

Federal Court



Cour fédérale

**Date: 20191128**

**Docket: T-458-17**

**Citation: 2019 FC 1524**

**Ottawa, Ontario, November 28, 2019**

**PRESENT: The Honourable Madam Justice Fuhrer**

**BETWEEN:**

**RALLYSPORT DIRECT LLC**

**Plaintiff**

**and**

**2424508 ONTARIO LTD., SYLVAIN CAYER,  
GENEVIEVE-ANN CAYER, and 2590579  
ONTARIO LTD. now carrying on business as  
“SubieDepot” and “SubieDepot.ca”**

**Defendants**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] This is a motion in writing for summary judgment or summary trial filed by the Defendants 2424508 Ontario Ltd., Sylvain Cayer, Genevieve-Ann Cayer, and 2590579 Ontario Ltd. (the “Defendants”) on December 3, 2018, pursuant to Rules 213, 215 and 369 of the *Federal Courts Rules*, SOR/98-106 (“*FCR*”). This is the third similar motion on a question of law filed

by the Defendants in this action, the first motion for summary trial or summary judgment having been filed June 29, 2017 (amended July 20, 2017) and the second motion for summary judgment having been filed December 5, 2017. In this current motion for summary judgment or summary trial, the Defendants seek:

- a) A determination of a question of law as to whether the business interest that the Plaintiff seeks to protect in this action falls within the scope of the *Copyright Act*, RSC 1985, c C-42 (the “*Copyright Act*”);
- b) In the alternative, if the above is found to be a protectable interest under the *Copyright Act*, an assessment of damages, if applicable, with respect to the Defendants’ potential liability, jointly and severally;
- c) If the Court finds in favour of the Defendants on the question of law, an award of costs on the motion and the action;
- d) If the Court finds in favour of the Plaintiff, (i) an award of damages no more than \$2.00 per work; and (ii) an Order that each party bear its own costs of this motion and action;
- e) An Order disposing of the action;
- f) An Order discontinuing the Defendants’ counterclaim, without costs; and
- g) Such further and other relief as this Court may deem just.

[2] In response to the Defendants’ current motion, the Plaintiff seeks:

- a) A declaration that the Defendants are severally and jointly liable for copyright infringement of the original RallySport photographs, including the 6 original

photographs, the 112 additional photographs, and the further 1318 photographs and 3 product descriptions;

- b) Statutory damages, in the amount of \$500.00 per work;
- c) Punitive and exemplary damages, in the amount of \$30,000.00;
- d) The Plaintiff's costs of this action, on a solicitor-client or full indemnity scale;
- e) Pre-and post-judgment interest on item (b), and post-judgement interest on item (d) above;
- f) An injunction restraining the Defendants from reproducing any of the Plaintiff's original photographic images or original product descriptions appearing on [www.rallysportdirect.com](http://www.rallysportdirect.com) on its website [www.subiedepot.ca](http://www.subiedepot.ca);
- g) A mandatory order, directing the Defendants to remove all the original photographic works and product descriptions from their website [www.subiedepot.ca](http://www.subiedepot.ca); and
- h) Such other relief as this Honourable Court may deem just.

[3] For the reasons that follow, this Court grants this motion for summary judgment, in part, in favour of the Plaintiff and in accordance with the terms below: *FCR* Rule 215(1).

## II. Pleadings

[4] In its Further Fresh as Amended Statement of Claim filed on September 25, 2018 ("FFAASOC"), the Plaintiff, Rallysport Direct LLC (the "Plaintiff" or "RSD") seeks the more detailed claims described in Annex A to these Reasons. I note RSD uses the terms "product descriptions" and "product monographs" interchangeably throughout the FFAASOC, as well as

in its motion record and submissions on this motion. A comprehensive review of the pleadings, however, clarifies that RSD seeks to assert copyright with respect to the photographs and the product descriptions. I therefore proceed on this basis.

[5] The “Statement of Defence and Counterclaim of Sylvain Cayer, Genevieve-Ann Cayer and 2590579 Ontario Ltd.” was filed on November 9, 2018. The Statement of Defence contains admissions to the effect that 2424508 Ontario Ltd. copied, or directed a third party to, copy the 112 and 1318 Photographs from RSD’s website at [www.rallysportdirect.com](http://www.rallysportdirect.com), and displayed them on its website at [www.subiedepot.ca](http://www.subiedepot.ca), and that 2590579 Ontario Ltd. displayed 41 of the 112 Photographs on the website [www.subiedepot.ca](http://www.subiedepot.ca) once it assumed management of the website. The Defendants explain this was done in the course of business as wholesale dealers of RSD’s products and for the purpose of displaying RSD’s products for resale. The parties expressed disagreement regarding the timing of posting and removal, and assertions were made regarding inadvertence or no knowledge of (“unbeknownst”) some of the copying. The Defendants pleaded that, in any event, the posting of RSD’s photographs and product descriptions on the Defendants’ e-commerce websites was lawful and is industry-practice in the aftermarket autoparts industry. Furthermore, they submit such use of RSD’s photographs and product descriptions constitutes “fair dealing” under s 29 of the *Copyright Act*.

[6] The Counterclaim of Sylvain Cayer, Genevieve-Ann Cayer and 2590579 Ontario Ltd. seeks:

- a) An order declaring RSD has made false and misleading representations under section 52 of the *Competition Act* (because RSD, in the course of marketing itself

as an aftermarket internet supplier of specialized automotive aftermarket components and accessories, does not state on its website, to which the Canadian public has access, that it also operates a retail business in the same area);

- b) Plaintiffs by Counterclaim's costs of this proceeding on the highest scale; and
- c) Such further and other relief counsel may request and this Court may allow.

[7] RSD filed a "Reply to Statement of Defence of Sylvain Cayer, Genevieve-Ann Cayer and 2590579 Ontario Ltd. and Defence to Counterclaim of Cayers & 2590579 Ontario Ltd." on November 21, 2018. In its Reply, RSD addressed the issues of subsistence of copyright and the alleged infringing activities of the Defendants in relation to RSD's photographic images and product descriptions in which copyright allegedly subsists, the alleged false and misleading representations by RSD, the alleged "fair dealing" by the Defendants, the liability of the named Defendants, and the harm and damages suffered by the Plaintiff. In its Defence to Counterclaim, RSD relied on the allegations in its Statement of Claim and in its Reply, and seeks dismissal of the Defendants' Counterclaim in its entirety and RSD's costs on the Counterclaim as well as in the main action.

[8] A "Reply to Defence to Counterclaim" was filed by the Defendants on December 3, 2018. All Defendants deny the allegations in the Reply to Statement of Defence and Defence to Counterclaim dated November 21, 2018. They assert no motion for default judgment could be brought against 2424508 Ontario Ltd. under *FCR* Rule 210, as 2424508 Ontario Ltd. previously served and filed an Amended Statement of Defence and Counterclaim on October 31, 2017. Further, the Defendants state RSD relies on and seeks to enforce portions of

commercial agreements (pertaining to RSD's Wholesale Dealer Program) between the parties on the one hand, and seeks to resile itself from the same commercial agreements, namely the terms of use agreement, on the other hand.

