entitled, except with the leave of the Court, to proceed with action, unless the other party is either joined as a plaintiff in the action or added as a defendant; but this subsection shall not affect the granting of an interlocutory injunction on the application of either of them.

(4) ...

¹⁰ The term 'exclusive licence' is defined by the Copyright Act as being, "*a licence in writing signed by or on behalf of the owner of copyright in a work authorizing the licensee, to the exclusion of all other persons, including the person granting the licence, to exercise a right which would otherwise be exercisable exclusively by the owner of the copyright."*

(5) *Where an action for infringement of copyright is brought which relates (wholly or partly) to an infringement in respect of which the copyright owner and an exclusive licensee have or had concurrent rights of action, then, whether or not the copyright owner and the exclusive licensee are both parties to the action, the court –*

- (a) *shall, in assessing damages take into account the terms of the licence and any pecuniary remedy already awarded or available to either of them in respect of the infringement;*
- (b) *shall not direct an account of profits if an award of damages has been made or an account of profits has been directed in favour of the other of them in respect of the infringement; and*
- (c) *shall, if an account of profits is directed, apportion the profits between them as the court considers just, subject to any agreement between them.”*

ANALYSIS AND FINDINGS

Submissions advanced on behalf of the Claimant

[14] In Written Submissions filed on behalf of JACAP, it was submitted that it is the music industry standard that royalties payable for performance rights are calculated as a percentage of gross advertising revenue of a television and/or radio broadcast station. It was further submitted that the authority of **Television Jamaica Limited v CVM Television Limited**¹¹, is instructive in assessing the measure of damages that the Claimant should receive and also gives insight to industry practice. It was further submitted that, by applying the interpretation of Sykes J (as he then was), the measure of Damages ought to be what the Defendant would pay had he obtained a license to use the copyrighted works legally. The Defendant, who would have no right to use the copyrighted protected works without the requisite license, is not in a position to dictate or influence what

¹¹ [2017] JMSC COMM 1

that calculation ought to be. Further, it was submitted that the evidence is clear that the standard amount charged as an annual licensing fee for radio stations has remained the same since 1999 and that consequently, the Defendant is not in a position to submit that the calculation should be different.

[15] The Claimant urged the court to consider the following factors: -

- i. That the materials which were used by the Defendant are copyrighted material which the Defendant had no right to use without the requisite license;
- ii. That the Defendant has had knowledge of the fact stated at i. above and continued to use the materials without the requisite license in contravention of the law;
- iii. That there is a statutory obligation on the Defendant to compensate copyright holders and to refrain from the infringement of copyright;
- iv. That the Claimant is the only licensing body in Jamaica who may issue a license for them to play these copyrighted works to the public;
- v. That there is no other entity in Jamaica that represents the same intellectual property rights that JACAP represents and as such, its method of calculation can only be compared to other entities outside of the jurisdiction with different and unique circumstances;
- vi. That the Defendant has unjustly enriched itself at JACAP's expense;
- vii. That there is no basis upon which the Defendant can rely to say that the proposed calculation is incorrect or unfair and subject to successful negotiations, it is the standard at which they are being held to use the copyrighted works lawfully.

[16] Consequently, it was submitted that the Claimant should be awarded Damages in the amount of Three Million Four Hundred and Seventy-Two Thousand Eight

Hundred and Eighty-Five Dollars and Eighty-Seven Cents (\$3,472,885.87) for the years spanning 1 September 2009 to 14 September 2015. It was also submitted that Damages for the period spanning 2010 to 2015 ought be determined and further that interest should be calculated at a rate of six percent (6%) per annum.

Submissions advanced on behalf of the Defendant

- [17] It was submitted on behalf of the Defendant that JACAP has pleaded that pursuant to a Heads of Agreement dated July 4, 1999, executed by the Claimant and other radio stations, the method of royalty calculation was dictated and, for the purposes of impartiality, is applicable to the Defendant. It was submitted that, despite pleading such an assertion, JACAP did not seek to rely on that document as part of its evidence in its attempt to support and to prove its Claim. It was further submitted that Ms Rose gave evidence that the method of calculation which JACAP applied in Exhibit 5 (Statement of Account from the Claimant showing calculation of Licence Fees), was a percentage of net advertising revenue, explaining that this was gross advertising revenue less agency commission. The Defendant contends that there were no concluded negotiations between the parties.
- [18] By way of submission, the Court was referred to another purported inconsistency in Ms Rose's evidence, in particular, that JACAP did not practise requesting music logs nor did it adopt a supervisory role over the broadcasting entities. Instead, JACAP had a device that would detect the use of music by entities such as the Defendant. With reference to Exhibit 7, it was submitted that JACAP sought arrears of music logs which, it was submitted, means that one can reasonably assume that a practise existed prior for the supply of music logs.
- [19] Additionally, the Court was referred to the dicta of Sykes J (as he then was) in the authority of **Television Jamaica Limited v CVM Television Limited**. It was submitted that Sykes J accepted that where no licensing arrangement existed between the parties, then a notional fee which represents a fair and proper basis on which to provide compensation should be used. This, it was submitted, would apply in the present circumstances, as JACAP failed in its evidential burden to

