



Date: 20240718

Docket: T-749-23

Citation: 2024 FC 1127

Toronto, Ontario, July 18, 2024

PRESENT: Madam Justice Whyte Nowak

BETWEEN:

DEMİRÖREN TV RADYO YAYINCILIK YAPIMCILIK A.S.

Plaintiff

and

GENERAL ENTERTAINMENT AND MUSIC INC.

Defendants

JUDGMENT AND REASONS

Table of Contents

I.	The evidence filed by Kanal D on this motion	3
A.	The affidavit of Selim Turkmen sworn March 6, 2024	4
B.	The affidavit of Rachel Barker sworn February 29, 2024 [the Barker Affidavit] ..	4
C.	The affidavits of Kim Humphrey sworn March 5, 2024 [the First Humphrey Affidavit] and May 24, 2024 [the Second Humphrey Affidavit]	5
D.	The affidavit of Kenan Çarıkçı sworn February 27, 2024	6
II.	Background facts	7
A.	The Plaintiff Kanal D	7
B.	The Defendant	7
C.	The allegations of copyright infringement	9
III.	Issues	9
IV.	Analysis	10
A.	Is this motion amenable to summary judgment?	10

B.	Has Kanal D shown there is no genuine issue for trial?	10
(1)	Guiding principles on summary judgment.....	10
(a)	Kanal D's evidentiary burden	11
(b)	The impact of the Defendant's decision not to respond to the motion	12
(2)	Application of the guiding principles to Kanal D's motion.....	13
(a)	Copyright subsists in the Kanal D Programs	13
(b)	Kanal D is the owner of the copyright in the Kanal D Programs .	14
(c)	GEM's infringement of Kanal D's copyright in the Kanal D Programs	16
(i)	The evidence of the unauthorized infringing acts	17
(ii)	Ownership of the infringing platforms	18
(d)	The allegations of inducement and/or authorized infringement ...	20
V.	Conclusion	23
VI.	Remedies.....	24
A.	Validation of service	24
B.	Declaratory relief	25
C.	Expungement of the GEM Copyright Registrations	25
D.	Injunctive relief	25
E.	Statutory damages	26
F.	Punitive damages	29
G.	Interest.....	29
H.	Costs.....	30

[1] The Plaintiff, Demirören TV Radyo Yayincilik Yapimcilik A.Ş. [Kanal D], is one of Turkey's largest broadcasters whose award-winning Turkish television programming is broadcast and streamed not only in Turkey, but throughout the world including in South America, Eastern Europe, the Middle East and Canada. Kanal D has brought this motion for summary judgment asserting its copyright in some 3,159 episodes of original television programming [the Kanal D Programs]. It alleges that the Defendant, General Entertainment and Music Inc. [GEM or the Defendant] has infringed as well as induced or authorized others to infringe its copyright in the Kanal D Programs in Canada.

[2] While GEM filed a defence in this action, it has not responded to this motion.

[3] Based on the evidence filed by Kanal D and for the reasons that follow, I am satisfied that this action is amenable to summary judgment and that Kanal D has met its burden in proving that it owns copyright in the Kanal D Programs and that GEM has infringed its copyright in 2,729 episodes of the Kanal D Programs. Kanal D is entitled to remedies including declaratory and injunctive relief as well as statutory damages in respect of this infringement. While Kanal D also alleges that GEM has induced others to infringe its copyright in the Kanal D Programs, I find that it has not met its burden with sufficiently clear, convincing and cogent evidence to make out its claim and for the reasons that follow, I decline to order a summary trial on the issue.

I. The evidence filed by Kanal D on this motion

[4] Kanal D filed the following affidavits in support of its motion.

A. *The affidavit of Selim Turkmen sworn March 6, 2024*

[5] Selim Turkmen [Turkmen] was a Kanal D employee between April 2016 and February 2024. He was the Foreign Content Sales Executive & Manager, Content Sales & Distribution Director and International Director of Sales. Turkmen states that in this position he regularly dealt with issues relating to ownership and licensing and had access to the company's business records.

[6] Turkmen describes the story behind each of the 22 Kanal D Programs at issue, identifies the number of episodes in the series, whether the content was created by Kanal D or was a work for hire, and provides the English and Turkish names for each. Turkmen also provides a 30-second video clip of the first and most recent episodes of each of the Kanal D Programs. Turkmen attaches the series production contracts pursuant to which Kanal D purports to own the rights to each of the Kanal D Programs [the Producer Agreements].

[7] Turkmen also includes evidence of infringement and evidence aimed at identifying GEM as the infringing party.

B. *The affidavit of Rachel Barker sworn February 29, 2024 [the Barker Affidavit]*

[8] Rachel Barker [Barker] is a private investigator who gives evidence of GEM's infringing activities. She swore an affidavit, which attests to the fact that she personally visited the GEM TV website four times over the course of four days in January 2021 and watched 18 of the 22 Kanal D Programs at issue. She includes video clips of her viewing of these Kanal D Programs

on the GEM TV website. Her videos also show the number of episodes of each of these Kanal D Programs available for viewing on the GEM TV website.

[9] Barker also employs the Wayback Machine on dates in February 2024 and takes screenshots to show the Kanal D Programs that were purportedly available for viewing on the GEM TV website on dates in 2018-2021.

[10] Finally, the Barker Affidavit includes evidence relating to Kanal D's allegations that GEM has induced or authorized others to infringe Kanal D's copyright in the Kanal D Programs. She provides videos she took of Kanal D Programs available on another IPTV website, www.GLWiZ.com [the GLWiZ website]. These videos show the streaming of three additional Kanal D Programs listed in the Statement of Claim but not available on the GEM TV website.

