



Date: 20190130

Docket: T-2022-13

Citation: 2019 FC 129

BETWEEN:

PYRRHA DESIGN INC.

Plaintiff

and

**PLUM AND POSEY INC.;
AND ADRINNA M. HARDY**

Defendants

REASONS FOR JUDGMENT

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PHELAN J.I. Overview

[1] These are the Reasons for Judgment dismissing the Plaintiff's claim for copyright infringement in respect of nine (9) pieces of jewellery. The nine pieces are shown in Schedule A of the Further Amended Statement of Claim and are reproduced at the end of these Reasons.

[2] The Plaintiff claims that the nine Defendants' designs [Plum and Posey Designs] have infringed those nine Plaintiff's wax seal jewellery designs [Pyrrha Designs] contrary to s 3(1) and 27 of the *Copyright Act*, RSC 1985, c C-42 [Act].

[3] The most relevant legislative provisions are:

Copyright in works

3 (1) For the purposes of this Act, **copyright**, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

(a) to produce, reproduce, perform or publish any translation of the work,

(b) in the case of a dramatic

Droit d'auteur sur l'oeuvre

3 (1) Le droit d'auteur sur l'oeuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'oeuvre, sous une forme matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie importante en public et, si l'oeuvre n'est pas publiée, d'en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif :

a) de produire, reproduire, représenter ou publier une traduction de l'oeuvre;

b) s'il s'agit d'une oeuvre

work, ...	dramatique, ...
(c) in the case of a novel or other non-dramatic work, ...	c) s'il s'agit d'un roman ou d'une autre oeuvre non dramatique, ...
(d) in the case of a literary, dramatic or musical work, ...	d) s'il s'agit d'une oeuvre littéraire, dramatique ou musicale, ...
(e) in the case of any literary, dramatic, musical or artistic work, ...	e) s'il s'agit d'une oeuvre littéraire, dramatique, musicale ou artistique, ...
(f) in the case of any literary, dramatic, musical or artistic work, ...	f) ... une oeuvre littéraire, dramatique, musicale ou artistique;
(g) to present at a public exhibition, ...	g) de présenter au public lors d'une exposition, ...
(h) in the case of a computer program ...	h) de louer un programme d'ordinateur ...
(i) in the case of a musical work, ...	i) s'il s'agit d'une oeuvre musicale, ...
(j) in the case of a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner,	j) s'il s'agit d'une oeuvre sous forme d'un objet tangible, d'effectuer le transfert de propriété, notamment par vente, de l'objet, dans la mesure où la propriété de celui-ci n'a jamais été transférée au Canada ou à l'étranger avec l'autorisation du titulaire du droit d'auteur.
and to authorize any such acts.	Est inclus dans la présente définition le droit exclusif d'autoriser ces actes.
...	[...]

Infringement generally

27 (1) It is an infringement of copyright for any person to do,

Règle générale

27 (1) Constitue une violation du droit d'auteur

without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

l'accomplissement, sans le consentement du titulaire de ce droit, d'un acte qu'en vertu de la présente loi seul ce titulaire a la faculté d'accomplir.

[Emboldening added by Court]

[4] In its Further Amended Statement of Claim, the Plaintiff sought the following relief:

- 1) A declaration that, as between the parties, the Plaintiff is the owner of the copyright in the nine Pyrrha Designs: "3 Graces", "Heart Lock", "I Am Ready", "Sweetness", "Faithful", "Crown", "Bond of Friendship", "Boars Head", and "Full of Spirit";
- 2) A declaration that the Defendants have infringed and are deemed to have infringed the Pyrrha Designs contrary to sections 3 and 27 of the *Copyright Act*;
- 3) Interlocutory and permanent injunctions restraining the Defendants and their servants, workmen, agents and employees from directly or indirectly infringing the Pyrrha Designs;
- 4) Damages, including statutory damages, and an accounting of profits, which may exceed fifty thousand dollars;
- 5) Punitive and exemplary damages;
- 6) An Order directing that the Defendants, at their own expense, and within a time upon such terms as fixed by this Honourable Court, destroy all articles in their position, custody or power, which offend in any way against any Order made, and provide the Plaintiff with a signed representation under oath, that such destruction has taken place;
- 7) Pre- and post-judgment interest;
- 8) The Plaintiff's costs; and
- 9) Such further and other relief as this Honourable Court may seem just.

Although the Plaintiff advanced relief by way of punitive and exemplary damages as well as pre- and post-judgment interest, it made no submissions in this regard. The Plaintiff also clarified in their closing argument that they were seeking statutory damages in an amount of \$5,000 per work and a permanent injunction.

[5] The main issues, as framed by the pleadings, are:

- a) Does Pyrrha Design Inc. [Pyrrha] have copyright in the Pyrrha Designs?
- b) Have the Defendants infringed such copyright in the Pyrrha Designs?

[6] The Plaintiff, Pyrrha, is a British Columbia corporation, and its two directors and officers are Danielle Wilmore [Wilmore] and Wade Papin [Papin]. Papin and Wilmore are employees of the Plaintiff, which has 30 employees.

[7] The Defendants are Plum and Posey Inc. [Plum and Posey], an Alberta corporation based in Nova Scotia, and Adrinna Hardy [Hardy], the sole director and principal shareholder and employee of Plum and Posey.

[8] For the reasons that follow, the Court has concluded that even if the Plaintiff owns copyright in the Pyrrha Designs, neither of the Defendants has infringed such copyright. Therefore, no declaration will issue and the claim for damages and injunction are dismissed with costs.

II. Witnesses

A. *The Plaintiff's Witnesses*

[9] The Plaintiff called five (5) lay witnesses and one expert.

[10] Papin provided evidence of Pyrrha's corporate history and structure, the design and finishing of Pyrrha's jewellery, and dates of creation and sale of the Pyrrha Designs. He testified as to Pyrrha's market reputation and profile. He outlined Pyrrha's perspective on Plum and Posey, their infringement and other players in the market. He also addressed the 2013 Settlement Agreement, other litigation and the numerous steps Pyrrha took to counter Plum and Posey's alleged infringement. His evidence was more about the marketing of the Pyrrha Designs than how the Pyrrha Designs were created operationally or artistically. He tended to overstate matters and avoid answering awkward topics, thus his evidence was approached with considerable caution.

[11] Wilmore was a more straightforward and credible witness. She spoke to the artistry and sophistication in the creation, design and production of Pyrrha's jewellery. She was passionate about her work and outlined the elements of judgment and skill which went into the Pyrrha Designs. She also addressed many of the technical aspects of Pyrrha's jewellery work, the equipment and processes used and the employment and training of personnel.

[12] Erica Somer [Somer] is a University of Victoria student, a part-time model, a purchaser of Pyrrha's jewellery and a follower of Pyrrha on social media. Her evidence related to seeing jewellery in a store and mistaking Plum and Posey jewellery for Pyrrha's. She took a video of the jewellery and posted it on Instagram with praise for Pyrrha's pieces to later issue a correction that the picture was of Plum and Posey's jewellery.

[13] While Somer was no doubt sincere, I put little importance on her evidence. She was such an obvious fan of Pyrrha's jewellery that she was predisposed to Pyrrha's position. Her evidence appeared to be too rehearsed to be taken at face value. Her powers of observation were questionable since her video showed clearly a sign indicating that the jewellery was Plum and Posey's, and her Instagram message to Pyrrha seemed more designed to catch Pyrrha's attention online. Further, as discussed later, the layperson's perspective is only a minor part of the infringement analysis.

[14] Lea Weir [Weir] is the co-owner of a boutique store also in Victoria. She spoke to the uniqueness of Pyrrha's jewellery. Her evidence confirmed what was seen in the various photos of online jewellery – that the name and the accompanying “meaning card” (telling the significance of the piece) is part of the attractiveness of this type of jewellery.

