

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2015-01073

BETWEEN

FULL BLOWN ENTERTAINMENT COMPANY LIMITED

Claimant

AND

DEVON MATTHEWS

1st Defendant

ANSON SOVERALL

2nd Defendant

GEM RADIO FIVE LIMITED

3rd Defendant

Before the Honourable Mr. Justice Frank Seepersad

Appearances:

1. Mr. R. Donawa for the Claimant
2. Mr. Moore, Ms. Harper for the 1st and 2nd Defendants
3. Ms. Caesar instructed by Ms. Ramsingh for the 3rd Defendant

Date of Delivery: 18th January, 2017

DECISION

1. The Claimant by way of Claim Form and Statement of Case filed on the 2nd day of April, 2015 instituted an action against the Defendants for an alleged copyright infringement of its composition entitled “No Worries” and sought the following relief:
 - a) Damages for copyright infringement;
 - b) Aggravated damages;
 - c) Interest, at such rate and for such period as the Honourable Court may deem fit and just;
 - d) Further and/or other relief as the Honourable Court may deem fit;
 - e) Costs.
2. On the 10th day of June, 2015, the 1st and 2nd Defendants filed a Defence & Counterclaim disputing that the Claimant’s work was infringed upon and they claimed, inter alia, damages.
3. On the 4th day of December, 2015 an Amended Defence was filed by the 1st and 2nd Defendants and the 3rd Defendant also filed a Defence.
4. The Claimant claimed that on or around October 2013, its songwriter, Kevon Hart, composed a song titled “No Worries” (hereinafter referred to as “the Claimant’s work”) and that on or around October 20, 2013, the First Defendant received an e-mail containing the Claimant’s work from the producer of the sound recording of the said work and he responded to the said e-mail.
5. The Claimant further claimed that on or around October 2014, Kevon Hart heard a song that was published on the online website, YouTube, and it was also circulated on social networking sites and was titled “No Worries” (hereinafter referred to as “the Defendants’ work”). The Claimant stated that this song had similar lyrical content to its work.
6. In addition the Claimant stated that the Third Defendant, the First Defendant’s employer, played the Defendants’ work repeatedly on its radio station, Red 96.7 FM and continued

to do so even after notices were sent informing them of an alleged copyright infringement.

7. In their Defence and Counterclaim the First and Second Defendants pleaded that the Defendants' work was co-written by Mr. Akeem "Preedy" Chance and the First Defendant and they stated that the lyrics were completed on or around June 26, 2014. They contended that the song was released on or about November 14, 2014 and that it was duly submitted to the Copyright Organisation of Trinidad and Tobago (hereinafter referred to as "COTT").
8. The First and Second Defendants denied that their work infringed upon the Claimant's work and pleaded that:
 - "a) The lyrical content is significantly different from the Claimant's work;
 - b) The melody and accompanying musical bed/score is significantly different from the Claimant's work; and
 - c) At the time of copyright and publication of the First and Second Defendants' song the Claimant has not copyrighted the alleged infringed work."
9. The First and Second Defendants further alleged that, consequent upon the Claimant's misrepresentation of an alleged copyright infringement, they suffered loss and damage to their character and reputation.
10. The Third Defendant by its Defence pleaded that the Defendants' work was sent via e-mail to a disc jockey employed by the radio station 96.7 FM on or about November 14, 2014, with a cover stating that the song was written by the First Defendant and Akeem "Preedy" Chance and that it was produced by the Second Defendant. The Third Defendant also pleaded that, if the song was played, no records now exist so as to establish how many times it was played, since the Telecommunications Authority of Trinidad and Tobago (hereinafter referred to as "TATT") only requires station recordings to be kept for 28 days. This Defendant accepted that it received a Pre-Action protocol

letter from the Claimant and stated that the Defendants' song was not played on air after the receipt of same.

The Evidence

11. The Claimant relied on the evidence of Kevon Hart and its expert witness, Dexter Simmons. The Defendants relied on the evidence of the First and Second Defendants, Akeem "Preedy Chance, Anthony Lee Aping, Kevin Licorish and upon the evidence of the expert Martin Raymond.

The Issues

12. The issues that fell to be determined by the Court were whether or not there was a violation of the Claimant's intellectual property rights and whether either the Claimant or the 1st and 2nd Defendants are entitled to damages.

