

Federal Court of Appeal



Cour d'appel fédérale

Date: 20220113

Docket: A-98-19

Citation: 2022 FCA 7

**CORAM: DE MONTIGNY J.A.
RIVOALEN J.A.
DAWSON D.J.C.A.**

BETWEEN:

PYRRHA DESIGN INC.

Appellant

and

**PLUM AND POSEY INC. AND
ADRINNA M. HARDY**

Respondents

Heard at Vancouver, British Columbia, on October 25, 2021.

Judgment delivered at Ottawa, Ontario, on January 13, 2022.

REASONS FOR JUDGMENT BY:

DAWSON D.J.C.A.

CONCURRED IN BY:

**DE MONTIGNY J.A.
RIVOALEN J.A.**

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REASONS FOR JUDGMENT

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[1] Historically, wax seals were affixed to a document so as to authenticate the document. In early 2005, the principals of the appellant, Pyrrha Design Inc., acquired a box of antique wax seal impressions. The principals then used the impressions to create metal jewellery that depicted the appearance and imagery of the wax seal impressions.

[2] At issue are nine pieces of jewellery made by Pyrrha (the Pyrrha Designs). Pyrrha claims copyright in each of the Pyrrha Designs and asserts that the respondent, Plum and Posey Inc., and its principal, Adrinna Hardy, infringed the copyrighted designs.

[3] For reasons cited as 2019 FC 129, the Federal Court dismissed Pyrrha's claim for copyright infringement. While the Court found that the Pyrrha Designs were original and subject to copyright protection (reasons, paragraph 113), it also found that Plum and Posey did not reproduce a "substantial part" of the skill and judgment evidenced in the Pyrrha Designs (reasons, paragraph 146). It followed that Pyrrha's copyright was not infringed.

[4] This is an appeal from the judgment of the Federal Court.

[5] Two issues are raised on this appeal:

- (1) Did the Federal Court err in its analysis of the originality of the Pyrrha Designs? Specifically, did the Court err by finding that the expression of each Pyrrha Design was of lower originality?
- (2) Did the Federal Court err in its analysis of the issue of infringement?

I. Standard of Review

[6] The parties agree that the decision of the Federal Court is to be reviewed on the standard set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Thus, questions of law are reviewed on the standard of correctness, findings of fact are not to be reversed in the absence of palpable and overriding error and findings of mixed fact and law are reviewed on the standard of

palpable and overriding error, unless there is an extricable question of law (which is reviewed on the correctness standard).

[7] The issue of the originality of a work has been held to be a question of mixed fact and law (*France Animation, s.a. c. Robinson*, 2011 QCCA 1361, [2011] R.J.Q. 1415), where, at paragraph 32, the Court stated that “[c]haracterizing the work and determining its original nature are questions of mixed law and fact.”

[8] In *Cinar Corporation v. Robinson*, 2013 SCC 73, [2013] 3 S.C.R. 1168 (*Cinar Corporation*), at paragraph 30, the Supreme Court found that the question of substantiality, a question central to the issue of infringement, is also a question of mixed fact and law.

II. Did the Federal Court err in its analysis of the originality of the Pyrrha Designs?

[9] The Federal Court concluded that each of the Pyrrha Designs was relatively simple so that the degree of originality of the designs was lower. Pyrrha asserts that in reaching this conclusion, the Federal Court made palpable and overriding errors of fact and/or did not properly appreciate and apply the evidence. The asserted errors are that:

- (1) The Federal Court wrongly considered the Pyrrha Designs to be relatively simple copyrighted works. By relying upon the simplicity of the process used to make the jewellery, the Court erroneously applied the “sweat of the brow” approach to originality.
- (2) The Federal Court did not correctly assess the evidence relevant to the issue of originality.

- (3) The Federal Court erred by relying upon the evidence of Plum and Posey's expert witness about jewellery made from wax seals or wax seal impressions.

