

Federal Court



Cour fédérale

Date: 20170510

Docket: T-1765-16

Citation: 2017 FC 463

Ottawa, Ontario, May 10, 2017

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

**GEMSTONE TRAVEL MANAGEMENT
SYSTEMS INC.**

Applicant

and

**GRAHAM MCKENZIE ANDREWS,
APPLECROSS INNOVATIONS INC. and
JIANFEI XU**

Respondents

JUDGMENT AND REASONS

I. Overview

[1] Gemstone Travel Management Systems Inc [Gemstone] applies under s 57 of the *Copyright Act*, RSC 1985, c C-42 and s 20(1)(b) of the *Federal Courts Act*, RSC 1985, c F-7 to expunge and modify records in the Register of Copyrights [Register].

[2] For the reasons that follow, the application is granted. Registration Nos. 1119696, 1119701, 1119702 and 1121572 shall be expunged from the Register. Registration No. 1114772 shall be amended to replace “Gemstone Travel Management Systems” with “Gemstone Travel Management Systems Inc”.

II. Preliminary Matter

[1] The Respondent Graham McKenzie Andrews filed neither a record nor a memorandum of fact and law. He did, however, file a Notice of Appearance indicating an intention to oppose the application. On May 4, 2017, the date scheduled for the hearing of the application, Mr. Andrews submitted a letter to the Court confirming that he had not filed a memorandum of fact and law, and advising that he would not appear or make oral submissions at the hearing. He then proceeded to make a number of written submissions in the letter, and asked that the letter form a part of the Court’s record.

[2] A party before the Court must limit its submissions to those advanced in its memorandum of fact and law (*Bridgen v Canada (Correctional Service)*, 2014 FCA 237 at para 35; *Sandhu v Canada (Citizenship and Immigration)*, [2000] FCJ No 902 at para 4 (CA); *Bedeir v Canada (Citizenship and Immigration)*, 2016 FC 594 at para 16; *Federal Courts Rules*, SOR/98-106, Rule 70). This ensures trial fairness and allows each party to effectively prepare for the hearing.

[3] Gemstone asks this Court to disregard Mr. Andrews’ letter dated May 4, 2017. Gemstone takes the position that nothing in the letter affects the relief sought in the application, and also notes that it has had almost no time in which to prepare a response.

[4] The Court has a discretion to permit a party to make submissions notwithstanding the absence of a memorandum of fact and law if the opposing party is not prejudiced (*Leung v Canada (Citizenship and Immigration)*, [1999] FCJ No 1692 (TD) at para 9. The Court may also decline to do so (*Canada (Attorney General) v Transport Beloeil St Hilaire Inc*, 114 FTR 70 at note 2 (TD)).

[5] Mr. Andrews has provided no explanation for his last-minute filing of written submissions and his failure to comply with the *Federal Courts Rules*. Gemstone is potentially prejudiced by Mr. Andrews' irregular and late-filed submissions, and I decline to consider them. Mr. Andrews' letter of May 4, 2017 does not form a part of the Court's record in this application.

III. Background

[6] This application is to a large extent a continuation of the application decided by Justice Richard Southcott in *Andrews v McHale*, 2016 FC 624 [*Andrews*]. In the previous proceeding, Justice Southcott dismissed Mr. Andrews' application for declarations and remedies relating to alleged copyright infringement and infringement of moral rights by Thomas Hilary McHale and 1625531 Alberta Ltd, a company owned by Mr. McHale.

[7] Justice Southcott described Mr. Andrews' claims as follows (*Andrews* at para 2):

Mr. Andrews is claiming that copyright subsists in four software systems, identified as CIRYS Travel and Rooms Management [CIRYS], GTMS, Gemstones Travel Management Systems, and FIFO (Fly-In/Fly-Out) Flight Scheduling and Aviation Program Management Software [FIFO] [collectively, the Software]. He submits that, pursuant to valid registrations under the Act, he is

both joint author and joint owner of the Software, and that he has moral rights related to the Software.

[8] Justice Southcott found that Mr. Andrews had failed to establish his claim of authorship, and that he had no moral rights in the software at issue. He therefore dismissed the application.

[9] The Respondents in *Andrews*, Thomas McHale and 1625531 Alberta Ltd, sought to have four copyright registrations made by Mr. Andrews expunged from the Register. Justice Southcott held that, in the absence of a cross-application, he was without jurisdiction to grant the relief sought by the Respondents in that proceeding (*Andrews* at para 112):

While I appreciate the Respondents' arguments based on the efficiency of seeking expungement in the present proceeding, considerations of efficiency do not confer jurisdiction upon the Court. In the absence of an applicaiton [*sic*] by the Respondents seeking expungement, my conclusion is that the Court does not have the jurisdiction under section 57(4) of the Act to grant this remedy.

[10] Gemstone has brought the present application to remedy the jurisdictional defect identified by Justice Southcott in *Andrews*.

[11] The Respondent, Jianfei Xu, has indicated through counsel that he has no objection to the relief sought by Gemstone. Dr. Xu is himself a Director of Gemstone.

IV. Issue

[12] The sole issue to be determined in this application is whether the records in the Register should be expunged and modified in the manner requested.

V. Analysis

[13] An interested person may apply to the Registrar of Copyrights or to this Court for an order rectifying the Register in three circumstances. First, to add an entry wrongly omitted from the Register (*Copyright Act*, s 57(4)(a)). Second, to expunge an entry wrongly made or remaining on the Register (*Copyright Act*, s 57(4)(b)). And third, to correct an error or defect in the Register (*Copyright Act*, s 57(4)(c)).