prove the existence of any licensing arrangement between itself and the Defendant. It was submitted that even with the issue of liability being resolved, JACAP still has the burden of proving its Damages or loss.

- [20] The Defendant asserts that in cases concerning copyright infringement, the courts have always accepted that there are factors related to the usage of the copyright work that must be taken into consideration when determining the sum owed and the method of calculation. Those factors are to be considered and determined on a case-by-case basis. In this regard, the Defendant relies on the authority of **Ludlow Music Inc v Williams**,¹² a position approved by Lightman J in the authority of **Island Records Ltd v Tring International PLC**¹³ and also adopted by Sykes J (as he then was) in the decision of **Television Jamaica Limited v CVM Limited**.
- [21] It was submitted that Ms Rose's viva voce evidence was inconsistent with her witness statement. It was further submitted that in Ms Rose's oral evidence, she referred to a Heads of Agreement but that this document was not tendered into evidence, nor was there any information provided as to its contents, so that the Court may appreciate who formed the Heads of Media Houses.
- [22] JACAP cannot request that the Court makes an award of the sums provided in Exhibit 5 (the Statement of Account from the Claimant showing the calculation of Licence Fees) and in the same breath, indicate that it does not accept the percentage grouping done in the document. It was further submitted that the authorities indicate that because JACAP suspects or assumes that its copyright is infringed, is not sufficient to warrant a payment of Damages for same, as the infringement must be proven. This same principle, it was submitted should be applied for the right to charge a license fee, as the Claimant must satisfy itself that its copyright was being used by the party.
- [23] The Defendant contends that the quantum of Damages payable to JACAP would be in the amount of Eight Hundred and Three Thousand Dollars Five Hundred

¹² [2002] EWHC 638

¹³ [1995] 3 All ER 444

and Sixty-Nine Thousand and Forty cents (\$803,569.40). The Defendant, in good faith, sought to pay JACAP the reasonable copyright fees based on a fair and just method of calculation on a fair payment plan and as such it paid the Claimant Three Hundred and Ten Thousand Nine Hundred and Twenty-Seven Thousand Dollars (\$310,927.00), which is contained in Exhibit 10. This, it was submitted would be classified as a pre-litigation settlement and ought to be deducted from the sum of damages deemed due. In light of this, it was submitted that the award of Damages to be made to the Claimant ought to be Four Hundred and Ninety-Two Thousand Six Hundred and Forty-Two Thousand and Forty Cents (\$492,642.40).

[24] It was submitted that where the Court deems that interest is warranted, then the same should be at a rate of only six percent (6%) and would only be applicable to each sum deemed due by the Defendant for the respective periods. It was further submitted that as the license fee is due at the end of each financial period for the Defendant, any interest, if applicable, would start to run the day after each financial period for the four periods covered under the Claim.

Discussion and Findings

[25] Section 32 of the Copyright Act provides as follows: -

"32.- (1) An infringement of copyright shall be actionable at the suit of the copyright owner; and, subject to the provisions of this section, in any action for such an infringement all such relief by way of damages, injunction, accounts or otherwise, shall be available to the plaintiff as is available in respect of the infringement of other proprietary rights.

(2) Where in an action under this section an infringement of copyright is proved or admitted, the court, having regard to any benefit accruing to the defendant by reason of the infringement, to the flagrancy of the infringement and to all other material considerations, shall have power to award such additional damages as the court may consider appropriate in the circumstances.

(3) Where in an action for infringement of copyright it is shown that at the time of the infringement the defendant did not know and had no reason to believe that the copyright subsisted in the work to which the action relates, then, the plaintiff is not entitled to damages against him, but without prejudice to any other remedy."

