

Court File No.

T-38-18

Federal Court

BETWEEN

DAWN THOMSON

Applicant

and

AFTERLIFE NETWORK INC. (O/A AFTERLIFE.CO)

Respondent

PROPOSED CLASS PROCEEDING

NOTICE OF APPLICATION

**APPLICATION UNDER FEDERAL COURTS RULES PART 5.1
AND THE COPYRIGHT ACT, RSC 1985, c C-42**

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at St. John's, NL.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.



12 ²⁸
January 11, 2018

Issued by: Sanya Smith
(Registry Officer)

Address of local office: 354 Water Street, St. John's, NL, A1C 1C4

TO: AFTERLIFE NETWORK INC.
operating as AFTERLIFE.CO
1415 Frank-Carrel, Suite 130
Quebec, QC G1N 4N7

APPLICATION

The Applicant makes application for:

- a) An Order certifying this application as a class proceeding and appointing the Applicant as a representative applicant under Part 5.1 – Class Proceedings of the *Federal Court Rules*;
- b) An interlocutory and permanent Injunction, pursuant to section 34 of the *Copyright Act*, RSC 1985, c C-42 (the "*Copyright Act*"), restraining the Respondent, its officers, directors and all others over whom it exercises control from infringing the copyright and moral rights, as hereinafter defined, of the Applicant and the class members;
- c) A wide injunction, pursuant to section 39.1 of the *Copyright Act*, restraining the Respondent, its officers, directors and all others over whom it exercises control from infringing the copyright and moral rights in other copyrighted works owned by the Applicant and members of the class;
- d) Statutory damages pursuant to section 38.1(1)(a) of the *Copyright Act*;
- e) Punitive damages;
- f) Aggravated damages;
- g) Pre-judgment interest;
- h) Costs; and,
- i) Such further relief as this Honourable Court may deem mete and just.

The grounds for the application are:

Overview

1. The Respondent's web site, www.afterlife.co/ca, contains hundreds of thousands of obituaries and accompanying photographs copied, without permission, from the web sites of Canadian funeral homes and newspapers.
2. All of these reproductions infringe copyright. The Respondent has never sought permission from the copyright owners to use these literary and artistic works.
3. The www.afterlife.co/ca web site generates revenue by displaying the advertising of third party businesses and by permitting users to light virtual candles and send flowers. The web site creates the false and misleading impression that the Respondent's activities are licensed or endorsed by the copyright owners and/or the families of the deceased, which is not the case.

4. This proposed class proceeding is the most efficient way to end the Respondent's rampant copyright infringement, to prevent bereaved relatives and friends from being duped by an unscrupulous business practice, and to recover a fair measure of damages for the copyright owners.

The Applicant

5. Dawn Thomson is the daughter of Denis "Brian" Trainor. When Mr. Trainor passed away in January 2017, Ms. Thomson was the sole author of an obituary for her father ("the Obituary").
6. The Obituary is an original literary work that is protected by copyright. Pursuant to the *Copyright Act*, Dawn Thomson has the sole right to reproduce all or a substantial part the Obituary, or to authorize reproduction of all or a substantial part of the Obituary.
7. Ms. Thomson gave a limited license to Fahey's Funeral Home and the Green's Harbour Community Channel to publish the Obituary. Ms. Thomson has otherwise never given a license to anyone to reproduce all or a substantial part of the Obituary.
8. Ms. Thomson is the owner of all moral rights associated with the Obituary.
9. Ms. Thomson also took a photograph of Mr. Trainor in or about 2010 ("the Photograph"). The Photograph is an original artistic work that is protected by copyright. Pursuant to the *Copyright Act*, Ms. Thomson has the sole right to reproduce all or a substantial part the Photograph, or to authorize reproduction of all or a substantial part of the Photograph.
10. Ms. Thomson gave a limited license to Fahey's Funeral Home and the Green's Harbour Community Channel to publish the Photograph to accompany the Obituary for Mr. Trainor. Ms. Thomson has otherwise never given a license to anyone to reproduce all or a substantial part of the Photograph.
11. Ms. Thomson is the owner of all moral rights associated with the Photograph.