### III. Background

[9] The Plaintiff, RSD, is an American corporation that actively carries on business as an aftermarket internet supplier and dealer of specialized automotive components and accessories. It does so as both a commercial wholesaler supplier and via direct sales on its e-commerce website at [www.rallysportdirect.com](http://www.rallysportdirect.com).

[10] The corporate Defendant, 2424508 Ontario Ltd. ("242 Ontario"), was an Ontario corporation that, from 2016-2017, actively carried on business as an aftermarket internet dealer of specialized automotive components and accessories via the e-commerce website [www.subiedepot.ca](http://www.subiedepot.ca). On March 22, 2018, 242 Ontario was placed into bankruptcy.

[11] The corporate Defendant, 2590579 Ontario Ltd. ("259 Ontario"), is an Ontario corporation incorporated in August 2017. 259 Ontario has carried on business actively as an aftermarket internet dealer of specialized automotive components and accessories via the e-commerce website [www.subiedepot.ca](http://www.subiedepot.ca), of which it assumed management in November 2017. 259 Ontario also conducts business through [www.ft86motorsports.com](http://www.ft86motorsports.com) and [www.dipit.ca](http://www.dipit.ca).

[12] Sylvain Cayer was the President, and an Officer and Director of 242 Ontario, and holds the same positions in 259 Ontario. Genevieve-Ann Cayer was an Officer and Director of

242 Ontario, and holds the same positions in 259 Ontario. As such, the named Defendants Sylvain Cayer and Genevieve-Ann Cayer were or are the directing and controlling minds of 242 Ontario and 259 Ontario. Sylvain Cayer also owns the rights in the domain name subiedepot.ca.

[13] From 2009-2017, RSD directed several of its employees to photograph 2000+ automotive aftermarket components and accessories to be used in connection with the advertising and sale of its products on its wholesale and retail websites. RSD required the employees to stage products, kits (comprised of multiple products that could be used together), and component assemblies in positions that would enable potential customers to examine key details of the products to ensure compatibility. RSD submits displaying key parts of these products is important in the automotive aftermarket components and accessories industry because of the wide variety of parts available and the cross-applicability of specific pieces. RSD also instructed its employees to prepare original product descriptions to accompany some of the product photographs.

[14] From May 2016, to December 1, 2016, 242 Ontario was an authorized wholesaler for RSD. In November 2016, Sylvain Cayer directed 3rd party contractors to copy RSD's images from RSD's website [www.rallysportdirect.com](http://www.rallysportdirect.com) and display them on the website [www.subiedepot.ca](http://www.subiedepot.ca) to promote 242 Ontario's business. Sylvain Cayer and the corporate Defendants argue such activity was lawful, as 242 Ontario was an approved wholesaler dealer at the time.

[15] On December 2, 2016, RSD ended 242 Ontario's status as an authorized wholesaler. RSD explains it took this step because of the above infringements. 242 Ontario nonetheless indicates it continued to market and source solely RSD's wholesale products until December 26, 2016.

[16] RSD alleges it became aware in late December 2016 that 242 Ontario was displaying 6 RSD-owned photographs on the website [www.subiedepot.ca](http://www.subiedepot.ca). On December 29, 2016, RSD's counsel advised Sylvain Cayer by letter and email of the infringement, and demanded 242 Ontario remove the RSD-owned photographs from this website. To RSD's knowledge, these were removed shortly thereafter.

[17] In February 2017, RSD discovered 242 Ontario was displaying an additional 112 RSD-owned photographs on its website [www.subiedepot.ca](http://www.subiedepot.ca). 242 Ontario alleges these photographs appeared because of an error committed by the 3rd party contractor hired by Sylvain Cayer, and that these images were uploaded originally while 242 Ontario was an authorized wholesaler for RSD. In response, RSD filed a Statement of Claim alleging copyright infringement for the 112 RSD-owned photographs on March 28, 2017, and served 242 Ontario on April 5, 2017.

[18] In June 2017, RSD became aware 242 Ontario was displaying an additional 1318 RSD-owned photographs and 3 RSD-owned product descriptions on its website [www.subiedepot.ca](http://www.subiedepot.ca). 242 Ontario alleges these additional images also were uploaded inadvertently by the same 3rd party contractor while 242 Ontario was an authorized wholesaler for RSD. 242 Ontario asserts that once it became aware of the infringements, it immediately and permanently removed the works from its website. RSD claims these images remained on 242 Ontario's website



www.subiedepot.ca until November 2017, and alleges they were removed only in response to ongoing court proceedings.

[19] On or about August 1, 2017, Sylvain and Genevieve-Ann Cayer incorporated 259 Ontario. After deciding to end 242 Ontario's online e-commerce business, Sylvain Cayer personally purchased 242 Ontario's website content and, on October 31, 2017, allowed 242 Ontario's lease for the domain name subiedepot.ca to lapse. On November 1, 2017, Sylvain Cayer leased the domain name subiedepot.ca and sold the website content to 259 Ontario.

[20] On December 5, 2017, prior to the commencement of discoveries, 242 Ontario filed its second Notice of Motion for summary judgment. Prothonotary Tabib ordered the parties to proceed concomitantly with discoveries and the summary judgment motion. Nonetheless, Sylvain Cayer advised he would not proceed with court-ordered discoveries set to begin mid February 2018, in light of 242 Ontario's impending bankruptcy.

[21] In a scheduling Order issued July 31, 2018, Prothonotary Tabib set timelines for RSD to serve and file a full motion record on the counsel for the proposed defendants on its motion to amend (its Statement of Claim) to add new defendants and for discoveries. On September 18, 2018, Prothonotary Tabib granted leave for RSD to add the named Defendants and 259 Ontario to its amended Statement of Claim, and awarded \$5,000.00 costs against the named Defendants and 259 Ontario for opposing the motion. RSD filed the FFAASOC on September 25, 2018.

[22] On December 3, 2018, the Defendants filed their motion record for the current Motion for Summary Judgment or Trial. On December 21, 2018, Prothonotary Tabib ordered, among other things, RSD to file its responding motion record by February 15, 2019. In its responding written representation, RSD pleaded its original grounds in the Statement of Claim, plus 42 instances of continued infringement from the 1318 RSD-owned photographs, 6 new instances of photographic infringements, 1 instance of continued infringement from the 112 RSD-owned photographs, and 1 new instance of infringing product descriptions.