The Law

13. The applicable provisions of the **Copyright Act, Chapter 82:80** (hereinafter referred to as "the Act") are sections 5, 7, 8, 26, 31, 34, 36 and 40. These sections provide as follows:

14. **Section 5 of the Act** states:

"5(1) Copyright is a property right which subsists in literary and artistic works that are original intellectual creations in the literary and artistic domain, including in particular—

- (a) Books, pamphlets, articles, computer programs and other writings;*
- (b) Speeches, lectures, addresses, sermons and other works of the same nature;*
- (c) Dramatic works, dramatic-musical works, pantomimes, choreographic works and other works created for stage productions;*
- (d) Stage productions of works mentioned in paragraph (c);*

- (e) Musical works, with or without accompanying words;*
 - (f) Audio-visual works;*
 - (G) Works of architecture;*
 - (h) Works of drawing, painting, sculpture, engraving, lithography, tapestry and other works of fine art;*
 - (i) Photographic works;*
 - (J) Works of applied art;*
 - (k) Illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.*
- (2) Works shall be protected by the sole fact of their creation and irrespective of their mode or form of expression, as well as of their content, quality and purpose.”*

15. Section 7 of the Act states:

“7(1) Notwithstanding the provisions of sections 5 and 6, but subject to subsection (2), no protection shall extend under this Act to—

- (a) Any idea, procedure, system, method of operation, concept, principle, discovery or mere data, even if expressed, described, explained, illustrated or embodied in a work;*
- (b) Any official text of a legislative, administrative or legal nature, as well as any official translation thereof; or*
- (c) Political speeches and speeches delivered in the course of legal proceedings.*

(2) Collections of texts or speeches referred to in subsection (1) (b) or (c), whether in machine readable or other form, shall be protected as works provided that such collections are original by reason of the selection, co-ordination or arrangement of their contents.”

16. Section 8 of the Act states:

“(1) Subject to the provisions of sections 9 to 17, the owner of copyright shall have the exclusive right to do, authorise, or prohibit the following acts in relation to the work:

- (a) Reproduction of the work;*
- (b) Translation of the work;*

- (c) Adaptation, arrangement or other transformation of the work;*
- (d) The first public distribution of the original and each copy of the work by sale, rental or otherwise;*
- (e) rental or public lending of the original or a copy of an audio-visual work, a work embodied in a sound recording, a computer program, a database or a musical work in the form of notation, irrespective of the ownership of the original or copy concerned;*
- (f) Importation of copies of the work, even where the imported copies were made with the authorisation of the owner of copyright;*
- (g) Public display of the original or a copy of the work;*
- (h) Public performance of the work;*
- (i) Broadcasting of the work; or*
- (j) Communication to the public of the work.*

(2) The rights of rental and lending under paragraph (e) of subsection (1) do not apply to rental or lending of computer programs where the program itself is not the essential object of the rental or lending.”

16. Section 26 (1) of the Act states that *“Subject to the provisions of subsections (2) to (5), the original owner of copyright is the author who has created the work.”*

17. Section 31 (1) of the Act states that, *“Subject to this Act, infringement of rights of the owner of copyright or neighbouring rights shall be actionable in the Court at the suit of the owner of copyright or neighbouring rights; and 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 any corresponding proceedings in respect of infringements of other proprietary rights.”*

18. Section 34 of the Act provides that:

“34. (1) Copyright in a work is infringed by a person who, without the authorization of the owner of copyright –

- (a) Possesses in the course of business;*
- (b) Sells or lets for hire, or offers or exposes for sale or hire;*
- (c) In the course of a business exhibits in public or distributes;*
- (d) Imports into Trinidad and Tobago; or*
- (e) Distributes otherwise than in the course of a business to such an extent as to affect prejudicially the owner of copyright, an article, which is, and which he knows or has reason to believe, is an infringing copy of a work.*

(2) Copyright in a work is infringed by a person who, without the authorization of the owner of copyright –

- (a) makes;*
- (b) imports into Trinidad and Tobago;*
- (c) possesses in the course of a business; or*
- (d) sells or lets for hire, or offers or exposes for sale or hire, an article specifically designed or adapted for making copies of that work, knowing or having reason to believe that it is to be used to make infringing copies.*

...

