

**THE HIGH COURT
COMMERCIAL**

[2005 No. 2599 P]

BETWEEN

**RETAIL SYSTEMS TECHNOLOGY
LIMITED**

PLAINTIFF

**AND
P.J. McGUIRE, DARRAGH McGUIRE AND
KELLY AND McGUIRE LIMITED**

DEFENDANTS**Judgment of Mr. Justice Kelly delivered the 2nd day of February, 2007****The Claim**

1. The plaintiff claims that its copyright in an electronic point of sale software product known as "iTouch" has been infringed by the defendants.
2. The plenary summons claims a number of injunctions to restrain such activity. It also claims damages under a variety of headings.
3. As the defendants gave satisfactory undertakings prior to trial, injunctions are no longer sought and this judgment is confined to the claim for damages.
4. The defence delivered on 26th October, 2005, although it offered undertakings and delivery up of the product, maintained a denial of liability. Liability was however conceded by letter on 17th January, 2006.
5. The plaintiff has elected for an assessment of damages rather than an account of profits. It is to that assessment that I will turn presently.
6. A complication arises from the defendants' representation. When the infringements were first discovered the defendants were represented by solicitors. Those solicitors were discharged prior to the commencement of these proceedings. At the early stages of this action the defendants purported to represent themselves. They then engaged a solicitor and counsel who drafted and delivered the defence. That legal representation came to an end on 8th May, 2006. Since that time there has been no professional representation for the defendants.
7. The third named defendant was struck off the register of companies on 25th November, 2005. No relief is now sought against it. The remaining defendants are father and son. At the hearing before me Darragh McGuire (the son) did not appear. His father had no entitlement to appear on his behalf in a formal sense but indicated to me that anything he had to say, whether by way of evidence or submission, was being done on his own behalf and with the knowledge and consent of the second defendant, his son.

The Parties

8. The plaintiff is a Northern Irish company with its head office at Campsie, Eglinton, Co. Londonderry. It was established in 1977. It has 31 employees who are situated in Campsie, Belfast and Dublin. In its early years the plaintiff's business was principally concerned with the supply of conventional cash registers and associated hardware to hospitality and retail outlets. It has always been involved in the development of innovative products in its area of expertise.
9. Towards the end of the last decade the plaintiff began to concentrate on electronic point of sale (EPOS) systems and it is one such system with which this litigation is concerned. I will describe it in some detail shortly.
10. The defendants trade under the style and title of "P.J. McGuire, Shop, Bar and Catering Equipment". They do so from a premises in Liltleton, Thurles, Co. Tipperary. They supply equipment of the type in suit to retail, hospitality and catering sectors.

iTouch

11. The plaintiffs' iTouch software system consists of a point of sale software module and a "back office" software system. The point of sale module operates a touch screen cash register whilst the back office system assists in cash management and stock control.
12. Historically, retailers used conventional cash registers, whether manual or electric, for all point of sale purposes. In recent years, however, there has been a trend to move to EPOS systems. The conventional cash register market has been in decline for some years whilst there has been substantial growth in the EPOS market. EPOS systems now make up about 60% of the value of the point of sale market. Retailers continue to move from cash registers to EPOS systems.
13. Even if there was complete market saturation with EPOS systems there is still a potential for growth in that market because retailers will need to replace the systems approximately every five to eight years. Thus, there is significant potential for repeat business for vendors of EPOS systems.
14. The EPOS market is not a mass market. It is confined to retailers and the leisure industry. It is that group that is targeted in marketing EPOS products.

Development of iTouch

15. In early 2003, the plaintiff decided to develop its iTouch product. It employed a Mr. Anthony Horrigan as a product development specialist to produce the new software. He did so. iTouch was released in September, 2003. Its development has continued since then so as to meet changing needs. The plaintiff spent in excess of St£300,000 in developing the iTouch product.

Sales

16. Since its inception the plaintiff has sold its goods in this State. For example, from 1979 to 1998, it had a contract to supply cash registers for all Dunnes Stores outlets in this State and elsewhere. Its average sales over the last five years in the Republic of Ireland have been St£415,355 per annum. In 2002, 33% of the plaintiffs' total sales were attributable to this State (St£651,746). In 2004 those figures dropped to 21% of total sales or St£348,087. In 2005 they had increased to 26% of total sales and amounted to St£354,988.