[23] The parties conducted various cross-examinations on the affidavits in their respective motion records (brief details of which follow below). RSD filed supplementary written submissions arising from these cross-examinations on April 5, 2019. The Defendants filed a Reply on April 26, 2019, which totalled 45 pages plus exhibits. They claimed this submission combined their *FCR* Rule 369(3) reply, and their written submissions arising from cross-examinations as they pertained to the main action.

[24] On May 1, 2019, as part of costs submissions filed in response to Pentney J's April 25, 2019 Direction (regarding the Defendants' appeal of the November 28, 2017 Scheduling Order of Prothonotary Tabib), RSD challenged the length of the Defendants' Reply as it exceeded the 30 pages mandated by *FCR* Rule 70(4). On May 3, 2019, the Defendants filed further Reply Submissions addressing, among other things, the length of their Reply, which they characterized as two pleadings as per the December 20, 2019 case management hearing and December 21, 2018 Order by Prothonotary Tabib.

[25] In response to the October 11, 2019 Direction of this Court to amend the length, file a motion requesting an extension of the length, or face a costs award, the Defendants withdrew and re-filed their *FCR* Rule 369(3) reply in conformance with *FCR* Rule 70(4) on October 21, 2019.

[26] Further details about the complexity and progress of this action are found in July 31, 2019 Order of Pentney J, regarding the appeal from the November 28, 2017 Scheduling Order. While the appeal was rendered moot during the course of the proceedings, I note Pentney J left the issue of costs to be determined on final disposition.

#### IV. Evidence

[27] Both RSD and the Defendants rely on affidavit and cross-examination evidence on this motion. The majority of the evidence concerned copyright ownership, the appropriate cost of producing the photographs and product descriptions, and opinion evidence on which of these costs should be included in considering the amount of damages RSD allegedly realized.

#### V. Issues

[28] The issues before the Court are:

- A. *Is the question of whether the business interest the Plaintiff seeks to protect in this action falls within the scope of the Copyright Act a genuine issue for trial?*
- B. *Is the appropriate quantum of damages a genuine issue for trial?*

VI. Submissions by Parties

A. *Is the question of whether the business interest the Plaintiff seeks to protect in this action falls within the scope of the Copyright Act a genuine issue for trial?*

(1) Submission by Moving Parties (Defendants/Plaintiffs by Counterclaim)

[29] The Defendants assert no genuine issue for trial exists where the judge has the evidence required to adjudicate the dispute fairly and justly: *Milano Pizza Ltd v 6034799 Canada Inc.*, 2018 FC 1112 [*Milano Pizza*] at paras 31-33. They further submit summary judgment may be granted even where facts and law are in dispute, unless it would be unjust to do so: *Inspiration Management Ltd v McDermid St* (1989), 36 BCLR (2d) 202 [*Inspiration Management*] at para 40. This is especially so when the Court is asked solely to decide on a question of law: *E Mishan & Sons, Inc v Supertek Canada Inc*, 2016 FC 613 [*E Mishan*] at para 30, citing *Hryniak v Mauldin*, 2014 SCC 7 [*Hryniak*] at paras 23-25, 28.

[30] The Defendants submit RSD's "business interests" do not fall within the scope of the *Copyright Act*, or in the alternative, whether they so do is a question of law. They submit the Court has the information necessary to determine either of these questions by summary judgment in writing.

[31] The Defendants assert copyright protection is not to be used to protect interests beyond the scope of creative expression. As such, RSD's efforts to protect what in the Defendants' view is a business interest, namely the selling of autoparts and growing its customer base and profits, do not fall within the scope of the *Copyright Act* and constitute a misuse of copyright protection.

They further submit that “[f]or RSD’s copyright infringement claim to succeed, both RSD and the Defendants must all be participants in the industry of images of autoparts and copyright must be the ‘sole purpose of exercise or use[,]’” which is not the case.

[32] The Defendants rely on Bastarache J’s minority opinion in *Euro-Excellence* that logos were merely incidental to the underlying consumer good of the chocolate bars; Fish J’s obiter comment in *Euro-Excellence* that the “laws governing the protection of intellectual property rights in Canada [should not] be transformed ... into an instrument of trade control”; and the Federal Court of Appeal’s conclusion in *TREB* that “anti-competitive behaviour cannot shelter behind a claim of copyright unless the use or protection of the copyright is the sole justification of the practice”: *Euro-Excellence Inc. v Kraft Canada Inc.*, 2007 SCC 37 [*Euro-Excellence*] at paras 56, 93-101; *Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 [*TREB*] at paras 179-181.

(2) Submissions by the Responding Party (Plaintiff/Defendant by Counterclaim)

[33] RSD argues whether RSD has copyright interests in photographs and product descriptions is not a genuine issue, and requests this Court award summary judgment in its favour: *Apotex Inc. v Pfizer Canada Inc.*, 2016 FC 136 [*Apotex*] at paras 33-36, aff’d 2017 FCA 201.

[34] RSD asserts the photographs and product descriptions fall squarely within the ambit of “every original literary ... and artistic work” as defined by sections 2 and 3 of the *Copyright Act*. They rely on *Century 21* and *Trader*, where the British Columbia Supreme Court (BCSC) and

the Ontario Superior Court of Justice (ONSC) respectively held that photographs of houses and property descriptions, and photographs of cars, were copyrightable subjects regardless of whether they were taken to advertise and sell other products: *Century 21 Canada Limited Partnership v Rogers Communications Inc.*, 2011 BCSC 1196 [*Century 21*]; *Trader v CarGurus*, 2017 ONSC 1841 [*Trader*].

[35] RSD distinguishes *Euro-Excellence* and *TREB* on the basis that in both cases, the plaintiff sought to restrict all trade or availability of the infringing product. RSD clarifies it seeks only to stop the Defendants' use of RSD's photographic images or works and product descriptions, and does not in any way seek to prevent the availability of the automotive aftermarket products the Defendants sell.

B. *Is the appropriate quantum of damages a genuine issue for trial?*

(1) Submissions by Moving Parties (Defendants/Plaintiffs by Counterclaim)

[36] Should this Court conclude RSD's business interests fall within the *Copyright Act*'s ambit, the Defendants concede joint and several liability. They submit where liability for infringement is conceded, proceeding to trial on a question of the amount owed is a waste of scarce judicial resources which delays and "can prevent the fair and just resolution of disputes" [emphasis in original]: *Milano Pizza*, above at para 28, citing *Hyrniak*, above at para 24. They assert the Court is entitled to assume the parties put their best foot forward on summary judgment motions, and that the Court has all of the information necessary to make a decision.

They further assert if the Court requires further facts, the appropriate way to do so would be by reference or a summary trial.