[26] Sykes J, in the authority of **Television Jamaica Limited v CVM Television Limited**¹⁴ pronounced with regard to section 32 of the Copyright Act as follows: -

"[18] The combined effect of these provisions is that TVJ, as the exclusive licensee can bring an action for breach of its exclusive licence as if it were the copyright holder and there is no legal necessity for there to be an assignment, and crucially, there is no need to join the copyright holder as a nominal claimant. TVJ is entitled to all the reliefs to which the copyright holder is entitled. Finally, if the infringer did not know that the work was copyrighted and had no reason to believe that copyright subsisted in the word then damages cannot be awarded against him.

...

[20] TVJ has put before the court a number of invoices setting out the cost of bringing the signal from Beijing China to Jamaica. It has excluded the cost that it incurred using its own staff to assist in that process. Initially, evidence of the cost was not in evidence but after an adjournment this omission was cured. As it presently stands there was no serious challenge to the costs indicated by the receipts tendered. The oral evidence from Mr Milton Walker and Mr Gary Allen on behalf of TVJ adequately explained the receipts, their significance and how they came into existence. CVM did not call any evidence on this phase of the trial. There is nothing to suggest that the testimony of both witnesses for TVJ was unreliable. The court accepts their evidence. The remaining question is whether the receipts provide an adequate basis on which to award damages.

*[21] ... It fits into the dictum of Lord Wilberforce in **General Tire and Rubber Co v Firestone Tyre** [1975] 2 All ER 173, 177 – 178. His Lordship was speaking about patents but substitute 'exclusive licence', or 'copyright protected*

¹⁴ [2017] JMSC Comm 1

work' for the phrase 'patents of inventions' and 'licence fees' for 'royalty payments' in the passage about to be cited and the point is made.

Other patents of inventions are exploited through the granting of licences for royalty payments. In these cases, if an infringer uses the invention without a licence, the measure of the damages he must pay will be the sums he would have paid by way of royalty if instead of acting illegally, he had acted legally.

[24] The claimant contended that it was entitled to the additional damages because of the flagrancy of the infringement and the circumstances surrounding it. The claimant also contended that the additional damages should include an exemplary component.

[25] Pumfrey J noted at paragraph 29 that leaving aside case of exemplary damages, the object of damages in tort is to compensate for loss or injury and the general rule in 'economic' torts is that the measure of damages is to be the sum of money which will put the injured party in the same position as he would have been in had the tort had not been committed. His Lordship stated that damages should be 'liberally assessed' but the object is still compensation and not punishment."

[Emphasis added]

[27] Both parties rely on the authority of **Television Jamaica Limited v CVM Television Limited**, where Sykes J (as he then was), who assessed and determined the measure of Damages for copyright infringement in circumstances where a licence ought to have been obtained for the Defendant to use the copyrighted work. That authority can be distinguished from the present instance, as TVJ presented a number of invoices, receipts and expert evidence to demonstrate the appropriate method of calculation for the relevant licensing fees in order to substantiate their claim for damages. This Court will adopt a similar evidence-based approach. The Court moves to consider the evidence of both parties to determine the amount of statutory damages and other damages for breach of license fees or royalty fees owed by KLAS to JACAP.

[28] The following pronouncements of Batts J, in the authority of **Jamaica Association of Composers Authors and Publishers Limited v Somane Pesole Communications Limited**¹⁵ are immediately relevant for present purposes and bear repeating: -

[17] Copyright infringement is primarily a statutory matter. The Copyright Act of 1993 was amended in 2015 and again in 2023. ...

*[18] These provisions were recently considered by this court in the matter of **Jamaica Association of Composers Authors and Publishers Limited v Jamaica C.V. Limited** [2021] JMSC Civ 91 (unreported judgment of Hutchinson J dated 24th September 2021). I respectfully adopt and agree with the learned judge's interpretation of sections 5 and 32 of the Copyright Act buttressed as she was by the decision of Sykes J (as he then was) in **TVJ Limited v CVM** [2017] JMCC Comm 1. Justice Hutchinson was not however considering an application for summary judgment but an application to strike out for want of jurisdiction. More recently the court considered these provisions, in the context of applications similar to that which is now before me, see **Jamaica Association of Composers Authors and Publishers Limited v Restaurants of Jamaica Limited t/a KFC** [2023] JMSC Civ 227 (unreported judgement of Staple J (Ag) dated 24th November 2024). Much of this judgment considered a "bureaucratic thicket" of legislation, of which "Humphrey Appleby" would have been "exceedingly proud", but which is not in issue before me. Staple J also considered the necessity for particulars. He concluded that there were "no specifics as to where this breach took place, what music was played or anything to show that the music played was subject to copyright protection in Jamaica or anywhere else and that the music played was part of the Claimant's repertoire." He granted summary judgment as the Claimant had not put forward a case with a real prospect of success.*

[19] It is now appropriate to examine the claim as amended and as supported by attachments to the statements of case and any affidavit in support. The following excerpts from the Amended Particulars of Claim filed 8th May 2024 are germane:

...