C. *The affidavits of Kim Humphrey sworn March 5, 2024 [the First Humphrey Affidavit] and May 24, 2024 [the Second Humphrey Affidavit]*

[11] Kim Humphrey is a legal assistant and law clerk employed by Kanal D's legal counsel. The First Humphrey Affidavit attaches various documents including: (1) GEM's Corporate Profile Report; (2) its Statement of Defence in this action; and (3) publicly available documents from the court record from another Federal Court file (File No. T-410-21) in which GEM itself has sued other parties for copyright and trademark infringement in the Federal Court [the GEM Action]. Those parties include GLWiZ Inc. [GLWiZ], Gold Line Telemanagement Inc. [Gold Line] and Ava Telecom Limited [Ava Telecom] [collectively, the GLWiZ Third Parties]. The GEM Action issued on March 3, 2021 and was stayed by an Order of this Court dated March 28,

2022 in favour of arbitration in Bermuda. That Order was upheld by the Federal Court of Appeal.

[12] Attached, as Exhibit C to the First Humphrey Affidavit, is the sworn affidavit evidence of Amirali Karimian [Karimian] from the GEM Action [the Karimian Affidavit]. Karimian identifies himself as the President and a director of GEM since 2017, but he states that he has held other roles with the “GEM Group of companies” going as far back as 2006. Evidence from the GEM Action, including the Karimian Affidavit have been tendered for a variety of purposes including identifying GEM as the owner of the GEM TV website over which infringing copies of the Kanal D Programs have been streamed.

[13] The Second Humphrey Affidavit contains email communications relating to service of this motion on GEM following an Order dated March 22, 2024 removing GEM’s former solicitors from the record.

D. *The affidavit of Kenan Çarıkçı sworn February 27, 2024*

[14] Kenan Çarıkçı provides certified English translations of the 22 Turkish Producer Agreements relied on by Kanal D to prove ownership of copyright in the Kanal D Programs.

II. Background facts

A. *The Plaintiff Kanal D*

[15] Kanal D is headquartered in Istanbul and is one of Turkey's largest broadcasters. Kanal D was earlier known as DTV Haber Ve Görsel Yayincilik A.Ş. and changed its name to Yelda Haber Yayincilik Yapimcilik A.Ş. and then to Demirören TV Radyo Yayincilik Yapimcilik A.Ş. in July 2022 after these proceedings were commenced.

[16] Kanal D develops, creates and acquires original entertainment content including popular multi-episode Turkish television series, which are broadcast and streamed in various countries around the world. Kanal D broadcasts its content, including the Kanal D Programs, on its website www.kanald.com.tr and streams its content on three digital platforms and its proprietary app for iOS and Android devices.

B. *The Defendant*

[17] The Plaintiff has identified GEM as the entity that has infringed its copyright in the Kanal D Programs. GEM is a broadcaster with 28 Persian-language (Farsi) linear television channels whose programs are broadcast through subscription satellite services [the GEM Channels] to viewers in Iran and other large Farsi-speaking communities around the world, including Canada.

[18] It is not disputed that Kanal D has never had a business relationship with GEM (i.e., General Entertainment and *Music* Company). However, it did have a licensing relationship with

General Entertainment and *Media* Company [GEMCO] between 2012 and 2018 in relation to a number of the Kanal D Programs. Turkmen provides copies of those licenses [the Iran Licenses] and the certified translations confirm their terms by which Kanal D granted GEMCO the limited right to dub, subtitle, translate into the Farsi language and broadcast the dubbed/subtitled/translated versions of various Kanal D Programs within Iran. It is Kanal D's theory that when the Iran Licenses expired, GEMCO had by then ceased operations, GEM had been incorporated, and it continued to translate and broadcast the Kanal D Programs with impunity while denying its corporate affiliation with GEMCO.

[19] The legal relationship between GEM and GEMCO is a matter of dispute in the parties' pleadings. In its Statement of Defence in this action, GEM denies that it is the corporate successor to GEMCO though it admits that it acquired certain of GEMCO's assets, including copyright assets, when GEMCO ceased operating in 2017.

[20] In his affidavit filed in the GEM Action, Karimian gives a history of the GEM Group of companies, which he says has been a family-run business since its inception in 2006. The focus of their business is on the Farsi-speaking and Middle East markets. GEMCO ceased operating in the Middle East after the sudden death of its CEO, Saheed Karimian. The family then moved to Canada. In its Statement of Defence in this action, GEM pleads that it was incorporated in 2015 for the purpose of holding and enforcing intellectual property rights in Canada.

C. *The allegations of copyright infringement*

[21] Kanal D alleges that Kanal D Programs were broadcast live and streamed on demand over the GEM IPTV service owned by GEM. These activities occurred between 2018-2021. According to Kanal D, GEM's IPTV service operates from Canada via the website www.GEMOnline.tv [GEM TV website].

[22] Kanal D also alleges that GEM is the entity that has provided the Kanal D Programs to the GLWiZ Third Parties who have wrongfully made the Kanal D Programs available over the GLWiZ.tv IPTV service, and more specifically the website www.GLWiZ.tv [the GLWiZ website]. Kanal D alleges that GEMCO provided the Kanal D Programs to Ava Telecom to stream its library of content over the GLWiZ website.

[23] In its Statement of Defence, GEM denies that it has ever operated the GEM TV website and denies that it has made available the Kanal D Programs and communication signals whether on the GEM TV website or by inducing or authorizing the GLWiZ Third Parties to do so.

