

**REPUBLIC OF TRINIDAD AND TOBAGO**

IN THE HIGH COURT OF JUSTICE

(Tobago)

Claim No. CV2018-01224

Between

**SEAN DRAKES**

Claimant

And

**DONALD GRANT**

Defendant

**Before the Honourable Mr. Justice R. Rahim**

Date: January 22, 2021

Appearances:

Claimant: Mr. J. Nathu

Defendant: Mr. D. Redman

## JUDGMENT

1. There are two agreed issues for trial in this case namely whether the claimant holds copyright in a particular photograph and if so whether the actions of the defendant breached that copyright.

### The Claim

2. The claimant is a professional photographer resident in New York City USA and visits Trinidad and Tobago from time to time to document the Carnival season as part of his international portfolio of work. He is the sole copyright holder of a photograph of a Carnival costume designed by Peter Minshall entitled "The Dying Swan, Ras Nijinsky in Drag as Pavlova" (the image) taken by him on January 28, 2016 at the Kings and Queen Carnival competition held at Queens Park Savannah.
3. The claimant is also an active contributor to Getty images a news aggregation service that makes copies of the work of contributors available to newspapers and other media outlets worldwide on the basis of royalty payments. The claimant is paid royalties whenever his work is licenced for use in newspapers, magazines, is televised, streamed or blogged.
4. The claimant was the only one who testified on his case. He gave that he is the author and sole owner of the copyright in the photograph including all moral and economic rights therein. Having created the image, the claimant uploaded it to the Getty website on January 28, 2016 in keeping with his usual practice and relationship with Getty. It is his evidence that such images are to be used solely for editorial purposes such as news feature reporting. Use of the image for commercial purposes such as advertising and/or marketing is not permitted. On April 4, 2016, he

discovered an advertisement poster in his newsfeed on his facebook page purporting to be one for an event entitled "Tobago Fashion Coda 4". The advertisement contained an unauthorized reproduction of the said image. Both the image uploaded by the claimant and the advertisement forms part of the evidence in this case. The face of the advertisement carries the letters DS at the top with the name Don Grant immediately thereunder and the word "Events" being set out under Don Grant. It is the evidence of the claimant that the defendant organized, promoted and advertised the event. It is to be noted that this averment was also contained at paragraph 14 of the Statement of Case the contents of which has been admitted by paragraph 12 of the Defence.

5. According to the claimant a substantially enlarged version of the poster was featured by the defendant at the A.N.R. Robinson International Airport in Tobago. Further, a photograph of the Manager of a hotel in Tobago standing next to the poster was posted on the facebook page for the event. A copy of the facebook post was annexed to the witness statement of the claimant. Further, the image containing a Getty watermark was posted by the defendant on the facebook page for the event subsequently. That post advertised the fact that the costume was coming to the Fashion Coda. This post is also annexed to the witness statement of the claimant. The defendant did not admit the first two publications set out herein in his Defence but admitted the latter by way of paragraph 19 of his filed Defence.
6. It is also the evidence of the claimant in chief that he did not discuss or enter into any agreement with the defendant for use of the said image for advertising, promotion or marketing of the event. The image was his original intellectual creation as the sole original author of the work. It is his

case therefore that he holds the exclusive right to authorize or prohibit reproduction, public display or communication to the public through the photograph. He noted that not only was the advertisement an unauthorized reproduction of the image but it was also distortion, mutilation and unauthorized modification.

7. Consequent upon his discovery, the claimant entered into discussions with the defendant and it is his case that the defendant agreed to pay for use of the image in the sum of \$5,800.00. The claimant has annexed his correspondence with the defendant on facebook in that regard and the invoice dispatched to the defendant who subsequently refused to pay.
8. Finally, a pre action protocol letter dated November 20, 2017 was dispatched on the instructions of the claimant but the issue remained unresolved.
9. In cross examination the claimant testified that he took several photographs of the costume but he did not annex the original photo to his claim. He did in fact however attach the photo that he uploaded to Getty images. In the court's view the issue of the court not having had sight of the original digital photo is not relevant to the issues to be decided in light of the admissions by the defendant.
10. The claimant admitted that he had entered into a contributor's contract with Getty but had not attached a copy to his case. He was also adamant that the photograph had not been taken for commercial purposes despite the suggestion to him that this was indeed the case. In that regard the evidence is as follows;

