

Federal Court



Cour fédérale

Date: 20201207

Docket: T-168-18

Citation: 2020 FC 1128

Ottawa, Ontario, December 7, 2020

PRESENT: Madam Prothonotary Mandy Ayles

SIMPLIFIED ACTION

BETWEEN:

LICKERISH, LTD.

Plaintiff

and

AIRG INC.

Defendant

JUDGMENT AND REASONS

I. Introduction

[1] This action, brought under the Court's simplified procedure, is a copyright infringement action relating to the alleged unauthorized use of two photographs of Meghan Markle [Photographs] on the Defendant's website.

II. Background

[2] The Plaintiff, Lickerish Ltd., is a corporation incorporated pursuant to the laws of the United Kingdom, with operations located in London, England. The Plaintiff operates as a photographic syndication agency providing beauty, celebrity, models and fashion images to the media.

[3] The Plaintiff asserts that the Photographs at issue in this proceeding were taken on November 16, 2012 by Dimitry Loiseau, a professional celebrity fashion photographer. Thereafter, the Plaintiff and Mr. Loiseau entered into an exclusive agency contract for the Plaintiff to act as Mr. Loiseau's agent for the syndication of the Photographs and other works [Agreement].

[4] The Defendant, airG Inc., is a Canadian software company headquartered in Vancouver, British Columbia. The Defendant's products include a social networking service designed for mobile use.

[5] The Plaintiff asserts that in November 2016, it discovered that the Defendant had, since as early as October 1, 2014, used and reproduced the Photographs on the Defendant's website, www.buzz.airg.com. The Plaintiff asserts that the reproduction, which was made without the Plaintiff's permission or authorization, constitutes copyright infringement. The Defendant asserts that the Plaintiff lacks standing to bring this action and denies that it published the Photographs on its website.

[6] In accordance with Rule 299 of the *Federal Courts Rules*, the parties served their respective affidavit evidence in advance of trial. The Plaintiff delivered an affidavit from Nigel Williams sworn February 24, 2020. In his affidavit, Mr. Williams, a Director of the Plaintiff, provides: (a) a description of the nature of the Plaintiff's business and services; (b) details regarding the Agreement with Mr. Loiseau and exhibits a copy thereof; (c) a description of Mr. Loiseau's photography skills, experience and business; (d) details of the taking of the Photographs at issue and exhibits a copy thereof; (e) details of the registration of the Photographs, and the Plaintiff's interest therein, with the United States Copyright Office and exhibits a copy of the application and resulting Certificate of Registration; (f) details of the alleged infringement of copyright by the Defendant and exhibits a copy of screenshots of the Defendant's website; and (g) details of various licenses issued by the Plaintiff to third parties for use of the Photographs and exhibits copies of related invoices. Mr. Williams appeared for cross-examination at trial.

[7] In advance of the trial, the Defendant served and filed a notice of objection to the admissibility of the majority of Mr. William's affidavit on the basis that it contains inadmissible hearsay, argument, speculation and opinion. The Defendant also objected to the exhibits on the basis that they are hearsay, not properly certified or verified copies, irrelevant and/or incomplete.

[8] It was agreed in advance of trial that I would receive Mr. Williams' affidavit into evidence when Mr. Williams was called as a witness, subject to rejecting his affidavit or portions thereof in reaching my determination on the merits. I will address my determinations related to his evidence in dealing with the issues below.

[9] In advance of trial, the Defendant served and filed an affidavit from Frederick Ghahramani. However, at the close of the Plaintiff's case, the Defendant elected to call no evidence and accordingly, Mr. Ghahramani's evidence is not before the Court.

III. Issues

[10] There are four issues for determination:

- A. Does the Plaintiff have standing to assert copyright infringement in relation to the Photographs?
- B. If so, did the Defendant infringe the Plaintiff's copyright in the Photographs?
- C. If so, what are the Plaintiff's damages and should the Plaintiff's conduct impact the quantum of damages recoverable?
- D. Costs of this action.