¹⁵ [2024] JMCC Comm 29

[20] The Claimant, it appears, is asking the court to infer from the fact that it is the licensee of a great number of works that the Defendant has broadcast such works that the Defendant has broadcast such works without permission. The generality of the foregoing is expanded by the fact that the claim covers the period of 2015 to the present. If, which I am minded to do, I grant the Claimant's oral application to amend that period contracts to 2018 to the present. It is manifest nevertheless that there are no particulars as to the works breached or the occasion of the breach. The broad brush of the allegation means that the Defendant, if the plea were to stand, is required to establish a negative. That is that it did not between 2018 and now ever play any of the listed recordings. This is not, I think, how our system of justice is designed to function. He who asserts must prove.

[21] The Claimant has not, in its response to the application for summary judgment, put forward evidence to support any particular breach of copyright. An application for summary judgment must be responded to by evidence... In this regard the absence of evidence that the Defendant played any of the pleaded works on any particular day, or time of day or, on any particular occasion, between 2018 and now, renders the claim one which has no real prospect of success. Support for my decision is found in the following:

(a) *Intellectual Property Law Second Edition by L. Bently and B. Sherman, Oxford University Press*, at page 1064,:

"Often intellectual property-right holders find out about infringement by chance. For example, an employee or representative may stumble across an infringing article while on holiday, or a dissatisfied customer may complain to the right-holder that the goods made by the infringer are faulty. Intellectual property rights-owners also have other more systematic ways of discovering infringements. In particular, collecting societies and trade associations such as the British Phonograph Industry's Anti-Piracy Unit, the Federation against Copyright Theft (which policies video piracy), and the Federation against Software Theft (which monitors software infringement play an important role in identifying and policing

infringement. Once a right-holder discovers that their rights are being infringed, a number of options are available. For example, they can sue for infringement or attempt to settle out of court. Whichever route is chosen it is usually prudent and often necessary for them to gather the relevant evidence. The evidence that is needed will vary according to the facts in hand and may include evidence that an infringement has taken place, the details of the parties involved, and the extent of infringement. In some cases, evidence of infringement is obtained by ambushing or entrapping the defendant. For example, a legal practitioner may pose as a bona fide customer of a person selling infringing products or service. Such actions, which are called ‘trap orders’, often involve a degree of deception by the person collecting the evidence. Despite this, the courts have not objected to evidence obtained in this way, nor have claimants relying on such evidence been treated as lacking ‘clean hands.’ Instead, the courts have left the probity of such techniques to be regulated by the appropriate professional bodies.” And

(b) “*Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*” Seventh Edition by Williams Cornish, David Llewelyn and Tanya Aplin at paragraph 2-58:

“English courts have generally been careful to protect defendants against speculative suits that are no more than “fishing expeditions” – proceedings begun to find out what, if anything, might really be claimed. Accordingly, in our field, infringement actions cannot be launched effectively unless the claimant can specify in his particulars of claim at least one act of infringement. If he does not give them and does not comply with any order for further and better particulars he will be unable to defend himself on a motion to strike out pleadings or action.”

[Emphasis added]

The Claimant's Evidence

[29] Ms Lydia Rose, the General Manager for JACAP, was the Claimant's sole witness. Her evidence is contained in the Witness Statement of Lydia Rose, which was filed on 6 February 2019. The following paragraphs of the Witness Statement are directly relevant in determining this issue: -

"11. The Claimant, being assignee and/or licensee of copyright and/or as the authorized collection agent in Jamaica of the music in the Claimant's repertoire as aforesaid, among other rights:

11.1 has the exclusive right to authorize or prohibit the broadcasting and/or transmission of any musical works in its repertoire; and

11.2 is the exclusive and/or non-exclusive licensee and/or issues licence by means of which all broadcasters are authorised by the Claimant to transmit and/or retransmit musical works from time to time in the Claimant's said repertoire in consideration of a fee or fees determined from time to time by the Claimant.