Q *And in your Witness Statement you have said the purpose of -- you have said what is the purpose of the images in your relationship with Getty, and I imagine that would also be in that agreement?*

A *The agreement would outline that the content submitted to Getty Images --*

Q *No, my question is a lot simpler than that. What you have said here is supposed to be in the agreement. Is it or is it not?*

A *What have I said here?*

Q *He said that, "Pursuant to my relationship with Getty, such images are to be used solely for editorial purposes such as news or feature reporting, and not for commission use such as advertising or marketing".*

A *Precisely. My contract would outline that they do not provide images for commercial use.*

Q *And that would be in the agreement?*

A *Absolutely.*

Q *And my point is, is that we don't have the benefit of that agreement to see exactly what the relationship is about?*

A *Well, you do have the extract -- the excerpt from the Getty site --*

Q *No, no. I'm talking about the agreement.*

A *The excerpt that was provided relates directly to what exist in the agreement with regards to the context in which images on the Getty --*

## The Defence

11. The pleaded defence is that the claimant is not the owner of the copyright as he acquired no rights himself to commercialize the photograph save for the purpose of news. To this end the defendant relied on the application for accreditation made by the claimant in 2016. Further that Getty Images does not fall within the scope of section 13 of the Copyright Act and is not a news outlet. The defendant admitted in his pleading that “he had a role” in that he hired someone to produce the brochure. He therefore asserted that he needed no permission to use the image as the claimant acquired no rights to the image. Lastly he pleaded that he agreed to pay as he had been mistaken as to the rights of the claimant over the image.
  
12. In his evidence, he being the only witness on his case, the defendant admitted that he traded as DG Events and that he was the producer of the Fashion Coda. In February 2016 he hired a graphic arts company to create a poster for promotion of the event as he had hired Peter Minshall to have the costume perform at the event. In that regard he assumed that the company he hired had complied with all requirements for use of the image. However, after the publication he was contacted by the claimant who asserted copyright and the defendant attempted to settle the matter without verifying the authenticity of the claimant’s assertion. Subsequently he obtained the application for accreditation filed by the claimant when seeking permission to take photographs for the Carnival season. It is his testimony that that the application was limited to photography for news purposes only. The application is annexed to his witness statement. As a consequence, he formed the view that the claimant held no copyright in the image as his permission was limited to news purposes only.

13. In cross examination the defendant did not admit that the claimant took the photograph. However, at paragraph 15 of his defence the defendant averred that he did not deny paragraph 19 of the Statement of case. Paragraph 19 of the Statement of case reads:

*The claimant contends that the said photograph was his original intellectual creation. The claimant further contends that he is the sole original author of such work and as such only the claimant can have the exclusive right to do, authorize or prohibit the reproduction, public display or communication to the public of the work or copy of the work.*

14. Further, the defendant denied that he had known that the claimant was associated with the photograph prior to the date of the event on April 21, 2016 at paragraph 5 of his witness statement and again in cross examination. However, when cross examined as to a series of conversation which he had with the claimant by text messages prior to the event starting on the 4<sup>th</sup> April 2016, the defendant admitted the terms of the conversation. The following are the relevant parts of the evidence;

Q        *So, Mr. Grant, what you have said at paragraph — do you have it in front of you, Mr. Grant?*

A        *Yes, Mr. Nathu.*

Q        *All right. So you have said, at paragraph 5 of your Witness Statement, “The promotional data were publicized and sometime after the event took place I was informed by the Claimant, Sean Drakes, that he owned the copyright and was seeking payment for use of the photograph which the graphic company used to create the advertisement.”*

*So, Mr. Grant, you're saying that it was only after the event that you were informed that Mr. Drakes was, in some way, related to this photograph?*

*A Correct.*

*Q It was only afterwards; never before?*

*A Correct.*

*Q Okay. But, Mr. Grant, that's not true, is it? You knew before.*

*A I did not take the photograph and I did not know that*

*—*

*Q No. Mr. Grant, my question is, didn't you know, before the event, that Mr. Drakes was associated with this photograph?*

*A I don't recall.*

*MR. NATHU: My Lord, may I refer the Defendant to Document No. 2 on the bundle of documents.*

*My Lord, that document is on page 11 of the bundle of documents.*

*.....*

*Q So, Mr. Grant, are you seeing the documents that are on the screen?*

*A Yes, Mr. Nathu.*

*Q Does that look familiar to you, Mr. Grant?*

*A I am trying to read it.*



Q Mr. Grant, they are extracts, from Facebook Messenger, of a conversation that you had with the Claimant. Does that look familiar? Does that look familiar, Mr. Grant?