[37] The Defendants argue that even if they are liable for infringement, damages are inappropriate as the interests RSD seeks to protect are not related to protecting the dissemination of works but are instead anti-competitive in nature: *Théberge v Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 at para 32; *Robertson v Thompson Corp.*, 2006 SCC 43 at para 69. They assert the scope of damages under the *Copyright Act* is limited to lost profits from selling or licensing creative works and reason that since RSD is not in the business of selling auto-parts images and does not license its photos, RSD has suffered no harm to justify damages. The Defendants reject that lost business from an e-commerce website, which in their view has not been demonstrated or proven in this case, falls within the scope of the *Copyright Act*. They instead characterize these losses as the result of a contractual issue, which is outside this Court's jurisdiction: *Netbored Inc. v Averty Holdings Inc.*, 2005 FC 933 [*Netbored*] at paras 2, 6, 10.

[38] Finally, the Defendants assert it is contrary to the interest of justice and tort law for the Plaintiff to benefit from the statutory damages provisions under the *Copyright Act* without proof of losses.

(2) Submissions by the Responding Party (Plaintiff/Defendant by Counterclaim)

[39] RSD seeks statutory damages, pursuant to s 38.1(1)(a) of the *Copyright Act*. RSD requests, in its Written Representations and by separate letter to this Court, an opportunity for a summary trial or oral submissions regarding damages and costs. RSD explains this will assist it

to better explain the affidavit evidence, case law, and history of proceedings, since an award of statutory damages requires the Court to consider the conduct of the parties under s 38.1(5) of the *Copyright Act*.

[40] RSD submits the Defendants intentionally decreased organically-generated web traffic, thus resulting in lower views and subsequent sales, and that the Defendants were able to avoid having to incur production costs through their infringements. RSD asserts statutory relief is necessary because Sylvain Cayer refused to attend for discovery, making it difficult for RSD to ascertain the profits the Defendants' realized from their infringement, and because it is difficult, if not impossible, to determine properly the economic losses caused by a lack of organically-driven web traffic.

[41] RSD cites the *Century 21*, *Trader*, and *Telewizja* cases as authority for this Court to proceed by way of statutory damages, even where loss of revenue is minimal: *Century 21*, above at para 421; *Trader*, above at paras 67, 104; *Telewizja Polsat SA v Radiopol Inc.*, 2006 FC 584 at para 49. The Plaintiff also refers to the *Collett* and *Ritchie* cases as previous examples where Canadian courts have awarded statutory damages: *Collett v Northland Art Company Canada Inc.*, 2018 FC 269 [*Collett*]; *Ritchie v Sawmill Creek Golf & Country Club Ltd.*, 2003 CanLII 24511 (ONSC) [*Ritchie*].

## VII. Analysis

### A. *Legal Principles Applicable to Summary Judgment Motions*



[42] In *Milano Pizza*, Mactavish J (as she then was) thoroughly canvassed the law of summary judgment as applied to the Federal Courts following the Supreme Court's decision in *Hryniak*, above: *Milano Pizza*, above at paras 24-41. These principles are as follows:

- A. The purpose of summary judgment is to allow the Court to (i) dispense summarily with an action if there is no genuine issue to be tried, (ii) conserve scarce judicial resources, and (iii) improve access to justice: *Milano Pizza*, above at para 25.
- B. Summary judgment rules must be interpreted broadly, favouring proportionality and fair access to affordable, timely and just adjudication; to be “fair and just” the process “must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found”: *Milano Pizza*, above at para 29, citing *Hryniak*, above at paras 5 and 28.
- C. The test of whether no genuine issue for trial exists is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial; or, alternatively, whether there is “no legal basis” to the claim based on the law or the evidence brought forward. It is not restricted to the “clearest of cases”: *Milano Pizza*, above at paras 31 and 33, citing *Canada (Citizenship and Immigration) v Campbell*, 2014 FC 40 at para 14, *Itv Technologies Inc. v Wic Television*, 2001 FCA 11 at paras 4-6, *Premakumaran v Canada*, 2006 FCA 213 at paras 9-11; *Canada (Minister of Citizenship and Immigration) v Schneeberger*, 2003 FC 970 at para 17; *Manitoba v Canada*, 2015 FCA 57 at para 15-16; and *Burns Bog Conservation Society v Canada*, 2014 FCA 170 at paras 35-36.
- D. Where the necessary facts cannot be found to resolve the dispute fairly and justly, or where it would be unjust to make a finding on those facts alone, summary

judgment should not be granted: *Milano Pizza*, above at paras 29 and 36, citing *Hryniak*, above at para 28.

- E. It would be unjust to make a finding on the facts alone where issues were not raised by one party, as doing so would preclude them from knowing the case to meet: *Milano Pizza*, above at paras 107-108 and 112, citing *Albian Sands Energy Inc. v Positive Attitude Safety System Inc.*, 2005 FCA 332 [*Albian Sands*] at para 45.
- F. Issues of credibility should not be decided on a motion for summary judgment. Observing live testimony and cross-examination often places a judge in a better position to draw appropriate inferences, and to weigh evidence, than can be done on affidavit evidence alone: *Milano Pizza*, above at paras 37-38, citing *TPG Technology Consulting Ltd. v Canada*, 2013 FCA 183 at para 3; *Newman v Canada*, 2016 FCA 213 at para 57; *Suntec Environmental Inc. v Trojan Technologies, Inc.*, 2004 FCA 140 [*Suntec*] at paras 20, 28-29; *MacNeil Estate v Canada (Department of Indian and Northern Affairs)*, 2004 FCA 50 at para 38.
- G. Not all conflicting evidence will raise credibility issues and preclude summary judgment. Courts should “take a hard look at the merits of the case” to determine if credibility issues need be resolved: *Milano Pizza*, above at para 39, citing *Granville Shipping Co. v Pegasus Lines Ltd. SA*, 1996 CanLII 4027 (FC) at para 7.
- H. The effect of granting summary judgment will be to preclude a party from presenting any evidence at trial; in other words, the unsuccessful party will lose its day in court: *Milano Pizza*, above at para 40, citing *Apotex Inc. v Merck & Co. Inc.*, 2004 FC 314 at para 12, *aff’d* 2004 FCA 298.

[43] With these principles in mind, I proceed with a consideration of the merits of the Defendants' motion.

B. *Is the question of whether the business interest the Plaintiff seeks to protect in this action falls within the scope of the Copyright Act a genuine issue for trial?*

[44] Copyright automatically exists “in every original literary, dramatic, musical and artistic work”: *Copyright Act*, s 5(1)(a).

[45] In *CCH*, the Supreme Court defined the scope of what is protected by copyright: *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13 [*CCH*] at para 16:

... “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 capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. 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. For example, any skill and judgment that might be involved in simply changing the font of work to produce “another” work would be too trivial to merit copyright protection as an “original” work.”  
[Emphasis added.]

[46] In *Century 21*, the BCSC found that both photographs and descriptions of houses for sale are the products of skill and judgment, and therefore attract copyright protection. While the Court recognized these images and descriptions were created explicitly for marketing purposes, this purpose was immaterial to whether infringement had occurred. Rather, what was important

was that the photographs and descriptions were substantially copied and distributed: *Century 21*, above at paras 185-187, 194.

