

Federal Court



Cour fédérale

**Date: 20210915**

**Docket: T-130-18**

**Citation: 2021 FC 955**

**Ottawa, Ontario, September 15, 2021**

**PRESENT: The Honourable Justice Fuhrer**

**BETWEEN:**

**ALEXANDER STROSS**

**Plaintiff**

**and**

**TREND HUNTER INC. AND JEREMY  
GUTSCHE**

**Defendants**

**ORDER AND REASONS**

I. Overview

[1] Alexander Stross, photographer, produced photographs of tiny houses located in a compound adjacent to the Llano River in Texas, United States of America. He registered copyright in these photographs and others with the United States Copyright Office. Six of his photographs [Llano River Photographs] were incorporated, without the permission of Alexander Stross, in a website post by market research firm, Trend Hunter Inc., entitled “Friendly Housing

Row.” The post included a short article by Joey Haar, a research writer employed by Trend Hunter at the relevant time, with the byline “‘Bestie Row’ is a Series of Four Houses Occupied by Best Friends.”

[2] Mr. Stross brought a simplified action in this Court for copyright infringement in which he was successful against Trend Hunter; the claim against the individual co-defendant, Jeremy Gutsche, however, was dismissed: *Stross v Trend Hunter Inc.*, 2020 FC 201 [*Stross*].

Prothonotary Furlanetto (as she then was) presided over the simplified action and awarded Mr. Stross \$3,983.40 in damages, and costs in the amount of \$9,493.94.

[3] Trend Hunter now moves, under Rule 51 of the *Federal Courts Rules*, SOR/98-106 [*FCR*], to appeal the *Stross* decision insofar as it relates to Trend Hunter.

[4] I am not persuaded that Prothonotary Furlanetto misstated or misapplied the relevant law, nor that she made any palpable **and** overriding errors warranting interference with the conclusions that Alexander Stross was entitled to bring this action, that Trend Hunter’s use of the Llano River Photographs was not “fair dealing,” and hence, that Trend Hunter is liable for copyright infringement. I also am not persuaded that the costs award was excessive in the circumstances. For the more detailed reasons that follow, I therefore dismiss Trend Hunter’s motion and appeal.

## II. Issues and Standard of Review

[5] Trend Hunter asserts that Prothonotary Furlanetto erred in determining that:

- (a) Mr. Stross had established, on a balance of probabilities, copyright ownership in the Llano River Photographs entitling him to exercise the acts described in paragraphs 3(1)(a) to (f) of the *Copyright Act*, RSC 1985, c C-42;
- (b) it was not necessary to consider whether Trend Hunter's use of the Llano River Photographs fell within the "news reporting" fair dealing exception to copyright infringement contemplated in section 29.2 of the *Copyright Act*;
- (c) Trend Hunter's use of the Llano River Photographs was not fair and, thus, did not fall within any of the fair dealing exceptions in sections 29 and 29.2 of the *Copyright Act*;
- (d) Mr. Stross was awarded costs of \$9,493.94.

[6] I am satisfied that the Court's role on this appeal of Prothonotary Furlanetto's decision is to consider whether she made any palpable and overriding errors in her determinations on these issues. Further, I am not persuaded that in the circumstances there are any questions of law or extricable legal principles warranting a correctness review.

[7] The parties agree, as do I, that the applicable standard of review is the appellate standard described by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*] at paras 7-36; *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 63, 65, 79 and 83. I disagree with the parties, however, regarding their description of the appellate review standard as it relates to questions of mixed law and fact. These questions are reviewed deferentially for any palpable and overriding errors of law, unless they involve an extricable legal principle.

[8] The Federal Court of Appeal recently summarized the *Housen* standard, once again, as follows: "questions of fact and mixed questions of fact and law are subject to the palpable and overriding error standard while questions of law, and mixed questions **where there is an**

**extricable question of law**, are subject to the standard of correctness” [emphasis added]:

*Worldspan Marine Inc. v Sargeant III*, 2021 FCA 130 at para 48. As I alluded above, the “palpable and overriding error” standard of review is highly deferential. Further, palpable means an obvious error, while an overriding error is one that affects the decision-maker’s conclusion: *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras 61-64.

### III. Analysis

#### A. *Ownership of Copyright in the Llano River Photographs*

[9] I am not persuaded Prothonotary Furlanetto erred in determining that there was no basis to support the conclusion Mr. Stross could not bring this action and assert copyright in the Llano River Photographs.

