



[2018] JMCC Comm 18

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2015 CD 00025

BETWEEN	TELEVISION JAMAICA LIMITED	CLAIMANT
AND	LINSCOM NETWORK LIMITED	DEFENDANT

COPYRIGHT – Cable Television – Whether Defendant infringed copyright by broadcasting Diamond League event - “overspill” - Whether Defendant liable – Statutory construction – Copyright Act sections 31(5), 31(1), 32(3).

Georgia Gibson-Henlin, Q.C., and Nicola Richards instructed by Henlin Gibson Henlin for the Claimant

Andrew Willis and Tewana Watson instructed by A.W. Willis & Associates for the Defendant

HEARD: 7th, 8th, 9th May and 29th June 2018

IN OPEN COURT

COR: BATTs, J.

- [1] The Claimant seeks a declaration and damages in consequence of an alleged breach of its copyright in the IAAF Diamond League 2014 events held in Eugene and New York, both in the United States of America. In its Amended Defence the Defendant, denied the Claimant's entitlement to exclusivity, alleged that the programme became available by way of satellite footprint or overspill, and denied knowingly infringing the Claimant's copyright.
- [2] The factual issues were not difficult to resolve. The Claimant established its entitlement to the exclusive right to broadcast the programme in Jamaica with the

evidence of Mr. Stephen Greig, the Claimant's corporate legal secretary at the time. His witness statement dated 29th March 2018 stood as his evidence in chief. Mr. Greig spoke to the Licence Agreement, page 1 of Exhibit 1 (Exhibit 1 is an agreed Bundle of Documents). He explains, without being contradicted, in paragraphs 11 and 12 of his witness statement that;

"11. The "event" and "designated right" are licensed to the Claimant by Trans World International Inc. The company that has the distribution rights to the event in Jamaica, pursuant to the agreement above. The owner of the copyright in the works is the International Association of Athletics Federations (IAAF).

12. In accordance with Clause C(1) of the licence Agreement the Claimant is the exclusive licensee of the rights via the "designated rights" during the licensed period throughout the licensed territory, which includes Jamaica. The designated rights cover all means of broadcast, television including terrestrial, satellite and cable television (analogue and digital)."

[3] The Defendant's main attack on the exclusivity of the licence was to suggest that there was a contractual allowance in respect of "overspill" or "satellite footprint". They pointed to Clause 10 of the license agreement:

"10.1 Licensee acknowledges and agrees that Lessor reserves the right to authorise third parties to transmit the Programme(s) for reception and/or viewing outside the Licensed Territory or for reception and/or viewing in those parts of the Licensed Territory where the Designated Rights are non-exclusive.

10.2 Licensee acknowledges that due to the inherent capability of:

- 10.2.1 Satellites to beam down signals which are not confined to territorial boundaries;**
- 10.2.2 Terrestrial signals to be capable of reception and/or viewing outside of territorial boundaries.**
- 10.2.3 broadband users to evade side-blocking security measures; and,**
- 10.2.4 mobile signals to overlap territorial boundaries,**
(the circumstances above being individually, and/or together called ‘overspill’) a transmission made in accordance with Clause 10.1 above may be capable of reception and/or viewing within the Licensed Territory including, as applicable, those parts of the Licensed Territory where the Designated Rights granted hereunder are exclusive. The parties agree that the occurrence of said overspill shall not constitute a breach of this Agreement.

It was submitted that, by virtue of this Clause, the Defendant could not be liable for transmitting programmes received as overspill.

- [4] I disagree. The Clause is an exemption clause. It precludes the grantor of the licence being liable to the grantees for errant transmissions and/or transmissions due to third party activity, cumulatively termed overspill. The Defendant's counsel was unable to explain how a non-party to the licence agreement could benefit from that exception. I put the analogy to counsel, and repeat it here, of a thief in his defence saying the owner/complainant was responsible for not adequately securing his property. The parties to the licence agreement recognised that overspill may lead to the broadcast's availability to third parties. They agreed that the licensor would not be in breach by reason of such overspill.