17. The plaintiff has a branch office in Dublin and provides after hours support nationwide through staff located in Kilkenny, Kildare, Dublin, Armagh, Down, Donegal and Derry.

18. More to the point as far as this judgment is concerned are the sales of the iTouch product. Since its launch in 2003 the following has been achieved. In the year to March 2004, 12 sites in the Republic of Ireland, accounting for 52 copies of the product, were supplied. In the year to March 2005, 21 sites in this State, accounting for 74 copies were supplied. In the nine months to September, 2005, 37 sites in this State, accounting for 135 copies were supplied.

Defendants Sales

19. After some difficulties in obtaining appropriate discovery from the defendants, eventually sufficient information was obtained to lead to the conclusion that 59 infringing items of software had been supplied by the defendants. The bulk of those sales involved supply, not merely of the software in question, but also the related hardware. I accept the plaintiff's evidence that the iTouch software is normally sold as part of a package with related hardware. Such being the case I am invited to apply the "Convoyed Goods Principle" to the assessment of damages. I will consider the application of such a principle in due course.

20. Before considering the evidence which has been led in support of this claim for damages it is necessary that I should identify the legal principles which are applicable to the task.

Statutory Provisions

21. Section 128 of the Copyright and Related Rights Act, 2000, (the 2000 Act) governs the assessment of damages in this case. That section provides as follows:-

"1. The court may, in an action for infringement of copyright award such damages as, having regard to all the circumstances of the case, it considers just.

2. Without prejudice to any other remedy, where, in an action for infringement of the copyright in a work, it is shown that at the time of the infringement the defendant did not know and had no reason to believe that copyright subsisted in the work to which the action relates, the plaintiff is not entitled to damages against the defendant.

3. In exercising its powers under subs. 1 in addition to or as an alternative to compensating the plaintiff for financial loss, the court may award aggravated or exemplary damages or both aggravated and exemplary damages."

22. Subsection 1 makes it clear that the court is entitled to award such damages as it considers just but before doing so must have regard to all the circumstances of the case. In considering such circumstances the court is entitled, if appropriate, to award aggravated and/or exemplary damages.

23. Subsection 2 provides a defence to a claim for damages for infringement of copyright. If it is shown that at the time of the infringement the defendant did not know and had no reason to believe that copyright subsisted in the work there is no entitlement to damages on the part of the plaintiff in such circumstances.

24. Mr. McGuire makes the case that he was an "innocent infringer" and so is entitled to rely upon subs. 2.

Innocent Infringer Defence

25. It is difficult to see how this defence can be raised having regard to all that took place prior to trial. First, there is the defendants' solicitor's letter of 17th January, 2006, to the effect that the defendants were satisfied to allow the case to proceed on the basis that liability is conceded. Whilst it is correct that there was a certain rowing back from that insofar as the second and third defendants are concerned in a subsequent letter of 26th January, 2006, that must be seen in context.

26. Prior to the writing of the letter of 17th January, 2006, there had been a number of adjournments of motions granted so as to enable the defendants to seek expert advice. On those adjournments the defendants' counsel indicated that if the expert concluded that the plaintiff's product was entitled to copyright then liability would be conceded. It was never contended that such a concession would only be made on the part of one defendant. The letter of 17th January, 2006, is unequivocal. The later letter, of 26th January, 2006, seeks to suggest that liability is admitted only by the first defendant but not conceded on the part of the second and third defendants.

27. In any event, on 2nd February, 2006, the plaintiff's solicitors wrote to the defendants' then solicitors concerning this apparent discrepancy between the two letters. They expressed annoyance at what had occurred and made it clear that if liability was to be disputed then the appropriate course was to make an application to the court for leave to put it back in issue. They said:-

"In the absence of such an application, we will proceed on the assumption that liability has been conceded on the part of all defendants."

28. No such application was made.

29. Furthermore it is to be noted that nowhere in the defence which was delivered was a plea of "innocent infringer" made.

30. In these circumstances I am of the view that it is not open to the defendants to raise the innocent infringer defence. That is certainly so in the case of the first defendant.

31. I would not wish to decide the issue solely on what might be regarded as a technical or pleading point. For that reason, I set out hereunder my findings and views on the merits.

The Discovery of the Infringement

32. Over the years the plaintiff has utilised a number of different methods to promote its products. They include direct customer contact, advertising nationally in directories, trade magazines and through press articles. Expenditure on advertising in this State for the last five years exceeded €75,000 in total. The plaintiff has also exhibited at major trade exhibitions in both Northern Ireland and in this State.