[10] The underlying facts pertaining to this issue can be found at paras 10-18 of the *Stross* decision. I add that there is no dispute the Llano River Photographs were produced or taken by Mr. Stross and, thus, he is their author. Further, there is no evidence contradicting that, as the author of the Llano River Photographs, he is the first owner of copyright, as contemplated by subsection 13(1) of the *Copyright Act*, nor was this disputed.

[11] Briefly, Trend Hunter relies on Section 1 of the Recovery Services Agreement, which Mr. Stross apparently entered into with an entity called ImageRights, purporting to appoint ImageRights as his “exclusive agent with respect to settlement of each Recovery Asset, which **may** include the right to grant licenses...” [emphasis added].

[12] In response, Mr. Stross points to Section 6 of the Agreement in which he “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.” I note Section 6 also provides, “[n]othing herein shall be deemed as one Party granting the other Party ownership or other rights in the first Party’s logo, name trademarks, servicemarks, trade dress and/or other intellectual property, except in accordance with and to the extent of the licenses set out in **this Section**” [emphasis added].

[13] I do not disagree with Prothonotary Furlanetto that “the evidence on the Recovery Services Agreement is far from clear.” Further, contrary to Trend Hunter’s submissions, I agree with Prothonotary Furlanetto that there is no express language confirming the rights enumerated in subsection 3(1) of the *Copyright Act*, which are non-exhaustive and include the right to authorize any of the acts specifically listed in such subsection, have been assigned or licensed exclusively to ImageRights. Nor, in my view, does the Agreement expressly assign to ImageRights a right of action for copyright infringement, in association with an assignment, or a grant of interest, of the copyright, as contemplated by subsection 13(6) of the *Copyright Act*.

[14] Here, there has been no assignment of copyright but rather there was an appointment of ImageRights as an exclusive agent to recover settlement fees (in respect of unauthorized copies of images that it finds in searching the Internet) that may involve granting licenses and that was subject to “prior approval of the general terms and conditions for each Recovery Asset.” In other words, there was no blanket or outright grant of exclusivity. I also find the scope of the

appointment was unclear, in part because the law governing the construction and interpretation of the Agreement is stated to be that of California about which there was no evidence.

[15] For these reasons, I find Prothonotary Furlanetto made no palpable and overriding errors in arriving at the conclusion that the evidence supports Mr. Stross as the owner of copyright in the Llano River Photographs and, thus, entitled to bring this action.

B. *No “News Reporting” Fair Dealing Exception under Section 29.2 of Copyright Act*

[16] In my view, Prothonotary Furlanetto made a palpable error, but not an overriding one, in determining the “Friendly Housing Rows” piece, and in particular, the article by Joey Haar, did not meet the requirements for “news reporting” as set out in section 29.2 of the *Copyright Act* (referred to as section 29.1 in the *Stross* decision at para 31). This section provides that, in order for news reporting to be considered fair dealing and, thus, not copyright infringement, the source must be mentioned **and** also the name of the author, if it is given in the source.

[17] The article by Joey Haar entitled “Bestie Row” is a Series of Four Houses Occupied by Best Friends, states “References countryliving & apartmenttherapy” under his name and date in the byline. The evidence before Prothonotary Furlanetto points to *CountryLiving* and *apartmenttherapy* articles available online as the sources from which Mr. Haar obtained the Llano River Photographs.

[18] In my view, the reference to the online publications with the articles displaying the Llano River Photographs meets the requirement that the source be “mentioned.” Further, Mr. Stross

admits in his written representations in response to Trend Hunter's motion that the sources were named. Even if I am incorrect about this first news reporting fair dealing requirement, I find the second requirement of mentioning the name of the author (i.e. of the Llano River Photographs, Alexander Stross) is applicable in the circumstances and has not been met.

[19] I disagree with Trend Hunter that the provision of hyperlinks to the source articles, where the author of the Llano River Photographs, Alexander Stross, is credited or named (and thus, the author's name is only a click or two away), is sufficient to meet the second requirement because Joey Haar's article itself, the alleged news reporting, does not mention the author's name. In my view, it is not enough, as argued by Trend Hunter, that the attribution (to the author, Alexander Stross) is readily available with minimum research. I thus find the case of *Warman v Fournier*, 2012 FC 803 [*Warman*], on which Trend Hunter sought to rely, is distinguishable because the requirement of mentioning the source and the author was satisfied in that case (*Warman*, at para 31).