[10] By way of background, I begin by observing that copyright is protected under the *Copyright Act*, R.S.C., 1985, c. C-42 (Act). Copyright protects only original work. To be original, a work must have originated from its author or creator, must not be copied and must be the product of an exercise of skill and judgment that is more than trivial (paragraph (5)(1)(a) of the Act, *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 (*CCH*), paragraph 28). "Skill" refers to "the use of one's knowledge, developed aptitude or practised ability in producing the work." "Judgment" refers to "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." (*CCH*, paragraph 16).

[11] As the Federal Court correctly observed, copyright does not protect ideas, concepts or methods (reasons, paragraph 91). Copyright protects expression only. It follows that Pyrrha could not claim copyright in the method used to cast the metal jewellery or in the concept of creating jewellery from wax seals or wax seal impressions.

[12] I now turn to a brief review of the reasons of the Federal Court.

[13] At paragraphs 95 through 99 of its reasons, the Federal Court correctly cited the test for originality articulated by the Supreme Court in *CCH*. While Pyrrha argues that the Federal Court erroneously applied the "sweat of the brow" approach, it does not allege any error in the Court's

articulation of the relevant legal principles. The Court then turned to the application of the test to the evidence before it.

[14] The Court concluded that the Pyrrha Designs were original works because sufficient skill and judgment was exercised in their creation. The designs were not simply a copy of an antique wax seal; rather, skill and judgment were used to display the imagery in metal. Particularly, the Court found that one of Pyrrha's principals, Danielle Wilmore, "exercised skill in knowing how to work with wax to modify the borders of wax seal impressions and judgment in designing the borders. She used skill and judgment in deciding how to finish the pieces by oxidizing with blackening chemicals and polishing." (reasons, paragraph 107).

[15] In the following paragraph, the Court rejected the notion that sufficient skill and judgment was used in the selection of the seals to be used.

[16] Having briefly reviewed the reasons of the Federal Court, I now turn to the specific errors asserted by Pyrrha.

A. *Did the Federal Court erroneously apply the "sweat of the brow" approach to originality?*

[17] Pyrrha argues that the Federal Court erroneously focused on what it viewed to be the relative simplicity of the Pyrrha Designs. By relying on this simplicity, the Court is asserted to have erred by relying on the "sweat of the brow" approach to originality. The correct approach is the "skill and judgment" approach set out in *CCH*.

[18] I reject this submission for the following reasons.

[19] Nowhere in its reasons does the Federal Court refer to the “sweat of the brow” approach. Rather, it correctly referred to the “skill and judgment” approach (reasons, paragraphs 96, 102 and 103) and concluded that sufficient skill and judgment were exercised so as to merit copyright protection (reasons, paragraphs 105-107).

[20] In view of the extensive, express reference to the “skill and judgment approach” and the absence of any reference to the “sweat of the brow” approach, Pyrrha points to various passages in the Court’s reasons where the Court is said to have concluded that because the Pyrrha Designs were made by a simple process, the skill and judgment used to create the Pyrrha Designs was lower. Specific reference is made to paragraphs 18, 39, 84, 99 to 101, 107, 110, 111, 123 and 140 of the reasons. In my view, read fairly, these passages refer to the creativity involved in the creation of the Pyrrha Designs. They do not support the claim that the Federal Court applied an incorrect approach to the issue of originality. As discussed below, the Court’s conclusion on the issue of originality was based on its findings of fact and appreciation of the evidence. The Court did not rely upon the effort expended to make the jewellery in order to conclude that the Pyrrha Designs were relatively simple.

B. *Did the Federal Court err in its assessment of the evidence relevant to the issue of originality?*

[21] Pyrrha challenges the conclusion of the Federal Court that because each of the Pyrrha Designs was relatively simple, the degree of originality of the Pyrrha Designs was lower. It asserts the following four palpable and overriding errors:

- (1) There was no evidence that wax seal jewellery existed when Pyrrha created its designs. The erroneous belief that the Pyrrha Designs were part of a known jewellery type is said to have directly influenced the originality analysis.
- (2) The Court relied upon inadmissible evidence to conclude that others had been making wax seal jewellery since the 1960s.
- (3) There was no evidence that other parties were making jewellery from wax seals prior to the creation of the Pyrrha Designs.
- (4) There was evidence that 16 third parties operated jewellery websites after the Pyrrha Designs were created. This evidence illustrated the infinite variety of expressions possible with jewellery having the appearance of wax seals. This evidence was ignored with the result that degree of originality of the Pyrrha Designs was higher than the Court found it to be.

