

**THE REPUBLIC OF TRINIDAD AND TOBAGO
IN THE COURT OF APPEAL**

CIVIL DIVISION

Civil Appeal No. P-297 of 2018

Claim No. CV2016-03461

BETWEEN

SEAN CARUTH

Appellant

AND

THE TOBAGO HOUSE OF ASSEMBLY

Respondent

Dated this the 22nd day of July 2025

Panel:

Justice of Appeal Gillian Lucky

Justice of Appeal Mira Dean-Armorer

Justice of Appeal Vasheist Kokaram

Appearances:

Mr. N. Trancoso instructed by Mr. D. Carter and Ms. D. Jones on behalf of Sean Caruth

Mr. G. Pantin instructed by Ms. F. Punch on behalf of The Tobago House of Assembly

I have read the Judgment of Dean-Armorer, J.A. I agree with it and have nothing to add

Gillian Lucky
Justice of Appeal

I have read the Judgment of Dean-Armorer, J.A. I agree with it and have nothing to add

Vasheist Kokaram
Justice of Appeal

Delivered by Mira Dean-Armorer, JA on 22nd July, 2025

JUDGMENT

Introduction

“Coal Pot (x8)

Chicken (x16)

Rice /Coal Pot...

Ah come home late from a fete

Rum done ah hungry to death

Ah bus open de fridge

One lonely cabbage watching me...”

1. In 2001, Sean Caruth the Appellant penned the above lyrics along with the accompanying melody. His composition was formally known as “*the Cook*”, but was popularly known as the “*Coal Pot*”.
2. “*Coal Pot*” was vibrant, lively and energetic. It was an immediate hit. The singer related his actions on returning home from a fete and on finding no food, decides to engage in the local pastime of making “*a cook*”. He calls to his neighbours and together they add rice and chicken on the coal pot.
3. Ten (10) years later, the Tobago House of Assembly, the THA, included an excerpt from “*Coal Pot*” in an advertisement designed to promote a tourist event.
4. The Appellant instituted proceedings claiming that the THA had infringed his neighbouring and moral rights. He was at first unsuccessful and has now appealed.
5. The issues which arose in this appeal concern the intellectual property rights of performers. We considered briefly the genesis of those rights and the advent of those rights into the international community by way of *the Berne Convention* and *the Rome Convention*.
6. More particularly, however, we considered neighbouring and moral rights, as provided for in local statutes. The latest statute and the one currently in force is the *1997 Copyright Act of Trinidad and Tobago*.
7. Having considered the law together with the submissions of Counsel, we held that the trial Judge was plainly wrong to have dismissed the Appellant’s claim and the THA had infringed the neighbouring and moral rights of the Appellant. We therefore allowed the appeal and entered Judgment for the Appellant.

8. Having so found, we proceeded to consider damages that were due to the Appellant under s.38 of *the 1997 Copyright Act*. It is our view that the Appellant was entitled to the following sums:

Pecuniary loss\$100,000.00

Non-Pecuniary loss\$100,000.00

Accordingly, we hold and direct as follows:

- i. The Appeal is allowed
- ii. Judgment is entered for the Appellant against the Respondent
- iii. The Respondent/THA do pay the Appellant damages assessed in the sum of \$200,000.00
- iv. The order of the Trial Judge as to costs is set aside
- v. The Respondent pay to the Appellant the costs at the High Court on the prescribed scale quantified on the value of the claim in the sum of \$200,000.00,
- vi. The Respondent to pay to the Appellant the costs of the appeal in the sum of 2/3 of the costs at (v) above.

Factual Matrix

9. The Appellant, as a composer and performer of musical works, became a member of the Copy Right Music Organisation of Trinidad and Tobago, (COTT). In his capacity as a member, he assigned a number of his rights in his musical works to COTT by a Deed of Assignment also dated the 1st July, 1997. The Deed of Assignment and its meaning were central to this appeal and are therefore set out in full below:

“1. In this Deed the expression “Musical work” has the meaning given to that expression in the Article of Association of COTT.

- 2. (a)The Assignor hereby assigns to COTT the under-mentioned rights in all musical works which now belong to or shall hereafter be acquired by or be or become vested in the Assignor during the continuance of the assignor’s membership of COTT, and all such*

parts or shares (whether limited as to time, place, mode of enjoyment or otherwise) of, and all such interests in, any such rights as so belong to or shall so be acquired assigned by or be or become vested in the Assignor (all which rights hereby assigned or expressed or intended to be assigned are hereinafter collectively referred to as "the rights assigned"), TO HOLD the same unto COTT for its exclusive benefit during such time as the rights assigned continue to subsist and (in accordance with the provisions of the Articles of Association of COTT for the time being in force) remain vested in or controlled by COTT.

(b) The rights assigned to the Society by this Deed are the rights: -

(i) to reproduce the works in any material form

(ii) to perform the works in public

(iii) to communicate the works by cable

(iv) to broadcast the works

(v) to distribute copies of the works

in so far as such rights subsist under the law relating to copyright in Trinidad and Tobago, and includes such rights as subsist under the laws relating to copyright in all other countries in the world as in force from time to time."

3. *COTT hereby covenants with the Assignor that COTT shall from time to time pay to the Assignor such sums of money out of the monies collected by COTT in respect of the exercise of the rights assigned to COTT in the works of its members as the Assignor shall be entitled to receive in accordance with the Rules of COTT for the time being in force.*

4. *The Assignor doth hereby covenant with COTT that the Assignor has good right and full power to assign the rights assigned in*

manner aforesaid to COTT, and hereby warrants that the musical works in respect of which the rights assigned are hereby assigned or purported to be assigned do not or will not as the case may be infringe the copyright in any other works, and that the Assignor will at all times hereafter keep COTT harmless and indemnified against all loss, damage, costs, charges, and expenses which COTT may suffer or incur in respect of any claims which may be made upon or against COTT in respect of or as a result of any exercise by COTT of any of the rights which may hereby assigned or purported to be assigned, and that the Assignor shall and will so long as the Assignor shall continue to be a member of COTT do, execute, and make all such acts, deeds, power of attorney, assignments to or vesting in COTT or enabling COTT to enforce the rights assigned or any part thereof as COTT may from time to time reasonably require.¹

10. There was no dispute that “*Coal Pot*” was composed in 2001 and that it was caught by the terms of the Deed.

11. In mid-2012, an event entitled the “*Tobago Culinary Festival*” was planned by the Tobago House of Assembly, (the THA)². The Appellant and his agent, Ms. Reshma Ramlal applied to present the song at the festival. To this end, Ms. Ramlal sent the Appellant’s biography and an invoice to Mr. John Arnold, the Events Coordinator of the THA. However, the advance was rejected, with Mr. Arnold indicating that the cast for the Tobago Culinary Festival had already been selected.

