

Federal Court



Cour fédérale

**Date: 20200206**

**Docket: T-130-18**

**Citation: 2020 FC 201**

**Toronto, Ontario, February 6, 2020**

**PRESENT: Prothonotary Angela Furlanetto**

***SIMPLIFIED ACTION***

**BETWEEN:**

**ALEXANDER STROSS**

**Plaintiff**

**and**

**TREND HUNTER INC., JEREMY GUTSCHE**

**Defendants**

**JUDGMENT AND REASONS**

**I. Background**

[1] This action, brought under the Federal Court's simplified procedure, is a copyright infringement action relating to the alleged unauthorized use of six photographs. The Plaintiff, Alexander Stross, is a professional photographer who has been working in the photography industry for 25 years. In and around 2011, Mr. Stross was engaged by an architect, Matthew Garcia, to photograph a housing project consisting of tiny houses located in a compound adjacent

to the Llano River in Texas, USA. Twenty-five photographs were produced, six of which are the subject of the herein action (the “Llano River Photographs”). According to Mr. Stross, the project was extensive and required between 90 and 100 hours of his time; well beyond his usual 10 to 20 hours. The Llano River Photographs, along with others, were registered for copyright in February, 2012 with the United States Copyright Office.

[2] The Defendant Trend Hunter Inc. (“Trend Hunter”) is a market research company that advises clients on consumer trends and strategies for innovation. Jeremy Gutsche, Co-Defendant, is the founder and CEO of Trend Hunter.

[3] Trend Hunter operates trendhunter.com, a database that generates research data for Trend Hunter by crowdsourcing content and measuring users’ interaction with that content. Trend Hunter uses both artificial intelligence as well as personnel to process data generated by trendhunter.com, which is then used to prepare consumer trend reports for clients.

[4] On January 11, 2017, Trend Hunter reproduced the Llano River Photographs on their website [www.trendhunter.com](http://www.trendhunter.com) in a piece entitled “Friendly Housing Rows”, which included a short article entitled “Bestie Row” is a Series of Four Houses Occupied by Best Friends. The “Friendly Housing Rows” piece appeared on the front page of trendhunter.com on the day it was posted (January 11, 2017) and thereafter remained live (but not promoted) on the site until it was taken down on October 27, 2017.

[5] Mr. Stross asserts that the reproduction of the Llano River Photographs, which was made without his permission or authorization, is copyright infringement. The Defendants assert that their use of the photographs is covered by the fair dealing exceptions to infringement under sections 29 and 29.2 of the *Copyright Act*. The Defendants also assert that any alleged damages arising from purported infringement have not been proven and that there is no evidence to establish any personal liability of Mr. Gutsche.

[6] Pursuant to Rule 299 of the *Federal Courts Rules*, each of the Plaintiff and the Defendants submitted one affidavit as its evidence in the proceeding.

[7] The Plaintiff delivered an affidavit from Alexander Stross, sworn October 3, 2019 (Trial Exhibit P1), the named Plaintiff, who appeared for cross-examination at trial. Mr. Stross' affidavit provides his background and experience as a professional photographer and describes his engagement by Matthew Garcia leading to the development of the Llano River Photographs. Mr. Stross attaches copies of the Llano Photographs and the United States Copyright registration covering such photographs. Mr. Stross also provides background relating to three photography licenses he entered into: two relating to photographs from a "Waterfall House" collection and one relating to two Llano River photographs licensed to Playboy Enterprises International Inc. Mr. Stross also explains the in-kind trade agreement with Mr. Garcia relating to the Llano River Photographs and design work that Mr. Garcia completed on his residence, which he values at \$15,000 USD.

[8] The Defendant delivered the Affidavit of Shelby Lee Walsh, sworn October 15, 2019 (Trial Exhibit D1). Ms. Walsh, who appeared for cross-examination at trial, is the President and Head of Research at Trend Hunter. Ms. Walsh provided background on Trend Hunter's business and the use of trendhunter.com and its software algorithms to generate data for Trend Hunter by using user-generated and linked content and measuring users' interaction with that content. Ms. Walsh explains how articles are submitted by users to Trend Hunter and posted and linked within trendhunter.com. She provides background to the "Friendly Housing Rows" piece and its uploading and use on trendhunter.com. Ms. Walsh also explains Trend Hunter's copyright policies and how Trend Hunter derives its revenue from research reports, speaking engagements and custom work generated for clients, and to a lesser extent advertising.