[22] In my view, the Federal Court did not err as asserted. Its appreciation of the degree of originality was based upon its appreciation of the totality of the evidence and a number of findings of fact, including the following:

- (i) Pyrrha did not create or modify the imagery in the wax seals used to create its jewellery. This imagery was in the public domain (reasons, paragraphs 39 and 146).

- (ii) The Court expressly discounted “to a significant degree” Pyrrha’s witnesses’ “exaggeration of the level of modifications and judgment used.” (reasons, paragraph 105).
- (iii) No significant creative work was involved in casting the jewellery pieces. Pyrrha used the “lost wax” casting method to create its jewellery. This method is in the public domain (reasons, paragraphs 39, 94).
- (iv) After the metal pieces with the impression of the wax seals were cast, Pyrrha finished the pieces by oxidizing and polishing the pendants. Generally, the finishing involved blackening the recesses with oxidation and polishing the high points to give contrast. Only the particular borders and the specific way oxidation and polishing were used in each design in combination with the rest of the features of the specific piece were subject to copyright protection (reasons, paragraphs 44, 107, 113, 139 and 140).
- (v) The jewellery making process was consistent with a fairly simple mechanical production. Based on its assessment of the credibility of Pyrrha’s witnesses, the Court rejected Pyrrha’s evidence about “the sophistication, artistry, skills and training that went into its operation.” (reasons, paragraph 18).

[23] In my view, the conclusion of the Federal Court that the Pyrrha designs were relatively simple copyrighted works was amply supported on the evidence before the Court. No palpable and overriding error was made in respect of the Court’s mixed finding of fact and law on originality.

[24] I now turn to briefly consider the four asserted errors.

[25] To begin, given the findings set out above, it is difficult to see how one or all of the asserted errors are sufficient to demonstrate palpable and overriding error in the Court's finding on originality.

[26] As to the alleged error that the Pyrrha Designs were part of a known jewellery type, the Federal Court concluded, correctly, that Pyrrha cannot claim copyright in the idea of creating jewellery from wax seals (reasons, paragraph 94). The Court further found, contrary to Pyrrha's assertion, that there was evidence that wax seal jewellery was made prior to the creation of the Pyrrha Designs (reasons, paragraph 30).

[27] The Court's conclusion that others had been making wax seal jewellery since at least the 1960s was supported by Plum and Posey's evidence that its principal had purchased a ring made from a wax seal. The ring bore a hallmark. The principal researched the mark and found it corresponded to a specific artisan and that the hallmark date was 1968 or 1969.

[28] In my view, the Court was entitled to rely on this evidence to conclude that jewellery had been made from wax seals since the 1960s. It follows that Pyrrha has not established that the Court's analysis of originality was flawed by a mistaken belief that the Pyrrha Designs were part of a known jewellery type. The Court's analysis was based upon its findings of fact, including those findings summarized at paragraph 22 above, which amply supported its conclusion.

[29] While Pyrrha's expert testified that Pyrrha "made to the initial decision to turn wax seals into jewellery" (Appeal Book, tab 185, page 1195), the Court found that the expert "suffered

from a lack of objectivity” and was “an enthusiastic fan of [Pyrrha’s principals], so full of praise for their contribution to jewellery making.” The Court concluded that it had “considerable reluctance in accepting, on its own, her evidence of originality.” (reasons, paragraph 21). This was a finding open to the Federal Court.

[30] The ring identified by Plum and Posey’s principal has the appearance and imagery of a wax seal. This was evidence that other parties were making jewellery from wax seals prior to the creation of the Pyrrha works.