[14] Applications to this Court under s 57(4) of the *Copyright Act* turn on their specific facts and the evidence presented. They are brought for a variety of purposes, including to correct the name of the copyright holder (*Kennedy v Ruminski*, 2014 FC 526 at para 22 [*Kennedy*]), to reflect joint ownership of a copyright (*Kennedy* at para 32; *Suttie v Canada (Attorney General)*, 2011 FC 119 [*Suttie*]), to address privacy concerns (*Suttie*; *Jacobs v Canada (Attorney General)*, 2009 FC 628), or to address an invalid registration (*Winkler v Roy*, 2002 FCT 950 at para 62). In *Wing v Van Velthuisen*, [2000] FCJ No 1940 (TD), Justice Marc Nadon found that the respondent was not entitled to apply for the copyright in the first place (at para 77). Justice Nadon observed that “[t]he fact that the Respondent obtained the copyright registration does not in any way indicate that she was entitled to obtain it” (at para 78, citing *Circle Film Enterprises Inc v Canadian Broadcasting Corp*, [1959] SCR 602 at 606), and ordered that the registration be expunged (at para 79).

[15] Gemstone seeks to expunge registration Nos. 1119696, 1119701, 1119702 and 1121572 from the Register pursuant to s 57(4)(b) of the *Copyright Act*, and to amend entry No. 1114772 pursuant to s 57(4)(c) of the *Copyright Act*.

[16] Registration No. 1119696 is titled “CIRYS Travel and Rooms Management”. The registered owners are Applecross Innovations Inc, Graham Andrews and Jianfei Xu. The registered authors are Graham Andrews and Jianfei Xu.

[17] Registration No. 1119701 is titled “FIFO (Fly-in/Fly-out) Flight Scheduling and Aviation Program Management Software”. The registered owners and authors are Graham Andrews and Jianfei Xu.

[18] Registration No. 1119702 is titled “Gemstone Travel Management Systems”. The registered owners and authors are Graham Andrews and Jianfei Xu.

[19] Registration No. 1121572 is titled “GTMS”. The registered owners and authors are Graham Andrews and Jianfei Xu.

[20] Justice Southcott held in *Andrews* at paragraph 89: “Concluding that Mr. Andrews is not an author of the Software, and therefore not a joint author with Dr. Xu as he claims, his application must fail, as his claims to both copyright ownership and moral rights are based on being an author.”

[21] The Respondent Applecross Innovations Inc [Applecross] is a corporation wholly owned and directed by Mr. Andrews. Mr. Andrews has been found by this Court not to be an author of the software in issue, and it follows that Applecross cannot be either. Nor has Applecross suggested otherwise.

[22] As previously noted, Dr. Xu does not object to the expungement of the records from the Register. I am therefore satisfied that registration Nos. 1119696, 1119701, 1119702 and 1121572 should be expunged from the Register.

[23] Registration No. 1114772 is titled "GTMS". The registered owner is Gemstone Travel Management Systems. The registered author is Jianfei Xu.

[24] The amendment sought with respect to registration No. 1114772 is intended only to correct a clerical error. Gemstone has submitted a historical corporate search of the Alberta Register of Corporations for Gemstone, as well as a current search dated July 20, 2016. In both documents, Gemstone is named as "Gemstone Travel Management Systems Inc". I am therefore satisfied that registration No. 1114772 should be amended to replace "Gemstone Travel Management Systems" with "Gemstone Travel Management Systems Inc".

VI. Costs

[25] Gemstone indicated in its memorandum of fact and law that it would not seek costs against Mr. Andrews unless he opposed the application, including by filing a memorandum of

fact and law or making submissions at any oral hearing of the application. Mr. Andrews sought to oppose the application by letter submitted the morning of the scheduled hearing.

[26] For reasons explained above, I have declined to consider Mr. Andrews' letter dated May 4, 2017. Gemstone therefore maintains its position that it is not seeking costs. This is a generous position in the circumstances. Mr. Andrews' conduct in this application has resulted in the needless expenditure of funds and scarce judicial resources. He is fortunate not to be burdened with a significant costs award.

VII. Conclusion

[27] The application is granted. Registration Nos. 1119696, 1119701, 1119702 and 1121572 shall be expunged from the Register. Registration No. 1114772 shall be amended to replace "Gemstone Travel Management Systems" with "Gemstone Travel Management Systems Inc".

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted. Registration Nos. 1119696, 1119701, 1119702 and 1121572 shall be expunged from the Register of Copyrights. Registration No. 1114772 shall be amended to replace "Gemstone Travel Management Systems" with "Gemstone Travel Management Systems Inc".

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1765-16

STYLE OF CAUSE: GEMSTONE TRAVEL MANAGEMENT SYSTEMS
INC. v GRAHAM MCKENZIE ANDREWS,
APPLECROSS INNOVATIONS INC. and JIANFEI XU

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: MAY 4, 2017

JUDGMENT AND REASONS: FOTHERGILL J.

DATED: MAY 10, 2017

APPEARANCES:

Laura J. MacFarlane
Sharn Mashiana

FOR THE APPLICANT

Did not appear

FOR THE RESPONDENT
GRAHAM MCKENZIE ANDREWS

Did not appear

FOR THE RESPONDENT
APPLECROSS INNOVATIONS INC.

SOLICITORS OF RECORD:

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FOR THE APPLICANT