III. Issues

[24] The following issues are raised by Kanal D's motion:

1. Is this motion amendable to summary judgment?
2. Has Kanal D shown that there is no genuine issue for trial such that summary judgment should be granted?

IV. Analysis

A. *Is this motion amenable to summary judgment?*

[25] I am satisfied that the issues raised by Kanal D are appropriate for summary judgment. The failure of GEM to respond to the motion coupled with Kanal D's obligation to put its best foot forward in making out its claims, means that the Court would be in no better position to assess the relevant facts and apply the law than if a trial or a summary trial were to be ordered. Deciding these issues on a summary basis therefore ensures fair access to affordable, timely and just adjudication of the issues which the Supreme Court called for in *Hryniak v Mauldin*, 2014 SCC 7 at paras 4-5 [*Hryniak*] and is in keeping with the objectives set out in Rule 3 of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*].

B. *Has Kanal D shown there is no genuine issue for trial?*

[26] My analysis starts with a review of the legal and evidentiary principles applicable to the Court's consideration of the written record filed by Kanal D, followed by an assessment of the evidence tendered by Kanal D in accordance with these principles in order to determine whether Kanal D has made out its claims.

(1) Guiding principles on summary judgment

[27] Summary judgment allows the Court to decide an action summarily based on a written record if there is no genuine issue to be tried. It is only where the necessary facts cannot be found to resolve the dispute fairly and justly, or where it would be unjust to make a finding on

those facts alone, that summary judgment should not be granted (*Milano Pizza Ltd v 6034799 Canada Inc*, 2018 FC 1112 at paras 29 and 36 [*Milano Pizza*] citing *Hryniak* at para 28). In such instances, the Court has the discretion to order a summary trial of an issue, or dismiss the motion in respect of that issue (Rule 215(3)(a) and (b) of the *Federal Courts Rules*).

(a) *Kanal D's evidentiary burden*

[28] The Court must scrutinize Kanal D's evidence in two critical ways.

[29] First, it must ensure that Kanal D's evidence is "sufficiently clear, convincing and cogent" in keeping with the evidentiary standard required in all civil proceedings (*Canada (Attorney General) v Fairmont Hotels Inc*, 2016 SCC 56 at para 36 citing *FH v McDougall*, 2008 SCC 53 at para 46).

[30] Second, the court must be cautious of evidence that would be inadmissible at trial. Where evidence based on information and belief in an affidavit tendered on a motion for summary judgment goes to a fundamental contested aspect of the summary judgment motion, the Court must first consider whether the evidence meets the criteria for admissibility at trial. If it does not, the onus falls on the party tendering the evidence to justify some expansion of the rules governing admissibility in the context of the motion (*Drummond v Cadillac Fairview Corporation Limited*, 2019 ONCA 447 at para 24 [*Drummond*]).

(b) *The impact of the Defendant's decision not to respond to the motion*

[31] Where facts are solely within GEM's ability to produce them, or only GEM could clarify any doubts the Court may have in the evidence put forward by Kanal D as the moving party, the Court is guided by two principles.

[32] First, the Court is entitled to assume that both of the parties have put their best foot forward and that the record contains all of the evidence on which each party would rely at trial (*Broadgrain Commodities Inc. v. Continental Casualty Company*, 2018 ONCA 438 at para 7). Once Kanal D as the moving party has discharged its burden, the evidentiary burden falls on GEM as the responding party to adduce specific facts showing that there is a genuine issue for trial (*Cabral v Canada (Citizenship and Immigration)*, 2018 FCA 4 at para 23).

[33] Second, where information is solely within GEM's knowledge, the Court may choose to draw an adverse inference that it has chosen not to respond by reason that the evidence would not have been favourable to it (*Wu v Ma*, 2024 BCCA 196 at paras 34-41). The Federal Court of Appeal has emphasized that the drawing of an adverse interest must be made based on the overall state of the evidence and, in the context of a failure to defend such as here, requires some probative evidence on the part of the moving party (*Voltage Holdings, LLC v Doe #1*, 2023 FCA 194 at paras 48, 57-58 and 75). The ability to draw an adverse inference against a non-participating party ensures that parties do not benefit from a strategic decision not to respond to a motion for summary judgment and thwart the very purpose of such a motion, which is to promote the timely and efficient adjudication of disputes.

(2) Application of the guiding principles to Kanal D's motion

[34] Kanal D bears the burden of showing that there is no genuine issue for trial with respect to the following issues: (i) the subsistence of copyright in the Kanal D Programs; (ii) Kanal D's ownership of the copyright in the Kanal D Programs; (iii) GEM's infringement of Kanal D's copyright in the Kanal D Programs; (iv) GEM induced and/or authorized the GLWIZ Third Parties' infringement of the Kanal D copyright.

(a) *Copyright subsists in the Kanal D Programs*

[35] Exhibits B and C to the Turkmen Affidavit list the 22 Kanal D Programs at issue on this motion.

[36] The Federal Court has consistently considered television programs to be cinematographic works entitled to the presumption of copyright and their "makers" entitled to a presumption of ownership of such copyright under section 34.1(1)(a) and (b) of the *Copyright Act* RSC, 1985, c C-42, s. 1 [the *Copyright Act*] (see *Vidéotron Ltée v Konek Technologies Inc*, 2023 FC 741 at paras 26 and 35 [*Vidéotron*]).

