

Federal Court



Cour fédérale

Date: 20250131

Docket: T-824-23

Citation: 2025 FC 205

Montréal, Quebec, January 31, 2025

PRESENT: Mr. Justice Gascon

BETWEEN:

CAVAN SPECIALITY ADVERTISING LTD.

Plaintiff

and

**LES PROMOTIONS UNIVERSELLES INC.
O/A UNIVERSAL PROMOTIONS**

Defendant

JUDGMENT AND REASONS

I. Overview

[1] The defendant, Les Promotions Universelles inc. [LPU], brings a motion for summary judgment [Motion] pursuant to section 213 of the *Federal Courts Rules*, SOR/98-106 [Rules]. This Motion is filed in the context of an action for copyright infringement [Action] brought by the plaintiff, Cavan Specialty Advertising Ltd. [Cavan]. In the Action, Cavan alleges that LPU infringed copyrights belonging to it by creating and selling hoodies bearing a drawing of a

contemporary version of the famous “Rosie the Riveter” icon [Rosie] [LPU Design]. Cavan claims that the LPU Design is an illicit copy of its own contemporary drawing of Rosie [Cavan Design] and of the photo at the source of the Cavan Design [Contemporary Rosie], for which Cavan holds an exclusive license from the author.

[2] In its Motion, LPU seeks a summary judgment dismissing the Action on the following grounds: (i) the Action raises no genuine issue requiring a trial; (ii) Cavan has not met its burden of proof that there is such an issue, as its evidence is flawed; and (iii) the Action may alternatively be decided on the basis of a single question of law.

[3] For the reasons that follow, the Motion will be dismissed. I find that, at this stage, the Action’s legal basis is not clearly without merit and that there is therefore a genuine issue for trial. More specifically, LPU’s specific combination and arrangement of some of the features from the Cavan Design — including its tagline — raises a genuine possibility that the LPU Design reproduces a substantial part of the Cavan Design. I am also unable to conclude with sufficient certainty that the similarities between both works are the mere product of using common source material or that the LPU Design is an independent creation. Moreover, the question submitted by LPU cannot resolve the Action. The LPU Design not only reproduces unprotectable elements of the Cavan Design, but also copies the Cavan Design’s tagline and combination.

II. Background

A. *The factual context*

[4] Cavan and LPU both operate in the sale and distribution of promotional items to unions. They are direct competitors.

[5] Over the years, the parties have each developed products based on Rosie. Since the Second World War, Rosie has been an emblematic icon of the North American labour movement and of female solidarity in the workforce. She is featured on various promotional products sold and distributed in connection with the feminist labour movement, such as hoodies, bags, and posters. It is not disputed that this work is now in the public domain.

[6] In 2016, Cavan discovered the Contemporary Rosie at an event in Winnipeg. This photo is a modern interpretation of Rosie featuring a Rosie lookalike with a sleeve tattoo and a brightly coloured camisole. Cavan then contacted its owner, professional photographer Michaël Fournier, and obtained an exclusive license to use it to create a variety of promotional items in its image.

[7] In 2019, Cavan commissioned an independent contractor, Fred Ladrillo, to create a new artwork featuring a group of women from diverse backgrounds posing in a manner evocative of Rosie and incorporating the Contemporary Rosie in the middle of the drawing. The Cavan Design was published in 2019. Importantly, Mr. Ladrillo adorned the Cavan Design with the distinctive tagline “Sisterhood – Solidarité féminine,” placed immediately below the female

characters, to convey the drawing's message of female solidarity. The Cavan Design also incorporates other elements, such as clusters of roses and wheat stalks along the background.

[8] In May 2022, Unifor, a major union in Canada, contacted LPU to place an order for hoodies that would display a drawing of multiple culturally diverse Rosies. To this end, Unifor provided LPU with the Cavan Design as a source of inspiration. In response, LPU informed Unifor that it could not use the Cavan Design, but that it would instead create an original drawing along the desired concept. LPU then commissioned a graphic designer, Tim Zollinger, to create the drawing requested by Unifor. In its instructions, LPU directed Mr. Zollinger not to copy the Cavan Design, but rather to create a new design of the same genre.

[9] To facilitate Mr. Zollinger's work, LPU provided him with several "Rosie-style" drawings from its archives. At the same time, Mr. Zollinger began his own online research and made several sketches based on vector files of Rosies of various ethnicities. These files were taken from websites offering drawings available under license and for commercial purposes.

[10] Based on the material supplied by LPU and files found online, the LPU Design was born. Mr. Zollinger arranged five diverse Rosies in a circular form, superimposed one on top of the other with a Black Rosie in the central position. To the immediate left of the Black Rosie is a White Rosie, with a black tattoo on her arm. Mr. Zollinger also added three roses at the bottom of the drawing, as well as the words "sisterhood" and "solidarité féminine" around the image.

[11] In July 2022, Unifor approved the LPU Design's final iteration and placed an order for 350 hoodies. These hoodies were then distributed free of charge by Unifor at their annual women's convention in September 2022.

[12] In October 2022, Cavan sent several e-mails to LPU alleging infringement of the Cavan Design and the Contemporary Rosie. Discussions began without prejudice. A few weeks later, Cavan again complained that hoodies were sold online by Unifor. Cavan subsequently agreed to a limited sale of approximately 150 of these hoodies until December 2, 2022, in exchange for products featuring the LPU Design being removed from Unifor's website after the deadline.

[13] As part of its discussions with Cavan, LPU, without any admission, informed Cavan that it would modify the LPU Design to further distinguish it from the Cavan Design. As a result, Mr. Zollinger replaced the tattoo on the White Rosie's arm with a tattoo of the Unifor logo, modified the roses, inserted wheat stalks beneath the roses, and added the words "strength" and "force" to the words "sisterhood" and "solidarité féminine" [Modified LPU Design].

[14] On February 27, 2023, LPU sent the Modified LPU Design to Cavan, but Cavan did not reply to the e-mail. On March 1, 2023, Cavan gave LPU formal notice to stop using the LPU Design.

[15] Towards the end of March 2023, Cavan discovered that the LPU Design and/or the Modified LPU Design were once again appearing on merchandise at a Unifor event. A few weeks later, Cavan filed the Action on April 18, 2023.

[16] In response to the Action, LPU filed the Motion on February 9, 2024.

B. *Relevant provisions*

[17] The relevant provisions of the Rules are Rules 3, 81(1), 213(1), 214, and 215, which read as follows:

General principle	Principe général
3 These Rules shall be interpreted and applied	3 Les présentes règles sont interprétées et appliquées :
(a) so as to secure the just, most expeditious and least expensive outcome of every proceeding; and	a) de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible;
(b) with consideration being given to the principle of proportionality, including consideration of the proceeding's complexity, the importance of the issues involved and the amount in dispute.	b) compte tenu du principe de proportionnalité, notamment de la complexité de l'instance ainsi que de l'importance des questions et de la somme en litige.
[...]	[...]
Content of affidavits	Contenu
81 (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which	81 (1) Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès sommaire –

statements as to the deponent's belief, with the grounds for it, may be included.

[...]

Motion by a party

213 (1) A party may bring a motion for summary judgment or summary trial on all or some of the issues raised in the pleadings at any time after the defendant has filed a defence but before the time and place for trial have been fixed.