## II. Legal Issues

[9] The following are the issues for determination as stated in the parties' Agreed Statement of Issues:

- i. Is Alexander Stross the owner of the copyright in the Llano River Photographs?
- ii. If so, did Trend Hunter infringe Mr. Stross' copyright in the Llano River Photographs?
- iii. If so, what are Mr. Stross' damages?
- iv. Should the claim against Jeremy Gutsche personally be dismissed?

III. Is Alexander Stross the owner of the copyright in the Llano River Photographs?

[10] The Defendants do not dispute that copyright subsists in the Llano River Photographs or that Alexander Stross is the author of such photographs. The dispute as to ownership centers on whether Mr. Stross has the authorization right to bring his infringement claim or whether that right has been licensed to a US-based copyright enforcement agency, ImageRights, with which Mr. Stross has entered into an “ImageRights Recovery Service Agreement”.

[11] The basis for the Defendants’ argument centers on the rights conferred under section 3(1) of the *Copyright Act*, which provides that:

- 3(1) For the purposes of this Act, copyright, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any materials form whatever, to perform the work or any substantial part thereof in public, or if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right
- a. to produce, reproduce, perform or publish any translation of the work,
  - b. in the case of a dramatic work, to convert it into a novel or other non-dramatic work,
  - c. in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,
  - d. in the case of a literary, dramatic or musical work, to make any sound recording, cinematography film or other contrivance by means of which the work may be mechanically reproduced or performed,
  - e. in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,
  - f. in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

- g. to present at a public exhibition for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,
- h. in the case of a computer program that can be reproduced in the ordinary course of its use, other than by reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program,
- i. in the case of a musical work, to rent out a sound recording in which the work is embodied, and
- j. in the case of a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner,

and to authorize any such acts

[12] The Defendants argue that the terms of the Recovery Services Agreement with ImageRights granted ImageRights an exclusive license to the Plaintiff's right to authorize others to engage in the rights set out in section 3(1). The Defendants point to Part 1 of the ImageRights Agreement which states:

1. Grant of Authority

1. You hereby appoint ImageRights and ImageRights hereby accepts such appointment, as Your exclusive agent with respect to the settlement of each Recovery Asset, which may include the right to grant licenses for both past and/or future uses of each Recovery Asset.

2. Subject to Your prior approval of the general terms and conditions of each Recovery Asset, ImageRights shall have discretion, based thereon, to negotiate the specific terms and conditions of any settlement fee and/or license of each Recovery Asset.

3. Subject to the terms and conditions herein, ImageRights shall have the full power and authority, directly and on Your behalf, to engage and discuss all related matters with one or more attorneys in connection with a given Recovery Asset, including but not

limited to: (i) the initiation of such litigation or other legal action; (ii) the identity of the Recovery Asset(s) involved in litigation or other legal action; and (iii) any settlement, judgment or other resolution. ImageRights shall be free to select any such attorney in its discretion, in accordance with the terms and conditions herein.

[13] According to the Defendants, by appointing ImageRights as Mr. Stross' "exclusive agent" Mr. Stross has exclusively licensed his authorization right to grant licences, negotiate settlement terms and to select, engage and instruct counsel in litigation involving his copyright. The Defendants argue that the ImagesRights Recovery Service Agreement raises the reasonable inference that the Plaintiff is not the exclusive owner of the copyright upon which his claim is based.

[14] The Plaintiff states that an exclusive right was not granted to ImageRights and that no assignment of Mr. Stross' rights under subsection 3(a)-(j) of the *Copyright Act* or to the right of action was ever legally effected to ImageRights.

[15] In his written argument, the Plaintiff points to section 6 of the Recovery Services Agreement which states:

Solely for the aforesaid purposes, Client hereby grants ImageRights a non-exclusive, non-transferable license to use, solely for the term of the Agreement, Client's logo, service marks, trademarks, trade dress, images and logos

[16] He also refers to section 3 of the Agreement, under the heading "Warranties and Representations of Client" where Mr. Stross confirms that he is the "single copyright owner or the exclusive licensee... in and to the Content provided."