(5) Where copyright in a work is infringed by a public performance of the work, or by the playing or showing of the work in public, by means of apparatus for showing audio-visual works or receiving visual images or sounds conveyed by electronic means, the following persons are also liable for the infringement:

- (a) a person who supplied the apparatus, or any substantial part of it, if when he supplied the apparatus of part –*
 - (i) he knew or had reason to believe that the apparatus was likely to be used so as to infringe copyright; or*
 - (ii) in the case of apparatus whose normal use involves a public performance or showing, he did not believe on reasonable grounds that it would not be so used as to infringe copyright;*

- (b) an occupier of premises who gave permission for the apparatus to be brought onto the premises, if when he gave permission he knew or had reason to believe that the apparatus was likely to be so used as to infringe copyright;*
- (c) a person who supplied a copy of an audio-visual work used to infringe copyright, if when he supplied it he knew or had reason to believe that what he supplied, or a copy made directly or indirectly from it, was likely to be so used as to infringe copyright.”*

19. Section 36 of the Act states that:

“36. (1) In proceedings brought by virtue of this Act with respect to a sound recording, where copies of the recording as issued to the public bear a label or other mark stating –

- (a) that a named person was the producer of the recording at the date of issue of the copies;*
- (b) that a named person was a performer in the recording at the date of issue of the copies; or*
- (c) that the recording was first published in a specific year or in a specified country, the label or mark shall be admissible as evidence of the facts stated and shall be presumed to be correct until the contrary is proved.*

(2) In proceedings brought by virtue of this Act with respect to an audio-visual work, where copies of the audio-visual work as issued to the public bear a statement –

- (a) that a named person was the author or director of the audio-visual work;*
- (b) that a named person was the owner of copyright in the audio-visual work at the date of issue of the copies; or*
- (c) that the audio-visual work was first published in a specific year or in a specified country, the statement shall be admissible as evidence of the facts stated and shall be presumed to be correct until the contrary is proved.”*

20. **Section 40 of the Act** makes copyright infringement an offence and the person guilty of the offence is liable on summary conviction to a fine of \$250,000.00 and imprisonment for ten years.

21. In **Copinger And Skone James On Copyright, 15th Ed. Vol. 1**, at paragraph 1-42, a useful guide for the analysis of a copyright problem is outlined as follows:

“a. First, the Claimant should identify the work in question, then the following questions should be asked:

i. Is the work in fact one in which copyright capable of subsisting?

1. Does it fit within the definitions of the works protected by the Act?

ii. Does copyright subsist in the work now?

1. Was the work reduced to writing or fixed in some other material form?

2. Were the originality requirements satisfied?

iii. Has the copyright expired?

b. Who is the author of the work?

c. What rights does the copyright prima facie include?

d. In particular circumstances, are there any reasons why such exclusive rights are not available for dealing with in a non-litigious context or are there any defences to an infringement claim in a litigious context? (Are there limitations imposed by statute on the exercise of copyright?)

e. Are the rights, although exercisable, subject to any form of control? Collective licensing of rights through collecting societies representing one or more categories of right owners is common practice.

f. In the case of infringement, what remedies are available?”

22. According to Halsbury's Laws of England, Copyright (Volume 23 (2016)), paragraph 503, "*Copyright is the exclusive right to do, and to authorize others to do... certain acts in relation to literary, dramatic and musical works, artistic works, sound recordings, films, broadcasts and published editions of works*"
23. In Creagh v Hit and Run Publishing Ltd [2002] EWHC 2512, it was held that, for there to be an infringement of copyright two elements had to be present:
- (a) there had to be sufficient similarity between the infringing work and the copyright work, or a substantial part of it, for the former to be described as a reproduction or adaptation of the latter and the question of what amounted to a substantial part of the copyright work was one of fact and degree.
 - (b) the copyright work had to be the source from which the infringing work was derived, directly or indirectly, and the claimant had to establish that the feature which it complained about had been copied, directly or indirectly from the copyright work and ultimately that was a question for the court to determine in the light of all the evidence.
24. In matters, such as the one before this Court, the Claimant has an obligation to satisfy the Court on a balance of probabilities that his work was actually copied and secondly that the copying of same was executed without the requisite authorisation and that the use of protected material was in the circumstances improper and/or unlawful.
25. Direct or circumstantial evidence must be advanced to establish that the alleged infringer actually had access to the protected work and the evidence must also establish that the alleged infringing work is substantially similar to the protected work, which must itself be work that was original, unique and capable of attracting the requisite intellectual property protection.
26. In the case of Laureyssens v. Zdia Group Inc. 964 F. 2d 131, (2d Cir. 1992), the Court opined that the successful determination of a copyright infringement would require consideration as to whether there was access to the protected work, whether substantial similarities existed between the protected work and the alleged infringing work, and that

regard should also be had to expert evidence so as to assist the Court with the resolution of the factual issues to be determined. Ultimately however, the Court has to undertake an objective determination.