[11] For the reasons that follow, I conclude that the Plaintiff does not have standing to assert copyright infringement in relation to the Photographs and accordingly, the claim of copyright infringement is dismissed.

IV. Does the Plaintiff have standing to assert copyright infringement in relation to the Photographs?

[12] As was recognized by the Supreme Court of Canada in *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13, copyright law is statutory – its rights and remedies are found in the *Copyright Act* [Act]. In Canada, an author is not required to register his or her copyright in order to acquire copyright protection. Rather, the author merely needs to be Canadian or a citizen of any of the signatory countries to the *Berne Convention for the Protection of Literary and Artistic Works* of September 9, 1886 [*Berne Convention*] and the works need to have been first published in such a country, if publication is relevant [see *Tremblay v Orio Canada Inc*, 2013 FC 109 at para 27].

[13] Section 3 of the *Act* sets out the content of copyright, which includes the sole right to produce or reproduce the work. Section 5 provide that copyright subsists in every “original” artistic work if the author was, at the date of the work, a citizen or subject of, or a person ordinarily resident in, a treaty country. The definition of “artistic work” in section 2 of the *Act* includes photographs. In terms of the requirement that the artistic work be “original”, the Supreme Court has held that an original work is one that originates from an author and is not copied from another work. Moreover, an original work must be the product of an author’s exercise of skill and judgment [see *CCH, supra* at para 25].

[14] Section 34.1(1)(b) of the *Act* sets out a presumption that, in any civil proceeding in which a defendant puts in issue either the existence of copyright or the title of the plaintiff to it, the author shall be presumed to be the owner of the copyright unless the contrary is proven.

[15] Section 13 of the *Act* sets out the elements relevant to the ownership of copyright. Section 13(1) provides that the author of a work is the first owner of the copyright therein. However, an author may subsequently assign the copyright or grant any interest in the right by license. Section 13(4) of the *Act* provides:

The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent.	Le titulaire du droit d'auteur sur une oeuvre peut céder ce droit, en totalité ou en partie, d'une façon générale ou avec des restrictions relatives au territoire, au support matériel, au secteur du marché ou à la portée de la cession, pour la durée complète ou partielle de la protection; il peut également concéder, par une licence, un intérêt quelconque dans ce droit; mais la cession ou la concession n'est valable que si elle est rédigée par écrit et signée par le titulaire du droit qui en fait l'objet, ou par son agent dûment autorisé.
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[16] Section 13(7) of the *Act* provides:

For greater certainty, it is deemed always to have been the law that a grant of an exclusive licence in a copyright constitutes the grant of an interest in the copyright by licence.	Il est entendu que la concession d'une licence exclusive sur un droit d'auteur est réputée toujours avoir valu concession par licence d'un intérêt dans ce droit d'auteur.
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[17] Accordingly, a holder of an exclusive license is granted a property interest in the copyright and has standing to bring a claim for copyright infringement. In order to constitute an exclusive license as contemplated by section 13(7) of the *Act*, the exclusive license must be in writing and

signed by the owner, and the following conditions must be met: (a) the copyright owner (licensor) permits another person (licensee) to do something within the copyright; (b) the licensor promises not to give anyone else the same permission for the duration of the license; and (c) the licensor itself promises not to do those acts that have been licensed to the licensee for the duration of the license [see *Euro-Excellence Inc v Kraft Canada Inc*, 2007 SCC 37].

[18] While the parties framed the issue for determination by the Court as whether the Plaintiff has standing to assert copyright infringement in relation to the Photographs, subsumed within that issue is the question of whether Mr. Loiseau is the author of the Photographs and owner of the copyright therein, as no admission has been made by the Defendant in this regard.