[47] In *Trader*, the ONSC found original photographs inherently fall under the scope of copyright, explaining that under s 5(1) of the *Copyright Act*, Canadian courts do not evaluate the artistic or aesthetic nature of a photograph, but rather look to whether “skill and judgment” was required in its creation: *Trader*, above at para 22. Since photographers necessarily exercise judgment when selecting subject matter, angles, staging, framing, and ultimately what products to use, the resulting photographs are protected by copyright: *Trader*, above at paras 23-26.

[48] Based on the above, I conclude that the photographs and product descriptions attract copyright protection; I am satisfied based on the evidence provided that RSD employees originally created them. RSD’s employees were required to acquire, situate, and photograph individual automotive parts and accessories - in some instances arranging them into “kits” - and to select the most appealing photos. This, as recognized in *Trader*, inherently involves the judgment and skill to the level required by *CCH*. Similarly, and as surmised in *Century 21*, the impugned product descriptions also meet this threshold; while the product descriptions are not overly creative, they are not required to be. What is important is they are an exercise of skill and judgment (*i.e.* not merely trivial changes made to another work) and they involve intellectual effort, not the mere collation of data: *CCH*, above at para 16. This was the case here; the product descriptions themselves explain the products in such a way as to incentivize buyers to purchase them over others. While they were created for marketing purposes (or what the Defendants

would characterize as “business interests”), this does not diminish the creativity required to produce, or the originality of, the works themselves.

[49] The Defendants assert that RSD seeks to misuse copyright protection in order to protect what is actually a business interest, which is prohibited per *Euro-Excellence* and *TREB*. The Defendants define “business interests” as RSD’s interests in maintaining or increasing its market share and web traffic. I do not agree this case should be limited to such a narrow approach. While it is true RSD seeks to quantify its damages in terms of market share loss or loss of organically-generated web traffic, it is not asserting its copyright solely to protect these interests. Rather, RSD seeks to control how its copyrighted works are used or otherwise commercialized by others. It has chosen not to provide for free or otherwise license its photographs precisely because it does not want others to use them. Why it chose to do so is irrelevant for the purposes of the *Copyright Act*. Having created the original works, it was within RSD’s rights to decide who could reproduce them: *Copyright Act* s 3(a).

[50] I agree with the BCSC that “works [created and] used for commercial purposes are also entitled to copyright protection” so long as the works themselves meet the threshold for attracting copyright protection in the first place: *Century 21*, above at paras 183-184; *TREB*, above at para 195. This was the approach followed by the 5-4 majority of the Supreme Court in *Euro-Excellence*. In categorically rejecting the “incidental works” approach proposed by Bastarache J., the Supreme Court held all artistic works receive copyright protection if they meet the required standards of ‘skill’ and ‘judgment’ set out in *CCH: Euro-Excellence*, above at

paras 4-6, 111. The Supreme Court rejected the “incidental works” approach explicitly because it would be too difficult to determine consistently primary and secondary use.

[51] While I recognize *Trader* sold “capture services” and *Century 21* involved images licensed by private individuals, these details are not relevant. The Defendants have not pointed me to a single case, nor am I aware of one, that confirms copyright cannot vest in an image that is not licensed for future reproduction.

[52] The Defendants also rely on *TREB*, where the Federal Court of Appeal found the impugned database was not copyrightable to begin with because the database was created instantaneously through the mechanical act of data entry and therefore did not meet the threshold of originality: *TREB*, above at para 194. I note Manson J reached the same conclusion with respect to metatags: *Red Label Vacations Inc. (redtag.ca) v 411 Travel Buys Limited (411travelbuys.ca)*, 2015 FC 18 at para 101, *aff’d* 2015 FCA 290 at para 29.

[53] In my view, and as discussed above, there is a significant difference between data entry or keyword selection, and photography and marketing descriptions. Whereas there may be limited ways to collect data or describe terms in metatags, there is not such a limited number of ways to stage a photograph of or to describe a product, in order to attract buyers, that affording copyright in the photographs and descriptions somehow would give a monopoly on photographing and describing the product for sale: *Trader*, above at para 25. Even where photographs must show key details of a unique product, one still must account for variables such as angles, staging and framing, among others: *Trader*, above at para 23.

[54] Further, while I recognize the Federal Court of Appeal in *TREB* does indicate concern that copyright was asserted to continue anti-competitive practices, this was discussed in the context of the available defences under the *Competition Act*. The Court did not review nor comment on the scope of protection under the *Copyright Act*: *TREB*, above at para 49.

[55] The case before this Court is distinguishable from *TREB*, as RSD's actions have not been established as anti-competitive. As pointed out by RSD, the Defendants may produce and use their own photos and product descriptions to compete with RSD in selling the same goods. This demonstrates what RSD is most concerned about is the Defendants' use of RSD's photographs and product descriptions in order to do so – something that is protected explicitly under the *Copyright Act*. In my view, one cannot appropriately cite *TREB* as an example of anti-competitive concerns trumping copyright protections, as copyright was held not to have subsisted in the first place: *TREB*, above at paras 194-195. Where it was discussed in relation to the *Copyright Act* at the Tribunal level, this was in reference to TREB attaching an anti-competitive condition to the use of its intellectual property: *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 CACT 7 at paras 754-756. This is not the case here, given RSD has not licensed these images.

[56] Finally, the Defendants assert this is a contractual dispute, and this Court does not have jurisdiction to grant a remedy: *Netbored*, above. I disagree. RSD's Statement of Claim and Defence to this Motion are properly framed; the remedies it seeks align with protections offered by the *Copyright Act*. In order to protect its copyright interest, the Plaintiff in *Netbored* sought to stop all competition by a former employee, for fear he would breach his employment contract:

*Netbored*, above at paras 6, 21-23. Here, RSD seeks to stop the Defendants' use of RSD's own images and product descriptions in order to protect its interests, not to stop competition in displaying images of these products altogether. The two cases are distinguishable, both in their approach and that the Defendants were not subject to an employment contract with nor fiduciary duty to RSD at the relevant times.

[57] In sum, creating photographs and product descriptions that meet the standard of originality set out in *CCH* attracts copyright protection. RSD therefore has copyright protection in its original photographs and product descriptions, and is entitled to seek to limit infringement of its copyright. The Defendants accept liability, jointly and severally, for copyright infringement if the Court finds the "interests" RSD seeks to protect are covered by the *Copyright Act*.

[58] The *Copyright Act* permits the copyright owner to seek damages, either provable or statutory, against infringements. RSD's ownership of copyright in these photographs and product descriptions is not at issue in this action, and hence this motion.