27. In **Baigent and another v. Random House Group Ltd. (2007) EWCA Civ 247**, Lord Justice Mummery laid out what was deemed to be a non-exhaustive check list that should be considered when determining whether there was an infringement of literary copyright under the UK 1988 Act. The tests outlined were as follows:

- (a) What are the similarities between the alleged infringing work and the original copyright work?
- (b) What access, direct or indirect, did the author of the alleged infringing work have to the original copyright work?
- (c) Did the author of the alleged infringing work make some use in his work of material derived by him, directly or indirectly, from the original work?
- (d) If the Defendant contends that no such use was made, what is his explanation for the similarities between the alleged infringing work and the original copyright work?
- (e) If, however, use was made of the original copyright work in producing the alleged infringing work, did it amount, in all the circumstances, to “a substantial part” of the original work?
- (f) What are the circumstances or factors which justifies a classification that the part copied in the alleged infringing work was a “substantial part” of the original copyright work?

28. In the case of **Coffey v. Warner/Chappel Music Ltd.** [2005] EWCH 449 (Ch), the Claimant, a singer/songwriter, had written the lyrics and vocal melody for a song called “Forever After”, which was recorded with musical accompaniment arranged and performed by another artist. She claimed that the recording of “Forever After” included an original musical work, which consisted of the combination of vocal expression, pitch contour and syncopation of, or around the words, “does it really matter”, but did not extend to the melody surrounding the words and it was pleaded that the words “does it really matter” comprised the song's ‘lyrical hook’. It was alleged that the copyright in

“Forever After” was infringed by the Defendants' activities, in relation to a song by Madonna, called “Nothing Really Matters”. The Defendants contended that the Claimant’s averments comprised no more than features of, or extractions from, what properly and objectively was to be regarded as the relevant work for copyright purposes.

29. In **Coffey** (supra), the Court found that what constituted the copyright work in any given case was a matter for objective determination by it and that the consequence of defining too narrowly the subject matter of the Claimant’s claim might deprive a Defendant of what might be a good defence that what he took had not involved the taking of a substantial part of the true copyright work, and also to create layers of different artistic copyrights. The Court also found that what was relied upon as the copyright work was not, in law, capable of being properly so regarded. In addition the Court found that it could not cherry-pick features of a work such as voice expression and pitch contour, to establish that there was copyright infringement.

30. At paragraph 5 of **Coffey** (supra), it was stated that the Claimant’s claim was based on “voice expression”, “pitch contour” and “syncopation” around the words “does it really matter” and Blackburn J stated:

“Insofar as I have been able to follow precisely what is intended by those three features, they appear, at any rate in large part, to appertain to interpretation or performance characteristics by the performer, which is not the legitimate subject of copyright protection in the case of a musical work, rather than to composition, which is. Thus it is pleaded (in relation to “pitch contour”) that each sung version of the contour is subject to improvisation by the singer.”

31. Blackburn J further stated in **Coffey** (supra) that copyright subsists in a work in its entirety, not in parts of or extracts from the work. If a part of a work is copied, copyright in the work in its entirety may be infringed if the part copied constitutes a substantial part, qualitatively or quantitatively, of the work as a whole. It is not open to a Claimant to pick and choose the elements of a work upon which he relies in order to make the

question of whether a substantial part has been copied more likely to be answered in his favour.

32. In **Repp v. Webber** 132 F. 3d 882, 889 (2d Cir. 1997), the Court determined that proof of access may be inferred, where there are striking similarities which may be probative of copying.

Resolution of the issues

33. The 1st Defendant admitted that he had reviewed the Claimant's work via email around October 2013, from Emmerson 'Wig' George and that he responded via email and said "yeah I like this, need a tweak but have vibes"
34. On the evidence therefore there is no dispute that the 1st Defendant had access to the Claimant's work.

Was there substantial similarity between the two songs?