12. In September, 2012, however, an advertisement appeared on CCN TV6 for another event: the *Tobago Blue Food Festival 2012*. The

¹ See p.* Record of Appeal

² The THA :The Respondent in this appeal

advertisement carried *“Coal Pot”* as its sound track for 39 seconds while the advertisement displayed various images of food types including pork. The advertisement bore a THA logo.

13. On the same day, the Appellant heard a radio advertisement, on 195.5 FM, promoting the 2012 Blue Food Festival. The radio advertisement also played the sound track with an excerpt from *“coal pot”*.
14. Ms. Ramlal on behalf of the Appellant, forthwith lodged a complaint with Mr. Arnold, who assured her that the advertisements would be discontinued.
15. Despite this assurance however, the ads continued to be displayed on multiple channels until the day of the Blue Food Festival on October 14, 2012.
16. One of the Appellant’s complaints concerned the display of pork dishes in the advertisements. The pork dishes were displayed while *“Coal Pot”* was being played. The Appellant testified that he found the association with pork to be offensive since he abstained from pork for religious reasons.
17. He therefore lodged a formal complaint with COTT, who eventually wrote to the representative of THA. By their letter, dated the April 5, 2013, COTT made a settlement offer of Sixty Thousand dollars (\$60,000.00) to the THA. There is no indication that THA ever responded to this letter nor is there any indication that COTT ever pursued the claim.

18. Mr. Arnold on behalf of the THA admitted that the THA played “*Coal Pot*” for the purpose of promoting the *Blue Food Festival*³. He claimed, however that the *Blue Food Festival* was not being presented for profit and its sole purpose was the promotion of Tobago as a Tourist destination⁴.
19. Mr. Arnold referred to conversations with Ms Ramlal, where he had agreed that the Appellant would be given a billing for the 2013 Blue Food Festival. Mr. Arnold testified further that Ms Ramlal accepted the proposal and that the Appellant indeed performed at the 2013 Blue Food Festival, for which he received a fee of Five Thousand dollars (\$5,000.00). Mr. Arnold contended that the Appellant thereby surrendered any claim regarding use of his song⁵.
20. On September 30, 2016, Attorney-at-Law, Mrs. Marielle Cooper-Leech sent a pre-action protocol letter to the THA. Mrs. Cooper-Leech contended that by playing “Coal Pot” in the Blue Food Festival advertisement, the THA infringed the Appellant’s neighbouring rights, performing rights and morals rights.⁶ Mrs. Cooper-Leech, claimed that her client had suffered loss and damage and sought compensation.
21. The THA never replied to the pre-action protocol letter and on October 14, 2016, the Appellant instituted proceedings seeking these items of relief:
- “(1) A declaration that the Defendant, whether acting by its officers, employees or agents or otherwise howsoever, infringed the*

³ See the witness statement of John Arnold filed on April 9, 2018 at para 4

⁴ Ibid para 8

⁵ See the Witness Statement of John Arnold at paragraph 9 & 19

⁶ See the Record of Appeal pages 167 and 168

neighbouring rights of the Claimant in the sound recording of the musical work entitled “The Cook (Coal Pot)”;

(2) A declaration that the Defendant, whether acting by its officers, employees or agents or otherwise however, infringed the moral rights of the Claimant in the musical work entitled “The Cook (Coal Pot)”;

(3) An inquiry as to damages for the infringement of neighbouring rights and moral rights, under section 38(1) of the Copyright Act, Chap. 82:80 (“the Act”), together with an order for the payment to the Claimant of all sums found due upon the making of the said inquiry;

(4) Exemplary damages under the Act;

(5) Interest on damages due and payable as the Court deems fit pursuant to section 25 of the Supreme Court of Judicature Act, Chap. 4:01 or alternatively the Court’s equitable jurisdiction;

(6) Costs (including all pre-action costs incurred by the Claimant);

(7) such further and/or other relief as the Court deems fit.”

22. On July 23, 2018, the trial Judge dismissed the Claim against the decision. Mr. Caruth has appealed.

The Judgment⁷

23. After setting out the undisputed facts, the Judge examined the provisions of s.18 and 21 of the 1997 Copyright Act⁸, which provided for neighbouring and moral rights.

24. The Judge identified the defences which were advanced by the Defendant. They were:

“a. The Defendant was not a proper party to the proceeding

⁷ See pages 7-16 of the Record of Appeal

⁸ Copy right Act 1997 Ch. 82:80

- b. The Claimant lacked the proper locus⁹ to bring the action*
- c. The Claim is instituted outside the limitation period*
- d. The Claimant is estopped from suing the Defendant or from claiming money from the Defendant”¹⁰.*

25. As to the defence of limitation, the Judge found that the provisions of the *Limitation of Certain Sections Act*¹¹ were expressly adopted by s.59 of the *Copyright Act*¹². The Judge held that the relevant limitation period was four (4) years from the date on which the cause of action accrued. According to the Judge, time would run from the date on which the alleged infringement occurred.
26. The Judge noted that the Blue Food Festival was held on October 14, 2012 and that the offending advertisements had been run from September, 20 up to that date. Since the claim was filed on October 14, 2016, the Judge found no merit in the limitation argument.
27. As to the contention that the THA was not a proper party, the Judge held that there was no evidence in support of this defence. The THA did not appeal this ruling.
28. In respect of the issue of *locus standi* however, the Judge held that the Appellant had assigned his neighbouring rights to COTT and was therefore incapable of instituting an action.¹³ There was however according to the Judge no evidence that the Appellant’s moral rights were assigned.

⁹ Locus standi

¹⁰ See paragraph 10 of the Judgment, ROA at page 11

¹¹ Ch. 7:09

¹² See paragraph 15 & 16 of the Judgment

¹³ See paragraph 25 of the Judgment

29. The Judge proceeded to consider whether the Appellant's moral rights were infringed. He considered in particular whether "*moral rights*" were infringed "*specifically by association of his work with pork and whether such an association legitimately offended his lifestyle choice and occasioned harm to his honour and reputation.*"¹⁴

30. The Judge rejected the Appellant's assertion that his moral rights had been infringed. He had regard to the fact that the Claimant had performed at the 2013 Blue Food Festival, where pork was served and promoted.¹⁵ The Judge reasoned in this way:

*"If as the Claimant contends, the use of his song in relation to pork offended his lifestyle and reputation then it is difficult to understand why he participated at the very same festival the following year, a festival at which pork would have been highlighted."*¹⁶

31. Ultimately, the Judge concluded:

*"The course of action aforementioned established in the Court's mind on a balance of probabilities that there can be no merit to the Claimant's contention that there was a distortion or mutilation of his work or that prejudice was occasioned to his honour or reputation."*¹⁷

The Appeal

32. The Appellant challenged the Judge's decision on two (2) major grounds. Firstly, the Appellant contended that the Judge was wrong to hold that he had assigned his neighbouring rights to COTT.

