

Federal Court



Cour fédérale

**Date: 20220405**

**Docket: T-1443-18**

**Citation: 2022 FC 470**

**Ottawa, Ontario, April 5, 2022**

**PRESENT: Madam Prothonotary Mireille Tabib**

**BETWEEN:**

**AUGUST IMAGE LLC**

**Plaintiff**

**and**

**AIRG INC.**

**Defendant**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Introduction**

[1] August Image LLC, the Plaintiff in this action (“August”), is a photographic syndication agency. It claims to have acquired the exclusive rights to license six photographs of Jennifer Lopez taken by celebrity photographer Joe Pugliese. August asserts that the Defendant, airG Inc. (“airG”) infringed the copyright in the photographs by reproducing them without authorization

on its website [www.buzz.airG.com](http://www.buzz.airG.com), and seeks damages in the amount of \$22,412.45 for the infringement.

[2] For the reasons set out below, August's action will be dismissed.

## II. Preliminary Remarks

[3] This action proceeded to trial following the Federal Court's simplified action procedure, whereby evidence in chief is adduced by way of affidavit and the opposing party is at liberty to cross-examine the affiants' *viva voce* during the trial. This trial was rather unusual, in that airG chose not to cross-examine any of August's affiants, and not to adduce any evidence of its own. AirG instead limited its defence to objecting to the admissibility of almost all the evidence tendered by August and to arguing that August had failed to meet its burden of proof in respect of nearly all constituent elements of the cause of action.

[4] Another unique feature of the proceeding was airG's emphasis on the similarities between this action and another copyright infringement action brought as a simplified action against airG, but by another plaintiff, Lickerish, Ltd. That action was dismissed after trial: *Lickerish Ltd. v airG Inc*, 2020 FC 1128. Much of the evidence led by the plaintiff in *Lickerish* was held to be inadmissible, with the result that the plaintiff failed to prove all constituent elements of the action.

[5] While there are similarities between the two proceedings, the Court's rulings on admissibility in *Lickerish* cannot be transposed wholesale to this action. Rulings as to the

admissibility of evidence must be made taking into account the facts and circumstances of each case. An important difference between this case and *Lickerish* is that none of the witnesses in that case had personal knowledge of the facts to which they deposed. August, here, has adduced the testimony of two witnesses with first-hand knowledge of most of the facts giving rise to the action. This has informed the characterization of the admissibility issues raised, and led, in many instances, to a different analysis and a different outcome. The Court has found it unnecessary to address all of AirG's arguments based on the rulings in *Lickerish* in these reasons. The Court has set out the framework of analysis for each objection to admissibility, and where the *Lickerish* rulings were inapplicable to that framework, they have not been discussed.

### III. The Issues

[6] The issues for determination in this action are as follows:

- a) Does Joe Pugliese own the copyright in the photographs at issue?
- b) Does August have standing to assert copyright infringement in the photographs?
- c) Did airG infringe copyright in the photographs?
- d) If airG did infringe, what damages should be awarded? and
- e) To which party and in accordance with what scale should costs be awarded?

IV. The Evidence

[7] As mentioned, airG has objected to the admissibility of practically every paragraph and exhibit of August's affidavits. Rather than rule on each objection as a preliminary matter, the Court will first set out the facts and documents attested by each affiant. The objections will be considered and disposed of as part of the Court's consideration of the evidence relevant to each essential element of the cause of action.

A. *Affidavit of Joe Pugliese*

[8] The first numbered paragraph of Mr. Pugliese's affidavit states: "I am the author of the photographs in the above-noted action [...]". From there, he goes on to describe his career as a portrait photographer, from his beginning in newspaper work to his freelance work and successful business as a photographer of celebrities. His subjects have included Hillary Clinton and the Duke and Duchess of York, and his work has been published in magazines such as People's Magazine and Vanity Fair. Mr. Pugliese describes how his reputation, "is built on the quality of [his] work and trust with [his] subjects, which begins on set and continues with the treatment of the photographs after the shoot".

[9] With respect to the photographs at issue, he testifies as follows:

13. I attended a photo shoot on April 17<sup>th</sup>, 2015, in Los Angeles, California. My representative at B&A negotiated the shoot of Jennifer Lopez for US Weekly Magazine. Attached hereto and marked as **Exhibit "B"** is the Agreement with US Weekly Magazine, signed by my agent, Ehrin Feeley.

14. The Jennifer Lopez photographs required my expertise, skill, judgement and a considerable amount of intellectual effort to

produce. A shoot of this calibre begins with creative discussions and reference boards to consider location, set, mode, and theme. Next it requires consultation with digital tech, wardrobe, hair and makeup. Each decision is made with creative integrity. I direct lighting, composition of the image, and the final presentation to the subject and the editors for the final product.

15. The end result was 12 photographs which were printed in US Weekly's June 2015 issue. Attached hereto and marked as **Exhibit "C"** are six of the photographs, at issue in this matter.