[19] As part of its closing argument, the Defendant asserted that the Court also needs to determine, as part of the issue of standing, whether copyright subsists in the Photographs – that is, whether the Photographs are “original” artistic works. This issue was not addressed in detail by the Plaintiff in its written or oral submissions. As the Statement of Defence contains no admission that the Photographs are original artistic works, this remains a contested issue for the Court’s determination. However, I will first deal with the issue of copyright ownership and whether the Plaintiff has an exclusive license for the Photographs, so as to have the property interest in the copyright necessary to bring this action.

[20] The Plaintiff asserts that Mr. Loiseau, as the photographer, is the owner of the copyright in the Photographs. The Plaintiff asserts that Mr. Loiseau entered into an exclusive license with the Plaintiff to act as his agent for all syndication and, as specifically provided in the Agreement, to

appoint the Plaintiff as his “exclusive worldwide agent during the Term with respect to the Sale of the Syndicated Material in any and all media now known or hereafter developed for any purpose whatsoever”.

[21] In addition to the Agreement, the Plaintiff relies on the Certificate of Registration issued by the United States Copyright Office in relation to the Photographs listing Mr. Loiseau as the author and copyright claimant and the Plaintiff as having “rights and permissions”. The Plaintiff asserts that section 5 of the *Act* identifies the subsistence of copyright in Canada if the work was created by an author resident in a treaty country within the meaning of the *Berne Convention*. Pursuant to section 53(3) of the *Act*, a certificate of registration of copyright is evidence that copyright subsists and that the person registered is the owner of that copyright. As Canada, the United States and the United Kingdom are all parties to the *Berne Convention*, the Plaintiff asserts that protections of copyright from one country are given the same protection in another treaty country, as if the work was created in the other treaty country. The Plaintiff asserts that the Certificate of Registration issued by the United States Copyright Office is therefore proof of the existence of copyright in the Photographs and the Plaintiff’s exclusive license in relation thereto.

[22] I now turn to address the Defendant’s objections to the admissibility of the evidence of the Plaintiff vis-à-vis the issue of standing.

[23] In considering the Defendant’s objections to Mr. William’s evidence, Mr. William’s evidence must be considered in light of Rule 81(1) of the *Federal Courts Rules*, which provides:

Affidavits shall be confined to facts within the deponent’s
Les affidavits se limitent aux faits dont le déclarant a une

personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.	connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.
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[24] Where an affidavit is made on belief, Rule 81(2) provides that an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.

[25] Paragraph 1 of Mr. Williams' affidavit provides that he has "personal knowledge of the matters and facts hereinafter deposed except where stated to be based upon information and belief and where so stated do verily believe the same to be true". However, nowhere in his affidavit does he refer to any of his specific evidence being on information and belief, nor to the source of his information.

[26] At paragraph 10 of his affidavit, Mr. Williams states that "on November 16, 2012, Dimitry photographed the celebrity actress, Meghan Markle". However, on cross-examination, Mr. Williams admitted that he was not present for the photo shoot with Ms. Markle and that the information set out in his affidavit was conveyed to him by Mr. Loiseau. There is no affidavit from Mr. Loiseau giving direct evidence regarding the taking of the Photographs. Moreover, there is no suggestion that it would have been impossible or even difficult to obtain an affidavit from him. To the contrary, Mr. Williams confirmed on cross-examination that Mr. Loiseau could provide evidence regarding the taking of the Photographs.

[27] As stated by the Federal Court of Appeal in *Pfizer Canada Inc v Teva Canada Limited*, 2016 FCA 161 at paras 79-81 and 84 [*Pfizer*], facts must be proven by admissible evidence. There are rare exceptions to this rule, such as facts which are subject to judicial notice, facts deemed or presumed to exist by legislation, facts found to exist in previous proceedings in circumstances that bind the court or facts that have been agreed to between the parties. Absent one of these rare exceptions, admissibility must be the Court's first inquiry where an objection has been made. Therefore, before the Court can rely on any evidence tendered by the Plaintiff and ascribe it any weight or draw any inferences from it, the Court must first determine its admissibility.