C. *Trend Hunter's use of the Llano River Photographs was not fair*

[20] I am not persuaded that Prothonotary Furlanetto erred in concluding that Trend Hunter's use of the Llano River Photographs, including the purpose of the dealing, was not fair, and thus, Trend Hunter infringed copyright.

[21] Prothonotary Furlanetto's finding regarding the non-applicability of "news reporting" occurred in the context of her articulation of the test for "fair dealing" under the *Copyright Act* and its application to the circumstances of this case. As Prothonotary Furlanetto noted, there is a

two-part test that requires first, a determination of whether the dealing falls within one of the permitted purposes of the *Copyright Act*, and if yes, then second, a determination of whether the dealing was fair: *Stross*, above at para 21, citing *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13 [*CCH*].

### *Research Purpose*

[22] In considering the first part of the *CCH* test Prothonotary Furlanetto was not satisfied that Trend Hunter's use of the Llano River Photographs was for the purpose of news reporting under section 29.2 of the *Copyright Act*, nonetheless she was satisfied that it was for the purpose of research under section 29: *Stross*, above at paras 24, 30 and 31. She noted that the term "research" is to be given a large and liberal interpretation to ensure users' rights are not constrained unduly, and that research is not limited to non-commercial or private contexts: *Stross*, above at para 23. On this basis, she found that Trend Hunter's use of the Llano River Photographs occurred in the context of a computerized form of market research that measures consumer interaction and preferences for the purpose of generating data for clients: *Stross*, above at para 30.

[23] She then described the second part of the test as involving a "holistic analysis" of the particular circumstances of the case, with reference to the public interest, to determine the fairness of the dealing, including the following factors (all of which may or may not arise in every case): (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work: *Stross*, above at paras 32-35.



*Balancing of Factors*

[24] Neither party disputes Prothonotary Furlanetto's articulation of the test for fair dealing in the context of research. Trend Hunter asserts that Prothonotary Furlanetto erred, however, in the assessment of the balance between the public interest in encouraging and disseminating works of the arts and the intellect and the author's right to a just reward: *Théberge v Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 [*Théberge*] at para 30.

[25] Trend Hunter argues that the conclusion there is "no broader public interest purpose associated with [Trend Hunter's] use of the Llano River Photographs" is tantamount to a requirement that Trend Hunter establish some independent, benevolent public interest purpose in its operations. I disagree and find that the reference to "broader public interest" can be understood when contrasted with, and in the context of, the narrower commercial interests of Trend Hunter (i.e. the purpose of the dealing) in evidence.

(1) Purpose of the Dealing

[26] For example, Trend Hunter posits that its goal, while commercial, is aimed at fostering a culture of creation and innovation and the development of a "robustly cultured and intellectual public domain." The purpose of its reports is to teach its users about new and emerging market trends, and that users can continue to learn about the subject of the Llano River compound by clicking on the hyperlinks to the source articles from *CountryLiving* and *apartmenttherapy*. While this may be a purpose, it is distinguishable in my view from music or song previews that draw the public's attention to the musical works from which they are derived so that the creators

can benefit by receiving a just reward through the ultimate purchase of the songs: *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36 [*SOCAN*] at para 30. Here, the Llano River Photographs are illustrative or an example of the content of Joey Haar's article, the ultimate goal of which is not to facilitate the user's purchase or licensing of the Llano River Photographs, but rather to elicit data generated by website visitor interactions with the article.

[27] Trend Hunter's own evidence, however, is that the purpose of its research and reports is to sell market data to third parties to develop strategies in their own sales and production. Trend Hunter generates periodic reports on its general trend research and offers these reports for sale. It also generates custom reports for clients. In addition, Trend Hunter uses its research results to advise clients on emerging trends relevant to each client's business. All of these activities are reflective, in my view, of the former "author-centric" view of copyright, in so far as Trend Hunter's research and reports are concerned, where any benefit (or creative innovation) the public might derive from the copyright system was only a fortunate by-product: *SOCAN*, above at para 9.

[28] Further, "some dealings, even if for an allowable purpose, may be more or less fair than others; research done for commercial purposes may not be as fair as research done for charitable purposes": *CCH*, above at para 54. I thus agree with Prothonotary Furlanetto, and find she made no palpable and overriding errors in concluding that the purpose of the Trend Hunter's dealing in the Llano River Photographs was commercial in nature, for the (narrower) benefit of Trend Hunter and its clients, with no benefit to Mr. Stross and no (broader) public interest purpose.