[...]

Facts and evidence required

214 A response to a motion for summary judgment shall not rely on what might be adduced as evidence at a later stage in the proceedings. It must set out specific facts and adduce the evidence showing that there is a genuine issue for trial.

If no genuine issue for trial

auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

[...]

Requête d'une partie

213 (1) Une partie peut présenter une requête en jugement sommaire ou en procès sommaire à l'égard de toutes ou d'une partie des questions que soulèvent les actes de procédure. Le cas échéant, elle la présente après le dépôt de la défense du défendeur et avant que les heure, date et lieu de l'instruction soient fixés.

[...]

Faits et éléments de preuve nécessaires

214 La réponse à une requête en jugement sommaire ne peut être fondée sur un élément qui pourrait être produit ultérieurement en preuve dans l'instance. Elle doit énoncer les faits précis et produire les éléments de preuve démontrant l'existence d'une véritable question litigieuse.

Absence de véritable question litigieuse

215 (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

215 (1) Si, par suite d'une requête en jugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.

Genuine issue of amount or question of law

Somme d'argent ou point de droit

(2) If the Court is satisfied that the only genuine issue is

(2) Si la Cour est convaincue que la seule véritable question litigieuse est :

[...]

[...]

(b) a question of law, the Court may determine the question and grant summary judgment accordingly.

b) un point de droit, elle peut statuer sur celui-ci et rendre un jugement sommaire en conséquence.

Powers of Court

Pouvoirs de la Cour

(3) If the Court is satisfied that there is a genuine issue of fact or law for trial with respect to a claim or a defence, the Court may

(3) Si la Cour est convaincue qu'il existe une véritable question de fait ou de droit litigieuse à l'égard d'une déclaration ou d'une défense, elle peut :

(a) nevertheless determine that issue by way of summary trial and make any order necessary for the

a) néanmoins trancher cette question par voie de procès sommaire et rendre toute

conduct of the summary trial; or	ordonnance nécessaire pour le déroulement de ce procès;
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(b) dismiss the motion in whole or in part and order that the action, or the issues in the action not disposed of by summary judgment, proceed to trial or that the action be conducted as a specially managed proceeding.	b) rejeter la requête en tout ou en partie et ordonner que l'action ou toute question litigieuse non tranchée par jugement sommaire soit instruite ou que l'action se poursuive à titre d'instance à gestion spéciale.
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[18] Turning to the *Copyright Act*, RSC 1985, c C-42, the relevant provisions read as follows:

Definitions

Définitions

2 In this Act,

2 Les définitions qui suivent s'appliquent à la présente loi.

[...]

[...]

work includes the title thereof when such title is original and distinctive;
(*oeuvre*)

œuvre Est assimilé à une œuvre le titre de l'œuvre lorsque celui-ci est original et distinctif. (*work*)

[...]

[...]

infringing means

contrefaçon

(a) in relation to a work in which copyright subsists, any copy, including any colourable imitation, made or

a) À l'égard d'une œuvre sur laquelle existe un droit d'auteur, toute reproduction, y compris l'imitation déguisée, qui a été faite contrairement à la présente loi

dealt with in contravention of this Act,

ou qui a fait l'objet d'un acte contraire à la présente loi;

[...]

[...]

Copyright in works

Droit d'auteur sur l'œuvre

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

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

[...]

[...]

Infringement generally

Règle générale

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

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

Secondary infringement

Violation à une étape ultérieure

(2) Constitue une violation du droit d'auteur

(2) It is an infringement of copyright for any person to	l'accomplissement de tout acte ci-après en ce qui a trait à l'exemplaire d'une œuvre,
(a) sell or rent out,	d'une fixation d'une prestation, d'un enregistrement sonore ou
(b) distribute to such an extent as to affect prejudicially the owner of the copyright,	d'une fixation d'un signal de communication alors que la personne qui accomplit l'acte sait ou devrait savoir que la production de l'exemplaire constitue une violation de ce droit, ou en constituerait une
(c) by way of trade distribute, expose or offer for sale or rental, or exhibit in public,	si l'exemplaire avait été produit au Canada par la personne qui l'a produit :
[...]	a) la vente ou la location;
a copy of a work, sound recording or fixation of a performer's performance or of a communication signal that the person knows or should have known infringes copyright or would infringe copyright if it had been made in Canada by the person who made it.	b) la mise en circulation de façon à porter préjudice au titulaire du droit d'auteur;
	c) la mise en circulation, la mise ou l'offre en vente ou en location, ou l'exposition en public, dans un but commercial;

III. Analysis

[19] LPU first submits that the Action raises no genuine issue for trial on the ground that the Action has no legal basis, since the *Copyright Act* does not prohibit anyone from drawing on conventional ideas, generic elements, concepts, or common words, only the expression thereof. In doing so, LPU would not have copied any substantial part of the Cavan Design, and the LPU

Design would be an independent creation of Mr. Zollinger. In response, Cavan claims that the elements copied by LPU are not generic ideas from the original Rosie, but rather original expressions from the skill and judgment of Mr. Ladrillo and Mr. Fournier (such as the roses). Cavan also points out that LPU had direct access to the Cavan Design at the time of the LPU Design's conception, which is readily admitted by LPU.

[20] In addition, LPU asserts that Cavan has not met its burden of proof to demonstrate that there is a genuine issue. What is more, Mr. Kevin Gilhooly's affidavit [Gilhooly Affidavit] would be contrary to Rule 81 due to the use of hearsay and arguments that Mr. Gilhooly was unable to remedy in cross-examination. As a result, Cavan would have produced no reliable evidence of the creative process or of the moment when the Cavan Design would have been developed. For its part, Cavan argues that Mr. Gilhooly was personally involved in managing the creation of the Cavan Design. Cavan also points out that LPU has admitted that both the Contemporary Rosie and the Cavan Design are subject to copyright protection. In the alternative, the Gilhooly Affidavit would meet the requirements of necessity and reliability required to admit hearsay evidence.

[21] Finally, LPU contends that the Action can alternatively be decided solely on the basis of a determination of the following question of law: is there a cause of action for copyright infringement where only the non-protectable elements of a work, such as ideas and generic elements, have been reproduced in the allegedly infringing work? Cavan, for its part, argues that it is rather the issues of originality and of substantiality that lie at the heart of the Action, and that these are mixed questions of fact and law (and not pure questions of law).

[22] For the following reasons, I am not persuaded by the arguments advanced by LPU — except with respect to parts of the Gilhooly Affidavit — and the Motion will be dismissed.

A. *The objections to the parties' evidence*

[23] Before turning to the merits of the Motion, I must first rule on the parties' objections to their respective evidentiary record.

(1) The argumentative parts of the Gilhooly Affidavit

[24] LPU challenges certain paragraphs of the Gilhooly Affidavit on the basis that they contain arguments, legal conclusions as well as opinions.

[25] Rule 81(1) provides that the alleged facts contained in an affidavit shall be confined to facts within the deponent's personal knowledge and must be delivered "without gloss or explanation" (*Coldwater First Nation v Canada (Attorney General)*, 2019 FCA 292 at para 19 [*Coldwater*], citing *Canada (Attorney General) v Quadrini*, 2010 FCA 47 at para 18 [*Quadrini*]). The general rule is that, unlike expert witnesses, lay witnesses may not give opinion evidence but may only testify to facts within their knowledge, observation, and experience (*White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at para 14 [*White Burgess*]; *Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 at para 78). The main rationale for this is that opinions from lay witnesses are generally not helpful to the decision maker and may be misleading (*White Burgess* at para 14).