[37] While the Defendant has not responded to this motion, it did plead that it has no knowledge as to the subsistence of copyright in the Kanal D Programs and Kanal D's ownership of that copyright. Kanal D is therefore entitled to the presumption afforded by section 34.1(1)(a) of the *Copyright Act* in respect of the Kanal D Programs with the result that copyright is presumed to subsist in the Kanal D Programs unless the contrary is shown.

[38] The presumption has not been displaced and in any event, the evidence filed supports a finding of copyright in the Kanal D Programs. The Turkmen Affidavit provides the storyline and 30 second video clips for each of the Kanal D Programs, which Turkmen identifies as original television programming. The Kanal D Programs are original cinematographic works that unquestionably meet the requisite level of skill and judgement which is “more than trivial” (*CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 16).

[39] There is therefore no genuine issue for trial on the subsistence of copyright in the Kanal D Programs.

(b) *Kanal D is the owner of the copyright in the Kanal D Programs*

[40] Turning to the presumption of ownership under section 34.1(1)(b) of the *Copyright Act*, section 2 of the *Copyright Act* defines the “maker” of a cinematographic work to be “the person by whom the arrangements necessary for the making of the work are undertaken.” I am satisfied that Kanal D meets the definition of “maker” by virtue of each of the Producer Agreements attached to the Turkmen and Çarıkçı Affidavits. The terms of these agreements confirm that Kanal D hired content creators and acquired the copyright and all associated rights of reproduction, distribution, transmission and broadcasting in the subject cinematographic works. By meeting the definition of “maker”, I am in turn satisfied that Kanal D is entitled to the presumption of ownership of the Kanal D Programs.

[41] While Kanal D is presumed to be the owner of the Kanal D Programs, there is evidence to the contrary that Kanal D must overcome. Attached to the Turkmen Affidavit are 13 GEM

Copyright Registrations for copyright in original sound recordings and first fixations. These registrations were obtained on dates in 2020 and name GEM as owner, though they contain titles that correspond to titles of twelve of the Kanal D Programs: 1170700 (Ruthless City); 1173797 (War of the Roses), 1173798 (Forbidden Love); 1173799 (Kuzey Guney); 1173800 (Fallen Angel); 1173801 (Love); 1173802 (Waiting for the Sun); 1174065 (Sweet Revenge); 1174069 (Leaf Cast); 1174072 (For My Son); 1174441 (Maryam); and 1174444 (Waves) [collectively, the GEM Copyright Registrations].

[42] Pursuant to subsection 53(2) of the *Copyright Act*, a certificate of registration of copyright is admissible evidence that copyright subsists in the work and that the person registered is the owner of that copyright. The question therefore is whether the GEM Copyright Registrations cover the same copyrighted works as those claimed and asserted by Kanal D on this motion, or whether the GEM Copyright Registrations cover other works despite having the same names as the Kanal D Programs.

[43] According to Turkmen, these registrations were wrongfully obtained. As such, Kanal D asks the Court to order that they be expunged from the Copyright Register as part of the relief it seeks. GEM denies this allegation. In its Statement of Defence, it pleads:

... [GEM] admits that it has registered copyrights in Canada including certain Copyright Registration Nos. noted in Schedule C of the Claim. It registered these on its own behalf and not on behalf of any other person. [GEM] also admits that it has asserted copyright registrations against a third party in [the GEM Action]. However, [GEM] denies that these registrations were wrongfully procured or that [GEM] is not the lawful owner of copyright in these works (Statement of Defence, paragraph 9).

[44] Copyright registrations in Canada do not allow for the deposit of samples of the work over which copyright is being claimed. In the absence of such a deposit, it is not possible without GEM's assistance, to determine what original sound recordings and first fixations the GEM Copyright Registrations actually cover. While there is nothing on the face of the registrations that confirm that the GEM Copyright Registrations relate to translated versions of Kanal D Programs, seven of the registration numbers match the copyright registration numbers listed in Schedule "B" to GEM's Statement of Claim in the GEM Action under its list of "dubbed" GEM Copyright Registrations (as distinct from a list of GEM Original Productions). This evidence satisfies me on a balance of probabilities that the GEM Copyright Registrations cover different works than those over which Kanal D asserts ownership on this motion. The fact that GEM has obtained copyright registrations for translated versions of the Kanal D Programs will be addressed later in these Reasons as evidence of GEM's infringing activities and its bad faith.

[45] As the presumption of Kanal D's ownership has not been displaced, there is no genuine issue for trial on Kanal D's ownership of the copyright in the Kanal D Programs.

(c) *GEM's infringement of Kanal D's copyright in the Kanal D Programs*

[46] Kanal D alleges that GEM has directly infringed its copyright in the Kanal D Programs listed in Annex 1 to these Reasons by wrongfully "acquiring, translating, copying, reproducing, storing on its servers and making available" the Kanal D Programs in Canada via its GEM TV website.

(i) The evidence of the unauthorized infringing acts

[47] Kanal D's evidence establishes direct infringement of its copyright in the Kanal D Programs which were copied and translated without permission, and made available for broadcast and streaming on the GEM TV website on dates in 2021. That evidence consists of the Barker and Turkmen evidence as well as the unauthorized acts of translating various Kanal D Programs evidenced by the GEM Copyright Registrations.

[48] Barker's evidence includes video samples of 18 of the 22 Kanal D Programs listed in the Statement of Claim on the GEM TV website in 2021. Barker also shows how many episodes of each was available for streaming in January 2021: Ruthless City (155), Price of Passion (111), Time Goes By (308), Meryem (98), Sweet Revenge (93), Waves (141), Flames of Desire (205), For My Son (264), Matter of Respect (78), Love (30), Leaf Cast (348), Fatmagül (190), Kuzey Guney (197), Mercy (99), Waiting for the Sun (150), Forbidden Love (160), Secrets (42), and Lost City (60) (for a total of 2,729 episodes). The GEM TV Channel has links that show the availability of these programs for viewing both live and on-demand.