[29] I also am not persuaded that Prothonotary Furlanetto erred by focusing the fair dealing assessment on the public interest contemplated in *Théberge*, or that it was done without reference to Trend Hunter’s policies. Trend Hunter refers to the decision in *York University v The Canadian Copyright Licensing Agency (Access Copyright)*, 2020 FCA 77 at paras 212-241 for the proposition that where a fair dealing defence is based on a system of fair dealing policies or practices, then the “purpose of the dealing” factor should focus on the safeguards in place to ensure that the dealing is fair.

[30] I disagree with Trend Hunter, however, that the enquiry regarding such safeguards ends with the policies themselves. As noted by Prothonotary Furlanetto, this case is not about challenging Trend Hunter’s policies. Rather, the allegation of copyright infringement here is centred on the “individual” use made of the Llano River Photographs. Prothonotary Furlanetto considered Trend Hunter’s policies for assessing the context and conduct around the particular or individual dealing: *Stross*, above at para 34. The Federal Court of Appeal did not displace this approach: *York*, above at paras 254 and 258. I thus am satisfied that Prothonotary Furlanetto did not commit any palpable and overriding errors in this regard.

(2) Character of the Dealing

[31] The parties agree, as do I, that Prothonotary Furlanetto’s findings regarding the character of the dealing (though more extensive than a single use in print advertising, did not constitute wide circulation: *Stross*, above at paras 43-44) should not be disturbed.

(3) Amount of the Dealing

[32] I am not persuaded that Prothonotary Furlanetto erred by finding the lower resolution of the Llano River Photographs, as reproduced by Trend Hunter, was not fair dealing. I agree the facts of this case are distinguishable from those in *SOCAN* where music previews were at issue. The previews did not reproduce songs in their entirety, thus making them less identifiable. Here, despite the reduced quality and resolution of the Llano River Photographs, the images nonetheless were reproduced essentially in their entirety. Notwithstanding Trend Hunter's argument regarding fewer pixels in its reproductions of the original Llano River Photographs, I find the originals are easily identifiable in the reproductions which in my view represent substantial copies.

[33] I further find Trend Hunter's reliance on *Century 21 Canada Ltd. Partnership v Rogers Communication Inc.*, 2011 BCSC 1196 [*Century 21*], which found that reproduction of images for use as thumbnails (that is, extremely low-resolution versions) was "fair use," is misplaced. The facts of *Century 21* also are distinguishable, in my view. Similar to *SOCAN*, the thumbnail image served as a link to the original property listing (*Century 21*, at para 231), just as the song previews were used to help customers decide whether to purchase the full songs. In contrast, the Llano River Photographs did not serve as links to the original photographs, but rather were incorporated in the Trend Hunter article to illustrate or emphasize the article's content and not as assistance to the reader in making a decision about whether to purchase or license the Llano River Photographs.

[34] I therefore am satisfied that Prothonotary Furlanetto committed no palpable and overriding errors in her consideration of this factor.

(4) Available Alternatives

[35] I am not persuaded that Prothonotary Furlanetto erred in concluding there were alternatives to the dealing that could have been used in this case.

[36] Whether Trend Hunter relaxes its safeguards when an experienced contributor like Joey Haar, who has been through Trend Hunter's training and who has contributed content before, uploads content, is a factual determination subject to review for any palpable and overriding errors. In my view, Prothonotary Furlanetto made no such errors.

[37] Prothonotary Furlanetto noted that not only does Trend Hunter's copyright policy require a content-provider to check for and avoid using any content that has a copyright notice or watermark, but Trend Hunter also has image content screens to screen out images with a copyright notice or watermark. Further, Trend Hunter's copyright training covers image sourcing practices that require mention of a photographer or image credit in the source to be included in the article. In addition, Prothonotary Furlanetto observed that Trend Hunter's standard freelance contractor agreement includes an addendum indicating that any use of copyrighted images without the owner's permission is viewed as copyright infringement.

[38] Turning specifically to the use made of the Llano River Photographs, Prothonotary Furlanetto found that Trend Hunter's research editors did not conduct a check of the material

prior to posting Mr. Haar's article. Instead the piece was flagged as "set to publish," not subject to editorial review, and posted immediately to the front page of trendhunter.com, all because Mr. Haar was an experienced contributor. As mentioned above, in my view this individual analysis was not contrary to *York*. Further, I find it was supported by the following cross-examination testimony of Shelby Lee Walsh, President and Head of Research at Trend Hunter:

Q. Trend Hunter could have conducted an editorial review of this -- these articles before they were published?

A. Yup, that could have been possible.

Q. And Trend Hunter could monitor and review all photographs for copyright detection prior to posting them on its website?