[17] The evidence on the Recovery Services Agreement is far from clear. I note that the Recovery Services Agreement with ImageRights was put into evidence by the Defendants in cross-examination of Mr. Stross during questioning on an answer given to a written interrogatory where Mr. Stross was asked: “Is there any agreement between you and ImageRights? If yes, then please produce the agreement.” In response, he provided two links:

<https://www.imagerights.com/service-agreement>; <https://www.imagerights.com/terms>. The Defendants printed the Recovery Services Agreement from the first link and asked Mr. Stross to identify the agreement during his cross-examination. The second link was not dealt with further in the evidence.

[18] During his testimony, Mr. Stross seemed to have limited information about the agreement and could not confirm that it was the form of the agreement that he had signed, but did confirm that he had provided the link as his response to the interrogatory question to produce the agreement.

[19] On the face of the Recovery Services Agreement, I do not see any express language that indicates that any of the rights under section 3(1) of the *Copyright Right* have been assigned or exclusively licensed to ImageRights. While the evidence supports some involvement of ImageRights in the present litigation, including in the recovery of remedies from the litigation, I do not have any basis to conclude that Mr. Stross cannot bring this action and assert copyright in the Llano River Photographs. Accordingly, I find that the evidence supports Mr. Stross as the owner of the Llano River Photographs.



IV. Did Trend Hunter infringe Mr. Stross' copyright in the Llano River Photographs?

[20] There is no dispute that Trend Hunter posted the Llano River Photographs on the Trend Hunter website. The sole issue with respect to infringement is whether the use made of the Llano River Photographs by Trend Hunter falls within the fair dealing exceptions to infringement set out in ss. 29 and 29.2 of the *Copyright Act*, which state:

**29. Research, private study, etc.** – Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.

...

**29.2. News reporting** – Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
  - (i) author in the case of a work,
  - (ii) performer, in the case of performer's performance,
  - (iii) maker, in the case of a sound recording, or
  - (iv) broadcaster in the case of a communication signal.

[21] In *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 (“*CCH*”), the Supreme Court of Canada set out the framework for analysis under the fair dealing exceptions of the *Copyright Act*. The framework involves a two-part test. The first part of the test requires a determination of whether the dealing falls within one of the allowable purposes of the *Copyright Act* (i.e., research, private study, education, parody, satire, news reporting). The second part of the test, requires a determination of whether the dealing is “fair”. The exceptions were

introduced into the *Copyright Act* as “user’s rights” and as such, the onus is on the user to establish that the provisions of section 29 apply.

A. *Part 1 of the Fair Dealing Test: was the dealing for the purpose of research or news reporting*

[22] For the dealing to be a fair dealing, it must be for one of the allowable purposes under the *Copyright Act*; in this case, as asserted, for either research or news reporting. As agreed by the parties, the threshold for the first part of the *CCH* test is low and these allowable purposes are understood as having a non-restrictive interpretation.

[23] The term “research” is to be given a large and liberal meaning to ensure that user’s rights are not unduly constrained and is not intended to be limited to non-commercial or private contexts (*CCH* at para 51). As applied in *CCH*, research for the purpose of advising clients, giving opinions, arguing cases and preparing briefs in support of lawyers carrying on the business of law for profit was considered to be research within the meaning of section 29.

[24] In this case, the Plaintiff argues that Trend Hunter has not met the threshold for establishing that its use was “research”. As argued by the Plaintiff, although Trend Hunter has clothed the language of its use as research, it is really data analysis, focussed on developing a product by analysing data and selling the product to clients for profit. I do not agree that this distinction takes the actions outside of the interpretation of “research” intended by this section. I agree with the Defendants, the activities of Trend Hunter are akin to a computerized version of a market research study group that measures consumer interaction and response to market trends.

[25] Ms. Walsh describes Trend Hunter as “primarily a market research company” that provides consumer insight services to its clients through “trend research reports”, custom reports, custom workshops and an annual conference. She describes Trend Hunter’s primary research tool as “trendhunter.com, a giant database of 400,000 ideas, each measured using billions of views from over 150,000 all-time visitors.” As stated by Ms. Walsh at paragraphs 16 and 17 of her affidavit:

16. trendhunter.com generates research data for Trend Hunter by crowdsourcing content and measuring users’ interaction with that content.

17. Trend Hunter employs both software-based research algorithms as well as skilled human researchers to process the vast amount of data generated by trendhunter.com to generate consumer trend insights for its clients.