[10] Mr. Pugliese goes on to describe how he typically proceeds to register the photographs with the United States Copyright Office, beginning with individual images as "proofs", and then, following publication, with the printed copies for publication as "Tearsheets". He states that he registered the Jennifer Lopez photographs as proofs, and also in accordance with their use in US Weekly Magazine, as Tearsheets. He attaches two documents, Exhibits "E" and "F", which he identifies as Certificates of Registration. The originals, he asserts, remain in the custody and control of Joe Pugliese Photography, the business he runs.

[11] With respect to his relationship with August, Mr. Pugliese states that:

10. I entered into a syndication agreement with August Image LLC on January 4, 2012, whereby August Image was granted an exclusive worldwide license to my work for the purpose of sale, licensing and other promotion. Attached hereto and marked as **Exhibit "A"** is a copy of the signed contract. August Image holds the original as part of their ordinary business records.

11. In accordance with the Agreement, I provide my work to August Image for their use to license my work. I continue to have this arrangement with August Image.

[12] Exhibit "A" is duly identified and attached to Mr. Pugliese's affidavit.

[13] It is noteworthy that, while Mr. Pugliese's affidavit contains the initial statement: "I, JOSEPH PUGLIESE, of Los Angeles, in the State of California, of the United States of America, AFFIRM THAT:", the affidavit contains no other statements as to Mr. Pugliese's residence or citizenship at any time relevant to the action.

B. *Affidavit of William Hannigan*

[14] Mr. Hannigan's affidavit states that he is the co-founder, sole operating partner and Chief Executive Officer of August Image LLC. The affidavit contains a general statement to the effect that:

2. The documents provided by August Image and attached as Exhibits to this Affidavit are part of the ordinary books and records of August Image when those entries were made and the entries were made in the usual and ordinary course of business. The original books or records are in the custody and control of August Image and the copies attached to this Affidavit are true copies thereof.

[15] The affidavit does not always specify who actually made the copies attached as Exhibits.

[16] The affidavit of Mr. Hannigan covers three main issues. The agreement with Mr. Pugliese, the receipt and licensing of the photographs, and the infringement by airG.

[17] With respect to the agreement with Mr. Pugliese, the affidavit states that:

5. August Image entered into an exclusive license with Pugliese on January 4, 2012 (the "Agreement"). The explicit terms of this exclusive license included:

a. That August would be Pugliese's exclusive worldwide agent for sale, licensing and other promotion of photographic portraits created during the Term;

b. For a Term of 2 years, thereafter renewable;

c. That Pugliese would submit all Images as they are created or become available, as the case may be on a continuous, periodic basis, along with all related permissions, releases, agreements and contracts.

6. I signed the Agreement on behalf of August Image. Attached hereto and marked as **Exhibit "A"** is a copy of the Agreement. The original is in the custody and control of August Image, and a copy attached to this affidavit is a true copy thereof.

7. I sent the Agreement to Pugliese over email. Pugliese executed the Agreement and returned an electronic copy signed for August Image's record.

[18] Exhibit "A" is duly identified and attached to the affidavit. On review, with the exception of the size of the copy and of annotations and page numbers in the margins, Exhibit "A" to the Pugliese Affidavit and Exhibit "A" to the Hannigan Affidavit appear to be exact copies of each other.

[19] Mr. Hannigan goes on to state that in 2015, Joe Pugliese sent August 12 new images of Jennifer Lopez to make them available for syndication under the Agreement. Mr. Hannigan states that on receiving the images, August added them to its online database. He attaches as Exhibit "C" screenshots of six of these images from the database, which he states were "taken by myself, and stored on my computer, located and controlled by the August Image headquarters in New York".

[20] With the exception of handwritten annotations and page numbers that appear on Exhibit “C” to Mr. Pugliese’s affidavit, the images in that Exhibit and in Exhibit “C” to Mr. Hannigan’s affidavit appear to be the same, albeit of different sizes and print quality.

[21] Mr. Hannigan’s affidavit states that the photographs were licensed through August, with license fees ranging from as low as AU\$700 to as high as US\$3250, with each image typically licensed for approximately US\$2084. Copies of past licenses are attached to his affidavit as Exhibit “D”.

[22] Finally, Mr. Hannigan’s affidavit states that:

16. Since at least August 2015 until sometime on or after January 11, 2018, the Lopez Images used (sic) and reproduced on the website buzz.airg.com. The Lopez Images accompanied an article titled “Jennifer Lopez REIGNS Supreme at Motherhood!”. Attached hereto and marked as **Exhibit “E”** is a screenshot of the article containing the Lopez Images as evidenced on January 11, 2018, and accurately reflect the website as it appeared to me at the time.

[23] Exhibit “E” shows several images, six of which appear to be the same as the images at Exhibits “C” of the Pugliese Affidavit (minus annotations and page numbers) and at Exhibit “C” of the Hannigan Affidavit.

