

- [2] Defendant's counsel indicated that neither written submissions nor an affidavit in response had been received from the Claimant whose counsel indicated that a further supplemental affidavit had been filed but not served. I directed that the affidavit be immediately emailed to the Defendant's counsel and allowed 15 minutes for its review. On the resumption counsel for the Defendant indicated that, having seen the affidavit, they were still willing to proceed. I therefore called upon the Claimant's counsel to commence arguments.
- [3] Mr. Scott, for the Claimant, urged that a default judgment should be entered against the Defendant as the Claim Form and Particulars had been properly served by one Mr. Mark Hynes. I indicated to Claimant's counsel that I was not with him and would not be entering a default judgment. There was no need to call on the Defendant. The reason is that the mode of service relied on was inappropriate. The affidavit of Lydia Rose, filed on the 9th November 2023, stated that the Defendant's registered office is Newport District, Newport Manchester. The affidavit of service by Mark Hynes, filed on the 27th September 2023 and amended by affidavit filed 24th November 2023, stated that he handed the documents to "*Kim Dunn a secretary and the person in charge*".
- [4] This is not the method of service required on a limited liability company. The document should be left at or sent by post to the registered office of the company, see section 387 of the Companies Act. The Civil Procedure Rules provide for other ways to personally serve such a company, see Rule 5.7:

"Service on a limited company may be effected-

(a) by sending the claim form by telex, FAX, prepaid registered post, courier delivery, or cable addressed to the registered office of the company;

(b) by leaving the claim form at the registered office of the company;

(c) by serving the claim form personally on any director, officer, receiver, receiver-manager or liquidator of the company;

(d) by serving the claim form personally on an officer or manager of the company at any place of business of the company which has a real connection with the claim; or

(e) in any other way allowed by an enactment.”

The following excerpt from “**A Practical Approach to Civil Procedure**” 22nd Edition by **Stuart Sime** page 74, paragraph 6.28, offers useful guidance:

“Instead of serving a company under the CPR at its principal office or place of business having a real connection with the dispute, a company may be served personally (see 6.30) or at its registered office (Companies Act 2006, S1139) Service under S1139 must be at the company’s registered office. Consequently, leaving the documents with a receptionist or security guard at the reception area of a managed building is not enough (Amenda Hess v Rome (2000) The Times, 15 March 2000) unless the company agrees to some method of service (Companies Act 2006, Sch4, para8)”

Alternatively, the Claimant must rely on alternative means of service of the claim and the way to do that is set out in section 5.13 of the Civil Procedure Rules. This was not initiated.

[5] By a further supplemental affidavit of service filed on the 17th day of May 2024 Mr. Mark Hynes endeavored to correct the earlier errors. He there stated,

“5. That to my certain knowledge from what I have seen, and information obtained the location at which I served the documents on the Defendant named in the court documents provided, is the only location in Newport District where the Defendant operates, does business or is located.”

[6] The record will show that on the 26th April 2024 the Defendant by its counsel filed an Acknowledgment of Service. That document stated that:

“Sometime in August 2023 a package was left on a windowsill at a secondary location of the company and were [sic] eventually individually placed among other documents.”

This account is buttressed by the affidavit of Mr. Peter Dunn, filed on the 26th April 2024. I will quote extensively from it:

*“7. Paragraph 7 is denied as no documents were ever served at the registered office of the Defendant. Further I am informed and do verily believe that the document exhibited as **'MH 1'** to the Amended Affidavit of Service of Mark Hynes is not the prescribed form required by the Companies Act to notify the Registrar of Companies of the location of the registered office of the company.*

*8. In further response to paragraph 7, the Defendant is a limited liability company and was duly incorporated in Jamaica on the 25th of August 2011. Exhibited hereto as **'PD 1'** is a copy of its Certificate of Incorporation.*

9. The Defendant's registered office is situate at Newport District, Newport P.O. Manchester. The Defendant has two offices in Newport District, Newport P.O., Manchester.

10. One location houses its headquarters, its registered office and is the location from which the directors and managers oversee the operations of the company. This is the office to which all official correspondence is sent and the only location authorized to accept official documents on behalf of the company.

11. The other location in the Newport district houses an application and payment office. This secondary location is where customers fill out applications and make all payments to the company.