33. One of the trade exhibitions at which both the plaintiff and the defendants exhibited was the Catex Exhibition held at the R.D.S. in February, 2005. At that exhibition the first defendant demonstrated a software programme at his stand. On the last day of the exhibition one of the plaintiffs' engineers, a Mr. Richard Goff, visited the defendants stand, amongst others. He was suspicious at

what he saw. He approached Mr. Darren Bradley, a director of the plaintiff, and indicated that he believed the defendants were offering the plaintiff's iTouch product. Mr. Bradley went to the defendant's stand. He went over to the touch screen display unit and examined the software which was running on it. He immediately recognised it as the plaintiff's iTouch product. There were a number of minor changes which had been made to it, but I am satisfied that they were of no significance.

34. Mr. Bradley was able to examine the directory structure of the programme and he recognised that as being the same as the iTouch one. When he went into the office application part of the programme and accessed the configuration section of it, his suspicions concerning the defendants' product were confirmed. In the stock control section of the plaintiff's product there is a spelling mistake in that "stock maintenance" reads "stock maintence". That same error was repeated in the defendants' product. There can be no doubt but that the defendant's product was to all intents and purposes a reproduction of that of the plaintiff and constituted an infringement of the plaintiff's copyright.

Previous Dealings

35. The defendants were not without knowledge of the plaintiff. They had earlier approached the plaintiff through Mr. Horrigan who at that time was employed as a lead programmer for the plaintiff. As a result of that approach the plaintiffs agreed to demonstrate the iTouch product to the defendants at the plaintiff's Dublin offices. The second defendant attended at that demonstration, along with a Mr. Eric Martin, who was a prospective customer of the defendants and to whom they hoped to sell the iTouch system.

36. Mr. Martin expressed interest in the iTouch system but wanted to have it modified so that pictures could be displayed together with items on the menu within the software.

37. The plaintiffs agreed to make those modifications. Subject to them being made, the first defendant agreed that he would purchase a number of copies of the iTouch software together with touch screen terminals, receipt printers, bar code scanners and cash drawers. Mr. Horrigan, on the instructions of Mr. Bradley, made the necessary modifications to the software. Mr. Bradley contacted the second defendant to confirm that the modifications had been completed. A number of subsequent attempts to contact the second defendant failed and the sale was never in fact completed.

38. The first defendant's evidence is that, later on, while he was in a shop in Kilkee, Co. Clare, Mr. Anthony Horrigan walked in by chance and had a conversation with him. The conversation turned to the needs of the defendant's prospective customer, Mr. Martin, and so came about the development of the defendants' infringing product which was designed by the same Mr. Horrigan.

Case Law

39. In order to avail themselves of the defence contained in s. 128(2) the defendants have to show that they did not know and had no reason to believe that copyright subsisted in the work to which the action relates. This is a very limited defence indeed. The defence is only available where on the facts it is reasonable for a person to believe that copyright did not exist in the work. No protection is given to a person who, knowing or suspecting that copyright exists, makes a mistake as to the owner of the copyright and under that mistake obtains authority to deal with the work from a person who is not in fact its owner.

40. In *Byrne v. Statist Company* [1914] 1 K.B. 622, Bailhache J. said:-

"Section 8 is no protection to a person who, knowing or suspecting that copyright exists, makes a mistake as to the owner of the copyright and under that mistake obtains authority to publish from a person who is not in fact the owner."

41. This statement of the law is still quoted in all the leading text books as being correct. Although referable to s. 8 of the Copyright Act, 1911, it is applicable to the statutory defence provided under s. 128(2) of the 2000 Act. The wording, although different, is to precisely the same effect.

Facts Relevant to Section 128(2)

42. In replies to particulars delivered by the defendants, they made it clear that they employed Anthony Horrigan in order to develop their product. They said:-

"Anthony Horrigan gave every assurance to the first defendant that there was no issue regarding legal ownership surrounding his developing the EPOS programme. Anthony Horrigan stated that he had no contractual relationship with the plaintiff which prevented him from carrying out the development of the EPOS programme." (Replies to particulars 18th November, 2005).

