



## Can You Enhance That?: Copyright in Facts and Retouched Images

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A recent case from Ontario's Small Claims Court serves as a good reminder that copyright does not extend to facts, regardless of the effort and lengths that a researcher may go to in their fact-finding mission, and provides insight into the limitations on copyright extending to the digitization of historical photos. The decision also serves as a reminder that copyright is balanced by user rights, including the right to fairly deal with someone else's work for news reporting, education and research purposes.

In *Goldi Productions Ltd. et al v Adam Bunch*,<sup>1</sup> the plaintiff brought a copyright infringement claim for the use of the "entire story" of a historical figure they had researched, as well as related historic photographs that were uncovered during research, and then digitized.

The plaintiff's "Canadian Anglo Boer War Museum" website catalogued information on Canada's role in the Boer War, and one of the subjects included on the website was J. Cooper Mason, a Canadian who was allegedly the first combat photographer. The plaintiff had contacted Mr. Mason's descendants and accessed the historical figure's diaries and photographs from during the Boer War. Using this information, the plaintiff detailed Mr. Mason's story on the museum website, and included photographs taken by Mr. Mason that the plaintiff claimed to have "enhanced" before posting them online. The defendant subsequently wrote an article titled "J. Cooper Mason and the Great Boer War" which cited its sources (including the plaintiff and the museum website) and reproduced factual information set out on the museum website, as well as Mr. Mason's photographs.

The plaintiff claimed the defendant had infringed copyright in the "entire story" of Mr. Mason, as well as of the photographs taken by Mr. Mason and reproduced on the plaintiff's museum website. On review, the Ontario Small Claims Court quickly dismissed the plaintiff's claim for copyright in the "entire story" of Mr. Mason, noting that "copyright protection does not extend to facts or ideas" and so "the claim of the plaintiff in regards to copyright in the facts of the story must fail."<sup>2</sup>

As for the photographs, the defendant claimed that the images were in the public domain (since they were taken by Mr. Mason, who died in 1923). The plaintiff, however, alleged to have "enhanced" the original photographs by Mr. Mason. The Court observed that, under Canadian law, for a work to be protected by copyright it must be "original," and that for a work to be original it "must be the product of an author's exercise of skill and judgment ... [that] must not be so trivial that it could be characterized as a purely mechanical exercise." In this case, the plaintiff gave evidence that they (1) sourced the photos from Mr. Mason's descendants, (2) photographed the original photos, and (3) put the photos through a computer program to "enhance" the photos.

The Court found that the plaintiff's process of photographing and "enhancing" Mr. Mason's photos amounted to a purely mechanical process and therefore did not meet the standard for originality. While uncovering the historic photos (in which copyright had lapsed) no doubt involved time and effort by the plaintiff, that alone does not give rise to copyright. The Court further found that the process of photographing the photos [and presumably scanning would be treated similarly] and running the images through an enhancement program amounted to a purely mechanical process as described by the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada*. The Court in *Goldie* did not specifically comment on whether skill and judgment may have been involved in photographing Mr. Mason's original photos, but presumably, the facts before the Court did not show sufficient skill and judgment by the plaintiff to give rise to copyright.



protection. Besides that the images had been “enhanced” via a computer program, there does not appear to have been any suggestion that the photos appearing on the museum website were retouched, colour corrected, or otherwise restored or altered. It is also not clear whether the plaintiff specifically dictated how the computer program “enhanced” the photos of Mr. Mason’s original images, or whether this process was entirely automated.

It is worth noting that the Court did observe judicial precedent for copyright in photographs more generally. As has been noted by the Superior Court of Québec,

In the field of photography in particular, originality is recognized by the choice, arrangement and placement of the subject, the choice of the angle of view and lighting, and artistic work and the personal effort of the photographer [translated].

The Ontario Small Claims Court in *Goldi* further noted a US case with “virtually identical” facts,<sup>5</sup> in which a New York district court noted that:

There is little doubt that many photographs, probably the overwhelming majority, reflect at least the modest amount of originality required for copyright protection. “Elements of originality . . . may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved.”

Various elements of photography may give rise to sufficient originality for copyright to subsist in photographs. Depending on how a photographer were to retouch and “enhance” a historical photograph, it is arguable that such augmentations could give rise to a separate layer of copyright protection over the resulting “remastered” image. Notwithstanding the decision in *Goldi*, the door remains open for those exercises to create a separate layer of copyright as a result of the skill and judgment involved in restoring or otherwise altering the original photos.

Finally, notwithstanding that the Court concluded that the plaintiff held no copyright in the facts or images, the defendant’s use was found to be a fair dealing with the content on the museum website. Although the Court did not engage in a full fair dealing analysis, it agreed with the defendant’s submission that “by analogy the defence of fair dealing should be applied to this situation where the purpose of the article of the defendant was to promote history.” In Canada, fair dealing must be for an enumerated purpose, which includes news reporting (with source attribution), education, as well as research purposes. While the Court did not comment on the purpose, it is not unreasonable for the defendant’s purpose to qualify, particularly since the plaintiff was attributed as the source.

It is interesting to note that there was no issue of whether the Terms of Use for the plaintiff’s museum website prohibited copying the photographs, or otherwise would have restricted the defendants acts. The issue of whether Terms of Use can be effectively relied on to restrict similar activities will be left for a future decision.

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<sup>1</sup> *Goldi Productions Ltd. et al v Adam Bunch*, Court File No.: 15-5800, dated August 1, 2018 [*Goldi*].

<sup>2</sup> *Goldi* at para 11, citing *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 [*CCH*] at para 22.

<sup>3</sup> *Goldi* at para 14, citing *CCH* at para 25.

<sup>4</sup> *Ateliers Tango Argentin Inc. c. Festival d'Espagne & d'Amérique Latine*, [1997] J.Q. no 3693, 84 C.P.R. (3d) 56, at para 39.

<sup>5</sup> *Bridgeman Art Library v. Corel Corp*, 36 F. Supp. 2d 191 [*Bridgeman*].

<sup>6</sup> *Bridgeman* at p. 196. The authors note that the US standard for originality is generally considered to be higher than that in Canada. Nevertheless, the US Court’s approach in this decision is generally consistent with Canadian law with respect to originality of photographs.



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