



Court File No.: 15-5800

ONTARIO
SUPERIOR COURT OF JUSTICE
BRAMPTON SMALL CLAIMS COURT

BETWEEN:

GOLDI PRODUCTIONS LTD, JOHN WERNER GOLDI
and JOAN CATHERINE GOLDI

and

ADAM BUNCH Defendant

For the Plaintiffs: Mr. J. Goldi
For the Defendant: Mr. J. Simpson

Reasons for Judgment

Background

1. The plaintiff John Goldi has been a “professional educator” for in excess of forty years. His career has included work as a principal/teacher and a professional documentary film maker. The plaintiff company was incorporated in 1979. The plaintiff John Goldi, according to his testimony, has won several international awards for his work. The co-plaintiff Joan Catherine Goldi is the spouse of John Goldi. There was no evidence presented as to any legal involvement by her with the plaintiff company.
2. The defendant was educated at York University studying film and video. He has worked as a music journalist and is a creative director in a small marketing agency. In 2010 he began to write about the history of Toronto. He created some work in various publications and also wrote via an on line blog entitled “The Toronto Dreams Project”. The blog work included fictional stories. He testified that he is very passionate about the history of Toronto. The internet blog was created not for profit intentionally and contains no ads. For his work he has received honourable mention for a Governor General’s Award.
3. In 2000 John Goldi intended to commemorate the Boer War with a television documentary. A four hour documentary was ultimately produced by him on this subject. During his research in South Africa he discovered an historic connection to Canada. As a result of this research, he established an “internet museum” entitled the “Canadian Anglo Boer War Museum”. The funding for its creation was by the government. Mr. Goldi is the creator. The site consists of

hundreds of coloured pictures of and several stories based on his initial and ongoing research. According to him this is the largest internet museum in the world. The pictures on the site are "enhanced" by him from originals discovered in his research. All materials on the site are flagged as copyrighted. During his research he uncovered the story of J. Cooper Mason, a Canadian from Toronto involved in the Boer War. From the descendants of Mason he accessed his camera, photographs he had taken, his diary, source et cetera. Mr. Goldi determined that he was the first combat photographer ever. As a result, Mr. Mason became a large web site presence on the internet museum. A significant portion (if not all) was made an exhibit (**Exhibit Tab H to Tab Q** inclusive).

4. Some time after its publication on line, Mr. Goldi discovered a blog article authored by the defendant entitled "J. Cooper Mason and the Great Boer War". A hard copy of this publication was made **Exhibit 1 Tab D**. The article contained several photos and information available on the internet museum site. Other sources were used by the defendant as well in writing this article. On the sixth page the defendant acknowledged his sources for the article including Mr. Goldi. The article contained the following:

"It was actually research for a big Casa Loma post that I am working on that first tipped me off to J. Cooper Mason. There is a bit of info in the book "Sir Henry Pellatt, the king of Casa Loma". Much of the info about Mason's time in the war comes from the retro-nineties looking web site of a documentary film maker, John Goldi: The Canadian Anglo-Boer War Museum. It has lots of photos and excerpts from Mason's letters and his diary here. The speculation about Mason's suicide comes from Wikipedia and suite 101-his obituary (here) and a couple of other sources say it was cancer."

5. There was no evidence presented that the defendant sought any permission to use the internet museum information and pictures prior to posting his article.

6. According to the defendant he discovered Mason's connection to Toronto and the Boer War when reading a "Casa Loma" book. In fact, Sir Henry Pellatt, builder of Casa Loma, and Mason were friends he discovered. He started researching news articles, a variety of web sites including the plaintiffs to obtain more information. In his evidence the defendant acknowledged that approximately twelve of the photos in his article were from the plaintiff web site. Approximately eight additional photos came from other blogs and Library Archives Canada.

7. Approximately one year after posting this article, Heritage Toronto called to advise they had been contacted by John Goldi who accused the defendant of copyright infringement and plagiarism. Ultimately Heritage Toronto later revoked his nomination for an award based on this article. He testified that he believed that the photographs from the plaintiff site were considered "public domain" since Mason had been deceased for in excess of fifty years (per Section 6 of the Copyright Act).