[26] It is not disputed that Mr. Gilhooly was a lay witness and not an expert. As such, the Court may strike or disregard all or parts of his affidavit where it contains opinions, arguments, or legal conclusions (*Choudhry v Canada (Attorney General)*, 2023 FC 1085 at para 39, [Choudhry], citing *Quadrini* at para 18 and *Cadostin v Canada (Attorney General)*, 2020 FC 183 at para 36 [Cadostin]).

[27] In this case, I agree with LPU about the presence of “controversial argumentation that steps over the line of permissibility” in parts of the Gilhooly Affidavit, in violation of Rule 81(1) (*Coldwater* at para 19, citing *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 116 at para 37). More specifically, portions of paragraphs 40, 41, 43, 52, 55, 61, 64, 66 to 69, and 74 to 76 contain opinion testimony concerning legal conclusions that are the responsibility of the trier of fact, i.e. whether the LPU Design is substantially similar to the Cavan Design and the Contemporary Rosie, suggesting that LPU would have infringed Cavan’s works. For example, the following passages highlight the nature of the opinion evidence in the Gilhooly Affidavit:

- Paragraph 40: “It is quite obvious from my perspective that Promotions Universelles had copied our Contemporary Rosie and Sisterhood Design as closely as possible, without making these identical.”
- Paragraph 41: “[...] I was shocked by the fact that such a close competitor would blatantly copy our Sisterhood Design.”
- Paragraph 43: “Although Ms. Veltman and I disagreed with Mr. Mimeault’s position and felt wronged by the fact that our work had been copied by a competitor [...]”.
- Paragraph 55: “This new revelation that Promotions Universelles had not substantially revised the Infringing Design and was continuing to market a slight variation to Unifor and other groups was very upsetting for us, especially considering the good faith concessions that we had made to both Promotions Universelles and Unifor.”

[28] In such a situation, the Court has the discretion of striking the impugned paragraphs or of giving them no weight or probative value (*CBS Canada Holdings Co v Canada*, 2017 FCA 65 at para 17; *Cadostin* at para 36). As requested by LPU, I will exercise my discretion and will not give weight or probative value to the impugned parts of the Gilhooly Affidavit that constitute impermissible opinion evidence (*Choudhry* at paras 43–44; *Abi-Mansour v Canada (Attorney General)*, 2015 FC 882 at paras 30–31).

(2) The hearsay allegations towards the Gilhooly Affidavit

[29] LPU further alleges that Mr. Gilhooly does not have personal knowledge of the creative process of the Cavan Design and that the following sections of his affidavit are hearsay: (i) the description of the exchanges between Mr. Ladrillo and Ms. Celia Huang to launch the creation of the Cavan Design (Gilhooly Affidavit at paras 29–30); (ii) the steps taken by Mr. Ladrillo to create the Cavan Design; (iii) the Cavan Design’s approval process by Ms. Huang (Gilhooly Affidavit at paras 30, 31, 73); and (iv) Mr. Ladrillo’s brief unsigned testimony, in which he describes the creative process (Gilhooly Affidavit at Exhibit 4).

[30] After review, I do not agree with the above hearsay objections. On the one hand, Mr. Gilhooly was copied on all exchanges between his employees and Mr. Mimeault concerning the alleged infringement. On the other hand, even if the remaining contentious sections of the affidavit evidence (including Exhibit 4) constituted hearsay, they are nonetheless admissible. Indeed, despite Rule 81(1), hearsay evidence may be admitted under the principled approach to hearsay, i.e., when the dual requirements of necessity and reliability are satisfied (*Cabral v Canada (Citizenship and Immigration)*, 2018 FCA 4 at paras 30–32).

[31] Hearsay is an out-of-court statement tendered for the truth of its contents. Its essential defining features are “(1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant” (*R v Khelawon*, 2006 SCC 57 at para 35 [*Khelawon*]). Consequently, statements that are outside a witness’s personal knowledge are hearsay and impermissible under Rule 81(1) (*Canadian Tire Corp Ltd v PS Partsource Inc*, 2001 FCA 8 at para 6). In the same vein, documentary evidence adduced for the truth of its contents is equally hearsay, given that there is no opportunity to cross-examine the author of the document contemporaneously with the creation of the document (Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 5th edition (Toronto: LexisNexis Canada, 2018) at §18.9).

[32] It is well established that hearsay evidence is presumptively inadmissible because it is often difficult for the trier of fact to assess its truth, and that relying on such evidence therefore threatens the integrity of the hearing’s truth-seeking process and fairness (*R v Bradshaw*, 2017 SCC 35 at para 1 [*Bradshaw*]). This presumptive inadmissibility may nevertheless be overcome when it is established that what is being proposed falls under a recognized common law or statutory exception to the hearsay rule. These hearsay exceptions are in place to facilitate the search for truth by admitting into evidence hearsay statements that are reliably made or can be adequately tested. Among the recognized exceptions to hearsay is the principled approach to hearsay, which makes hearsay evidence admissible when it meets the cumulative criteria of “necessity” and “reliability” (*Bradshaw* at para 23; *R v Mapara*, 2005 SCC 23 at para 15). The onus is on the person wishing to admit hearsay evidence to demonstrate that these criteria are met, on a balance of probabilities (*Khelawon* at para 47).

[33] “Necessity” relates to the relevance and availability of the evidence. This requirement is satisfied when it is “reasonably necessary” to present the hearsay evidence in order to obtain the declarant’s version of events (*R v Khan*, 1990 CanLII 77 (SCC), [1990] 2 SCR 531 at p 546). This is a flexible criterion that cannot be equated with the witness’s unavailability (*Khelawon* at para 78). In fact, it may even be a matter of mere convenience (*Coldwater* at para 53, citing *R v Smith*, 1992 CanLII 79 (SCC), [1992] 2 SCR 915 at p 934). For instance, “[a]voidance of an impracticably large number of affidavits, thereby promoting speed and efficiency, can fulfil the necessity requirement” (*Coldwater* at para 59).

[34] “Reliability” refers to “threshold reliability,” which is for the trier of fact to determine. This threshold “can be established by showing that (1) there are adequate substitutes for testing truth and accuracy (procedural reliability) or (2) there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability)” (*Bradshaw* at para 27). In other words, while procedural reliability is concerned with determining whether there is a satisfactory basis for rationally evaluating the statement, substantive reliability is concerned with determining whether the circumstances and any corroborating evidence provide a rational basis for rejecting other explanations for the statement, apart from the truthfulness of the declarant or the accuracy of their statement (*Bradshaw* at para 40).

[35] The principles of necessity and reliability are not fixed standards. They are fluid and work together in tandem. If specific evidence exhibits high reliability, then necessity can be relaxed. Conversely, if necessity is high, then less reliability may be required (*R v Baldree*, 2013 SCC 35 at para 72; *Khelawon* at paras 46, 77, 86).

[36] In the present case, I conclude that the criteria of reliability and necessity are met — albeit narrowly — and I admit the hearsay evidence contained in the Gilhooly Affidavit.