43. Later the defendants said in the same replies to particulars:-

"Anthony Horrigan stated to the first named defendant that there was no issue with regard to him developing the EPOS programme, therefore implying that the plaintiff had authorised Anthony Horrigan and therefore the first named defendant to use the programme. Anthony Horrigan stated that the programme was his programme and he was the author of the programme and therefore authorised to deal with same as he wished."

44. From these replies alone it is clear that the defendants must have been aware that the iTouch product was covered by copyright but they say they accepted Mr. Horrigan's assurances that he had authority to permit them to use it.

45. In his evidence the first defendant said that he believed the programme to be the property of Anthony Horrigan. Even if one assumed that the defendants were entirely taken in by Mr. Horrigan it is clear that that does not provide them with the defence of "innocent infringer", having regard to the position at law.

46. On the basis of the evidence which I heard I am not convinced that the first defendant was as taken in by Mr. Horrigan's representations as he suggests. The defendants were clearly aware of Mr. Horrigan's previous relationship with the plaintiff and indeed with another entity earlier on from which he had parted company. They knew from that entity that Mr. Horrigan was bound by a restraint of trade covenant not to develop any EPOS software product for the duration of one year after leaving that entity. That should have heightened their concerns about Mr. Horrigan's representations to them. At a minimum they ought to have made contact with the plaintiffs to confirm that Mr. Horrigan was in a position to deal with them as he said. They failed to do so.

47. It is clear that having regard to both the replies to particulars and the defendants evidence it is not open to them to make the defence of "innocent infringer" in these proceedings.

Case Law on Quantification of Damages

48. As is clear from the statutory provision, which I have already quoted, the power given to the court to award damages is quite wide.

49. In *Universal City Studios Incorporated v. Mulligan (No. 3)* [1999] 3 I.R. 407, Laffoy J. quoted with approval the summary of the principles governing the quantification of damages for infringement of copyright in Clarke and Smith on "*Intellectual Property Law in Ireland*". The quotation reads:-

"The principles which underlie the award of damages following upon a copyright infringement are based upon the principle of compensation, although there are other possibilities...It sometimes occurs that the issue of damages is not central to the litigation – the establishment of infringement of right may be more important to a plaintiff and some judges may simply award a figure without an enquiry into loss.

The measure of damages following on from an infringement of copyright is sometimes said to be a matter which is left 'at large' – that the award is a matter for the court's judgment and discretion. However, it is accepted that the plaintiff will normally seek to obtain the amount by which the value of the copyright of the plaintiff had been diminished as a chose in action; this is often calculated by looking at the volume of sales made by the defendant of the pirated work and deducting the cost of production from the income made by the defendant by way of the unauthorised reproduction and sale. This approach, however, does not always provide adequate compensation to the plaintiff, even if it has the merit of being simple and compatible with the principles of unjust enrichment. The plaintiff may be able to show that his product was more expensive and had a higher profit margin than the pirated work, so merely giving the plaintiff the defendant's profit may not compensate the plaintiff for lost volume of sales. This is particularly important and some cases hold that where the defendant's product undercuts the plaintiff's product, this should be reflected in the compensation award."

50. Like Laffoy J., I have no difficulty in accepting those general principles. They are in accord with leading English cases on the topic and in particular with the decision in *General Tire and Rubber Co. v. Firestone Tyre and Rubber Co.* [1975] 2 All ER 173. Lord Wilberforce in the course of his speech in that case said:-

"As in the case of any other tort (leaving aside cases where exemplary damages can be given) the object of damages is to compensate for loss or injury. The general rule at any rate in relation to economic torts is that the measure of damages is to be, so far as possible, that sum of money which will put the injured party in the same position as he would have been in if he had not sustained the wrong.

In the case of infringement of a patent, an alternative remedy at the option of the plaintiff exists by way of an account of profits made by the infringer. The respondents did not elect to claim an account of profits; their claim was only for damages. There are two essential principles in valuing that claim: first, that the plaintiffs have the burden of proving their loss; second, that the defendants being wrong doers, damages should be liberally assessed but that the object is to compensate the plaintiffs and not to punish the defendants."

51. Whilst that case dealt with an infringement of a patent, those principles are equally applicable to damages for infringement of copyright. (See later).

52. His Lordship went on to consider the manner in which damages should be calculated. He said:-

"1. Many patents of inventions belong to manufacturers, who exploit the invention to make articles or products which they sell at a profit. The benefit of the invention in such cases is realised through the sale of the article or product. In these cases, if the invention is infringed, the effect of the infringement will be to divert sales from the owner of the patent to the infringer. The measure of damages will then normally be the profit which would have been realised by the owner of the patent if the sales had been made by him..