[24] The remainder of the Hannigan affidavit asserts that the photographs were at all times available for licensing by August and that no permission was ever granted by August for reproduction of the images on airG’s website, as well as Mr. Hannigan’s belief, from reading the buzz.airg.com’s secondary pages, that the site is owned and controlled by airG.



C. *Other Evidence*

[25] Finally, August relies on read-ins from the examination on discovery of airG, in which airG admits that it has, in the past, owned and used the website [www.buzz.airg.com](http://www.buzz.airg.com)

D. *Does Joe Pugliese own the copyright in the photographs at issue?*

[26] Copyright is a right created and governed exclusively by statute. The *Copyright Act*, RSC 1980 c C-42 confers copyright to “the author” of every “artistic work” if the author was, at the date of the work, either a citizen, a subject or an ordinary resident of Canada or of any other country signatory to the *Berne Convention*, an international treaty governing copyright law. For Mr. Pugliese to be recognized, under the *Copyright Act*, as the owner of the copyright in the photographs, it must therefore be established that the photographs are an original artistic work, that Mr. Pugliese is the author and that, at the time they were made, he was either an ordinary resident, a subject of or a citizen of Canada or of another treaty country. The United States of America is a signatory to the *Berne Convention*.

[27] That the alleged photographs constitute original artistic works in which copyright can subsist is one of the very few facts that are not contested by airG in this action. airG otherwise disputes the admissibility of the images depicting the photographs, Mr. Pugliese’s authorship and his citizenship or residence in a treaty country. Each of the contested factor will be examined in turn.

(1) Admissibility of the photographs, Exhibit “C”

[28] Exhibit “C” to Mr. Pugliese’s affidavit are copies of the photographs at issue. AirG submits that these copies are inadmissible because originals should instead have been tendered, and because the requirements of section 30(3) of the *Canada Evidence Act* RSC 1985 c C-5 have not been met to make these copies admissible in lieu of originals.

[29] AirG’s argument on this point erroneously conflates the best evidence rule and the rule against hearsay.

[30] Hearsay evidence is presumptively inadmissible. It is defined as “an oral or written statement that was made by someone other than the person testifying at the proceeding, out-of-court, that the witness repeats or produces in court in an effort to prove that what was said or written is true” (*Pfizer Canada Inc v Teva Canada Limited*, 2016 FCA 161 at para 89). The rule against hearsay applies to documents when they are tendered as proof of the truth of their content. It does not apply when a document is tendered as proof that it exists or that it has been made (*Pfizer*, above, at para 90).

[31] Section 30 of the *Canada Evidence Act* provides an exception to the rule against hearsay. It is permissive in nature, rather than exclusory, in that it sets out the conditions by which certain documents, namely business records, can be adduced as evidence to constitute proof of the facts recorded therein when they might otherwise be inadmissible under the common law rule against hearsay.

[32] The photographs at issue in this matter are not tendered as constituting proof of the facts recorded in them. They are not tendered as evidence of Ms. Lopez' appearance, of the clothes she was wearing or of the place where she was on the date the photographs were taken. Rather, they are adduced as representing "the artistic works" at issue, as a means of identifying the object of the copyright and as evidence that they were made. As such, the photographs constitute facts rather than a record of facts. The hearsay rule does not apply to them in this instance and section 30 of the *Canada Evidence Act* finds no application here.

[33] In complaining that the originals of the photographs, rather than copies, ought to have been produced, airG is essentially invoking the best evidence rule.

[34] The best evidence rule was first formulated in the 18<sup>th</sup> century. As originally phrased: "... the best proof that the nature of the thing will afford is only required", it was as much inclusionary as exclusionary. If better evidence was not available, then the best that was at hand could be received; on the other hand, if better "primary" evidence existed (such as an original document), secondary evidence (such as a copy), could not be admitted (Sopinla, Lederman and Bryant, *The Law of Evidence in Canada*, 2d Ed, 1999 at pages 1005-1006, paras 18.4 and 18.5).

[35] The modern rule now allows flexibility; in most instances, the question will be one of weight and not admissibility. In the case of photocopies and printouts of electronic documents, the rule will generally not be applied to exclude the evidence unless there is an issue as to whether the document has been altered or changed. This Court, in *ITV Technologies Inc v WIC*

*Television Ltd*, 2003 FC 1056, dismissed an objection to the admissibility of copies on the ground that they were not certified, recognizing, at para 22:

22 WIC objected to the admissibility of most of the printed material filed by ITV Technologies on the grounds that the documents were hearsay, and the copies were not certified. It is true that certified copies were not produced and the traditional best evidence rule could be applied to exclude the admission of such copies. However, the fact that modern technology has enabled copies to be accurately made has diminished the importance of the best evidence rule. As stated in Sopinka, Lederman and Bryant, "The Law of Evidence in Canada", 2nd Ed. (1999) at pages 1013-1014:

[...] in the age of photocopies, computer printouts, facsimile transmissions and video cassettes, it may be a subtle question which document is the original. Also, the rules of evidence should reflect the practices of modern society. In *R. V. Governor of Pentonville Prison, ex Parte Osman*, Lloyd L.J. said:

... this court would be more than happy to say goodbye to the best evidence rule. We accept that it served an important purpose in the days of parchment and quill pens. But since the invention of carbon paper and, still more, the photocopier and the telefacsimile machine, that purpose has largely gone. Where there is an allegation of forgery the court will obviously attach little, if any, weight to anything other than the original; so also if the copy produced in court is illegible. But to maintain a general exclusionary rule for these limited purposes is, in our view, hardly justifiable.