12. I am informed and do verily believe that sometime in August 2023 a man came to the second location, that is the payment office, and asked to speak to me. When advised that I was not there and that they did not know what time I would be coming in he left a package at the windowsill when no one took the documents from him. He did not explain anything about the package.

13. The documents were never handed to anybody at the secondary office. Further there is no one by the name of Kim Dunn' who works at the secondary location and no director, officer or manager of the company was present at the time the documents were left on the windowsill at the secondary office.

14. I am informed and do verily believe that as a result of not being aware of the contents of the document the cashier placed the documents with other correspondence. The package remained at the second location for some time until it was sent over to our headquarters and registered office.

15. I am informed and do verily believe that it was eventually brought to the attention of the office manager a few days later

and she called Ms. Lydia Rose, who directed the employee to call the offices of Samuda and Johnson, Attorneys-at-Law for clarification. The office manager in good faith was in dialogue with the Attorneys-at-law and thought she could deal with the matter and at no time was she advised that the company should get a lawyer to respond to the court documents. Having not heard anything further we were waiting on the Claimant's Attorneys-at-law to get back to us.

16. Upon receiving a copy of the Notice of Adjourned Hearing filed on March 1, 2024, I realized that we needed the assistance of a lawyer and immediately sought to retain the services of a law firm to assist us, especially since the Notice stated that we were ordered to attend the adjourned hearing to be heard by a Judge in chambers at the Supreme Court, Kings Street, Kingston on the 8th of May 2024 at 10:00 am for hour.

17. There was no attempt on the part of the company to disrespect the court or its processes as the office manager was under the mistaken belief that by contacting the attorneys named on the documents the matter was being resolved, and was unaware of the need to file a response in the court.

18. In response to paragraph 8, no documents were ever served at the registered office of the company. Neither was any director, officer or manager of the company ever served personally with the documents herein at the registered office, the company's secondary location or anywhere else. As a result of this the company did not file an Acknowledgment of Service or Defence in the prescribed time.”

[7] Mr. Dunn’s account is accepted and states precisely what is likely to occur when established modes of service are not adopted. Leaving documents with a person

other than the company secretary or other officer runs the risk of documents being mislaid or overlooked. There is further no evidence to contradict Mr. Dunn's statement that the place at which the documents were left was not the Defendant's principal place of business. Mr. Dunn was not cross-examined and the evidence that the Defendant's manager contacted the Claimant's attorneys but was not advised to get legal advice remained uncontradicted. The alacrity with which the Defendant acted, once notice of proceedings came to its attention, is also a factor in its favour.

[8] I therefore refuse the application for the entry of default judgment. The evidence is not such as to satisfy me that service was made at the registered office of the Defendant, at its principal place of business or, on any director or officer of the company. There has not been personal service on the Defendant. Furthermore, once the claim came to the attention of the officers of the Defendant, it instructed attorneys, acknowledged receipt and filed a Defence. In these circumstances it is just and correct, in any event, to exercise a discretion pursuant to Rule 26.8(2) and grant relief. I will therefore grant such orders, if necessary, to put matters right and allow the Defence as filed to stand.

[9] The Claimant's Notice of Application, filed on the 9th November 2023, also sought disclosure of audited financials for the years 2018 to 2023 and/or its Subscriber Television Quarterly Returns for that period. Such orders for disclosure only become necessary if the Defendant's application, for summary for judgment and/or striking out, fail. In that regard the Defendant relies on a formidable array of technical submissions.

[10] In the first place the Defendant argues that the Copyright Act of Jamaica, as amended, permits actions for infringement of copyright by the owner or an exclusive licensee only. Furthermore, unless both are claimants, or in some way parties to the claim, the permission of the Court is required before such an action may be commenced. In this case, the Defendant submits, the owner has not been made a party and therefore permission of the court ought to have been obtained

before proceedings were commenced. The Defendant submitted further that there is no evidence that the Claimant is an “exclusive licensee”. It is contended that, unlike in some other jurisdictions, our statute does not enable a non-exclusive licensee to commence a claim. Section 35(3) of the Copyright Act, it is asserted, only permits either the owner or an exclusive licensee to bring a claim. A memorandum in writing from the owners themselves authorizing the Claimant, a non-exclusive licensee, is required. In its submissions the Defendant embarked on a detailed review of the documentation annexed to the claim including various powers of attorney.