[49] Turkmen also purports to provide evidence that additional Kanal D Programs and additional episodes were made available live and for streaming on the GEM TV website in 2020. Based on his evidence, the number of infringing episodes would climb by an additional 268 episodes to 2,997 episodes in total and would include the following three additional Kanal D Programs: Love Trap, Sunshine Girls and Fallen Angel. Turkmen states that "[a]ccording to our business files and records, others at Kanal D were also able to see the Kanal D Programs

available on GEMTV, during 2020.” No records are attached to corroborate this statement, nor are the “others” identified. Mr. Turkmen’s evidence on infringement falls short of the clear, cogent and convincing standard of evidence that Kanal D is required to put forward on this motion and the infringing episodes will be limited to those 2,729 episodes identified in the Barker Affidavit.

[50] Based on Turkmen’s evidence, I find that the Infringing Activities were not authorized.

(ii) Ownership of the infringing platforms

[51] In its pleading, GEM does not deny that the Kanal D Programs were made available and streamed on the GEM TV website, however, it denies that it owns or operates the GEM TV website at issue and it denies that it has made available the Kanal D Programs or communication signals. Its pleaded defence is that it does not own or operate or control the infringing service or website:

[GEM] is aware of the website www.GEMOnline.tv. [GEM] does not own, operate or control this website, directly or indirectly” (Statement of Defence, paragraph 29).

[52] Disturbingly, GEM pleads the exact opposite in its Statement of Claim in the GEM

Action:

The GEM Channels and GEM Works are also provided to subscribers in Canada and elsewhere in the world through Internet Protocol Television (“IPTV”) services providing subscription access to stream those television channels and programs (both live and in video on demand format) via GEM’s website located at www.GEMOnline.tv. (Statement of Claim, paragraph 4).

[53] The First Humphrey Affidavit also attaches a copy of a publicly available discovery transcript excerpt of GEM's President in the GEM Action together with an answer to an undertaking arising from the question asked in the discovery excerpt. That answer confirms that GEM owns the GEM TV website.

[54] GEM's ownership of the GEM TV website is further confirmed in the Karimian Affidavit obtained from the public record of the GEM Action, where Karimian states in paragraph 20:

“At present, the GEM Channels and GEM Works are only lawfully and exclusively made available by GEM Inc. in Canada through its secure www.GEMOnline.tv website and streaming platform.”

[55] I consider the discovery and affidavit evidence from the GEM Action to be admissible on this motion whether simply as evidence of the fact that these statements were made by GEM's President, or as hearsay evidence, based on an expansion of the rules of admissibility considering their reliability as sworn evidence (*Drummond* at para 4). I am also prepared to draw an adverse inference against GEM on this issue based on the totality of the evidence: GEM has not tendered evidence refuting its ownership of the GEM TV website because it cannot do so and its pleading to the contrary in this action was knowingly false.

[56] I find on the evidence that of the various alleged activities, Kanal D has shown that GEM infringed Kanal D's copyright in the Kanal D Programs by copying, translating, broadcasting and streaming 2,729 episodes in 2021 without Kanal D's authorization [the Infringing Acts] contrary to subsections 3(1)(a), (d) and (f) and 27(1) of the *Copyright Act (Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada, 2012*

SCC 35 at para 56); *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 at para 8).

[57] There is therefore no genuine issue for trial on GEM's infringement of Kanal D's copyright based on the Infringing Acts.

(d) *The allegations of inducement and/or authorized infringement*

[58] Kanal D also alleges that GEM has induced or authorized the GLWiZ Third Parties to infringe its copyright in the Kanal D Programs via the GLWiZ website. Specifically, Kanal D alleges that: (i) but for GEM's acts of infringement in translating broadcasting and making available the Kanal D Programs via its service, GLWiZ could not have engaged in its acts of infringement; (ii) GEM was *de facto* authorizing GLWiZ to engage in similar activities, or at least "enabling those activities"; and (iii) "practically, GEM must have uploaded the Kanal D Programs onto its website."

[59] Notably, while Kanal D has grouped inducement and authorization together in its submissions; they are distinct causes of action. Authorizing infringement is a statutory cause of action (subsections 3(1) and 27(1) of the *Copyright Act*) whereas inducing copyright infringement was recognized by this Court in *Bell Canada v L3D Distributing Inc. (INL3D)*, 2021 FC 832 [*Bell Canada*] at para 71).

[60] Kanal D alleges that the GLWiZ website is owned and operated by GLWiZ and its parent company, Goldline, and Ava Telecom. Kanal D further alleges that GEMCO licensed Ava

Telecom to stream its library of content including the Kanal D Programs over the GLWiZ website pursuant to a Content and Acquisition Agreement dated September 25, 2013, a copy of which is attached to the Turkmen Affidavit [the Ava Telecom Agreement].

[61] In its pleading, the Defendant denies that it has induced or authorized the alleged infringement by the GLWiZ Third Parties. GEM also denies that it is the entity that contracted with Ava Telecom and pleads:

In particular, the Defendant denies that such alleged agreement from 2013 could have included a term that the Defendant was to receive any revenue, given that in 2013 the Defendant did not exist. The Defendant denies that it performed any acts under any such agreement.” (Statement of Defence, paragraph 11)

[62] According to the Turkmen Affidavit, Kanal D learned in 2019 that GLWiZ was making available online and streaming Farsi translated versions of the Kanal D Programs on the GLWiZ website.