In so doing the licensor was not authorising, or granting a right to, third parties to broadcast the copyrighted work received by way of overspill in Jamaica.

- [5] I am fortified in this construction of the contract by the evidence of Mr Milton Walker. He indicated that Clause 10 of the agreement was primarily aimed at territories where there was a shared border. However he also said:

“Q: Put to you that any showing of the programme by Linscom by virtue of overspill received by satellite

A: No those signals are illegal so not covered by overspill agreement”

To the court he gave the following answer:

“Q: The overspill would be illegal?

A: Yes, Diamond League shows on specific channels. In Jamaica cable companies show American networks, ABC CBS NBC FOX. They have no agreement to broadcast these channels in Jamaica. Because programming is domestic to the United States. Overspill re Canada, USA, Mexico land borders. NBC [may be] legally airing a programme it will spill over the border. That's what clause speaks to. No territory close to us within 700 miles that had the Diamond League. But it was shown in USA and Canada. So for cable companies to show a network is illegal. They are showing signal illegally because no contract to give them the right to that.”

Mr. Walker is wrong in thinking Clause 10 is applicable only whenever there is a shared border. However he is, I think, spot on

when he suggests that the clause does not protect those who broadcast in breach of copyright, or as he put it “illegally”. This aspect of the defence took an unexpected turn as the Defendant’s first witness, Mr. Garth Schleifer, denied the broadcast was due to overspill, he said:

“Q: NBC not because of overspill

A: If I understand what I am saying yes.

Q: which is correct did you show NBC because of overspill or because there is a contract?

A: There is a contract, no overspill because showing NBC.”

[6] The parties to the licence agreement recognised that signals carrying the event might reach Jamaica due to: the satellite “footprint”, that is, its signal is not confined within a boundary; broadband users evading blocking and geo-security measures; and, mobile signals overlapping territorial boundaries. They considered that the owner ought not to be liable for a breach of the exclusive licence if this occurred. It does not detract from the licensee’s right to exclusivity and to enforce that right, in the licensed territory, against those who broadcast the programme without permission.

[7] The Defendant also submitted, and I suppose it is an alternative argument, that their broadcast was authorised. The Defendant put in documentation which purported to establish that they had permission to broadcast the IAAF Diamond League. These documents were disclosed in the course of the trial and were admitted by consent. They were:

Exhibit 9; Letter dated 6th June 2005 Santastic Cable Systems Ltd to Broadcasting Commission of Jamaica.

Exhibit 10: Letter dated 6th June 2005 Santastic Cable Systems Ltd to CEO of Linscom Network Ltd.

Exhibit 11: Customer Information Form

Exhibit 12: Signal Launch Form

Exhibit 13: WTBJ – NBC Miami Signal Launch Commitment Form

Exhibit 14: Invoices from Lora Communications Inc to Santastic Cable Systems Ltd

(a) 20th April 2018

(b) 1st May 2018

These documents represented to the Broadcasting Commission, and established, that the Defendant had authority to transmit the feed from a certain network. This feed was received via satellite. The Defendant therefore urged the court to conclude that since the IAAF broadcast came over that network, the Defendant was authorised to broadcast it. In consequence there was no breach of the Claimant's copyright.

[8] This limb of the Defence fails because the evidence establishes that there is a distinction between the network rights, the satellite feed rights and the programming rights. In other words a right to broadcast a network does not necessarily include a right to the programmes in that network's feed. The Defendant's witness, Mr. Schleifer, underscored this,

"Q: The arrangement Linscom has with Santastic is for down link?

A: To receive.

Q: Isn't it true in course of that arrangement from time to time you have access to U.S. channels?

A: Yes.

Q: Even when access to those channels are there times you are required to block access because the programme is owned by someone.