2. Other patents of inventions are exploited through the granting of licences for royalty payments. In these cases, if an infringer uses the invention without a licence, the measure of the damages he must pay will be the sums which he would have paid by way of royalty if instead of acting illegally, he had acted legally. The problem which is that of the present case – the respondents not being manufacturers in the United Kingdom – is to establish the amount of such royalty."

53. On this aspect of the matter observations made by Sargant J. in the case of *A.G. Für Autogene Aluminium Schweissung v. London Aluminium Co. Limited No. 2* [1923] 40 RPC 107 were quoted, with approval, by Lord Wilberforce. Sargant J. said:-

"What has to be ascertained is that which the infringer would have had to pay if, instead of infringing the patent, he had come to be licensed under the patent. I do not mean by that that the successful patentee can ascribe any fancy sum which he says he might have charged, but in those cases where he has dealt with his property merely by way of licence, and there have been licences at certain definite rates, there prima facie, apart from any reason to the contrary, the price or royalty which has been arrived at by means of a free bargain between the patentee and the person desiring to use the patented article has been taken as the price or royalty that presumably would have to be paid by the infringer. In doing that, it seems to me that the court is certainly not treating the infringer unduly harshly; he should at least, in my judgment, have to pay as much as he would in all probability have had to pay had he to deal with the patentee by way of free bargain in the way in which the other persons who took the licences in fact did pay."

54. Lord Wilberforce's third guideline as derived from the case law was expressed as follows:-

"In some cases it is not possible to prove either (as in 1) that there is a normal rate of profit, or (as in 2) that there is a normal, or established, licence royalty. Yet clearly damages must be assessed. In such cases it is for the plaintiff to adduce evidence which will guide the court.... The ultimate process is one of judicial estimation of the available indications."

55. The first of the two guidelines alluded to by Lord Wilberforce appears to have been followed in effect in this jurisdiction by Costello J. (as he then was) in *Allibert S.A. v. O'Connor* [1982] I.L.R.M. 40. In that case the defendants had infringed the plaintiffs' copyright in packing boxes. They did so by importing boxes to the plaintiff's design for sale to a company called Arctic Fish Sales Company. Costello J. awarded damages for loss of profit on the boxes which the plaintiff said they would have sold to Arctic Fish but for the defendant's wrongful act. He said:-

"...I conclude that but for the defendant's tortious acts the plaintiffs would have obtained the Arctic Fish contract and

would have made a profit of £16,600 on it. So their claim under this head should be allowed.”

56. I was not referred to any Irish authority which specifically applied the second or third of Lord Wilberforce’s guidelines but I see no reason why they should not apply in an appropriate case.

Application to Copyright

57. I have already pointed out that the General Tire case was a decision in a patent infringement case. The principles are equally applicable to copyright cases as is clear from the decision of the Court of Appeal in *Blayney v. Clogau St. David’s Goldmines Limited* [2003] FSR 361.

58. That case is instructive not merely for its decision to the effect that there was no reason not to apply the General Tire principles to cases of copyright infringement but also because it found the entitlement of a claimant to damages computed both by reference to profits forgone in respect of lost sales and by way of royalty for other infringing sales, having been well established in cases of patent infringement, was equally appropriate to cases of copyright infringement. The court also went on to find that it would be a denial of justice for the court to refuse any compensation at all simply because there was no evidence as to what the notional royalty rate should be. It held that the court should assess compensation by reference to a notional royalty rate payable under a notional licence agreement but should err on the side of under compensation in the absence of evidence enabling it to make a precise calculation.

59. In the course of his judgment Morritt V.C. (with whom Rix and Jonathan Parker L. JJ. agreed) said (at p. 370):-

“Though the nature of the monopoly conferred by a patent is not the same as that conferred by copyright I see no reason why that should affect the recoverability of damages in cases where the monopoly right has been infringed. The fact that the claimant may not be able to prove the application of one measure of damages, namely lost sales, does not mean that he has suffered no damage at all, rather some other measure by which to assess the compensation for that interference must be sought. Whilst, no doubt, there are differences between the rights granted to a patentee and those enjoyed by the owner of a copyright they draw no distinction between the effect of an infringement of a patent rather than a copyright.”