[15] Aside from Weir's evidence of uniqueness, she outlined her own confusion at seeing some of Plum and Posey's jewellery. However, the weight to be given her evidence is undermined by her exclusive selling arrangement with Pyrrha, her sales and profit motive in advancing the uniqueness of Pyrrha's jewellery, and thus in underselling Plum and Posey's jewellery. Her enthusiasm for Pyrrha was obvious in her testimony.

[16] The Plaintiff's last lay witness, who testified by video conference from Nova Scotia, was Samantha Downey [Downey]. Downey works part-time for Plum and Posey and is its only employee other than Hardy. She described the operations at the Amherst office. She outlined what she does to the raw castings including polishing and oxidation. There were aspects of the

making of a mould of a wax seal or stamping of a wax tool with which she was not familiar and she knew little about how Hardy actually made a piece before casting.

[17] Downey was a straightforward witness who appeared to try to honestly answer questions posed. The limitations of video-conference testimony does appear to have had an impact on the quality of her evidence.

[18] Although the Plaintiff tried, through questioning, to show that Plum and Posey's wax jewellery making process was similar to the Plaintiff's, Downey's evidence, including her description of her lack of training and the overall operation, was more consistent with a fairly simple mechanical production than the picture the Plaintiff presented of the sophistication, artistry, skills and training that went into its operation.

[19] The Plaintiff's expert witness, Karin Jones, is an instructor and department head of Jewellery Art and Design at Vancouver Community College. She was qualified as an expert in "jewellery art and design".

[20] Applying the definition of "originality" from the *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 16, [2004] 1 SCR 339 [CCH] decision, she opined that Pyrrha's jewellery required substantial skill and judgment in the selection and design of the wax seal jewellery, and skill in its production, including adding and subtracting material and determining the thickness, symmetry and shape of the pendants. The most skill and judgment occurred at the beginning and end of the process: the choosing of shape, size and imagery at the

beginning and the finishing steps of polishing and oxidization. However, she acknowledged that oxidization and polishing were commonly used techniques in jewellery making that were not developed by the Plaintiff.

[21] Jones' evidence was sincere, but as an expert she suffered from a lack of objectivity. She was such an enthusiastic fan of Wilmore and Papin, so full of praise for their contribution to jewellery making, that she willingly accepted to write her report on broad assumptions provided to her by the Plaintiff, including that Wilmore and Papin made artistic decisions. The Court has considerable reluctance in accepting, on its own, her evidence of originality.

B. *The Defendants' Witnesses*

[22] The Defendants called only two witnesses, Hardy, the principal of Plum and Posey, and its expert, Robyn Cornelius [Cornelius].

[23] Hardy gave evidence of Plum and Posey's corporate structure and the design and finishing of wax seal jewellery. She also touched on the 2013 Settlement Agreement, and other proceedings commenced by the Plaintiff to stop her wax seal jewellery sales.

[24] She put together a form of financial statement to show the profit to Plum and Posey per Plum and Posey Design. However, it was more of a "rough and ready" cash flow statement with some glaring errors than something upon which the Court could rely other than to establish the obvious – that the drain of legal expenses to defend the myriad attacks by the Plaintiff depleted Plum and Posey's limited resources.

[25] Hardy admitted to knowing of Pyrrha's jewellery and of following Pyrrha's marketing of various jewellery pieces. Not surprisingly she denied copying or attempting to copy Pyrrha's work or processes. Plum and Posey and Pyrrha market through many of the same channels of trade particularly online through sites such as "Etsy".

[26] The Plaintiff has asked that the Court give little or no credence to Hardy because of the numerous errors in her evidence, her incomplete response to undertakings and production of dubious financial information. I find that Hardy was generally credible, overwhelmed by the numerous pieces of litigation, but honest about the facts. She downplayed the skill and judgment required for this type of jewellery, a reasonable position given her perspective on what had to be done to make her jewellery. I do accept her evidence of the absence of intent to copy the Pyrrha Designs.

[27] Robyn Cornelius was qualified as an expert with respect to jewellery making. She was a graduate of Alberta College of Art and Design with a BFA in jewellery and metals. She has worked in the business for several years and teaches courses in jewellery making.

[28] While she was called to rebut Jones and opined that Pyrrha's jewellery did not meet the *CCH* test for originality, she went beyond that to give helpful (to the Court) objective evidence as to the making of wax seal jewellery.

[29] While Cornelius knew Hardy before this litigation and has exhibited her own jewellery together with that of Plum and Posey, she did not lose her objectivity, maintained the proper

expert's approach and did not exhibit undue enthusiasm for the Defendants' work. I found her to be credible and, while not accepting all of her conclusions as to Pyrrha's jewellery, I attach significant weight to her testimony particularly as to the various skills required. She put those skills and judgments into a useful context particularly with respect to the finishing processes of oxidization and polishing.

III. Factual Background

A. *Wax Seal Jewellery Creation*

[30] Wax seal jewellery, the type of jewellery at issue, is not something which Pyrrha invented. People had been making such jewellery since at least the 1960s. Pyrrha does not claim copyright in the process by which wax seal jewellery is made but in the expression of it found in the Designs.

[31] Wax seal jewellery is created by transferring the image from a pre-existing wax seal impression or wax seal tool to metal jewellery.

[32] There are two methods for making wax seal jewellery which are relevant to this case: precious metal clay [PMC] and lost wax casting. Both of these methods are commonly used methods to make jewellery from "found" objects such as wax seals and wax tools. The evidence of the principal parties and the expert Cornelius establish that.

[33] The steps involved in creating wax seal jewellery are:

1. Selection of the wax seal image: The jeweller finds and selects the desired wax seal impressions or wax seal tools to use in making the jewellery piece.
2. Creating and modifying the impression of the wax seal to be used in casting:
 - For the PMC method, the jeweller will either press a wax seal tool directly into a ball of PMC, or make a silicon or rubber mould of the wax seal, then take an impression of the mould in PMC. The jeweller may modify or smooth the edges of the PMC impression.
 - For the lost wax casting method, the jeweller will create a master wax. If the jeweller starts from a wax seal tool, he or she will stamp the tool into sealing wax or a mix of wax until the jeweller gets an impression in wax that they like. If the jeweller starts from an antique wax seal impression, he or she may modify the wax impression by subtracting from or adding to the border, adding cracks, or smoothing or roughening the edges.
3. Converting the wax seal impression into metal:
 - For the PMC method, the jeweller then fires their PMC impression in a kiln or by torch, which burns off the binding material and leaves an impression of the wax seal in fine silver.
 - For the lost wax casting method, the jeweller will make a silicon or rubber mould of the master wax. Then the jeweller will create wax copies of the mould. These wax copies are then encased in plaster, called an investment. The wax is then melted out of the plaster leaving an impression of the wax copy in plaster. The cavity in the plaster is filled with molten metal and left to cool. The metal takes on the imagery and shape of the wax copy.

4. Finishing of the jewellery: The jeweller finishes the wax seal jewellery through a process of polishing, often combined with oxidization. There are a wide range of finishing options for silver jewellery. However, polishing and oxidization are common methods for finishing silver jewellery. Oxidization is a process of adding chemicals to jewellery to create a tarnished appearance. There are many oxidization chemicals available that will produce a variety of colours. Oxidization and polishing create contrast in varying degrees between the dark oxidized part of a piece and the brighter polished part of a piece.

B. *Creation of the Pyrrha Designs*

[34] Wilmore and Papin started making wax seal jewellery between 2004-2005. The Pyrrha Designs were created over the period from 2004 to 2012.

[35] There was some experimentation in taking antique wax seals and converting them into jewellery. Wilmore did the majority of the work in the design and creation of the Pyrrha Designs and the Plaintiff's other wax seal jewellery designs, while Papin was significantly involved in the marketing of Pyrrha products.