[31] Finally, as to the assertion that the Court ignored evidence of the infinite variety of expression possible, the lack of reference in the Court’s reasons to screenshot images of wax seal jewellery does not demonstrate palpable and overriding error. A trial court is not obliged to refer to every piece of evidence adduced before it.

C. *Did the Federal Court err by relying upon the evidence of Plum and Posey’s expert about jewellery made from wax seals?*

[32] Pyrrha asserts that the Federal Court erred when it relied upon the expert’s evidence about the jewellery finishing processes because her evidence was not specific to wax seal jewellery. It also says that the expert’s evidence was biased and that the Federal Court erred by finding that the witness “did not exhibit undue enthusiasm” for Plum and Posey’s work (reasons, paragraph 29).

[33] I reject these contentions.

[34] As to the first assertion, Pyrrha does not point to any evidence that the skill and judgment used to polish and oxidize silver jewellery is at all different from the skill and judgment used to polish and oxidize wax seal jewellery made from silver.

[35] The allegation of bias stems from the fact that the expert went to the same school as Plum and Posey's principal and that she cross-merchandised and promoted Plum and Posey products in the past. The expert only learned that she and Plum and Posey's principal went to the same school the day before she testified. The fact that she cross-merchandised or promoted some Plum and Posey products in the past does not by itself demonstrate "undue enthusiasm" for its work or demonstrate palpable and overriding error on the part of the Federal Court when assessing the relative objectivity of competing experts. Pyrrha's evidence falls far short of what is required to demonstrate bias.

III. Did the Federal Court err in its analysis of the issue of infringement?

[36] The Federal Court found that the copyright in the Pyrrha Designs was not infringed by Plum and Posey. Pyrrha asserts that, in reaching this conclusion, the Federal Court erred by:

- (i) Relying upon paragraph (3)(1)(j) of the Act.
- (ii) Finding that one of the Pyrrha Designs was not created and sold prior to Plum and Posey's design.
- (iii) Failing to apply the correct test for copyright infringement.
- (iv) Rendering the conclusion about Plum and Posey's access to the Pyrrha Designs meaningless.

- (v) Failing to apply a holistic and qualitative approach to the assessment of infringement.
- (vi) Erroneously relying upon Plum and Posey's lack of intent to copy the Pyrrha Designs.
- (vii) Erroneously applying the layperson test.
- (viii) Erroneously assessing the evidence of Pyrrha's lay witness.

[37] Before considering these asserted errors, I begin my analysis by reviewing some of the key principles relevant to the issue of copyright infringement.

[38] In *Phillip Morris Products SA v. Marlboro Canada Ltd.*, 2010 FC 1099, 374 F.T.R. 213 (*Philip Morris FC*) (affirmed on appeal on the issue of copyright 2012 FCA 201 (*Philip Morris FCA*), 434 N.R. 207, leave to appeal refused [2012] SCCA No. 413, [2012] C.S.C.R. No. 413), the Federal Court held, at paragraph 315, that in order to establish infringement, two essential elements must be established:

First, there must be a sufficient similarity between the works in question such that the allegedly infringing work could be considered a copy or reproduction of the protected work. In other words, there must be proof of substantial similarity between the original work and the allegedly infringing work. Whether the Defendants have infringed copyright by taking a substantial part of a copyrighted work is essentially a question of fact. Second, the Plaintiffs must prove that the Defendants had access to the work protected by copyright; that is to say, that the copyrighted work was the source from which the allegedly infringing work was derived. This is sometimes referred to as a "causal connection".

[39] In *Cinar Corporation*, cited above, the Supreme Court considered what is required to demonstrate that a “substantial part” of a work has been reproduced. At paragraph 26 the Court held:

A substantial part of a work is a flexible notion. It is a matter of fact and degree. “Whether a part is substantial must be decided by its quality rather than its quantity”: *Ladbroke (Football), Ltd. v. William Hill (Football), Ltd.*, [1964] 1 All E.R. 465 (H.L.), at p. 481, *per* Lord Pearce. What constitutes a substantial part is determined in relation to the originality of the work that warrants the protection of the *Copyright Act*. As a general proposition, a substantial part of a work is a part of the work that represents a substantial portion of the author’s skill and judgment expressed therein.

