

Federal Court



Cour fédérale

Date: 20190910

Docket: T-2175-18

Citation: 2019 FC 1154

Ottawa, Ontario, September 10, 2019

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

POPSOCKETS LLC

Plaintiff

and

CASE WORLD ENTERPRISES LTD.

Defendant

JUDGMENT AND REASONS

I. Overview

[1] This decision relates to a motion for default judgment filed by the Plaintiff, PopSockets LLC, on July 22, 2019, and argued on an *ex parte* basis at General Sittings in Toronto on August 20, 2019. The Plaintiff seeks declarations that the Defendant, Case World Enterprises Ltd., has infringed, passed off, and depreciated the goodwill in certain trademarks and infringed certain copyrights, as well as injunctive relief, damages and costs.

[2] As explained in greater detail below, my conclusion is that it is appropriate (1) to grant default judgment against the Defendant, finding the Defendant to have infringed the Plaintiff's rights to the registered word mark POPSOCKETS and certain registered copyrights; and (2) to award the Plaintiff resulting injunctive relief, including delivery up, damages, and costs on a party-and-party basis. I have not found liability for passing off or other causes of action under sections 7 or 22 of the *Trademarks Act*, RSC 1985, c T-13 [*Trademarks Act*].

II. Background

[3] The Plaintiff, PopSockets LLC, is a company incorporated pursuant to the laws of the State of Colorado in the United States, with a registered office in Boulder, Colorado. It asserts rights in relation to certain registered and unregistered trademarks relating to various categories of accessories for mobile phones and other digital devices, as well as copyrights to certain artistic works depicting such accessories and their use.

[4] The Defendant, Case World Enterprises Ltd., is a corporation registered pursuant to the laws of the Province of British Columbia, with registered office in Surrey, British Columbia. The Plaintiff alleges that the Defendant is engaged in the offering for sale and sale of counterfeit versions of the Plaintiff's goods at three retail locations in Surrey, British Columbia. According to the Plaintiff, the Defendant allegedly employed, on goods and packaging, both marks and artistic works that infringe, respectively, the Plaintiff's rights under the *Trademarks Act* and the *Copyright Act*, RSC 1985, c C-42 [the *Copyright Act*].

[5] In support of its allegations of wrongful conduct, the Plaintiff relies on the affidavit of a private investigator, who attended, on several occasions between April and October of 2018, retail locations that the Plaintiff says are operated by the Defendant. The investigator made observations, took photographs of items for sale, and, on some of these occasions, purchased such items. In July 2018, the investigator also delivered cease-and-desist letters at one of these locations.

[6] The Plaintiff subsequently filed a Statement of Claim dated December 21, 2018, asserting its allegations against the Defendant. The Plaintiff submits that its pleading was served on the Defendant on December 27, 2018. The Plaintiff's counsel then received by email a letter dated January 2, 2019 from Mr. Rabinder Gill, taking the position that the Defendant does not own or operate the retail locations identified in the Statement of Claim. Mr. Gill subsequently filed a motion, identifying himself as a Director of the Defendant and seeking leave under Rule 120 of the *Federal Courts Rules* to represent the Defendant in this proceeding. Mr. Gill's motion also sought an extension of time to file a Statement of Defence.

[7] By Order dated March 15, 2019, Prothonotary Ring dismissed Mr. Gill's Rule 120 motion, required the Defendant to serve and file a Notice of Appointment of Solicitor, no later than 45 days from the date of the Order, and adjourned the motion for extension of time *sine die* pending compliance with such requirement.

[8] By further Order dated July 8, 2019, Prothonotary Ring dismissed the Defendant's motion for an extension of time to file a Statement of Defence, as the Defendant had failed to file a Notice of Appointment of Solicitor within the time provided by the previous Order or at all.

[9] The Plaintiff then filed the present motion for default judgment on July 22, 2019.

III. Issues

[10] The Plaintiff's motion raises the following issues for the Court's determination:

- A. Was the Defendant properly served with the Plaintiff's Statement of Claim?
- B. Has the Defendant infringed the Plaintiff's rights under section 7, 19, 20 or 22 of the *Trademarks Act*?
- C. Has the Defendant infringed the Plaintiff's rights under the *Copyright Act*?
- D. To which remedies, if any, is the Plaintiff entitled?
- E. To which measure of costs, if any, is the Plaintiff entitled?