[37] First, the evidence of the Cavan Design’s creative process is fairly reliable. As the owner, president, secretary, and director of a modestly sized company like Cavan, Mr. Gilhooly was personally involved in managing the creation of the Cavan Design. LPU also acknowledges that Cavan owns the Cavan Design. With this in mind, I am satisfied that Mr. Gilhooly is in a good position to relate the Cavan Design’s creative process. The sketches of the various Rosies at Exhibit 6 of the Gilhooly Affidavit also appear to originate from Mr. Ladrillo, and this exhibit is not covered by LPU’s hearsay allegations.

[38] Second, given the reliability of the evidence, the necessity requirement can be slightly relaxed. In doing so, although it would have been more appropriate to file affidavits from Mr. Ladrillo and Ms. Huang, I recognize the necessity of the hearsay evidence, for the sole purpose of deciding the Motion, in compliance with the objectives of fairness, expeditiousness, and cost effectiveness set forth in Rule 3.

[39] I further note that the “corporate subordinate exception” can also apply in this case to accept the Gilhooly Affidavit’s hearsay evidence. To be clear, corporate subordination it is not an exception to hearsay *per se*, but instead reflects an application of the principled approach to hearsay (*Merck Sharp & Dohme Corp v Pharmascience Inc*, 2022 FC 417 at 48). However, I find it useful due to Mr. Gilhooly’s supervisory capacity during his work for Cavan, thus crystallizing the Gilhooly Affidavit’s fulfilment of the requirements for the principled approach to hearsay.

[40] The relevant appellate precedent on the “corporate subordinate exception” is Justice Stratas’ decision in *Coldwater*. In *Coldwater*, the Federal Court of Appeal [FCA] recognized that a person in a supervisory role in a department is considered to have sufficient personal knowledge to testify first-hand with regard to the “conduct, activities and events in and around that department” (*Coldwater* at paras 42, 46). In his reasons, Justice Stratas further referred to *Pfizer Canada Inc v Teva Canada Limited Pfizer*, 2016 FCA 161 at paragraphs 105–116 [*Pfizer*], where he observed that evidence is admissible from departmental supervisors or similar individuals concerning the activities of their department, the conduct of their employees, and events taking place in relation to their department, given that their knowledge is sufficiently direct and personal of such activities in light of the functions they exercise and the authority they have over the employees (*Coldwater* at para 42).

[41] Based on *Coldwater* and *Pfizer*, there is no doubt that the “corporate subordinate exception” has a limited scope: “it only applies to situations where a person is acting in a supervisory capacity in relation to specific corporate actions within his or her own company, when these actions are accomplished through subordinates under his or her supervision. In those situations, a supervisor is not required to be directly involved in all of the conduct, activities and events involving his or her department, in order to be able to make statements about these conduct, activities or events, and the supervisor can be found to have sufficient first-hand knowledge of such actions to be able to testify about them” (*Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 Comp Trib 15, 2020 CanLII 100059 at para 47).

[42] Here, I find that the hearsay evidence within the Gilhooly Affidavit falls within the limited scope of the “corporate subordinate exception.” As LPU pointed out in cross-examination, Mr. Gilhooly was not directly involved in the creative process of the Cavan Design. Nonetheless, being the owner, president, secretary, and director of Cavan, Mr. Gilhooly was acting in a supervisory capacity towards Ms. Huang, the employee directly responsible for managing Mr. Ladrillo’s work on the Cavan Design. It is by virtue of his responsibilities in Cavan and by the fact that he was acting in a supervisory capacity that Mr. Gilhooly is in a position to testify about the work or actions of members of his team without necessarily having direct knowledge, and to know that the facts contained in his subordinates’ statements are true.

(3) Cavan’s objection on the origin of the White Rosie in the LPU Design

[43] Finally, at the hearing on the Motion, counsel for Cavan requested the Court to rule on her objection regarding the origin of the White Rosie featured in the LPU Design.

[44] During the re-examination of Mr. Zollinger, counsel for LPU asked Mr. Zollinger where the White Rosie came from and if he still had its vector file. Mr. Zollinger replied that the White Rosie came from the same resource he employed for the Black Rosie (i.e., “buytshirtdesign.com”) and that he used it to have the original vector file for the White Rosie. However, he was unable to find it while he was preparing his affidavit. In response, counsel for Cavan objected to this line of questioning since the origin of the White Rosie was not addressed in Mr. Zollinger’s affidavit.

[45] The purpose of re-examination is to rehabilitate and explain a witness's testimony. Re-examination on an affidavit must be limited to addressing or explaining matters that were raised in cross-examination, and it cannot be used as an excuse to introduce evidence that should have been included in the affidavit (*Canada (National Revenue) v ASB Holdings Limited*, 2024 FC 494 at para 32, citing *R v Candir*, 2009 ONCA 915 at para 148 [*Candir*]; see also *R v Evans*, 1993 CanLII 102 (SCC), [1993] 2 SCR 629 at p 644).

[46] Upon review of Mr. Zollinger's cross-examination, Cavan's objection is dismissed. I find that LPU's questions on the origin of the White Rosie are within the bounds of those acceptable on re-examination. During cross-examination, counsel for Cavan had asked Mr. Zollinger essentially the same questions as counsel for LPU raised on re-examination on the source of the White Rosie (Transcript of the Cross-Examination of Mr. Zollinger at pp 26–27). As a result, I am satisfied that the purpose of LPU's line of questioning is "largely rehabilitative and explanatory," and cannot be qualified as an attempt to introduce new facts that were omitted from Mr. Zollinger's affidavit (*Candir* at para 148).

B. *Summary judgment is not the appropriate means of adjudicating the Action*

(1) The test for summary judgment

[47] On a motion for summary judgment, the moving party is seeking a judgment from the Court in a summary way on either the whole or a substantial part of its case, in order to avoid a full trial and the expenses, time, and energy it entails. The moving party must therefore convince

the Court that the matter is so doubtful that it does not deserve consideration by the trier of fact at a future trial.

[48] In accordance with Rule 215(1), the Court shall grant summary judgment when it is satisfied that “there is no genuine issue for trial with respect to a claim or defence.” The rationale for such a rule is clear: “a case ought not to proceed to trial, with all the consequences that would follow for the parties and the costs involved for the administration of justice, unless there is a genuine issue that can only be resolved through the full apparatus of a trial” (*CanMar Foods Ltd v TA Foods Ltd*, 2021 FCA 7 at para 24 [*CanMar*]).

[49] There is no genuine issue for trial if there is no legal basis for the claim based on the law or the evidence at hand, or if the motion judge has the evidence required to fairly and justly decide the dispute (*Canada v Bezan Cattle Corporation*, 2023 FCA 95 at para 138; *Gemak Trust v Jempak Corporation*, 2022 FCA 141 at para 64 [*Gemak*]); *Gupta v Canada*, 2021 FCA 31 at para 29; *Manitoba v Canada*, 2015 FCA 57 at para 15 [*Manitoba*], citing *Hryniak v Mauldin*, 2014 SCC 7 at para 66 [*Hryniak*]; *Andrie LLC v Bluewater Ferry Limited*, 2023 FC 155 at para 35 [*Andrie*]; *Milano Pizza Ltd v 6034799 Canada Inc*, 2018 FC 1112 at para 31 [*Milano*]).