A. Yes, we have the ability to do that.

[39] I also disagree with Trend Hunter that Prothonotary Furlanetto held Trend Hunter should have obtained authorization from Mr. Stross. I find that at the outset of her analysis of alternatives to the dealing factor, Prothonotary Furlanetto correctly identified the principle (from *CCH*, above at para 70) that the availability of a licence is not relevant to determining whether a dealing was fair because it does not take into account the balance between creator and user rights: *Stross*, above at para 48.

[40] Having analyzed Trend Hunter's use of the Llano River Photographs in the context of its copyright policy and practices, Prothonotary Furlanetto concluded that "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**" [emphasis added]: *Stross*, above at para 54. In light of the above-mentioned addendum to Trend Hunter's standard freelance contractor agreement, in my view the emphasized wording is a

factual determination. Even if I am incorrect in this regard, I find the reference to “without any authorization by Mr. Stross” at most to be an error of mixed fact and law, with no extricable legal principle, and thus subject to palpable and overriding error review. At best, the reference was a palpable error, but not an overriding one, because the focus of Prothonotary Furlanetto’s analysis of the particular alternative to the dealing was compliance with Trend Hunter’s own copyright policy.

[41] In addition, I find no factual error with the determination that the Llano River Photographs were not essential to Trend Hunter’s research (i.e. for the purpose of compiling market data to sell to clients), especially in light of cross-examination testimony of Ms. Walsh to the effect that the Llano River Photographs were statistically insignificant: *Stross*, above at para 55. I note Ms. Walsh testified further in cross-examination:

Q. Just a second. And in terms of just the content of these articles, as we discussed, they're a photo with text and then some links. You'd agree that the main component that draws users into those articles would be the photos. Right?

A. No.

Q. That's not the first striking thing that draws your attention to an article, is the big photograph posted on the front of the article?

A. I think for many of the articles, and even particularly this case, it's not the architecture that's strikes the eye, it's the idea of it being a bestie row and co-living together. That would be the concept we're most interested in. And that's what we're trying to score on, the idea behind it, as opposed to just the imaginary of it. Imaginary is a nice complementary addition to the article.

(5) Nature of the Work

[42] I agree with Mr. Stross that the viral nature of the Llano River Photographs does not justify their unauthorized use by Trend Hunter. Contrary to Trend Hunter's argument, I find that Prothonotary Furlanetto did not make a palpable and overriding error in determining that the nature of the work is a neutral factor in this case. As Prothonotary Furlanetto noted, and I agree, the previous wide distribution on the internet goes to the effect of the dealing and the impact of Trend Hunter's use on Mr. Stross: *SOCAN*, above at para 48.

(6) Effect of the Dealing

[43] I agree with Trend Hunter that Prothonotary Furlanetto's conclusion regarding this factor is not stated expressly. Prothonotary Furlanetto noted first that the parties are not competitors. Further, there is no evidence of any direct effect on Mr. Stross of Trend Hunter's use of the Llano River Photographs, nor that the dealing resulted in commercial gain for Trend Hunter – it was viewed fewer than 200 times and generated minimal advertising revenue. There also is no direct evidence pointing to a decreased prospect of licensing of the Llano River Photographs by Mr. Stross as a result of Trend Hunter's posting.

[44] I note, however, that “[a]lthough the effect of the dealing on the market of the copyright owner is an important factor, **it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair**” [emphasis added]: *CCH*, above at para 59. Further, neither competition nor financial harm is a prerequisite to succeeding in a claim for copyright infringement. These factors may be taken into account, however, in respect of the



damages to which a successful claimant may be entitled, as occurred in this case: see *Stross*, above at para 75.

*Conclusion on Fair Dealing*

[45] Based on the foregoing analysis, I am satisfied that Prothonotary Furlanetto's findings in this matter with respect to fair dealing and copyright infringement do not warrant the Court's intervention.

D. *Did the Trial Judge err in awarding costs to the Plaintiff in the amount of \$9,493.94?*

[46] I also am satisfied that Prothonotary Furlanetto did not err in awarding costs to the successful party, Alexander Stross, in the amount of \$9,493.94. I agree with Mr. Stross that, absent reasons to do otherwise, costs tend to follow the event, and guidance on the quantum can be found in the *FCR* Rule 407; that is, party-and-party costs will be assessed in accordance with Column III of Tariff B: *Pembina County Water Resource District v Manitoba*, 2019 FC 82 at para 20. As noted by Prothonotary Furlanetto, and I agree, both parties claimed similar amounts in their respective bills of costs for their fees, calculated in accordance with Tariff B of the *FCR*, and disbursements. I note the fee component, including applicable taxes, of the costs award was \$7,373.25, while the disbursements, also inclusive of taxes, were \$2,120.69, which Prothonotary Furlanetto found reasonable.