[26] When a contributor uploads an article, they must select a category for the article and link the source of the article as well as connect the article to other articles already on the Trend Hunter’s website (para 22). Trend Hunter’s software generates data about the article, including when it was posted, the user who posted it, geographical data, demographic data and key words and categories that describe the article’s content for further linking (para 24).

[27] Artificial intelligence is used to determine the subject matter of each article, create links to other articles within Trend Hunter’s body of content and to identify categories of content and relationships to ideas (para 25).

[28] Trend Hunter also tracks user interaction according to metrics, such as, the number of clicks, time spent viewing each article, and how users navigate through articles (para 29).

[29] As noted in *CBC v. SODRAC*, [2015] 3 SCR 615 at para 66, the *Copyright Act* is intended to keep up with technological advances. The definition of “research” must be interpreted and considered in this light.

[30] In my opinion, the use described by Ms. Walsh is a computerized form of market research that measures consumer interaction and preferences for the purpose of generating data for clients. This use is sufficient to meet the low threshold necessary to satisfy the first part of the *CCH* test.

[31] In view of my conclusion that the use satisfies the definition of “research” set out in section 29 of the *Copyright Act*, it is not necessary for me to consider whether such use also satisfies the definition of “news reporting”. However, I note that one of the criteria for “news reporting” is the identification of the source of the copyright in the news report. As the source of the Llano River Photographs was not included on the face of the “Friendly Housing Rows” piece, in my opinion the use in question would not meet the requirements for “news reporting” as set out in section 29.1 of the *Copyright Act*.

B. *Part two of the Fair Dealing Test: was the dealing “fair”*

[32] The heart of the fair dealing analysis is the second part of the *CCH* test: the determination of whether the dealing is “fair”. The determination of whether the dealing is “fair” is a question of fact to be assessed on the circumstances of each case (*Access Copyright v. York University* 2017 FC 669 at para 252 (“*York University*”)) bearing in mind the following six relevant factors: (i) the purpose of the dealing; (ii) the character of the dealing; (iii) the amount of the dealing; (iv)

alternatives to the dealing; (v) the nature of the work; and (vi) the effect of the dealing on the work (*CCH* at para 53).

[33] “Fairness” is to be assessed using a holistic analysis of these factors, considering a balancing of interests and the practical and real dealing by the user of the owner’s work (*York University* at para 55).

[34] In *York University*, the Court held that the fairness assessment may be done on the basis of individual dealing as well as on the basis of policies and/or practices (*York University* at para 254). In this case, the allegation of copyright infringement is based on the use by Trend Hunter of the Plaintiff’s Llano River Photographs; it is not a challenge to Trend Hunter’s policies and practices at large. Accordingly, a review of the policies in place by Trend Hunter will be considered only for the purpose of assessing the context and conduct around which the dealing took place.

[35] The Plaintiff argues that “the fairness of the dealing” must be considered with reference to the public interest. As argued by the Plaintiff each of the leading cases on fair dealing: *CCH, Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 (“*Alberta (Education)*”), and *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 (“*SOCAN*”), raise a public interest reason for determining that the dealings at issue were fair. In *CCH*, the issue involved whether users of the Great Library at Osgoode Hall could access legal materials in print format and have them reprinted so that legal opinions and arguments could be prepared for clients. The Plaintiff argues that there was a

public interest in allowing this access as the rule of law dictates that lawyers should have the information necessary to properly represent their clients. In *Alberta (Education)*, the Plaintiff argues that the reproduction of textbook materials raised the issue of public interest in the advancement of education and lowering the need for the purchase of textbooks in voluminous amounts to be distributed to classmates. The Plaintiff argues that *SOCAN* also aligned with a public interest perspective as it involved only the dealing of previews of music by purchasers where the purchase of the full songs were subject to royalties to be paid to the artists. As the artists obtained royalties for their work, an appropriate balance was struck between creators and users.

[36] I agree that the public interest underscores the fair dealing provisions of the *Copyright Act*. As stated in *Théberge v. Galerie d'Art du Petit Champlain Inc.*, [2002] 2 SCR 336 at para 30, the *Copyright Act* is “a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator”. The evaluation of whether the dealing is “fair” must be considered with this balance in mind.

[37] For the reasons that follow, I find that upon consideration of the specific factual circumstances of this case and the *CCH* factors, the use in question was not a fair dealing and that copyright infringement should be found.