The modern common law, statutory provisions, rules of practice and modern technology, have rendered the rule obsolete in most cases and the question is one of weight and not admissibility.

[36] In the particular case of the photographs, it is not entirely clear whether "originals" of the photographs exist in a form that could practically be adduced in evidence. If the photographs were taken digitally, then the photographs attached as Exhibit "C" may very well be a direct reproduction from an electronic file and thus, the best evidence available of the photographs.

AirG objects that the witness failed to depose that Exhibit “C” are “actual prints from a negative or electronic capture”. However, the witness did not depose that the exhibits were copies of the originals. He deposes that they are the photographs. AirG chose not to cross-examine the witness. AirG cannot, on pure speculation, argue that the photographs are not the originals or the best evidence thereof.

[37] Even if the photographs adduced as Exhibit “C” were only copies of the originals, the Court would still admit them into evidence. The images are tendered as evidence that photographs were taken, and for the purpose of identifying the works over which copyright is claimed. Mr. Pugliese recognized and identified them as the photographs of which he claims to be the author. There is no suggestion that they are misidentified or that they have been materially altered from the originals. Indeed, one of the essential rights protected by copyright is the right to prevent others from reproducing or copying one’s work, even imperfectly. All that is needed here is for the Court to be able to identify the work over which copyright is claimed. The images attached as Exhibit “C” to the Pugliese affidavit are admissible for that purpose.

(2) Authorship

[38] The Court is satisfied, based on Mr. Pugliese’s testimony describing his involvement in the creation of the photographs at issue, that he is the author of the photographs.

[39] It seems obvious to say that the author of a photograph is the person who took the photograph, just as the author of a book is the person who wrote the book, and the author of a musical composition the person who composed it. It is, however, less obvious to tease out what

we really mean when we say “take” a photograph, “write” a book or “compose” a score. The vocabulary we use conjures the image of the author’s own hand pressing the camera’s trigger, holding the pen or typing the keys that will inscribe the words or the notes. These gestures, however, are purely mechanical. They could often just as effectively be carried out by a person without any skill, talent or judgment, at the sole direction of another. A person may dictate to another the words to be written, or hum a tune to be transcribed. Is the true author the one whose words and ideas have been transcribed, the one who in fact “wrote”? Another person could set a scene, choose lighting, instruct a subject as to a pose, determine the camera angle and settings and instruct another to press the shutter. Is authorship in the resulting photograph to be credited to the person who directed this shoot, or to the person whose finger touched the button? The *Copyright Act* does not provide a direct answer to these questions, nor does it even define the term “author”.

[40] To define or determine who is the author of a work, one must start with an understanding of what defines an “original artistic work”, in which copyright may subsist under the *Copyright Act*. The Supreme Court defined an “original” work as follows in *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13, 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 knowledge, developed aptitude or practised ability in producing the work. By judgment, 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.

(Emphasis added)

[41] What copyright protects is the use of skill and judgment in producing a work that expresses an idea. The author, therefore, is the person whose skill and judgment went into producing the work.

[42] Mr. Pugliese identifies himself as the author of the photographs at issue. The reputation, including the quality of his work, and the relationship with his subjects that he describes as forming the foundation of his career as a celebrity photographer constitute knowledge, developed aptitude and practised ability that he has acquired and which he uses to produce his work. He explains what this reputation and these relationships consist of and provides examples. Mr. Pugliese also describes the elements of the shoot that required decisions and judgment prior to the shoot itself. Reading the testimony as a whole, the Court understands that Mr. Pugliese made these decisions and applied his judgment to those issues. Mr. Pugliese also describes the elements which he directed on the day, and those he subsequently directed. The Court understands from the testimony that Mr. Pugliese did not carry out the activities himself, but directed others as to how to carry them out to achieve the work. The Court is satisfied that Mr. Pugliese expended considerable intellectual effort in applying his own skill and judgment to create the photographs, and that he is their author.

[43] The Court does not accept the Defendant's arguments to the effect that the sworn statement of Mr. Pugliese lacks details or facts, or that it only contains self-serving or conclusory

statements. The fact that Mr. Pugliese also utilizes the language consecrated by jurisprudence to characterize his actions does not detract from the details he otherwise provides. The Defendant objects that Mr. Pugliese did not explain what he meant by “directed”, “composition” or “final presentation”. Those words are neither opaque nor technical in nature; in the context of the affidavit, they are self-explanatory. Finally, as discussed above, Mr. Pugliese’s failure to expressly state that he “took” the photographs is of no moment. He has sufficiently explained the steps, skills and judgment he took, used and expended to create the works.