A Yes, Mr. Nathu.

Q Do you recall a conversation, with the Claimant, via Facebook Messenger?

A I recall a conversation; the content, I don't recall specifically.

.....

Q You don't recall the conversation. But you see the date.

Now, would you accept that the text in the blue bubble is that of the Claimant, Mr. Drakes?

A Could you enlarge it so I could read it, please?

Q Certainly. And I can read it for you.

It says, "Greetings, Mr. Grant, I am in Miami. I am just seeing that you attempted to reach me. I am just hearing your message about your interest in using my photography in your events marketing. Minutes ago I discovered that my work appears in your marketing piece though we did not get to speak. Appreciate if you would identify how my photo was sourced for use on your ads. My telephone number: 404-654-0859 and my email is seandrakesphot@gmail.com. Cheers."

Do you see that, Mr. Grant?

A Yes, Mr. Nathu.

Q *And do you accept that those are the words of the Claimant in a conversation that he had with you?*

A *In this, yes, Mr. Nathu.*

Q *And immediately below that, Mr. Grant, there are some texts: "My pleasure. Are you coming for Coda? I was also able to convince Mensch & Company that is the best shot for the Swan going forward."*

*Do you see that, Mr. Grant?*

A *Yes. Okay, I see it now.*

Q *And those are your words, are they not?*

A *Yes, Mr. Nathu.*

Q *And that is your profile picture in the circle next to the conversation, is it not?*

A *Yes, Mr. Nathu.*

Q *Now, Mr. Grant, a moment ago you said that you were able to read the date as 4/04/2016?*

A *Correct.*

Q *And you already established that the event took place on 21/04/2016, not so?*

A *Correct.*

Q *So, therefore, you had conversations with the Claimant prior to the event. Isn't that correct?*

A *Correct.*

Q But in your Witness Statement you said it was afterwards. So, Mr. Grant — but in your Witness Statement you said it was otherwise. You said it was after the event. Isn't that what you said in your Witness Statement?

.....

Q Mr. Grant, is your email address dgevents9@icloud.com?

A Yes, Mr. Nathu.

Q And then we see text: "Hello Sean, it was a pleasure speaking with you yesterday. Please, let me know about your availability to come to Coda on Thursday, 21<sup>st</sup> April 2016. Thanks for your time and courtesy in this matter. Best, Don."

Do you see that?

A Yes, Mr. Nathu.

Q So you are, in this text paragraph, asking the Claimant whether he can come to the event. Isn't that so?

A Correct.

Q And you accept, Mr. Grant, that this conversation took place before the event?

A Correct.

Q It took place on 5<sup>th</sup> April, 2016. Not so?

A Correct. Correct, yes.

Q So clearly, Mr. Grant, you knew before the event that the Claimant was associated with this photograph, did you not?

A *Associated, yes.*

Q *And clearly, Mr. Grant, you had conversations and discussions with the Claimant, about the photograph, before the event?*

A *Yes, I did.*

Q *So, therefore, Mr. Grant, it is not true at paragraph — what you have put at paragraph 5 in your Witness Statement, that you were informed by the Claimant, Sean Drakes, that he owned the copyright and was seeking payment sometime after the event took place, that's not true, is it?*

A *Well, I know not the exact date he was seeking payment.*

15. The court has set out the above extensively because the above two instances of cross examination are merely examples of the tenor of the cross examination in that the defendant at first denied relevant matters but then accepted them when confronted with his written communication with the claimant.

16. Additionally, the defendant accepted in cross examination that he was the one ultimately responsible for the poster, any advertising and promotional material although he had hired others to prepare the material. He also admitted that he was responsible for the poster that was displayed at the A.N.R Robinson International Airport and agreed to the mas being used in the poster.

