

BETWEEN

TOMMY FLEMING, TINA MITCHELL FLEMING AND T.F. PRODUCTIONS LIMITED

PLAINTIFFS

AND

TELEFIS MHAIGH EO TEORANTA T/A IRISH TV

DEFENDANT

**JUDGMENT of Mr. Justice Paul Gilligan delivered on the 26th of July 2017.**

1. The factual background from the plaintiffs' perspective is set out in the statement of claim delivered on 1st June, 2016, and I have the benefit of oral and affidavit evidence of the first and second named plaintiffs on their own behalf and on behalf of the third named defendant. Initially the defendant company entered an appearance on 2nd February, 2016 and a notice for particulars issued on behalf of the defendant on 26th September, 2016 and a notice for further and better particulars issued on 17th November. Subsequent to the appointment of a liquidator to the defendant company no part has been taken by or on behalf of the defendant in these proceedings. Injunctive relief in favour of the plaintiffs is already in place pursuant to previous orders as made herein and the present application is for damages only.

2. The first named plaintiff in these proceedings, Mr. Tommy Fleming is a musical artist with over 25 years experience in the entertainment business.

3. The first named plaintiff has provided over that extended time, musical and performance related services both in Ireland, Europe and internationally, and, in so doing, has acquired a significant reputation, especially in the State. He has toured extensively, both at home and abroad, and has made numerous radio and television appearances over the years, in Ireland and beyond.

4. In addition to touring annually, the first named plaintiff has recorded several, albums, CDs and DVDs since he first started singing, including the "Voice of Hope" CD and DVD released in 2005, the subject matter of the within proceedings.

5. The second named plaintiff, Ms. Tina Mitchell-Fleming, is the manager of the first named plaintiff and has been since 2002. The first and second named plaintiffs wholly own and are the directors of the third named plaintiff, TF Productions Limited. The first and second named plaintiffs are also married to each other.

6. The third named plaintiff is a private company, incorporated in the State on 17th February, 2011 for the purposes of overseeing the business affairs of the first and second named plaintiffs respectively. Since its incorporation in 2011, the third named plaintiff has been engaged in the provision of, *inter alia*, musical service and services relating to the licensing the intellectual property rights of the first and second named plaintiffs.

7. At all material times, the first and second named plaintiffs have been the joint owners of all rights, title and interest in the former's works, including all intellectual property rights therein.

8. It is averred by the plaintiffs that the first named plaintiff's best selling work to date has been the "Voice of Hope" CD and DVD. The work has sold to date in excess of 3 million copies, by way of CD and DVD worldwide. It is further averred that the production has played a pivotal role in establishing the first named plaintiff as a musical star on the world stage.

9. It is averred that the production, the first of its kind, is a remarkable concert recorded at the Basilica in Knock in December, 2004 where the first named plaintiff performed a number of well-known songs accompanied by various artists.

10. The defendant Teilifis Mhaigh Eo Teoranta trading as Irish TV was launched in or around May, 2014. Irish TV provided broadcasting services to domestic, UK and other European and international audiences by television and online, specifically targeting the Irish diaspora. Irish TV was available on the SKY platform, on Eircom's 'Freesat' free-to-air boxes, and via the defendant's websites. On 20th December, 2016 an Order was made winding up the defendant company and appointing a liquidator thereto.

11. In April, 2014 a DVD of "Voice of Hope" was forwarded by the second named plaintiff to the defendant for review as is standard practice within the entertainment industry for the procurement of licensing fees. It is the ordinary course that should a company wish to broadcast the production on the basis of the sampling product forwarded, a beta tape of a much higher standard will be furnished. It is of significant importance that it is not the accepted industry practice to broadcast from a DVD and use of a beta tape is the accepted standard.

12. It is averred by the plaintiffs that the prohibition of any broadcast or copying of the recording was expressly stated on the face of the 'Voice of Hope' DVD forwarded to the defendant by the second named plaintiff. It is further contended by the plaintiffs that the "Voice of Hope" Community Trade Mark attached to the DVD was removed.

13. In essence, two unauthorised broadcasts of the plaintiff's production as per the DVD were aired on Irish TV on separate occasions listed on Irish TV's electronic page guide as the "Tommy Fleming Musical Extravaganza" with the description "Tommy Fleming Musical Extravaganza - one of Ireland's best-selling artists takes us on a musical extravaganza".

14. Subsequent to the second broadcast on Irish TV, the plaintiffs aver they became aware of the unauthorised scheduling of programmes under an unofficial title and the second named plaintiff immediately notified the defendant that they had no licence or right to broadcast the plaintiffs' product. A scheduled third broadcast by Irish TV did not proceed as listed, and was cancelled.

15. The plaintiffs were and remain unaware and unable to quantify the number of viewers of the unauthorised broadcast. In addition, the plaintiffs aver that their unease is compounded by the uncertainty as to the appearance of the broadcast for the viewing audience and can only be satisfied that this broadcast was a version of an ordinary domestic DVD that was not suitable for formal broadcasting.