[28] Hearsay evidence is presumptively inadmissible at trial. Hearsay has been defined as "an oral or written statement that was made by someone other than the person testifying at the proceeding, out of court, that the witness repeats or produces in court in an effort to prove that what was said or written is true" [see *Pfizer, supra* at paras 87, 89]. The law recognizes some specific exceptions to the hearsay rule, as well as a more general principled exception that permits a court to admit hearsay evidence if it is necessary and reliable [see *Pfizer, supra* at para 103].

[29] I find that the evidence given by Mr. Williams in paragraph 10 of his affidavit constitutes hearsay evidence, as the Plaintiff seeks to rely on the truth of the statement made by Mr. Loiseau to Mr. Williams. I am not satisfied that any specific or general hearsay exception would permit its admission, particularly given that there is no suggestion that it would have been impossible or even difficult to obtain an affidavit from Mr. Loiseau. Accordingly, I find that paragraph 10 of Mr. Williams' affidavit is inadmissible.

[30] Moreover, the Court may draw a negative inference if a witness (in this case, Mr. Loiseau) who logically should have been called was not. The inference is that the evidence would be harmful to that party's case [see *Aga Khan v Tajdin*, 2011 FC 14 at para 65]. No explanation has been offered as to why Mr. Loiseau could not provide an affidavit and appear for cross-examination. In the circumstances, I am entitled to draw an inference adverse to the Plaintiff and I do so.

[31] The Plaintiff asserts that it does not need to provide the Court with direct evidence from Mr. Loiseau as the Certificate of Registration issued by the United States Copyright Office is valid proof of the existence of Mr. Loiseau's copyright in the Photographs. Mr. Williams states in his affidavit that:

13. On November 3, 2016, Dimitry filed an application to register the Markle Photographs, along with 11 other photographs of Markle, for copyright with the United States Copyright Office ("USCO").

14. On November 3, 2016, the USCO granted Dimitry with registration of the Markle Photographs and subsequently provided Dimitry with a Certificate of Registration for the works titled "Group Registration Photos, Meghan Markle, Published approximately Dec. 15, 2012; 13 photos".

15. The exclusive rights and permissions granted to Lickerish was also registered. The Registration number for the Markle Photographs is VA 2-023-447. Attached hereto and marked as Exhibit "B" is a copy of Certificate of Registration which evidences same.

[32] On cross-examination, Mr. Williams admitted that he has no personal knowledge of the actual application for registration with the United States Copyright Office or its issuance of the Certificate of Registration appended to his affidavit. Rather, he stated that Mr. Loiseau authorized the Plaintiff to file the application and Mr. Williams then authorized a third party, ImageRights International, to proceed with the filing of the application. He did not file the application himself,

nor was he present when it was filed by ImageRights International. Mr. Williams further stated that once the Certificate of Registration was obtained by ImageRights International, it was not forwarded to him but rather to someone within the Plaintiff's organization. In preparation of his affidavit, he did not make the copy of the Certificate of Registration exhibited to his affidavit, nor did he compare the copy to the version of the Certificate of Registration that was provided by ImageRights International to the Plaintiff. Mr. Williams admitted that the copy of the Certificate of Registration exhibited to his affidavit is not a certified copy.

[33] Mr. Williams also confirmed on cross-examination that the Photographs have not been registered with the Registrar of Copyrights in Canada.

[34] When a document is produced at trial, the prerequisite to its admission is authentication. The Defendant has not admitted the authenticity of the Certificate of Registration and as such, the Plaintiff must demonstrate its authenticity.

