



**PROVINCIAL COURT AWARDS STATUTORY DAMAGES FOR COPYRIGHT INFRINGEMENT.**

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PRECIS: The Plaintiff, a professional photographer, sued the Defendant for failure to pay him for photographic services and for damages for alleged copyright infringement. The Provincial Court of Alberta ruled that the Plaintiff's copyright in the photographs had been infringed, and awarded him statutory damages.

In *Don Hammond Photography Ltd. v. The Consignment Studio Inc.*, (2008 ABPC9, 2008-01-07) the Provincial Court of Alberta ordered that the Defendant pay Plaintiff's account for photographic services, and awarded statutory damages for copyright infringement.

The Plaintiff was engaged by a company which had been hired by the Defendant to manage an advertising campaign promoting its line of household furniture. Plaintiff was to photograph items of furniture with the Defendant's dogs posing in the pictures. When Plaintiff was engaged, it was agreed to in writing that he would bill the Defendant directly.

Five photographs featuring the dogs on pieces of furniture were taken by the Plaintiff.

These photographs were published in local newspapers as ads for the Defendant's line of household furniture. The Defendant failed to pay the account of \$1,431,00 due to the Plaintiff. Consequently, the Plaintiff threatened to sue the Defendant for breach of copyright, but the use continued.

After assessing that the Plaintiff's claim was within the jurisdiction of the Provincial Court of Alberta, Justice Ingram proceeded to the analysis of the sections of the *Copyright Act* which set out the rules as to ownership of a photograph.

Under the Act, a photograph is an artistic work. Section 10(2) of the *Copyright Act* provides that the owner of the initial negative of the photograph is deemed to be the

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author of the photograph. However, in regards to Section 13(2), if the order of the original photograph was made by someone else, for valuable consideration which was paid in pursuance of that order, the person who ordered the original shall be the owner of the copyright in absence of any agreement to the contrary.

In this case, all the requirements to make the defendant the owner of the copyright were met, except for the payment of the consideration. Therefore, the Plaintiff remained the owner of the copyright under Section 10(2) of the Act. Having reproduced the photographs without permission, the Defendant had clearly infringed the Plaintiff's rights in the photographs.

After establishing the ownership of the Plaintiff, and noting the absence of any assignment of the copyright, the Court set out to evaluate the damages, and more specifically, statutory damages in case of an infringement.

Section 34(1) of the Act provides that infringement gives a Plaintiff a right of action for damages. Here, instead of electing for damages actually suffered under Section 35 of the Act (as there was no proof of loss suffered due to the infringement, nor of profits made by the Defendant), the Plaintiff elected to recover statutory damages under Section 38.1 of the Act. Such damages exist as a way for copyright owners to enforce their rights provided that actual damages are often hard to prove.

In respect to each infringed work, an infringer is liable for a sum of not less than \$500 or more than \$20,000, to the discretion of the Court. Some exceptions apply, notably where there is more than one work and where the awarding of the minimum amount would result in a total award grossly out of proportion to the infringement. Justice Ingram found that such an exception applied here.

After analysing the criteria listed in Section 38.1(5) in order to assess the damages, and after noting that use by the Defendant would probably not have devalued the copyright in anyway, the Court found that in regards to the damage done to the Plaintiff, no aggravating factors were present. The only financial loss suffered by Plaintiff was the unpaid account as there was no evidence to the fact that he was planning to use these photos.

The Court therefore decided to award to the Plaintiff, in addition to the unpaid account, an amount of \$500 in damages for the infringement of the five works altogether. Under the Act, if the Defendant were to continue reproducing the works, additional damages would be recoverable by the Plaintiff. However, once the account paid, the Plaintiff would no longer be the owner of the copyright and the Defendant would have no further liability.

The Court concluded by congratulating the Plaintiff for having conducted the entire proceedings without a lawyer and for having elected for statutory damages, awarded

him the costs of the action, and directed that the Defendant pay the sum of \$1,931.00 with interest.

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