A: Yes you request by letter”

The Defendant's second witness, Mr. Christopher McCatty, also underscored the point,

“Q: Over the years you are aware that programme owner is different from the network owner?

A: In some case. In some cases, but three different categories. Content providers, network/channel owners and satellite providers. Sometimes all three the same. Sometimes two, the content and network owners are the same, sometimes network owner and satellite are the same.

Q: You agree Diamond League all three are different?

A: Having seen the evidence posited by TVJ, I can say yes.”

- [9] The net effect of the evidence is therefore that the Defendant may have had permission to broadcast certain networks or channels. There is however no evidence that the Defendant had permission to broadcast the programme in issue i.e. the live IAAF Diamond League. The Claimant put before the court unchallenged evidence of an exclusive licence to broadcast that programme in Jamaica. The lacuna in the Defendant's case was evidence that NBC (the network) had a licence to broadcast the programme in Jamaica. The Defendant therefore failed to meet its evidential burden which was to demonstrate that someone other than the Claimant had given it permission to broadcast the

copyrighted programme in issue. On the evidence therefore, and on a balance of probabilities, I find that the Defendant did not have a licence to do so.

- [10] The Defendant, very late in the day, urged me to say that the Copyright Act exempts cable operators from liability. This submission relies on Section 31(5) which states,

“Copyright in a work is infringed by a person who, without the licence of the copyright owner, transmits the work by means of a telecommunications system, (otherwise than by broadcasting or inclusion in a cable programme service) knowing or having reason to believe that infringing copies of the work will be made by means of the reception of the transmission, in Jamaica or elsewhere.”

This submission also fails even though neither party put forward any case decided on Section 31(5) or similar sections elsewhere. It is manifest that the section is speaking to liability for the use of a “telecommunications system” to transmit the work knowing that copies of the work are likely to be made. “Telecommunications” is not defined in this Act but I would reference the Telecommunications Act which says,

“telecommunications” means the transmission of intelligence by means of guided or unguided electro-magnetic, electrochemical or other forms of energy including but not limited to intelligence –

(a) In the form of-

- (i) Speech, music or other sounds;**
- (ii) Visual images, whether still or animated;**
- (iii) Data or text; any type of signals;**

- (b) in any form other than those specified in paragraph (a);**
- (c) in any combination of forms ; and**
- (d) transmitted between persons and persons, things and things or persons and things;**

This case does not appear to concern the use of a telecommunications system. The section is, in the parenthesis contained therein, exempting cable operators from liability merely because they transmitted knowing that receivers of the transmission may make copies.

- [11] The reliance on Section 31(5) ignores the other sections of the Act which demonstrate that liability of cable operators is contemplated. Section 31(1) reads,

“The 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 pursuant to section 9.”

Section 9, states,

“By virtue of and subject to the provisions of this Act, the owner of the copyright in a work shall have the exclusive right to do or to authorise other persons to do any of the following acts in Jamaica –

- (a) –(b)**
- (c) to perform the work in public or, in the case of a sound recording, film or broadcast or cable programming, to play or show the work in public.**
- (d) to broadcast the work or include it in a cable programme service,**

(e)

The submission also ignores Section 6:

“6(1) Copyright is a property right which, subject to the provisions of this section, may subsist in the following categories of work;

- (a) Original literary, dramatic, musical or artistic work.**
- (b) Sound recordings, films, broadcasts or cable programme.**
- (c) Typographical arrangements of a published edition”**

Indeed the Act precludes the cable operator who merely onward transmits a feed from claiming copyright by virtue of that transmission, see section 6(6)

“Copyright shall not subsist in a cable programme –

- (a) if it is included in a cable programme service by reception and immediate retransmission of a broadcast, or**
- (b) if it infringes, or to the extent that it infringes, the copyright in another cable programme or in a broadcast”**

[12] In this case the owner of the copyright to the IAAF Diamond League 2014 granted to the Claimant an exclusive licence to broadcast it in Jamaica. There is no statutory provision which precludes the grant of such a licence to the Claimant. The evidence, which was unchallenged and ultimately admitted by the Defendant's witness, is that the Defendant transmitted the IAAF Diamond League event on two occasions. They have failed to establish they had the owner's, or any other licensee of the owner's, permission to broadcast the event. It is clear the Claimant did not give the Defendant permission to do so.