¹⁴ See paragraph 26 of the Judgment (page 14 of ROA)

¹⁵ See para 28 of the Judgment

¹⁶ Ibid

¹⁷ See paragraph 28 of the Judgment.

33. The Appellant also challenged the Judge's decision on moral rights. In particular the Appellant contended that the Judge erred by impliedly finding that the Appellant could forfeit his claim to breaches of his moral rights by his subsequent participation in the Blue Food Festival 2013.
34. The Appellant contended as well that the Judge failed to appreciate that the Appellant had a right to have his name prominently indicated in connection with the public use of his work.¹⁸

Submissions on Appeal

35. Mr Trancoso for the Appellant, submitted that the effect of the 1997 *Copyright Act* was that notwithstanding the Appellant's assignment of his music to COTT, he retained his neighbouring rights as producer and performer of "*Coal Pot*" and his moral rights as the author of that work.¹⁹
36. According to Mr Trancoso , the Judge had misread the Deed of Assignment and that "*the undermentioned rights*" in the Deed of Assignment did not include neighbouring and moral rights.
37. The Appellant cited the learning of *Copinger and Skone James on Copy Right* on moral rights and contended that the treatment of a work is "*derogatory*" if "*it amounts to a distortion or mutilation of the work or is otherwise prejudicial to the honour and reputation of the author.*"²⁰

¹⁸ See paragraph 3 (i) of the Notice of Appeal

¹⁹ See paragraph 19 of the Written Submissions filed on behalf of the appellant on October 11, 2019

²⁰ See para 23 Written Submissions filed on behalf of the Appellant

38. The Appellant argued further that his rights were breached in that the THA made no reference to him as the creator of the song. The Appellant was not identified as composer or producer or performer.²¹

Respondent's Submissions

39. In their succinct written submissions, Mr Pantin for the Respondent argued that on a plain reading of the Deed of Assignment and the *1997 Copyright Act*, the Appellant had transmitted his neighbouring rights to COTT. Counsel argued that the Judge was correct in his view that the Appellant did not have *locus standi* to claim that there was a breach of his neighbouring rights.²²
40. The Respondent also argued that the Judge was correct in his decision on moral rights that the Appellant's subsequent performance at the Blue Food Festival 2013 demonstrated that the "*alleged derogatory treatment*" did not exist.

Viva Voce Submissions

41. Parties supplemented their written submissions of the hearing of the appeal.
42. Mr. Trancoso for the Appellant restated his submissions that the Appellant had not assigned his neighbouring rights to COTT. He alluded to the different sections which created the two rights: copyright and the neighbouring right. Counsel argued the two rights were brought into the jurisdiction of Trinidad and Tobago by two

²¹ Ibid at paragraph 29

²² See paragraph 11 of the written submissions filed by the Respondent on January 30, 2020

different conventions that is to say the *Berne Convention*²³ and the *Rome Convention*.²⁴

43. In answer to the President of the panel, Mr. Trancoso specified that section 5 of the 1997 Copyright Act concerned copyrights and section 20 concerned neighbouring rights. According to Mr. Trancoso section 5 (1)(e) of the 1997 Copyright Act, which provided for “musical works” in fact concerned the literacy aspect of a musical work²⁵. Mr. Trancoso submitted further that when Mr. Caruth penned the song and took it to COTT, it was the sheet music that fell within the protection of s.5(1)(e) and which was assigned to COTT²⁶.
44. Mr. Trancoso took the Court to *Sawkins v Hyperion Records Ltd*²⁷ a decision in which the Court of Appeal (UK) considered the meaning of the “original musical works in the context of the 1998 UK Act²⁸. Referring to paragraph 45 of the judgment, Mr. Trancoso submitted that a musical work in which copyright subsists must consist of music and accompanying words, must be original and must be recorded.
45. Mr. Trancoso submitted that COTT does not administer neighbouring rights and for that reasons Mr. Caruth instituted his claim in respect of neighbouring rights.
46. Mr. Trancoso turned to moral rights. He stated that a moral right that cannot be assigned is the right to be indicated prominently on the work when it is in public view.

²³ Berne Convention for the Protection Literacy and Artistic Works 1886

²⁴ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisation (Rome Convention) 1961

²⁵ See page 8 of the Transcript dated March 22, 2024

²⁶ Ibid at page 9

²⁷ [2005] 1WLR

²⁸ See the Transcript date March 22, 2024 at page 10

47. Mr. Trancoso, in answer to the panel, argued that the Deed of assignment dealt only with copyright²⁹. Mr. Trancoso underscored, that it was for that reason, that the claim was only based on neighbouring and moral rights.
48. Ultimately, Mr. Trancoso argued that the nub of the appeal was whether clause 2 of the Deed of Assignment included neighbouring and moral rights.
49. Counsel argued that the association of the song with pork offended Mr. Caruth's moral rights. It was at this point in his submissions, that Mr. Trancoso referred to *Inshan Ishmael v Weston Rawlins*³⁰. This authority concerned a claim in defamation and was irrelevant to the matter before us.

Submissions for the Respondent

50. In his *viva voce submissions*, Mr. Pantin for the Respondent identified the crux of the issue to be the proper interpretation to be placed on the Deed of Assignment.
51. Mr. Pantin submitted that the issue would really “*boil down*” to an interpretation of clauses 2(a) and (b) to see whether 2(b) captures “*neighbouring right that may be associated with musical work and with the capacity of an assigner.*”³¹
52. Counsel continued by clarifying the capacity in which Mr. Caruth entered the agreement with COTT.