[63] The Barker Affidavit attaches video clips showing Ms. Barker accessing seven of the Kanal D Programs (totalling 256 episodes) that she was able to stream on four occasions in January 2021 from the GLWiZ service for which she obtained a subscription. All but three of these Programs (Sunshine Girls, Fallen Angels and War of the Roses) are also the subject of the direct infringement allegations against GEM.

[64] Leaving aside whether the foregoing activities amount in law to inducing or authorizing infringement, I find Kanal D is seeking to make this claim out based on insufficiently clear and cogent evidence.

[65] Even if I accepted the evidence showing that translated versions of the Kanal D Programs were unlawfully streamed on the GLWiZ website in 2021 including the evidence established by Barker using the Wayback Machine, I do not accept that Kanal D has proven that GEM was the source of this programming based on Turkmen's evidence which consists of two pieces of hearsay evidence.

[66] First, the Turkmen Affidavit attaches an email string dated March 2019 [the Gold Line email] in which the VP of Operations of Gold Line responds to a cease and desist letter from lawyers for Kanal D alleging unauthorized broadcasting of 14 of the Kanal D Programs by stating:

Can you please send me the email below from your work email so I can send it to Gem TV, who has provided us these programs.

[67] Second, Kanal D relies on the Ava Telecom Agreement which is attached to the Turkmen Affidavit. The Kariam Affidavit provides evidence that GEMCO never assigned the Ava Telecom Agreement and it was terminated by notice dated October 17, 2015.

[68] The Gold Line email and the Ava Telecom Agreement go to a fundamentally contested issue and would not be admissible at trial as Turkmen has no direct knowledge of these documents. There is no basis for expanding the rules of admissibility to allow for their admission on this motion. I also do not consider that it would be fair or just to make a finding on those facts alone even if I found this evidence admissible (*Milano Pizza* at paras 29 and 36). At the hearing of this motion, counsel for the Plaintiff advised that Kanal D has an ongoing copyright and radio communications infringement action in the Federal Court (File No. T-206-

21) which it commenced against GLWiZ, Gold Line and Ava Telecom in connection with the unauthorized streaming of Kanal D Programs [the GLWiZ Action]. That action will necessarily involve a determination of the acts of infringement by the Third Parties and whether those acts were induced or authorized by GEM.

[69] I appreciate that GEM is not a party to the GLWiZ Action, with the result that the relief sought in this action cannot be obtained by Kanal D in that action if it is successful.

Nevertheless, I must consider the fairness of making a finding on an uncontested motion on the basis of hearsay evidence which would decide a critical issue in the GLWiZ Action which is contested and will undoubtedly allow for a more robust determination of the issue. Nor do I consider it appropriate to order a trial of the issue in this action: ordering a trial of the issue will serve no purpose given GEM's non-participation and the fact that Kanal D is assumed to have put its best case forward and chose to bring this motion before the GLWiZ Action was decided.

[70] Kanal D's motion in respect of GEM's inducement and/or authorization of infringement of the Kanal D Programs by the GLWiZ Third Parties is dismissed.

V. Conclusion

[71] Kanal D has established that it is the exclusive copyright owner of the Kanal D Programs listed in Annex 1 and thereby retains the exclusive right to copy, translate or stream them. It has further established that 2,729 episodes of the Kanal D Programs were unlawfully copied, translated, broadcast and streamed on the GEM TV website, which is owned by GEM. Kanal D is therefore entitled to remedies as canvassed below.

VI. Remedies

[72] Kanal D seeks validation of service of this motion on GEM, declaratory relief under the *Copyright Act*, as well as a permanent and wide injunction, statutory damages (\$15,000 per work infringed), punitive damages (\$1,000,000), and lump-sum costs on a substantial indemnity basis.

[73] I address each of these forms of relief in the paragraphs that follow.

A. *Validation of service*

[74] By the time Kanal D served this motion, counsel for GEM had successfully brought a motion to be removed as solicitors of record. Kanal D submitted an affidavit of service sworn May 29, 2024 attesting to the fact that the motion record for the motion herein was served on GEM via email at legal@gemonlive.tv and support@gemgroup.tv and via courier to GEM's registered corporate address. It also forwarded the motion record by email to GEM's former counsel who advised Kanal D's counsel that they would forward the Plaintiff's motion to their former client as a "courtesy."

[75] Pursuant to Rule 147 of the *Federal Courts Rules*, Kanal D's attempt to serve GEM with its motion record is hereby validated. I find that either GEM received notice of the motion herein, or to the extent that it did not, it was due to the Defendant's avoidance of service.

B. *Declaratory relief*

[76] Kanal D's entitlement to declaratory relief flows from what it has established on the evidence. It is therefore entitled to a declaration that it is the owner of the copyright in the Kanal D Programs and that GEM has infringed that copyright.

C. *Expungement of the GEM Copyright Registrations*

[77] Kanal D seeks an order expunging the GEM Copyright Registrations pursuant to subsection 57(4) of the *Copyright Act*. Having found that the GEM Copyright Registrations were improperly obtained by GEM, the relief sought by Kanal D is granted for the following registrations: 1170700, 1173797, 1173798, 1173799, 1173800, 1173801, 1173802, 1174065, 1174069, 1174072, 1174441 and 1174444.