(3) Residency or citizenship of a treaty country

[44] August asserts that Mr. Pugliese is a resident of the United States and therefore entitled to copyright protection under the *Copyright Act*. It cites, in support of that assertion, Mr. Pugliese’s opening statement in his affidavit, identifying himself as being “of Los Angeles, California”, the Copyright Registration Certificates issued in the United States that bear his California address (and also identify him as a citizen of the US), and the contract between himself and August, which also gives the same California address (although with a different suite number).

[45] The Court’s analysis begins with considering the admissibility of the Copyright Registration Certificates attached to Mr. Pugliese’s affidavit, and the evidentiary purposes for which they might be admitted.

[46] August submits that, pursuant to section 53 of the *Copyright Act*, these certificates of registration constitute evidence that copyright subsists and that the person registered is the owner of that copyright. However, the Copyright Registration Certificates were not issued by the



Canadian Copyright Office referred to in the *Copyright Act*, but, according to Mr. Pugliese's evidence, by the United States Copyright Office. To the extent they are admissible at all, they would not have the effect of constituting evidence that copyright subsists in the photographs. The Court agrees entirely with the analysis and conclusions reached in *Lickerish*, above, at paragraphs 39 to 40, to the effect that section 53 applies only to Canadian certificates of registration, and that certificates of registration issued by the United States Copyright Office cannot be used as proof of the existence of copyright pursuant to section 53(2) of the *Copyright Act*.

[47] Short of being conclusive evidence that copyright subsists and is owned by Mr. Pugliese, could those certificate still be admitted into evidence for the purpose of establishing Mr. Pugliese's citizenship or residence in the United States at the time the photographs were created?

[48] The Certificates contain statements to the effect that Mr. Pugliese is a citizen of the United States and that his address is on Romaine Street in Los Angeles, California. These statements, however, fall squarely within the definition of hearsay and are inadmissible. They are "a [...] written statement that was made by someone other than the person testifying at the proceeding, out-of-court, that [Mr. Pugliese] produces in court in an effort to prove that what was [...] written is true". Nowhere in his affidavit does M. Pugliese state that the facts set out in the Certificates of Registration are true.

[49] In order to be admissible as evidence of the truth of the statements regarding Mr. Pugliese's citizenship or address, the Certificates would have to qualify as "business records"

under section 30 of the *Canada Evidence Act*. As mentioned above, section 30 creates an exception to the hearsay rule. It makes admissible what would otherwise not be. However, in order for a litigant to benefit from that exception, it must meet all of the conditions prescribed, including those very technical conditions regarding the circumstances in which a copy, rather than the original record, may be used. The leeway the Courts have developed in applying the best evidence rule does not come into play when the benefit of this statutory exemption is claimed (*Canada (Min. of Citizenship and Immigration) v Dueck*, (1998) 154 FTR 265, at para 3; *R. Andrew* [1986] BCJ No 2447 at para 100; *R. v Ho*, 2006 BCPC 112, at paras 30-32).

[50] In order to use copies of the Certificates as a business record pursuant to section 30 of the *Canada Evidence Act*, August must meet the requirements of paragraph (3) of that section, which reads as follows:

**(3)** Where it is not possible or reasonably practicable to produce any record described in subsection (1) or (2), a copy of the record accompanied by two documents, one that is made by a person who states why it is not possible or reasonably practicable to produce the record and one that sets out the source from which the copy was made, that attests to the copy's authenticity and that is made by the person who made the copy, is admissible in evidence under this section in the same manner as if it were the original of the record if each document is

**(a)** an affidavit of each of those persons sworn before a commissioner or other person authorized to take affidavits; or

**(b)** a certificate or other statement pertaining to the record in which the

**(3)** Lorsqu'il n'est pas possible ou raisonnablement commode de produire une pièce décrite au paragraphe (1) ou (2), une copie de la pièce accompagnée d'un premier document indiquant les raisons pour lesquelles il n'est pas possible ou raisonnablement commode de produire la pièce et d'un deuxième document préparé par la personne qui a établi la copie indiquant d'où elle provient et attestant son authenticité, est admissible en preuve, en vertu du présent article, de la même manière que s'il s'agissait de l'original de cette pièce pourvu que les documents satisfassent aux conditions suivantes : que leur auteur les ait préparés soit sous forme d'affidavit reçu par une personne autorisée, soit sous forme de certificat ou de déclaration comportant une attestation selon laquelle ce certificat ou cette déclaration a été établi en

person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.

conformité avec les lois d'un État étranger, que le certificat ou l'attestation prenne ou non la forme d'un affidavit reçu par un fonctionnaire de l'État étranger.