IV. Analysis

A. Was the Defendant properly served with the Plaintiff's Statement of Claim?

[11] In support of its position that the Defendant was personally served with the Statement of Claim on December 27, 2018, the Plaintiff relies on an affidavit of its private investigator, Brian

Lambie, who swears that on that date he left a copy of the document with Rabinder Singh Gill, a director of the corporate Defendant who appeared to be in control or management of the place of business at 8809 128th Avenue, Surrey, British Columbia. Mr. Lambie also notes that the signage at the business at this location read “Case World”.

[12] The Plaintiff has also filed a copy of the BC Registry Services corporate printout for the Defendant, which identifies the Defendant’s registered office to be 8809 128th Street, Surrey, British Columbia. While I note that the printout refers to 128th Street and the affidavit of service refers to 128th Avenue, this appears to be an inconsequential error. Moreover, the printout identifies Rabinder Gill as a director of the Defendant. Rule 130(1)(a)(i) provides that personal service of a document on a corporation can be effected by leaving the document with a director of the corporation. I also note that, while Mr. Gill’s January 2019 letter disputes the Defendant’s participation in the alleged wrongdoing, neither that letter nor Mr. Gill’s subsequent motion disputed the validity of service.

[13] I therefore find that service was validly effected upon the Defendant, by leaving a copy with Mr. Gill, on December 27, 2019.

[14] Following expiry of the 30-day period for filing a Statement of Defence, and the dismissal of the motion for an extension of time for such filing, the Plaintiff was entitled to bring this motion for a default judgment on an *ex parte* basis under Rules 210(1) and (2). However, the Plaintiff has also filed an affidavit of service sworn by Sandra Napier, a legal secretary, confirming that she served the Defendant with a courtesy copy of the Motion Record for Default

Judgment by sending a copy by regular mail on July 17, 2019 to 12773 88 Ave, Surrey, British Columbia, described as the last known address for the Defendant. I note that this is the address provided by Mr. Gill in his January 2019 letter.

[15] Ms. Napier's affidavit notes that the motion was originally returnable August 13, 2019. As such, the Notice of Motion sent to the Defendant on July 17, 2019 would have provided that date. The hearing of the motion was subsequently adjourned, at the request of the Court, to August 20, 2019. However, the Plaintiff has also filed an affidavit sworn by Maria Papadopoulos, a law clerk employed by the Plaintiff's solicitors, which in turn attaches a copy of a letter dated August 8, 2019, from the Plaintiff's counsel to the Defendant, to the attention of Mr. Gill at 12773 88 Ave, Surrey, British Columbia, confirming the change in the hearing date. The affidavit also evidences that a copy of this letter was sent by email on August 14, 2019 to the email address previously employed by Mr. Gill when sending his January 2, 2019 letter to the Plaintiff's counsel.


[16] While this is not a formal requirement under the Rules, the Court is satisfied that the Defendant has been provided an opportunity to respond to the Plaintiff's default judgment motion and has failed to do so. It is therefore appropriate for the Court to consider on an *ex parte* basis the Plaintiff's evidence and argument in support of its efforts to establish its claim.

B. Has the Defendant infringed the Plaintiff's rights under section 7, 19, 20 or 22 of the Trademarks Act?

(1) Role of the Defendant

[17] In recognition of its responsibilities on an *ex parte* motion, the Plaintiff has brought to the Court's attention the Defendant's position, expressed in Mr. Gill's January 2019 letter, that the Defendant does not own or operate the retail locations identified in the Statement of Claim. To address this position, the Plaintiff relies on the BC Registry Services printout for the Defendant, which identifies the Defendant's registered office to be 8809 128th Street, Surrey, British Columbia, as well as an affidavit of an internet investigator, which attaches screenshots of webpages at the website www.caseworld.com. The website appears to relate to an enterprise that employs the business name "Case World". One of the webpages on this site shows addresses for three locations of the business, which correspond with the addresses of the three locations visited by Mr. Lambie. One of those addresses in turn corresponds with the registered address of the Defendant shown on the BC Registry Services printout. In the absence of any evidence to support the Defendant's position, I am satisfied based on the above evidence that the Defendant operates the relevant three locations.