²⁹ See p. 14 of the Transcript

³⁰ Inshan Ismael v Weston Rawlins cv2023-00753

³¹ See the transcript at page 20 lines 15-17

“That is to say capacity as a performer or as an author in which the copyright acts...would really attach to him as an author.”³²

53. Addressing the content of neighbouring rights, Mr. Pantin directed the Court’s attention to paragraph 2(b) of the Deed of Assignment and submitted that it related to the reproduction of music in a material form. Mr. Pantin reminded the Court that the Appellant’s claim related to a sound recording which was “*a recorded form*” and not “*a material form*”.³³
54. Counsel pointed out that clause 2(b) dealt with the performance of a work in public. He submitted that those rights have been assigned under the Deed of Assignment.
55. Mr. Pantin submitted that the language at clause 2(b) of the Deed of assignment captures the same subject matter as the neighbouring rights, as set out at section 21 of the *1997 Copyright Act*.
56. In response to a question from the President of the Court, Mr. Pantin stated that section 8 of the *1997 Copyright Act* did not assist the Appellant to the extent that section 8 demonstrated that clause 2(b) of the Deed of Assignment refers to neighbouring rights.³⁴
57. Mr. Pantin confirmed that in his submission clause 2(b) of the Deed of Assignment included neighbouring rights.³⁵ He submitted that the Appellant wore different hats in relation to the same work, that is to

³² Ibid at line 17-20

³³ Ibid p. 20 lines 21-27

³⁴ See page 22 of the Transcript at lines 9-13

³⁵ See page 22 of the Transcript at lines 21-22

say as author and performer.³⁶ Mr. Pantin continued that by the Deed of assignment, the Appellant assigned

“...all of his rights that he has or may now and shall hereafter acquire...”.³⁷

58. Mr. Pantin’s attention was drawn to the pre-action protocol letter dated September 30, 2016.³⁸ He then referred to the letter dated April 5, 2013 and written on behalf of COTT³⁹, and submitted;

“it strikes me that what COTT is seeking...to exert its mandate in relation to copyright acts since they are dealing with it on behalf of Mr. Caruth...”.⁴⁰

59. Mr. Pantin made this concession:

*“so I do accept that at least by this letter (the letter of April 5) COTT has not sought to try and assert any rights in relation to the protection of neighbouring rights.”*⁴¹

60. Mr. Pantin suggested that in July, 1997 when the Deed of Assignment was executed, the 1997 Copyright Act had not been enacted. Mr. Pantin submitted that the Court was required to interpret *“what the clear language of this Deed of Assignment is saying....”*.⁴²

61. Mr. Pantin submitted that there was nothing in the Deed of Assignment or in the evidence before the Court below to suggest that COTT, when it executed the deed of Assignment, was restricting itself solely to the copyrights and not to the neighbouring rights.

³⁶ See page 23 of the Transcript at lines 6-9

³⁷ Ibid at lines 14-20

³⁸ See page 167 of the Record of Appeal

³⁹ See p. 157 of the ROA

⁴⁰ See the Transcript at page 25 lines 19-14

⁴¹ Ibid at lines 26-29

⁴² See page 26 of the Transcript line 11-13

62. In answer to the President of the Court, Mr. Pantin acknowledged the force of clause 4 of the Deed of Assignment, which created a covenant by the assigner but had not mention neighbouring rights. Mr. Pantin submitted that clause 4 spoke for itself.
63. Counsel submitted that neighbouring rights came into being by the *Rome Convention*.⁴³ Justice of Appeal Kokaram drew to Mr. Pantin's attention the similarity between clause 2 (b) and s. 8 (1) of *the 1997 Copyright Act*, suggesting that the rights in question were limited to copyrights.
64. Mr. Pantin addressed the issue of moral rights. Justice of Appeal Kokaram questioned Mr. Pantin on the evidence that is to say whether the complaint was that images of pork were displayed while the song was being played.

Discussion

65. Two issues arise for our consideration. The first is whether the Judge was plainly wrong in dismissing the Appellant's claim in respect of neighbouring rights. The second is whether the Judge was plainly wrong in dismissing the Appellant's claim in respect of moral rights.

Neighbouring Rights

66. We considered the meaning of the term "*neighbouring rights*." Historically they were rights recognised by the international community in the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting*

⁴³ Rome convention for the Protection of Performers, Producers of Phonograms Broadcasting 1961

Organisations 1961. This Convention, also known as the “*Rome Convention of 1961*” or the “*Neighbouring Rights Convention*”⁴⁴ was drafted at the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organisation. The conference was convened jointly by the ILO, UNESCO and United International Bureaux for the Protection of Intellectual Property (BIRPI) which is the predecessor of WIPO.

67. The Convention was designed to protect the rights of performers whose works of art had an ephemeral character in that “*they disappeared the moment they were seen or heard...*”.⁴⁵
68. It was recognised that technological innovations towards the end of the 18th Century, rendered the reproduction of the performances open to unauthorised reproduction through phonograms, radio and television. It was possible to capture and reproduce performances without the permission of performers. The Convention addressed the rights of those performers, who not being the composers or creators of the works did not hold rights in copyright.
69. The neighbouring rights were therefore distinct from the rights in literacy and artistic works, the protection of which was recognised in ***the Berne Convention for the Protection of Literary and Artistic Works*** 1971. The latter was known as copyrights convention and pertained to more permanent works, while neighbouring rights pertained to the transient, ephemeral performances, which are not fixed.

⁴⁴ See the Guide by WIPO to the Rome Convention and to the Phonograms Convention P.15

⁴⁵ WIPO Guide to the Rome Convention p. 9 para XII

70. The concept of neighbouring rights made its first appearance into domestic law of Trinidad and Tobago through the Copyright Act 1985.⁴⁶ This Act repealed *the Copyright Act of 1913*, which was reproduced as Ch. 82:80 of the Revised Law of Trinidad and Tobago 1980 and which made no reference to neighbouring rights.

71. The 1985 Act however provided for neighbouring rights at Part III of that Act. Part III of the 1985 Act includes Sections 10 to 17. Section 10 identifies the three categories of productions in respect of which neighbouring rights may subsist. They were:

- (i) Sound recordings
- (ii) Audio visual productions
- (iii) Broadcasts

Each of these was defined at section 3 of the 1985 Act as follows:

“audio-visual production” means the aggregate of a series accompanying sounds, if any, which is capable of being shown by means of a mechanical, electronic or other device and irrespective of the nature of the material support on which the visual images and sounds if any, are carried, but does not include a broadcast;

.....

“a broadcast” means the aggregate of sounds, or of sounds and visual images, embodied in a programme as transmitted by radio or television broadcasting;

.....

“sound recording” means the aggregate of sounds embodied in, and capable of being reproduced by means of, a record of any description, other than a soundtrack associated with an audio-visual production;

⁴⁶ Act No.13 of 1985

72. Section 12 of the 1985 Act identified the nature of the protection provided by neighbouring rights. They were the exclusive right in respect of sound recordings and the right to reproduce and to distribute them.⁴⁷
73. By section 17, of the 1985 (repealed) Act, copyright and neighbouring rights were to subsist independently, section 17 provides: *“the neighbouring rights subsisting by virtue of this Part shall be additional to, and independent of, any copyright subsisting by virtue of Part II”*.
74. The 1985 Act was repealed and replaced by the 1997 *Copyright Act*. This Act, though amended in the years 2000 and 2008, is the currently subsisting *Copyright Act* and has been referred throughout this judgment as *the 1997 Copyright Act*. It received Presidential Assent on May 9, 1997 and came into force on October, 1, 1997.
75. The Copyright Act 1997 refers to neighbouring rights at section 20 in these terms:
- “Neighbouring rights are property rights which subsist in performances, sound recordings and broadcasts.”⁴⁸*
76. Section 21 provides for the rights of performers. They are invested with the exclusive right to authorise or to prohibit the broadcasting or other communication of his performance to the public.