## The first issue

### Whether the claimant holds copyright in the photograph

17. It is not in dispute that the image was taken by the claimant. The starting point must therefore be the provisions of the **Copyright Act** Chap 82:80 (the Act) which sets out firstly by its interpretation section (section 3) that “copyright” is the right subsisting under Part II of the Act. The other relevant sections are as follows:

*5. (1) Copyright is a property right which subsists in literary and artistic works that are original intellectual creations in the literary and artistic domain, including in particular—*

*(i) Photographic works...*

#### *Original work*

18. The issue therefore is whether the image as taken on a camera by the claimant and uploaded on Getty can be considered his original intellectual creation. In this regard two matters are of note. Firstly, the claimant in cross examination testified to the skill used by him to capture the image on camera. The discourse between the claimant and Attorney for the defendant proceeded as follows:

*Q When you filed your Witness Statement, you could have reproduced the exact photo to show that that photo that you are claiming that you uploaded is one that you have in your possession?*

A When you say "reproduce", I think that's the point of the question that I'm a little unclear about. What you mean by reproduce?

Q Reproduce like put as an exhibit to Witness Statement.

A The photo that I submitted to my Witness Statement

--

Q That you claim to be uploaded.

A Right. That is exactly what exist on the Getty Images website is the photograph that I took.

Q But you could have put one that is not from the Getty's --

A (Indiscernible 9:54:26 a.m.).

Q Sorry?

Q No, when you say reproduction to a photography we translate that as duplication, so you don't duplicate an original image. There's only one frame. When you're shooting movement, you shoot multiple frames. Like when you're shooting sports, you have to shoot constantly to catch that one image that captures everything in, you know, where you really think it's a fabulous shot. So there is only one rendition of that frame.

19. Secondly, in the course of re-examination the following was stated by the claimant;

Q Mr. Drakes, can you tell us whether the photograph in SD-1 is identical to that in SD-2?

A Is exactly identical, down to the shadows.

Q And how do you know that -- well, you said the shadows. Could you just explain what you mean by the shadows?

A Right. That was the first thing. In the series of photographs that I took, there are some -- one of the most distinguishing features, if you zoom right in the feet, there are certain points where I was able to look to see whether one of the dancers toes of the costume was touching the ground. That was the degree of scrutiny I went into before I brought this to you because I know there were other photographers there. And, so, looking at that and also the way the shadow falls, those are some of the details that I looked into as well as the shadows within the pleats of the dress, because no two photographers are right on each other. So someone is standing three feet away, their shadow is not going to fall just exactly as my shadow. So I looked at the shadows in this poster to my original and that's how I was able to say that is my image.

20. In the court's view the evidence set out above spoke to the ability of the photographer to create an image which is unique in composure, framing, lighting and angle to name a few original attributes. These are matters that engage the creative mind of the photographer while shooting as is obvious throughout the evidence above. It requires a professional effort from the photographer which is only obtained through experience, effort by way of the exercise of known and unknown techniques of photography as a matter of judgment and labour<sup>1</sup>.

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<sup>1</sup> See the well-known cases of Ladbroke v William Hill (1964) 1 All ER 465 and Antiquesportfolio.com plc v Rodney Fitch & Co Ltd [2000] IP & T 1375 in which it was held that copyright subsists in a simple photographs of three dimensional objects, because the taking of such photographs involves judgment that is, the positioning of the object, the angle from which the picture is taken, the lighting and the focus.

21. Further, the court accepts the submission of the claimant that a photograph of a mas costume is on its own capable of being an original intellectual creation separate and apart from the work of mas itself. The Act treats with this at section 3 in that “work of mas” is described as;

*“an original production intended to be performed by a person or a group of persons in which an artistic work in the form of an adornment or image presented by the person or persons is the primary element of the production, and in which such adornment or image may be accompanied by words, music, choreography or other works, regardless of whether the production is intended to be performed on stage, platform, street or other venue.”*

22. Suffice to say that although an argument based obliquely on the work of mas provision was pleaded in the defence at paragraph 26, that issue is no longer relevant to the issues the court must decide and it has not been raised by the defendant in submissions.