[35] The Plaintiff asserts that the Certificate of Registration states that "This Certificate issued under the seal of the Copyright Office in accordance with title 17, United States Code, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office record". The Plaintiff asserts that the original Certificate of Registration can be found in the United States Copyright office as a government document, is an official document from the United States Register of Copyrights and Director and is searchable as a public record. It is therefore admissible as a copy in the same manner as are official or public documents of Canada under section 24 of the *Canada Evidence Act*.

[36] Contrary to the assertions of the Plaintiff, I am not satisfied that the Certificate of Registration should be admitted into evidence. First, Mr. Williams has no direct knowledge of the issuance or receipt of the Certificate of Registration and is therefore not in a position to authenticate the document. Second, as acknowledged by Mr. Williams, the document itself is not a certified copy of the original Certificate of Registration.

[37] Even if the document could be characterized as a certified copy (which it is not), section 24 of the *Canada Evidence Act* does not, on its face, appear to apply to foreign documents and the Plaintiff has provided the Court with no authorities that would suggest that it does:

In every case in which the original record could be admitted in evidence,

(a) a copy of any official or public document of Canada or of any province, purporting to be certified under the hand of the proper officer or person in whose custody the official or public document is placed, or

(b) a copy of a document, by-law, rule, regulation or proceeding, or a copy of any entry in any register or other book of any municipal or other corporation, created by charter or Act of Parliament or the legislature of any province, purporting to be certified under the seal of the corporation, and the hand of the presiding officer, clerk or secretary thereof,

is admissible in evidence without proof of the seal of the corporation, or of the signature or official character of the person or persons appearing to have signed it, and without further proof thereof.

[38] As acknowledged by the Defendant, it is possible that the Certificate of Registration could be admissible pursuant to section 25 of the *Canada Evidence Act*. However, section 25 would only apply to a certified copy of the Certificate of Registration, which is not what is before the Court.

[39] Even if I am wrong, I do not accept the Plaintiff's assertion that the Certificate of Registration issued by the United States Copyright Office constitutes *prima facie* proof of the existence of Mr. Loiseau's copyright in the Photographs pursuant to section 53(2) of the *Act* and the *Berne Convention*. Section 53 of the *Act* provides as follows:

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| (1) The Register of Copyrights is evidence of the particulars entered in it, and a copy of an entry in the Register is evidence of the particulars of the entry if it is certified by the Commissioner of Patents, the Registrar of Copyrights or an officer, clerk or employee of the Copyright Office as a true copy. | 53 (1) Le registre des droits d'auteur, de même que la copie d'inscriptions faites dans ce registre, certifiée conforme par le commissaire aux brevets, le registraire des droits d'auteur ou tout membre du personnel du Bureau du droit d'auteur, fait foi de son contenu. |
| (2) A certificate of registration of copyright is evidence that the copyright subsists and that the person registered is the owner of the copyright. | (2) Le certificat d'enregistrement du droit d'auteur constitue la preuve de l'existence du droit d'auteur et du fait que la personne figurant à l'enregistrement en est le titulaire. |
| (2.1) A certificate of registration of an assignment of copyright is evidence that the right recorded on the certificate has been assigned and that the assignee registered is the owner of that right. | (2.1) Le certificat d'enregistrement de la cession d'un droit d'auteur constitue la preuve que le droit qui y est inscrit a été cédé et que le cessionnaire figurant à l'enregistrement en est le titulaire. |
| (2.2) A certificate of registration of a licence granting an interest in a copyright is evidence that the interest recorded on the certificate has been granted and that the licensee registered is the holder of that interest. | (2.2) Le certificat d'enregistrement de la licence accordant un intérêt dans un droit d'auteur constitue la preuve que l'intérêt qui y est inscrit a été concédé par licence et que le titulaire de la licence figurant au certificat d'enregistrement détient cet intérêt. |
| (3) A certified copy or certificate appearing to have been issued under this section is admissible in all courts without proof of the signature or official character of the | (3) Les copies certifiées conformes et les certificats censés être délivrés selon les |

person appearing to have signed it. paragraphes (1) ou (2) sont admissibles en preuve sans qu'il soit nécessaire de prouver l'authenticité de la signature qui y est apposée ou la qualité officielle du signataire.