[59] The Supreme Court outlines the circumstances where there will be no genuine issue for trial: *Hryniak*, above at para 66:

[66] On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may,



at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[60] Based on the above, and given these principles apply equally to the *FCR* Rules 213 and 215, I find there is no genuine issue for trial on the issue of whether the Plaintiff's "business interest" falls within the ambit of the *Copyright Act*: *FCR* Rule 215(1). In my view, the appropriate question is whether copyright subsists in RSD's photographs and product descriptions, given the images were produced solely to support RSD's e-commerce business. I have found copyright does exist and, as mentioned, the Defendants have admitted joint and several liability for infringement if this is the case.

[61] The Plaintiff has requested this motion be decided in its favour: *Apotex*, above at paras 33-36; *Milano Pizza*, above at paras 108, 112. In *Apotex*, Diner J held that since the primary issue was a question of law which did not depend on the evidentiary record, he could grant summary judgment in favour of either party: *Apotex*, above at para 36, relying on *Manulife Bank of Canada v Conlin*, [1996] 3 SCR 415 [*Conlin*]. In *Conlin*, the Supreme Court allowed summary judgment against the appellant, finding the appellant had the opportunity to test the respondent's evidence but had chosen not to do so: *Conlin*, above at para 73. The Federal Court of Appeal applied the same consideration, albeit with a different outcome, to *Albian Sands*, above. There, the Court found the issue of copyright validity was not before the motions judge on the partial motion for summary judgment, and it was therefore unreasonable for the motions judge to rule on copyright validity as the appellants were not given an opportunity to present their case: *Albian Sands*, above at paras 42-46.

[62] The case before this Court is akin to *Apotex* and *Conlin*, and distinguishable from *Albian Sands*. The parties were both on notice that copyright validity, not just infringement, was at issue by virtue of how the Defendants' motion for summary judgment or trial was phrased.

Accordingly, RSD filed evidence (Justin Smith's affidavit) to establish RSD's ownership of copyright in the applicable works. I am satisfied that, on the evidence available, copyright in the photographs and product descriptions subsists and ownership of copyright in these works resides with RSD: *Copyright Act*, ss 5(1)(a) and 13(3); *Milano Pizza*, above at paras 29, 36. Further, I note the Defendants, who had the opportunity to cross-examine Justin Smith and all of RSD's affiants, concede liability jointly and severally if the *Copyright Act* is found to apply to their actions. I note the Defendants submit they were precluded from cross-examining Justin Smith on his July 28, 2017 affidavit, but find this did not compromise their interests given only the February 11, 2019 affidavit is before this Court.

[63] On this basis, I agree it would be "fair and just" to award summary judgment in favour of RSD on the issue of whether RSD's business interests fall within the scope of the *Copyright Act*.

C. *Is the appropriate quantum of damages a genuine issue for trial?*

[64] RSD has elected to pursue statutory damages for infringements for commercial purposes in the minimum amount of \$500.00/work: *Copyright Act*, s 38.1(1)(a). The *Copyright Act* governs statutory damages assessments by setting the outside parameters for each award, listing what factors the Court must assess when coming to a range within these parameters, and under what circumstances a Court may wish to consider to justify lowering the payment outside the statutory parameters: *Copyright Act* ss 38.1(1), 38.1(5), and 38.1(3) respectively.

[65] Whether to lower the minimum amount of statutory damages from \$500.00/work remains at this Court's discretion: *Copyright Act* s 38.1(3). The factors listed in the *Copyright Act* as justification for doing so - a single medium or grossly disproportionate to the infringement - are not exhaustive nor determinative of this matter. Instead, this Court must reasonably assess "all of the circumstances in order to yield a just result": *Telewizja*, above at paras 34, 37.

[66] As the appropriate range of statutory damages is broad, I find the Court would benefit from further submissions on what would be an appropriate range in these circumstances rather than to rely solely on the written material filed in this matter. I note RSD properly filed its request for an oral hearing on this motion in conformance with *FCR* Rule 369(2): their request was included in their Reply record which, although was filed past the 10-day mark envisaged in *FCR* Rule 369(2), nonetheless accorded with the timeline established by Prothonotary Tabib in an Order dated December 21, 2018. This remains one of several options available to the parties.

[67] I further note I have reviewed the parties' submissions and evidence, and am satisfied the affiants' credibility is not so central to the determination of quantum of damages and costs that it would necessitate a trial. Both parties have had the opportunity to present and cross-examine on affidavit evidence, and provide the information necessary to determine the matter: *E Mishan*, above at para 75. Differences of opinion on what occurred do not demand a trial; what is important is that all evidence is considered, and one opinion not favoured over another unless the affiants were given an opportunity to testify, as this would allow the Court to assess the parties' overall credibility before determining with which opinion to proceed: *Inspiration Management*, above at para 40; *Suntec*, above at paras 20-30; *Gupta v Canada*, 2019 FC 669 at paras 41-42;

*Milano Pizza*, above at paras 37-38. In my view, and absent compelling arguments otherwise, the necessary evidence is clearly on the record, and can be considered justly through affidavits and cross-examinations alone. That said, a summary trial on the quantum of damages and costs remains an available option to consider.

[68] In the interests of conserving scarce judicial resources, and in considering these proceedings are already case managed, I believe it would be beneficial to hold a case management conference to determine the appropriate next step for determining the appropriate quantum of damages and costs, with the ultimate outcome to follow in a subsequent Order. How the case management conference will proceed will be the subject of a separate Direction to the parties.

[69] Finally, RSD seeks an injunction restraining the Defendants from reproducing any of its copyrighted works on the website [www.subiedepot.ca](http://www.subiedepot.ca). An injunction related to the infringed copyrighted works before this Court is a common remedy, and warranted in this case: *Thomson v Afterlife Network Inc.*, 2019 FC 545 at para 49. To further extend this injunction to all of RSD's other copyrighted images (a "wide injunction"), I must be satisfied the Plaintiff is the owner of the copyright, and that the Defendants will likely infringe the copyright in the Plaintiff's other works or subject-matter unless enjoined by the Court from doing so: *Copyright Act* s 39.1(1). Without weighing on whether the additional infringements which continue to be identified emanate from additional uploads or infringements which occurred at the same time but have not yet been discovered, I believe in these circumstances a wide injunction is appropriate.

**JUDGMENT in T-458-17**

**THIS COURT’S JUDGMENT is that:**

- 1) Copyright subsists in the 112 Photographs, the 1318 Photographs, and the 3 Product Descriptions, and is owned by RallySport Direct Inc;
- 2) The Defendants unlawfully electronically reproduced and displayed RSD’s 1433 works in which copyright subsists (the 112 Photographs, the 1318 Photographs, and the 3 Product Descriptions) on the website [www.subiedepot.ca](http://www.subiedepot.ca), and hence, infringed RSD’s copyright in these works; and
- 3) The Defendants are jointly and severally liable for the above infringements.