35. In the recent United States case of **Joel McDonald v. Kanye West, et al.** 15-3489cv 2nd Cir. (October 7, 2016), the court applied the "ordinary observer" test, which provides that substantial similarity will be found where "Defendant took from the Plaintiff's work so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such music is composed, that the Defendant wrongfully appropriated something which belongs to the plaintiff."
36. In **Designer Guild Ltd. v Russell Williams Textiles** [2001] 1 All ER 700, the differentiation between "similarity" and "substantiality" was further explained as follows:
- "Whether a substantial part of the artistic work has been taken depends upon the cumulative effect of copied features and not upon whether each feature has, in isolation, been substantially copied. If similarities between two works are sufficient to raise the inference of copying, those similarities will normally satisfy the requirement of substantiality."*

37. In the said case, the Judge found that it did. Although there was no direct evidence of copying, the Judge's finding was based on the extensive similarities between the pieces *Ixia* and *Marguerite*. The similarities, coupled with the opportunity to copy, in the absence of any acceptable evidence from the Defendant as to an independent provenance for *Marguerite*, led the judge to conclude, on a balance of probabilities, that *Marguerite* had been copied from *Ixia*. If the similarities between the two works were sufficient to justify the inference that one had been copied from the other, there was, the Court found, no further part for the concept of substantiality to play.

38. This Court, in the instant case, had the benefit of listening to both pieces of work and recognized that the expert evidence adduced by the parties had the potential to, and did in fact, provide invaluable assistance to it in its resolution of the issues for determination.

39. The two experts who were called were Mr. Dexter Simmons on behalf of the Claimant and Mr. Martin Raymond on behalf of the 1st and 2nd Defendants. Their evidence was as follows:

Mr. Dexter Simmons

40. Mr. Simmons testified that a spectrum analysis of the two pieces of work was conducted and stated that the said analysis focused on the melody and chord structure.

41. In cross-examination, he explained that the spectrum analysis focused on 1) Amplitude, 2) Frequency and 3) Time and opined that the above mentioned tests enabled the user to see into the music via sound images.

42. The Court enquired of him what he meant by the notion of “seeing into the music” and he referred to the spectrum diagram and explained that the music which is louder appears brighter in colour and that this indicates high frequencies and that the visible notes or dashes on the bottom of the spectrum were indicative of low frequencies.

43. Mr. Simmons noted that the both songs were in different keys but testified that there were similarities in amplitude and frequencies.
44. The witness also explained that both songs centered on the lyrics “wine with no worries” and that this phrase was ‘the hook’. He noted that in the spectrogram both pieces amplified the particular lyrics “wine with no worries”.
45. Mr Simmons further explained that while the notes were different, the performance of the words were similar and that there was an intensification and amplification of the words “no worries” and he contended that phrasing performed in both songs extended at the same time.
46. The witness accepted that the words “no worries” were not unique but he insisted that focus had to be placed on how the words were performed in relation to amplitude, frequency and timing.
47. The witness stated that he was unable to recall whether it was explained to him that his primary obligation was to the court and he also said that his recollection of the Defendants’ work was not very vivid but he was able to recall that the only similarity in terms of lyrics was the phrase “no worries”.

Mr. Martin Raymond

48. Mr Raymond testified that he isolated the melodic element of both songs using the industry standard Logic Pro software and both songs were played at the same tempo and they were replicated and transposed, so that the choruses were played in the same key for the melodies to be compared. He stated that the spectrogram was not the ideal tool in this particular case, as the spectrogram analysis was done on the entire song and there were competing elements. He opined that a more meaningful comparison could have been done using just the vocals. The witness explained that the spectrogram would show the same readings if either a performer sang a line at the same intensity or if a musical

instrument was played at the same intensity, as the spectrogram records no differentiation between vocals and musical instruments.

49. The witness stated that melody was the most significant factor in determining similarity and uniqueness between the songs, as melody is the most memorable part of a song and that a linear succession of notes is the major area for meaningful comparison. It was his opinion that the melodies were significantly different.

50. Mr. Raymond also considered the question of phrasing as being a natural outgrowth of speech or cadence which naturally fell within the same meter and duration and he disagreed with the contention that “no worries” was sung similarly. He said that the First Defendant had hit a higher note at “no worries” than the Claimant and there was also a difference in the sequence of the notes, although the notes were held for a similar length. He expressed the opinion that the duration of the note was due to the calypso style and he did not find it to be significant enough so as to attract protection.

