

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY ENTERPRISE COURT

Claim No. IP14S01982

7 Rolls Building
Fetter Lane
London
EC4A 1NL

Thursday, 5th March 2015

Before:

DISTRICT JUDGE HART

Between:

JONATHAN CLIVE KENDAL WEBB

Claimant

-v-

(1) **VA EVENTS LIMITED**

(2) **CARL AUSTIN**

(3) **DALE VICKER**

Defendants

The Claimant appeared In Person

The Defendants were represented by MR CARL AUSTIN

APPROVED JUDGMENT

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Number of Folios: 54
Number of Words: 3,890

JUDGMENT

DISTRICT JUDGE HART:

1. This is a claim for copyright infringement that was issued by Mr Jonathan Webb on 13th May 2014. He is a professional aerial photographer who earns his living from licensing of images to which he owns the copyright. The defendants in this case are VA Events Limited, Mr Carl Austin and Mr Dale Vicker. Both Mr Austin and Mr Vicker were the directors and shareholders of VA Events Limited at the material times.
2. The allegation of primary infringement of copyright in an aerial image of Manchester taken at night in breach of sections 16 and 20 of the Copyright Designs & Patents Act 1988 (“CPDA”) is not disputed. The image was displayed on the first defendant’s website from at least May 2012 to January 2014. No defences having been received in response to the proceedings, judgment in default has been entered against all three defendants.
3. Mr Webb has done his best to estimate his damages and claims a sum of some £4,500 or so, inclusive of interest and elements of his costs. His primary claim is his claim for additional damages for flagrancy, for damages for breach of his moral rights and for derogatory treatment to the image. That accounts for some £3,300 or so of his claim.
4. The evidence that I have seen consists of Mr Webb’s original particulars of claim dated 9th May 2014 and an amended version of that claim served with the permission of the court and dated 18th August 2014. Both attach various supportive documents. In addition, there is a witness statement from Mr Webb of 14th August 2014.
5. From the defendants I have no formal evidence at all. There is nothing by way of a witness statement supported by a statement of truth. However, two letters have been sent in to the court which I have taken into account, those being dated 21st October and 14th November 2014.
6. The basic facts are that from at least May 2012 to January 2014 the image in which Mr Webb owns the copyright was used as the background to every page of VA Events Limited’s website. VA Events Limited was a company involved in promotions and marketing. The case put forward by the defendants is that they were unaware that the image used on the website might have been used in breach of copyright because they subcontracted the task of creating the website to a Mr Stephen Howson, who appears to have been the director of Mancunian Creative Limited. Where convenient I will refer to him and the company simply as the “Web Designer”. The defendants assert that responsibility for any infringement lies with the web designer and that they have acted responsibly in seeking and achieving the removal of the offending website.
7. Mancunian Creative Limited is apparently no longer in existence and perhaps for that reason, but perhaps because it either never occurred to the defendants or because they did not see the need to do it, no attempt has been made to join either the company or Mr Howson as a party to these proceedings.
8. The issues which have to be decided in this case are as follows:

- a) the status of VA Events Limited, which by all accounts has now been dissolved.
- b) whether Mr Vicker and Mr Austin, as the only directors and shareholders of VA Events Limited, have any personal liability as joint tortfeasors for the admitted infringement.

In relation to the assessment of damages:

- c) whether there is any defence under section 97(1) of the CDPA:
 - d) the extent to which any of the defendants should be held responsible for the actions of the Web Designer;
 - e) the notional licence fee should have been paid to Mr Webb for the use of his image; and lastly,
 - f) whether in addition to that he should be granted additional damages under section 97(2) of the CDPA or in respect of breach of his moral rights or in relation to derogatory treatment.
9. Firstly, the status of VA Events Limited. Judgment in default was entered against that company on 21st July 2014. A DSO1 form, signed by Mr Vicker and Mr Austin as directors applying to have the company struck off had been signed on 19th May 2014. On 10th June the Registrar of Companies issued the standard notice that if no objections were received within three months he would strike the company off the register of companies and the company would thereafter automatically be dissolved in accordance with the Companies Act 2006 on the notice of striking off being published. As a consequence, of that is the date when judgment in default was entered against VA Events Limited the company was still subsisting.
10. Mr Webb will now have difficulty in enforcing any judgment against the company. Assuming there was no challenge to the Registrar's notice, the company will by now have been dissolved and therefore, Mr Webb would not be able to enforce this judgment unless he successfully applies to have the company restored to the companies' register, which he might not seek to do if the company has no assets. However, since restoration may be a technical possibility and since judgment in default was in place before the company was struck off, it is still appropriate to assess damages against the company.
11. The second issue is the question of whether Mr Vicker and Mr Austin as the directors and shareholders of VA Events Limited should be held personally liable as joint tortfeasors. They say is that what was done was done in the name of a company; the company is therefore liable for any wrong doing and they have no personal liability. As a matter of law I disagree. In accordance with the Court of Appeal's decision in *MCA Records Inc & Anor v Charly Records & Ors [2001] EWCA Civ 1441* the position is not as clear cut as that. The Court of Appeal held that an individual who intended, procured and shared a common design for an infringement of copyright by a company could be made liable as a joint tortfeasor. A director was not liable as a joint tortfeasor with a company if he did no more than carry out his constitutional role in the governance of the company, i.e., by voting at board meetings but if a director or

a controlling shareholder chose to exercise control otherwise than through the constitutional organs of the company and the circumstances were such that he would be liable if he were not a director or controlling shareholder there was no reason why he should not be liable with the company as a joint tortfeasor. Accordingly, the fact that he could have procured the wrongful act through the exercise of constitutional control of the company did not mean that a director could escape liability as a joint tortfeasor if his liability with the company arose from participation or involvement which went beyond the exercise of constitutional control.

12. In this case Mr Austin has confirmed to me this afternoon what is apparent from the company papers that I have seen. He and Mr Vicker were the sole directors and shareholders of the company. He confirmed to me that they were essentially the directing mind of the company responsible for its day to day actions and for the decisions that were made. They cannot therefore hide behind the company's separate legal identity because the available evidence clearly establishes that what they were doing was far more than simply exercising a right to vote on a board of directors or exercising a right to vote as a shareholder. They were directing the actions of the company and they are responsible as joint tortfeasors. I will, therefore, treat all defendants as joint tortfeasors in this action and assess damages accordingly.
13. In relation to the assessment of damages it is important to note at the outset that whatever the defendants say was done without their knowledge by the web designer it does not change the fact that they are liable here for primary infringement under the CDPA on the undisputed facts of this case. The primary infringement provisions at section 16(d) and section 20 involve infringing by communicating the image to the public and by making it available by electronic transmission in such a way that members of the public might access it from a place and a time chosen by them. To that extent it is irrelevant who designed the website. The website was used by the company and by Mr Vicker and Mr Austin as the controlling mind of the company and they are therefore liable for the undisputed primary infringement.
14. There is an issue that should be addressed in relation to section 97(1) of the CPDA. That provides that it is a defence to damages in an action for infringement of copyright to show that at the time of the infringement the defendant did not know and had no reason to believe that copyright subsisted in the work to which the action relates. However, that defence is a very narrow one. The narrowness of it was considered in the case of *Hoffman v Drug Abuse Resistance Education (UK) Limited* [2012] EWPC 2 a decision of the Patents County Court by His Honour Judge Birss (as he was then). That case involved a charity that instructed a third party to design their website and the charity genuinely believed that they had permission to use the images. It was decided in that case that even though that belief was genuine it was not a defence under section 97(1) CPDA. There was no bar to damages being awarded, because there is a distinction to be drawn between a case where a defendant believes that no copyright exists and has no reason to believe otherwise and one where the defendant's belief is that he had permission to use the images. In this day and age, it is naive to suggest that a company in the business of promotions and marketing considers that images found on the internet may not be covered by copyright. As was said to me by Mr Austin this afternoon, the assumption may well be that images are being used with permission, because there is a licence to use what

would otherwise be an image protected by copyright. However, that is not a defence under section 97(1) CPDA.