[40] Section 53 makes no reference to foreign certificates of registration and the Plaintiff has provided the Court with no case law which supports its assertion that foreign certificates of registration are treated in the same manner as Canadian certificates of registration under section 53. As there is no evidence before the Court of any Canadian registration, I find that the Plaintiff cannot benefit from section 53 of the *Act* to establish that Mr. Loiseau is the owner of the copyright in the Photographs.

[41] Moreover, while the Plaintiff asserts that Mr. Loiseau benefits from the protections afforded in section 5(1) of the *Act* by virtue of being “a citizen or subject of, or a person ordinarily resident in, a treaty country”, the Plaintiff has led no evidence as to Mr. Loiseau’s citizenship or residence. I am not prepared to conclude that he is a citizen or resident of the United States based solely on an address listed for him in the Certificate of Registration (which I have, in any event, found to be inadmissible).

[42] In light of my findings regarding the inadmissibility of paragraph 10 of Mr. Williams’ affidavit and the Certificate of Registration, I find that the Plaintiff has not established that Mr. Loiseau is the owner of the copyright in the Photographs. In making this finding, I leave open the possibility that Mr. Loiseau is the owner of the copyright. However, there is simply no admissible evidence before the Court upon which I can make such a finding in this case. In the absence of a

determination that Mr. Loiseau is the owner of the copyright, the Plaintiff cannot establish, on a balance of probabilities, that it received an exclusive license from the owner of the copyright in the Photographs so as to have standing to bring this action.

[43] However, in the event that I am wrong on the issue of copyright ownership, I will go on to consider whether, assuming Mr. Loiseau is the owner of the copyright, the Plaintiff has an exclusive licensing granting it a property interest in the copyright of the Photographs.

[44] With respect to the Agreement, Mr. Williams's evidence on cross-examination was that he negotiated the Agreement with Mr. Loiseau. The Agreement is a standard form contract that was prepared by the Plaintiff (not Mr. Williams personally) and sent to Mr. Loiseau for execution. Mr. Williams stated that he received the executed Agreement from Mr. Loiseau by email, although the email has not been produced by the Plaintiff. Mr. Williams thereafter printed and signed the Agreement and forwarded it electronically to the Plaintiff's office in London.

[45] In preparing his affidavit, Mr. Williams admitted that he did not make the copy of the Agreement exhibited to his affidavit (it was made by someone in the London office) and he did not review the copy exhibited to his affidavit against the original Agreement (being the copy that he signed and sent electronically to London).

[46] Mr. Williams admitted that Mr. Loiseau's name appears nowhere in the Agreement. There is a blank space reserved for the insertion of the name of the "Rights Holder", but no name was inserted. The signature line on the final page of the Agreement also fails to include the name of

the Rights Holder above the signature of the presumed Rights Holder. Section 16 of the Agreement provides that notices to be sent to the Rights Holder are to be sent not to Mr. Loiseau, but to Emma Carlsen, an employee of the Plaintiff.

[47] Mr. Williams admitted on cross-examination that he did not witness Mr. Loiseau sign the Agreement and does not know whether the signature that appears on the Agreement is Mr. Loiseau's signature. As noted earlier, there is no affidavit from Mr. Loiseau, nor any affidavit from anyone who witnessed his signature or claims to recognize his signature.

[48] In light of the above, the evidence before me is not capable of establishing that the Agreement is authentic and therefore I cannot conclude that the Plaintiff received an exclusive license, in writing and signed by Mr. Loiseau, granting the Plaintiff a property interest in the copyright to the Photographs. I note that a similar finding was made by this Court in *J.L. De Ball Canada Inc v 421254 Ontario Ltd*, [1999] FCJ No 1977, where Justice Sharlow held that the evidence before her was not capable of establishing that an assignment agreement was authentic, as there was no evidence from the author who was purporting to assign copyright under the agreement, the witness before the Court had not witnessed the author sign the agreement and could not identify the author's signature, there was no evidence from any person claiming to be the witness to the author's signature and no evidence from anyone who claimed to recognize the author's signature.