⁴⁷ See section 12 *“Subject to this act, the neighbouring rights subsisting in a protected production are the exclusive rights to do, or to authorise other persons to do, in relation to the production or a substantial part thereof, in Trinidad and Tobago or on any ship or aircraft registered in Trinidad and Tobago any of the following acts- (a) in the case of a sound recording, reproducing or distributing copies of it...”*, Copyright Act 1985 Repealed

⁴⁸ Act 8 of 1997 which may be found at Ch.82:80 of the Revised Laws of Trinidad and Tobago (2006)

77. The producer of a sound recording is invested with exclusive rights by section 22 to authorise or prohibit the direct or indirect reproduction of the sound recording.
78. Section 24 identifies the period during which the right will subsist. They are operative from the moment when the broadcast takes place until the end of the 50th calendar year following the year in which the broadcast first took place.
79. Exceptions are provided at section 25, which limits the protection afforded by ss. 21, 22, 23 and 24 of the Act. The exceptions pertain to three distinct situations. They are where the use of the broadcast is by a natural person for personal purposes; where a short excerpt is used for reporting current events; or where the broadcast is used for face to face teaching or scientific research.
80. Interestingly, the *1997 Act* omits the provision of section 17 of the repealed 1985 Act, which provides that copyright and neighbouring rights are to subsist independently.
81. However, throughout the *1997 Act*, the two rights are treated separately. For example section 26, which provides for ownership and assignments, treats copyrights and neighbouring rights separately. Ownership in copyright is held by the author who has created the work.⁴⁹ On the other hand, the original owners of neighbouring rights are held by the performer in the case of performances, and by the producer in the case of sound recordings and by the broadcasting organisation in the case of a broadcast.⁵⁰

⁴⁹ See section 26(1) of the 1997 Act

⁵⁰ See section 26(1A) of the 1997 Act

82. Section 28 contemplates the transmission of copyright and neighbouring rights by assignment, by disposition or by operation of law.⁵¹ Such assignment must be in writing and signed by the assignor in order to be effective.⁵²

Applying the 1997 Copyright Act to the Appellant

83. The Appellant was the author of “*Coal Pot*”.⁵³ He was therefore entitled to the copyright in the musical work. There is no dispute that his rights in copyright had been assigned to COTT.⁵⁴

84. He was also the performer of “*Coal Pot*”. He testified that he recorded the song at Rituals Recording Studio in Port of Spain in December 2001 and that he first performed it publicly on December 26, 2001 at Skinner Part, San Fernando.⁵⁵

85. The effect of this undisputed evidence is that the Appellant was the holder of both copyright and neighbouring rights in “*Coal Pot*”. The broadcast of the soundtrack of “*Coal Pot*” by the THA would therefore have been in breach of those rights, so as to attract the civil remedies provided by *the 1997 Copyright Act*.

86. The question which arises in this appeal however is whether those rights had been assigned to COTT. If they had, the Appellant would have had no *locus standi* to complain since his rights had been assigned under Part VI of *the Act*.

⁵¹ Section 28(1) of the Act

⁵² See s.28(2) 1997 Act

⁵³ See para 3 of his Witness Statement dated 9th April, 2018

⁵⁴ Copyright Organisation of Trinidad and Tobago

⁵⁵ See para 3 of the Witness statement of Mr. Caruth’s dated 9th April, 2018

87. It was common ground that Mr. Caruth had assigned his copyrights in “Coal Pot” and indeed in all his musical works to COTT. It was for that reason that his claim omitted any reference to his rights in copyright.

88. The question which arises is whether by the Deed of Assignment to COTT⁵⁶, the Appellant assigned both copyrights and neighbouring rights. The Appellant asserts that the assignment related to copyright only, while the THA argues that it related to both.

89. The resolution of this issue depends on the interpretation to be placed on the Deed of Assignment, which was made on July, 1, 1997.

90. The entire deed of Assignment is set out earlier in this judgment. The operative words may be found however at Clause 2(a):

“The Assignor hereby assigns to COTT the undermentioned rights in all musical works which now belong to or shall be acquired by or become vested in the Assignor during the continuance of the Assignor’s membership of COTT.”

91. “Coal Pot” was composed in 2001. However, by its clear provision, Clause 2(a) has prospective effect and would have been effective in assigning “Coal Pot” to COTT.

92. What was disputed however was whether the term “the undermentioned rights” as expressed in clause 2(a) included both copyright and neighbouring rights.

93. The undermentioned rights, are listed out at Clause 2(b). they are set out here:

(i) To reproduce the works in any material form

⁵⁶ The Deed of Assignment dated July 1, 1997. See p.* Record of Appeal

- (ii) *To perform the works in public*
- (iii) *To communicate the works by cable*
- (iv) *To broadcast the works*
- (v) *To distribute copies of the works*

in so far as such rights subsist under the law relating to copyright in Trinidad and Tobago, and includes such corresponding rights as subsist under the laws relating to copyright in all other countries in the world as in force from time to time.”

94. This menu of rights bore a close and curious resemblance to the rights set out at s.8(1) of *the 1997 Act*. The question was whether Cl. 2(b) was a reflection of s.8 and whether it could be interpreted in the light of clause 8, which expressly related to copyright. Both Counsel submitted that section 8 of *the Act* was unhelpful, since the Deed of Assignment pre-dated *the 1997 Act*. According to Counsel, *the Act* could not aid interpretation, since it had not yet come into effect.