(1) *the purpose of the dealing*

[38] The first factor to be considered is the purpose of the dealing; this is to be analyzed from the user’s perspective. (*CCH* at para 54).

[39] The evaluation of the purpose of the dealing for the second part of the test is distinct from the first part of the test and involves considering the fairness of the real purpose or goal of the permitted activity (the research) (*York University* at para 268; *Alberta (Education)* at para 22). In this case, the analysis involves consideration of the “fairness” of allowing the photographs to be embedded in an article used for Trend Hunter’s research for the end goal of evaluating the research results for inclusion in trend reports for clients in the commercial context.

[40] The overall goal of Trend Hunter’s research is to advise clients about market trends and strategies to increase commercial opportunities. As stated by Ms. Walsh, Trend Hunter advises its clients on trends and strategies in order to “assist its clients to develop innovative ideas and products as well as foster attitudes and practices that will generate greater innovation within the client’s organization” (paragraph 5 Trial Exhibit D1).

[41] The ultimate goal is therefore commercial in nature, for the benefit of Trend Hunter and its clients; there is no benefit to Mr. Stross and no broader public interest purpose associated with the Defendants use of the Llano River Photographs.

(2) *the character of the dealing*

[42] The second factor for consideration is the character of the dealing. In assessing the character of the dealing, the Court must examine how the work was dealt with, such as whether multiple copies of the work were being widely distributed, or whether a single copy of the work was being used for a legitimate purpose (*CCH* at para 55).

[43] In this case, the Llano River Photographs were embedded in an overall themed piece entitled “Friendly Housing Rows” that included both the photographs as well as an article entitled “‘Bestie Row’ is a Series of Four Houses Occupied by Best Friends”. The article included links to source articles from *Country Living* and *Apartment Therapy* where the photographs were found and originally posted. The “Friendly Housing Rows” piece was posted on the front page of trendhunter.com for one day and thereafter remained live, but not promoted, on the site until it was taken down nine months later on October 27, 2017.

[44] The Plaintiff argues that Trend Hunter’s distribution of the photographs on the internet should be considered a wide distribution as anyone with access to a computer and the internet would have been able to retrieve the photographs. The Defendants submit that this factor must be considered in the context of technological advancement. I agree with this general principle. The Defendants’ evidence indicates that the “Friendly Housing Rows” piece received 168 views from the time it was posted, which was considered by Trend Hunter to be insufficient to use the research on this article in a trend research report. On the basis of this evidence, it is my view that the use of the Llano River Photographs on trendhunter.com should be considered to be more extensive than a single use in print advertising, although not sufficient, in this case, to be considered to be in wide circulation from an internet-based perspective based on the number of views made.



(3) *the amount of the dealing*

[45] The third factor to be considered is the amount of the dealing. This factor involves consideration of both the quantity of the dealing and the importance of the work allegedly infringed (*CCH* at para 56).

[46] The Defendants argue that the reduced quality and resolution of the photographs should be considered under this factor and should be interpreted as a reduced percentage of use of the photographs. I do not consider this argument to be persuasive.

[47] While the photographs as used may be of a reduced quality, the whole of the photographic images were still in use and were identifiable. Therefore, I do not consider this argument to be analogous to *SOCAN* where only portions of a song were being previewed prior to purchase.

(4) *alternatives to the dealing*

[48] The fourth factor to be considered is whether there was an alternative to the dealing that was available; such as a non-copyrighted equivalent of the work that could have been used instead of the copyrighted work and whether the dealing was reasonably necessary to achieve the ultimate purpose (*CCH* at para 57). The fact that the copyright owner could have obtained a license for the use in question is not a legitimate argument for consideration under this factor as it does not consider the balance between creator and user rights (*CCH* at para 70).

[49] In this case, the nature of Trend Hunter's research requires numerous articles to be posted to trendhunter.com to gauge user interaction and interest. Photographs and imagery typically accompany the articles in order to attract user attention. Because of the volume of articles required for the research and the user-based framework, the platform relies on articles to be posted by a wide number of contributors. This ability of contributors to upload content to trendhunter.com is necessary to the framework of Trend Hunter's market research platform.

[50] As support for its argument of the fairness of its dealing with images, the Defendants highlight the objectives and safeguards that are found in Trend Hunter's copyright policy for content and image handling. This copyright policy is to be followed by all content providers before uploading content to trendhunter.com.