**THIS COURT ORDERS that:**

- 1) A permanent injunction restraining the Defendants, any companies which the named Defendants may create in future or over which they may exercise control, and their respective officers, directors, employees, agents, servants, successors, affiliates, subsidiaries, or related companies, from infringing, or assisting any 3rd party to infringe, the Plaintiff’s copyright, in whole or in substantial part, in the 1433 works in which copyright subsists, namely the 112 Photographs, the 1318 Photographs, and the 3 Product Descriptions (the “infringed copyrighted works”), in accordance with sections 34 and 39.1 of the *Copyright Act*;
- 2) Without limiting I above, that the Defendants remove, from their website [www.subiedepot.ca](http://www.subiedepot.ca) and any other website which the Defendants control directly or indirectly, and refrain from posting, or assisting or permitting any 3rd party to post on such website(s), all or any of the infringed copyrighted works and other original photographic works and product descriptions in which the Plaintiff holds copyright;

- 3) That the Defendants deliver to the Plaintiffs, or destroy under oath, such electronic files and webpages related to the infringed copyrighted works and other original photographic works and product descriptions in which the Plaintiff holds copyright; and
- 4) Damages and costs to be determined and the subject of a subsequent Order.

“Janet M. Fuhrer”

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Judge

**Annex A: Plaintiff's Pleadings in FFAASOC**

[1] The Plaintiff RallySport Direct LLC (“Rallysport”) claims the following relief as against each of the Defendants:

- a) Declaration that each of the 112 photographs of after-market automotive products (“the 112 Photographs”) appearing or which appeared on RallySport’s website [www.rallysportdirect.com](http://www.rallysportdirect.com) are each original photographic works depicting 112 separate individual automotive parts, kits, or assemblies of automotive components being offered for sale on such website, copies of such 112 Photographs contained in associated Plaintiff’s product monographs which appear on the Plaintiff’s website being reproduced in Schedule “A” attached hereto (hereinafter “the 112 Product Monographs”) [...] and that each of such individuals, at the relevant date of creation of the respective 112 Photographs appearing in the respective 112 Product Monographs identified in Schedule “A” hereto, were employees of the Plaintiff RallySport;
- b) A Declaration that each of additional 1318 photographs (“the 1318 Photographs”) which appear respectively in a further 1318 product monographs of Plaintiff’s after-market automotive products, kits, and assemblies and displayed on Plaintiff’s website [www.rallysportdirect.com](http://www.rallysportdirect.com) [a list of the URL’s for such additional 1318 product monographs and accompanying respective 1318 Photographs reproduced in Schedule “B” hereto] are likewise each original photographic works and which 1318 Photographs are part of 1318 product monographs of individual automotive parts , kits, or assemblies of automotive components which are being offered for sale on the Plaintiff’s website (hereinafter “the 1318 Product Monographs”) and

that the 1318 Photographs appearing respectively in said 1318 Product Monographs were taken/created by the individuals listed in Schedule “B” and that each of said individuals at the relevant date of creation of the respective original photographic works indicated therein were employees of the Plaintiff RallySport;

- c) A Declaration that a subset of the above aforesaid 1318 Product Monographs identified in Schedule “B” hereto, namely a quantity of 3 thereof appearing at the URL’s identified in yellow in Schedule “B” hereto (i.e. items 9, 31, 32 thereof hereinafter “the 3 Product Monographs”) each further included an original accompanying written description of the respective automotive part , kit, or assembly of describing its features, capabilities, qualities and/or specifications, that such accompanying written description was created/authored by the individual listed in Schedule “B” on or about the respective dates listed in Schedule “B”, and that each of said individuals at the relevant date of creation of the respective written description was an employee of the Plaintiff RallySport;
- d) A Declaration that:
- (i) each of the above employees of the Plaintiff as well as the Plaintiff itself were at all relevant times citizens and residents of the United States;
  - (ii) that the Plaintiff; is the owner of copyright in:
    - the 112 Photographs;
    - the 1318 Photographs; and
    - the 3 Product Monographs (written descriptions).created by its employees;



- e) A Declaration that the defendant Sylvain Cayer personally expressly instructed 3rd party computer programmers to “scrape” the Plaintiff’s website [www.rallysport.com](http://www.rallysport.com) by copying photographs from Plaintiff’s website and uploading same onto the [www.subiedepot.ca](http://www.subiedepot.ca) website, which actions were not in the ordinary course of Sylvain Cayer’s job functions with 2424508 Ontario Ltd., and constituted a deliberate, willful and knowing pursuit of a course of conduct that was likely to constitute copyright infringement and was indifferent to the risk of it, and further that his actions of instructing the third parties to “scrape” and thereafter post the Plaintiff’s copyright works onto the website [www.subiedepot.ca](http://www.subiedepot.ca) caused and directly induced the corporate defendant 2424508 Ontario Ltd to thereafter infringe the Plaintiff’s copyright therein by displaying such copyright works to customers who assessed the aforesaid website [www.subiedepot.ca](http://www.subiedepot.ca) for purchasing and who did purchase the products identified, and that Sylvain Cayer is personally liable for copyright infringement, contrary to s 27 of the *Copyright Act*, R.S.C. 1985, c. C-42 and for resultant damages arising to the Plaintiff;
- f) A Declaration that the personal defendants acting through the corporate vehicle 2424508 Ontario Ltd. unlawfully electronically reproduced and displayed the following, namely:
- (i) the 112 Photographs appearing in the 112 Product Monographs identified in Schedule “A” hereto;
  - (ii) the additional 1318 Photographs in the 1318 Product Monographs identified in Schedule “B” hereto; and

(iii) the 3 written descriptions contained in the 1318 Product Monographs identified in Schedule “B” hereto;

on the website [www.subiedepot.ca](http://www.subiedepot.ca), and did thereby infringe the Plaintiff’s copyright therein, contrary to s 27 of the *Copyright Act*, R.S.C. 1985, c. C-42;

g) A Declaration that the personal Defendants Sylvain Cayer and his wife Genevieve-Ann Cayer, through their corporate vehicle 2424508 Ontario Ltd., displayed and reproduced on the website [www.subiedepot.ca](http://www.subiedepot.ca) the aforesaid copyright works of the Plaintiff, despite express written notice from counsel for the Plaintiff provided immediately prior to commencement of this action March 28, 2017 (letter to Sylvain Cayer dated December 29, 2016 attached as Schedule “C” hereto) expressly informing the Defendant Sylvain Cayer of Plaintiff’s copyright in the photographs and written descriptions contained in its Photographs and Product Monographs appearing on Plaintiff’s website, up until approximately November 2017;