[50] The test of Rule 215(1) “is not whether a party cannot possibly succeed at trial, but rather whether the case is clearly without foundation, or is so doubtful that it does not deserve consideration by the trier of fact at a future trial” (*CanMar* at para 24; see also *Gemak* at para 66). There is no need for the case to rank among the “clearest of cases” (*Gemak* at para 66). However, it must nevertheless be clearly without legal foundation. If there is significant doubt in

this respect, summary judgment will not be granted and the case will proceed to trial (*Techno-Pieux Inc v Techno Piles Inc*, 2022 FC 721 at para 143 [*Techno-Pieux*]).

[51] In *Hryniak*, the Supreme Court of Canada [SCC] held that there will be no genuine issue when the motion judge is able to fairly and justly decide the dispute, which will be the case when the summary judgment process “(1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result” (*Hryniak* at para 49). That said, it bears reminding that *Hryniak* was decided in the context of section 20 of Ontario’s *Rules of Civil Procedure*, RRO 1990, Reg 194, which is worded differently than Rule 215(1). In *Manitoba*, the FCA thus found that *Hryniak* does not materially change the procedures or standards to be applied in summary judgment motions brought under Rule 215(1) (*Manitoba* at paras 11–15). In reality, *Hryniak* applies here “only in the sense of reminding us of certain principles resident in our Rules,” more specifically those set out at Rule 3 (*Manitoba* at paras 11, 15; see also *Lauzon v Canada (Revenue Agency)*, 2021 FC 431 at paras 19–21). In sum, contrary to what counsel for LPU asserted at the hearing, *Hryniak* did not expand or alter the test for summary judgment at the federal level. It rather provides general principles that should be used to assist the Court in determining whether there is no legal basis for a claim.

[52] As to the burden of proof, the party moving for summary judgment first has the onus of demonstrating that there is no genuine issue for trial. This is a high bar (*Saskatchewan (Attorney General) v Witchehan Lake First Nation*, 2023 FCA 105 at para 23 [*Witchehan Lake*], citing *Canada (Attorney General) v Lameman*, 2008 SCC 14 at para 11 [*Lameman*]). If the moving party meets this high threshold, then Rule 214 provides that “the evidentiary burden falls on the

responding party, who cannot rest on its pleadings and must come up with specific facts showing that there is a genuine issue for trial” (*Witchekan Lake* at para 23, citing *CanMar* at para 27). It is therefore up to both parties to “put their best foot forward,” even though the initial burden falls on the moving party (*Lameman* at para 11; *CanMar* at para 27). This is because the Court is entitled to presume that no additional evidence would be filed if the case were to go to trial (*Andrie* at para 39; *Kaska Dena Council v Canada*, 2018 FC 218 at para 23; *Rude Native Inc v Tyrone T Resto Lounge*, 2010 FC 1278 at para 16).

[53] It must however be underlined that, in the context of a motion for summary judgment, the responding party must only present evidence — and put its best foot forward — to demonstrate that there is a genuine issue for trial, not that it will prevail on the merits.

[54] Alternatively, under Rule 215(2)(b), if the only genuine issue is a single question of law, the Court may rule on the question and grant summary judgment accordingly (*Boehringer Ingelheim (Canada) Ltd v Sandoz Canada Inc*, 2023 FC 241 at paras 25, 29–30).

(2) The Action is not clearly without merit

(a) *Applicable principles of copyright law*

[55] The purpose of the *Copyright Act* is to establish “a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator” (*Théberge v Galerie d’Art du Petit Champlain Inc*, 2002 SCC 34 at para 30; see also *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 at para 67). However, it does not give the

author a monopoly on ideas or elements that are in the public domain. These form an important part of our collective culture, and everyone is free to draw inspiration from them (*Cinar Corporation v Robinson*, 2013 SCC 73 at para 23 [*Cinar*]).

[56] The *Copyright Act* protects all original literary, dramatic, musical, or artistic works (section 5 of the *Copyright Act*). It protects the expression of ideas in original works, but not the ideas themselves (*Cinar* at para 24; *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 8 [*CCH*]). The idea/expression dichotomy is also a fundamental feature of copyright law in England and the United States, although the scope of what constitutes an idea is greater in the United States than in Canada or England, thus narrowing the breadth of copyright protection in this country (*Andrews v McHale*, 2016 FC 624 at para 86, citing *Delrina Corp v Triolet Systems Inc*, 2002 CanLII 11389 (ON CA), 58 OR (3d) 339 at paras 32–36).

[57] To be original within the meaning of the *Copyright Act*, a work needs not be innovative or unique. It merely has to result from “an exercise of skill and judgment” (*Cinar* at para 24; *CCH* at para 16). Skill is demonstrated by “the use of one’s knowledge, developed aptitude or practised ability in producing the work,” whereas judgment is exercised by “the use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work” (*CCH* at para 16).

[58] Considering that originality does not require innovation, “the use of common techniques and methods can still result in an original work” (*Pyrrha Design Inc v Plum and Posey Inc*, 2019 FC 129 at para 110 [*Pyrrha FC*], aff’d 2022 FCA 7 [*Pyrrha FCA*], citing *Rains v Molea*, 2013 ONSC 5016 at paras 13–16 [*Rains*]). For example, the Ontario Superior Court acknowledged an

artist's copyright in paintings depicting pieces of crumpled paper (*Rains* at paras 12–16). In that case, Justice Victoria Chiappetta noted that many elements of the paintings were not unique to the artist, as they were “admittedly influenced by great painters before him” (*Rains* at para 13). However, the fact that in creating the paintings, the artist employed “commonplace tropes used by painters for centuries does not render his individual images any less original; it acknowledges the reality of visual art in the use of skill and judgment to combine commonplace elements and influences into an original image” (*Rains* at para 13). Canadian courts have also recognized originality in other relatively simple works such as case summaries, a tax form for employee training, an automobile purchasing guide listing private and retail sales, a telephone directory, and a dictionary (*Lainco Inc v Commission scolaire des Bois-Francs*, 2017 FC 825 at para 95 [*Lainco*]).

[59] Copyright in an original work implies the exclusive right to produce or reproduce all or part of the work, in any material form (section 3 of the *Copyright Act*). Copyright infringement therefore occurs when a person reproduces the copyrighted work, or any substantial part of it, without the owner's consent (subsection 27(1) of the *Copyright Act*).

[60] The notion of “substantial part” is flexible. It is a matter of fact and degree: “[a]s a general proposition, a substantial part of a work is a part of the work that represents a substantial portion of the author's skill and judgment expressed therein” (*Cinar* at para 26). This concept is assessed on a qualitative basis, rather than a quantitative one. The analysis is therefore not limited to counting the number of similarities between the original work and the alleged infringing work. A specific element of an original work may alone represent a substantial part of the work if it is likely to have an impact on the value of the work as a whole, in the same way as

several less striking elements of the work, if they have a similar impact when considered together (see, *a contrario*, *Cinar* at para 25). That being said, it is worth noting that “simple” works enjoy less copyright protection, meaning that the “substantial part” reproduced must be more important: “the simpler a copyrighted work is, the more exact must be the copying in order to constitute infringement” (*Pyrrha FCA* at para 53, citing *DRG Inc v Datafile Ltd*, 1987 CanLII 8999 (FC), [1988] 2 FC 243 at p 256 [*DRG*], *aff’d* [1991] FCJ No 144 (FCA)).