[51] The policy includes a prohibition against posting content that infringes intellectual property rights and puts the responsibility on contributors to warrant that the content they are posting is not an infringement (Exhibit E of Trial Exhibit D1). A content-provider is to check for and avoid using any content that has a copyright notice or watermark. Freelancers and staff writers are provided with copyright training that includes image sourcing practices which encourage image credits to be added to avoid copyright infringement, that require mention of a photographer or image credit in the source to be included in the article, and that warn that images containing watermarks or copyright symbols should be avoided (Exhibit F of Trial Exhibit D1). Trend Hunter's standard freelance contractor agreement also includes a copyright addendum that states at paragraph 35 that: "Images with watermarks or copyright symbols are considered

copyrighted work. Any use of copyrighted images without permission from their owner is considered a copyright violation” (Exhibit G of Trial Exhibit D1).

[52] In addition to the checks made by the content provider, Trend Hunter also has image content screens to screen out images with a copyright notice or watermark. It also has in place a copyright notice-and-takedown system that is compliant with the *Digital Millennium Copyright Act* of the United States.

[53] While I agree that the policy on its face respects copyright in images, the policy was not followed in this case. Furthermore, safeguards are relaxed when an experienced contributor who has been through the Trend Hunter training and who has contributed content before, uploads content.

[54] In this case, when Joey Haar, an experienced contributor and employee of Trend Hunter, uploaded the Llano River Photographs to trendhunter.com and linked his article to the source articles *Country Living* and *Apartment Therapy*, he did not see the copyright notices associated with the Llano River Photographs. As Mr. Haar was an experienced contributor, his contribution was flagged as “set to publish” and was not subject to editorial review, but was immediately posted to the front page of trendhunter.com. Trend Hunter’s research editors did not conduct a check of the material before posting. It was not until the cease and desist letter was sent regarding the posting of the photographs that the copyright notice was identified and the photographs removed from the Trend Hunter website (para 52 Trial Exhibit D1). While the Defendants mitigated their damages by removing the Llano River Photographs from the

trendhunter.com website, the copyright policy for posting content on the site was not followed and the Llano River Photographs were posted when they should not have been under the policy and without any authorization by Mr. Stross.

[55] On the basis of the number of articles posted on the Trend Hunter website in a given area, it is my view that the Llano River photographs were not essential to Trend Hunter's research and should not have been posted on trendhunter.com in accordance with Trend Hunter's copyright policy. As stated by Ms. Walsh on cross-examination (Transcript, October 23, p. 81, line 28 – p. 82, line 6):

Q. ... the research reports that you've produced, the conclusions that you draw, the Llano River photographs are but a small piece of data that are in that larger group of data that you analyse?

A. Yes.

Q. They're statistically insignificant?

A. Yes.

[56] As such, I conclude that alternatives to the dealing were available and should have been used in this case.

(5) *the nature of the work*

[57] The fifth factor to be considered is the nature of the work and whether the work was previously published or was confidential (*CCH* at para 58).

[58] The work in this case is photographs that were previously licensed and distributed online. The Defendant asserts that the photographs were already "viral" as a result of an episode of

NBC's television program, the "Today Show", and an article that was posted to today.com in 2015. As such, the Defendant argues that this factor should afford limited weight to the analysis. The Plaintiff did not dispute this descriptor, but argued that the earlier distribution should not be considered as authorization of the use in question.

[59] I agree that the nature of the work is a neutral factor in this case. The fact that the photographs were already widely distributed on the internet in my view goes to the effect of the dealing and the likelihood of there being a reduced impact on Mr. Stross from the reproduction of the photographs on trendhunter.com.

(6) *the effect of the dealing on the work*

[60] The sixth factor to be considered is the effect of the dealing on the work and whether the reproduced work has a market impact on the original work (*CCH* at para 59). The onus is on the right's holder to establish that the use in question has some effect on its business.

[61] It is undisputed in this case that the Defendant is not a direct competitor of the Plaintiff and operates a different type of business. Accordingly, there is no evidence of any direct effect on Mr. Stross from Trend Hunter's use of the Llano River Photographs in the "Friendly Housing Rows" piece on trendhunter.com.