[11] The Defendant submits also that the Claimant has failed to particularize the musical works in which copyright was allegedly breached. The Defendant challenges the sufficiency of an assertion by the Claimant that it has reciprocal collection agreements with other performing rights societies which “*together are entitled to collect royalties for just about every musical work broadcast*” (see paragraph 2 Particulars of Claim). These submissions the Defendant says apply also to the Amended Claim and Particulars of Claim. Further the Amended Particulars of Claim indicates a period for which the Limitation of Actions Act would apply.

[12] The Defendant argues that the Copyright Act does not permit delegation by an exclusive licensee. Therefore, for example, as ASCAP is an exclusive licensee it cannot convert the Claimant to such a condition. The Act does not permit this for the same reason it does not permit a claim without the owner’s participation. It wants to avoid a multiplicity of proceedings and wishes to avoid actions by unauthorized persons. The Defendant further argues that the documentation is insufficient to satisfy the court that the authority to bring the claim is current. There is no plea or documentation to satisfy the court that there has been no reassignment, termination or reservation of the alleged right.

[13] The Defendant argues also that the Claimant has failed to particularize the works infringed and/or the occasion of the infringements. The Claimant is obliged to prove:

- a) The musical work in issue;
- b) The owner of copyright;
- c) The date it was produced since copyright only exists for 95 years;
- d) That copyright does exist in the work;
- e) That the Claimant is an exclusive licensee;
- f) That the Defendant had no license.
- g) That the Defendant carried out a restricted act at a particular date, time or occasion.
- h) That the Defendant gave permission for apparatus to be brought onto premises.

The Defendant relied on several authorities in support of these submissions.

[14] The Defendant's application to strike out, on the ground that no reasonable basis for bringing the claim is disclosed, is on similar grounds. In all the circumstances the Defendant asks that summary judgment be entered as the claim has no real prospect of success. The Claimant it is asserted is abusing the court's process by throwing a "*wide net*" to "*see what they can catch*".

[15] The Claimant's response, to these submissions, was to say that the issues raised were all triable. The court ought not to, at this stage, draw any factual conclusions but should allow these issues to be dealt with at trial. The issues being whether there was copyright and whether licenses were exclusive and whether there was a breach. Furthermore, it was submitted, the amended pleadings particularized in detail the works over which copyright was claimed. On the matter of limitation of actions an oral application was made to amend by deleting the year 2015 and inserting the year 2018 in paragraph 18 of the Amended Particulars of Claim.

[16] It is now well established that on an application for summary judgment, although a court is not to embark on a mini-trial of facts in issue, it is permissible to assess documents and have regard to the evidence to determine whether the claim has a real prospect of success, see **Sagicor Bank Jamaica Limited (Appellant) v Taylor-Wright (Respondent) [2018] UKPC 12**. On an application to strike out a claim, for disclosing no reasonable ground for bringing the claim, regard is had to the statements of case, see **City Properties Limited v New Era Finance Limited [2013] JMSC Civ 23**. In either case it is of course necessary to be clear on the cause of action involved and that which must be established in law.

[17] Copyright infringement is primarily a statutory matter. The Copyright Act of 1993 was amended in 2015 and again in 2023. The provisions (as amended) relevant to this litigation read as follows:

“2.

.... exclusive licence” means 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. (1) *Unless otherwise specifically provided in this Act, copyright shall not subsist in any work unless it satisfies the requirements specified in this Part as respects –*

(a) the category of work; and

(b) either –

(i) the qualification of the author; or

(ii) the country or place of first publication, or in the case of a broadcast or cable programme, the country or place where it is made or from which it is sent, as the case may be.

(2) If the requirements of this Part or of section 146 are once satisfied in respect of a work, copyright does not cease to subsist by reason of any subsequent event.

...

31. (5) *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*

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.*

...

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.*

...

35. (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 an 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.

...

87. (1) *In this Part-*

"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;

"licensing body" means 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;

"licensing scheme" means 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.

(2) References in this Part to licences or licensing schemes covering works of more than one

author do not include licences or schemes covering only –

(a) a single collective work or collective works of which the authors are the same; or

(b) works made by, or by employees commissioned by, a single individual, firm, company or group of companies.