60. Having regard to the foregoing the following is the approach which I adopt in assessing damages.

1. Every infringing sale by the defendants is a separate infringement of the plaintiff’s rights. In respect of those sales which resulted in sales lost to the plaintiff, the measure of damages is the profit on those sales lost by the plaintiff.
2. In respect to those sales which do not directly represent lost sales to the plaintiff, there is still an infringement of the plaintiff’s copyright and it is necessary to determine an appropriate measure of damages in respect of those sales. The plaintiff has submitted that the most appropriate measure of such damages is by reference to a notional licence. I accept this to be so.

The Convoyed Goods Principle

61. I have already accepted that the iTouch software is normally sold as part of a package with its related hard wear. In circumstances such as the present the plaintiff will suffer loss not only in respect of the software protected by copyright but also in respect of the hard wear which is not so protected but is normally sold together with the software. Is the plaintiff to be compensated for the loss of profit on the hardware?

62. I believe the answer to be in the affirmative by reference to the “convoyed goods” principle.

63. In *Gerber Garment Technology Inc. v. Lectra Systems Limited* [1997] R.P.C. 443 the Court of Appeal had to consider this precise problem in the context of a patent rather than a copyright infringement.

64. In that case the patents in suit related to machines for the automatic cutting of fabric. The plaintiff had been held to be entitled to damages for infringement of the patent. Commonly sold with those manufacturing machines were computer aided design machines to produce cutting patterns. In the enquiry as to damages the judge had awarded loss of profits in respect of design machines that the plaintiff could have been expected to sell with the manufacturing machines although the design machines did not themselves infringe the patents. Similarly the judge had awarded loss of profits in respect of spare parts and servicing of the infringing machines. He also awarded damages in respect of some machines sold after the expiry of the patents, on the theory that the defendants would not have been able to make those sales if they had not entered the market sooner than they should have done. The trial judge made many other findings in favour of the plaintiffs but the ones which I have identified are those of relevance to this case.

65. On appeal, the defendants contended that the damages recoverable by way of loss of profits were limited to the profits that would have been earned in activities for which the patent provided a monopoly. They argued that either the general rules for the recovery of damages in tort did not apply to patent infringement or that the purpose of the rule imposing the duty owed to the plaintiff by the defendants did not make them liable for all the consequences of their wrongful conduct.

66. The Court of Appeal held that infringement of a patent was a statutory tort and that one would expect the damages recoverable to be governed by the same rules as with other torts. The elementary rules are:-

1. That the victim should be restored to the position he would have been in if no wrong had been done, and
2. That the victim could recover loss which was:
 - i. Foreseeable (i.e. not too remote)
 - ii. Caused by the wrong, and
 - iii. Not excluded from recovery by public or social policy. (See p. 452 per Staughton L.J.).

67. The court went on to find that the patents legislation was aimed at protecting patentees from commercial loss resulting from the wrongful infringement of their rights. Damages in respect of the infringement under s. 61(1)(c) of the U.K Patents Act, 1977 did not

distinguish between profit on the sale of patented articles and profit on the sale of other goods commonly sold together with them. By s. 61(6) the extent of the relief granted was to be determined by applying the principles hitherto applied by the court. Viewing the cases as a whole, no rule of law could be found which restricted the scope of recovery by way of loss of profits to activities which themselves constituted infringements of the patent. (See pp. 453, 455).

68. In my view the above approach is not confined to cases involving patent infringement but also applies to copyright infringement.

69. Section 128 of the Act of 2000 does not restrict the assessment of damages only to loss of profits on the sale of the goods protected by copyright thereby excluding the loss of profits on the sale of goods commonly sold together with the protected goods. If anything the wording of the 2000 Act is wider than the relevant provisions of the Patents Act of 1977. In the 1977 Act reference is made to "damages in respect of the infringement". The 2000 Act speaks of "such damages as having regard to all the circumstances of the case (the court) considers just".

70. I hold that the "conveyed goods" principle is appropriate for application in this case.

Damage to Business Generally

71. The plaintiff also contends that it is entitled to have damages awarded to it in respect of damage to its business generally.

72. It relies upon a statement from Laddie Prescott and Victoria "*The Modern Law of Copyright*" which states:-

"If the defendant is in direct competition with the plaintiff, the latter may be justified in saying that his business has been harmed over and above the direct financial loss suffered by reason of lost sales and, if the court accepts that, the damages will be increased in order to compensate for the additional harm."

