Citation: *Glanzmann Tours Ltd.* v. *Yukon Wide Adventures,* 2012 YKSM 3

Date: 20120510
Docket: 11-S0062
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON
Before: His Honour Judge Faulkner

GLANZMANN TOURS LTD.

Plaintiff

v.

YUKON WIDE ADVENTURES

Defendant

Appearances:
Peter Sandiford — Counsel for Plaintiff
Thomas de Jager — Appearing on own behalf for the Defendant

REASONS FOR JUDGMENT

[1] This is the tale of a very nice photograph of the aurora borealis or northern lights and of two tourism operators, Glanzmann Tours Ltd. and Yukon Wide Adventures.

[2] The plaintiff, Glanzmann Tours Ltd., is a Yukon corporation owned and operated by Beat Glanzmann. The defendant, Yukon Wide Adventures, is a sole proprietorship owned and operated by Thomas de Jager. Both businesses are closely-held "one man" operations and in the reasons that follow I use the terms "plaintiff" and "defendant" interchangeably to refer to either the corporation, the proprietorship or their principals.

[3] The plaintiff, Glanzmann Tours Ltd., offers guided adventure and sight-seeing tours in the Yukon, primarily to a German-speaking clientele. To promote its tours, Glanzmann Tours maintains a website.

[4] In addition to operating tours, Mr. Glanzmann is also a professional photographer and derives a significant portion of his income through the licencing of photographs he has taken. To market his photographs, Mr. Glanzmann utilizes the services of Corbis Corporation, a large international photo marketing business.

[5] In 1996, Mr. Glanzmann took a stunning photograph of the aurora borealis. The photograph was not sent to Corbis, but was retained by the plaintiff. Around 2007, Mr. Glanzmann uploaded a digital copy of the photo to his own website. According to Mr. Glanzmann, Corbis permits such personal use, so there was still the potential to licence the aurora photo to Corbis. The copy of the photo displayed on the plaintiff's website had no copyright or watermark on it, however, the website itself had a notice that all its contents were copyright protected.

[6] Around December of 2011, a copy of the aurora photo appeared on a website maintained by the defendant, Yukon Wide Adventures. Yukon Wide offers tour services similar to those marketed by Glanzmann Tours. Both cater almost exclusively to the German market. In short, Mr. Glanzmann and Mr. de Jager are direct competitors. Indeed, the aurora photo was being used by Yukon Wide to promote a Northern Lights Tour: Mr. Glanzmann offers a similar tour

and was using the photo on his website to the same purpose.

[7] After Mr. Glanzmann became aware that his photo was being used, he contacted Mr. de Jager who immediately removed the photo from Yukon Wide's website.

[8] As indicated, both businesses cater almost exclusively to the German-speaking market. However, the plaintiff's aurora photo only appeared on the English language portion of the defendant's website. The defendant never, in fact, sold or ran any of the Northern Lights Tours and so made no profit from the use of the photo.

[9] It is clear, and the defendant does not seriously dispute, that it infringed the plaintiff's copyright in the aurora photo. Mr. de Jager claims that the infringement was inadvertent. He testified that he found the photo among computer files he inherited when he bought the business in 2003. There was no indication of copyright and he assumed that it was permissible to use the photo.

[10] The plaintiff, however, says that he did not put the photo on his own website until 2007 and since the photo had never been published anywhere else, the photo could only have been obtained from the Glanzmann Tours website. By 2007, Mr. de Jager was in sole control of Yukon Wide Adventures. Consequently, the plaintiff says that if the photo was on the defendant's computer, it was Mr. de Jager who downloaded it.

[11] However, it is difficult to believe that Mr. de Jager would be so rash as to

deliberately copy the photo from the website of another local tourism operation marketing an identical product. This is especially so given that similar aurora photos are readily available for nominal fees from internet-based stock photo agencies. I note that the history of the aurora photo from the time it was digitized, including the copies of it that made their way into the Glanzmann Tours and Yukon Wide Adventures websites, might have been discoverable by reference to the metadata that accompanies digital photo files. Metadata can include when an image was created and when a computer copy of it was made or manipulated. However, neither party offered such evidence.

[12] At the end of the day, it remains unclear how the plaintiff's aurora photo found its way onto the defendant's computer and website. However, it is not a defence to the present action that the copyright infringement was inadvertent. The plaintiff is still entitled to damages equal to the loss he suffered from the infringement.

[13] This is where the real issue in the case arises.

[14] Mr. Glanzmann's position regarding his alleged losses was fraught with problems. Originally, the plaintiff claimed damages of $5,000.00. On the day of the trial he sought to amend his claim to seek $7,500.00. I refused to allow the amendment as it came far too late in the day.