[49] In making this finding, I am also mindful of the complete absence of any evidence corroborating the existence of a contractual relationship between Mr. Loiseau and the Plaintiff.

Mr. Williams admitted on cross-examination that the Plaintiff has not produced in this action, nor placed before the Court, any correspondence or documents exchanged between the Plaintiff and Mr. Loiseau related to the administration of the Agreement and expressly provided for in the Agreement itself, such as the provision of “Potential Material” (as defined in the Agreement) by Mr. Loiseau to the Plaintiff, the Plaintiff’s confirmation of the photographs that would be subject to the Agreement, or any statements of account or payments rendered to Mr. Loiseau for the syndication of his photographs.

[50] As I have found that the Certificate of Registration with the United States Copyright Office is inadmissible, it cannot assist the Plaintiff in establishing its standing to bring this action.

[51] Accordingly, I find that the Plaintiff has not established, on a balance of probabilities, that it has standing to bring this copyright infringement action against the Defendant.

[52] Given my findings, I need not address the issue of whether the Photographs constitute “original” artistic works.

V. If the Plaintiff has standing, did the Defendant infringe the Plaintiff’s copyright in the Photographs?

[53] In the event that I am wrong on the issue of standing, I find that the Plaintiff’s evidence regarding infringement suffers from similar deficiencies as those found in relation to the issue of standing.

[54] At paragraph 16 of his affidavit, Mr. Williams states:

On or about November 30, 2016, Lickerish discovered that AirG began using and reproduced the Markle Photographs since at least October 1, 2014 on their website: www.buzzairg.com. Attached hereto and marked as Exhibit “C” are original copies of the Markle Photographs at issue along with screenshots taken from AirG’s website which evidence same.

[55] On cross-examination, Mr. Williams admitted that he did not discover the use of the Photographs on the Defendant’s website, nor did he take the screen captures exhibited to his affidavit. Rather, someone at ImageRights International made the discovery and took the screen captures exhibited to his affidavit. Mr. Williams does not know who at ImageRights International made the discovery or the screen captures, nor does he know where the ImageRights International representative was when they made the screen captures, acknowledging that ImageRights International has offices around the world.

[56] The evidence given by Mr. Williams in paragraph 16 of his affidavit constitutes hearsay and I am not satisfied that any specific or general exception would permit its admission, particularly given that there is no suggestion that it would have been impossible or even difficult to obtain an affidavit from the representative(s) of ImageRights International who made the discovery and who made the screen captures. Accordingly, paragraph 16 of Mr. Williams’ affidavit is inadmissible.

[57] With respect to the screen captures themselves, the Plaintiff asserts that the screen captures are admissible as electronic documents under the *Canada Evidence Act*. As was recognized in *R v Bernard*, 2016 NSSC 358 [*Bernard*], in order to have electronic document evidence admitted, there must be compliance with both the *Canada Evidence Act* and the customary rules for

admission of documentary evidence. The burden is on the Plaintiff to establish such compliance. The Plaintiff must prove authenticity by evidence capable of supporting the finding that the electronic document is that which it purports to be. In this context, the best evidence rule may be satisfied by way of a statutory presumption. The Plaintiff relies on the statutory presumption contained in section 31.3(b), which provides that, in the absence of evidence to the contrary, the integrity of an electronic document system by or in which an electronic document was recorded or stored is proven if it is established that the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to introduce it. The Plaintiff asserts that the screen captures are of the article with the Photographs controlled and stored by the Defendant (the adverse party) on its website and thus section 31.3(b) should apply to admit the screen captures into evidence.