15. The next issue is whether the defendants are to be held responsible for the actions of the web designer. That is the most important issue because at the heart of the assessment of damages in this case is the assessment of the additional damages for flagrancy, breach of moral rights and derogatory treatment. Those aspects actually relate to what was done to the image by the web designer according to the defendants. So the question is whether they should be held responsible for that in a situation where they say that they did not realise what had gone on. The prime example relied on by Mr Webb is the painstaking removal from the image of the 33 assertions of copyright that he had placed onto the image and which he says, and which I accept, had to be individually removed to enable the infringement to take place.
16. What the defendants have asserted in their letters to the court is as follows. Unknown to VA Events Limited, Mancunian Creative Ltd inadvertently included on the new website a number of images in which Mr Webb held the copyright without seeking Mr Webb's permission. Elsewhere it is suggested in the correspondence that the fault actually lies with Mr Webb because he should have protected his work better.
17. I am afraid I find the attitude displayed by the defendants in relation to this issue far from satisfactory. It is a bit reminiscent of the "could not care less" attitude that is sometimes referred to in relation to the test of flagrancy. The reason it is unsatisfactory is, firstly, that the position of the defendants is based on a complete lack of persuasive evidence. There is no formal evidence filed at all, despite directions having been given by the court. There is no evidence, therefore, that the issue of copyright was considered by the defendants even though for over 15 years they had been involved in the business of promotions and marketing. They have not produced the contract that was entered into with the web designer, which might assist in establishing how these matters were dealt with. There is no evidence of whether there was any thought given to or any provision included about the use of images that were included in the design. Nor how licence fees were to be funded for images which were to be used. There is no evidence from the Web Designer and, apart from oral submissions, nothing to explain why that might be the case. The use of the term "inadvertent" to describe the Web Designer's actions in the face of the unchallenged evidence from Mr Webb about the careful removal of his 33 assertions of copyright is, frankly, misleading and indicative of the defendants' attitude here.
18. Nor does the defendants' case quite tally with the documents. So, for example, one of Mr Webb's complaints is that the defendants' attitude was unresponsive, in that they did not initially respond to correspondence. The letter that was responded to was Mr Webb's letter of 3rd April 2014, which was the formal letter before claim indicating that proceedings were about to be issued. Mr Vicker responded by letter dated 11th April, saying he was shocked to hear that images had been used in breach of Mr Webb's copyright, but passing Mr Webb on to Mancunian Creative. In fact, the evidence is that the website had been removed in the January of 2014, several months earlier. The defendants have always said that they obtained the removal of the website having tracked the Web Designer down, which was not so easy, as a result of Mr Webb's complaints.