[62] Further, the actual dealing in issue did not result in commercial gain. The evaluation of the research results indicated that consumers did not have significant interest in the piece. The article did not score well enough to be inputted into a trend research report as a larger pattern

(Transcript, October 23, p. 80, lines 14-21). The evidence of Ms. Walsh was that the article was viewed fewer than 200 times and generated less than seven cents of advertising revenue (paras 56 and 57, Exhibit O, Trial Exhibit D1).

[63] The Plaintiff argues that by decreasing the resolution of the Llano River Photographs, the Defendant has changed the quality of the photographs and in turn has depreciated their value. He submits that by this type of use the opportunity to obtain further licenses has been negatively impacted. Such assertions, however, in my view, are speculative and should be afforded limited weight without any evidence to support them.

[64] The evidence submitted indicates that additional licenses were taken out by Mr. Stross for these photographs. The dates and details of the licenses are not in evidence. While Plaintiff's counsel argued that the Plaintiff's ability to license the Llano River Photographs was affected by Trend Hunter's use, there is no direct evidence to suggest that the prospect of licensing decreased as a result of the Trend Hunter posting. On the basis of the evidence filed, I am unable to conclude that the Plaintiff's ability to license the Llano River Photographs has been affected by the use in issue.

C. *Conclusion on Fair Dealing*

[65] On a balance of the factors set out above, it is my opinion that the use of the Llano River Photographs by Trend Hunter does not constitute fair dealing and that Trend Hunter is liable for copyright infringement.

[66] The amount of content relied upon by Trend Hunter for its research and the user-interface nature of its research platform, requires Trend Hunter to rely on its contributors to abide by its copyright policies for uploading content. While copyright policies are in place at Trend Hunter to prohibit the use of copyrighted images on trendhunter.com, the fairness of the policy relies on the practices under the policy. In this case, the policy was not followed by Trend Hunter's contributor and the Llano River photographs were posted on trendhunter.com when the policy provided that they should not have been and without Mr. Stross' authorization. Although the effect of the use of the Llano River Photographs has not been directly shown, when considered holistically I do not consider the circumstances of the use, and the ultimate purpose of the dealing to support a finding of fair dealing in this case.

V. What are Mr. Stross' Damages?

[67] Pursuant to section 35(1) of the *Copyright Act*:

Where a person infringes copyright, the person is liable to pay such damages to the owner of the copyright as the owner has suffered due to the infringement and, in addition to those damages, such part of the profits that the infringer has made from the infringement and that were not taken into account in calculating the damages as the court considers just.

[68] A Plaintiff may elect to recover statutory damages for infringement in lieu of damages and profits under s. 35(1). As no such election was made in this case, damages and profits must be determined under s. 35(1).

[69] Where damages are difficult to quantify under s. 35(1), they may be assessed based on the license fee that would otherwise have been charged if not for the infringement (*Hager v. ECW Press Ltd.*, [1999] 2 FC 287 at para 75).

[70] In this case, the evidence of the Plaintiff is limited and relates to three licenses and an invoice for the in-trade agreement with Mr. Garcia. These documents are found at Exhibits C to F of Trial Exhibit P1.

[71] Two of the licenses (Exhibits C and D) relate to the web and print use of photographs of a different property, “the Waterfall House”, which is a house in Austin, Texas. The rate proposed under these licenses ranged from \$500 USD/photograph to \$1,000 USD/photograph.

[72] The only license agreement relating to the Llano River Photographs was found at Exhibit F and is part of a settlement between Mr. Stross and Playboy Enterprises International Inc. (“Playboy Enterprises”). The license indicates that Playboy Enterprises paid Mr. Stross \$8,000 USD for the settlement, which involved the license of two Llano River Photographs. Without further context as to the full settlement between these parties it is difficult to conclude what the \$8,000 USD represents and whether it encompasses additional consideration associated with the settlement of the dispute.

[73] At Exhibit E, Mr. Stross provided the invoice for the in-trade agreement between Mr. Stross and Mr. Garcia where architectural design work on Mr. Stross’ home was exchanged for use of seven of the Llano River photographs, valued at \$15,000 USD. While the Plaintiff refers



to this arrangement as a license agreement, the details of the arrangement are far from standard, and are more in line with a trade of time.

[74] It is noted that the Plaintiff acknowledged during discovery that there were further license agreements relating to the use of the Llano River Photographs on the websites “Business Insider” and “The Lighter Side of Real Estate”; however, details regarding those licenses were not provided, despite being ordered to be produced (Transcript, October 23, p. 89, line 26 – p. 90, line 21).