[40] A reviewing court is required to engage “in a qualitative and holistic assessment of the similarities between the works” (*Cinar Corporation*, paragraph 41). The perspective of a layperson was said in *Cinar Corporation* to be a “useful” perspective, however the question of whether a substantial part of a plaintiff’s work has been copied “should be answered from the perspective of a person whose senses and knowledge allow him or her to fully assess and appreciate all relevant aspects — patent and latent — of the works at issue. In some cases, it may be necessary to go beyond the perspective of a lay person... and to call upon an expert to place the trial judge in the shoes of “someone reasonably versed in the relevant art or technology”” (*Cinar Corporation*, paragraph 51).

[41] I now turn to the asserted errors.

[42] The first two asserted errors are easily disposed of.

[43] Pyrrha argues that the Federal Court erred by stating, at paragraph 3 of the reasons, that the most relevant provision of the Act is paragraph (3)(1)(j). In fact, paragraph 3 of the reasons sets out portions of the subsections 3(1) and 27(1) of the Act. For some reason paragraph (3)(1)(j), dealing with distribution rights, is set out in bold. However, nowhere in the reasons does the Court consider or apply paragraph (3)(1)(j). At paragraph 120 of its reasons, the Court correctly references the relevant portion of subsection 3(1): the “sole right to produce or reproduce the work or any substantial part thereof in any material form.”

[44] Nothing turns on the fact that paragraph (3)(1)(j) was set out in the reasons in a bolded font.

[45] Similarly, Pyrrha argues that the Federal Court committed a palpable and overriding error by stating, at paragraph 152 of the reasons, that Pyrrha did not establish that the “I Am Ready” design was created prior to Plum and Posey’s “Stags Crest — I Am Ready” design. At paragraph 42 of the reasons, the Court correctly found that the “I Am Ready” design was first sold by Pyrrha on August 21, 2012.

[46] Given the Court’s conclusion that Plum and Posey had not reproduced a substantial part of the skill and judgment in the Pyrrha Designs, a finding that I would uphold for the following reasons, nothing turns on the finding about the date the “I Am Ready” design was created. Any error is neither palpable nor overriding.

[47] I now turn to the remainder of the asserted errors.

D. *Did the Federal Court fail to apply the correct test for copyright infringement?*

[48] As explained above, for an allegedly infringing work to be a copy or reproduction of the protected work, there must be proof of substantial similarity between the two works. Where there is no evidence of actual copying, the assessment of similarity is combined with access to the protected work to draw an inference of copying. The “substantial part” analysis is then used to determine if the copying is of a sufficiently substantial part of the protected work to constitute an infringement of copyright. Pyrrha asserts that the Federal Court “muddled together two distinct parts of the test (substantial similarity and substantial part)” (Appellant’s Memorandum of Fact and Law, paragraph 69). This is said to be an error of law and an error of mixed fact and law.

[49] Pyrrha supports this argument by pointing to paragraph 145 of the reasons where the Court set out a table illustrating its assessment of the specific pieces in issue. Included in the chart is a column describing the “Overall Similarities” between each of the Pyrrha Designs and the corresponding allegedly infringing works, comparing the similarities and differences between the works. A further column is entitled “Whether these similarities form a substantial part of Pyrrha’s skill and judgment”. Notwithstanding the title of this column, Pyrrha asserts that the Federal Court failed to determine whether the copied features reproduced in the defendants’ pieces constituted a substantial part of the corresponding Pyrrha Designs. Rather, it argues that the Court continues to compare the similarities and differences between the pieces. Pyrrha says that the Court failed to ask the critical question of whether the infringing works copy a substantial part of Pyrrha’s originality.

[50] In my view, the Court did not err as asserted.