[47] I am not persuaded that the "divided" success of Mr. Stross is a significant factor in this case warranting the Court's intervention. Although the claim against the individual co-defendant,

Jeremy Gutsche was dismissed, the reason for the dismissal was lack of evidence. The claim was not pursued vigorously and it was dismissed readily: *Stross*, above at paras 78-80. Further, in recognition that the matter proceeded as a simplified action, and consistent with the trier's discretion under the *FCR* Rule 400, Prothonotary Furlanetto awarded costs to Mr. Stross in accordance with the middle of Column III, the lowest of the three calculations (mid Column III, mid Column IV and upper Column IV) provided by both parties. In my view, the costs award in this case is commensurate with the overall success of Mr. Stross, and I see no need to depart from it.

#### IV. Conclusion

[48] In sum, I am not persuaded that Prothonotary Furlanetto's determinations, that Mr. Stross is the authorized owner of the copyright, that Trend Hunter's dealing does not fall under the "news reporting" exception, and that the dealing was not fair (based on a holistic analysis with reference to the enumerated *CCH* factors and their balancing), warrants the Court's interference with the outcome of the simplified action, including the costs award. Trend Hunter's motion and appeal, therefore, are dismissed.

#### V. Costs of this Motion

[49] Costs of this motion and appeal are awarded to Mr. Stross, payable by Trend Hunter. Although both parties claimed their costs, neither party provided any specifics. If they cannot come to an agreement on the amount of costs, they will have until October 8, 2021, to serve and

file brief written submissions on costs, not exceeding three pages, for the Court to determine the quantum of costs to be awarded to Mr. Stross in the circumstances.

**ORDER in T-130-18**

**THIS COURT ORDERS that:**

1. Trend Hunter Inc.'s motion and appeal are dismissed.
2. Alexander Stross is awarded his costs of this motion and appeal, payable by Trend Hunter Inc..
3. If the parties cannot agree on the amount of costs, they will have until October 8, 2021, to serve and file brief written submissions on costs, not exceeding three pages, for the Court to determine the quantum of costs to be awarded to Mr. Stross in the circumstances.

"Janet M. Fuhrer"

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Judge

**Annex “A”: Relevant Provisions**

*Federal Courts Rules (SOR/98-106)*  
*Règles des Cours fédérales (DORS/98-106)*

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|---|--|
| <p><b>Appeals of Prothonotaries’ Orders</b><br/> <b>Appeal</b></p> <p><b>51 (1)</b> An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.</p>   | <p><b>Appel des ordonnances du protonotaire</b><br/> <b>Appel</b></p> <p><b>51 (1)</b> L’ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour fédérale.</p>   |
| <p><b>Awarding of Costs Between Parties</b><br/> <b>Discretionary powers of Court</b></p> <p><b>400 (1)</b> The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.</p> | <p><b>Adjudication des dépens entre parties</b><br/> <b>Pouvoir discrétionnaire de la Cour</b></p> <p><b>400 (1)</b> La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.</p> |
| <p><b>Assessment of Costs</b><br/> <b>Assessment according to Tariff B</b></p> <p><b>407</b> Unless the Court orders otherwise, party-and-party costs shall be assessed in accordance with column III of the table to Tariff B.</p>                         | <p><b>Taxation des dépens</b><br/> <b>Tarif B</b></p> <p><b>407</b> Sauf ordonnance contraire de la Cour, les dépens partie-partie sont taxés en conformité avec la colonne III du tableau du tarif B.</p>   |

*Copyright Act (R.S.C., 1985, c. C-42)*  
*Loi sur le droit d’auteur (L.R.C. (1985), ch. C-42)*