95. In construing a written instrument such as a Deed of Assignment, the Court is concerned to give effect to the real intention of the parties.⁵⁷ The real intention must be gathered from the written instrument read in the light of such extrinsic evidence as is admissible for the purpose of construction.⁵⁸ The Court is concerned to ascertain what the parties meant by the words that have been used, to give effect to the intention as expressed.⁵⁹ The instrument must be construed as a whole.⁶⁰

⁵⁷ See Vol. 12, Halsbury's Laws of England (4th ed.) para 1459

⁵⁸ *Ibid* at para 1460

⁵⁹ *Ibid*

⁶⁰ *Ibid* para 1469

96. The law provides for the possibility of implied terms which may be read into an instrument in a number of situations. These include the implications relating to a particular trade; or implications necessary to give effect to a transaction and terms which can be implied by statute.⁶¹ However, the rule of *expressio unius est exclusio alterius* is applicable to the interpretation of Deeds of Assignment. Accordingly, the express inclusion of copyright excludes rights that have not been expressly mentioned.
97. Throughout the Deed of Assignment, between the Appellant and COTT there is express mention of copyright. Conversely, there is no express mention of neighbouring rights. In order to include neighbouring rights in the Deed of Assignment, it would be necessary to do so by necessary implication.
98. A plain reading of the instrument however does not suggest that there is a need to include neighbouring rights for any reason recognised by law. There is no necessary implication because of a trade usage or custom. It is not necessary to impliedly include reference to neighbouring rights in order to give effect to the instrument, and there is no term, whose implication is required by statute.
99. As stated above, what one finds is express mention of copyright with neighbouring rights having been excluded. By the operation of the *expressio unius* principle, the express mention of copyrights, as listed at s.2(b), impliedly excludes the neighbouring rights of the Appellant as a performer. For this reason, it is our view that the Deed of Assignment related only to copyright. There are however other reasons.

⁶¹ 12, Halsbury's Laws of England, (4thed.) para 1474

100. The parties are correct, and we accept their submission that the *1997 Copyright Act* was not in force when the Deed of Assignment was executed. Its provisions ought not to be invoked as an aid to interpreting the Deed of Assignment. At the time of execution of the Deed of Assignment however, the prevailing *Copyright Act* 1985 was in force and was repealed only when *the 1997 Act* came into force in October 1997. Parties would have been aware of the provision in the 1985 Act that rendered copyright and neighbouring rights distinct rights. This meant that reference to one could not impliedly include reference to the other.
101. Moreover, both the *1985 Act*, and the current *1997 Copyright Act*⁶², prohibits assignment of both copyrights and neighbouring rights, unless the assignment is in writing.⁶³ Both statutes treat the rights separately, suggesting that an assignment of the neighbouring rights, in order to be effective ought to have been expressly in writing. In the context of the statutes, anything short of an express written assignment would not be effective.
102. The trial Judge did not consider the Deed of Assignment in the context of the prevailing statutory provisions. His failure to consider caused him to fall into error and it is our view that in so far as he held that the Deed of Assignment included neighbouring rights, he was plainly wrong.
103. The clear implication of our finding is that the Appellant had not assigned his neighbouring rights to COTT. By their broadcasts by way of advertisements, the THA reproduced the sound track of “*Coal Pot*” without the Appellant’s permission. They breached his

⁶² 1997 Act at 28(2)

⁶³ 1985 Act section 19(3)

neighbouring rights and are therefore liable to compensate him in accordance with the *1997 Copyright Act*.

Moral Rights

104. We proceed to consider the Appellant's claim in respect of moral rights. The trial Judge refused the claim in respect of moral rights because he rejected the Appellant's testimony that he found the association of his work with pork to be offensive. We found the trial Judge's assessment to have been unfair in that he did not consider that images of pork were displayed while the song was being played, so as to create a distinct connection between the pork dishes and the song. The Judge also made reference to aspects of Tobagonian culture, in respect of which there was no evidence.⁶⁴ He also asserted that pork dishes were served at the 2013 Blue Food Festival and there was also no evidence of this.⁶⁵ Nonetheless, we are prepared to recognise that the Judge's decision in this regard is one of fact and we will be slow to interfere.

105. Moral rights are not however breached only by reference to offensive material. One clear statutory aspect of moral rights is the right to have one's name indicated in the reproduction of the work. Accordingly, s.18(1) of the *1997 Act* provides:

"18. (1) Independently of his copyright and even where he is no longer the owner of copyright, the author of a work shall have the right

(a) To have his name indicated prominently...in connections with any public use of his work."

⁶⁴ See para 28 of the Judge's decision at page 9 of the ROA

⁶⁵ Ibid

106. There was no dispute in this claim that THA did not indicate the Appellant's name in the soundtracks that accompanied their advertisements. This consideration was totally omitted by the trial Judge. In this way, the trial Judge fell into error and was plainly wrong.

107. We therefore find in favour of the Appellant. The Judge was plainly wrong on both issues as to neighbouring rights and moral rights. His decision is set aside and judgment entered for the Appellant.

Damages

108. At the hearing of the appeal, the Court gave directions for the filing of additional submissions on the issue of the damages which might be due to the Appellant, should his appeal be successful.⁶⁶

Submissions for the Appellant on Damages

109. Mr. Trancoso for the Appellant, relying on *Sheldon v Daybrook House Promotions Ltd*⁶⁷ argued that the measure of damages due to the Appellant fell to be measured according to the amount of his license fee. According to Mr Trancoso, where there was no "going rate" for licenses, damages should be determined according to the evidence. At length, Mr Trancoso argued that the Appellant was entitled to \$60,000.00 in damages for each infringement as the amount invoiced by COTT to the THA on April, 5, 2013 for synchronisation license.

110. Mr. Trancoso argued that the Appellant was entitled to additional damages, in the sum of \$100,000.00. As to moral rights, it was

⁶⁶ Submissions were filed for the Appellant on April 9, 2024 for THA on April 23, 2024 and Reply on April, 30.

⁶⁷ [2013] EWPCC 26

contended that \$60,000.00 for each infringement was appropriate compensation.

111. Counsel argued further that the Appellant was entitled to an award of exemplary damages in the sum of \$100,000.00.

112. Altogether, Counsel submitted that the Appellant was entitled to the following:

(a) General damages for		
Neighbouring rights	...	\$2,940,000.00
(b) General damages for		
For moral rights infringement		
Under s.18.1(a)	...	\$2,940,000.00
For 49 months		
(c) General damages for		
For moral rights infringement	...	\$2,205,000.00
For 49 months		
(d) Exemplary damages		\$ 100,000.00
(e) Additional damages		\$ 100,000.00

Submissions for the Respondent

113. Mr. Pantin for the Respondent argued that the Appellant's claim for general damages was irrational and unreasonable. In respect of additional damages, Mr. Pantin argued that there is no provision for additional damages in the local Act.⁶⁸ Counsel admitted however, that the Appellant could receive compensation for non-pecuniary loss such as hurt feelings. As to exemplary damages, Mr. Trancoso argued that these are not prescribed by s.38 of the Act.

⁶⁸ See the written submissions for the Respondent filed on April 23, 2024 at para 2

114. Mr. Pantin argued that in the absence of evidence as to an appropriate licence fee, the Court should award nominal damages. Counsel suggested that an appropriate award of \$150,000.00.

Appellant's Submissions in Reply

115. In reply, Mr. Trancoso argued that the conduct of the THA as a State body was absolutely unacceptable and their flagrancy ought to be condemned by an award of exemplary damages.
116. As to the lack of evidence, Mr. Trancoso made submissions on the proper interpretation to be placed in the settlement offer by COTT. He argued that COTT had not extended its services to facilitate social media. In his submission however, the Court of Appeal should consider the reach of the Respondent advertisements on social media.