23. The defendant’s submission on this issue is that notwithstanding the provisions of section 5(1)(i), the claimant must satisfy the court that he acquired such rights. In this regard it is submitted that the evidence demonstrates that the claimant sought and obtained the right to take the photograph for the purpose of news and not for the purpose of commercialization.

#### *Authorship*

24. The court also finds that the photograph was authored by the claimant as he was the natural person who created the work. In that regard there is no



evidence otherwise from the defendant to dispute the evidence of the claimant. There is however evidence that the defendant acknowledged the association of the claimant in the photograph both in cross examination and in the pleaded defence. This association could only in the circumstances of this case be understood to refer to the claimant being the photographer and the author in the context of the admissions set out above and the inconsistencies between the witness statements of the defendant and his admissions in cross examination.

25. Further, in a letter dated January 10, 2018, in response to a letter by attorney for the claimant, the then attorney for the defendant admitted at paragraph 4 thereof that the claimant took the photograph pursuant to the arrangement with the NCC<sup>2</sup>.

#### *Accreditation*

26. The defendant argued essentially that the claimant was not accredited to use take and use photographs for the commercial purposes but only for the purpose of news. As a consequence, the claimant did not obtain any copyright in the photograph. In the court's view there is a marked distinction between accreditation and copyright. The starting point is the natural and ordinary meaning of the word accredit. The Pocket Oxford English Dictionary 10<sup>th</sup> edition provides two meanings for the word. The first is to give someone the credit for something and the second is to give official authorization to.

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<sup>2</sup> See attachment J to the statement of case

27. The court must therefore determine the meaning of the word as used in the accreditation agreement<sup>3</sup>. The heading of the agreement made between the claimant and the National Carnival Commission, NCC (the state body responsible for Carnival events) sets out that the document contains “*Accreditation terms and conditions and guidelines for media accreditation*”. Clause 2 sets out the process inclusive of an application and photographs. Clause 3 sets out that persons accredited are allowed entry into shows and events promoted by the NCC and provides mandatory guidelines as to what shall be worn and visibility. It also provides that accreditation cannot be transferred. Clause 4 provides for use of the facilities and the application of utmost care so as not to cause damage or loss.

28. Clause 5 is highly instructive in the court’s view. In this clause the NCC disclaimed all rights to ownership, use and/or exploitation of any intellectual property rights of producers of mas, designers, musicians, performers or other third party NCC events. In particular it provides;

*An accredited person must, prior to the event, obtain a licence to record and use, in whatever media or form that may be required, the works of producers of mas, designers, musicians, performers or other third parties at NCC events. The only permitted exception is where a media representative is recording an event for the limited purpose of publishing short excerpts for the reporting of current events. Otherwise an accredited person must show such a licence when requested by the NCC official or any authorized agent of the Producers, Designers, Musicians and others, failing which he or she may be requested to cease recording the event. Accredited*

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<sup>3</sup> See document number 11 of the List of Agreed documents.

*persons are encouraged to familiarize themselves with the Copyright Act Chapter 82:80 of the laws of Trinidad and Tobago.*

*Accredited persons who intend to record and use proprietary rights in any video and/or still photographs and/or audio production at NCC events must obtain from Rights Holders prior to the event, a licence to record and use, in whatever media form that may be required at any show and/or event promoted or organized by the NCC and shall be responsible for ensuring that they have authorization of the Rights Holders and making proper arrangements with the Rights Holder for the payment of fees rights and/or royalties.*

29. Finally, clause 9 sets out the purpose of accreditation as follows;

*Accreditation by the NCC is ONLY for access to the venue and use of facilities provided for persons. The rights to record, publish, broadcast or transmit events in any format must be negotiated with the relevant rights holders...*

30. The agreement also provides for the use of enclosures for accredited working media only.

31. The defendant has submitted that:

*The National Carnival Commission clearly sought to limit the commercializing of the festival by issuing accreditations. The Claimant clearly understood this by applying for the limited accreditations as evidenced in DG1.*

*However, the Claimant gained entry based on his sought and acquired accreditation but from his own testimony, he has*

*sought to exploit this accreditation for a commercial purpose. This is morally wrong. Copyright laws seek to protect the artist from moral wrongs. The Claimant is seeking that very law to endorse his own immoral actions. If he wanted to commercialize his accreditation, he ought to have applied for and pay the higher fee for the appropriate fee. Therefore, the Claimant cannot seek to enforce a copyright when he in fact violated the permission he obtained to enter this show to take pictures. The right obtained clearly limited his use of the photograph to news purposes only.*