(emphasis added)

[51] Mr. Pugliese's affidavit fails to satisfy these requirements. It does not state why it might be impossible or not reasonably practicable to produce the original record; it does not attest that he himself made the copy; it therefore cannot stand as evidence of the source from which the copy was made, or as an attestation of its authenticity. The Certificates of Registration cannot be admitted into evidence to constitute proof of the statements they contain pursuant to section 30 of the *Canada Evidence Act*, and therefore remain inadmissible for that purpose under the rule against hearsay.

[52] Mr. Pugliese otherwise testifies that he took steps to register the photographs at issue with the United States Copyright Office, that he received Certificates of Registration, and that the copies of the Certificates attached to his affidavit fairly represent the original certificates he received. These statements remain admissible as evidence that he took those steps and the Certificates can be admitted as proof of their existence, but that is all. The Certificates do not constitute admissible evidence that the statements they contain are true, including those as to Mr. Pugliese's address and citizenship at the time.

[53] The identifying statement at the start of Mr. Pugliese's affidavit, sworn on October 5, 2021, that he is "of Los Angeles, in the State of California, of the United States of America",

constitutes evidence that he was, at that time, ordinarily resident in the United States. Indeed, the rules of practice in this Court and in the superior courts of most provinces require that a person swearing an affidavit use the accepted formula “I, [name] of [City or Town] of [name] in the [County, Regional Municipality, etc.], swear [or attest] that [...]”. In this formula, the place indicated is understood to be the affiant’s place of residence.

[54] However, the conditions for the subsistence of copyright in Canada pursuant to paragraph 5(1) of the *Copyright Act* is that “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”. Mr. Pugliese’s affidavit does not establish that he was ordinarily resident in the United States at the time the works were created, in or around April 2015.

[55] The licensing agreement between Mr. Pugliese and August, dated January 4, 2012, provides a specific address for Mr. Pugliese in Los Angeles, California. The admissibility of this license agreement is considered in further detail below. However, even assuming the agreement were admissible in evidence for the truth of that statement, it would not constitute satisfactory evidence of Mr. Pugliese’s place of ordinary residence or citizenship at the relevant time.

[56] The phrase “ordinarily resident” is not defined in the *Copyright Act*. The term “residence”, either on its own or qualified with adjectives such as permanent, principal or ordinary, is used in many Canadian federal and provincial statutes. In relation to a natural person, residence means the place the person calls their home, where they live, where they “in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories in

social relations, interest and conveniences at or in the place in question” (*Re: Koo* [1993] 1 FC 286, at para 2, citing from *Re: Papadogiorgakis*, [1978] 2 FC 208 (TD)). Residence is a question of fact that goes beyond a person’s physical presence at any one time and beyond the address they might choose to give for the purposes of executing or carrying out a commercial contract such as the license agreement in this case.

[57] The mere fact that Mr. Pugliese listed an address in California on a contract entered into in 2012 does not constitute evidence that he was ordinarily resident in California in 2015, even if considered in conjunction with the fact that he resided there in 2021, and that the photo shoot occurred in California. A person’s ordinary residence is not static. While it does not change by reason of a temporary stay or visit elsewhere, it can change from year to year, as the person’s intentions and life circumstances change. It was incumbent on August to prove, on a preponderance of evidence, that Mr. Pugliese was a resident or citizen of the United States – or of any other *Berne Convention* country – at the time the photos were created in 2015, in order to establish that copyright subsisted in the photographs pursuant to the *Copyright Act*. They have failed to meet that burden.

[58] Pursuant to subparagraph 5(1)(c) of the *Copyright Act*, copyright in Canada could also subsist in the photographs if they were first published in a Treaty country “in such a quantity as to satisfy the reasonable demands of the public”. Although August has not pleaded the issue, the Court notes that Mr. Pugliese testifies that the photographs were printed in US Weekly’s June 2015 issue, and that he sought registration in the United States based on that publication. For the sake of completeness, the Court has considered whether that evidence might meet the

requirements of section 5 of the *Copyright Act*. Despite the title of the magazine, there is no evidence that it was in fact published in the United States, let alone that the United States was the country of first publication; there is no evidence of the quantity in which the magazine was published. The Court cannot take judicial notice of the circulation or place of publication of US Weekly magazine.

[59] The Court concludes that August has not proven that copyright subsists in the photographs at issue.

[60] This conclusion is fatal to August's action, and it would not be necessary to go any further. However, in the event this conclusion is in error, the Court will briefly pursue its analysis of the other elements of the cause of action.

E. *Does August have standing to assert copyright infringement in the photographs?*

[61] August is not the author of the photographs. It can only sue for a breach of copyright if the author has assigned to it an interest in the copyright. Pursuant to paragraph 13(4) of the *Copyright Act*, such an assignment is only valid if it is in writing and signed by the author or its authorized agent.

[62] August asserts that it has standing to sue by virtue of a written, worldwide, exclusive license agreement signed in its favour by Mr. Pugliese, Exhibit "A" to both Mr. Hannigan's and Mr. Pugliese's affidavits. AirG objects to that agreement being admitted into evidence because

the original has not been produced and because the requirements of paragraph 30(3) of the *Canada Evidence Act* regarding the use of copies have not been met.