19. It cannot be the case that the April letter is a true reflection of events if the evidence about the removal in January is true. I find that the most likely explanation is that the letter from Mr Vicker in April was not in fact the first that the defendants had heard about this matter. They had known about it from at least January, probably earlier and had simply been ignoring correspondence whilst in the background they had tried and succeeded in getting the website taken down.
20. In summary, since the website that is complained about is the website of VA Events Limited, in the absence of any substantive evidence to the contrary the fact that the website was designed by someone else, or by another company, is irrelevant. In my judgment, the defendants are responsible for the website and what was done in relation to the creation of that site because I have no substantive evidence to the contrary.
21. That brings me on to the notional licence fee. Mr Webb is at a slight disadvantage here because of his own pragmatic business practices. The burden is on him to show his loss on the balance of probabilities and the starting point is that the court should award a sum of money that would put him in the same position as if there had been no infringement.
22. The first thing to look at is the licence fee that would have been asked for by Mr Webb and paid for by a willing licensee. In looking at that licence fee I would usually look at the quality of the image and the labour that had gone into taking that image. In this case, it is not a cheap image to take. It was taken at night from a chartered helicopter and costing £1,800 per hour. It required, because of the use of the helicopter and the nature of the photograph, the use of specialist equipment. Accordingly the image has a rarity value. In fact, Mr Webb says that he knows of only one other photographer who has taken similar night time aerial photographs of Manchester.
23. Also relevant to the notional fee would usually be the use to which it was put by the licensee. In this particular case it was used on a commercial website. It was central to that website, being the background for every page. Although it is asserted by the defendants that the use of the image did not get them any benefit, I disagree. There was a purpose to choosing that background image which was intended to convey something about the essence of VA Events Limited.
24. So if I were to value this image without regard to Mr Webb's evidence as to his normal fees, I would probably grant him more than his normal licence fee of £300 plus VAT. But the correct approach is to consider his usual fixed fee for an aerial photograph, regardless of its merits, which is £300 plus VAT. For that fee a licence holder may use the image for as long as he/she wishes and without crediting Mr Webb on the face of the image. (I am assuming, however, that embedded in the image would remain the metadata). So in terms of the licence fee, the correct valuation is £300 and since this amount is payable as damages, it is not subject to VAT.
25. The majority of his claim really rests on persuading the court that additional damages are required in this case. Section 97(2) of the CDPA states that the court may in an action for infringement of copyright, having regard to all of the circumstances and in particular to the flagrancy of the infringement and any benefit accruing to the defendant by reason of the infringement, award such additional damages as the justice

of the case requires. The idea of flagrancy implies scandalous conduct or deceit, including deliberate or calculated infringement where the defendant reaps a reward in excess of what he would have had to pay.

26. I think there is a considerable overlap here between two other heads of damage which Mr Webb claims, the first being derogatory treatment under section 80 CPDA. That provision states that the author of a copyright artistic work has the right not to have his work subjected to derogatory treatment. That includes additions, deletions, alterations and adaptations. Similarly, the third concept, which is the breach of moral rights. Moral rights concern the right of an author to be identified as the copyright owner of a work.
27. In this case there are two elements that fall within those three overlapping concepts. First, I consider that the deliberate removal of the thirsty-three labels that Mr Webb put on top of the digital image asserting his copyright is flagrant. It was a deliberate deceit and a calculated removal of his asserted copyright. It was not something that was, according to Mr Webb, easy to do. It had to be done individually. Secondly, he attached metadata to the image, which again asserted his rights and copyright and that metadata was removed. So there was a deliberate intention here to infringe and I have found that the defendants are responsible for that deliberate infringement.
28. The consequence of these actions (in particular the removal of the metadata) was to orphan the image, which opened the way to other people copying it without it being recognised as Mr Webb's. I accept that previously this image had not been orphaned. Further, there is derogatory treatment in the fact that VA Events Limited added an assertion of copyright on the website close to Mr Webb's image. So there was a deliberate removing of his copyright and an assertion of VA Events Limited's copyright (although I accept that was in relation to the website as a whole). That rather indicates that they knew entirely of the value of the protection of copyright.
29. In those circumstances it is appropriate to give an uplift on top of the £300 fee. In this case, the total uplift that should be awarded is 500 percent. That means that there would be an additional £1,500 on top of the licence fee of £300, which comes to a total of £1,800. I consider it appropriate to apply a percentage uplift on the fee and to that extent again Mr Webb's claim is somewhat capped by the level of the licence fee.
30. In addition Mr Webb seeks interest and I award him interest from May 2012, which is the date from which he knows that the image was being used, until the date of judgment. That is a period of two years, ten months.
31. I do *[not?]* accept that there is a claim for interest under the Late Payment of Commercial Debts Act, nor do I allow the administration fee sought.
32. I award judgment to the claimant in the sum of £1800 for damages, plus interest at four percent per annum amounting to £204.

[Discussions re costs follow]