[58] Assuming that the screen shots are electronic documents, the focus of the Court's inquiry into whether the presumption in section 31.3(b) is satisfied is on the screen captures themselves, not the Defendant's website. The screen captures were not taken by a party adverse in interest to the Plaintiff and thus the presumption in section 31.3(b) does not apply. In any event, I have no evidence before me of who recorded and stored the original screen captures and how the screen captures made their way to Mr. Williams for inclusion in his affidavit, nor is there any evidence that the screen captures now before the Court accurately reflect what appeared on the Defendant's website when the screen captures were taken. There is no evidence before the Court that Mr. Williams has ever seen the Defendant's website, such that he could even have been in a position to authenticate the screen captures [see *Bernard, supra*]. In the circumstances, I am left with no

basis to satisfy the presumption in section 31.3(b). As a result, I find that the screen captures are inadmissible.

[59] Even if the screen captures were admissible, I am not satisfied that the Plaintiff has demonstrated a “real and substantial connection” between the Defendant’s website and the jurisdiction of Canada [see *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, [2004] 2 SCR 427; *Miguna v Walmart Canada et al*, 2015 ONSC 5744, aff’d 2016 ONCA 174]. There is no evidence before the Court that the www.buzz.airg.com website is controlled by the Defendant, that the website is hosted on a server in Canada or that ImageRights International or anyone else accessed the Defendant’s website from within Canada. The Plaintiff stated in its written submissions that the Photographs were also located on Amazon web services, at the link s3-us-west-2.amazonaws.com/airgbuzz/media/d0b19fb9db44e1a0417bbc715fc78e.jpg (a screen capture of which was also exhibited to Mr. Williams’ affidavit). The Plaintiff asserts in its written submissions that Amazon web services is a provider of cloud storage platforms, was used by the Defendant as its cloud management system and as the owner of the Amazon web services account, the Defendant controlled the content stored on the Amazon web services account. However, there is simply no evidence before the Court as to what Amazon web services is, that it was used by the Defendant or that the Defendant controlled the content stored thereon. This evidence is not contained in Mr. Williams’ affidavit, nor was it addressed on Mr. Williams’ cross-examination.

[60] Accordingly, I find that the Plaintiff has not established, on a balance of probabilities, that the Defendant infringed its copyright in the Photographs.

VI. If the Defendant infringed the Plaintiff's copyright, what damages are owing to the Plaintiff and should the Plaintiff's conduct impact the quantum of damages recoverable?

[61] In light of my findings above, I do not need to make a determination of this issue.

VII. Costs

[62] On the consent of the parties, it was agreed that the costs of this action would be dealt with at a later date following the release of this Judgment and Reasons, in the event that the parties were unable to reach an agreement thereon.

JUDGMENT in T-168-18

THIS COURT'S JUDGMENT is that:

1. The claim against the Defendant for copyright infringement is dismissed.
2. In the event that the parties are unable to reach an agreement on the issue of costs, the parties shall, by no later than December 18, 2020, provide a proposed schedule for delivery of any additional written cost submissions and the availability of the parties for brief oral cost submissions.

"Mandy Aylen"
Prothonotary

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-168-18

STYLE OF CAUSE: LICKERISH, LTD. V. AIRG INC.

PLACE OF HEARING: HEARD BY ONLINE VIDEOCONFERENCE HOSTED
BY THE REGISTRY

DATE OF HEARING: NOVEMBER 17 AND 19, 2020

JUDGMENT AND REASONS: AYLEN P

DATED: DECEMBER 7, 2020

APPEARANCES:

MADISON STEENSON FOR THE PLAINTIFF

JOHN SHIELDS FOR THE DEFENDANT

SOLICITORS OF RECORD:

KNIGHT LLP FOR THE PLAINTIFF

JOHN DOUGLAS SHEILDS,
LAW CORPORATION FOR THE DEFENDANT