[63] Again, airG's arguments improperly conflate the best evidence rule and the rule against hearsay. The licence agreement in the present instance is not used to establish the truth of any statement contained in it, but to establish its existence and to support the witnesses' testimony as to its terms. Two of the signatories to the document have testified that August and Mr. Pugliese have entered into an agreement whereby Mr. Pugliese granted to August an exclusive worldwide licence for the purpose of the sale, licensing and promotion of Mr. Pugliese's work, that this agreement was in writing and was signed by them. There is no hearsay here, but admissible testimonial evidence from two witnesses with direct personal knowledge of the facts. Section 30 of the *Canada Evidence Act* finds no application.

[64] As to the best evidence rule, both witnesses produce a document that each recognizes as a copy of that agreement; both copies are in all material respect identical; there is no evidence that the documents have been materially altered or changed. Moreover, there is evidence to the effect that the agreement was executed in counterparts, with Mr. Pugliese's signature affixed on an emailed copy, which was then returned to August electronically. There is thus not one obvious "original" to be produced. The Court is satisfied that the copies of the agreement attached as Exhibits "A" to both witnesses' affidavits are admissible as proof of the existence and terms of the agreement between August and Mr. Pugliese.

[65] AirG further objects that the agreement does not evidence an agreement with the Plaintiff, whose full corporate name is August Image LLC, but with a different entity, identified in the agreement as “August LLC”.

[66] It is true that the entity identified as the contracting party in the Agreement is “August LLC” and not “August Image LLC”, the Plaintiff’s correct designation. This, however, does not signify that the agreement was made by or in favour of “a completely different entity” as airG suggests. There is no evidence that there exists such an entity as “August LLC”, and therefore no evidence that any agreement might have been reached or can exist between Mr. Pugliese and any entity other than August. In the face of the uncontroverted evidence of Mr. Hannigan that he signed that agreement on behalf of August Image LLC, and of Mr. Pugliese’s equally unchallenged evidence that he entered into that agreement with August Image LLC, the conclusion that must be drawn is that the designation of August LLC in the agreement is simply a clerical error. It does not change the fact that the true, effective and intended party to the agreement is August.

[67] Similarly, the Court does not retain airG’s argument that the licensing agreement is ineffective or unenforceable because of a perceived ambiguity in the description of the images or in the determination of a “Launch Date” in two of its clauses. The parties to the agreement testified to their common understanding that that the photographs at issue were communicated to August for the purpose of being governed by the license agreement and that the license was effective as of the date the photographs were delivered to August for that purpose. AirG had an opportunity to cross-examine the witnesses to challenge their assertion and their conduct in light



of the perceived ambiguities. It chose not to do so. The Court is not persuaded that the witnesses' common interpretation of the agreement is incorrect or unsupported by the terms of the agreement, or that they conducted themselves in a manner inconsistent with that interpretation.

[68] Finally, Mr. Hannigan's affidavit, at paragraph 9, establishes that August received the six photographs at issue from Mr. Pugliese, and that they thus became subject to the terms of the licence. The copies of the photographs attached as exhibit "C" to Mr. Hannigan's affidavit are tendered for the purpose of identifying the photographs received, and not as proof of any statement made in them. Mr. Hannigan testifies to have retrieved and printed the copies from August's database himself. The rule against hearsay does not apply to exclude those images. The Court has been able to compare the images attached to Mr. Hannigan's affidavit and those identified by Mr. Pugliese as his work, and is satisfied that they represent the same works.

[69] The Court is satisfied that, had copyright subsisted in Canada in respect of the photographs at issue, August would have standing to enforce the copyright pursuant to a written, exclusive license granted to it and signed by the photographs' author.

F. *Did airG infringe copyright in the photographs?*

[70] Paragraph 16 of Mr. Hannigan's affidavit, reproduced at the beginning of these reasons, establishes to the satisfaction of the Court that Mr. Hannigan personally saw, on January 11, 2018, the photographs at issue in this action displayed on the website [buzz.airg.com](http://buzz.airg.com), which airG admits to have owned and used. The screenshot of the website attached to his affidavit as Exhibit "E" is not an original; there is no evidence as to who made the copy and when it was made. Still,

the image is not tendered as proof that it was taken, as independent evidence of the content of the website, or as proof of any statement made therein. It is therefore not hearsay evidence, does not need to meet the requirement for business records, and is not “an electronic document” to which the requirements of section 31.2 of the *Canada Evidence Act* apply.