[36] The Plaintiff produces 300-400 wax seal jewellery designs. To make the jewellery, Wilmore and Papin used found antique wax seals and antique seal tools mostly from the 18th and 19th century. They selected the seals and seal tools from their collection of thousands of wax seals and dozens of wax seal tools.

[37] Eight of the nine pieces were created using antique wax seals which were modified prior to moulding and casting. The modifications included adding and subtracting wax on the borders, cracking the wax, and smoothing or roughening the border edges, although most antique wax seals already had some kind of border.

[38] The ninth piece, called “Full of Spirit”, was made using a wax seal tool. After making several impressions of the tool in wax, one was chosen from which to make the jewellery piece.

[39] Wilmore and Papin neither created nor modified the imagery in the wax seals used to create their jewellery. They used the relatively common method of lost wax casting for their jewellery which did not involve significant creative work in casting their pieces.

[40] After the metal pieces with the impression of the wax seals were cast, Pyrrha finished them by oxidizing and polishing the pendants. Generally the finishing involved blackening the recesses with oxidization and polishing the high points to give the contrast earlier referenced.

[41] Oxidizing and polishing wax seal jewellery requires skill and in selecting which finishing options to use, according to Jones, Wilmore and Papin exercised judgment.

C. *Sale of the Pyrrha Designs*

[42] The Pyrrha Designs were publicly available on Pyrrha’s website, through its catalogues and in stores. Jewellery pieces with the Pyrrha Designs appeared on Pyrrha’s website at least

4-6 weeks after the date of first sale. In this case, the Pyrrha Designs and their dates of first sale are:

- “Three Graces” – January 21, 2009;
- “Heart Lock” – January 31, 2007;
- “I Am Ready” – August 21, 2012;
- “Sweetness” – February 6, 2007;
- “Full of Spirit”, previously “Rooster” – February 7, 2005;
- “Faithful Friend”, previously called “Tiger” – February 7, 2009;
- “Crown” – August 28, 2009;
- “Bond of Friendship”, previously “Friends Forever” – August 10, 2010; and
- “Boar’s Head” – March 25, 2005.

[43] The prices of these pieces vary from \$48 (Boar’s Head) to \$262 (Three Graces).

D. *Plum and Posey Jewellery*

[44] The Plum and Posey Designs were created approximately between 2009 and 2013. Hardy used her own wax seals and antique wax seal tools from her own collection of 6,000-6,200 wax seals and 500 wax seal tools to make her jewellery – specifically the pieces in issue. Plum and Posey sells between 250 to 260 different wax seal designs.

[45] There was no evidence or even suggestion that Hardy directly copied Pyrrha’s jewellery by working from a Pyrrha Designs’ piece, casting and the finishing from a replica of Pyrrha

Designs' pieces. Pyrrha's complaint is with Plum and Posey's end product – what it initially called the “look and feel” of the pieces.

[46] At the beginning of her operations from 2009 to 2015, Hardy used the PMC method for creating her jewellery. Having made an impression of the wax seal tool or wax seal in PMC, Hardy would add a loop to the top, put her trademark on the back of the piece and smooth the borders of it.

[47] Hardy moved to the lost wax casting method in August 2015. It is a cheaper and more efficient way to make identical copies of jewellery. It is also the way that Pyrrha casts its wax seal jewellery. While the method of making the pieces changed, the source – Hardy's own collection of wax seals and wax seal tools – remained the same.

[48] When Hardy changed to the lost wax casting method, she experimented to find the way to produce the imagery and get the correct shape for her jewellery.

[49] To make her jewellery using the lost wax casting method, Hardy presses an antique wax seal tool into her own mix of wax until she gets one that shows the desired imagery and has a full border. As before, she adds a loop at the top and stamps her trademark on the back. A silicon compound is used to make a mould, wax is poured into the mould to create a wax copy which is then surrounded by plaster to harden. The wax is then melted away and molten metal is poured into the cavity of the plaster mould which creates a replica of the antique wax seal or impression of the antique wax seal tool. The metal used is generally silver, gold or bronze.

[50] The jewellery pieces are finished at Plum and Posey's Nova Scotia studio by initially polishing in a tumbler then applying the oxidization chemicals. After this, the pieces are finished by Hardy polishing the pieces by hand to give the desired look.

[51] Plum and Posey sells its jewellery online through Etsy, its own websites and through retailers and at websites. While the price for the Plum and Posey Designs and the lowest price for the Pyrrha Designs were comparable, as one moved up the scale, Plum and Posey's prices were noticeably lower, topping out at \$109 for the alleged infringing piece ("Gratiae – The 3 Graces") compared to \$262 for Pyrrha's comparable piece ("3 Graces").

[52] As indicated earlier, Hardy submitted some form of financial calculation into evidence to show a profit margin of 4.82% and to show that professional fees (largely legal fees) made up 23.65% of Plum and Posey's expenses. The Court can only draw so much from this financial exercise because it was at best "a back of the envelope" calculation. Given the result in this case, the information was of little relevance.

E. *Litigious Relationship*

[53] Following Pyrrha's first letter to Plum and Posey in 2010 raising copyright issues, Hardy changed some of the names of her jewellery and added Plum and Posey's trademark to each piece while also denying Pyrrha had copyright or that Plum and Posey infringed it.

[54] On May 25, 2012, Pyrrha commenced its first Federal Court action (Court No. T-1035-12) claiming trademark and copyright infringement by Plum and Posey in respect of

18 jewellery designs. None of the Pyrrha Designs in this litigation were part of the 18 jewellery designs at issue in the 2012 litigation.

[55] The parties entered into a Settlement Agreement on October 3, 2013, which was sanctioned in an Order by Justice de Montigny [Settlement Agreement Order]. The Settlement Agreement covered the following areas relevant in the current litigation:

- Plum and Posey acknowledged the validity of Pyrrha’s copyright in the 18 specific designs and agreed to stop selling any of those designs.
- Plum and Posey further agreed not to make, sell or distribute any wax seal jewellery with cracks in the imagery, an incomplete or rough border or more than a single crack in the border. Plum and Posey was to pay \$2,000 per piece if it breached this provision.
- Pyrrha released Plum and Posey from any claims or causes of action arising from alleged infringement of the Pyrrha Trade Dress and/or Pyrrha’s copyrights in all 18 designs occurring before July 4, 2013. “Pyrrha Trade Dress” is undefined.

[56] Since the Settlement Agreement, Pyrrha has commenced four (4) proceedings in three (3) different courts against the Defendants – two in Alberta, one in British Columbia (which remains ongoing) and this present case in the Federal Court. In addition, in 2017 Papin sent five (5) Notices of Intellectual Property Infringement to Etsy headquarters in the United States, based in United States law, which had the effect of suspending Plum and Posey’s online sales through Etsy for 10 business days for each filing.

[57] Pyrrha commenced this proceeding in the Federal Court on December 6, 2013 (two months after the Settlement Agreement Order) claiming infringement by 37 of Plum and Posey's designs. The Statement of Claim has been amended twice – firstly to increase the infringing designs from 37 to 41 and later (five weeks before trial) to reduce the infringing designs to the nine at issue.

[58] The Alberta actions figured prominently in this case but the Court has found the arguments of both parties on the impact of these actions to be largely irrelevant.

[59] In December 2013, Pyrrha alleged before the Alberta Court of Queen's Bench that Plum and Posey had breached the Settlement Agreement. Justice Sheilah Martin (now of the Supreme Court of Canada) dismissed the case summarily and her decision was upheld by the Court of Appeal. No proceedings were brought in this Court alleging breach of the Settlement Agreement Order.

[60] In the course of her reasons Justice Martin made adverse comments about Papin's credibility upon which the Defendants seek to rely in this Court or to have this Court adopt.

[61] Justice Martin also engaged in interpreting the Settlement Agreement including comments on the Pyrrha Trade Dress (an undefined term).