12. To my certain knowledge music has been an integral part of the Defendant's programming from the date of its first broadcast until the commencement of these proceedings and continuing and the Defendant has, from September 2009, to date and continuing been broadcasting and/or transmitting to the public either discretely or embedded in its programming, copyright music which falls within the repertoire of musical works, the rights for which are administered in Jamaica by the Claimant.

13. For the period September 2009 until commencement of these proceedings and continuing, the Defendant has on a daily basis broadcast and/or transmitted and/or authorised the transmission and/or retransmission via its cable station or other modalities either discretely or embedded in the programming, one or more of the musical works in the Claimant's repertoire without first obtaining the permission or consent of the copyright owner and/or the Claimant and/or paying the requisite licence fees.

14. *To my certain knowledge it is music industry standard that royalties payable for performance rights are calculated as a percentage of gross advertising revenue of a television and/or radio broadcast station.*

15. *Given the Defendant's failure to respond to repeated correspondence from the Claimant to regularize its position, I instructed on behalf of the Claimant, Attorneys-at-Law Samuda & Johnson (hereinafter "the said Attorneys") to make a demand of the Defendant to pay the outstanding amount.*

16. ...

...

19. *We received from the Defendant company the Defendant's audited Financial Statements for the period January 1, 2020, until December 31, 2015. However, the period from 2016 onwards remains outstanding.*

20. *The Financial Statement confirmed that for the period January 1, 2010, to December 31, 2015, the gross revenue earned by the Defendant was \$272,596,983.75 and based on the gross revenue for each year, the amount owed for the period 2010-2015 is \$3,472,885.57 calculated at 1.75% of the gross revenue. This calculation has been the standard amount charged as an annual licensing fee for radio stations since 1999. However, a payment was made by the Defendant company by way of a cheque dated February 3, 2017, in the sum of \$310,927.00 which brings the outstanding balance to \$3,161,958.58 with costs awarded at the hearing of the Default Judgment still to be agreed or taxed.*

21. *To my certain knowledge the Defendant has not made any payment to the Claimant on account of the licence fees since the payment mentioned in the paragraph above dated February 3, 2017, and to my certain knowledge there is no agreement in place for the payment of the costs awarded to the Claimant.*

22. *By the Defendant's actions it has infringed the Claimant's copyright in its repertoire and has unjustly enriched itself at the Claimant's expense.*

23. **The Defendant was at all material times aware that the said works in the repertoire were the property of the Claimant and that the Claimant is the exclusive and/or non-exclusive licensee thereof and that the said broadcast and/or transmissions constituted actionable infringements until and unless**

the Defendant obtained a copyright licence from the Claimant which the Defendant, to date has failed to do.”

The Defendant's Evidence

[30] For its part, the Defendant relied on the evidence of its sole witness, Mr Alston Stewart, the Executive Chairman of KLAS from September 2009 to present. His evidence is that: -

“4. The Defendant's broadcasting station is primarily that of a Talk Radio Station, which carries current affairs and sports program for most of the on-air time.

5. During the period September 2009 to June 2013 the radio station was broadcasting sports programs from 6:00 am to 7:00 pm on weekdays. It subsequently changed its programming in June 2013 and started [sic] operating an eighteen (18) hours sports program from 6:00 am to 12:00 am. During those hours [sic], music was not an integral part of the program if played any at all.

6. The station does not air any sponsored music show which would facilitate revenue generation and has very little commercial schedules for air during the small music segment that only occurred from June 2013 at 12:00 am to 6:00 am. This air segment is sometimes used as a religious program time and so does not play music straight through all the time.

7. During our two main sports program we play a total of five (5) songs. Three of the songs are played during the program Sports Desk and those songs attract a sponsorship fee of \$16,000.00 per month and two (2) songs are played during the Scoreboard program. We earn no income from those two songs. All other music is used as fillers when we are not airing sports programs or current events and so take place between 12:00 am and 6:00 am classified as non-prime broadcasting hours. The Defendant's business model is not geared towards revenue generation from music.

8. ...

9. The defendant's programming as a Talk radio earns almost 90% of its gross advertising Revenue from its current Affairs and Direct Sports Programmed which do not include music, the basis of the Claimant's

licence. It has therefore always been the position of the Defendant that the revenue earned from those portions would also have to be removed from any gross advertising revenue prior to any calculation being done by the claimant.