[61] In determining substantiality, a qualitative and holistic assessment of the original work and the alleged infringement must be carried out. Concretely, one must, on the one hand, assess all the cumulative effect of the similarities between the works and, on the other hand, determine whether the similarities as a whole are a “substantial part” of the author’s skill and judgment (*Cinar* at paras 35–36, 41; *Pyrrha FC* at para 126). This means that one must not “conduct the substantiality analysis by dealing with the copied features piecemeal” (*Cinar* at para 36). Importantly, non-original elements cannot be eliminated from the analysis and can form part of the “substantial part” where the specific combination of these elements has been reproduced in the alleged infringement (*Cinar* at para 36; *Pyrrha FC* at paras 127–128).

[62] Moreover, the alteration of certain reproduced features or their incorporation into a work that is notably different from the copyrighted work does not necessarily preclude a decision in favour of the plaintiff (*Cinar* at para 39). Indeed, copyright infringement includes a situation where a person creates a “colourable imitation” of the work (see the definition of “infringing” at section 2 of the *Copyright Act*), i.e. “a form of the original work that has been altered or modified in such a way as to deceive” (*Techno-Pieux* at para 120, citing *Rains* at para 45, and

May M. Cheng and Michael Shortt, “Colourable Imitation: The Neglected Foundation of Copyright Law” (2012) 17 *Intellectual Property* at p 1131).

[63] Finally, in the absence of evidence of actual copying, the Court may infer that copyright infringement took place when the evidence indicates (1) that there is a substantial similarity between the two works and (2) that the infringer had access to the original work at the time the infringing work was conceived (*Techno-Pieux* at para 121; *Pyrrha FC* at paras 121–122, citing *Philip Morris Products SA v Marlboro Canada Limited*, 2010 FC 1099 at paras 315, 320 [*Philip Morris*], aff’d 2012 FCA 201 at para 119). This inference can be rebutted, however, by establishing that the similarity between the two works arises solely from the use of conventional ideas or of common source material, or that the allegedly infringing work was conceived independently of the original work (*Pyrrha FC* at para 122, citing *Philip Morris* at para 320; see also *Techno-Pieux* at para 121).

(b) *It is not clear that the LPU Design is not an infringement*

[64] Following a careful examination of the two works in dispute, I conclude that LPU has not met its burden of proving the absence of a genuine issue for trial, as it is not sufficiently clear that the LPU Design is an original creation rather than an infringement of the Cavan Design.

[65] A priori, it is important to underline that LPU recognizes that the Cavan Design (and the Contemporary Rosie) are copyrighted works, and that Cavan holds the copyright. Nor does LPU dispute the fact that Unifor showed it the Cavan Design as part of the order for hoodies for its

annual women's convention in 2022. From that point on, the crux of the Action is exclusively on the question of whether the LPU Design reproduces a substantial part of the Cavan Design.

[66] In its memorandum, LPU provides a comparative table exhaustively highlighting the differences between the two works. As examples, I single out the following differences explained by the table: (ii) there is no Latina Rosie, Indigenous Rosie, or LGBTQ+ Rosie in the Cavan Design; (ii) LPU's White Rosie does not feature the unique sleeve tattoo of the Contemporary Rosie, unlike the White Rosie in the Cavan Design; and (iii) the textures used for the Rosies in the LPU Design are more sophisticated and realistic than those used for the Rosies in the Cavan Design.

[67] After completing its comparative analysis, LPU concludes that the only similarities between the LPU Design and the Cavan Design (including the Contemporary Rosie) relate to common source material from the public domain. More specifically, this public source material would be the character of the original Rosie and her generic physical attributes, as well as the fact of presenting a tattooed, Black, Muslim, or Asian Rosie, the use of generic symbols of the feminist union circles (like roses) and the use of common words such as "sisterhood" or "solidarité féminine." In other words, these features would not be original aspects of the Cavan Design or of the Contemporary Rosie and would rather be mere ideas. In light of this, LPU asserts that Cavan could not prevent anyone from using them via the pretext of copyright exclusivity.

[68] I agree with LPU that there are many differences between the two works. The LPU Design is certainly not an exact copy of the Cavan Design. Nevertheless, LPU's strictly

comparative approach essentially amounts to a “piecemeal” analysis or dissection process prohibited by the SCC in *Cinar* (*Cinar* at para 36). This type of analysis is barred due to the importance of a holistic and qualitative assessment and of the concept of “colourable imitation.” For instance, the Ontario Superior Court found that the differences between two townhomes did not detract from the fact that there was substantial similarity — and later copyright infringement — between both works: “[t]his is evidenced by the fact that despite some aesthetic, construction, and other changes, the two designs remain observably strikingly similar with respect to the overall concept design and layout as reflected in the style of home, the outside appearance, the relationship of one room to another and the flow of the building” (*1422986 Ontario Limited v 1833326 Ontario Limited*, 2020 ONSC 1041 at para 80 [*1422986 Ontario*]).

[69] After conducting a preliminary holistic and qualitative analysis of the LPU Design and the Cavan Design, I am of the view that there remains sufficient similarity between the two works to prevent me from concluding, at this stage, that the Action is clearly without legal basis.

[70] LPU correctly asserts that a case does not have to be among the most clearly unfounded for there to be no genuine issue for trial (*Gemak* at para 66). That said, the fact remains that the lack of legal foundation must be clear, which represents a “heavy burden on the moving party” (*CanMar* at para 24; see also *Witchekan Lake* at para 23, citing *Lameman* at para 11).

Accordingly, if there is any significant doubt as to whether the case is without merit, summary judgment cannot be granted. Indeed, the Court must exercise caution when ruling on motions for summary judgment, since summary judgment deprives the losing party of the opportunity to present *viva voce* evidence to a trial judge. Simply put, the unsuccessful party will lose its “day

in court” (*Gemak* at para 73, citing *Milano* at para 40, aff’d 2023 FCA 85 and *Apotex Inc v Merck & Co*, 2004 FC 314 at para 12, aff’d 2004 FCA 298).

[71] In the present case, the cumulative effect of the specific combination of diverse Rosies, the sleeve tattooed Contemporary Rosie, the roses, and the words “sisterhood” and “solidarité féminine” argue in favour of some basis for the Action. I am satisfied that this composition, drawings, and design iterations arguably involved an exercise of skill and judgment by Mr. Ladrillo and Cavan’s team. It goes without saying that the dismissal of the Motion in no way suggests that, on the merits of the Action, the trial judge would find infringement. I only conclude that LPU has not met its burden of proving that the Action is clearly without merit. On the merits, the Action may very well be dismissed due to the elevated similarity threshold for simpler works (*Pyrrha FCA* at para 53, citing *DRG* at p 256), depending on the trial judge’s appraisal of the law and the evidence.