73. The authority for that proposition is the decision of Peterson J. in *Byrne Brothers Limited v. Keene and Co. Limited* [1918] 2 Ch. 281. In that case the court noted that the damage to the plaintiff was aggravated by the fact that infringing greeting cards were sold at a lower price than the plaintiff's own cards.

74. It appears to me that the proposition identified in the passage which I have quoted above is accommodated in the approach of Laffoy J. in *Universal City Studios* case and, insofar as it is relevant, I propose to apply it in this case.

Evidence on damages

75. The principal evidence on the topic of damages was given by Mr. John Cregan who is the finance director of the plaintiff.

76. I have already recorded in this judgment the extent of the plaintiff's sales in this State and the amount which it cost them to develop the product.

77. The product in suit first went on sale in September, 2003. It was in February, 2005, at the exhibition in the RDS that the plaintiff discovered the defendant's infringements. As a result of that, Mr. Cregan and others visited the premises of Mr. Martin in Clonmel and there observed the products supplied to him by the defendant being used. It was clearly a copy of the iTouch software manufactured and developed by the plaintiff.

78. With a view to discovering the extent of the defendant's dealings in the infringing software the plaintiff contacted an English company called Microcosm Limited from which the plaintiff had purchased dongles for its software. A dongle is a software security device which is plugged into the USB port of a computer. When a piece of software is run which requires a dongle, the software will check whether the appropriate dongle is connected to the computer. Each dongle contains a unique code which relates to the particular piece of software. If the correct dongle is not attached the software will not run. The plaintiff uses dongles for its product and suspected that the defendants were also using dongles for the infringing software. Microcosm Limited confirmed that they had supplied the defendants with 160 dongles. The defendant's dongles had a different serial number to those supplied by Microcosm Limited to the plaintiff. A modification to the software was all that was required to accommodate the defendants' dongles.

79. Knowing that 160 dongles had been purchased by the defendant, the plaintiff made a complaint to the Police Service of Northern Ireland against both Mr. Horrigan and the first named defendant. On foot of those complaints on the 28th June, 2005, the Police Service of Northern Ireland arrested and questioned Mr. Horrigan. On the same day members of the Garda arrested and questioned the first and second defendants and seized equipment and records at their premises and also at the premises of Mr. Martin. The Gardaí also took a copy of the infringing software from Mr. Martin's premises.

80. Of the 160 dongles purchased by the defendants, 88 were seized by the Garda. That left 72 to be accounted for.

81. In undertakings which were furnished prior to trial the defendants agreed to provide details of all supplies of the infringing software made by them. On foot of those undertakings they disclosed 24 sites where the infringing software had been installed, accounting for 46 copies of it. In the course of discovery (and indeed following orders for further and better discovery and particulars) they disclosed a total of 31 sites where the software was installed accounting for 59 copies of it. Of those, 49 were copies of the point of sale software and ten were copies of the back office software.

82. The plaintiffs, through independent investigations carried out by them, identified one additional site where the defendants had installed software. That was at a premises in Kilmallock, Co. Limerick. The defendants claimed on affidavit that they did not install the software there but Mr. Bradley examined the software installed at that address and I am satisfied that it was the infringing software.

83. It follows from the above that the vast majority of the 72 unaccounted for dongles were, as a matter of probability, used in installations in which infringing software was installed.

84. There is a further complication in that the defendants admit that they produced a modified version of the infringing software which does not require dongles. They installed seven copies of that at a nightclub in Dundrum, Co. Tipperary. The plaintiffs believe that further copies of that may have been installed elsewhere, but there is no proof of that.

85. I am of opinion that, as a matter of probability, the defendants' total number of sales of the infringing software is of the order of 75.