Discussion

117. Intellectual property rights, including neighbouring and moral rights owe their existence to statute. The infringement of those rights have been treated as statutory torts. Awards of damages must therefore be assessed principally according to the according *Copyright Act* and secondly, according to the general principles for the award of damages in tort, at common law.⁶⁹
118. Regrettably in our jurisdiction, there is a dearth of authority on the award of damages in intellectual property cases . The issue of damages under the *Copyright Act* was however considered by Master Pierre in *Sean Drakes v Donald Grant*⁷⁰. This was an authority cited by both parties.

⁶⁹ Llewelyn, Assessment of Damages in Intellectual property Cases at paragraph 13

⁷⁰ CV 2018-01224

119. Sean Drakes was a journalist/photographer who had taken a photo of Peter Minshall's "*Dying Swan*"⁷¹. Mr. Drakes had uploaded the photograph to a licencing platform, entitled the Getty Images. He later discovered that the photograph was being reproduced by Donald Grant for the promotion of a profit event entitled *Fashion Coda 4*.
120. Drakes instituted proceedings which were successful before Rahim J. The issue of damages was remitted to be assessed by Master Pierre.
121. In the course of her judgment, Master Pierre cited *Sheldon v Daybrook*⁷² and noted that where the Claimant is in the business of licencing out the copyright, damages are to be measured by a licence fee. She referred to *Oliver Harris (manufacturing) v Hamilton*⁷³ where the appropriate measure of damages was held to be a reasonable charge for the use of the work in question based on what would have been fair remuneration, if a licence had been granted.⁷⁴
122. As it transpired there was no evidence of a licence and Master Pierre took into account the amount, which Drakes requested of Grant when the infringement was discovered.
123. Master Pierre considered whether additional damages should be awarded. She cited UK and Australian authorities and noted that those cases were decided on express provisions in their respective jurisdictions. Master Pierre noted that there is no provision for

⁷¹ The Dying Swan Ras Nijinsky in Drag as Pavlova

⁷² [2013] EWPCC 26

⁷³ [1992] SLT 392

⁷⁴ Sean Drakes v Donald Grant *Master Pierre para 7

additional damages in the local Act. Having considered the evidence of distress, Master Pierre made an award for inconvenience and distress by uplifting the first award by \$5,000.00.

124. Master Pierre rejected the claim for exemplary damages on the ground that it had not been pleaded.

Applying the Authorities to the Appellant

125. Where there is an infringement of a right protected by *the 1997 Copyright Act*, the Court is empowered to award damages pursuant to s.38 (1) (d) and (e). Section 38(1) provides:

“The Court shall have the authority

.....

(d) to order that the owner of any right protected under this Act, whose right has been infringed be paid by the infringer, damages adequate to compensate for injury suffered as a consequence of the act of infringement as well as the payment of expenses caused by the infringement, including legal costs.

(e) to fix the amount of damages taking into account the pecuniary and non-pecuniary loss suffered by the owner of the right.

(f) to order an account of the infringer’s profits.”

126. The Appellant invoked these sections to harvest damages under 3 heads: general damages, additional damages and exemplary damages, in respect of the infringement of his neighbouring rights and his moral rights. We considered each head separately.

127. The meaning of additional damages was considered extensively by Pumfrey J in *Nottinghamshire Healthcare NHS Trust v News*.⁷⁵ It is noted however that UK decisions on “*additional damages*” are

⁷⁵ [2002] EWHC 409

based on the specific statutory provisions of the *Copyright, Designs and Patents Act 1988 UK*. Section 97 of the UK Act provides as follows:

“Provisions as to damages in infringement action.

(1) The court may in an action for infringement of copyright having regard to all the circumstances, and in particular to-

(a) The flagrancy of the infringement, and

(b) Any benefit accruing to the defendant by reason of the infringement,

Award such additional damages as the justice of the case may require modification etc”.

128. There is no analogous provision in *the 1997 Copyright Act*. There is also no provision for the award of additional damages in the local *1997 Act*. The Court is empowered to award damages as prescribed by s.38 (d) and (e). The Court is not empowered to import common law heads of damage or to make an award on the basis of a foreign statute, which has no analogous provision in Trinidad and Tobago.

129. This is equally true of exemplary damages. There is no provision for exemplary damages in *the 1997 Copyright Act*. Damages therefore fall to be assessed according to s.38 (1) (d) and (e), which we proceed to consider.

130. The regime established by *the 1997 Copyright Act* for the award of damages is set out in s.38 (1) (d) and (e). Sub-section (d) invests the Court with the authority to order that damages be paid by the infringer to the person whose rights have been infringed.

131. The sub-section also sets out the measure of those damages. They must be adequate to compensate for injury suffered. This will

require the Court to embark on an enquiry into the evidence of the injury suffered by the person whose rights have been infringed.

132. Under section 38(1)(d) of the 1997 *Copyright Act*, the aggrieved holder of the right is entitled, in addition to damages, to the payment of expenses caused by the infringement including legal costs. Under this second head of damages, compensation will not be at large but will be restricted to actual expenses, for which, the aggrieved person should furnish proof.

133. Having empowered the Court to order damages and having specified that damages are awarded to compensate the aggrieved person for injury, *the 1997 Copyright Act* proceeds at s.38(1)(e) to direct the Court to the factors which should be taken into account in fixing the amount of damages. They are restricted to pecuniary and non-pecuniary loss suffered by the owner of the right. Non-pecuniary loss would include distress and inconvenience. Pecuniary loss must be over and above the expenses for which the aggrieved person received compensation under s.38(1)(d) and would include loss of profits or goodwill as a result of the infringement. In both cases, the losses must be established by evidence.

134. The pecuniary loss suffered by the Appellant was the use of the recording without a licence. Where there is no evidence of the value of the licence, the Court must award reasonable charges for the use of the work.⁷⁶

135. In these proceedings, there is no evidence of the amount of the licence fee. The Appellant has argued that the value of the licence fee is to be found in the letter of COTT.