Proposed Class

12. Ms. Thomson is representative of a class of individuals who are residents of Canada and who are the copyright owners of obituaries and/or photographs that were reproduced by Afterlife.

Federal Courts Rules

13. The Applicant will apply to have this proceeding certified as a class proceeding under Part 5.1 – Class Proceedings of the *Federal Court Rules*.

The Respondent

14. The Respondent ("Afterlife") owns the domain www.afterlife.co/ca ("the Domain").
15. Afterlife claims that it is Canada's largest database of deceased people, and that users can access more than 7 million obituaries and death notices of people throughout North America, Australia and New Zealand.
16. To obtain content for the Domain, Afterlife copies and reproduces obituaries and accompanying photographs from the web sites of funeral homes and newspapers across Canada.
17. In addition to reproducing obituaries, Afterlife posts advertisements for third party businesses, offers virtual candles and a flower ordering/delivery service. The Domain creates the false and misleading impression that it is authorized by the family members of the deceased, or that donations and gifts are shared with or for the benefit of family members.

Copyright Infringement

18. Afterlife has not sought permission from the owners of copyright in obituaries and accompanying photographs to reproduce these works on the Domain.
19. Pursuant to section 27 of the *Copyright Act*, the unauthorized reproduction of obituaries and accompanying photographs infringes the Applicant's copyright.

Moral Rights Infringement

20. Both the offering of virtual candles and selling of flowers create the false and misleading impression that at least part of the money collected by Afterlife in association with the Domain will be shared with or distributed to the family members of the deceased.
21. The offering of virtual candles is also used by the Respondent to collect personal information from Canadians, such as names, mailing addresses and email addresses.
22. The use of the Obituary and photograph in association with this misleading scheme compromises the integrity of the Obituary and the Photograph, and infringes the authors' moral rights.

Remedies

i. Compensatory Damages

23. The Applicant elects statutory damages pursuant to section 38.1(1)(1)(a) of the *Copyright Act*, and claims the maximum relief for each obituary and photograph placed on the Domain without permission from a Canadian copyright owner.

ii. Punitive Damages

24. Afterlife is a knowledgeable and sophisticated user of intellectual property. In its Terms of Service, the Respondent asserts that "The content of the website afterlife.co (including news, texts, photos, images, illustrations, audio extracts, videos and software) are protected by Copyright and other intellectual property protection over the world and is owned by or under the control of afterlife.co." As for the obituaries and accompanying photographs, this is manifestly false. These copyrighted works were taken without license or permission; Afterlife has no ownership or control over them.
25. The wholesale infringement of copyright in millions of obituaries and accompanying photographs was intentional and deliberate. Such blatant infringement of copyright and moral rights, combined with claims to ownership of the same works, requires sanction by this Court.
26. The obituaries, with accompanying photographs, are created at a time when families and loved ones are at their most vulnerable. Appropriating obituaries and accompanying photographs for private commercial gain is reprehensible, and requires sanction by this Court.

iii Aggravated Damages

27. The Respondent's conduct, particularly looking to profit while misrepresenting its authority to publish obituaries and accompanying photographs, caused the Applicant and other members of the class mental distress, anguish, vexation and outrage. These non-pecuniary losses must be compensated by an award of aggravated damages.

iv. Injunction

28. The Respondent will carry on its illegal activities unless restrained by this Court. An interlocutory and permanent injunction is necessary to protect the rights of the Applicant and the class members.

v. Wide Injunction

29. The Respondent's business model is based on infringement of copyright. The Respondent will likely infringe the copyright in other works or subject-matter owned by the Applicant or members of the class unless enjoined by this Court from doing so. A wide injunction, pursuant to section 39.1 of the *Copyright Act*, is required.

The application will be supported by the following material:

1. Affidavit of Dawn Thomson, to be filed; and,
2. Such further and other evidence as will be filed by the Applicant.

January 11, 2018



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