[62] In August 2015, Pyrrha filed a lawsuit in the British Columbia Supreme Court alleging passing off and copyright infringement regarding its website and photographs of its jewellery.

[63] Then, in November 2017, Pyrrha commenced the second proceeding in Alberta alleging breach of the disclaimer term in the Settlement Agreement. That action was struck based on *res judicata* and abuse of process. Justice Hughes in that action noted Pyrrha's apparent desire to intimidate and bankrupt the Defendants.

[64] In addition to these court proceedings, Pyrrha, in the period June to December 2017, filed five Notices of Intellectual Property Infringement with Etsy. Cumulatively, these notices covered all nine Plum and Posey Designs at issue. Each of the notices had the effect of preventing Plum and Posey sales on Etsy for 10 days. Even after Hardy filed a notice with Etsy contesting the claim, the notice from Pyrrha operated as a delisting of the products for sale for 10 days; after which Pyrrha had to file evidence of an interlocutory injunction, failing which the designs were re-listed for sale.

[65] Pyrrha never filed evidence of an injunction, never sought much less obtained such an injunction, and yet continued to submit these notices. The only reasonable explanation the Court can draw is that each notice acting as a 10-day injunction was designed to punish Plum and Posey in ways which a Canadian court would not sanction.

[66] Finally, the Defendants were denied by the case management prothonotary an amendment to this action adding the issues of *res judicata* and abuse of process against the Plaintiff.

IV. Issues

[67] The three principal issues in this trial are:

- a) Does copyright subsist in any of the Pyrrha Designs because they are original artistic works?
- b) Are any of the nine Plum and Posey designs substantially similar to the nine Pyrrha Designs so as to constitute copyright infringement?
- c) What remedies, if any, should be ordered?

[68] The role of the Settlement Agreement and the other court proceedings arises in both issues (a) and (b) to some extent. There are a number of sub-issues within the principal issues, in addition to the Settlement Agreement and the role of the other court proceedings.

[69] This case turns, in reality, on the issue of infringement. If there is no infringement, the issue of copyright subsistence is largely academic.

V. Analysis

A. *Findings in Previous Proceedings*

[70] Both parties, to varying degrees and for different issues and different purposes, referred to the findings and comments in other proceedings. However, the Plaintiff's basic position is that these findings and comments are irrelevant. The Plaintiff objected to the introduction of much of

the evidence from these proceedings; however, the Court admitted them for the limited purpose the Defendants said they needed to have the evidence before the Court.

[71] The Defendants argued that the evidence and findings from previous proceedings – particularly those of Madam Justice Martin – were important to their defence and needed for cross-examination. The findings from the Alberta proceedings were said to be relevant to Papin’s credibility and to the interpretation of the Settlement Agreement as that matter may impact this trial.

[72] Subsection 23(1) of the *Canada Evidence Act*, RSC 1985, c C-5, generally permits any party to file any evidence of any proceeding or court record in a provincial court. Further, the scope of cross-examination is fairly broad and allows a high degree of latitude in terms of what may be put to a witness particularly in terms of credibility challenges.

[73] While this evidence may be admissible, for the purposes described in the Court’s ruling, its relevance and weight may be assessed against the whole trial record. It is the role of the trial judge to separate “the wheat from the chaff”.

[74] The findings of Justice Martin on Papin’s credibility are not particularly relevant, weighty or ultimately adoptable for purposes of determination of the issues in this trial.

[75] Given that Papin was a witness in this trial, the findings are not necessary. This Court can and should make its own assessment of credibility. The Defendants used the findings to support

its argument that Papin's testimony was self-serving and unreliable. The Defendants also used the findings of Justice Hughes in the second Alberta action as evidence of malice toward Hardy; that the Plaintiff was intent on driving her into the ground by loading on a significant litigation burden.

[76] Bad faith/malicious intent of the copyright owner is not a defence to infringement or a bar to the recognition of copyrights. The vigour with which the Plaintiff pursued Hardy can equally be attributed to an honest belief that Hardy was infringing the Plaintiff's rights which negates bad faith or malice. The Plaintiff's record on this issue is spotty in light of its shifting position on which designs had been infringed and its use of Notices to gain a 10-day online delisting of Plum and Posey's products. On balance I conclude that the Plaintiff was motivated by a reasonable belief in their dispute against the Defendants. Some of these matters may go toward the level of costs awarded but not to the core issues in this litigation.

[77] This Court is able to make its own findings on credibility taking into account Papin's conduct as a witness and to the extent relevant, his history in initiating litigation and sending intellectual property infringement notices.

[78] Importantly, the Defendants did not put either Justice Martin's or Justice Hughes' statement to the witnesses. This offends the rule in *Browne v Dunn* (1893), 6 R 67 (HL), which is more a rule of fairness than a rule of evidence.

[79] Moreover, courts must be cautious about accepting of its own the finding of other judges, particularly made on the basis of different facts, law and context. The Court relies on its own observations and the material in this Court in the context of this case in making its conclusion that Papin's evidence needs to be approached with caution – that it was more marketing than strictly factual.

[80] Nor do I adopt on its own Justice Martin's findings with respect to the Settlement Agreement. Her findings must be put in the context of a summary judgment motion with a record considerably less fulsome than that before this Court. Some of her findings were also based on looking at pictures of the jewellery – she did not have the benefit that this Court had of actually having the jewellery before it. Some of her comments were based on facts shown to be inaccurate. That is always the risk of summary judgment proceedings in any court.

[81] While the Settlement Agreement could have a bearing on this Court's conclusion, those conclusions must be this Court's. As with the core issues in this case, they are to be resolved on the basis of the evidence and law before this Court. The findings of other courts, while of interest and deserving of respect, cannot determine this Court's ultimate decision.

B. *Existence of Copyright*

[82] Paragraph 5(1)(a) of the Act sets out the requirements for copyright to subsist in an artistic work:

5 (1) Subject to this Act, copyright shall subsist in Canada, for the term

5 (1) Sous réserve des autres dispositions de la présente loi, le droit d'auteur existe au

hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met:

(a) in the case of any work, whether published or unpublished, including a cinematographic work, the author was, at the date of the making of the work, a citizen or subject of, or a person ordinarily resident in, a treaty country;

Canada, pendant la durée mentionnée ci-après, sur toute oeuvre littéraire, dramatique, musicale ou artistique originale si l'une des conditions suivantes est réalisée :

a) pour toute oeuvre publiée ou non, y compris une oeuvre cinématographique, l'auteur était, à la date de sa création, citoyen, sujet ou résident habituel d'un pays signataire;

[83] Pyrrha is the owner of any copyright in Pyrrha Designs under subsection 13(3) of the Act as Wilmore and Papin created the Pyrrha Designs in the course of their employment with Pyrrha. Wilmore and Papin are both Canadian citizens.

[84] The Pyrrha Designs are artistic works and are similar to engravings which, like etchings, lithographs, woodcuts and prints, are reproductions of previously created images yet in a different medium. The Pyrrha Designs are to some extent also like a sculpture which uses a cast or model.

[85] While there is limited authority in Canada on the issue of whether jewellery is an “artistic” work, Canadian courts have generally broadly interpreted the types of “works” protectable under the Act, including “artistic works” (see *DRG Inc v Datafile Ltd* (1987), 18 CPR (3d) 538 at 546, [1988] 2 FC 243, (FCTD), aff'd (1991), 25 ACWS (3d) 711 (FCA) [DRG].)

[86] The Defendants have not challenged the Plaintiff on this point of wax seal jewellery as an artistic work.

[87] However, the issue of whether there is copyright in Pyrrha Designs depends on whether the Pyrrha Designs are (1) protected expressions of an idea and (2) original.

C. *Protection – Idea or Expression*

[88] The Defendants argue that Pyrrha is seeking protection of the idea of making jewellery with the appearance of an antique seal and refers to the Supreme Court of Canada decision in *CCH* at para 8, which states that copyright “does not protect ideas in and of themselves.”