The Issues

8. The plaintiff's claim damages for copyright infringement by the use by the defendant of the photos and the "entire story" of J. Cooper Mason contained in the internet museum site. These damages claimed include: 1. Damages (for loss of revenue derivable from licensing of this information) in the amount of \$3,356.10 (see **Exhibit 1- b**); 2. Punitive damages in the amount of \$5,000 since the defendant refused to move the photos from his blog after the demand to do so was made by the plaintiffs; 3. Special damages in the amount of \$15,000 which is an amount alleged to compensate the plaintiff for his inability to exploit his own work to produce a book on the subject. There was absolutely no evidence presented to support this special damage claim during the trial.

9. The defence is two-fold as follows:

1. The plaintiffs have no copyright in the photos or the facts contained on the internet museum site;
2. Alternatively, if there exists copyright protection, the use by the defendant of these items constitutes "fair dealing" in accordance with Section 29 of The Copyright Act.

The Law

10. Section 5 of The Copyright Act states that in Canada copyright shall subsist "in every original literary, dramatic, musical and artistic work". Originality is not defined in the Act but Section 2 defines "every original literary...work" as including "every original production in the literary...domain, whatever may be the mode or form of its expression". The defendant relies significantly on **Law Society of Upper Canada vs CCH Canadian Limited [2004] 1R.C.S.**

11. As stated in Paragraph 22 of the judgment: **"This said, in Canada, as in the United States, copyright protection does not extend to facts or ideas but is limited to the expression of ideas"**. Clearly, the claim of the plaintiff in regards to copyright in the facts of the story must fail.

12. This leaves the issue as to whether copyright protection extends to the photos used by the defendant in his article.

13. In Paragraph 16 the Court stated as follows:

"For a work to be "original" within the meaning of The Copyright Act, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work."

14. At Paragraph 25 the Court stated as follows:

“For these reasons I conclude that an “original” work under The Copyright Act is one that originates from an author and is not copied from another work. That alone, however, is not sufficient to find that something is original. In addition, an original work must be the product of an author’s exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise”

15. According to the evidence of Mr. Goldi, the photos contained in the internet museum involved three steps:

1. Sourcing the photo (from family et cetera);
2. Photographing the photo;
3. Putting the photo in a computer programme to enhance the photo.

16. I conclude that this process was a “purely mechanical process” within the meaning of the above mentioned case and the photos therefore are not “original”. There is no protection by copyright attached to these photos.

17. An American decision with facts virtually identical to those in this case reached the same conclusion: **The Bridgeman Art Library Ltd. vs Corel Corporation No. 97 CIV.6232 (LAK).**

18. At paragraph 197 the Court stated as follows: “There is little doubt that many photographs, probably the overwhelming majority, reflect at least the modest amount of originality required for copyright protection. “Elements of originality...may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved but “slavish copying” although doubtless requiring technical skill and effort, does not qualify. As the Supreme Court indicated in **Feist**, “sweat of the brow” alone is not the “creative spark” which is the **sine qua non** of originality.

19. The alternate defence is “fair dealing”. Section 29 of The Copyright Act reads as follows:

“Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.”

In **Law Society of Upper Canada**, the Court stated at Paragraph 29:

“ The fair dealing exception under S 29 is open to those who can show that their dealings with a copyrighted work were for the purpose of research or private study. “Research” must be given a large and liberal interpretation in order to ensure that user’s rights are not unduly constrained.”

20. And at Paragraph 71 the Court stated as follows:

"It is generally in the public interest that access to judicial decisions and other legal resources not be unjustifiably restrained. Moreover, the Access Policy puts reasonable limits on the Great Libraries photocopy service. It does not allow all legal works to be copied regardless of the purpose to which they will be put. Request for copies will be honoured only if the user intends to use the works for the purpose of research, private study, criticism, review of use and legal proceedings. This further supports a finding that the dealings were fair."

21. The defendant submits that by analogy the defence of fair dealing should be applied to this situation where the purpose of the article of the defendant was to promote history. I agree entirely with this submission. The defence of fair dealing under Section 29 is made out if, contrary to my previous conclusion, the use of photos amounted to copyright infringement.

Damages

22. While damages are not awardable based on my conclusion on the liability issue, I would assess the claim for damages at \$3,356.10. There is no basis to support a claim for punitive damages.

Conclusion

23. In summary, the claim of the plaintiffs will be dismissed. This leaves outstanding the issue of legal costs. If, within 10 days of the release of these reasons, the parties are unable to agree on this outstanding issue the parties shall each provide brief written submissions on this issue to the Clerk of the Small Claims Court at Brampton.

Dated: ^{August 1st}
~~July~~, 2018


D. Bryan Holub, Deputy Judge