10. From the Defendant's calculation which has been reduced into a statement, the Defendant owes the Claimant the sum of \$992,560.85 for the period of 2009 – 2014 which is covered by the claim and an additional sum of \$415,534.44 for the period of 2015-2017. The total amount owed is \$1,408,095.30. This figure is vastly different from that being claimed by the Claimant using their general method of calculation.

11. The Claimant claims that the industry standard method of calculation is what is utilised however I am not aware of any industry standard as all radio stations do not air the same categories of program and as such could not be expected to pay the same level of fees for the utilization of music during its air time. Radio stations that are modelled as music-based advertising revenue generators cannot be expected to pay the same as non-music advertising revenue generators."

[31] The Court accepts the submissions advanced by Learned Counsel for the Defendant with regard to the discrepancies between the written evidence and viva voce evidence proffered by Ms Rose. In cross-examination, Ms Rose provided the following responses to questions posed by Learned Counsel Ms Gaff: -

Q: *Licence fees are calculated on net advertising revenue?*

A: Yes

Q: *JACAP's Royalty Fees/ Licence Fees?*

A: *For Media Houses only?*

Q: *For entities that the Defendant falls in.*

A: Yes.

Sugg: Paragraph 20 [of the Witness Statement of Lydia Rose] would be incorrect then... as you stated that it is calculated on the gross revenue. Would it be incorrect because it is not saying net income?

A: Yes

Sugg: The section that you have pointed out in the document does contradict your position that the royalties are calculated as a percentage of gross revenue but instead it should be net advertising revenue.

A: No, it doesn't contradict because in my evidence given today, I spoke to net advertising earnings. What is stated at paragraph 20 of my witness statement should have been further clarified. 1.75% of gross revenue should have been net.

[Witness directed to paragraph 14 of her witness statement]

It is based on gross advertising revenue net of commission. Unfortunately net of commission is missing from my statement. Net advertising revenue is derived from gross advertising revenue less sales rep commission. I would not know if sales rep commission were the same as agency commission. It depends on the agency.

...

[Witness directed to paragraph 12 of her witness statement]

Q: Is there any evidence corroborating your certain knowledge of the integral aspect of music in the Defendant's radio programming?

A: Yes

Q: Is the Claimant able to calculate royalty fees on the Defendant's broadcasting gross advertising revenue if no music is played?

A: No.

...

Q: The radio station is mainly a sports radio talk show?

A: I cannot answer that question

[Witness directed to Exhibit 5, which contains the Statement of Account from Claimant showing the calculation of Licence Fees]

I assisted in the preparation of this document.

[Witness directed Column 2 from the left which is entitled Talk 75%]

Sugg: 75% of the Defendant's radio programming you have classified as 'talk'.

A: No. This document was done when we were negotiating different scenarios were put on the table.

...

Based on information that we gathered that the Defendant supplied to us. That was in the negotiation stage. It's not a matter that the Defendant's talk is 75%. When we were in discussions with the Defendants there were different formulas that can be used to arrive at the licence fees for media houses. When I say formulas, it is not the main formula as I had expressed to the Court's below. The main formula will always remain but users of music are able to negotiate with us on how the main formula is applied. While negotiating with the Defendant the licence fee was broken in the format that was present to the Court.

Sugg: The Defendant has maintained that the royalty fees should not be calculated on its talk.

A: I cannot say what the Defendant has maintained because we did not arrive at an agreement.

...

[With reference to Exhibit 5 and paragraph 20 of her witness statement] *1.75% is indicated. Even if Defendant does not use music, you would apply 1.05%.¹⁶ Even in talk, you do have aspects of music.*

[32] The main thrust of KLAS' defence is not that they did not infringe JACAP's licence, but primarily that they would not utilize as many copyrighted works during the course of their broadcast as their business model is primarily talk show. KLAS contends that during the period 2009 to 2013, their prime broadcast times were weekdays from 6:00 am to 7:00 pm, but this was expanded to eighteen hours daily from 2013 onwards. In Exhibit 6, a document entitled Royalty Calculations – September 2009 to December 2014, KLAS asserts that the following is their programme schedule: -

"2009 to 2013 (June)

Weekdays: Sports content 6:00 am to 7:00 pm

Music 7:00 pm to 6:00 am (some time with a religious program)

Weekends: - Sports 40% and Music 60%

2013 to Present;

Weekdays: - Sports content 6:00 am to 12:00 am

Music 12:00 am to 6:00 am (some time with a religious program)

Weekends: - Sports 40% and Music 60%"

[33] In this regard, the Court accepts the submissions advanced on behalf of the Defendant that licensing fees should not be applied to talk show programming. Having so decided, the Court will assess damages on the 75/25 programming model formula as evident in Exhibit 5, the Statement of Account from Claimant showing calculation of Licence Fees.