[89] As held in *Théberge v Galerie d'Art du Petit Champlain Inc*, 2002 SCC 34 at para 5, [2002] 2 SCR 336, and *Bishop v Stevens*, [1990] 2 SCR 467 at 477, 22 ACWS (3d) 568, copyright law in Canada is a creature of statute with exhaustive rights and remedies provided for in the Act.

[90] For copyright to subsist in a work, a work must be a fixed expression of an idea (*CCH* at para 8). To determine whether a work is fixed, as held in *Canadian Admiral Corp v Rediffusion, Inc*, [1954] Ex CR 382 at 394, 20 CPR 75, it must be expressed in “some material form, capable of identification” and have some “permanent endurance”.

[91] Therefore, copyright does not protect ideas, concepts or methods in and of themselves.

[92] In determining whether there is fixed expression of an idea, the Supreme Court of Canada in *Cinar Corporation v Robinson*, 2013 SCC 73 at paras 43-45, [2013] 3 SCR 1168 [*Cinar*], considered whether a work had distinct features and appearance that were the product of an author's skill and judgment – similar to the test for originality.

[93] The *Cinar* decision is particularly relevant to this litigation, both in terms of copyright and infringement. The Court concluded that copyright subsisted in the character and setting of a television show based on the particular combination of distinct visual and personality traits of the characters of the show. The distinctive expression of an idea is necessary because copyright cannot exist in a generic idea or method.

[94] I have concluded that the Pyrrha Designs are a fixed expression since the Plaintiff is claiming copyright in each of the Pyrrha Designs, which are specific expressions of a certain wax seal image in metal, finished in a certain way. The Plaintiff's claim in their Further Amended Statement of Claim that it developed the method and idea for creating wax seal jewellery cannot be accepted. The Plaintiff cannot claim copyright in the method of lost wax casting or in the idea of creating jewellery from certain wax seals. The method and idea are in the public domain.

D. *Designs – Original Works*

[95] The Plaintiff claims that all the Pyrrha Designs are “original” as that term is defined in *CCH* at para 16. The Plaintiff argues that the Ontario Superior Court of Justice in *Beach v Toronto Real Estate Board* (2009), [2009] OJ No 5227 at para 101, 183 ACWS (3d) 570 (Sup Ct J) [*Beach*], confirmed that a work based on an earlier work can still be “original” if the new work

is the result of skill and judgment and not merely a copy. The Defendants take the quite opposite position; that skill and judgment in the copying of another work cannot confer originality.

[96] Although subsection 5(1) of the Act requires a work to be original in order for copyright to subsist, the Act does not define an “original” work. However, the Supreme Court in *CCH* at para 28 set out the three (3) elements required for an original work:

1. The work must have originated from the author;
2. The work must not be copied; and
3. The work must be the product of the exercise of skill and judgment that is more than trivial.

[97] In accordance with *CCH* at para 16, skill refers to the “use of one’s knowledge, developed aptitude or practical ability in producing the work” and judgment refers to the “use of one’s capacity for determining or ability to form an opinion or evaluation by comparing different possible options in producing the work”.

[98] As such, a work does not have to be creative, novel, or unique to be original but the effort put into creating it must be more than a trivial or purely mechanical exercise. *CCH* is an example of this non-creative original and effort to create tension in holding that headnotes, case summaries, indices and compilations of original decisions are original while the actual judgments reflected in these headnotes *et al.* are in the public domain and not copyrightable.

[99] A work can still be original if it takes existing material and casts it in a different form as long as sufficient judgment is exercised (see *CCH* at para 33; *Lainco Inc v Commission scolaire des Bois-francs*, 2017 FC 825 at para 84; 284 ACWS (3d) 377 [*Lainco*]; *Beach* at para 101).

[100] A further consideration is that the Act defines an “artistic work” to include an engraving. As commented upon in John S McKeown, *Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed (Toronto: Thomson Reuters, 2003) (loose-leaf updated 2018), ch 10 at 10:11(d) [*Fox on Copyright*], “[t]he fact that an engraving is based on another work does not preclude copyright in the engraving”.

[101] As stated earlier, the “artistic works” in this case - the wax seal jewellery designs - are much like an engraving; the jewellery is based on another work, the wax seal or wax seal tool.

[102] What takes the jewellery based on another work into the realm of copyright protection is the skill and judgment used to make the jewellery beyond the mere replication of the imagery. As held in *Interlego AG v Tyco Industries Inc and others*, [1988] 3 All ER 949 at 971, [1989] AC 217 (PC), a small material alteration or embellishment can convert a substantially copied work into an original work.

[103] Of the three factors to determine originality, the most important in this case is the exercise of skill and judgment in the creation of the Pyrrha Designs.

[104] The first factor, whether the Designs originated from Wilmore and Papin is not an issue – they clearly did. The second factor, that the work is not a copy, fits better into the skill and judgment analysis since if there is sufficient skill and judgment exercised in addition to merely copying the imagery, the work is not a copy.

[105] I have concluded, based on the whole of the evidence but particularly Wilmore, that there was sufficient skill and judgment in the creation of the Pyrrha Designs. I discount to a significant degree Papin's and Jones' exaggeration of the level of modifications and judgment used. However, there was more than trivial skill and judgment exercised.

[106] The Pyrrha Designs are not merely a copy of an antique wax seal. Although the imagery is copied from an antique seal, the expression of the seal's image in metal is different from merely copying a drawing or photograph from another drawing or photograph. The Designs are more than a replica of the wax seal or a mere reproduction. Skill and judgment was used to display the imagery in metal.

[107] Particularly, Wilmore exercised skill in knowing how to work with wax to modify the borders of wax seal impressions and judgment in designing the borders. She used skill and judgment in deciding how to finish the pieces by oxidizing with blackening chemicals and polishing. The fact that employees have to be trained over months to perform these functions (both at Pyrrha and Plum and Posey) suggest some element of skill is involved.

[108] However, I do not accept that Wilmore and Papin used sufficient skill and judgment in the selections of the seals to be used. In particular, there is little evidence to show how these nine seals were selected out of the 300-400 antique seals that Pyrrha produces nor how, of the whole of Pyrrha's collection of seals, these seals were chosen. Furthermore the selection process is too closely aligned with trying to copyright an idea.

[109] Copyright subsists in each individual Pyrrha Design to the extent that Pyrrha took the imagery of a wax seal and expressed it in metal in a specific way.

[110] As recognized in *Rains v Molea*, 2013 ONSC 5016 at paras 13-16, 231 ACWS (3d) 787 [*Rains*], the use of common techniques and methods can still result in an original work. The Defendants' expert Cornelius acknowledged that there are a variety of finishing options for silver jewellery and that oxidization and polishing are very common techniques.

[111] Cornelius opined that the skill and judgment used by Wilmore and Papin would be the same as for other jewellers and thus recognized that there was some skill and judgment employed. The law does not suggest that the skill and judgment of the creator need be different or superior to that of other skilled people. It is the ultimate expression in the jewellery piece which is protected, not the uniqueness of the skill and judgment.

[112] The bar for establishing originality is low. As summarized in *Lainco* at para 95, Canadian courts have held that relatively simple works can be original works. Against that standard Pyrrha

established that the Pyrrha Designs are original. The corollary to the low bar is reflected in the more exacting standard applicable to a finding of infringement of the original work.

[113] Contrary to the Defendants' position, the Pyrrha Designs do not need to be novel, unique or created through innovative methods to be held as original. The final expressions of the Pyrrha Designs are original because Wilmore and Papin exercised sufficient skill and judgment in choosing to create the particular borders and finishing to express a specific image in metal.