[51] In paragraph 146 of the reasons, the Court explained the two-step process it had undertaken. It first “considered all of the similarities and then determined whether those similarities represented a substantial portion of the author’s skill and judgment.” The title of each column is consistent with a separate two-step analysis. At paragraph 127 of the reasons, the Court correctly directed itself to the need to “make a holistic comparison and determine whether the similarities represent a substantial part of the originality in the protected work as a whole.” Throughout, the Federal Court correctly directed itself to the steps it was to take in its analysis.

[52] The Court had previously found that only the particular borders and the specific way oxidization and polishing were used in each design, in combination with the rest of the features of the specific piece, were subject to copyright protection. These features were reviewed when the Court considered whether the similarities formed a substantial part of Pyrrha’s skill and judgment. To illustrate, in respect of the “Stags Crest — I Am Ready” design, the Court found “[t]he specific expression of the stag imagery in metal is not similar between the two designs, as the borders, the shape, the size, and the level of oxidization in the pieces are different.” (reasons, paragraph 145).

[53] The Pyrrha Designs were relatively simple copyrighted works; it followed that there was a limited ambit of copyright protection. Put another way, “the simpler a copyrighted work is, the more exact must be the copying in order to constitute infringement.” (*DRG Inc. v. Datafile Ltd.*,

[1988] 2 FC 243 (T.D.) at page 256, 15 F.T.R. 174, aff'd (1991), [1991] F.C.J. No. 144, 35 C.P.R. (3d) 243).

[54] Pyrrha has not demonstrated that the Federal Court erred as it asserts.

E. *Did the Federal Court render the conclusion about Plum and Posey's access to the Pyrrha Designs meaningless?*

[55] Pyrrha argued at trial that Plum and Posey's access to its designs, combined with the similarities between the designs, created a *prima facie* case of copying. At paragraph 148 of its reasons, the Federal Court found that "given the Court's finding of non-infringement, the issue of access is secondary." Pyrrha now argues that the Court was required to first assess "substantial similarity" and access in order to determine whether there was a causal connection between the works. Only after that determination was made could the Court consider "substantial part" and infringement.

[56] Pyrrha cites no authority in support of its argument.

[57] In *Philip Morris FC*, cited above, the Federal Court, after finding there to be no infringement, wrote that "[a]s a result, it would be unnecessary for the Court to consider the second element which must be shown for a finding of copyright infringement, namely whether there is a causal connection between the copyrighted work and the alleged infringing work." (*Philip Morris FC*, paragraph 366). On appeal, this Court found that no reviewable error was made when the Federal Court concluded that there was no taking of a substantial part of the

copyrighted work. It followed that there was no need to consider arguments that the Federal Court had applied a wrong test to determine if a sufficient causal connection existed (*Philip Morris FCA*, paragraph 123).

[58] Again, Pyrrha has demonstrated no error of law.

F. *Did the Federal Court fail to apply a holistic and qualitative approach to the assessment of infringement?*

[59] In *Cinar Corporation* the Supreme Court noted that a reviewing court is required to engage “in a qualitative and holistic assessment of the similarities between the works.” (paragraph 41) While the Federal Court correctly described this approach at paragraph 128 of its reasons, and stated at paragraph 146 of its reasons that this was the approach adopted by the Court, Pyrrha argues that the Federal Court did not conduct a holistic assessment. It points to the fact that the Court expressly stated, at paragraph 146 of its reasons, that it “considered all of the similarities and then determined whether those similarities represented a substantial portion of the author’s skill and judgment.” In that second step “the similarities in the imagery did not form a substantial part of the author’s skill and judgment as the imagery is in the public domain.”

[60] This quote omits the final sentence of paragraph 146. In its entirety, paragraph 146 reads:

[146] In completing this assessment, I adopted the holistic qualitative approach stipulated in *Cinar*. I considered all of the similarities and then determined whether those similarities represented a substantial portion of the author’s skill and judgment. In this second step, the similarities in the imagery did not form a substantial part of the author’s skill and judgment as the imagery is in the public domain (see also the discussion of the selection of imagery in paragraph 109). The imagery is only considered in assessing whether the overall expression of the wax seal imagery with the borders and finishing are substantially similar.