¹⁶ See paragraph 16 of the Particulars of Claim, which was filed on 6 November 2014 and which states: "Pursuant to a Heads of Agreement dated July 4, 1999, executed between the Claimant, IBSL [Island Broadcasting Services Limited] and the Defendant's competitor radio stations a rate of 1.05% of gross advertising revenues less 225 agency commission for Talk Radio. The Claimant asserts that in the interest of impartiality in its application of royalty rates this rate is also chargeable to the Defendant."

[34] In light of Ms Rose's viva voce evidence that parties can negotiate as to how the formula for the calculation of royalties is applied. The Court accepts the Defendant's proposal regarding the calculation of outstanding licensing fees. The Court will utilize the figures in Exhibit 5, KLAS' Statement of Accounts to determine the award of damages. In applying the formula of deducting twenty-two percent for agency commission from the gross advertising revenue presented for each year during the period spanning 2010 to 2014 and applying the rate of 1.05% (representing JACAP's licence fees) on the Net Advertising Revenue, the Court has determined the quantum of damages to be awarded to JACAP. Notably, although JACAP has requested Damages from in or around September 2009 to 2014, there are no audited financial statements presented by either JACAP or KLAS for 2009.

• 2010

Gross Advertising Revenue Reported by KLAS:	\$59,035,925.00
25% of Gross Advertising Revenue (General Programming):	
\$14,758,981.25	
22% of General Programming (Commission):	\$3,246,975.88
Net Advertising Revenue (General Programming – Commission):	
\$11,512,005.38	
Net Advertising Revenue x Rate of 1.05% (Licence Fee owed):	\$120,876.06

• 2011

Gross Advertising Revenue Reported by KLAS:	\$66,111,610.00
25% of Gross Advertising Revenue (General Programming):	\$16,527,902.50
22% of General Programming (Commission):	\$3,636,138.55
Net Advertising Revenue (General Programming – Commission)	\$12,891,763.95
Net Advertising Revenue x Rate of 1.05% (Licence Fee owed):	\$135,363.52

• 2012

Gross Advertising Revenue Reported by KLAS:	\$68,278,392.00
25% of Gross Advertising Revenue (General Programming):	\$17,069,598.00
22% of General Programming (Commission):	\$3,755,311.56
Net Advertising Revenue (General Programming – Commission):	
\$13,314,286.44	
Net Advertising Revenue x Rate of 1.05% (Licence Fee owed):	\$139,800.01

• 2013

Gross Advertising Revenue Reported by KLAS:	\$52,031,005.00
25% of Gross Advertising Revenue (General Programming):	\$13,007,751.25
22% of General Programming (Commission):	\$2,861,705.28
Net Advertising Revenue (General Programming – Commission):	
\$10,146,045.97	
Net Advertising Revenue x Rate of 1.05% (Licence Fee owed):	\$106,533.48

• 2014

Gross Advertising Revenue Reported by KLAS:	\$118,005,713.00
25% of Gross Advertising Revenue (General Programming):	\$29,501,428.25
22% of General Programming (Commission):	\$6,490,314.22
Net Advertising Revenue (General Programming – Commission):	
\$23,011,114.03	
Net Advertising Revenue x Rate of 1.05% (Licence Fee owed):	\$241,616.70

TOTAL LICENCE FEE OWED FOR 2010-2014: **\$744,189.77**

[35] The Court declines to make an award of Damages for the period 2015-2020 as claimed.

DISPOSITION

[36] It is hereby ordered that: -

1. Damages are assessed and awarded to the Claimant against the Defendant in the sum of Seven Hundred and Forty-Four Thousand One Hundred and Eighty-Nine Dollars and Seventy-Seven Cents (\$744,189.77), with interest thereon at the rate of six percent (6%) per annum.
2. Costs are awarded to the Claimant against the Defendant and are to be taxed if not sooner agreed.
3. The Claimant's Attorneys-at-Law are to prepare, file and serve these Orders.