[75] On the basis of the evidence submitted, it is my view that there is insufficient evidence to establish a standard licensing fee for the Llano River Photographs. In the circumstances, including the lack of proof of actual damage, the short time that the photographs were posted and the steps taken by Trend Hunter to immediately take down the photographs on notice, I will award only a nominal amount of damages based on a percentage of the amount per photograph as valued under the Garcia arrangement and in line with the low end of the licensing terms provided at Exhibits C and D: \$500 USD/photograph for a total of \$3000 USD or \$3,983.40 CAD, as converted to Canadian currency as of the date of this judgment.

[76] With respect to profits, the uncontradicted evidence of Ms. Walsh indicates that only minimal advertising revenue was generated from user traffic to the “Friendly Housing Rows” piece. Profits from such advertising was *de minimus*. Further, there is no evidence to justify any award of punitive damages. The infringing act in issue was unintentional and is not such that

should be punished in addition to the damages already awarded. Thus, the total amount that will be awarded to the Plaintiff is \$3,983.40 CAD.

[77] As the Plaintiff has not provided any submissions regarding the question of interest, the Court will not award any pre-judgment interest and will award only post judgment interest, at the rate of 5%, not compounded, as of the date of the Judgment (*L.S. Entertainment Group Inc. v. Formosa Video (Canada) Ltd.* 2005 FC 1347 at para 71-72).

VI. Should the claim against Jeremy Gutsche personally be dismissed?

[78] The Plaintiff asserts that Jeremy Gutsche in his role as CEO and founder of Trend Hunter is also personally liable for copyright infringement for the same uses of the Llano River Photographs made by Trend Hunter.

[79] No evidence was presented at trial to support this claim or to show that Mr. Gutsche was personally involved in posting the “Friendly Housing Rows” piece that included the Llano River Photographs. The claim against Mr. Gutsche appears to be based exclusively on his position within Trend Hunter. Indeed, Mr. Stross admitted on cross-examination that he had no personal knowledge of Mr. Gutsche’s involvement in the activities that formed the basis of the copyright infringement claim (Transcript, October 23, p. 24, lines 15-23; p. 27, lines 7-19).

[80] The claim against Mr. Gutsche is accordingly dismissed for lack of evidence.

VII. Costs

[81] Each party included a bill of costs along with its general submissions. The bills of costs were generally consistent, with each party claiming similar amounts in fees as calculated under Tariff B of the *Federal Courts Rules*, and as to disbursements.

[82] While each party submitted fees according to both the middle of column III and the middle of column IV of Tariff B, I do not consider there to be any basis to justify fees calculated at any level other than the standard level; the middle of column III of Tariff B, particularly as this matter proceeded as a simplified proceeding.

[83] In view of the Plaintiff's overall success in the action, costs will be awarded to the Plaintiff payable in the amount of \$9493.94, which includes fees with taxes calculated at the middle of column III of Tariff B ( \$7373.25 as calculated by the Plaintiff), along with the Plaintiff's reasonable disbursements, which have been awarded at \$2120.69, inclusive of taxes. As noted by the Defendants, recovery of Mr. Stross' expenses for travel and attending the trial are not permitted (*Lundbeck Canada Inc. v. Canada (Health)*, 2014 FC 1049 at para 91) and have been deducted from the disbursement amount.

**JUDGMENT in T-130-18**

**THIS COURT'S JUDGMENT is that:**

1. The claim against the Defendant Trend Hunter Inc. for copyright infringement is allowed.
2. The Plaintiff is awarded \$3,983.40 in damages for copyright infringement by Trend Hunter Inc., along with post judgment interest at a rate of 5%, not compounded, from the date of this Judgment.
3. The claim against Jeremy Gutsche is dismissed.
4. Costs are awarded to the Plaintiff in the amount of \$9493.94.

\_\_\_\_\_  
"Angela Furlanetto"  
Prothonotary

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-130-18

**STYLE OF CAUSE:** ALEXANDER STROSS V. TREND HUNTER INC.,  
JEREMY GUTSCHE

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** OCTOBER 23-24, 2019

**JUDGMENT AND REASONS:** FURLANETTO P

**DATED:** FEBRUARY 6, 2020

**APPEARANCES:**

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