(2) The Plaintiff's Marks

[18] The Plaintiff relies on the affidavit of its General Counsel, David Gottlieb, in support of the rights it asserts in this motion. Mr. Gottlieb's affidavit explains that the Plaintiff is the owner of the registered Canadian word mark POPSOCKETS [the Word Mark], the unregistered design mark  which is the subject of a pending Canadian trademark application [the Design Mark],

and a further mark registered in the United States which employs the Design Mark in place of each letter “O” in the word POPSOCKETS [the Stylized Word Mark].

[19] Because only the Word Mark is registered in Canada, it is the only mark that can be the subject of an infringement action under section 19 or 20 of the *Trademarks Act*. Also, while the Plaintiff has pleaded section 19, it acknowledges that this section is not applicable to the conduct of the Defendant about which it complains, involving use of the word “Popsocket”, i.e. the singular version of the Word Mark, which is not identical to the Word Mark. The Plaintiff therefore relies on section 20, prohibiting use of a confusing mark, for its claim in relation to the registered Word Mark.

(3) Evidence of Infringement

[20] The evidence of the Plaintiff’s private investigator, Mr. Lambie, is that on April 28, 2018, he attended Case World Enterprises Ltd. located at 8809 128th Avenue, Surrey, British Columbia [defined in Mr. Lambie’s affidavit as Case World Store #1] and observed over 50 “grips” on display for sale. Mr. Lambie purchased one grip and obtained a receipt. Photographs of same show the word “Popsocket” appearing on a Universal Product Code [UPC] sticker on the front of the packaging for the purchased item and the word “Popsocket” identifying the item on the receipt issued therefor.

[21] On May 3, 2018, Mr. Lambie attended Case World Enterprises Ltd. located at Unit C115 12477 88th Avenue, Surrey, British Columbia [defined in Mr. Lambie’s affidavit as Case World Store #2] and again observed over 50 grips on display for sale. Mr. Lambie again purchased one

grip and obtained a receipt. Photographs show the word “Popsocket” identifying the item on the receipt.

[22] Also on May 3, 2018, Mr. Lambie attended Case World Enterprises Ltd. located at 13627 72nd Avenue, Surrey, British Columbia [defined in Mr. Lambie’s affidavit as Case World Store #3] and observed over 100 grips on display for sale. Mr. Lambie again purchased one grip and obtained a receipt. Photographs show the word “Popsocket” identifying the item on the receipt, There is also a UPC sticker on the back of the packaging which may show the word “Popsocket”, but the photograph is not clear enough to be certain of this.

[23] On July 12, 2018, Mr. Lambie attended Case World Store #1 to serve cease-and-desist letters on behalf of the Plaintiff. He observed over 40 grips on display for sale. The employee with whom Mr. Lambie spoke at the store provided him with the phone number for the manager of the store, described as Rav Singh. Mr. Lambie spoke with Mr. Singh, who stated that he would let the owners of Case World know about the cease-and-desist letters for all three Case World locations. He also requested that Mr. Lambie leave letters for all three locations at Case World Store #1. Mr. Lambie did so.

[24] Immediately thereafter, Mr. Lambie visited Case World Store #2, where he observed over 50 grips on display for sale, and Case World Store #3, where he did not observe any grips on display for sale.

[25] Finally, on October 12, 2018, Mr. Lambie again attended Case World Store #3, observing over 70 grips on display for sale, and purchased one of the grips. On this occasion, neither the

packaging for the item nor its receipt displayed the word “Popsocket”. The receipt instead described the item as “Mobile Phone Holder 2IN1 Set”.

(4) Analysis under Section 20 of the Trademarks Act

[26] As an initial point, I note that the Plaintiff’s private investigator describes the allegedly infringing goods as “grips.” I also note from reviewing the Plaintiff’s trademark registration for the Word Mark that it is not registered in relation to “grips.” Rather, it applies to “Carrying cases, holders, protective cases and stands featuring power supply connectors, adapters, speakers and battery charging devices, specially adapted for use with handheld digital electronic devices, namely, phones, sound players, video players.” This language can be contrasted with the Plaintiff’s application for registration of the Design Mark, which applies to “Grips, stands, and mounts for handheld electronic devices, namely, smartphones, tablets, cameras, sound players, and video players.”