[71] The image at Exhibit “E” is tendered to support Mr. Hannigan’s testimony. Mr. Hannigan identifies the image as “accurately reflect[ing] the website as it appeared to [him] at the time”. The image appears fair and there is no suggestion of an intention to mislead. Mr. Hannigan was familiar with the photographs and personally saw the website; he is thus in a position to verify that Exhibit “E” accurately represents the website. (see *R. v Murphy*, 2011 NSCA 54; *R. v Creemer and Cormier*, [1968] 1 CCC 14 (NSCA) at 22). The images are admissible for the purpose of representing the appearance of airG’s website on January 11, 2018. The Court has compared the photographs shown in the screenshot of airG’s website with the photographs identified as Mr. Pugliese’s works, and is satisfied that six of the photographs that appeared on airG’s website are copies or reproductions of the photographs at issue in this action.

[72] While the evidence suggests that Mr. Hannigan might have seen the images on that website at other times, as early as August 2015, the testimony is not sufficiently precise to allow the Court to conclude that the images have been consistently displayed on airG’s website from August 2015 to January 2018. Still, the Court is satisfied that airG did, at least on January 11, 2018, reproduce the photographs at issue on its website without August’s permission.

[73] That, however, is not by itself sufficient to establish actionable infringement. The *Copyright Act* only applies to protect against unauthorized use or reproduction of copyrighted material in Canada. In the case of internet communications, the Supreme Court in *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2002] 2 SCR 427 held that there must be a “real and substantial connection” between the communication and Canada. “In terms of the Internet, relevant connecting factors would include the situs of the content provider, the host server, the intermediaries and the end user” (*Socan*, above, at paragraph 61). The only evidence of a connection to Canada in this matter is the place of business of airG, in Vancouver, British Columbia. While airG admits to have owned the website on which the photographs were posted, there is no evidence as to who uploaded the content to the website, of the *situs* of the content provider, of where the server or any intermediary are located, and no evidence of any end user located in Canada. Mr Hannigan, the only person who has testified to ever seeing the website, was as of September 21, 2021, a resident of New York. There is no evidence that he was ever in Canada, or that he accessed airG’s website from a Canadian location.

[74] While the Court is satisfied that airG used the photographs on its website without authorization, the Court is not satisfied that there is a real and substantial connection between that unauthorized use and Canada. This Court does not have jurisdiction to apply the *Copyright Act* to sanction this unauthorized use – assuming that Canadian copyright subsisted the photographs.

G. *If airG had infringed, what damages should have been awarded?*

[75] Had the Court found in favour of airG, it would have awarded damages assessed on the basis of the licence fee that would otherwise have been charged for each photograph. That amount is established as an average of \$2,084.00 USD per image.

[76] To the extent they are introduced as proof of the facts set out in them, the copies of the past licence agreement attached as Exhibit “D” to the affidavit of Mr. Hannigan constitute hearsay and are not admissible in evidence. They do not meet the requirements of paragraph 30(3) of the *Canada Evidence Act* to be admissible for that purpose as business records. That, however, does not detract from the direct and admissible testimonial evidence of Mr. Hannigan to the effect that August has licensed the photographs at issue on the basis of an average fee of \$2,084.00 USD per image.

[77] The Court has no reason to disregard or doubt the accuracy or veracity of Mr. Hannigan’s affidavit on that subject. While he testifies that negotiations as to the terms of licenses with interested parties were conducted by members of August’s staff, this does not negate his personal knowledge of the terms and fees ultimately charged for the licences granted. Mr. Hannigan’s affidavit states clearly that he does have personal knowledge of the facts set out in his affidavit, unless he indicates that it is based on information. In two instances, he specifically indicates that certain statements are based on information, and in those instances, he provides the basis for the information. The Court finds Mr. Hannigan’s evidence to be measured, precise and credible.

H. *To which party and in accordance with what scale should costs be awarded?*

[78] AirG has been successful on this action and should recover its costs.

[79] AirG relies on *Sanofi-Aventis Canada Inc. v Apotex Inc.* 2009 FC 1139, at paragraph 13, to argue that intellectual property trials are “recognized” as presenting significant and complex issues that justify awards of costs at Column IV of Tariff B. August for its part, argues that costs at the middle of Column III of the Tariff are sufficient and appropriate to this simplified proceeding action. It is true that many intellectual property matters raise complex and significant issues. Still, it is not axiomatic that every intellectual property action necessarily raises such issues. This was a simplified action. It raised no new or complex issues of law. Indeed, the content of the substantive law was hardly contested. The facts were equally simple, and the contestation centered almost exclusively on the admissibility of the evidence tendered by August. The middle of Column III of Tariff B more than sufficiently reflects the relative importance, complexity or difficulty of the issues.

**JUDGMENT**

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

1. The Plaintiff's action is dismissed.
2. Costs, to be assessed in accordance with the middle of Column III of Tariff B, are awarded in favour of the Defendant.

"Mireille Tabib"  
\_\_\_\_\_  
Prothonotary

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

**DOCKET:** T-1443-18

**STYLE OF CAUSE:** AUGUST IMAGE LLC V AIRG INC.

**PLACE OF HEARING:** OTTAWA, ON

**DATE OF HEARING:** NOVEMBER 1-2, 2021

**REASONS FOR  
JUDGMENT AND  
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**DATED:** APRIL 5, 2022

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