16. The second named plaintiff averred that the unauthorised broadcast of "Voice of Hope" by Irish TV has impacted on the first named plaintiff's reputation in that the production as a whole has been devalued.
17. At all material times, the first named plaintiff has operated under his own name, Tommy Fleming, and in terms of musical and performance-related services, he has established goodwill and a notable reputation. Tommy Fleming is an unregistered Trade Mark, however the domain names [www.tommyfleming.net](http://www.tommyfleming.net), [www.tommyfleming.com](http://www.tommyfleming.com) and [www.tommyfleming.ie](http://www.tommyfleming.ie) have been registered.
18. The first named plaintiff is a talented artist who has been well-received publicly; he is a remarkable and well-loved performer and has had a successful career in the entertainment industry both in Ireland and abroad.
19. It is averred by the plaintiffs that the "Voice of Hope" is synonymous with the first named plaintiff and has become particularly distinctive of the first named plaintiff.
20. It is averred by the plaintiffs that the unauthorised broadcast by Irish TV has damaged the first named plaintiff's reputation leading to a drop in sales of their best selling product. Prior to the breach complained of, average annual sales for the product "Voice of Hope" was around 3,500 units. It was averred by the second named plaintiff that profit on the product was approximately €4 per unit.
21. Sales in 2015, subsequent to the broadcasts complained of tailed off to 1,500 units. In 2015 the plaintiffs re-released a new edition of the CD which included a DVD of the documentary about the making of the concert selling 6,500 copies in the same year.
22. The first named plaintiff's work has been on the market since 2005 and had been licensed annually on an exclusive basis. This status continued until December, 2015 though I note that from the date of the unauthorised broadcasts complained of, the "Voice of Hope" was not broadcast by the licence holder for the remaining duration of the licence agreement. I further note that subsequent to December, 2015 there was a period during which the product was unlicensed.
23. The effect of the breach has escalated into a decline in favourable licensing fee arrangements with major broadcasters such that any agreements reached after the broadcasts complained of were for a nominal fee. Furthermore, the product's reduced value has negatively impacted on the airplay time given to the production having a knock on effect on turnover. It is averred by the plaintiffs that the "Voice of Hope" DVD plays a pivotal role in the advertisement and marketing of the first named plaintiff's services, and when it is broadcast, it has been the catalyst for the subsequent purchase of Tommy Fleming concert tickets by a sizable proportion of customers, as well as online retail sales of Tommy Fleming merchandise.
24. It is worth noting that following the unauthorised broadcast by Irish TV, it was averred by the second named plaintiff that there was no bounce in the sale of concert tickets and merchandise as is the norm for the first named plaintiff.
25. It is further averred by the first named plaintiff that the use of the word extravaganza has had the effect of devaluing his name and the product, equating his performance to a circus. The first named plaintiff suffered distress by the description of the product as an extravaganza and indicated in oral evidence that he has "worked very hard and tirelessly to keep standards up."
26. I am mindful that the loss complained of following the broadcast has occurred not only within the State but has extended to the first named plaintiff's global platform. Evidence has been adduced to the effect that since the unauthorised broadcast for the first time in the first named plaintiff's career he made a loss while touring in the United States of America.
27. It is contended by the plaintiffs that they have been forced, on foot of the broadcasts, complained of, to create, produce and manufacture a new product a lot sooner than would otherwise have been required.
28. I note the decrease in production costs for the manufacture of the product "Voice of Hope" resulting from lack of demand for the product.
29. In respect of the overall damage to the first named plaintiff substantial sums of money have been expended on marketing and advertising to redress the drop in ticket sales caused by the defendant's breach. I note the employment of additional personnel including publicists and additional musicians to the live production and that the plaintiffs have honoured their duty to minimise their losses.
30. I am satisfied that the defendant breached the plaintiffs' various intellectual property rights by broadcasting on a number of occasions the work of Mr. Tommy Fleming without his authority and without notice to him.
31. Furthermore, the defendants portrayed their broadcast as a 'Tommy Fleming Musical Extravaganza' when in fact it was the "Voice of Hope" and the broadcast itself was not from a beta tape but simply from a "Voice of Hope" sampling DVD. The unlawful broadcasts have resulted in multiple unlawful poor recordings.
32. By reason of the infringement I am satisfied that the first and second named plaintiffs have suffered loss or damage and the first named plaintiff has suffered a serious set back to his entertainment career.
33. I accept the first named plaintiff's evidence that his career has been undermined and the public perception of him has been altered. It has been necessary for the plaintiffs to expend additional sums to restrict the nature and extent of the damage caused.
34. In my view the professional standard with which the first named plaintiff, Mr. Tommy Fleming, has operated in the music industry has been damaged by the unauthorised broadcasts.
35. In all the circumstances I will award the first and second named plaintiffs the sum of €100,000.00 by way of damages for infringement of the intellectual property rights of which they are the owners and I will allow the third named plaintiff the sum of €50,000.00 by way of damages as a contribution to the monies expended by the third named plaintiff on minimising its loss allowing for the benefit of the total amount disbursed. Pursuant to previous orders, the injunctive relief in favour of the plaintiffs is to continue. I will hear the submissions of counsel as to the form of the order to be drawn up.