The Impact of Defendants' Activities

86. I accept that the point of sale market is a small one and that the defendants' activities are well known in it. The plaintiff's

product, having been launched as recently as 2003, was still in the process of establishing itself when the defendants' wrongful behaviour began in the second half of 2004. I accept that the defendants' activities had a direct impact on the roll-out of the plaintiff's iTouch product. An example was given in evidence. During the period when the infringement began the plaintiff was trying to obtain "authorised supplier" status in respect of Mangan Brothers Group. Mangan's are one of the largest franchise retailers in Ireland. They offer three retail brands, the best known of which is Mace, with Vivo and XpressStop being the others. Mangan's recommend suppliers of EPOS equipment to their franchisees. Therefore achieving authorised supplier status gives a supplier a privileged access to a market of over 230 franchise stores. The plaintiff was in the process of making modifications to its product in order to achieve such status. But the defendants had the source code of the infringing software modified to communicate with Mangan's software and thus enable them to supply EPOS to some of Mangan's customers. However, they failed to properly support the infringing software supplied and that resulted in it being removed from at least one of Mangan's sites. I accept that this was prejudicial to the plaintiff's efforts to obtain access to that market. The potential value of sales into the Mangan Group alone was in region of €460,000 per annum. The failure to support the software supplied and installed by the defendants, I am satisfied, was also generally prejudicial to the plaintiff's interests.

87. Of the 75 infringing items that were sold by the defendants I believe it likely that the plaintiffs would have captured of the order of 50% of the sales effected by the defendants. The plaintiffs contend that they would have achieved at least 75% of such sales. I believe that estimate to be too high because of the personal relationship between the defendants and their customers and the limited geographical area supplied.

88. That accounts for 37 units in respect of which the plaintiffs are entitled to recover damages calculated on the profit lost by them in respect of those sales. I have already accepted that the convoyed goods principle applies in respect of these. I find on the evidence that the likely loss of profits in respect of them was €4,000 per copy. Thus, a figure of €148,000 is applicable in respect of them.

89. In respect of the other 38 units, whose sales the plaintiff would not have obtained, it is nonetheless entitled to damages on the basis of a notional royalty. For the purposes of this exercise I have to set a notional licence fee equal to the sums which the defendants would have had to pay by way of royalty if, instead of behaving as they did, they had acted legally. Acting legally would have involved them seeking a licence from the plaintiff to deal in its software. The defendants would only have required a licence for the software. They could then proceed and sell it along with the hardware in the normal way. It seems likely that if the defendants had sought a licence from the plaintiff, it would charge a higher licence fee than the standard list price of the software because of the fact that it would not stand to make any profit in the sale of hardware. The plaintiff's trade pricelist, as of June, 2005, lists a price of €320 per copy for the point of sale module and €570 for the back office module. The plaintiff contends that it should be entitled a higher notional licence fee than these because of the lack of any ability to make a profit from the sale of the hardware. I believe this to be correct. I will allow €450 in respect of point of sale and €750 for back office modules. I will award €21,000 under this heading.

90. Finally, I am satisfied that the plaintiff is entitled to a sum in respect of general damage to its business. I have no doubt but the defendants' activities did have an impact on the plaintiff's sales. The sales projections, particularly for the year in which the defendants' activities were greatest, were not achieved by the plaintiffs. The re-branding of the software in the defendants' name also destroyed a benefit by way of goodwill to the plaintiff's product.

91. The plaintiff placed evidence before me dealing with the failure to meet the sales projections in both the United Kingdom and this State. They readily acknowledge, however, that it is impossible to say how much of the shortfall in question was attributable to the defendants' infringing activity. The only shortfall that I would be prepared to take into account for the purposes of awarding damages is that which occurred in this State. The difficulty of assessing damages in such circumstances has been mentioned in many of the cases to which I have referred in this judgment or which were referred to by counsel. As was said by Lord Shaw of Dunfermline in *Watson, Laidlaw & Co. Limited v. Pott, Cassels and Williamson* [1914] 31 R.P.C. 104 at 118, compensation is to be assessed on the basis of inference, conjecture and the like, by the exercise of sound imagination and the practice of the broad axe. I propose to award a further sum of €35,000 damages under this heading.

Aggravated and Exemplary Damages

92. The plaintiffs also claim an entitlement to damages arising from the general way in which the defendants behaved themselves both in relation to their unlawful activity and the way in which they have conducted this litigation. There is no doubt but that their behaviour throughout this litigation has been less than satisfactory. They procrastinated and delayed on many occasions. Information was obtained, both by discovery and particulars, only after numerous applications to court. In my view an award of aggravated damages demonstrating the courts disapproval of this behaviour and the general way in which they conducted themselves is appropriate. I award a further €10,000 damages for aggravated damages.

93. I decline to award exemplary damages.

Conclusion

94. There will be judgment for the plaintiff against the first and second defendants in the total sum of €214,000.