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|--|--|
| <p><b>Interpretation</b><br/> <b>Definitions</b></p> <p><b>2</b> In this Act,</p> <p><i>artistic work</i> includes paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilations of artistic works; (œuvre artistique)</p> | <p><b>Définitions et dispositions interprétatives</b><br/> <b>Définitions</b></p> <p><b>2</b> Les définitions qui suivent s’appliquent à la présente loi.</p> <p><i>œuvre artistique</i> Sont compris parmi les œuvres artistiques les peintures, dessins, sculptures, œuvres architecturales, gravures ou photographies, les œuvres artistiques dues à des artisans ainsi que les graphiques, cartes, plans et compilations d’œuvres artistiques. (artistic work)</p> |
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| <p><b>Exclusive licence</b></p> <p><b>2.7</b> For the purposes of this Act, an exclusive licence is an authorization to do any act that is subject to copyright to the exclusion of all others including the copyright owner, whether the authorization is granted by the owner or an exclusive licensee claiming under the owner.</p>   | <p><b>Licence exclusive</b></p> <p><b>2.7</b> Pour l'application de la présente loi, une licence exclusive est l'autorisation accordée au licencié d'accomplir un acte visé par un droit d'auteur de façon exclusive, qu'elle soit accordée par le titulaire du droit d'auteur ou par une personne déjà titulaire d'une licence exclusive; l'exclusion vise tous les titulaires.</p>   |
| <p><b>Copyright and Moral Rights in Works</b></p> <p><b>Copyright in works</b></p> <p><b>3(1)</b> For the purposes of this Act, <i>copyright</i>, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material 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,</p> <p>(a) to produce, reproduce, perform or publish any translation of the work,</p> <p>(b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,</p> <p>(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,</p> <p>(d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,</p> <p>(e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,</p> | <p><b>Droit d'auteur et droits moraux sur les œuvres</b></p> <p><b>Droit d'auteur sur l'œuvre</b></p> <p><b>3(1)</b> Le droit d'auteur sur l'œuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'œuvre, sous une forme matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie importante en public et, si l'œuvre n'est pas publiée, d'en publier la totalité ou une partie importante</p> <p>a) de produire, reproduire, représenter ou publier une traduction de l'œuvre;</p> <p>b) s'il s'agit d'une œuvre dramatique, de la transformer en un roman ou en une autre œuvre non dramatique;</p> <p>c) s'il s'agit d'un roman ou d'une autre œuvre non dramatique, ou d'une œuvre artistique, de transformer cette œuvre en une œuvre dramatique, par voie de représentation publique ou autrement;</p> <p>d) s'il s'agit d'une œuvre littéraire, dramatique ou musicale, d'en faire un enregistrement sonore, film cinématographique ou autre support, à l'aide desquels l'œuvre peut être reproduite, représentée ou exécutée mécaniquement;</p> <p>e) s'il s'agit d'une œuvre littéraire, dramatique, musicale ou artistique, de reproduire, d'adapter et de présenter publiquement l'œuvre en tant qu'œuvre cinématographique;</p> |

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| <p>(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,</p> <p>...</p> <p>and to authorize any such acts.</p>  | <p>f) de communiquer au public, par télécommunication, une œuvre littéraire, dramatique, musicale ou artistique;</p> <p>...</p> <p>Est inclus dans la présente définition le droit exclusif d'autoriser ces actes.</p>   |
| <p><b>Conditions for subsistence of copyright</b></p> <p><b>5(1)</b> Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met:</p> <p>(a) in the case of any work, whether published or unpublished, including a cinematographic work, the author was, at the date of the making of the work, a citizen or subject of, or a person ordinarily resident in, a treaty country;</p>  | <p><b>Conditions d'obtention du droit d'auteur</b></p> <p><b>5 (1)</b> Sous réserve des autres dispositions de la présente loi, le droit d'auteur existe au Canada, pendant la durée mentionnée ci-après, sur toute œuvre littéraire, dramatique, musicale ou artistique originale si l'une des conditions suivantes est réalisée:</p> <p>a) pour toute œuvre publiée ou non, y compris une œuvre cinématographique, l'auteur était, à la date de sa création, citoyen, sujet ou résident habituel d'un pays signataire;</p>   |
| <p><b>Ownership of Copyright</b></p> <p><b>13 (1)</b> Subject to this Act, the author of a work shall be the first owner of the copyright therein.</p> <p><b>Assignments and licences</b></p> <p><b>(4)</b> The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent.</p> | <p><b>Possession du droit d'auteur</b></p> <p><b>13 (1)</b> Sous réserve des autres dispositions de la présente loi, l'auteur d'une oeuvre est le premier titulaire du droit d'auteur sur cette oeuvre.</p> <p><b>Cession et licences</b></p> <p><b>(4)</b> Le titulaire du droit d'auteur sur une œuvre peut céder ce droit, en totalité ou en partie, d'une façon générale ou avec des restrictions relatives au territoire, au support matériel, au secteur du marché ou à la portée de la cession, pour la durée complète ou partielle de la protection; il peut également concéder, par une licence, un intérêt quelconque dans ce droit; mais la cession ou la concession n'est valable que si elle est rédigée par écrit et signée par le titulaire du droit qui en fait l'objet, ou par son agent dûment autorisé.</p> |