D. *Injunctive relief*

[78] Given my finding that Kanal D has established GEM's infringement of the Kanal D Programs, Kanal D is entitled to a permanent injunction restraining any further infringement (*Trimble Solutions Corporation v Quantum Dynamics Inc*, 2021 FC 63 at para 66). I am satisfied that it would be just in the circumstances considering: GEM's wilful and knowing infringement; its attempts to deny and conceal its infringing activities; and its apparent disregard for court processes.

[79] Kanal D has also requested a wide injunction pursuant to section 39.1(1) of the *Copyright Act*, which would enjoin GEM from engaging in any of the infringing activities in connection with any other works. Kanal D has not, however, satisfied the requirement under subsection 39.1(1)(b) of showing that GEM will likely infringe the copyright in those other works or subject-matter unless enjoined by the court from doing so. In fact, Kanal D's pleading suggests the contrary: it pleaded that GEM's infringing activities have stopped.

E. *Statutory damages*

[80] Pursuant to section 38.1 of the *Copyright Act*, Kanal D has elected to recover an award of statutory damages instead of its actual damages.

[81] Kanal D is asking for \$15,000 per episode. This falls within the \$500 to \$20,000 per work range prescribed by statute where the infringing acts were for commercial purposes (*Copyright Act*, s 38.1(1)(a)). For the reasons that follow, I believe that \$10,000 per episode is a more appropriate and just award.

[82] In order to assess the reasonableness of the statutory damages sought, I start with the principle that statutory damages are to be assessed on a case-by-case basis to achieve a just result (*Rallysport Direct LLC v 2424508 Ontario Ltd.*, 2020 FC 794 at para 6 [*Rallysport FC*] aff'd *2424508 Ontario Ltd v RallySport Direct LLC*, 2022 FCA 24 [*Rallysport FCA*]).

[83] Kanal D supports its statutory damages claim by pointing to the evidence of its probable economic losses in the form of lost licensing fees. While not determinative (*Rallysport FCA* at

paras 29 and 38), I consider Kanal D's evidence relating to its actual loss to be an important starting point in arriving at an amount of statutory damages that is fair and proportionate. The Iran Licenses are evidence of 16 of the commercially negotiated licensing fees that Kanal D and GEMCO agreed on for the linear broadcasting of various Kanal D Programs in a single country over a decade ago. Those licensing fees ranged from USD\$500 to \$4,000 per episode [the Iran Licensing Rates]. The Turkmen Affidavit provides evidence that today, Kanal D would charge at least USD\$4,000 (or CAD \$5,500) per year per episode to broadcast or stream any of the Kanal D Programs in a single territory [the Current Licensing Rate]. Kanal D's claim for \$15,000 per episode is based on the Current Licensing Rate multiplied by three, a number that Kanal D admits is random, but which reflects the fact that GEM's infringing activities allowed for streaming in more than one country.

[84] I appreciate that arriving at a statutory damages award is a "rough and ready" exercise that is intended to facilitate justice by allowing the Court to provide a copyright owner with a monetary award without the need to prove actual damages. Still, I am not prepared to arbitrarily multiply the Current Licensing Rate without more cogent evidence as to Kanal D's current licensing practices for the streaming of the Kanal D Programs, which it could easily have tendered.

[85] I am satisfied, however, that an award of \$10,000 per episode for each Kanal D Program shown to have been infringed by GEM is justified based on the aggravating factors of GEM's bad faith, its conduct in these proceedings, and most importantly, the need for deterrence. All of

these are factors that must be considered pursuant to sections 38.1(5)(a)(b) and (c) of the *Copyright Act*.

[86] *GEM's Bad Faith* - GEM is a sophisticated litigant whose assertion of its own copyright in the GEM Action shows that it understands the damage that pirating can inflict on a copyright owner. By all accounts, GEMCO negotiated the Iran Licenses and when they expired, GEM continued to access the Kanal D Programs, translated them and made them available on its GEM TV website thereby avoiding the payment of licensing fees. Not only did GEM seek to avoid paying licensing fees, but it wrongfully obtained copyright registrations for works that infringed Kanal D's intellectual property rights and sought to monetize those rights.

[87] *GEM's conduct in this proceeding* - GEM's lack of participation in this motion, and in this action as a whole, makes it difficult for the Court to gauge whether the statutory amount awarded is grossly disproportionate to GEM's profits from engaging in the infringing activities. However, the fact that GEM itself sought a statutory damage award of \$20,000 per episode against like infringers in the GEM Action confirms that an award of \$10,000 per episode is not grossly out of proportion to the infringement.

[88] *Deterrence* - A per episode rate that is meaningfully higher than the actual Current Licensing Rate, ensures that GEM and other defendants who might seek to avoid the payment of licensing fees in the future are deterred (*Vidéotron* at para 81). This Court has recognized the "enduring harm" that results from unauthorized broadcasting and streaming which includes an unlimited potential for continued infringement due to the loss of control over the copyrighted

works (*Bell Canada* at para 101). GEM itself understands this and sought damages in the GEM Action on the basis of the “irreparable damage” that similar acts caused it. Infringers who ask their customers to “pay per view” should likewise do the same.

F. *Punitive damages*

[89] Kanal D is seeking \$1,000,000 in punitive damages.

[90] While punitive damages may be awarded in addition to statutory damages pursuant to section 38.1(7) of the *Copyright Act*, they should not be awarded where the statutory damages award already fulfills a punitive and retributive function as it does in this case (*Telewizja Polsat S.A. v Radiopol Inc*, 2006 FC 584 at para 52 and *Vidéotron* at para 118).

G. *Interest*

[91] Prejudgment interest is also awarded on the statutory damages calculated from the date that Kanal D made GEM aware of their infringement in June 2021 at the rate of 5.3% per annum, not compounded.

