Cassels

The Cost of Copying Photographs from the Internet Just Got Higher

Jessica Zagar

09/22/2020

A recent Federal Court decision, *Rallysport Direct LLC v. 2424508 Ontario Ltd.*,[1] serves as an important reminder to Internet users that copying or scraping photographs found online without permission from the copyright owner, even if those photographs are relatively mundane, can give rise to a significant damages award.

In *Rallysport Direct*, both parties were in the aftermarket automotive parts industry. The plaintiff, RSD, argued that the defendants infringed copyright by copying its photographs and posting them on the defendants' websites. The photographs, taken by RSD employees, depicted automotive aftermarket components and accessories, which were staged, assembled into kits, and positioned to enable customers to examine key details about the products to ensure compatibility.

Having concluded that the photographs were subject to copyright protection and that the defendants infringed copyright by copying and displaying the photographs on their websites,[2] the Court turned to the issue of damages. Under the *Copyright Act*, a plaintiff can choose to seek its damages and the defendants' profits from the infringement, or it can elect to receive statutory damages for commercial infringements in an amount not less than $500 and no more than $20,000 per work. For infringements for non-commercial purposes, the range is $100 to $5,000 for all works infringed. RSD elected statutory damages and sought damages in the amount of $500 per work.

As the Court stated at the outset of its analysis, statutory damages are recognition that actual damages are difficult prove in copyright cases and these types of damages awards are intended to both deter infringers and incentivize copyright owners to enforce their copyright. The prescribed range of damages can be reduced where there is more than one work at issue on a single medium and where awarding the minimum per work would lead to a total damages award grossly out of proportion with the infringement. The Court cautioned against conflating statutory damages with actual or probable damages, confirming that statutory damages encompass other factors, such as deterrence.

The Court determined that copyright economic loss considers the market value of the image. That value is not limited to lost licensing fees and can encompass production costs, including labour. Indeed, when copyright is infringed in respect of works that are created to sell another product, and not to be sold themselves, it is appropriate to look to the associated production costs to help determine the quantum of damages. The Court conducted a thorough review of past statutory damages awards in the case law, along

with the statutory factors, with specific attention to the defendants' bad faith conduct, the need to deter the defendants and others from infringing RSD's works, and RSD's labour costs. In the result, the Court arrived at a damages award of $250 per work, for a total of $357,500 in statutory damages.

Significantly, those were not the only damages awarded against the defendants. The Court determined that punitive damages in the amount of $50,000 were warranted in addition to statutory damages because of the defendants' "high-handed" efforts to transfer assets in an attempt to judgment-proof their actions.

At first glance, *Rallysport Direct* stands in stark contrast to another recent Canadian copyright infringement case, brought by Trader Corporation against a competitor for the unauthorized use of its photographs on the competitor's website.[3] In *Trader*, decided by the Ontario Superior Court of Justice in 2017, the plaintiff was awarded only $2 per work against the defendant for a total of $305,064 in statutory damages. However, there are important factual differences underlying the two decisions.

In *Rallysport Direct*, the evidence demonstrated that the defendants acted in bad faith, including by continuing to display the photographs that they had scraped for more than two years despite numerous cease and desist letters and false claims to having removed the works. In *Trader*, the Court found no bad faith on the part of the defendant. The defendant was new to the market and did not appreciate that its US business model was inappropriate in Canada. There was no allegation that the defendant scraped or copied photos from the plaintiff's website and the defendant responded to the plaintiff's cease and desist letter immediately. The Court in *Trader* also noted deficiencies in the plaintiff's demands, which lacked specificity about its claims. Moreover, the plaintiff in *Rallysport* had never licensed, or even considered licensing, its photos to others. In *Trader*, the evidence showed that the plaintiff charged its syndication partners a licence fee of $5.00 per dealer per month, regardless of how many photos were at issue.

The lesson is twofold. First, the parties' conduct will inform the appropriateness of a damages award. Knowledgeable legal counsel can help a potential plaintiff draft an appropriate cease and desist letter if their copyright has been infringed. A potential defendant, upon receipt of such a letter, should act quickly and seek legal advice to help it determine how to proceed. A defendant's good or bad faith conduct can have a significant impact on its exposure to damages, and an experienced copyright lawyer can help navigate the response.

Second, the decision reinforces that copyright protects not only original works fixed in a tangible form in print, but also works that exist primarily on the Internet. Internet users may mistakenly assume that they can copy and use the photographs, images, or graphics that they find online, particularly when they do not see the © symbol or some other recognized form of copyright notice. Copying or scraping photographs, even if they appear to be relatively mundane, can attract significant liability for infringement particularly if it is done for commercial purposes.

---

[1] 2020 FC 794 (CanLII).
[2] *Rallysport Direct LLC v. 2424508 Ontario Ltd*., 2019 FC 1524 (CanLII).
[3] *Trader v CarGurus*, 2017 ONSC 1841 (CanLII) [*Trader*].

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.