[15] To support the claim for damages, Mr. Glanzmann swore an affidavit claiming revenues from sales of certain of his photos of as much as $20,000.00. However, during his testimony at trial, it became clear that the figures in the

affidavit were wildly inaccurate, as the revenues that he calculated in dollars were often paid in other currencies such as German marks. Moreover, it also became apparent that the figures were gross revenues, whereas the plaintiff actually receives 37.5 % of the licencing fees.

[16] Nevertheless, it was eventually established that some of the plaintiff's photographs have earned considerable revenue – netting him $5,000 or more in licencing fees. Typically, a licencee would pay much less for a one-time use, but some photos are licenced multiple times. Other photos have generated four figure fees from a single licencing.

[17] Mr. Glanzmann produced at trial a number of his photographs as well as agency records showing the fees he received following sales by Corbis. The difficulty with this evidence is that there is no way to determine in advance what sort of revenue a particular photograph will produce. Some will sell well, others less so, and some not at all.

[18] The aurora photo is, to my eye, a very nice photo, but as I have indicated, similar photos are readily available for nominal fees. Interestingly, some of the plaintiff's photographs that did generate considerable income were, again to my eye, rather ordinary looking, something the average tourist might have taken while on vacation. So, the potential value of a particular photograph is difficult to predict.

[19] As indicated, Mr. Glanzmann produced evidence concerning the sales of some, but by no means all, of his photographs. How he selected them is

unclear. He gave no evidence regarding the average market value of all his photos. He did testify that his annual earnings from photography have varied between five and twenty-five thousand dollars.

[20] None the less, given Mr. Glanzmann's undoubted success as a photographer and some of the sales he has enjoyed, it is reasonable to assume that the aurora photo has considerable value: potentially several thousand dollars in all and a single-use value of as high as $1,000.00.

[21] However, the plaintiff does not, as one might expect, claim damages on the basis of a single use – i.e. what Yukon Wide would have to pay to properly licence and use the photograph. Rather, the plaintiff claimed that the defendant's use had destroyed any and all commercial value the photograph had and he claimed damages on that basis.

[22] Mr. Glanzmann claimed that his understanding of his contract with his agent, Corbis, was that Corbis would not accept photos that had been used elsewhere.

[23] When the court expressed some skepticism about the value of Mr. Glanzmann's interpretation of a legal document he had not produced in evidence, he sought, and was granted an adjournment in order to obtain the contract and it was later provided to the court.

[24] Unfortunately for the plaintiff, the contract does not contain what he says it does. In the first place, it is apparent that Corbis will accept photos that have

been used before since, on the plaintiff's own evidence, it has accepted photos which the photographer has published himself – on his own website, for example. Moreover, the contract clearly contemplates the non-exclusive licencing of photos. Even where the licencing argument is exclusive, the contract simply provides that the photographer must make Corbis the exclusive agent for the photo and must warrant that he has not previously licenced the photo to anyone else. None of this would in any way prevent Mr. Glanzmann from licencing the aurora photo to Corbis.

[25] Mr. Glanzmann also testified that he had a telephone conversation with a representative of Corbis and was told that they would no longer be interested in the aurora photo if it had been used elsewhere. There are at least three problems with this evidence. First, the evidence is hearsay. Second, it contradicts the wording of the agency contract itself. Third, it is far from clear that the scenario the plaintiff presented to the Corbis representative concerning the provenance of the aurora photo was an accurate representation of what actually occurred in this case. The aurora photo has not been previously licenced and it appeared but briefly on the defendant's English language website – a site which, given the defendant's clientele, is probably little viewed.

[26] I have already noted that, thus far, the plaintiff has made no attempt to market the photo in question. It may be reasonable to assume that the value of the photo has been diminished somewhat, but there is no evidence capable of showing that the value of the aurora photograph, whatever it was, has been completely and utterly destroyed by the actions of the defendant.

[27] In my view, the only reasonable estimation of damages in this case must be based on a *reduction* in the market value of the photo. One measure of that reduction in value would be the cost of a single use licence -- which would be unlikely to have netted the plaintiff more than $400.00 to $500.00, especially considering that the plaintiff receives 37.5% of the gross revenue.

[28] Even assuming that the aurora photograph's history of misuse by the defendant might complicate its marketing and further reduce its value, the plaintiff's losses have not been proven to exceed $1000.00 and I give judgment for the plaintiff in this amount.

[29] With respect to costs, I find that success has in a sense been divided. Moreover both parties, but the plaintiff in particular, caused the proceeding to become needlessly protracted. In the result, each party will bear their own costs.

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FAULKNER T.C.J.