E. *Relevance of Settlement Agreement to Copyright in Design*

[114] Much has been made by both parties as to the significance of the Settlement Agreement and its scope and reach into the issues before this Court. Reliance on the Settlement Agreement for the purposes of what this Court must decide is misplaced.

[115] The Plaintiff relies on the Settlement Agreement to argue that the Defendants have previously acknowledged copyright in Pyrrha's jewellery generally. The Settlement Agreement acknowledged, as between the parties, copyright in 18 designs not at issue in this case.

[116] In my view, an acknowledgement of the existence of copyright as between the parties to the Settlement Agreement cannot confer copyright under the Act. At most it may operate as an estoppel against the admitting party. Further, the admission relates only to the eighteen pieces in issue in that litigation; it does not cover the nine in this case. There was no general admission by the Defendants of Pyrrha's copyright in its jewellery and the Defendants have consistently rejected such a notion.

[117] The Plaintiff's own action of commencing this litigation on the Pyrrha Designs shortly after the Settlement Agreement rather than taking proceedings under the Settlement Agreement Order evidences a clear distinction between the two cases and the scope or reach of that Settlement Agreement.

[118] Nevertheless, I have concluded that Pyrrha has copyright in the Pyrrha Designs.

VI. Infringement

[119] Having established that the Plaintiff had a valid claim of copyright over their nine designs (or even assuming such to be the case), the Court does not find that the copyright in the Pyrrha Designs has been infringed by Plum and Posey.

A. *Legal Framework*

[120] Subsection 27(1) of the Act provides that it is an infringement for any person to do anything that the owner of the copyright has the right to do. One of those rights is the sole right to produce or reproduce the work or any substantial part thereof in any material form (s 3(1)).

Infringement will also occur where there is a colourable imitation of the work (s 2).

[121] In this case, Pyrrha had to establish either direct proof of copying – of which there is no evidence - or two elements of infringement:

1. Similarity – sufficient similarity between the infringing work and the copyright work or of a substantial part of the copyright work; and

2. Access – evidence of access to the work or a connection between the two works, showing that the copyright work is the source for the infringing work.

(See *Phillip Morris Products S.A. v Marlboro Canada Ltd*, 2010 FC 1099 at para 315, 195 ACWS (3d) 237, aff'd re copyright 2012 FCA 201 at para 119, leave to appeal to SCC refused [2012] SCCA No 413 [*Phillip Morris*].)

[122] A showing by the Plaintiff of sufficient similarity and access to the work would raise a *prima facie* case of infringement. However, a showing by the Defendants that the infringing work is the result of work from a common source or that it is an independent creation, means no infringement could be found (*Phillip Morris* at para 320).

[123] As noted earlier and confirmed in *DRG* at 548, the infringing work must copy a substantial part of the copyright work and the simpler the copyrighted work, the greater the need to establish exact copying in order to establish infringement.

B. *Substantial Similarity*

[124] The principal guidance from the Supreme Court of Canada on the issue of substantial similarity is *Cinar*. The Defendants' reliance on the Ontario Court of Appeal in the decision of *Delrina Corp v Triolet Systems Inc* (2002), 58 OR (3d) 339, 112 ACWS (3d) 141 [*Delrina*], is misplaced as *Cinar* has overtaken the earlier case law.

[125] An infringing work will have copied a “substantial part” where it has recreated a substantial part of the originality in the copyrighted work.

[126] Pursuant to the *Cinar* decision (paras 26 to 43), the question of the copying of a “substantial part” is assessed by looking holistically and qualitatively at the copyrighted work and the allegedly infringing work. The Supreme Court of Canada set out the analytical steps to be undertaken by the trial judge:

- assessment of all the cumulative similarities between the works (for artistic works, *Fox on Copyright* at 21:6 states that the similarities are those that are “visually significant”).
- the determination of whether the similarities overall form a substantial part of the author’s skill and judgment.

[127] Decisions such as *Delrina* and *Rains* took a less holistic approach. In *Cinar* at para 36, unlike in *Delrina*, the Court held that a trial judge should not eliminate the non-protected elements of the works and compare the leftover similarities. Instead, a court should make a holistic comparison and determine whether the similarities represent a substantial part of the originality in the protected work as a whole.

[128] This holistic and qualitative approach allows for non-original elements to form part of the substantial part of an author’s skill and judgment where the specific combination of these elements has been copied by the alleged infringer.

[129] Slight differences between the works does not necessarily prevent a successful claim of similarity where such differences are colourable imitation (*Cinar* at para 39; Act, s 2).

[130] Unlike trademark confusion cases, the substantial similarity analysis is grounded in whether a substantial part of the work has been copied – not necessarily whether a layperson could identify the similarities. This is not a situation of the “hurried (or harried) consumer” often referred to in trademark confusion cases.

[131] Substantial similarity is to be assessed from the perspective of someone who can assess and appreciate all the relevant aspects of the work (*Cinar* at para 51). This is the task of the trial judge possibly assisted by expert evidence on the relevant art, but based on the evidence available to the judge as to the relevant aspects of the work.

C. *Application of Legal Framework*

[132] As held in *Cinar* at para 26, the test is whether the similarities between the works are “a substantial part of the author’s skill and judgment”. The question is not whether the similarities are visually a substantial part of the work (both non-original and original) but whether the Defendants copied a substantial part of the originality in the Pyrrha Designs.

[133] The originality in the Pyrrha Designs is in the specific combination of the wax seal image with the particular border and finishing used for each of the Pyrrha Designs. As stated earlier, the fact that these pieces are relatively simple copyrighted work means that a more exact copy is required to reach the threshold of infringement.

[134] Although the perspective of a layperson may be useful, it does not take one all the way. The real question is whether there are substantial similarities based on the relevant parts of the

works, including latent similarities not necessarily obvious to the layperson that may influence how a layperson experiences the work (*Cinar* at paras 51-52).

[135] Absent expert evidence on infringement, the Plaintiff recognized that the trial judge, having been versed in the subject matter to some degree, must make the assessment. The Plaintiff contends that the examination of the works should be done from 2-3 feet away because that is the likely spacing from a purchaser's perspective.

[136] This is only one perspective from which to examine the pieces. In order to do a holistic rather than an impressionistic analysis, it was useful for the Court to have the actual pieces of the jewellery in front of it.

[137] The evidence of Somers and Weir was a "drive-by analysis" more closely similar to the hurried consumer who glances in a display window.

[138] Looking at the Pyrrha Designs and the Plum and Posey works as a whole, none of the Plum and Posey works copied a substantial part of the skill and judgment in the Pyrrha Designs. In so concluding, I have applied a relatively higher threshold of similarity given the simplicity of the works and in order to avoid limiting the use of designs and techniques in the public domain.

[139] Limiting the use of oxidization generally in silver jewellery would be inconsistent with one of the purposes of the Act – to encourage creativity in using elements in the public domain. It would stray into the copyrighting of a method common in jewellery making. Therefore, only

the specific way oxidization is used in each Pyrrha Design in combination with the rest of the features of the specific piece can be protected.

[140] The same can be said for polishing, which is a common feature of jewellery making, and of wax seal jewellery making in particular. Polishing, whether of low or high points, is a common method and is in the public domain.

[141] The end products of both the Pyrrha Designs and Plum and Posey Designs were put to the Court as physical exhibits. Pictures of the pieces individually and in comparison to each other were also put into evidence.

[142] The Court observed noticeable differences between the actual pieces and even the photographs of them. Due to the limits of photographs, where detail and nuances are more difficult to discern than physical examination, the Court preferred to compare the actual physical exhibits.

[143] The evidence also included numerous copies of the online display of jewellery on such websites as Etsy – apparently a key channel of distribution and sale display for these types of products. The nature and quality of the photographs online impacts comparisons; even so the differences between the Pyrrha Designs and Plum and Posey Designs were observable.

[144] In comparing the physical exhibits, those differences were more noticeable.