32. It is clear to the court however that the accreditation granted by the NCC falls squarely into the second definition set out above in that the agreement provides for permission or authorization to persons to have access to its events for several purposes inclusive of commercial use. Clause 5 seeks to make it clear that it is the duty and the responsibility of the applicant to obtain copyright rights or permission from the relevant persons to use the material except where its use is for short new excerpts. The NCC has sought to make it clear at several parts of the agreement that it shall not be held responsible for breaches of copyright. It follows that the NCC does not have or purport to have or hold copyright in any of the productions and therefore cannot transfer or create what it does not have contrary to the submission of the defendant set out above. Quite simply the accreditation agreement provides for permission to enter and use NCC events and facilities for the purpose of recording of carnival events and the court so finds.

33. When viewed from that perspective it becomes clear that the issue of copyright grant or infringement is not one for the NCC and the failure of an accredited person to obtain permission or copyright from the artist is

only relevant to the NCC in so far as access may be denied to events where such permission or copyright was not obtained save and except that no such permission or copyright is required where the use is solely for the purpose of news. It follows that issues of copyright between the holder and the copyright is a matter between the person accredited and the third party and the court so finds.

34. In any event, the court finds that copyright rights were created when the photograph of the mas was taken and are independent of and distinguishable from the copyright rights that are attached to the mas costume itself. There were therefore two separate copyrights created. This case is about the former and not the latter. To that end the submissions of the defendant is in the respectful view of the court misconceived.

35. Further, photographic work is described at section 3 of the Act as the recording of light or other radiation on any medium on which an image is produced or from which an image may be produced, irrespective of the technique (chemical, electronic or other) by which such recording is made; a still picture extracted from an audio-visual work shall not be considered a “photographic work” but a part of the audio-visual work concerned.

36. The court therefore finds that upon creation of the photograph by the claimant, the claimant became the author of the photograph which was his original intellectual creation. It follows that he did in fact hold copyright in the photograph.

## **Second Issue**

### **Whether the actions of the defendant breached that copyright**

37. Section 8 of the Act confers the following exclusive rights;

*8. (1) Subject to the provisions of sections 9 to 17, the owner of copyright shall have the exclusive right to do, authorise, or prohibit the following acts in relation to the work:*

*(a) reproduction of the work;*

.....

*(c) adaptation, arrangement or other transformation of the work;*

.....

*(g) public display of the original or a copy of the work;*

*And*

*(j) communication to the public of the work.*

38. It is the case for the claimant that his original photograph was reproduced, adapted into a poster for a commercial event and publicly displayed the work by placing same in social media and thereby communicated the work to the public thereby infringing his exclusive rights. In that regard the claimant exhibited the photograph that he uploaded to Getty Images with the Getty Images watermark thereon. He has not produced the original image prior to upload on Getty and he has admitted this in cross examination. In the court's view the fact that the original photograph was not exhibited is of no moment in the circumstances of all of the evidence in this case as the claimant has identified the photo that carries the Getty mark as the one uploaded by him.

39. Further, infringement is defined by section 3 of the Act as any act that contravenes any rights protected under the Act. Infringing copies means; an article, the making of which constitutes an infringement of the copyright work, performance, sound recording or Broadcast.

40. Public display is defined by **section 3** of the Act as the showing of the original or a copy of a work—

*(a) directly;*

*(b) by means of a film, slide, television image or otherwise on screen;*

*(c) by means of any other device or process; at a place or places where persons outside the normal circle of a family and its closest social acquaintances are or can be present, irrespective of whether they are or can be present at the same place and time or at different places or times, and where the work can be displayed without communication to the public within the meaning of the definition of “communication to the public”.*

41. Communication to the public is defined by the said section as the transmission to the public by wire or wireless means, including the making available to the public of the images or sound or both, of a work, performance or sound recording, in such a way that members of the public may access it from a place and at a time individually chosen by them;

