

Federal Court



Cour fédérale

Date: 20181115

Docket: T-1848-16

Citation: 2018 FC 1153

Ottawa, Ontario, November 15, 2018

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

DEAN JOSEPH EVANS

Plaintiff

and

DISCOVERY COMMUNICATIONS LLC

Defendant

ORDER AND REASONS

[1] The Defendant, Discovery Communications LLC moves for summary judgement dismissing this action for copyright infringement.

The Action

[2] The Plaintiff alleges that episodes from the television series *Futurescape* [the TV Series], broadcast by the Defendant, infringes his copyright in the novel, *Glimpses of a Black Ops* [the Novel]. The Novel was published in August 2011 and the TV Series broadcast in late 2013.

[3] The Plaintiff provides a description of the Novel in paragraph 9 of the Amended Statement of Claim:

The Plaintiff's work is a book (Glimpses of a Black Op) and depicts the story of how a variety of modern and near future technology trends affects the lives of one individual and then society in general. The science and technology in question is portrayed as 'Black Technology' controlled by the few and their hands the Department and focuses on Electromagnetic Wave technology and its power to interface with and control the human mind. Through the story a very wide array of other emerging science and social trends is explored and from this exploration we see the composition of topics and themes emerge (See Appendix D). The overarching theme of the work is of technology superseding nature and evolution and leading to social and evolutionary risks for humanity's future and recommendations on how to make the world a fairer and safer place in light of these risks.

[4] Having read the material in the record, it is the Court's view that the TV Series can be described as a number of episodes that examines the scientific underpinnings of various futuristic concepts including telepathy, electromagnetic technology, extrasolar planets, robotics, genetic engineering, and invisibility. The TV Series explores ethical implications of future technologies and their impact on humanity.

[5] The Plaintiff's allegation of infringement is not that the TV Series has copied all or any parts of the text of the Novel, but that it took from its scientific content. This is explained in detail in paragraph 10 of the Amended Statement of Claim, as follows:

The basis of infringement between the works presented in this claim is of non-literal copyright infringement. The scope of this claim relates to the scientific content of the works only and not to the story. This scope limitation is still a very substantial part of both works. The evidence of the transcript of FutureScape as compared to the manuscript of Glimpses of a Black Op is provided in Appendix D and Appendix F (these are provided in softcopy and

word files on usb drives due to their size and the practicalities of comparing the 2 works). The detailed extrinsic analysis provided is referenced between relevant sections of both works and explores base idea volume similarities and more complex expression similarities such as themes. The analysis in Appendix D shows very substantial similarities between the two works measured as 342 similar ideas in a strikingly similar composition of topics and themes, summarized in the table below.

<u>Theme similarity</u>	<u>Substantially explored in both works</u>	<u>Somewhat explored in both works</u>
	75%	100%
	6 of 8	8 of 8
Based on the 4 Episodes of FS		
<u>Topic similarity</u>	<u>Substantially explored in both works</u>	<u>Somewhat explored in both works</u>
(based on 29 topics identified in FS)	81%	97%
	21 of 26	28 of 29
(based on 31 topics identified in Glimpses)	81%	87%
	21 of 26	27 of 31
Based on all 6 Episodes of FS		
(based on all 38 topics identified in FS)	55%	74%
	21 of 38	28 of 38

[6] The parties have each examined the other for discovery. The Defendant has no evidence that anyone involved in the TV Series was aware of the Novel. Conversely, the Plaintiff has offered no evidence that the Defendant or any person involved in the TV Series accessed the Novel, or was aware of it prior to this litigation.

[7] The Plaintiff has filed no evidence on this motion and did not cross-examine the affiants put forward by the Defendant on the motion.

Copyright Infringement

[8] In Canada, copyright is a creation of statute, the *Copyright Act*, RSC 1985, c C-42. Subsection 27(1) of the Act says that “it is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.”

[9] “Copyright protects an original mode of expression, not the idea expressed”: Roger T Hughes, Susan J Peacock & Neal Armstrong, *Hughes on Copyright & Industrial Design*, 2nd ed, (Toronto: LexisNexis, 2005) (loose-leaf, release 58-6), ch 1 at 101. In *Robinson v Films Cinar Inc*, 2013 SCC 73, at para 23, the Supreme Court of Canada observed that while the purpose of copyright law is to ensure that authors reap the benefit of their efforts, “it does not give the author a monopoly over idea or elements from the public domain, which all are free to draw upon for their own works.”