[92] GEM shall pay post-judgment interest on all the amounts owed, at a rate of 7% per annum, not compounded, from the date of this Judgment until the amounts ordered by this Court are paid in full.

H. *Costs*

[93] Kanal D submitted a Bill of Costs seeking a lump sum award on a substantial indemnity basis based on scandalous and outrageous conduct on the part of GEM.

[94] An award of costs on a substantial indemnity basis is exceptional. I have considered the various factors in Rule 400 of the *Federal Courts Rules* including the fact that Kanal D did not make out its claim on indirect infringement, and I am awarding costs on a partial indemnity basis in the lump sum of \$78,512.09 based on the amounts for fees and disbursements provided in Kanal D's Bill of Costs which I consider to be reasonable.

JUDGMENT in T-749-23

THIS COURT'S JUDGMENT is that:

1. The Plaintiff's service of the motion herein on GEM is hereby validated in accordance with Rule 147 of the *Federal Courts Rules*;
2. Copyright subsists in the Kanal D programs, consisting of the cinematographic works listed in Annex 1 [the Kanal D Programs];
3. The Plaintiff is declared to be the exclusive owner of the copyright in the Kanal D Programs and thereby holds the exclusive right to communicate those works in Canada by telecommunication, including via Internet and television broadcast, whether streamed or on demand;
4. The Defendant is declared to have infringed the Plaintiff's copyright in the Kanal D Programs by copying, translating and streaming 2,729 episodes of the Kanal D Programs directly by unlawfully allowing users of its GEM TV service and its Internet Protocol television (IPTV) service at www.gemonline.tv to access and watch the Kanal D Programs by means of telecommunication from a place and time individually chosen by them contrary to sections 3(1)(a), (d) and (f) and 27(1) of the *Copyright Act*;
5. The Defendant and its affiliates, including officers, directors and any other person acting on their behalf, are hereby permanently enjoined from directly or indirectly possessing, copying, reproducing, translating, dubbing, storing, downloading, uploading, broadcasting, distributing, streaming, or otherwise making available any episode(s) of the Kanal D Programs;

6. The Registrar of Copyright shall in accordance with subsection 57(4)(b) of the *Copyright Act* rectify the Register of Copyrights so as to expunge the following Copyright Registrations: Registration Nos. 1170700, 1173797, 1173798, 1173799, 1173800, 1173801, 1173802, 1174065, 1174069, 1174072, 1174441 and 117444;
7. The Defendant shall pay to the Plaintiff statutory damages in the amount of \$10,000 for the infringement of copyright in each of the 2,729 episodes of the Kanal D Programs for a total award of \$27,290,000 pursuant to s 38.1 of the *Copyright Act*;
8. The Defendant shall pay the Plaintiff's costs (including disbursements) of this action on a partial indemnity basis in the lump sum of \$78,512.09;
9. The Defendant shall pay the Plaintiff pre-judgment interest on the award of statutory damages from June 2021 at the rate of 5.3% per annum, not compounded; and
10. This Judgment shall bear interest at a rate of 7% as of the date of its issuance.

"Allyson Whyte Nowak"
Judge

ANNEX 1 – KANAL D PROGRAMS

English Name	Turkish Name	Farsi Name	No. of Episodes infringed by GEM
1. Love Trap	Afili Aşk	Eshghe Tajamolati	
2. Ruthless City	Zalim İstanbul	Istanbul Zalim	155
3. Price of Passion	Siyah Beyaz Aşk	Eshghe Siah O Sefid	111
4. Time Goes By	Öyle Bir Geçer Zaman Ki	Roozi Roozegar	308
5. Meryem	Meryem	Maryam	98
6. Sweet Revenge	Tatlı İntikam	Entegham Shirin	93
7. Sunshine Girls	Güneşin Kızları	Dokhtarhaye Aftabi	
8. Waves	Bodrum Masalı	Taghaato	141
9. Flames of Desire	Hayat Şarkısı	Maxira	205
10. For My Son	Poyraz Karayel	Poyraz Karayel	264
11. Matter of Respect	Şeref Meselesi	Sherafat	78
12. War of the Roses	Güllerin Savaşı	Nabard e golha	
13. Love	Aşk	Eshgh	30
14. Leaf Cast	Yaprak Dökümü	Barg Rizan	348
15. Fatmagül	Fatmagül Suçu Ne?	Fatmagul	190
16. Kuzey Guney	Kuzey Güney	Kuzey Guney	197
17. Mercy	Merhamet	Marhemat	99
18. Waiting for the Sun	Güneşi Beklerken	Dar Entezare Aftab	150
19. Forbidden Love	Aşk-I Memnu	Eshgh Mamnoo	160
20. Secrets	Kayıp	Gomshodeh	42
21. Lost City	Kayıp Şehir	Zire Pooste Shahr	60
22. Fallen Angel	Kötü Yol	Birahe	
			TOTAL: 2729

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-749-23

STYLE OF CAUSE: DEMİRÖREN TV RADYO YAYINCILIK YAPIMCILIK
A.S. v GENERAL ENTERTAINMENT AND MUSIC
INC.

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 24, 2024

JUDGMENT AND REASONS: WHYTE NOWAK J.

DATED: JULY 18, 2024

APPEARANCES:

Jim J. Holloway

FOR THE PLAINTIFF

SOLICITORS OF RECORD:

Baker & McKenzie LLP
Barristers and Solicitors
Toronto, Ontario

FOR THE PLAINTIFF