(3) For the purpose of section (2) “group” in relation to a company means that company and –

(a) any other company which is its holding company or subsidiary;

(b) any other company which is a subsidiary of the holding company;

(c) any company which directly or indirectly controls or is controlled by any company referred to in paragraph (a) or (b); and

(d) any company which is controlled by a person who directly or indirectly controls a company referred to in paragraph (a), (b) or (c).

87A. (1) No person shall carry on the activity of negotiating or granting of licences on behalf of owners of copyright unless that person is a licensing body, holding a certificate of registration.

(2) Subsection (1) shall not apply where any activity therein referred to is carried on by a person acting as an authorized agent for one author and for no other.

(3) A society or other organization that intends to carry on operations as a licensing body, shall apply to the

Executive Director in the form and manner prescribed, for a certificate of registration, and submit the prescribed fee.

(4) The Executive Director shall not register more than one licensing body at the same time to carry on operations in respect of the same class of rights, unless that Executive Director is satisfied that the registration of more than one such body is justified by market conditions and is in the public interest.

(5) For greater certainty and in furtherance of the functions conferred by the Jamaica Intellectual Property Office Act, the Executive Director shall have the functions in relation to the grant, refusal, suspension or revocation of a certificate issued under this Part.

(6) Any person who contravenes subsection (1) commits an offence and shall be liable on summary conviction before a Resident Magistrate-

(a) in the case of an individual, to a fine not exceeding one million dollars or in default of payment thereof to imprisonment for a term not exceeding six months; or

(b) in the case of a body corporate, to a fine not exceeding one million dollars.

...

154. (1) Notwithstanding section 87A, and subject to section (2), an unregistered organization carrying on the activity of negotiating or granting licences, on behalf of owners of copyright immediately before the 30th day of July, 2015, may continue to do so, without holding a certificate of registration, during the transitional period.

- (2) *Where, during the transitional period, an unregistered organization mentioned in subsection (1) applies for a certificate of registration under this Act, if the Executive Director refuses to grant a certificate of registration to that unregistered organization, that unregistered organization shall immediately cease to negotiate or grant licences on behalf of owners of copyright.*
- (3) *The transitional period shall end on a date specified by the Minister, by notice published in the Gazette.*
- (4) *In this section-*

“transitional period” means the period commencing on the 30th day of July, 2015, and ending on the date specified under subsection (3);

“unregistered organization” means the-
(a) Jamaica Copyright Licensing Agency;
(b) Jamaica Association of Composers, Authors and Publishers; or
(c) Jamaica Music Society.”

[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 judgment 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:

“1. The Claimant is a Limited Liability Company with registered office situate at 21 Connolley Avenue, Kingston 4, in the parish of St. Andrew, a Collective Management Organization authorized by the Government of Jamaica to act under the Copyright Act and a copyright licensing body within the meaning of section 87 of the Copyright Act, 1993 and the Copyright (Amendment)(No. 2) Act, 2023, and is comprised of individual members and acts as an agent and/or licensee pursuant to the reciprocal collection and agency agreements with both local, regional and international performance rights societies and music publishers who have assigned to the Claimant 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, programming and/or recordings and/or any other works within their repertoire by radio, television (terrestrial and satellite) or otherwise. Such rights held by the Claimant are known as public performance rights. Annexed hereto and marked "A" and "B" respectively are copies of the Claimant's Memorandum of Association and the Copyright (Amendment) (No. 2) Act, 2023

2. The Claimant is a party to about twenty five reciprocal collection agreements with regional and international performance rights societies, and in particular, it is a party to reciprocal collection agreements with such major international collecting societies as the Performing Rights Society (hereinafter referred to as "PRS"), American Society of Composers Authors and Publishers (hereinafter referred to as "ASCAP") and Broadcast Music Inc. (herein after referred to as "BMI") which are international performing rights societies which together are entitled to collect for almost every musical work, programming and/or recordings and/or any other works broadcast or transmitted by radio, television or cable, throughout the world including Jamaica.

...

4. The Claimant avers that music, and/or recording being an integral part of the Defendant's programming from the date of its first broadcast until the commencement of these proceedings and continuing,

the Defendant has, during the aforementioned period, been broadcasting and/or transmitting to the public copyrighted music and/or recordings which falls within the repertoire of musical works and/or recordings, the rights for which are administered in Jamaica by the Claimant either directly or embedded in the programming.

...