*Copying, reproducing and or adapting the photograph*

42. The claimant submitted that the court may infer on the evidence before it that the photograph was copied, adapted and reproduced. In that regard he relied on the case of **Designers Guild Ltd v Russell Williams (Textiles) Ltd (t/a Washington DC)** [2000] 1 W.L.R. 2416, Lord Millett noted at page 2425:

*“The first step in an action for infringement of artistic copyright is to identify those features of the defendant's design which the plaintiff alleges have been copied from the copyright work. The*

*court undertakes a visual comparison of the two designs, noting the similarities and the differences. The purpose of the examination is not to see whether the overall appearance of the two designs is similar, but to judge whether the particular similarities relied on are sufficiently close, numerous or extensive to be more likely to be the result of copying than of coincidence. It is at this stage that similarities may be disregarded because they are commonplace, unoriginal, or consist of general ideas. If the plaintiff demonstrates sufficient similarity, not in the works as a whole but in the features which he alleges have been copied, and establishes that the defendant had prior access to the copyright work, the burden passes to the defendant to satisfy the judge that, despite the similarities, they did not result from copying.”*

Features of the Poster and the photograph that the claimant alleges have been copied adapted and reproduced

43. The court has scrutinized the Getty Image and the poster for the purpose of comparison. It is clear to the court and it finds that the photo used in the poster is the same photograph as that contained in the Getty Image for the following reasons:

- a. The angle from which the photo was taken appears to be the same angle as that at which the photographer would have been at in the photo used in the poster.
- b. The angle of the pose of the costume is the same in both and the image inclusive of the appearance of the masquerader and the costume.
- c. The general pose of the costume is the same with toes to the floor.
- d. The shadow on the ground to the left seems to be the same.



- e. The arms of the masquerader are outstretched in the same manner.
- f. The defendant has admitted at paragraph 4 of his witness statement that he gave instructions to the graphic arts company A&C Marketing to use an image of the Dying Swan for the promotion of the show. It follows that the defendant admitted that he authorized and instructed the use of the very photo to be used to prepare create the poster and the court so finds.

44. The court therefore is of the view that the similarities are sufficiently close, numerous or extensive to be more likely to be the result of copying than of coincidence. When considered together with the admissions of the defendant and on his behalf, set out above the court is satisfied that the claimant defendant did in fact have access to the photo prior to the poster being created. It is therefore more likely than not that the photograph was copied and placed on the poster some aspects of it having been omitted inclusive of the Getty watermark. The court also notes that the burden would have fallen on the defendant to demonstrate that the photograph was not copied and he has failed to discharge this burden.

45. Additionally, the evidence set out above demonstrates that the photo was publicly displayed on the social media app facebook and at the A.N.R. International Airport in that the copy as contained in the poster was shown directly online thereby providing visual access to persons throughout the world.

46. The court therefore answers the issue in the affirmative in that it finds that the defendant did infringe the copyright exclusive rights of the claimant in the photograph by copying same and publicly displaying that copy.

## Conclusion

47. In concluding there is one other matter raised by the defendant in his submissions that the court ought to treat with. The defendant submitted that the claimant averred in his statement of case that the use of the photograph was in violation of what is referred to as the Getty Comp Licence. When cross examined about the said licence the claimant's answer was of no assistance and copy of this document was not produced in court. In that regard the submission of the defendant is that the claimant would have transferred his rights to Getty pursuant to that agreement. In the court's view there is no merit to this submission as there is no evidence of the transfer of any rights to Getty whatsoever. The evidence is in fact to the contrary in that the claimant has testified that his agreement with Getty was that it would be used solely for editorial purposes such as news or feature reporting and not for commission use such as advertising or marketing. In that regard the fact that the claimant has not exhibited his agreement with Getty does not make his evidence thereon unbelievable and the court accepts his evidence on same in the absence of any other evidence to the contrary.

## Disposition

48. The court therefore makes the following order;
- a. The defendant shall pay to the claimant damages for infringement of the claimant's copyright in that photograph *of The Dying Swan Ras Nijinsky in Drag as Pavlova* created by the claimant on January 28, 2016 and uploaded to Getty Images on January 28, 2016.

- b. The defendant shall pay to the claimant the prescribed costs of the claim.
- c. Damages are to be assessed and costs quantified by a Master on a date to be fixed by the Court Office.

Ricky N. Rahim

Judge