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| <p><b>Ownership in case of partial assignment</b></p> <p>(5) Where, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee, with respect to the rights so assigned, and the assignor, with respect to the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright, and this Act has effect accordingly.</p> <p><b>Assignment of right of action</b></p> <p>(6) For greater certainty, it is deemed always to have been the law that a right of action for infringement of copyright may be assigned in association with the assignment of the copyright or the grant of an interest in the copyright by licence.</p> <p><b>Exclusive licence</b></p> <p>(7) For greater certainty, it is deemed always to have been the law that a grant of an exclusive licence in a copyright constitutes the grant of an interest in the copyright by licence.</p> | <p><b>Possession dans le cas de cession partielle</b></p> <p>(5) Lorsque, en vertu d'une cession partielle du droit d'auteur, le cessionnaire est investi d'un droit quelconque compris dans le droit d'auteur, sont traités comme titulaires du droit d'auteur, pour l'application de la présente loi, le cessionnaire, en ce qui concerne les droits cédés, et le cédant, en ce qui concerne les droits non cédés, les dispositions de la présente loi recevant leur application en conséquence.</p> <p><b>Cession d'un droit de recours</b></p> <p>(6) Il est entendu que la cession du droit d'action pour violation du droit d'auteur est réputée avoir toujours pu se faire en relation avec la cession du droit d'auteur ou la concession par licence de l'intérêt dans celui-ci.</p> <p><b>Licence exclusive</b></p> <p>(7) Il est entendu que la concession d'une licence exclusive sur un droit d'auteur est réputée avoir valu concession par licence d'un intérêt dans ce droit d'auteur.</p> |
| <p><b>Fair Dealing</b><br/><b>Research, private study, etc.</b></p> <p>29 Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.</p> <p><b>Criticism or review</b></p> <p>29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:</p> <p>(a) the source; and</p>   | <p><b>Utilisation équitable</b><br/><b>Étude privée, recherche, etc.</b></p> <p>29 L'utilisation équitable d'une œuvre ou de tout autre objet du droit d'auteur aux fins d'étude privée, de recherche, d'éducation, de parodie ou de satire ne constitue pas une violation du droit d'auteur.</p> <p><b>Critique et compte rendu</b></p> <p>29.1 L'utilisation équitable d'une œuvre ou de tout autre objet du droit d'auteur aux fins de critique ou de compte rendu ne constitue pas une violation du droit d'auteur à la condition que soient mentionnés :</p> <p>a) d'une part, la source;</p>  |



**(b)** if given in the source, the name of the

- (i)** author, in the case of a work,
- (ii)** performer, in the case of a performer's performance,
- (iii)** maker, in the case of a sound recording, or
- (iv)** broadcaster, in the case of a communication signal.

### **News reporting**

**29.2** 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 a performer's performance,
  - (iii)** maker, in the case of a sound recording, or
  - (iv)** broadcaster, in the case of a communication signal.

**b)** d'autre part, si ces renseignements figurent dans la source :

- (i)** dans le cas d'une œuvre, le nom de l'auteur,
- (ii)** dans le cas d'une prestation, le nom de l'artiste-interprète,
- (iii)** dans le cas d'un enregistrement sonore, le nom du producteur,
- (iv)** dans le cas d'un signal de communication, le nom du radiodiffuseur.

### **Communication des nouvelles**

**29.2** L'utilisation équitable d'une œuvre ou de tout autre objet du droit d'auteur pour la communication des nouvelles ne constitue pas une violation du droit d'auteur à la condition que soient mentionnés:

- a)** d'une part, la source;
- b)** d'autre part, si ces renseignements figurent dans la source :
  - (i)** dans le cas d'une œuvre, le nom de l'auteur
  - (ii)** dans le cas d'une prestation, le nom de l'artisteinterprète,
  - (iii)** dans le cas d'un enregistrement sonore, le nom du producteur,
  - (iv)** dans le cas d'un signal de communication, le nom du radiodiffuseur.

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

**DOCKET:** T-130-18

**STYLE OF CAUSE:** ALEXANDER STROSS v TREND HUNTER INC.  
AND JEREMY GUTSCHE

**PLACE OF HEARING:** OTTAWA, ONTARIO (VIA TELECONFERENCE)

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