6. By reciprocal agreement between the Claimant and PRS in 1999, the Claimant was assigned the performing rights in Jamaica in the PRS repertoire. The said reciprocal agreement of 1999 was replaced by JACAP-PRS Developmental Representation Agreement dated February 17, 2022 together with Amendment No. 1 dated April 11, 2023, and Amendment No. 2 dated December 5, 2023 whereby PRS appointed the Claimant as its agent and assigned to the Claimant exclusive rights to PRS performing rights in Jamaica and, together with Power of Attorney dated July 21, 2014, PRS granted the Claimant authority to bring copyright infringement proceedings against broadcasters in respect of the unauthorized public performance, of any and all musical works, and/or recordings and/or any other works which are for the time being and from time to time owned and administered by PRS. Annexed hereto marked "C" and "D" respectively are copies of the agreement dated February 17, 2022, together with Amendment No. 1. and Amendment No. 2 and Power of Attorney dated July 21, 2014.

7. *By reciprocal agreement with ASCAP dated January 1, 2008, and confirmed in letter dated January 10, 2013, the Claimant was granted exclusive authority in Jamaica to licence the repertory of ASCAP in Jamaica and to bring copyright infringement proceedings in respect of unauthorized public performance of any and all musical works, and/or recordings, and/or any other works which are for the time being and from time to time owned and administered by ASCAP. Annexed hereto and marked "E" and "F" respectively are copies of the said letter dated January 10, 2013, from ASCAP and agreement dated January 1, 2008.*

8. *By reciprocal agreement dated January 15, 2004 between the Claimant and BMI, confirmed in letter dated July 11, 2014 the Claimant was granted the non-exclusive authority in Jamaica to licence the repertory of BMI in Jamaica and to bring copyright infringement proceedings in respect of the unauthorized public performance of any and all musical works, and/or recordings, and/or any other works which are for the time being and from time to time owned and administered by BMI. Annexed hereto and marked "G" and "H" respectively are copies of the reciprocal agreement dated January 15, 2004 and letter dated July 11, 2014.*

9. *By virtue of written agreements executed by its individual members, the Claimant has been granted exclusive rights to authorise or prohibit the broadcasting and/or transmission of the musical works of its members. The said agreements transfer to the Claimant absolutely, for all parts of the world, the rights*

which belong to its individual members. Annexed hereto and marked "I" are copies of agreements between the Claimant and some of its individual members.

10. By virtue of the aforementioned agreements, the Claimant has assigned and transferred to it the performing rights in the musical works, and/or recordings, and/or any other works of its individual members and members of the sister societies of all the collecting societies party to a reciprocal agreement with the Claimant. Copies of some agreements with sister societies such as SOCAN in Canada, ABRAMUS in Brazil and COTT in Trinidad and Tobago are annexed hereto and marked "J", "K" and "L". All the performing rights assigned to the Claimant as outlined in the aforementioned paragraphs are referred to as the Claimant's repertoire.

....

15. By the Defendant's actions pleaded aforesaid the Defendant has infringed the Claimant's copyright in its repertoire and has and continues to unjustly enrich itself at the Claimant's expense. Annexed hereto are copies of works infringed by the Defendant marked "M" on which the Claimant will rely, and further documents will be produced in the process of discovery."

[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 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. It is the evidence to which the court has regard when deciding if a claim has a real prospect of success. 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 polices 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 William 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."

[22] On the issue of exclusivity of the license I agree with the Claimant that the minute examination of the deeds, documents, and the powers of attorney, which the Defendant's submissions invite, is inappropriate for a court considering summary judgment. On the face of the plea, and the documents relied on, the Claimant has satisfied me that it has a real prospect of successfully establishing *locus standi* to bring this suit.

[23] The Defendant is on stronger ground with its assertion that permission to bring the claim ought to have been requested. Section 35(3) of the Copyright Act is clear. Where the owner of the work or works is not a party to the claim then permission of the court is required before a claim is filed. The failure to obtain the court's permission, which at this late stage has still not been requested, is therefore also fatal and will result in an order to strike out the claim.

[24] My decision makes it unnecessary to consider the Claimant's application for disclosure. For the reasons stated above my orders are as follows:

1. The claim is struck out and there is judgment for the Defendant against the Claimant.
2. Costs to the Defendant to be taxed or agreed.

David Batts
Puisne Judge.