[27] However, I also note from the photographs taken by Mr. Lambie that the packaging for the Defendant’s allegedly infringing goods describes the item as a “Mobile Phone Holder”. Given the Defendant’s own use of the term “holder” to describe the items in question, I find that the items fall within the list of goods to which the Plaintiff’s registration of its Word Mark applies.

[28] Section 20(1)(a) of the *Trademarks Act* provides that the right of the owner of a registered trademark to its exclusive use is deemed to be infringed by any person who is not entitled to its use and who sells, distributes or advertises any goods or services in association with a confusing trademark. The likelihood of confusion is to be assessed with regard to all

surrounding circumstances, including the factors expressly prescribed by section 6(5), as a matter of first impression in the mind of a casual consumer somewhat in a hurry (see *Veuve Clicquot Ponsardin v Boutiques Clicquot Ltée*, 2006 SCC 23 at para 20).

[29] In my view, the present case does not require a detailed analysis of the section 6(5) factors in order to establish infringement. There is clearly a significant degree of resemblance between the mark “Popsocket”, used on the packaging of and receipts for the Defendant’s goods, and the Plaintiff’s Word Mark. I will explain later in these Reasons the shortcomings in the Plaintiff’s evidence surrounding goodwill or reputation associated with its marks. For the same reason, I make no finding about acquired distinctiveness of the Plaintiff’s Word Mark. However, I am satisfied that the nature of the Word Mark, being a made-up word, brings a high level of inherent distinctiveness.

[30] I have little evidence of the length of time the Plaintiff’s Word Mark has been in use, other than Mr. Gottlieb’s evidence that sales of its merchandise have increased dramatically in the last 2 years, and I have no evidence as to the length of time the Defendant has been using the mark “Popsocket.” However, based on Mr. Gottlieb’s evidence, there appears to be significant similarity in the nature of the parties’ goods and the nature of their trade. Considering all the section 6(5) factors, I am satisfied that there is a likelihood of confusion and that the Defendant has infringed the Plaintiff’s rights under section 20 of the *Trademarks Act*.

(5) Analysis under Sections 7 and 22 of the Trademarks Act

[31] The Plaintiff also asserts causes of action under subsections 7(b), (c) and (d) of the *Trademarks Act*. These causes of action potentially apply not only to the registered Word Mark, but also to the Design Mark and the Stylized Word Mark, which are not registered in Canada. The Plaintiff notes that the Design Mark is embossed on the second item in each package purchased by Mr. Lambie. The Stylized Word Mark does not appear on the items purchased by Mr. Lambie, their packaging, or the receipts.

[32] The Plaintiff acknowledged that, to succeed under section 7 of the *Trademarks Act* (or at least under subsection 7(b)), it must establish goodwill or reputation in its mark that is the subject of the cause of action. A claim for passing off under subsection 7(b) of the *Trademarks Act* requires the claimant to establish: goodwill or reputation in a mark, deception of the public due to a misrepresentation, and actual or potential damage to the Plaintiff (see *Ciba-Geigy Canada Ltd v Apotex Inc*, [1992] 3 SCR 120, 1992 CarswellOnt 1007 at para 32 [*Ciba-Geigy*]). In the absence of argument on the point, I would not wish to state definitively whether goodwill is always required to prove liability under subsections 7(c) and 7(d). However, given the manner in which the Plaintiff has framed its particular arguments under those subsections, in my view it must demonstrate goodwill in its marks to succeed on these causes of action as presented.

[33] To establish such goodwill, the Plaintiff relies upon the combination of its use and its advertising of its marks, as set out in Mr. Gottlieb's affidavit. With respect to use, Mr. Gottlieb deposes that the Word Mark always appears on the Plaintiff's merchandise, either alone or

together with the Design Mark or the Stylized Word Mark, and that sales of its merchandise have dramatically increased in the last 2 years, exceeding many millions of dollars in Canada.