(i) *The specific arrangement of the Cavan Design’s elements*

[72] I am ready to accept that, taken individually, the following four features of the Cavan Design represent mere ideas from the public domain: (i) the character of the original Rosie and her generic physical attributes; (ii) the fact of presenting a tattooed, Black, Muslim, or Asian Rosie; (iii) the use of generic symbols of the feminist union circles such as roses; and (iv) the use of common words such as “sisterhood” and “solidarité féminine.” The copyright on the original Rosie has long since expired, and the use of tattoos — rather than the reproduction of a specific original tattoo — as well as race, gender, common terms, and other conventional ideas are arguably not copyrightable *per se*. However, I reiterate that non-original elements should not be excluded from the substantiality analysis, since they can form part of the substantial part

reproduced where the specific combination of these elements has been copied (*Cinar* at para 36; *Pyrrha FC* at paras 127–128).

[73] Similarly, a work created by compiling elements produced or designed by others can be protected by copyright as long as the arrangement developed by the author stems from the exercise of his or her skill and judgment. In *CCH*, the SCC stated that one may have copyright “in the form represented by the compilation” because what is covered by copyright is not the various components from which the compilation is made, but rather “the overall arrangement of them which [the author] through his industry has produced” (*CCH* at para 33; see also *Lainco* at paras 84–85). Here, in creating the Cavan Design (aside from the Contemporary Rosie), Cavan reused ideas rather than tangible material produced by others, but the principle remains that “[c]opyright protects originality of form or expression” (*CCH* at para 33).

[74] To illustrate, in *1422986 Ontario*, Justice Tracey Nieckarz found, at paragraph 82, that generic features common to two townhomes (e.g., a bathroom sharing plumbing with a kitchen) — that one could seemingly liken to sole ideas — represented, when taken together, a substantial part of the architect’s skill and judgment because of the replication of the specific compilation and arrangement used for these features:

[82] The Defendants argue that even if there are substantial similarities between the two projects, it is only because there is nothing unique about either the layout of the Weiler Boulevard townhomes, or the features such as a cab-over design home. They further argue that there is nothing unique about having a door beside a garage, a bathroom sharing plumbing with a kitchen, a window over the door or garage and other features of the design. I agree with the Defendants in this regard. There was no evidence that each of these, along with other features such as a split-level design, are design features unique to the Plaintiff in that he created them. This was also clear from the evidence of both experts.

However, it is not simply the fact that both projects are cab-over designs or have several similar features or common design elements in common that leads to the conclusion that Nelson Street is a substantial reproduction of Weiler Boulevard; it is the arrangement of all these details and the reproduction of how these characteristics were compiled by the Plaintiff into an overall design concept for a multi-unit, split-level, cab-over townhome he created using his own skill and judgment.

[Emphasis added.]

[75] In the present case, I find that there is a genuine possibility that the specific composite effect, combination, and arrangement of various diverse iterations of Rosie (including the sleeve tattooed Contemporary Rosie), red roses as well as the words “sisterhood” and “solidarité féminine” could represent a substantial part of the Cavan Design. Indeed, a brief visual comparison of the two works reveals that the arrangement of the aforementioned features is a key element of Mr. Ladrillo’s skill and judgment and that it has been copied, at least in part, by Mr. Zollinger: two Rosies are positioned at the centre and are placed back to back so as to catch the eye, the White Rosie tattoo is set on the upper part of the arm, and the roses are placed below the Rosies. This conclusion does not mean that the trial judge will definitely determine that such a combination constitutes a substantial part of the work, but the fact that it is a concrete possibility suffices to dismiss a motion for summary judgment.

[76] In short, a particular combination of otherwise public or generic material can become an original work or the expression of an idea subject to copyright protection.

(ii) *The Cavan Design’s tagline*

[77] In addition to the compilation of the non-original elements highlighted above, it is also worth to separately discuss LPU's copying of the Cavan Design's tagline.

[78] In principle, slogans and other short phrases should not be protected by copyright, as they are more akin to ideas than original expressions. Conferring copyright protection on them would be tantamount to handing down a death sentence to complex literary works, since the former are essential to the creation of the latter.

[79] Based on the foregoing, the word "solidarité" alone would certainly not be subject to copyright. Rather, the originality of the Cavan Design's tagline lies in Cavan's skill and judgment in translating "sisterhood" into "solidarité féminine." As Cavan explains, "solidarité féminine" is not a direct French translation of "sisterhood" (it would rather be "sororité"). In cross-examination, Mr. Mimeault indeed confirmed that he had initially indicated to Mr. Zollinger that the "solidarité féminine" translation was unusual and should not be used. He then asked Unifor if LPU could not use those same words, while pointing out that "solidarité féminine" is not a common expression in union circles and that he had in fact never seen it used before. Unifor refused, forcing Mr. Mimeault to ask Mr. Zollinger to include the specific words in the LPU Design (Transcript of the Cross-Examination of Mr. Mimeault at pp 41, 75–77).

[80] This Court has previously recognized that translations of literary works can themselves be protected by copyright. In *Drolet v Stiftung Gralsbotschaft*, 2009 FC 17 [*Drolet*], Justice Yves de Montigny (as he then was) found copyright protection for French translations of several texts that had entered the public domain. Justice de Montigny held that, although they were inspired by the original texts of the work and earlier translations, the translations in question were

“undoubtedly a sign of creative work” (*Drolet* at para 229). The translator “did not simply repeat a previous translation by making only cosmetic changes, but substantially altered its style to make it more literary and less literal” (*Drolet* at para 229).

[81] In the same vein, the Cavan Design’s tagline could be covered by copyright protection in its capacity as the title of the work. The definition of “work” at section 2 of the *Copyright Act* provides that a “work includes the title thereof when such title is original and distinctive.” While this does not make the title a separate work — it is rather part of the work as a whole, it may form a part or the entirety of the “substantial part” reproduced, thus contributing to a finding of infringement (*Winkler v Hendley*, 2021 FC 498 at paras 147, 151 [*Winkler*], citing *Francis, Day & Hunter Ltd v Twentieth Century Fox Corp Ltd et al*, 1939 CanLII 276 (UK JCPC), [1939] 4 DLR 353 at pp 359–360). In the words of my colleague, Justice Nicholas McHaffie, “[w]hile the title may be qualitatively important in the determination of whether there is a substantial taking, the issue remains whether there has been a substantial taking of the work as a whole, rather than simply a substantial portion of the title” (*Winkler* at para 151).

[82] As it stands, I find that LPU’s reliance on Cavan’s tagline in its drawing weighs heavily in the substantiality analysis, at least at the stage of the Motion — as opposed to the merits of the Action. In fact, in accordance with the qualitative and holistic analysis prescribed by the SCC, it is theoretically possible for a single specific element included in an original work to constitute a substantial part of the work, so long as it is likely to have an impact on the value of the work as a whole (*Cinar* at paras 25–26). This could be the case here, given the visual predominance of the tagline in the Cavan Design. Indeed, in the case of artistic works, the crucial similarities in the substantiality analysis are those that are “visually significant” (*Pyrrha FC* at para 126, citing

John S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed (Toronto: Thomson Reuters, 2003) (loose-leaf updated 2018), c 10 at 21:6).

(iii) *The lack of a clear rebuttal of the inference of infringement*

[83] For the sole purpose of disposing of the Motion, I will infer copyright infringement in light of a concrete possibility of substantial similarity between both works and of LPU's undisputed access to the Cavan Design (*Techno-Pieux* at para 121; *Pyrrha FC* at paras 121–122, citing *Philip Morris* at paras 315, 320). As a result, I must now determine whether the inference of infringement may be clearly rebutted by one of the two applicable defences: (i) the similarity between the two works arises solely from the use of conventional ideas or of common source material; or (ii) the allegedly infringing work is an independent creation (*Pyrrha FC* at para 122, citing *Philip Morris* at para 320; see also *Techno-Pieux* at para 121.).