[10] In the case before the Court, the Plaintiff does not assert that the two works are precisely similar or that the TV Series copied the Novel. At the hearing he stated that they were “semantically similar” and were substantially similar in terms of their “bonded expression.” Neither expression is one commonly used and most certainly not one found in copyright law. It is the Court’s view that what the Plaintiff actually alleges is that the scientific content of the two are similar. This allegation cannot found a successful infringement action for many reasons and this motion and the underlying action can be dealt with in a few words.

[11] First, as noted above, there is no copyright in ideas, only in the expression of ideas. Even the Plaintiff asserts that his is a claim “of non-literal copyright infringement” related to “the scientific content of the works only and not to the story.” I can only conclude that he is somehow claiming that his ideas have been copied by the Defendant. But there is no copyright in ideas and thus this action cannot succeed.

[12] Further, it has been held in *Maltz v Witterick*, 2016 FC 524, that there is no copyright in facts, and to the extent that this is the claim asserted, this too cannot found an action for copyright infringement.

[13] Second, even if there is some similarity between the two works, having reviewed both works as set out in the record, I am unable to conclude that there is any substantial similarity in the expression of the ideas each expresses. Each uses different words and each depicts different scenes.

[14] Third, even if there is some similarity, there is no evidence that the Defendant or anyone involved in the creation of the TV Series copied the Novel, or was even aware of it. The dissimilarity of the two works is such that I am not drawn inexorably to the conclusion that the authors of the TV Series must have had access to the Plaintiff’s work. Moreover, it has been held that “if it could be shown as a matter of fact that two precisely similar works were in fact produced wholly independently of one another, the author of the work published first would not be entitled to restrain the publication by the other author of that author’s independent and original work.” *Corelli v Gray*, (1913) 29 TLR 570 (ChD). Although the Plaintiff submitted that

the Defendant had not “proved” that the TV Series was an independent creation, I accept the uncontradicted evidence of Mr. Lavin that the creators brainstormed the ideas themselves and this, coupled with the evidence that no one was aware of the Novel, shows independent creation.

[15] Fourth, any similarity is explained by the expert opinion of Allan Weiss, filed by the Defendant, who explained that “the themes and topics in both works are common to science fiction, speculation, and science journalism” and that “it would be very surprising if a series on cutting-edge and future technology did not deal with brain mapping, mind-body links, technological enhancements of biological and cognitive systems, space travel, and police and military applications of all these technologies, since these topics are at the forefront of research and the ethical concerns attending such developments.”

[16] Subrule 215(1) of the *Federal Courts Rules* provides that summary judgment shall be granted if the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence. No genuine issue for trial exists if the motions judge has all of the evidence required to fairly and justly adjudicate the claim: *Manitoba v Canada*, 2015 FCA 57 at para 15. The Plaintiff concedes that his best evidence is that which is before the Court on this motion.

[17] Accordingly, and for these reasons, I am satisfied that there is no genuine issue for trial. The Plaintiff cannot succeed in his action and it must be dismissed, with costs. The Defendant presented the Court with a Draft Bill of Costs for this motion calculated in accordance with the middle of Column III, which totals \$2,175.00 for fees and \$9,200 for disbursements, including a fee for its expert of \$8,400.00. I find that the expert fee is high and particularly so given the

limited value it has had in the Court determining the motion. In my discretion, I fix the recoverable costs of this motion at \$5,000.00, inclusive of fees, disbursements and taxes. As the successful party the Defendant is also entitled to its costs of the action.

ORDER IN T-1848-16

THIS COURT ORDERS that:

1. The style of cause is hereby amended to name DISCOVERY COMMUNICATIONS LLC as the defendant in place of DISCOVERY COMMUNICATIONS INC.;
2. This motion for summary judgment is granted;
3. The action is dismissed; and
4. The Defendant is entitled to its costs of this motion fixed at \$5,000.00, and its costs of the action.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1848-16

STYLE OF CAUSE: DEAN JOSEPH EVANS v DISCOVERY
COMMUNICATIONS LLC

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 15, 2018

ORDER AND REASONS: ZINN J.

DATED: NOVEMBER 15, 2018

APPEARANCES:

Dean Joseph Evans

PLAINTIFF
ON HIS OWN BEHALF

Kevin Sartorio
Charlotte McDonald

FOR THE DEFENDANT

SOLICITORS OF RECORD:

- Nil -

SELF-REPRESENTED PLAINTIFF

Gowling WLG (Canada) LLP
Barristers and Solicitors
Toronto, Ontario

FOR THE DEFENDANT