However, these statements provide no evidence, either quantitative or qualitative, as to how frequently either the Design Mark or the Stylized Word Mark appears. Even the evidence of the volume of use of the Word Mark is quite vague. Moreover, Mr. Gottlieb does not speak to the recognisability of any of the marks, i.e. whether customers associate these marks with the Plaintiff's goods (see, e.g., *Ciba-Geigy, supra*).

[34] The evidence of advertising of the marks relates to their use in the promotion of the Plaintiff's merchandise through social media. Mr. Gottlieb describes the number of followers the Plaintiff has on each of Instagram, Facebook and Twitter. For each of these platforms, Mr. Gottlieb states that the numbers include followers in Canada. However, there is no way to determine from this evidence, again either qualitatively or quantitatively, the number of followers in Canada.

[35] In my view, the combination of the evidence of use and advertising relied upon by the Plaintiff is insufficient to establish goodwill or reputation in Canada. I therefore find no liability under section 7 of the *Trademarks Act*.

[36] The Plaintiff's claim for depreciation of goodwill under section 22 of the *Trademarks Act* also fails for the same reason.

C. Has the Defendant infringed the Plaintiff's rights under the Copyright Act?

[37] Mr. Gottlieb's affidavit establishes that the Plaintiff owns several copyrights, registered in Canada under the *Copyright Act*, and includes depictions of the artistic works that are the subject of those copyrights. The Plaintiff's claim for infringement of those copyrights is based on the appearance of drawings on the packaging of the merchandise purchased by Mr. Lambie from the Defendant's retail locations. The Plaintiff submits that these drawings are substantially identical to its copyrighted works.

[38] The Plaintiff recognizes that there are minor differences between its copyrighted works and the drawings on the Defendant's packaging, principally in the use or absence of colour. Copyright infringement can be established in the case of reproduction of all or any substantial part of a copyrighted work, or in a circumstance where the reproduction is strikingly similar to the copyrighted work (see, e.g., *Stork Market Inc v. 1736735 Ontario Inc. (Hello Pink Lawn Cards Inc)*, 2017 FC 779 at para 78). After comparing the drawings on the Defendant's packaging with the copyrighted works, including taking into account the differences, I find that the drawings are strikingly similar to the Plaintiff's works with Canadian registration numbers 1147462, 1147465, 1147466 and 1147467 and therefore represent infringement of the Plaintiff's rights, contrary to under section 27 of the *Copyright Act*.

D. To which remedies, if any, is the Plaintiff entitled?

[39] Having found infringement under both the *Trademarks Act* and the *Copyright Act*, the Plaintiff is entitled to remedies against the Defendant. Section 53.2 of the *Trademarks Act* provides that the Court may make any order that it considers appropriate in the circumstances, including an order providing for relief by way of injunction and the recovery of damages or profits, for punitive damages and for the destruction or other disposition of any offending good. Similarly, section 34(1) of the *Copyright Act* provides that, where copyright has been infringed, the owner of the copyright is, subject to the *Act*, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

[40] Against that backdrop, I will consider each of the categories of relief sought by the Plaintiff.

(1) Injunctive Relief and Delivery Up

[41] The above statutory provisions contemplate the possibility of injunctive relief and delivery up, which I consider to be appropriate in the circumstances of this case. My Judgment will afford such relief, restraining the Defendant from conducting the activities that represent infringement of the Plaintiff's rights and requiring delivery up of the infringing merchandise.

(2) Damages for Trademark Infringement

[42] As damages for trademark infringement, the Plaintiff seeks so-called nominal or minimum compensatory damages, in the amount of \$8000.00 per incident of infringing activity at the retail level. I accept that such damages are appropriate in circumstances such as these, where proof of actual damages would be difficult, and that this figure is consistent with established authority (see *Kwan Lam v Chanel S de RL*, 2016 FCA 111 at paras 17-18).

[43] The Plaintiff asserts that there are six incidents of infringing activity: the four occasions on which Mr. Lambie purchased merchandise from the Defendant's retail locations, plus the two other occasions on which he observed merchandise for sale but did not make a purchase. In my view, the evidence establishes the conduct of activity infringing the *Trademarks Act* on only three of these occasions. On the first three occasions on which Mr. Lambie purchased merchandise, the mark "Popsocket" which I have found to have infringed the Plaintiff's Word Mark was displayed on a UPC sticker on the packaging of the merchandise and/or on the receipt issued for the merchandise. That infringing mark did not appear on the packaging or the receipt for the fourth purchase made by Mr. Lambie.