⁷⁶ See para 7 of *Sean Drakes v Donald Grant**

136. On April 3, 2013, COTT wrote to Mr. John Arnold in respect of the infringement of Mr. Caruth's copyright in the song "*the Cook aka Coal Pot*". COTT claimed that the THA could be liable for statutory damages as high as \$250,000.00. The author of the letter gave no particulars or computation as to how he arrived at that figure. He indicated that the Appellant had agreed to a settlement figure of \$60,000.00. Once again there was no indication as to the computation of \$60,000.00. There was no evidence of a licence fee for copyright or any other right protected under *the Act*. We therefore find that the letter of April 5 provides no evidence of the licence fee and is no more than a settlement offer.
137. We therefore proceed to consider what would have been a reasonable charge for the use of the recording of the "*the Cook*" having regard to all the evidence.
138. In these proceedings however, there is no evidence of the pecuniary losses suffered by the Appellant. The Court is left to rely on the settlement offer and the amount which the Appellant, through COTT, indicated as an acceptable quantum for the infringement of his copyright.
139. The settlement offer was made in April, 2013, some six (6) months after the major infringement of Mr. Caruth's rights. This occurred between September 20, 2012 and 14th October, 2012, by the airing of ads on CCN TV6, CNC 3 and Tobago Channel 5. The settlement offer did not appear to include the indefinite reproduction of the sound recording on YouTube.
140. The Court recognises that, in making a settlement offer, a litigant takes into account the expenses, which would be avoided by litigation. One would expect that a settlement offer would fall

marginally below the quantum which would be eventually sought by the litigant in court proceedings.

141. In all the circumstances it is our view that, with the Appellant's settlement offer in mind, as well as the continuing infringement on YouTube a just award of damages for pecuniary loss would be \$100,000.00.

142. We proceed to consider the non-pecuniary loss. The Appellant clearly suffered distress and inconvenience. He was aware of the popularity of his song and this motivated him to offer to perform it at the Tobago Culinary Festival 2012. He gave evidence of his surprise at hearing the advertisements. This led to an unsuccessful request to have the ads removed.

143. The Appellant's non-pecuniary loss therefore consisted in hurt feelings, distress and outrage. This was compounded by the impunity with which the advertisements were run and the length of time for which they were allowed to continue. In all those circumstances, it is our view that a just award of damages for non-pecuniary loss would be \$100,000.00.

144. As stated above, additional and exemplary damages have not been contemplated in the *1997 Copyright Act* and no award will be made under these heads.

Disposition

- i. The Appeal is allowed
- ii. Judgment is entered for the Appellant against the Respondent
- iii. The Respondent/THA do pay the Appellant damages assessed in the sum of \$200,000.00

- iv. The order of the Trial Judge as to costs is set aside
- v. The Respondent pay to the Appellant the costs at the High Court on the prescribed scale quantified on the value of the claim in the sum of \$200,000.00,
- vi. The Respondent to pay to the Appellant the costs of the appeal in the sum of 2/3 of the costs at (v) above.

Dated the 22nd day of July 2025

Mira Dean-Armorer⁷⁷

Justice of Appeal

⁷⁷ Sherisse de Freitas (JRC 1)

Appendix

The Law

*the Copyright Act*⁷⁸ Salient provisions

Section 5

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—....(e) musical works, with or without accompanying words;....*⁷⁹

(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.*

Section 8

8. (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;

⁷⁸ The Copyright Act Ch. 82:80

⁷⁹ Emphasis mine

(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.

Section 18 provides for moral rights

18. (1) Independently of his copyright, and even where he is no longer the owner of copyright, the author of a work shall have the right—

(a) to have his name indicated prominently on the copies and in connection with any public use of his work, as far as practicable;

(d) to object to any distortion, mutilation or other modification of, or other derogatory action in relation to his work, which would be prejudicial to his honour or reputation.

(2) None of the rights mentioned in subsection (1) shall be transmissible during the life of the author, but the right to exercise any of those rights shall be transmissible by testamentary disposition or by operation of law following the death of the author.

(3) The author may waive any of the moral rights mentioned in subsection (1), provided that such a waiver is in writing and clearly specifies the right or rights waived and the circumstances in which the waiver applies and provided further, that any waiver of the right under paragraph (d) of subsection (1) specifies the nature and extent of the modifications or other action in respect of which the right is waived, and following the death of the author, the natural person or legal entity

upon whom or which the moral rights have devolved shall have the right to waive the said rights.

(4) Independently of his copyright and even where he is no longer the owner of copyright, the performer shall, as regards his live performances and performances fixed in sound recordings and audio-visual fixations, have the right-

(a) to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance; and

(b) to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation

(5) Subsections (2) and (3) apply mutatis mutandis to the rights granted under subsection (4).

(6) Nothing in this section shall be construed to deprive the performer of the right to agree by contract, on terms and conditions more favourable for him in respect of his performance.

Section 20 provides for neighbouring rights

20. Neighbouring rights are property rights which subsist in performances, sound recordings and broadcasts.

Section 38(1) of the Act sets out the items of relief which can be awarded when rights under the Act have been infringed.

We have set out s.38 in its entirety in the Appendix below.

We have however set out Sub-sections (d) and (e) which are relevant to this appeal:

“(d) to order that the owner of any right protected under this Act, whose right has been infringed be paid by the infringer, damages adequate to compensate for injury suffered as a

consequence of the act of infringement as well as the payment of expenses caused by the infringement, including legal costs.

(e) to fix the amount of damages taking into account the pecuniary and non-pecuniary loss suffered by the owner of the right.

(f) to order an account of the infringer's profits."

38. (1) The Court shall have the authority—

- (a) to grant injunctions to prohibit the committing, or continuation of committing, of an infringement of any right protected under this Act;*
- (b) to order the impounding of copies of works or sound recordings suspected of being made or imported without the authorisation of the owner of any right protected under this Act where the making or importation of copies is subject to such authorisation, as well as the impounding of the packaging of, the implements that could be used for the making of, and the documents, accounts or business papers referring to, such copies;*
- (c) to order the forfeiture and seizure of all copies of works or sound recordings manufactured, reproduced, distributed, sold or otherwise used, intended for use or possessed with intent to use in contravention of section 8 or 22 and all plates, moulds, matrices, masters, tapes, film negatives, or other articles by means of which such copies of works or sound recordings may be reproduced, and all electronic, mechanical or other devices for manufacturing, reproducing, or assembling such copies of works or sound recordings;*
- (d) to order that the owner of any right protected under this Act whose right has been infringed, be paid by the infringer, damages adequate to compensate for the injury suffered as a consequence of the act of infringement, as well as the payment of expenses caused by the infringement, including legal costs;*

(e) to fix the amount of damages taking into account the pecuniary and non-pecuniary loss suffered by the owner of the right; (f) to order an account of the infringer's profits attributable to the infringement; (g) where infringing copies exist, to order the destruction or other reasonable disposition of those copies and their packaging outside the channels of commerce in such a manner as to avoid harm to the right holder, unless the owner of the right requests otherwise.

(2) Where the infringer did not know or had no reasonable reason to know that he was engaged in infringing activity, the Court may limit damages to the profits of the infringer attributable to the infringement.

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

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

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

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