h) A Declaration that the personal Defendants Sylvain Cayer and Genevieve-Ann Cayer together incorporated, after commencement of this action on March 28, 2017 against 2424508 Ontario Ltd., a new separate corporate entity, namely the Defendant 2590579 Ontario Ltd. of which they are likewise the sole officers and directors and directing minds and which has the same principal address as does 2424508 Ontario Ltd., namely their personal residence, and that they thereafter fraudulently conveyed the assets and business of 2424508 Ontario Ltd., including the right to use of the web domain [www.subiedepot.ca](http://www.subiedepot.ca) and including property belonging to the Plaintiff appearing on such website [www.subiedepot.ca](http://www.subiedepot.ca), namely

copyright works belonging to the Plaintiff, to such newly-incorporated entity 2590579 Ontario Ltd., so as to be able continue to operate the former business of 2424508 Ontario Ltd. and the web-site [www.subiedepot.ca](http://www.subiedepot.ca) and thereby continue to not only infringe the Plaintiff's copyright in the aforesaid Photographs and Product Monographs despite any injunction and liability that may issue against 2424508 Ontario Ltd., but also to take away the income of 2424508 Ontario Ltd. from operation of the SubieDepot business and website [www.subiedepot.ca](http://www.subiedepot.ca) so as to frustrate the Plaintiff in its action against the corporate defendant 2424508 Ontario Ltd. by making such company become bankrupt so that the Plaintiff would then have no assets to recover against for any successful judgment for copyright infringement obtained against 2424508 Ontario Ltd;

- i) A declaration that Sylvain Cayer and his wife Genevieve-Ann Cayer, by their actions aforesaid and the actions of their newly-created corporate entity 2590579 Ontario Ltd. in continuing, after November 2017, to display on the website [www.subiedepot.ca](http://www.subiedepot.ca) at least items 298, 364, 365, 375, 431, 432, 445, 535, 543, 544, 547, 548, 552, 555, 561, 564, 565, 566, 573, 609, 628, 630, 654, 674, 683, 685, 713, 716, 838, 839, 886, 1205, 1209, 1213, 1214, 1215, 1235, 1241, 1242, 1245, & 1314 listed in Schedule "B" hereto, are thereby continuing to directly infringe and induce their newly-created corporate vehicle 2590579 Ontario Ltd. to infringe the Plaintiff's copyright therein, contrary to s 27 of the *Copyright Act*, R.S.C. 1985, c. C-42;
- j) A Declaration that the personal Defendants Sylvain Cayer and his wife Genevieve-Ann Cayer are the directing and controlling minds of each of the corporate

Defendants 2424508 Ontario Ltd. and newly-created Defendant 2590579 Ontario Ltd., and that the corporate veil of each of said corporate defendants should be pierced so as to make these personal defendants personally and jointly responsible along with the aforesaid companies for the infringing actions carried out through each of the aforesaid companies as regards copyright infringement;

- k) Damages for injury to the Plaintiff arising from the Defendants' aforesaid actions, and in addition to those damages, such part of the profits that the Defendants have made from the aforesaid infringements that were not taken into account in calculating the Plaintiff's damages, pursuant to s 35 of the *Copyright Act.*, R.S.C. 1985, c. C-42, and that the Defendants be each jointly and severally liable therefor;
- l) In the alternative to (k) above, pursuant to s 38.1(1)(a) of the *Copyright Act.*, R.S.C. 1985, c. C-42, statutory damages in the sum of not less than \$500.00 and not more than \$20,000(CAD) that this Court considers just, with respect to all infringements by the Defendants for each work of the Plaintiff that has been infringed, namely each of the individual works comprising the 112 Photographs, the further 1318 Photographs, and the 3 written descriptions, and that the Defendants be each jointly and severally liable therefor;
- m) A declaration that the assets and property of 2424508 Ontario Ltd., including but not limited to the website [www.subiedepot.ca](http://www.subiedepot.ca) containing thereon the aforesaid Photographs and Product Monographs belonging to the Plaintiff and in which the Plaintiff owns copyright, were imbued with and subject to the legal obligation to account to the Plaintiff for damages for past copyright infringement and/or profits and/or legal costs payable to the Plaintiff, and that such assets are currently being

held by the operators of the business of [www.subiedepot.ca](http://www.subiedepot.ca), namely the corporate vehicle 2590579 Ontario Ltd. and Sylvain Cayer and Genevieve-Ann Cayer, in a constructive trust for the benefit of the Plaintiff;

- n) An interlocutory and permanent injunction expressly restraining the personal defendants Sylvain Cayer and Genevieve-Ann Cayer, and their agents, as well as the corporate Defendants 2424508 Ontario Ltd., and 2590579 Ontario Ltd., and any companies in which they may create in future or which they may exercise control over, and their respective officers, directors, employees, agents, servants, successors, affiliates, subsidiaries, related companies, and all other persons who have direct or indirect knowledge of this injunction, from thereafter directly or indirectly:
  - (i) infringing the Plaintiff's copyright in any of the Plaintiff's Product Monographs, including and not limited to the 112 Photographs, the additional 1318 Photographs, or the 3 written descriptions;
  - (ii) displaying any of the 112 Photographs, the 1318 Photographs, or the further 3 written descriptions, on the website [www.subiedepot.ca](http://www.subiedepot.ca) or on any website;
  - (iii) assisting or creating any third party to do any of the foregoing;
- o) Exemplary, punitive and aggravated damages, as against each of the Defendants jointly and severally, for wilfully and knowingly infringing, directing and/or inducing the infringement of, the Plaintiff's copyright and for continuing to infringe or direct the infringement of, the Plaintiff's copyright after receiving written notice from the Plaintiff on or about December 29, 2016 expressly advising of the

Plaintiff's copyright rights in photographs appearing in Plaintiff's Product Monographs posted on the Plaintiff's website;

- p) An order and mandatory injunction requiring the Defendants to deliver up to the Plaintiff forthwith, or destroy under oath, such electronic files and web pages identified in Schedules "A" & "B" hereto relating to:
- (i) the 112 Photographs appearing in the 112 Product Monographs;
  - (ii) the 1318 Photographs in the further 1318 Product Monographs; and
  - (iii) the 3 written descriptions contained in certain of the additional 1318 Product Monographs;
- q) Costs of this action, on a solicitor-client scale, including all disbursements and applicable G.S.T, as against all Defendants, and that they be jointly and severally liable therefor;
- r) Pre-judgment and post-judgment interest on monies held to be owing to the Plaintiff, pursuant to the *Federal Courts Act*, R.S.C. 1985, c F-7; and
- s) Such further and other relief that to this Honourable Court may seem just.

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

**DOCKET:** T-458-17

**STYLE OF CAUSE:** RALLYSPORT DIRECT LLC v 2424508 ONTARIO LTD

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO  
RULE 369 OF THE *FEDERAL COURTS RULES***

**JUDGMENT AND REASONS:** FUHRER J.

**DATED:** NOVEMBER 28, 2019

**APPEARANCES:**

D. Doak Horne

FOR THE PLAINTIFF

Bayo Odutola

FOR THE DEFENDANTS

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