[61] I see no error. The final sentence of paragraph 146 makes clear that the Court did consider the imagery when assessing whether the overall expression of the imagery with the borders and finishing were substantially similar. This is also demonstrated in the Court’s analysis of the “Stags Crest — I Am Ready” design set out above. The Court considered the two designs holistically including not just the borders and the oxidization levels but also the shape and sizes of the designs.

[62] In *Robertson v. Thomson Corp.*, 2006 SCC 43, [2006] 2 S.C.R 363, the Supreme Court wrote at paragraph 81:

In *CCH*, originality was held to encompass the exercise of “skill and judgment” by an author: see para. 16. Every copyrighted work — individual or collective — is the product of the exercise of skill and judgment. In determining, therefore, whether a work like a newspaper, or “any substantial part thereof”, has been reproduced, what will be determinative is the extent to which the item said to be a reproduction contains within it, in qualitative rather than quantitative terms, a substantial part of the skill and judgment exercised by the creator of the work: see *Édutile Inc. v. Automobile Protection Assn.*, 2000 CanLII 17129 (FCA), [2000] 4 F.C. 195 (C.A.), at para. 22.

(Emphasis added)

[63] This was the exercise the Federal Court conducted.

G. *Did the Federal Court erroneously rely upon Plum and Posey’s lack of intent to copy the Pyrrha Designs?*

[64] At paragraph 26 of its reasons, when describing the evidence adduced by the witnesses called for Plum and Posey, the Federal Court found its principal to be “generally credible, overwhelmed by the numerous pieces of litigation, but honest about the facts.” The Court went on to say “I do accept her evidence of the absence of intent to copy the Pyrrha Designs.”

[65] Pyrrha now argues that by referencing a lack of intent to copy, the Court “made a finding that was not probative to the cause of action and which he clearly relied upon in his finding of non-infringement” (Appellant’s Memorandum of Fact and Law, paragraph 81). Pyrrha states that the Court erred by considering it necessary to find the intent to infringe in order to find infringement.

[66] There are, I believe, two responses to this argument. First, this is the sole reference to Ms. Hardy’s intent. There is nothing in the Court’s analysis of the infringement issue to suggest that this in any material way influenced the Court’s consideration of whether the Plum and Posey designs copied a substantial part of the copyrighted works of Pyrrha. Second, as discussed above, the Federal Court did not consider it necessary to consider whether the copyrighted work was the source from which the allegedly infringing work was derived and so the notion of intent, or the lack thereof, never arose.

H. *Did the Federal Court erroneously apply the layperson test?*

[67] The Federal Court wrote at paragraph 134 of its reasons:

[134] Although the perspective of a layperson may be useful, it does not take one all the way. The real question is whether there are substantial similarities based on the relevant parts of the works, including latent similarities not necessarily obvious to the layperson that may influence how a layperson experiences the work (Cinar at paras 51-52).

[68] Pyrrha now argues that the Federal Court erred by not conducting an assessment through the eyes of the layperson in the intended audience as required by the Supreme Court in *Cinar Corporation*. Further, Pyrrha filed photographs of the Pyrrha Designs and the Plum and Posey

designs being worn by a model so that the viewer was about two or three feet from the model.

The Federal Court is said to have further erred by writing, at paragraph 136, that the photographs are “only one perspective from which to examine the pieces. In order to do a holistic rather than an impressionistic analysis, it was useful for the Court to have the actual pieces of the jewellery in front of it.”

[69] I think it helpful to consider exactly what the Supreme Court said in *Cinar Corporation* at paragraph 51:

In my view, the perspective of a lay person in the intended audience for the works at issue is a useful one. It has the merit of keeping the analysis of similarities concrete and grounded in the works themselves, rather than in esoteric theories about the works. However, the question always remains whether a substantial part of the plaintiff's work was copied. This question should be answered from the perspective of a person whose senses and knowledge allow him or her to fully assess and appreciate all relevant aspects — patent and latent — of the works at issue. In some cases, it may be necessary to go beyond the perspective of a lay person in the intended audience for the work, and to call upon an expert to place the trial judge in the shoes of “someone reasonably versed in the relevant art or technology”: Vaver, at p. 187.