- [13] The fact that the Defendant broadcast the programme in breach of the Claimant's copyright is not however an end of the matter. Section 32(3) of the Copyright Act provides:

"32(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 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 remedies."

The Defendant says that it did not know the Claimant had copyright in the event. The programme they say was streamed on NBC. They honestly and reasonably therefore believed it was sent with the owner's permission. In consequence they are not liable in damages.

- [14] The Claimant tried to prove that they had issued notices to all cable operators and in particular to the Defendant prior to the broadcast. This effort failed. The document marked 'A', on which they intended to rely was not admitted in evidence. This is because there was no nexus between the document and the Defendant. The Claimant's witnesses were unable to say that the Defendant's email address appeared on it. In short there was no evidence that the Defendant was advised of the Claimant's exclusive right to the programme in Jamaica.
- [15] Queen's counsel appearing for the Claimant urged that Section 32(3) does not require such notification. All that is required is proof that the Defendant knew that someone owned copyright in the event. It is to this end that the Defendant's witnesses were induced to and did accept that ownership in programmes sometimes differed from ownership of network broadcast and of satellite transmissions. The Claimant relied on the following authorities:

- (a) **Retail Systems Technology LTD v PJ McGuire and others[2007]IEHC 13 (2nd February 2007) decided by Kelly J .**
- (b) **Alan Mackie, Pursuer v Maxi Construction Ltd, Defender (Scottish Court opinions), [2017] Lexis Citations 36, (Note by Sheriff Douglas A Kinlocke, Advokate).**
- (c) An extract from "**The Modern Law of Copyright and Designs**" Third edition Volume 2 Paragraph 39.44.

[16] I am satisfied, having reviewed the authorities, that section 32 (3) is to be narrowly construed. It is not sufficient that the Defendant was unaware of, or made a mistake as to the true owner, of the copyright. The Defendant, in order to benefit from the statutory exemption, must prove that he was unaware that copyright existed in the programme transmitted. The Defendant may have been, and I find it was, mistaken in the belief that Lorac Communications Inc and /or Santastic Cable Systems Ltd and/or NBC were authorised to transmit the programme to Jamaica. If so, depending on their contractual arrangements, that may be an issue to be resolved between those entities and the Defendant. However the Defendant's error, as to the person entitled to copyright, is not a Defence. Section 32(3) is speaking to a situation where one is unaware that the work is owned or that copyright continues to subsist. So for example one may have reason to believe that more than 50 years have passed (now 95 years see the amendments of 2015) since the work was first made available to the public. On the other hand, if someone knows or has reason to believe that copyright may exist in a work, the onus is on that person to seek out the owner and obtain permission before broadcast. If one is receiving a continuous feed it may be prudent either, to ensure that the source of that feed has permission to broadcast/transmit programmes contained in that feed to Jamaica or, to obtain appropriate indemnities and/or guarantees in that regard.

- [17] In the result therefore I find the Defendant is liable for breach of copyright and that the Claimant is entitled to a declaration and damages.
- [18] On the matter of Damages learned Queen's counsel submitted for additional damages as per Section 31(2) of the Act.

"31(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."

In this case I consider that the Defendant broadcast the programme in the mistaken belief that they were authorized so to do. I also reflect on the fact that they stopped the broadcast immediately they were alerted to the breach. I do not consider it is a case that warrants any additional damages. There was no evidence that the Defendant earned additional or special income by way of the broadcast. There were, to my mind, no circumstances of aggravation. It was not the flagrant or calculated type of breach considered by my brother Sykes J (now the Chief Justice) in **Television Jamaica Limited v CVM Television Limited [2017] JMSC COMM 1 (Claim no.2015 CD 00112; unreported Judgment dated 9th January 2017)**.