51. Mr. Raymond also represented that he had specific expertise with regard to Carnival and the genre of Soca music and he said he did not consider the phrase “no worries” to be the central hook line as between both songs. Mr. Raymond also addressed the issue of metering or singing of the words in a similar way and he explained that while there was some similarity in relation of metering, he was of the view that this similarity was due to the genre of groovy Soca, being the category into which both songs fell.

52. The witness further expressed the view that a consideration of amplitude did not provide much assistance as it was common for contemporary pieces of music to have similar amplitudes.

The Claimant’s evidence

53. The Claimant also relied upon the evidence of Mr. Kevon Hart. He is one of the Claimant’s Directors and he stated that he co-authored the Claimant’s work and wrote the melody but that it was put into music by a producer. He testified that the crux of his

complaint centered not only upon the words “no worries” but the way in which the said words were performed. The witness acknowledged that the melody and rhythm of both songs were different but said, though this was not pleaded, that the “metering” was similar.

54. During his cross examination, a list of 6 soca songs written around the same time as the Claimant’s work that had the words “*no worries*” in them, was put to Mr. Hart to illustrate the fact that the said words were very common in the soca songs. Mr. Hart denied knowledge of the said songs and he maintained that the words used in the Claimant’s work were unique.

The Defendant’s evidence

Mr. Devon Matthews

55. The First named Defendant gave evidence that he received between 10 to 25 demos to review every carnival season in his capacity as a singer and approximately 25 new releases to be played in his capacity as a radio personality and he said that he kept no catalogue of these songs, with regard to the Claimant’s demo he stated that he listened to it once.

56. Mr. Matthews testified that he has been involved in the music industry for about 15 years, with 6 years as a professional artiste and while he accepted that he did receive the Claimant’s work, he indicated that “it needed a tweak” which he said was his way of expressing constructive criticism without discouraging the artiste. In cross-examination he stated that he was not really interested in the song but “did not want to kill their vibes”.

57. The First named Defendant clarified that he wrote the introduction or the scat part of the song but stated that Akeem “Preedy” Chance wrote the rest of it.

58. He testified that his writing process was usually collaborative and that he frequently consulted writers as well as producers. In cross examination, it was suggested to the

witness that he was aware that the 2013 song sent to him called “No worries” had been written by Kevon Hart and he denied any such knowledge.

Mr. Akheem “Preedy” Chance

59. Mr. Akeem “Preedy” Chance gave evidence that he wrote the winning song for the Junior Soca Monarch 2013, Aaron Duncan and he said he had been a professional songwriter for about 3 years.

60. He testified that he met the First named Defendant through the Second named Defendant and stated that the “no worries” concept was used in different genres and he first used it in his song “Away” in April, 2013. He gave evidence that in his opinion both songs do not sound similar and he stated that the alleged protected work was never sent to him. Mr. Chance gave evidence that he wrote most of the song “No Worries” which was sung by the First named Defendant and produced by the Second named Defendant.

Mr. Anson Soverall

61. The Second Defendant Mr. Soverall gave evidence that he completed the music for the song in July 2014 and that the First named Defendant completed the recording of the song in August, 2014. The Defendants’ work was then mixed and mastered sometime in October, 2014. He reiterated that he was unaware that the Claimant had a demo song called “no worries” at the time he was involved with the Defendants’ work and that he only heard the Claimant’s work “after the fact”. Furthermore, he stated that he was not involved in the writing process for the lyrics for the song.

The Third Defendant’s evidence

62. Mr. Lee Aping, the President of the Radio Network of the Third Defendant, explained that the records of broadcasts were only kept for 28 days pursuant to the Concession for the Operation of a Public Telecommunications Network and/or Provision of Public Telecommunications of Broadcasting Services, regulation D33. Mr. Lee Aping further explained that it is prohibitive to keep records for a 24 hour radio station for a longer

period and that the Information Technology Department of the Third named Defendant cleared these records every 28 days.

63. Mr. Lee Aping also testified that he did not actually listen to all of the content on each of the radio stations daily and therefore did not know whether the Defendants' work was played. He also indicated that he left the issue of the play-list of songs to his disc jockeys but indicated that popularity was gauged by the frequency at which a song was played. He opined that the Defendants' work was not popular since he did not hear it being played. Mr. Lee Aping further testified that the First named Defendant was generally a well-received artiste but that this song did not receive much traction.