[145] The following chart outlines the Court’s assessment of the specific pieces in issue. The assessment is based on looking at the actual pieces rather than pictures or website printouts. The assessment is focussed on the Plum and Posey Designs that were made with the lost wax casting method starting in 2015 given that Pyrrha contended that these designs were more similar to the Pyrrha Designs than the 2013 Plum and Posey pieces made with PMC. Only the actual Plum and Posey pieces produced by lost wax casting were entered into evidence.

Pyrrha Design	Plum and Posey Design	Overall Similarities	Whether these similarities form a substantial part of Pyrrha’s skill and judgment
Three Graces	Gratiae – The Three Graces	Both designs have similar, but not identical, imagery of three naked women. The designs are both oval in shape. Both designs have a smooth, rounded border although the Pyrrha border is thicker with more pockmarks. Both designs are oxidized, although the Pyrrha design appears to have blacker oxidization. The women in the centre of the image are polished in both designs. However, the women in the image are not as highly polished in the Plum and Posey Design.	The Plum and Posey design does not copy a substantial part of the skill and judgment in the Pyrrha Design. Overall, I give little weight to the fact that the imagery is similar as it is in the public domain. The specific expression of the seal imagery in metal is not that similar, given the differences in the level of polishing on the imagery and the different thickness and texture of the borders.
Heart Lock	Heart Padlock	Both pendants have similar, but not identical, imagery of a heart-shaped padlock. The pendants are both oxidized, although the contrast between the padlock and the background is greater in the Pyrrha pendant. The Pyrrha pendant has an oval shape overall compared to the round shape of the Plum and Posey pendant. The border of the Pyrrha pendant is more pock-marked and misshapen than the Plum and Posey designs, which is rounded.	The Plum and Posey design does not copy a substantial part of the skill and judgment in the Pyrrha Design. The borders of the wax seal do not have a similar shape and the oxidization and polishing looks different between the two designs.
I Am Ready	Stags Crest – I Am Ready	Both pendants have similar, but not identical, imagery of a stag’s head and a banner. The Pyrrha pendant says “Je Suis Pret” while the Plum and Posey pendant says “Je Suis Prest”. Overall	The Plum and Posey design does not copy a substantial part of the skill and judgment of Pyrrha in their design. The specific expression of the stag imagery in metal is not similar

Pyrrha Design	Plum and Posey Design	Overall Similarities	Whether these similarities form a substantial part of Pyrrha's skill and judgment
		the Pyrrha pendant is much smaller. The Plum and Posey pendant is more flat and square shaped. Both are oxidized with a dark grey or black, but the contrast between the stag and the background in the Pyrrha pendant is higher.	between the two designs, as the borders, the shape, the size, and the level of oxidization in the pieces are different.
Sweetness	Rose and Butterfly – Thy Sweetness Is My Life	Both pendants have different imagery of a rose and a butterfly with the words “Thy Sweetness is My Life” wrapped around the image. The shape of the border is quite similar between the two designs. The Pyrrha design is larger than the Plum and Posey design. The Pyrrha borders are more textured than the smooth borders of the Plum and Posey pendant. Both images have dark oxidization in the background, although Pyrrha's imagery is polished more brightly.	The Plum and Posey design does not copy a substantial part of the skill and judgment of Pyrrha in their design. However, of all the designs, this one, along with the Full of Spirit/Rooster design, comes close to being substantially similar. The shape of the border in combination with this image and dark oxidization comes close to copying a substantial part of Pyrrha's skill and judgment. However, given the relatively simple nature of this work, the Plum and Posey design still does not copy a substantial part of Pyrrha's skill and judgment to constitute infringement, as the texture of the border and size are still different.
Faithful	Faithful	Both pendants have nearly identical imagery of a side-facing dog and the word “Faithful”. The pendants are a similar size and circular shape. However, the Pyrrha borders are thicker, with multiple cracks and lines, while the Plum and Posey borders are thinner with no cracks or lines. Both pendants have dark oxidization of the background, although the dog in Pyrrha is polished to contrast with the background more than the Plum and Posey pendant.	The Plum and Posey design does not copy a substantial part of the skill and judgment of Pyrrha in their design. The specific expression of the dog imagery in metal is not sufficiently similar to form a substantial part of Pyrrha's original expression. The borders are different as is the level of oxidization.
Crown	Petite Crown	Both pendants have similar, but not identical, imagery of a crown. The pendants have a similar circular shape with a second circle in the middle. The background of both pendants is darkly oxidized, although the Pyrrha	The Plum and Posey design does not copy a substantial part of the skill and judgment of Pyrrha in their design. The specific expression of the crown imagery in metal is not substantially similar between the two designs.

Pyrrha Design	Plum and Posey Design	Overall Similarities	Whether these similarities form a substantial part of Pyrrha's skill and judgment
		pendant is polished more than the Plum and Posey pendant. Both borders are relatively thick and rounded. The borders of the Plum and Posey pendant are thicker. The borders of the Pyrrha pendant have lines and cracks not present on the Plum and Posey pendant. The Plum and Posey pendant is slightly larger.	Although the shape of the piece and the thickness of the borders are somewhat similar, the texture of the borders, the size, and the level of polishing in the pieces are different.
Bond of Friendship	Friendship – Clasped Hands	Both pendants have slightly different imagery of clasped hands. The pendants have a similar circular shape and size. However, the borders of the Pyrrha design are thicker and brighter than the Plum and Posey pendant. Both designs are darkly oxidized in the background, but the imagery in the Pyrrha pendant is polished to contrast more with the background. In addition, the Pyrrha pendant has a distorted internal border and has an outside border that has a more textured finish.	The Plum and Posey design does not copy a substantial part of the skill and judgment of Pyrrha in their design. The specific expression of the clasped hands imagery in metal is not substantially similar between the two designs. The borders and level of polishing are different.
Boar's Head	Warrior – Boar's Head	Both pendants have similar, but not identical, imagery of a boar's head. The borders in both pieces are bulbous. The shape of the pendants are different; the Plum and Posey pendant is more round, while the Pyrrha pendant is more of an irregular shape. Both pendants are darkly oxidized in the background, although the background of the Pyrrha pendant is darker and the image in the middle is more highly polished.	The Plum and Posey design does not copy a substantial part of the skill and judgment of Pyrrha in their design. The specific expression of the boar's head imagery in metal is not substantially similar between the two designs. Any similarity in the irregularity of the border appears to be a result of the shield shape of the wax seal used. The overall shapes of the pendants are different.
Full of Spirit	Rooster – While I Live I'll Crown	Both pendants have similar, but not identical, imagery of a rooster with the words "While I Live I'll Crow". The borders are both thick and rounded, although the Pyrrha pendant has a slightly thicker, textured border with a less rounded edge. The pendants have the same circular shape, although Plum and Posey's is	The Plum and Posey design does not copy a substantial part of the skill and judgment of Pyrrha in their design. However, this design, along with "Sweetness", does come close to being substantially similar. The round shape of the piece, thickness of the border, in combination with the similar rooster image and dark

Pyrrha Design	Plum and Posey Design	Overall Similarities	Whether these similarities form a substantial part of Pyrrha's skill and judgment
		slightly wider on the sides. Both pendants have dark oxidization and the imagery and letters are polished.	oxidization comes close to copying a substantial part of Pyrrha's skill and judgment. However, given the relatively simple nature of this work, the Plum and Posey design still does not copy a substantial part of Pyrrha's skill and judgment to constitute infringement, as the borders still are slightly different. In addition, this Pyrrha Design appeared to have less modifications done to the wax as it was created by stamping a seal tool into wax.

[146] In completing this assessment, I adopted the holistic qualitative approach stipulated in *Cinar*. I considered all of the similarities and then determined whether those similarities represented a substantial portion of the author's skill and judgment. In this second step, the similarities in the imagery did not form a substantial part of the author's skill and judgment as the imagery is in the public domain (see also the discussion of the selection of imagery in paragraph 109). The imagery is only considered in assessing whether the overall expression of the wax seal imagery with the borders and finishing are substantially similar.