(Emphasis added)

[70] In the impugned paragraph of its reasons, paragraph 134, the Federal Court acknowledged that the perspective of a layperson “may be useful” but went on to state that such perspective “does not take one all the way.” Importantly, the Court continued: “[t]he real question is whether there are substantial similarities based on the relevant parts of works, including latent similarities not necessarily obvious to the layperson that may influence how a layperson experiences the work.” I see no error of law in the Court’s reasoning about the role of the layperson.

[71] At trial, Pyrrha recognized that in the absence of expert evidence on infringement, it was for the Court to assess whether its copyright was infringed. The Court rejected Pyrrha's contention that the works should only be examined from two to three feet away because that is the likely spacing from a purchaser's perspective. "The Court observed noticeable differences between the actual pieces and even the photographs of them." The Court then reasoned that "[d]ue to the limits of photographs, where detail and nuances are more difficult to discern" the Court preferred to compare the actual physical exhibits (reasons, paragraph 142). No palpable and overriding error has been shown in this finding and approach.

[72] Moreover, the Pyrrha Designs sell for between \$48 and \$262, depending upon the design (reasons, paragraph 43). Particularly, with the more expensive designs, it is fair to infer that a layperson purchasing a design would look closely at the design and the wax seal imagery.

I. *Did the Federal Court erroneously assess the evidence of Pyrrha's lay witness?*

[73] Erica Somer testified that she went into a jewellery store in Victoria, British Columbia and mistook Plum and Posey pieces in a display cabinet for Pyrrha's pieces. Pyrrha argues that the Federal Court erred by rejecting her evidence on the basis that it was a "drive-by analysis" more similar to the hurried consumer who glances in a display window (Appellant's Memorandum of Fact and Law, paragraph 88). Pyrrha also argues that her evidence was also rejected on the basis that she was said to later issue a correction that the picture was of a Plum and Posey design. Pyrrha complains that the Federal Court misapprehended the evidence because it was a video and not a picture, and there was no evidence at trial that a correction had been issued.

[74] There are two answers to these concerns.

[75] First, the Federal Court gave a number of reasons for rejecting the evidence of Erica Somer. At paragraph 13, the Court described Ms. Somer to be “such an obvious fan of Pyrrha’s jewellery that she was predisposed to Pyrrha’s position. Her evidence appeared to be too rehearsed to be taken at face value. Her powers of observation were questionable since her video showed clearly a sign indicating that the jewellery was Plum and Posey’s.” Finally, her message to Pyrrha, where she apologized and said she had assumed the jewellery to be from Pyrrha, “seemed more designed to catch Pyrrha’s attention online.” (reasons, paragraph 13). The Federal Court gave ample reasons for rejecting the evidence of this witness and no palpable and overriding error has been demonstrated.

[76] Moreover, reasons of a trial court are not to be parsed. A sentence which refers to a video and then goes on to refer to a correction that the “picture” was of Plum and Posey’s jewellery falls far short of a palpable and overriding error. Similarly, the reference to a correction was a reference to a message put in evidence by Pyrrha in which the witness apologized and said she assumed it was jewellery from Pyrrha. Again, no palpable and overriding error has been demonstrated.

IV. Conclusion

[77] For these reasons I would dismiss the appeal, with costs.

"Eleanor R. Dawson"

D.J.C.A.

"I agree
Yves de Montigny J.A."

"I agree
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE: PYRRHA DESIGN INC. v.
PLUM AND POSEY INC. AND
ADRINNA M. HARDY

PLACE OF HEARING: VANCOUVER,
BRITISH COLUMBIA

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REASONS FOR JUDGMENT BY: DAWSON D.J.C.A.

CONCURRED IN BY: DE MONTIGNY J.A.
RIVOALEN J.A.

DATED: JANUARY 13, 2022

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