

DOUBLE WHAMMY AS INFRINGERS ARE HIT WITH TWO ORDERS FOR STATUTORY DAMAGES

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PRECIS: The Federal Court has granted summary judgments to two separate plaintiffs in actions claiming copyright infringement by the same set of defendants. Justice O’Keefe also granted statutory damages based on the attitude, involvement and evidence that the defendants profited from the copyrighted works at the plaintiffs’ expenses.

In *Film City Entertainment Ltd v Golden Formosa Entertainment Ltd* (2006 FC 1149; 2006-09-27) and *Film City Entertainment Ltd v Chen* (2006 FC 1150; 2006-09-27) the Federal Court of Canada has granted summary judgments and statutory damages to the plaintiffs in actions claiming copyright infringement by the defendants. Justice O’Keefe granted statutory damages based on the attitude, involvement and evidence that the defendants profited from the copyrighted works at the plaintiffs’ expenses.

In the first case, numerous plaintiffs took action for copyright infringement in a film against Golden Formosa Entertainment Ltd and members of the Chen family who participated actively in the management and operations of the corporate defendant. In the second case, the plaintiffs Film City Entertainment Ltd and the Motion Picture Development foundation ROC took action for copyright infringement in a television show, to the same defendants and others. Rather than waiting for trial, the plaintiffs moved for summary judgment. Federal Court Rule 216, 1998, SOR 198-106 provides that if the court is not satisfied that there is a genuine issue for trial with respect to a claim of defence, it shall grant summary judgment accordingly. Further, if the court is satisfied that the only genuine issue is the amount to which the

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moving party is entitled or a question of law, it may grant in some cases summary judgment.

The motions for summary judgment were prompted by defences that were mere denial, together with extensive evidence that the film and television show were crude and counterfeit forms of work.

To determine if a summary judgment had to be granted, the judge adopted the general principles summarized in *Grandville Shipping Co v Pegasus Lines Ltd SA* (1996) 111 FTR 189 (FCTD)). The purpose of a summary judgment is to allow the court to summarily dispense with cases that have no genuine issue to be tried. The test that has to be applied is not determinative and is not whether a party cannot possibly succeed before a court; rather it is whether the case is so doubtful that it does not deserve the consideration of a trial. Each case is different and should be interpreted according to its facts and contextual framework, and a court may determine questions of fact and law on the motion for summary judgment. No summary judgment can be granted if the necessary facts cannot be found and if it would be unjust to do so. Finally, if the issue is serious with respect to credibility, the case should go to trial and the parties cross examined. A hard look at the merits of the case is needed and an apparent conflict in the evidence does not preclude summary judgment.

Statutory judgments were granted in both cases since there was no genuine issue to be tried and no issue as to credibility. Summary judgments, including declarations of ownership, subsistence of the copyright and permanent injunctions were granted in both cases.

Statutory damages were introduced in 1997 for circumstances for which statutory judgments could be granted. In these two cases, the judge considered all relevant facts, such as good or bad faith of the defendants, their conduct before and during the proceedings and the need to deter other infringements of the copyright in question. In particular, the defendants' involvement in similar proceedings, their attitude toward the judicial process and the high level of sophistication were considered in determining the amount of statutory damages.

Further, the obvious counterfeit nature of the recordings, the continuing copyright infringement and the evidence that the defendants profited from the copyrighted works at plaintiffs' expenses were also taken into account. No exemplary and aggravated damages were granted.

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