[147] Further, I have not found Plum and Posey's Designs to be a "colourable imitation" of the Pyrrha Designs. The differences do not appear to be added superficially or in a way that suggests Hardy was camouflaging her alleged imitation. The differences are more plausibly the result of using similar (but not identical) imagery from separate sources (each party's own collection) but choosing to modify and finish the jewellery in a slightly different way.

D. *Access to Pyrrha Designs*

[148] The Plaintiff contends that since Plum and Posey had access to the Pyrrha Designs and, given the alleged similarities, there is a *prima facie* case of infringement by the Defendants. This allegation would be more important if the Court had found that the Defendants had infringed copyright in the Pyrrha Designs, but given the Court's finding of non-infringement, the issue of access is secondary.

[149] The Defendants were strangely silent in their written submissions.

[150] The Pyrrha jewellery designs have generally been available since 2005 through stores, its website, catalogues, look books, media, movies and television shows. Hardy admitted to following Pyrrha's website and social media since 2010 when she received the first "lawyer's letter" from Pyrrha's counsel.

[151] Obviously the lawyer's demand letter in 2010 and lawsuit brought the Pyrrha Designs to the Defendants' attention. The Plaintiff further says that Plum and Posey's new website and advertising shows that they are copying Pyrrha Designs. The 2015 change in the website to displaying Plum and Posey's jewellery on a white background is said to be similar to Pyrrha as is Plum and Posey's first sales catalogue because it used similar pictures of women with pendants against a background similar to Pyrrha's 2015 Look Book.

[152] I conclude that Pyrrha has established that Hardy had access to Pyrrha Designs prior to creating her own designs (except for the “I Am Ready” design). The Pyrrha Designs were created and sold prior to Plum and Posey’s date of creation. Pyrrha did not show that the “I Am Ready” design was clearly created prior to Plum and Posey’s “Stags Crest – I Am Ready” design.

[153] However, access does not on its own establish infringement. There is no doubt that Pyrrha showed Plum and Posey and potentially others what can be done with wax seals. In fact, Pyrrha may well have inspired Hardy to move in the direction of wax seal jewellery but Pyrrha does not have copyright in either the idea of wax seal jewellery or in the process used to create such jewellery – only in the expression found in each piece.

[154] There is insufficient evidence to convince me that the changes in the Plum and Posey website in 2015 and the catalogue in 2017 constitute copying as alleged by the Plaintiff. Without evidence to the contrary, the use of a white background to display jewellery appears to be a common modern way to display on websites. The use of pictures of women outdoors in a catalogue selling jewellery primarily to women is common and cannot be protected. Moreover, the models are displayed, posed and dressed differently.

E. *Defence of Common Source*

[155] Given the Court’s finding of non-infringement, the defence of common source issue is irrelevant. The defence arises where the similarity between designs is the result of the use of conventional ideas as common source material (see *Phillip Morris* at para 320).

[156] However, in this case, the design elements of the metal jewellery – the specific appearance of the borders and the oxidization – are not from a common source. If there were copying of a substantial part of the originality in the Design, the defence of common source would not have prevented a finding of copyright infringement.

F. *Paragraph 13 of the Settlement Agreement – Pyrrha Trade Dress*

[157] Paragraph 13 of the Settlement Agreement is a release provision by which Pyrrha released the Defendants from potential claims in respect of Pyrrha Trade Dress.

[158] The Defendants contend that the provision bars Pyrrha from claiming the Defendants' infringement in respect of such matters as a darkened look from oxidization and wax seal borders.

[159] Paragraph 13 reads:

13. Pyrrha hereby releases the Defendants, their successors, assigns, heirs, legal representatives, agents, principals, employees, insurers, and all other persons, firms, or corporations, who might be liable or who might be claimed to be liable of and from any and all contracts, claims, demands, damages, causes of actions, suits or causes of suits of any kind or nature whatsoever, known or unknown, suspected or unsuspected, arising from the Defendants' alleged infringement of the Pyrrha Trade Dress and/or Pyrrha's copyrights in the jewellery designs attached as Schedule "A" hereto, occurring on or before the Effective Date.

[160] One difficulty with this issue among the many difficulties is that it arose in oral argument without a proper evidentiary record upon which the Court could render a proper interpretation of the provision.

[161] The issue seems to have arisen from Justice Martin's oral judgment on a summary motion possibly compounded by comments from Papin in his discovery.

[162] A key feature of the provision is the term "Pyrrha Trade Dress" – an undefined term in the Settlement Agreement. Without a proper evidentiary basis for the use of terms, its meaning and the scope of the release, it is neither necessary, wise, nor feasible for the Court to pronounce on the issues of paragraph 13.

[163] Therefore, there appears to be no bar to the Plaintiff pursuing this litigation arising from paragraph 13 of the Settlement Agreement.

VII. Remedies

[164] In view of the Court's conclusion that there has been no infringement, discussion of the Plaintiff's remedies of injunction and statutory damages is moot.

[165] While ownership has been found based on this record and the Plaintiff seeks a declaration of copyright as between the parties, no practical utility in such a declaration, in the absence of a finding of infringement, has been advanced. Therefore, no declaration will be granted.

[166] The Defendants are entitled to have this action dismissed with costs. The parties shall have 30 days to make submissions as to costs.










"Michael L. Phelan"

Judge










Ottawa, Ontario
January 30, 2019

SCHEDULE A










Schedule A

	Pyrrha's Design Title	Pyrrha's Design Picture	Defendant's Design Title in 2013	Defendant's Design Picture in 2013	Defendant's Design Title in 2018	Defendant's Design Picture in 2018
1.	3 Graces		Gratae - The 3 Graces		Gratae - The 3 Graces	
2.	Heart Lock		Heart Padlock - Key to my Heart - Heart Lock and Key Lovers		Heart Padlock - Antique Wax Seal Necklace - Lovers Key to my Heart	
3.	I Am Ready		Stag - I Am Ready		Slags Crest - I am Ready	

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4.	Pyrrha's Design Title	Sweetness	Pyrrha's Design Picture		<p>Defendant's Design Title in 2013</p> <p>Rose and Butterfly - Thy sweetness is my life</p>		<p>Defendant's Design Title in 2018</p> <p>Rose and Butterfly - Thy sweetness is my life</p>	
5.	Faithful	Faithful - Faithful Friend Loyalty Devotion Love and Affection Dog Friendship		<p>Defendant's Design Title in 2013</p> <p>Faithful - Faithful Friend Loyalty Devotion Love and Affection Dog Friendship</p>		<p>Defendant's Design Title in 2018</p> <p>Faithful - Wax Seal Necklace - Faithful Friend Loyalty Devotion Love and Affection Dog Friendship</p>		
6.	Crown	Crown		<p>Defendant's Design Title in 2013</p> <p>Crown</p>		<p>Defendant's Design Title in 2018</p> <p>Petite Crown</p>		

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7.	Pyrrha's Design Title	Bond of Friendship		Pyrrha's Design Title in 2013	Friendship – Clasped Hands		Defendant's Design Title in 2018	Friendship – Clasped Hands	
8.	Boars Head	Warrior – Boars Head		Defendant's Design Title in 2013	Warrior – Boars Head		Defendant's Design Title in 2018	Boars Head Warrior Necklace	
9.	Full of Spirit	Rooster - While I live I'll crow Courage, Confidence and Bravery Rooster		Defendant's Design Title in 2013	Rooster - While I live I'll crow		Defendant's Design Title in 2018	Rooster – While I live I'll crow	

FEDERAL COURT
SOLICITORS OF RECORD

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AND ADRINNA M. HARDY

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DATED: JANUARY 30, 2019

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