[44] For the two occasions on which Mr. Lambie made observations of the grips for sale but made no purchases, there is no evidence as to whether a UPC sticker displaying the infringing mark was applied to the packaging of any of these grips. I also note that the infringing mark did not appear on the applicable receipt on all the occasions on which Mr. Lambie made purchases. Therefore, the Court cannot conclude the packaging or receipts related to the grips Mr. Lambie observed for sale, on the two occasions on which he did not make purchases, would have displayed the infringing mark.

[45] Based on the above analysis, I am prepared to award \$24,000.00 in damages for trademark infringement.

(3) Damages for Copyright Infringement

[46] Section 38.1(1) of the *Copyright Act* provides for the payment of statutory damages, at a claimant's election, in the range of \$500.00 to \$20,000.00 in cases of infringement for commercial purposes. The Plaintiff is seeking statutory damages in the total amount of \$5000.00 in respect of all wrongful conduct related to the packaging of the Defendant's goods.

[47] Section 38.1(5) of the *Copyright Act* provides a list of relevant factors for the Court to consider in exercising its discretion in awarding statutory damages. Those factors include the good or bad faith of the defendants, the conduct of the parties before and during the proceedings, and the need to deter other infringements of the copyright in question. While the Defendant has not participated substantively in these proceedings, Mr. Gill's January 2019 letter does not demonstrate willingness to take responsibility for the Defendant's acts of infringement. Nor did the acts of copyright infringement cease following the Defendant's receipt of the cease-and-desist letters: the item purchased by Mr. Lambie on October 2, 2018 still displays on its packaging the drawings that infringe the Plaintiff's copyrights.

[48] Taking into account those circumstances in the context of the factors prescribed by section 38.1(5), I am satisfied that the Plaintiff is not overreaching with a claim for \$5000.00 in statutory damages, particularly given the multiple acts of infringement.

(4) Punitive Damages

[49] The Plaintiff also seeks punitive damages, in an unspecified amount, based on the Defendant's refusal to cooperate with the requests in the cease-and-desist letter and its having persisted in selling the infringing merchandise. The Plaintiff refers the Court to *Louis Vuitton Malletier SA v Yang*, 2007 FC 1179 at paras 46 to 49, in which Justice Snider canvassed principles applicable to the award of punitive damages as explained in *Whiten v Pilot Insurance Co*, 2002 SCC 18. Punitive damages are awarded in exceptional cases for malicious, oppressive and high-handed conduct that offends the Court's sense of decency. Factors to be considered include: whether the conduct was planned and deliberate; the intent and motive of the defendant; whether the defendant persisted in the outrageous conduct over a lengthy period of time; whether the defendant concealed or attempted to cover up its misconduct; the defendant's awareness that what he or she was doing was wrong; and whether the defendant profited from its misconduct.

[50] Applying these principles to the present case, I am not satisfied that an award of punitive damages is appropriate. There is little evidence that speaks to the Defendant's intent or motive, or whether it was aware that what it was doing was wrong. Other than, perhaps, the Defendant's denial that it was the operator of the relevant retail locations, there is also no indication of an attempt to cover up its misconduct. It is reasonable to infer that the Defendant has profited from its misconduct and, as noted above, its misconduct in relation to the Plaintiff's copyrights did not cease following service of the cease-and-desist letters. However, the evidence does not support a conclusion that it has persisted in this misconduct over a lengthy period of time. Based on the

Defendant's conduct to this point in time, I do not regard this case as involving malicious, oppressive or high-handed conduct that would support an award of punitive damages.

V. Costs

[51] In the written representations filed in support of its default judgment motion, the Plaintiff claimed costs on a solicitor-client basis, relying on the Defendant's conduct in failing to defend the proceeding. It sought to quantify those costs at \$15,000.00 but offered no evidence in support of that quantification, submitting only that this figure is less than its actual costs.

[52] At the hearing of this motion, the Court afforded the Plaintiff an opportunity to provide post-hearing written submissions on appropriate quantification of lump sum party-and-party costs, to be considered in the event the Court decided to award the Plaintiff costs on that basis. The Plaintiff has filed such submissions, and a Bill of Costs, in support of costs in the lump sum amount of \$9249.15.