[84] In my view, neither of these potential defences exists here. First, it is highly unlikely that the similarities between both works are merely the consequences of the use of common source material, namely, the likeness of the original Rosie. For example, I have already determined that the Cavan Design's tagline, which is reproduced word for word in the LPU Design, may possess originality within the meaning of the *Copyright Act*. It is therefore inaccurate to assert that the only similarities between the two works stem from generic source material from which all are free to draw inspiration.

[85] Second, there remains significant doubt on whether the LPU Design was truly conceived independently of the Cavan Design or whether it is instead a colourable imitation.

[86] In support of its Motion, LPU provided detailed explanations on Mr. Zollinger's creative process for the LPU Design: (i) Mr. Zollinger first received the Cavan Design but was instructed not to copy it; (ii) he then used several previous "Rosie-style" designs from LPU as a starting point for the LPU Design; (iii) in parallel, he made several sketches based on vector files of Rosies of various ethnicities, which were taken from the websites "etsy.com" and "buytshirtdesigns.com"; (iv) among other changes, he changed the skin and hair colour of a Black Rosie found on "buytshirtdesigns.com" to create the LPU Design's White Rosie; (v) he arranged five diverse Rosies in a circular form, superimposed one on top of the other with the Black Rosie in the central position; (vi) he added three roses to the bottom of the drawing; and (vii) he inserted the words "sisterhood" and "solidarité féminine" around the image.

[87] There is no doubt that the LPU Design did not copy the Cavan Design's specific Rosies and rather reused those it found online. However, LPU may regardless have reproduced the "style" or arrangement of the Cavan Design's features as well as its tagline and the Contemporary Rosie's tattooed arm, which would be enough to thwart the defence of independent creation. Indeed, the designs from LPU's archives that were provided to Mr. Zollinger are quite different, meaning that LPU could possibly have copied the arrangement of the Cavan Design. The LPU Design's tagline is also identical to the one used for the Cavan Design. In other words, faced with these doubts, I am of the view that the LPU Design cannot clearly be considered as an independent creation, and that Cavan therefore deserves to have its "day in court."

[88] In summary, it is not clear that the inference of copyright infringement may be rebutted at the stage of a motion for summary judgment. I therefore find that there is a genuine issue for trial due to significant doubt on the absence of infringement.

(3) The Action cannot be decided solely on the basis of a single question of law

[89] Finally, as an alternative argument in support of its Motion, LPU argues that the Action can be decided solely based on the following question of law: is there a cause of action for copyright infringement where only the non-protectable elements of a work, such as ideas and generic elements, have been reproduced in the allegedly infringing work? According to LPU, the question should be answered in the negative, since the only similarities between the LPU Design and the Cavan Design (and the Contemporary Rosie) would relate to ideas from the public domain.

[90] With respect, I cannot dispose of the Action by ruling on the question of law proposed by LPU. As explained previously, the similarities between the two works do not exclusively relate to conventional ideas or other generic elements from which anyone is free to draw inspiration. The LPU Design recreates the Cavan Design's specific arrangement of many of its features and copies of the Cavan Design's "Sisterhood – Solidarité féminine" tagline. The premise of LPU's proposed question of law — namely, that only non-protectable elements of a work have been reproduced — is without merit and does not reflect the factual matrix of this case. It is not a situation where there is no originality in the Cavan Design and where its constituent elements are entirely in the public domain.

[91] In reality, Cavan is right to maintain that the issues of originality and of substantiality are the real determinative issues in the Action. These issues are mixed questions of fact and law (and not just pure law), i.e., they “involve applying a legal standard to a set of facts” (*Housen v Nikolaisen*, 2002 SCC 33 at para 26). Indeed, the questions identified by Cavan concern the application of the legal principles relating to the notions of originality and of “substantial part” under the *Copyright Act* to the facts of the present case. They are therefore not pure questions of law, as required by Rule 215(2)(b).

C. *The suitability of a summary trial*

[92] As a final remark, I underscore that the dismissal of the Motion should not be construed to imply that a subsequent motion for summary trial would necessarily be dismissed. Under the test for summary trial, the nature and sufficiency of the evidence play an even more important role, as demonstrated by Rule 216(6) (*Noco Company, Inc v Guangzhou Unique Electronics Co, Ltd*, 2023 FC 208 at para 86). Here, the parties’ evidence is relatively exhaustive. This evidentiary record includes, among other things, numerous e-mails between the key people in the dispute, detailed affidavits from Mr. Gilhooly, Mr. Mimeault, and Mr. Zollinger, as well as transcripts of the cross-examinations of these three affiants. It may therefore be appropriate for Cavan to request a summary trial at a later date, once it has obtained the financial documents on LPU that it desires. Of course, LPU could also move for summary trial, with leave of the Court (Rule 213(2)).

[93] I recognize that, when dismissing a motion for summary judgment, the Court may exercise its discretion to order a summary trial via Rule 215(3)(a). This is in fact the second

order alternatively sought by LPU in its Motion. However, counsel for LPU made no submissions on the suitability of a summary trial, and did not demonstrate the sufficiency of the evidence readily available before the Court. As hinted above, the considerations with respect to whether a summary trial is appropriate differ from those for summary judgment (*Andrie* at para 45). Yet, a party may not include a request for alternative relief in its factum without establishing its applicability, merely to see if it “sticks.” In short, in the absence of sufficient submissions from both parties on the issue, the Court cannot order a summary trial at this stage.

IV. Conclusion

[94] For the above reasons, the Motion is dismissed. I find that, at this stage, there remains a genuine issue for trial as to the legal basis of the Action. Indeed, considering LPU’s specific compilation and arrangement of various diverse iterations of Rosie, red roses, and of the Cavan Design’s original tagline, I cannot conclude that the LPU Design does not clearly reproduce a substantial part of the Cavan Design. It is equally unclear whether the similarities between both works only stem from common source material or whether the LPU Design is an independent creation. Moreover, the question of law submitted by LPU cannot decide the Action. The LPU Design not only reproduces conventional ideas from the Cavan Design, as it also copies Cavan’s tagline.

[95] Further to the Court’s instructions at the hearing, the parties have conveyed, in a letter dated December 2, 2024, their position on the matter of costs on this Motion. As the parties have agreed that costs on the Motion should be fixed in the lump sum amount of \$60,000, costs will be awarded accordingly to the successful party.

JUDGMENT in T-824-23

THIS COURT’S JUDGMENT is that:

1. The defendant’s motion for summary judgment is dismissed.
2. Costs in the all-inclusive lump sum amount of \$60,000 are awarded to the plaintiff.

“Denis Gascon”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-824-23

STYLE OF CAUSE: CAVAN SPECIALITY ADVERTISING LTD v LES
PROMOTIONS UNIVERSELLES INC. O/A
UNIVERSAL PROMOTIONS

PLACE OF HEARING: MONTREAL, QUEBEC

DATE OF HEARING: NOVEMBER 18, 2024

JUDGMENT AND REASONS: GASCON J.

DATED: JANUARY 31, 2025

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