64. Mr. Lee Aping accepted that the Third named Defendant played songs on its radio station that contained samples and he said that once the Claimant's pre-action letter was received, that the Defendant's work ceased to be played on the Third named Defendant's Radio Station.

65. Mr. Lee Aping also explained that a flat annual negotiated fee is paid by the Third named Defendant to the Copyright Authority of Trinidad and Tobago ("COTT") and he said that if a song is played, the disbursement of funds is between the artiste and COTT

Mr. Kevin Licorish

66. This witness gave evidence that as a disc jockey with the Third named Defendant, he did not make it a habit to play songs only because it was his friend's song and that the music he played had to fit within his mid-morning shift.

67. Mr. Licorish admitted that he played the Defendants' work and he testified that the song was not played all throughout the carnival season since "not too long" after it was released, the Third Defendant received the pre-action letter during his shift, and the song was taken off the system.

68. He stated that the regularity with which a song was played depended upon the traction and he gave evidence that although he felt that the Defendants' work was good it was not played often.

Analysis of the evidence

69. On the evidence there is no dispute that the Claimant's work was written by Kevon Hart and recorded sometime in October 2013 and that a demo copy of same was emailed to the Frist Defendant around October 2013.

70. The Claimant accepted that as between its work and the Defendants' work there was no similarity with regard to the musical score and identified the words "wine with no worries" as being the words to which protection should attach.

71. **Having carefully considered the law, the Court is of view there is and can be no original skill, labour or originality of thought associated with the said words "wine with no worries" and it cannot be said that the said words originated with the Claimant. Variants of the said words have been used in many songs across various genres of music and the said words are common within local parlance and are synonymous with the revelry and gaiety of Carnival, which, after all, is the season to 'wine and to abandon all worries'. Consequently, the Court is of the view that no originality can be attributed to the words "wine with no worries" as the phrase is not a unique literary expression which can attract copyright protection.**

72. The Claimant, during the trial, attempted to say that the thrust of its complaint focused on the manner in which the said words were sung in a similar way but this position was not pleaded. Notwithstanding the Claimant's failure to plead this issue, the Court still considered same.

73. The Claimant's expert Mr. Simmons stated that, the phrasing of the lyric "worries" was similar in both songs. The Court considered that the matters complained of in large measure pertained to interpretation or performance characteristics by the performer and

formed the view that these factors are not the legitimate subject of copyright protection in the case of musical work and the Court followed the reasoning in the IPC Media and Coffey (supra). Ultimately, the Court, as a matter of objective determination, had to consider what the features of the Claimant's work were that were capable of attracting copyright protection.

74. In the instant case, the Claimant's position is that there is significant similarity in the way that the word "worries" was sung throughout the song by the First Defendant and that the said phrase and its rendition, was a substantial part of its song.

75. The Court found that the analytical approach adopted by Mr. Raymond was of more assistance than the approach adopted by Mr. Simmons and accepted Mr. Raymond's position that melody is a significant factor when determining similarity and uniqueness. The Court further found that the isolation of the melodic elements of both songs provided a more useful basis of comparison than the spectrogram analysis conducted by Mr. Simmons. The expert evidence adduced by Mr. Raymond established that the First Defendant sang a higher note at "no worries" than the note in the Claimant's work and that there was a difference in the sequence of the notes, although the notes were held for a similar length.

76. The Defendant's expert Mr. Raymond also found that the similarity in the choruses of both songs had more to do with the words "no worries" rather than the entire phrase "wine with/wit no worries". The Court noted that the Claimant's work emphasized the phrase "wine wit no worries" by repeating 'wine' in the chorus whilst the Defendants' work encompassed the concept of doing other activities such as "drinking" and/or "chipping" with no worries.

77. Mr. Raymond also explained that a similarity in phrasing could have occurred as a natural outgrowth of speaking a common phrase and he gave evidence that this similarity would not constitute a unique feature of the phrasing.