[53] The Bill of Costs provides three alternative bases for calculation of the Plaintiff's costs. The first, totaling \$9249.15, appears to represent actual legal fees and disbursements, but applied only to the services that would be taxable under Tariff B. The second approach employs the same taxable services and numbers of units selected at the top of the range of Column V of the Tariff. The third approach employs those services and numbers of units selected at or near the top of the range of Column III.

[54] In my view, based on the same considerations underlying my decision not to award punitive damages, this is not a case that warrants an award of solicitor-client costs, the modified approach to same represented by the Plaintiff's \$9249.15 figure, or costs based on Column V of the Tariff. However, while this matter has been concluded through an uncontested motion, I appreciate that the requirement to prove its case on a default judgement motion resulted in the Plaintiff having to expend considerable effort in preparing its evidence and argument. I am therefore prepared to award costs based on the numbers of units that the Plaintiff has selected at or near the top of the range of Column III. I also note that the Plaintiff has included 7 units under item 15 of the Tariff, for preparation and filing of written argument for a hearing. While this item could be seen as duplicative of item 4 (the preparation of an uncontested motion including all materials), I am prepared to include it, again because of the requirement for substantive written argument associated with proving the Plaintiff's claim.

[55] Employing the Plaintiff's Column III figures plus taxable disbursements results in a costs award of \$5,195.27.

JUDGMENT IN T-2175-18

THIS COURT’S JUDGMENT is that:

1. This Court declares and adjudges that as between the Plaintiff and the Defendant, the Plaintiff’s Canadian registered trademark TMA962,483 (POPSOCKETS) [the Subject Trademark] is deemed to have been infringed by the Defendant by virtue of the sale of merchandise bearing a reproduction of the Subject Trademark without the consent, license or permission of the Plaintiff, contrary to section 20 of the *Trademarks Act*, R.S.C. 1985, c. T-13.
2. This Court declares and adjudges that as between the Plaintiff and the Defendant, the Canadian registered copyrights numbered 1147462, 1147465, 1147466 and 1147467 owned by PopSockets LLC [the Subject Copyrights] have been infringed by the Defendant by virtue of the sale of merchandise bearing the Subject Copyrights without the consent, license or permission of the Plaintiff, contrary to section 27 of the *Copyright Act*, R.S.C. 1985, c. C-42.
3. The Defendant is restrained from offering for sale, displaying, advertising, selling, manufacturing, distributing, or otherwise dealing in merchandise not being that of the Plaintiff, bearing the Subject Trademark or any mark confusing therewith.
4. The Defendant is restrained from reproducing, copying, and distributing merchandise bearing the Subject Copyrights, or any work or logo substantially

similar thereto, which is not manufactured by or for the Plaintiff, pursuant to the provisions of section 39.1 of the *Copyright Act, supra*.

5. The Defendant shall forthwith deliver up to the Plaintiff or the Plaintiff's solicitors all merchandise in its possession, custody and/or control, wheresoever situated, to which paragraph 3 and/or 4 of this Order applies, and same shall be released to the Plaintiff or the Plaintiff's solicitors to be dealt with in their absolute discretion.
6. The Defendant shall pay to the Plaintiff minimum compensatory damages in the amount of \$24,000.00 arising from the infringement by the Defendant of the Subject Trademark, and \$5000.00 in statutory damages arising from the infringement by the Defendant of the Subject Copyrights.
7. The Defendant shall pay to the Plaintiff costs in the amount of \$5195.27.

THIS JUDGMENT bears interest at the rate of 5% per year from its date.

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2175-18

STYLE OF CAUSE: POPSOCKETS LLC V CASE WORLD ENTERPRISES LTD.

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: AUGUST 20, 2019

JUDGMENT AND REASONS SOUTHCOTT, J.

DATED: SEPTEMBER 10, 2019

APPEARANCES:

David S. Lipkus

FOR THE PLAINTIFF

SOLICITORS OF RECORD:

Kestenberg Siegal Lipkus LLP
Toronto, Ontario

FOR THE PLAINTIFF