- [19] I accept, as indicated by Sykes J (see above), that an appropriate measure of damages is the amount the Claimant might have earned from the broadcast. That is, their loss is the usual or normal charge for permission to broadcast the programme. In this regard the evidence from Mr. Milton Walker is found at Paragraph 8 of his Witness Statement:

"8. In my experience the fees for sub-licensing in Jamaica and the Caribbean is usually done on a shared basis. In cases where parties share rights in an event jointly, sums paid by the

parties for licence fees are usually allocated equally. That is therefore the starting point and the basis on which I propose that a reasonable licence fee would be 25% of the total sum paid by the Claimant. In this case, the amount was discounted from the usual 50/50 apportionment in light of the fact that the Defendant did not broadcast the entire 2014 Diamond League events but only the ones held on May 31, 2014 and June 14, 2014.”

Mr. Walker also gave evidence of separate fees for technical charges. These charges would have been incurred whether or not the Defendant had infringed the copyright. The Claimant submits for 25% of the total cost. The sum claimed for damages totals US\$53,062.50. Mr. Walker's evidence in this regard was not tested by the cross-examiner. I would have thought that the basis of choosing 25% rather than 10% or 40% would have been explored

- [20] In assessing damages, on the basis I earlier indicated, I must have regard to all the relevant evidence. In this regard the IAAF Diamond League Broadcast rights for the year 2014 cost the Claimant US\$192,000.00 plus US\$20,250.00 for technical charges. The overall cost according to Mr. Walker's evidence was US\$212,250 (paragraph 7 of his Witness Statement). The contract document (page 1, Exhibit 1) suggests the figure is US\$2,000.00. However that appears to be a misprint because the relevant invoices, put in evidence as exhibits 2, 3, 4, 5, and 6, total US\$212,250.00 and support Mr. Walker's evidence. He was, as I indicated, not tested on this. In all the circumstances I therefore accept that the overall cost to broadcast the IAAF Diamond League 2014 was US\$212,250.00.
- [21] Also in evidence is the schedule of IAAF Diamond League events for 2014, (see page 13 of Exhibit 1). This shows there were 14 such events. The invoice, Exhibit 2, lists 15 events. Mr. Greig in his witness statement, which stood as his evidence in chief, said at paragraph four thereof that there were 14 meets. I therefore find that the Defendant's infringement involved only 2 of 14, or

approximately, 14% of the events. If, as Mr. Walker stated, the normal price charged by the Claimant for the broadcast of the entire Diamond League is 50% of the total cost, then the cost to broadcast 14% of the event should be similarly assessed. I therefore assess the loss to the Claimant by computing 50% of 14% of US\$212,250.00, being US\$14,857.50.

This, on the evidence, is that which the Defendant would reasonably have been asked to pay had they sought and obtained the permission of the Claimant to broadcast the programme on those two dates. The Claimant claimed interest on damages being 1% above the bank's prime lending rate. No evidence was lead to support this claim. I bear in mind also that the claim is for United States dollars and hence the value of any such award will be relatively stable. The Claimant has however not had the use of these funds had compensation been promptly paid. I will therefore award Interest on general damages in the usual way.I award 1.5% when regard is had to the currency of the award.

[22] In the result, therefore, my decision is as follows:

1. Judgment for the Claimant against the Defendant.
2. It is Declared that the Defendant infringed the copyright of the Claimant in the IAAF Diamond League broadcast on the 31st May 2014 and 14th June 2014.
3. Damages assessed in the amount of US\$14,857.50.
4. Interest at 1.5% from the 4th March 2015 (the date of service of the Claim) to the date of payment.
5. Costs to the Claimant to be taxed if not agreed.

DAVID BATT
PUISNE JUDGE.