78. **Having heard both songs and having accepted and considered the evidence of the expert witnesses, the Court found as a fact that there are no substantial similarities in relation to the lyrics, melody and/or the delivery of the respective performances with respect to how the words ‘no worries’ were sung. The Court also found as a fact, having listened to both pieces of work, that it could not be said that the Defendants took from the Claimant’s work so much of what was pleasing to the ears of the target audience or that there was an unauthorized appropriation for which the Defendants should account.**

79. In **Designer Guild Limited (supra)** at pages 708 to 709 the House of Lords explained:

“The first step in an action for infringement of artistic copyright is to identify those features of the defendant's design which the plaintiff alleges have been copied from the copyright work. The court undertakes a visual comparison of the two designs, noting the similarities and the differences. The purpose of the examination is not to see whether the overall appearance of the two designs is similar, but to judge whether the particular similarities relied on are sufficiently close, numerous or extensive to be more likely the result of copying than of coincidence. It is at this stage that similarities may be disregarded because they are commonplace, unoriginal, or consist of general ideas. If the plaintiff demonstrates sufficient similarity, not in the works as a whole but in the features which he alleges have been copied, and establishes that the defendant had prior access to the copyright work, the burden passes to the defendant to satisfy the judge that, despite the similarities, they did not result from copying.”

80. **The Court also found that the Defendants’ work was not the result of copying but was the product of independent provenance.**

81. **On the facts, the Court found that the evidence of independent origin as outlined by the witness Akeem “Preedy” Chance was cogent and uncontested. Consequently, the Court accepted the evidence of the First and Second Defendants as to the circumstances that operated in relation to the creation of their song and the factors that operated in relation to its coming into being and found that the Claimant’s allegation of copying was without merit. The Court also formed the view that the Defendants’ work was created without any consideration to the Claimant’s demo song and that Mr. Chance save for the scat part of the song, was the true author of the said piece and he had no knowledge of the existence of the Claimant’s work at the material time. While the First Defendant did have access to the Claimant’s work, the Court accepted Mr. Matthews evidence, found him to be a credible, compelling and forthright witness of truth, found as a fact that he did not copy the lyrics or music from the Claimant’s work, and that the use and reference to ‘wining’ and ‘no worries’, were concepts that were not unique but which formed an integral and entrenched part of the cultural fabric of this society.**

82. The Court also accepted the evidence adduced on behalf of the Third Defendant that it removed the Defendants’ work from its playlist and ceased playing same upon receipt of the Claimant’s pre action protocol letter.

83. The First Defendant set out in his Witness Statement that in the Carnival season of 2014 he wrote and performed 4 songs including “Start it up” which got him to the Finals of the 2014 Soca Monarch and that he was invited to perform at numerous events for which he was paid \$5,000.00 per performance. For the 2015 Carnival season, he testified that he received approximately 10 invitations and stated in cross examination that when the radio stations stopped playing his song, the fete and event promoters stopped inviting him to perform.

84. **The Court formed the view that the First Defendant was unable to satisfy it, on the evidence, that there was the requisite nexus between the receipt of the Claimant’s pre-action protocol letter, the pulling of the Defendants’ work from the airwaves**

and his receipt of fewer invitations to perform at fetes and events. In the circumstances, the Court cannot make any award of damages in favour of the First Defendant, on the counterclaim.

85. The issues raised in this case were important and, though the Claimant was not successful, the invocation of the Court's jurisdiction to determine an issue of intellectual property protection should be applauded. This Republic is blessed with artists whose talent, creativity and competence are remarkable but this raw talent has not been nurtured, harnessed or cultivated. Intellectual property sensitization and the protection it offers is of paramount importance as artists have a level of protection and security in knowing that the spoils of their creativity can manifest into tangible benefits that can endure well beyond an annual carnival season. The protection afforded enables creators and innovators to harvest the fruits of their creativity. In the case of copyright, the protection afforded requires no registration or the incurrence of antecedent costs. An appreciation and awareness of intellectual property matters can also serve to dissuade artists from merely copying melodies and lyrics from Africa and India cognizant that such activity can be met by the institution, even across continents, of legal action. The unauthorised replication of artistes' recordings and the sales of DVDS' on the street are glaring examples of intellectual property infringement but yet this type of violation continues unabated. The protection afforded can serve to stimulate and encourage the development of true artistic expression, originality and innovation. The laws in this area are adequate but they have, hitherto, not been utilised. Stakeholders should earnestly defend their intellectual property rights and as demonstrated in the instant matter, it is possible to have a matter instituted, litigated and determined within one year of the first hearing before the Court.

86. For the reasons that have been outlined the Claimant's claim is dismissed. The counterclaim filed on behalf of the 1st and 2nd Defendants is also dismissed and the Claimant is to pay the Defendants, costs on the claim. On the counterclaim there shall be no orders as to costs and the parties shall be heard on the issue of the quantum of costs.

FRANK SEEPERSAD
JUDGE